DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

Washington, D.C.
June 30, 1980

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FEDERAL MARITIME COMMISSION

DOCKET NO. 79-56

MCGIFFIN & COMPANY, INC. v. ELLER & COMPANY, INC.
PETITION FOR A DECLARATORY ORDER

NOTICE OF WITHDRAWAL OF PETITION

July 5, 1979

Notice is given that the petition for declaratory order initiating this proceeding has been withdrawn and accordingly the proceeding is hereby discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[DOCKET NO. 79-13; GENERAL ORDER 16, AMDT. 30 AND GENERAL ORDER 22, AMDT. 9]

PART 502—RULES OF PRACTICE AND PROCEDURE

PART 503—PUBLIC INFORMATION

FEES FOR SERVICES

July 5, 1979

ACTION: Final Rules

SUMMARY: Parts 502 and 503 have been revised to reflect the updating of existing fees and charges and the establishment of new fees for certain services provided by the Federal Maritime Commission. The purpose of the revision is to assure the recovery of costs to the extent possible for services rendered to identifiable individuals that are not offered to the public as a whole. Periodic reassessment of fees and charges is required under guidelines established by the Office of Management and Budget.

EFFECTIVE DATE: August 15, 1979

SUPPLEMENTAL INFORMATION:

This proceeding was instituted by a Notice of Proposed Rulemaking published in the *Federal Register* on March 14, 1979 (44 Fed. Reg. 15517-19). The Federal Maritime Commission proposed to revise its schedule of fees and charges for certain services by updating existing fees and charges and establishing new fees.

In the provisions of Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. §483(a)), hereinafter referred to as "Title V," Congress has stated that "any work, services, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible." In order to bring about the accomplishment of this objective, Title V authorizes the head of each agency to prescribe by regulation such fees and charges as he shall determine " . . . to be fair and equitable taking into consideration direct and indirect cost to the government, value to the recipient, public policy or interest served and other pertinent facts."

This enabling legislation also provides that the fees and charges shall be as uniform as practicable and subject to such policies as the President may prescribe. On September 23, 1959, the Bureau of the Budget, now the Office of Management and Budget, issued Circular No. A-25, which sets forth general policies for developing a fair, equitable, and uniform system of charges for certain government services and property so as to implement the applicable provisions of Title V. Essentially, Circular No. A-25 requires that a reasonable charge be made to each recipient for a measurable unit or amount of Federal Government service from which he derives a benefit in order that the Government recover the full cost of rendering that service. The Circular further calls for a periodical reassessment of costs, with related adjustment of fees, if necessary, and the establishment of new fees where none exists.

Two comments were received in response to the Notice of Proposed Rulemaking. The National Capital Area Paralegal Association objects to the establishment of a fee for processing applications of non-attorneys to practice before the Commission (proposed 503.43(h)). Mr. Wade S. Hooker, an attorney who practices before the Commission, has commented on the rise in the charge for subscription to Commission issuances in formal proceedings (proposed section 503.43(d)(1)).

The Commission proposed to establish a fee of $10 for processing applications of nonattorneys for admission to practice. The Association argues that such a fee discriminates against nonattorneys in favor of attorneys who need only certify that they are a member in good standing of a state or Federal bar. The Association further questions whether nonattorneys should be required to apply for admission at all. We disagree with the position expressed by the Association. An attorney in good standing has already been examined as to professional ability and personal qualifications. On the other hand, a nonattorney applicant may be totally unknown to the Commission. The Commission has a duty to assure that persons appearing before it are qualified to represent others. Under the circumstances, the requirement for application for admittance is appropriate and the assessment of a modest fee for processing the application is proper under Title V.

Mr. Hooker expresses "surprise" that the charge for the subscription list should rise from $30 to $175 annually since the existing price was "established on February 25, 1975." In point of fact, the $30 fee was established in 1965 and costs associated with providing the service have escalated considerably since then. The most recent survey by the Commission shows the cost of service to be slightly in excess of $200. We have set the revised fee at $175 in acknowledgement of the public interest standard of Title V.

In light of the foregoing, we have determined to publish the final rules as they were proposed.*

Therefore, pursuant to the provisions of section 4 of the Administrative Procedure Act (5 U.S.C. § 553) and Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483(a)), as implemented by Budget Circular No. A-25, dated September 23, 1959, and Rule 52 of the Commission's Rules of Practice and Procedure, 46 C.F.R § 502.52, Parts 502 and 503 of Title 46, Code of Federal Regulations are amended as set forth hereinafter.

I. Subpart E of Part 503, Title 46 of the Code of Federal Regulations is revised to read as follows:

SUBPART E—FEES

§ 503.41 Policy and Services Available

Pursuant to policies established by the Congress, the Government's costs for special services furnished to individuals or firms who request such service are to be recovered by the payment of fees (Act of August 31, 1951—5 U.S.C. § 140).

(a) Upon request the following services are available upon the payment of the fees hereinafter prescribed:
  (1) Copying records/documents
  (2) Certification of copies of documents
  (3) Records search

(b) Fees shall also be assessed for the following services provided by the Commission:
  (1) Subscriptions to Commission publications
  (2) Placing one's name, as an interested party, on the mailing list of a docketed proceeding
  (3) Processing nonattorney applications to practice before the Commission

§ 503.42 Payment of fees and charges

The fees charged for special services may be paid through the mail by check, draft, or postal money order, payable to the Federal Maritime Commission, except for charges for transcripts of hearings. Transcripts of hearings, testimony, and oral argument are furnished by a nongovernmental contractor, and may be purchased directly from the reporting firm.

§ 503.43 Fees for services

The basic fees set forth below provide for documents to be mailed with postage prepaid. If copy is to be transmitted by registered, certified, air, or special delivery mail, postage therefor will be added to this basic fee. Also, if special handling or packaging is required, costs thereof will be added to the basic fee.

* A sentence has been added to § 503.43(c) to clarify the intent of the proposed rule to charge five cents per page plus cost of services when copying is performed by Commission personnel.

(a) Photo-copying of records and documents performed by requesting party will be available at the rate of five cents per page (one side), limited to size 8 1/4″ × 14″ or smaller.

(b) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $3 for each such certification.

(c) To the extent that time can be made available, records and information search and/or copying will be performed by Commission personnel for reimbursement at the following rates. Any such charges are in addition to a five cent per page charge for copies provided.

(1) By clerical personnel at a rate of $5 per person per hour.

(2) By professional personnel at an actual hourly cost basis to be established prior to search.

(3) Minimum charge for record and information search $5.

(4) Minimum charge for copying services performed by Commission personnel, $1.

(5) *Exceptions.* No charge for copying or searching will be made for providing a single copy of a tariff page on file with the Commission.

(d) Annual subscriptions to Commission publications for which there are regular mailing lists are available at the charges indicated below for calendar year terms. Subscriptions for periods of less than a full calendar year will be prorated on a quarterly basis. No provision is made for refund upon cancellation of subscription by a purchaser.

(1) Orders, notices, rulings, and decisions (initial and final) issued by Administrative Law Judges and by the Commission in all formal docketed proceedings before the Federal Maritime Commission are available at an annual subscription rate of $175.

(2) Final decisions (only) issued by the Commission in all formal docketed proceedings before the Commission are available at an annual subscription rate of $50.

(3) General Orders of the Commission are available at the following rates: 1) initial set including all current General Orders for a fee of $12.50, and 2) an annual subscription rate of $2 for all amendments to existing General Orders and any new General Orders issued.

(4) *Exceptions.* No charge will be made by the Commission for notices, decisions, orders, etc., required by law to be served on a party to any proceeding or matter before the Commission. No charge will be made for single copies of the above Commission publications individually requested in person or by mail. In addition, a subscription to Commission mailing lists will be entered without charge when one of the following conditions is present:

(i) The furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization.

(ii) The recipient is another governmental agency, Federal State, or local, concerned with the domestic or foreign commerce by water of the United States or, having a legitimate interest in the proceedings and activities of the Commission.

(iii) The recipient is a college or university.

(iv) The recipient does not fall into paragraphs (d)(4)(i), (ii), or (iii) of this section but is determined by the Commission to be appropriate in the interest of its program.

(e) To have one's name and address placed on the mailing list of a specific docket as an interested party to receive all issuances pertaining to that docket, cost $3 per proceeding.

(f) The Commission publication entitled "Automobile Manufacturers' Measurements" is available on a fiscal year subscription basis, including any supplements issued during the fiscal year in which purchased, for a fee of $5.

(g) Loose-leaf reprint of the Commission's complete, current Rules of Practice and Procedure for an initial fee of $2.50. Future amendments to the reprint are available at an annual subscription rate of $1.50.

(h) Applications for admission to practice before the Commission for persons not attorneys at law must be accompanied by a fee of $10 pursuant to § 502.27 of this Chapter.

(i) Upon a determination by the Commission that waiver or reduction of the fees prescribed in this section is in the public interest because the information furnished has been determined to be of primary benefit to the general public, such information shall be furnished without charge or at a reduced charge at the discretion of the Commission.

(j) Additional issuances, publications and services of the Commission may be made available for fees to be determined by the Managing Director, which fees shall not exceed the cost to the Commission for providing them.

II. The second sentence of 46 C.F.R. § 502.27 is amended to read as follows:

Applications by persons not attorneys at law for admission to practice before the Commission shall be made on the forms prescribed therefor, which may be obtained from the Secretary of the Commission, shall be addressed to the Federal Maritime Commission, Washington, D.C. 20573, and shall be accompanied by a fee as required by § 503.43 (h) of this Chapter.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-5

LEONARD T. BUTLER D/B/A MANUFACTURERS FORWARDING—
INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND
INTERMODAL SALES, INC—
POSSIBLE VIOLATIONS OF SECTIONS 15 AND 18(b)(3)

NOTICE

July 11, 1979

Notice is given that no exceptions have been filed to the June 5, 1979 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-5

LEONARD T. BUTLER D/B/A MANUFACTURERS FORWARDING—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND INTERMODAL SALES, INC. POSSIBLE VIOLATIONS OF SECTIONS 15 AND 18(b)(3)

Finalized July 11, 1979

Violations of sections 15 and 18(b)(3) of Shipping Act, 1916, found.
Because of violations and lack of showing of mitigation to warrant granting of license as independent ocean freight forwarder upon this record, the application is denied.

Thomas E. Durkin, Jr., for respondent-applicant.
Joseph Slunt, Deana E. Rose and *J. Robert Ewers*, Director of Commission's Bureau of Hearing Counsel, for Hearing Counsel.

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

This is a proceeding in which an independent ocean freight forwarder license is sought by Leonard T. Butler d/b/a International Sales, Inc. Investigation of the application raised possible violations of sections 15 and 18(b)(3) of the Shipping Act, 1916.

The Presiding Administrative Law Judge takes official notice that the original application, dated November 22, 1977, sought a license for Leonard T. Butler d/b/a Transmodal Forwarding Company. The Commission began its investigation.

After *mesne process*, an amended application, dated May 15, 1978, was filed and license was sought for Leonard T. Butler d/b/a Manufacturers Forwarding (to be established).

Pursuant to section 510.8 of the Commission's General Order 4 (46 C.F.R. § 510.8), the Commission, on October 30, 1978, advised Leonard T. Butler d/b/a Manufacturers Forwarding of its intent to deny the application for the

[1] This decision will become the decision of the Commission in absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. §502.227).

reasons set out hereinafter. In accordance with General Order 4 an applicant may, within 20 days of receipt of such advice, request a hearing on the application.

By letter dated November 6, 1978, Leonard T. Butler d/b/a Manufacturers Forwarding requested the opportunity to show at a hearing that the denial of the application is unwarranted.

On January 24, 1979, the Commission served the instant Order of Investigation and Hearing (published in the *Federal Register* January 29, 1979, Vol. 44, No. 20, pages 5713–5714). It indicates that during the course of the Commission's investigation of Leonard T. Butler d/b/a Manufacturers Forwarding, information was received possibly indicating that:

1. Intermodal Sales, Inc. of which Mr. Butler is President and majority stockholder under the trade name Intermodal Services, Inc., maintains with the Commission an NVOCC tariff as required by section 18, Shipping Act, 1916. Evidence deduced in the course of the investigation appeared to demonstrate that Intermodal Services, Inc. violated section 18(b)(3), Shipping Act, 1916, (46 U.S.C. §817) on at least eleven of the nineteen shipments it handled during the period January 15, 1978 through May 12, 1978 in charging, demanding or collecting a greater, lesser or different compensation for the transportation of property than the rates and charges specified in its tariff on file with the Commission.
2. Intermodal Sales Inc. d/b/a Intermodal Services, Inc. appeared to violate section 15, Shipping Act, 1916, (46 U.S.C. §814) in that it and Seaway Express Lines, a vessel operating common carrier by water, entered into an exclusive, non-competitive cooperative working agreement subject to the filing and approval requirements of the aforementioned section 15, implementing that agreement in carrying out its terms without the pre-requisite Commission sanction.

In view of the above, Leonard T. Butler, 52% owner and President of Intermodal Sales, Inc. would appear to lack the fitness to properly carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder as required by section 44 and the Commission's Rules and Regulations issued pursuant to section 44 of the Shipping Act, 1916.

The Commission ordered that pursuant to sections 15, 18(b), 22 and 44 (46 U.S.C. §§814, 817, 821 and 841(b)) of the Shipping Act, 1916, and section 510.8 of the Commission's General Order 4 (46 C.F.R. §510.8), it be determined:

1. Whether Intermodal Sales Inc. d/b/a Intermodal Services, Inc. has violated section 15 Shipping Act, 1916, by entering into an exclusive non-competitive cooperative working agreement with Seaway Express Lines without the pre-requisite Commission approval;
2. Whether Intermodal Sales, Inc. d/b/a Intermodal Services, Inc. has violated section 18(b)(3), Shipping Act, 1916, by transporting property at rates and charges other than those specified in its tariff on file with the Comission, and

3. Whether, in light of the evidence, adduced pursuant to the foregoing issues, together with any other evidence adduced, Leonard T. Butler d/b/a Manufacturers Forwarding possesses the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to properly carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder.

The named respondents herein are (1) Leonard T. Butler d/b/a Manufacturers Forwarding and (2) Intermodal Sales, Inc.

By notice served January 30, 1979, a prehearing conference was scheduled for Thursday, February 22, 1979. Counsel for respondent telephoned the Presiding Administrative Law Judge on February 16, 1979, pleading he was on call for cases in his own jurisdiction and requested a postponement. By notice served the former date, which was preceded by telephone notice to all parties on February 16, 1979, of the change, the prehearing conference was rescheduled and held on Monday, February 26, 1979. The official stenographic transcript thereof consists of 12 pages. Hearings began and concluded on Monday, March 12, 1979. The transcript of the hearing consists of 50 pages. The total pages of transcipt are 62. Two (2) exhibits were introduced and received into evidence. The briefing schedule developed was: (1) opening brief of respondent-applicant to be filed on April 9, 1979 (Tr. of Hearing, at 48, line 25, change 1978 to 1979); (2) Hearing Counsel's reply brief to be filed on April 23, 1979; and (3) the closing brief of respondent-applicant to be filed on May 7, 1979 (Tr. 49).

The opening brief of respondent-applicant was received in the Commission on April 11, 1979; it had been mailed by Registered Mail No. 854603 from Newark, New Jersey, on April 6, 1979. Hearing Counsel's Reply Brief was received in the Commission on April 23, 1979. On May 10, 1979, the Presiding Administrative Law Judge received from counsel for the respondent-applicant a letter dated May 8, 1979, stating, *inter alia*, "I acknowledge receipt of the Brief of Hearing Counsel, and I would respectfully advise that I do not see the need for any further submissions."

Hearing Counsel in its brief proposed 18 findings of fact (Brief, at 3 to 5). The respondent-applicant's brief proposed no findings of fact. Hearing Counsel's requests upon consideration are granted in substance or denied as shown in the following section entitled "Facts."

The transcript of testimony and exhibits, together with all papers and requests filed in this proceeding, constitutes the exclusive record for the finding of facts and for decision (Rule 169, 46 C.F.R. §502.169).

FACTS

1. Intermodal Sales, Inc., a sales agency and marketing arm for various carriers (Tr. 36) does business as Intermodal Services, Inc. It was founded in 1971-72 by Leonard T. Butler. Intermodal Services, Inc., has on file with this Commission NVOCC Freight Tariff No. 1 (the original effective date of the tariff was October 2, 1976) between United States Atlantic, Gulf and Pacific

Coasts, Puerto Rico, Hawaiian and Alaskan Ports. The tariff is worldwide. The Issuing Officer of the tariff of Intermodal Sales, Inc. is Leonard T. Butler (1st Revised Title Page, effective November 21, 1978).

2. Intermodal Sales, Inc., a corporation of the State of New Jersey (Exh. 1, Attachment A, page 1) admitted (it is stipulated all demands for admission of Exh. 1 are acknowledged in the affirmative (Tr. 4)) its officers are:

Leonard T. Butler	President and 52% shareholder of the company.
Reuben Klein	Executive Vice President and 48% shareholder of the company.
Marilyn T. Butler	Secretary and holder of no stock interest therein.

3. Intermodal Services, Inc., issued the following bills of lading under which shipments were carried at rates other than those in its NVOCC tariff:

B/L No.	*Dated*	*Commodity*
10	1-15-78	Construction Material
11	1-15-78	Copper Wire
18	2-26 78	Rigid Steel Galvanized
19	2-28 78	Stranded Cable Alpha
20	2-28-78	KV Single Phase Shielded Cable
21	3-08-78	Kitchen, Laundry & Other Equipment for Units of Ministry of Health
22	2-28-78	Kitchen, Laundry & Other Equipment for Units of Ministry of Health
24	3-24-78	Cabinet Sections
26	4-23-78	Conduit Pipes
27	5-12-78	Operation Rods for Disconnect Switches
28	5-12-78	Cast Iron Pipe Accessories of Piping Fittings

The filing of the tariffs and tariff changes pertaining to the rates assessed the above shipments was delegated to a company in that business (Tr. 13) and to Reuben Klein (Tr. 37).

4. Under date of September 24, 1976, Intermodal Sales, Inc., entered into a Sales Agency Agreement with Klevan Associates Incorporated, a corporation of the State of Pennsylvania. Klevan is the owner and operator of a certain container service more commonly known and referred to as Seaway Express Lines, a Panamanian Corporation. Under the terms of the said agreement, Intermodal Sales, Inc., is to act as Seaway's exclusive sales and marketing agent in the United States for those services rendered by Seaway in its container services between the United States, Taiwan and Korea; a noncompetitive clause in the agreement provides that during the term thereof, Intermodal will not represent any carrier or carriers who offer similar container services between the United States and Taiwan and Korea. Exh. 1 At 1, and Attachment A; Tr. 36. The term of the agreement was for a two-year period and was to renew itself for a period of two years. The agreement was signed for Intermodal Sales, Inc., by Leonard T. Butler, President. Mr. Butler testified the relationship with Seaway was terminated in September of 1978 (Tr. 40).

5. Intermodal Sales, Inc., operated under the terms and tenure of the said Sales Agency Agreement with Klevan. However, Intermodal Sales, Inc., did

not file that agreement with this Commission (Tr. 36) for approval pursuant to section 15, Shipping Act, 1916.

6. Applicant Leonard T. Butler, asked to outline his activities over the last ten or fifteen years, particularly within the ambit of the shipping industry (Tr. 35), testified he held marketing and agent positions as follows:

1964 to 1968 with Sea-Land (Tr. 35)
1968 to 1972 with Seatrain
1972 started his own business—Intermodal Sales

After founding of his own business, the agreements or associations are between his company, Intermodal Sales, and others (Tr. 43):

1973 to 1975—agent for Zim Container Services (Tr. 44)
1974 to 1975—agent for Medspan Shipping
1976 to 1977—agent for Mercantile Marine, a vessel operating carrier (Tr. 44)
1976 to 1977—agent for Iran Overland (Tr. 44)
1976 to 1978—Sales Agency Agreement with Kleven Associates
1978—Sales Agency Agreement with Oceans International, agent for Lignes Centre Africaine

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

Leonard T. Butler testified that he did not file the September 24, 1976, Seaway and Intermodal agreement with the Commission (Tr. 36). Asked, "Is there a reason why you didn't so file, if in fact you were required to file?" he answered:

> I had a previous contract, the contract that is mentioned here is subsequent to a previous contract with Seaway as sales agent. Because in the services I performed for Seaway, sales, I did not know that there was anything else required. At the time I entered into that contract I did not even have a tariff as an NVO.

The applicant in his brief at page 3 argues that:

> Acknowledging fully that the responsibility to so file may not be necessarily excused by any such claim, the "seriousness' of such failure may be, however, ameliorated if such an explanation is believed.

Hearing Counsel in its Reply Brief at 2 states:

> By stipulation, respondents affirmatively admitted all facts contained in Hearing Counsel's "Request for Admissions" (Exhibit 1), thereby admitting the facts pertinent to the sections 18(b)(3) and 15 issues.

The circumstances of this case demand that the Presiding Administrative Law Judge agree with Hearing Counsel that the respondent has admitted the facts pertinent to the sections 18(b)(3) and 15 issues. Therefore he *finds* and *concludes* that Intermodal Sales, Inc. d/b/a Intermodal Services, Inc., has violated section 15, Shipping Act, 1916, by entering into an exclusive non-competitive cooperative working agreement with Seaway Express Lines without the prerequisite Commission approval and has violated section 18(b)(3), Shipping Act, 1916, by transporting property at rates and charges other than those specified in its tariff on file with the Commission.

It is to amelioration, if any, as to the violations of sections 15 and 18(b)(3) of the Shipping Act, 1916, that attention is directed. The applicant, as indicated above, testified he was unaware of the filing requirements under section 15 to which Hearing Counsel counters (Brief for Hearing Counsel at 7) ignorance of the law is no excuse; nor is inadvertence, citing *Investigation of Rates in the Hong Kong—United States Atlantic and Gulf Trade*, Docket No. 1083, 11 F.M.C. 168, 178 (1967). The latter citation points to section 18(b)(3) violations. The Commission wrote:

> We have no authority under section 18(b)(3) to dismiss a charge simply because it may have been an isolated violation or an honest mistake though we may couple our finding of violation with such other factual determinations as may tend to mitigate the seriousness of the offense.

Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 11 F.M.C. at 178.

The parties do not dispute the facts as to allegations of violations of section 15 and section 18(b)(3) as is evidenced by Exhibits 1 and 2.

The only lawful rate which a carrier may charge is that rate appearing in the carrier's filed tariff. This rate must be charged and paid regardless of seemingly innocent justification for departure such as mistake, inadvertence, or contrary intention of the parties. *United States v. Pan American Mail Lines, Inc.*, 359 F. Supp. 728, 733 (S.D.N.Y. 1972).

The applicant argues in his brief at page 5 that the involved tariff was filed so as to become effective October 2, 1976. He says (Brief for Applicant at 6) that the tariff, when effective, concerning rates or charges, contained only a single factor cargo N.O.S. (not otherwise specified), WM $295; that this rate "of course, and as is usual, was never intended to be utilized commercially, but was, in fact, established so as to be in compliance with the requirements of a tariff filing." However, it is argued by the applicant (Brief for Applicant at 7) (speaking of the 11 Bills of Lading in Exhibit 1, Attachment B), that no potential shippers received any advantage nor were they disadvantaged by any rate quoted to any of the involved shippers in the instances here illustrated. Then the applicant poses the question:

> Isn't this aspect of the Commission's case at very best extremely technical and ministerial and is it not clearly distinguishable from the usual and ordinary tariff violation?

Brief for Applicant at p. 8.

Hearing Counsel assert, at page ten of his brief, that the applicant argues without record support that no shipper was advantaged or disadvantaged by the admitted improper tariff assessments.

The Presiding Administrative Law Judge is not persuaded by the questions asked by the repondent-applicant that mitigation is found in them, because the arguments and the law presented by Hearing Counsel is more persuasive that the situation is proved by a preponderance of the evidence that the Presiding Administrative Law Judge must and does *find* and *conclude* that violations of sections 15 and 18(b)(3) have been committed by the respondent and that no mitigating circumstances have been shown in these areas.

Now as to whether Leonard T. Butler d/b/a Manufacturers Forwarding possesses the requisite fitness, within the meaning of section 44(b), Shipping

Act, 1916, to properly carry on the business of forwarding and to conform to those provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder. The applicant argues (Brief for Applicant at 2) that he, individually, must be deemed to be fit, willing and able to properly carry out the business and functions of a forwarder; that it must be accepted as irrefutable fact that there is no issue nor is there controversy as to the moral characteristics or reputation of the applicant (*Id.*). He concludes (*Id.* at 10) the applicant possesses all of these moral traits and characteristics required and desired of an applicant.

Hearing Counsel contends that Leonard T. Butler d/b/a Manufacturers Forwarding does not possess the requisite fitness to be licensed as an independent ocean freight forwarder (Brief for Hearing Counsel at 11). Counsel cites *Harry Kaufman, Independent Ocean Freight Forwarder*, Docket No. 71-47, 16 F.M.C. 256, 271 (1973) for the Commission enunciated standard of conduct required of an applicant seeking a license:

> It is crucial to his "fitness" that it appear that the applicant intends to and will in good faith adhere to such "high standard" of conduct and that he intends to and will obey the Commission's rules and policies for the conduct of licensed freight forwarders.

The Hearing Counsel argues that the existence of past Shipping Act violations by an applicant for a freight forwarder's license is highly pertinent to the issue of whether the applicant "intends to or will obey" the U.S. shipping laws (Brief for Hearing Counsel at 11). Hearing Counsel points out that the Commission recently denied a freight forwarder application in *Concordia International Forwarding Corporation—Independent Ocean Freight Forwarder Application and Possible Violation of Section 44, Shipping Act, 1916*, Docket No. 78-34, 18 SRR 1364, 1371 (FMC 1978), exhorting that disregard of the shipping statutes would not be tolerated. The Commission said: "In determining whether an applicant possesses the requisitness fitness, a past violation of the Shipping Act militates against the issuance of a license." Brief for Hearing Counsel at 12. Hearing Counsel contends that the activities of Leonard T. Butler, President of Intermodal Sales, Inc. d/b/a Intermodal Services, do not constitute the standard of conduct the law imposes upon those seeking to be licensed as an ocean freight forwarder (*Id*., at 15); that the applicant has failed to meet his burden of demonstrating his character qualifications and fitness to operate as a freight forwarder and to conform to the provisions of the Shipping Act and that the Commission should deny his application.

As has been indicated above, the applicant made no reply to Hearing Counsel's Reply Brief other than to submit a letter, repeated now: "I acknowledge receipt of the Brief of Hearing Counsel and I would respectfully advise that I do not see the need for any further submissions."

The parties do not dispute certain facts in this case. The undisputed facts are deemed by the Presiding Administrative Law Judge to support the position of Hearing Counsel against the applicant. The applicant's attempt to show mitigation of circumstances so as to warrant granting of the license as an independent ocean freight forwarder is unpersuasive and falls short of showing such mitigation.

The Supreme Court has held that the only lawful rate which a carrier may charge is that rate appearing in the carrier's filed tariff. This rate must be charged and paid regardless of seemingly innocent justification for departure such as mistake, inadvertence or contrary intention of the parties, *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915).

FINDINGS AND CONCLUSIONS

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

1. Applicant Leonard T. Butler's Intermodal Services, Inc., violated section 18(b)(3), Shipping Act, 1916, on at least eleven of the nineteen shipments it handled during the period January 15, 1978, through May 12, 1978, in charging, demanding, or collecting a greater, lesser or different compensation for the transportation of property than the rates and charges specified in its tariff on file with the Commission.

2. Intermodal Sales, Inc. d/b/a Intermodal Services, Inc., violated section 15, Shipping Act, 1916, in that it and Seaway Express Lines, a vessel operating common carrier by water, entered into an exclusive, noncompetitive cooperative working agreement subject to the filing and approval requirements of the aforementioned section 15, implementing that agreement in carrying out its terms without the prerequisite Commission sanction.

3. In view of the above, Leonard T. Butler, 52% owner and President of Intermodal Sales, Inc., is found to lack the fitness to properly carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder as required by section 44 and the Commission's Rules and Regulations issued pursuant to section 44 of the Shipping Act, 1916.

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

(A) Leonard T. Butler d/b/a Intermodal Sales, Inc., is found to have violated sections 15 and 18(b)(3) of the Shipping Act, 1916, as indicated herein.

(B) The application of Leonard T. Butler d/b/a Manufacturers Forwarding for an independent ocean freight forwarder license be and hereby is denied.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
June 5, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-30

PUERTO RICO MARITIME SHIPPING AUTHORITY—
GENERAL INCREASE IN RATES

NOTICE

July 11, 1979

Notice is given that no appeal has been filed to the June 1, 1979 order of discontinuance in this proceeding and the time within which the Commission could determine to review that order has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77-30

PUERTO RICO MARITIME SHIPPING AUTHORITY—
GENERAL INCREASE IN RATES

DISCONTINUANCE OF PROCEEDING

Finalized July 11, 1979

The Commission instituted this proceeding in an Order of Investigation served on July 7, 1977, in order to investigate the reasonableness of a 10.4% general rate increase by the Puerto Rico Maritime Shipping Authority (PRMSA) effective June 19, 1977. The Commission specifically directed that a hearing not be held until a Commission decision had been issued in a related on-going proceeding (Docket No. 75-38).

On August 16, 1978, Administrative Law Judge William Beasley Harris issued his decision upon remand in Docket No. 75-38, finding the increase therein under investigation to be just and reasonable. No exceptions were filed and on September 21, 1978 the Commission determined not to review that decision. The period for requesting appellate review of the decision expired in November, 1978 with no review petitions having been filed.

Subsequent to the above events concerning #75-38, a tentatively scheduled prehearing conference for the instant proceeding was postponed at the request of Hearing Counsel to allow for informal review of PRMSA's audited financial reports by staff experts working with Hearing Counsel. That review has been completed and Hearing Counsel now has no challenge to PRMSA's data or conclusions relating to revenues, rate of return on rate base or the need for the subject general rate increase. See also summarized data set forth in PRMSA's April 27, 1979 Motion To Discontinue Proceeding, at 3-4.

PRMSA filed a Motion To Discontinue Proceeding on April 27, 1979, to which Hearing Counsel filed a reply on May 11, 1979. Hearing Counsel's Reply makes the point that merely because "a given rate increase has been in effect for an extended period of time and has been 'superseded' by yet another increase in rates does not, in and of itself, mandate a discontinuance of the proceeding," citing the Commission's decision in the *Matson* proceeding (F.M.C. Docket 76-43, Dec. 12, 1978, 18 SRR 1351, 1352). However, Hearing Counsel joins in the Motion For Discontinuance herein on the basis that the financial data clearly show that PRMSA's 10.4% general rate increase is just and reasonable; indeed, the Commission's Office of Economic Analysis has expressed concern regarding the relatively low level of profitability of PRMSA's operation. Hearing Counsel agrees that no useful purpose would be served by continuing this investigation. I find that the financial summary set forth by PRMSA (in its Motion) for Fiscal Year 1978 support those conclusions.

Accordingly, the motion is granted and the proceeding is ordered to be discontinued.

(S) THOMAS W. REILLY
Administrative Law Judge

June 1, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-22

I. CHARLES LUCIDI, D/B/A
LUCIDI PACKING COMPANY

v.

THE STOCKTON PORT DISTRICT

NOTICE

July 17, 1979

Notice is given that no exceptions have been filed to the June 8, 1979 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-22

I. CHARLES LUCIDI, D/B/A LUCIDI PACKING COMPANY

v.

THE STOCKTON PORT DISTRICT, KILL-PEST, INC., DELK TERMINEX PEST CONTROL, TERMINEX INTERNATIONAL, INC., COOK INDUSTRIES, INC.

Finalized July 17, 1979

Respondent, Port of Stockton, is not in violation of section 16, First, in that it does not give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic.

Respondent, Port of Stockton, is not in violation of section 16, First, in that it does not subject complainant to any undue or unreasonable prejudice or disadvantage.

Respondent, Port of Stockton, is in violation of section 17 in that Item 85 of its Terminal Tariff No. 4 constitutes an unjust or unreasonable regulation and practice related to or connected with receiving, handling, storing or delivering property.

C. Richard Walters for complainant, I. Charles Lucidi d/b/a Lucidi Packing Company.
Edwin Mayall for respondent, Stockton Port District.
Frank Wagner for intervenor, Port of Los Angeles, California.
John Robert Ewers, Aaron W. Reese and *Bruce Love*, Hearing Counsel.

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

Charles Lucidi, d/b/a Lucidi Packing Company (Lucidi), complainant herein, filed a civil action in the Supreme Court of California against the Stockton Port District (Stockton or Port), respondent herein, seeking recovery for alleged damage to property of Lucidi while on the terminal facilities of Stockton. It was alleged that 25,710 bags of sesame seeds became infested with rodent and bird droppings while being stored on Stockton's terminal facilities.

[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 C.F.R. §502.227.

Stockton pleaded as an affirmative defense the provisions of item 85 of its Terminal Tariff No. 4. Item 85 provides:

The Port of Stockton shall not be responsible for any injury to freight on or in its facilities, by fire, leakage, evaporation, natural shrinkage, wastage, decay, animals, rats, mice, other rodents, moths, weevils, other insects, weather conditions, sweat moisture, the elements or discharge of water from breakdown of plant, machinery, other equipment, collapse of building or structure, insurrection, war, or shortage of labor; for delay, loss or damage arising from riots, strikes, labor or other disturbances of any persons or of any character beyond the control of the Port of Stockton.

The California Court, recognizing the Commission's primary jurisdiction, granted the port's motion to stay the trial of the civil action pending a determination by the Commission as to the validity of Item 85.

Thereupon, in compliance with the order of the California Court, this complaint was filed naming the Stockton Port District, Kill-Pest, Inc., Delk Terminex Pest Control, Terminex International, Inc., and Cook Industries, Inc., respondents. The complaint does not identify any of the named respondents other than Stockton, nor does it make any allegations concerning them. The record contains nothing to show that the named respondents, other than the Stockton Port District, are other persons subject to the Shipping Act and, therefore, they are dismissed as parties in this proceeding.

Complainant contends that Item 85 is unjust, unreasonable and void on its face as against public policy as it purports to exculpate the Port from the consequences of its own fault or negligence. Complainant further contends that the tariff item is unlawfully discriminatory against complainant.

The Port of Los Angeles, California (Los Angeles), having shown an interest in this proceeding, was permitted to intervene.

Discovery having been completed, all counsel agreed that the documents developed during discovery provide an adequate record for disposition of this proceeding and that there remain no genuine issues of material fact which require oral testimony and cross-examination. Accordingly, seven documents were admitted as exhibits in evidence and, with the brief filed herein, constitute the complete record in this proceeding as follows:

Ex. 1 Respondent's first set of answers to Hearing Counsels Interrogatories;
Ex. 2 Respondent's second set of answers to Hearing Counsel's Interrogatories;
Ex. 3 Respondent's answers to Complainant's Interrogatories;
Ex. 4 Deposition of Walter H. Meryman;
Ex. 5 Deposition of Owen E. Block;
Ex. 6 Further Responses of Walter Meryman to Interrogatories and Deposition Questions; and
Ex. 7 Central National Insurance Company policy insuring the Port of Stockton for the period December 9, 1975 to December 9, 1978.

An opening brief was filed by Hearing Counsel, and Lucidi adopted as its own opening brief the opening brief of Hearing Counsel.

Reply briefs were filed by Stockton and by Los Angeles.

ISSUES

The issues to be resolved in this proceeding are whether the tariff provision of the Port of Stockton which has been challenged by complainant (1) results in undue or unreasonable preference or advantage or in any undue or unreasonable prejudice or disadvantage in any respect whatsoever within the meaning of section 16, First,[2] or (2) constitutes an unjust or unreasonable regulation and practice related to or connected with receiving, handling, storing, or delivering property within the meaning of section 17, Second Paragraph.[3]

FINDINGS OF FACT

1. Respondent, the Stockton Port District, was created pursuant to the provisions of the Harbors and Navigation Code of the State of California.

2. The Port is an operating port as distinguished from a non-operating or landlord port.

3. The Port operates marine terminal facilities, providing various terminal services with its own employees. The Port provides terminal services and facilities to break-bulk vessels, bulk carriers and a combination of break/bulk and container vessels. The terminal services furnished by the Port include dockage, wharfage, free time, wharf demurrage, terminal storage and cargo handling.[4] As such, the Port is a person subject to the Shipping Act, 1916, as defined in section 1 thereof.

4. The Port has published and filed with the Commission a tariff, effective November 1, 1977, relating to its terminal services which is designated Terminal Tariff No. 4. The Port also publishes a tariff designated General Tariff No. 1.

5. When outbound cargo arrives at Port facilities, the Port issues a dock receipt. When inbound cargo is delivered to a place of rest on its facilities by independent stevedoring companies, the Port takes custody of the cargo until it is delivered to trucks or rails cars.

6. The Port participates in the activities of the California Association of Port Authorities (CAPA). The Committee on Tariffs and Practices of CAPA meets from time to time to discuss and agree upon rates and charges for wharfage, dockage and related port services. The Committee and the full Association

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[2] Section 16, First, of the Shipping Act, 1916 (46 U.S.C. §815) declares it unlawful for any common carrier by water or other person subject to the Act:

> To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . .

[3] Section 17, Second Paragraph, of the Shipping Act, 1916 (46 U.S.C. §816) provides:

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

The Commission, in order to discharge its responsibilities under section 17 of the Shipping Act, adopted General Order 15, 46 C.F.R. §533, which requires every terminal operator to file with the Commission a tariff showing all its rates, charges, rules and regulations relating to or connected with the receiving, handling, storing and/or delivering of property at its terminal facilities.

[4] See 46 C.F.R. §533.6 (d).

discussed and agreed to wharfage increases which were adopted and placed into effect by the Port in 1974, 1975, 1976, 1977 and 1978.

7. There has been no consideration of the provisions of Item 85 of Stockton's tariff or of similar provisions in the tariffs of any other ports (Ex. 4).

8. The Port does not solicit bids for its liability insurance nor are specifications written for the procurement of insurance. Liability insurance is obtained through independent brokers who are given a copy of existing policies and instructed to obtain the same coverage as provided by the policies which are expiring (Ex. 5).

9. At the time of the alleged damage to complainant's property which was the basis of the civil action filed in the Superior Court of California, May 14, 1974, the Port has property damage insurance with total liability limits of $16,000,000, with a $1,000 deductible clause.

10. The Port's liability insurance is issued by the Central National Insurance Company of Omaha, Nebraska, for a three-year term commencing December 9, 1975. That policy covers the liability of the Port for physical loss or damage to property of customers of the Port. The policy does not, *inter alia*, cover liability of the assured Port:

(a) For property held as "storage in transit" under the terms of an applicable bill of lading issued by the assured;
(b) For loss or damage caused by or arising out of ordinary wear and tear, gradual deterioration, dampness or atmosphere, extremes of temperature, inherent vice or latent defect;
(c) For damage sustained due to and resulting from any repairing, restoration or retouching process, unless caused by fire;
(d) For loss due to delay, loss of use or loss of market;

11. Lucidi's cargo of sesame seeds of some 25,710 bags was received at the Port's Dock 9; unloading commenced on February 2, 1974, and was concluded by February 4, 1974.

12. Employees of the Federal Department of Agriculture inspected the seed in transit shed 9 where it had been deposited, on or about May 2, 3, 4 and 6, 1974, and Lucidi received notice of the contamination found by them on May 14, 1974.

13. The sesame seed was being held on the dock for instructions from Lucidi because complainant did not have the facilities available at its Fresno plant to process the seed at that time.

14. There are thirteen wharves at the Port, and only seven of them have transit sheds on them. The Port also has long-term storage facilities. When the free time expires for ingoing cargo, the shipper has his choice of whether it will be placed on wharf demurrage or wharf storage. It may be transferred from the transit shed into the warehouses where it comes under the regulations of General Tariff No. 1.

Discussion

Complainant alleges that Item 85 of Stockton's Terminal Tariff No. 4 is unlawfully discriminatory against complainant "as applied under the circumstances." Complainant has not specifically alleged a violation of section 16, First, but the complaint in a "shotgun" allegation embraces several sections of the Act by contending:

Is unlawful and invalid as violative of the Shipping Act of 1916, Title 46 U.S.C. §§814-817;

The record contains nothing to indicate that respondent makes or gives any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic. The record is also lacking any evidence to support a finding that Item 85 of the Port's tariff subjects complainant to any undue or unreasonable prejudice or disadvantage. To the contrary, the record establishes that the Port invokes the exculpatory provision of Item 85 as to all users of its facilities who suffer damage or loss from any of the causes set forth therein.

The record is clearly without any evidence to support a finding of a violation of section 16, First.

Accordingly, we now consider whether the regulation or practice established by Item 85 is unjust and unreasonable within the meaning of section 17, Second Paragraph.

The Commission in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966), stated that:

As used in section 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.

The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable.

Item 85 of Stockton's tariff proclaims that the Port will not be responsible for any injury to freight in or on its facilities resulting from various specified causes.[5]

In addition to its Terminal Tariff No. 4, Stockton also publishes a tariff entitled General Tariff No. 1, a copy of which is on file with the Commission. Section 2 of that tariff establishes warehouse rules and regulations. Item 114(c) of its General Tariff No. 1 contains an exculpatory clause similar to Item 85 of Terminal Tariff No. 4 except for the following language:

unless such loss or damage be caused by failure of the warehousemen to exercise the ordinary care and diligence required of them by law.

Exculpatory clauses in the water transportation industry appears to have been first considered by the U.S. Supreme Court in *The Steamer Syracuse*, 12 Wall. 167 (1870), where it was held that, notwithstanding a contractual agreement that "the canal boat was being towed at her own risk," the towing boat "must be visited with the consequences" of its negligence. 12 Wall. at 171.

The Supreme Court, in *United States v. Atlantic Mutual Insurance Co., et al.,* 343 U.S. 236 (1952), stated that there is a controlling rule of law that, without Congressional authority, common carriers cannot stipulate against their own negligence or that of their agents or servants.

[5] The Port pleaded this provision as an affirmative defense in a civil action for damages brought by complainant, which action was based upon the alleged negligence of the Port

In *Bisso v. Inland Waterways Corporation,* 349 U.S. 85 (1955), the Court said:

For many years *The Syracuse* seems to have been generally accepted as either (1) construing a contract to "tow at own risk" as not including an exemption from negligence, or (2) holding invalid as against public policy a contract which exempts a tower from his negligence.

349 U.S. at 86 and at pages 90–91:

This rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers. [Footnote omitted.]

In 1959, the Supreme Court modified the long-established general rule that exculpatory clauses were invalid as a matter of law in a case where such a clause was contained in a tariff which had been filed with the Interstate Commerce Commission. The question before the Court in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.,* 360 U.S. 411 (1959), was:

[W]hether consideration of public policy which may be called upon by courts to strike down private contractual arrangements between tug and tow are necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of an expert administrative body.

360 U.S. at 417

The Court distinguished *Bisso* by noting that the exculpatory clause there was part of a contract over which the ICC had no control. The Court said:

In these circumstances we would be moving too fast were we automatically to extend the rule of *Bisso* to govern the present case. For all we know, it may be that the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the towboat owner of the expense of insuring itself against liability for damage caused tows by the negligence of its servants, and is a reasonable rate so computed. If that were so, it might be hard to say that public policy demands that the tow should at once have the benefit of a rate so computed and be able to repudiate the correlative obligation of procuring its own insurance with knowledge that the towboat may be required to respond in damages for any injury caused by its negligence despite agreement to the contrary. For so long as the towboat's rates are at all times subject to regulatory control, prospectively and by way of reparation, the possibility of an overreaching whereby the towboat is at once able to exact high rates and deny the liabilities which transportation at such rates might be found fairly to impose upon it can be aborted by the action of the I.C.C. The rule of *Bisso,* however applicable where the towboat owner has "the power to drive hard bargains," may well call for modification when that power is effectively controlled by a pervasive regulatory scheme. [Footnote omitted.]

360 U.S. at 417, 418.

The Court concluded:

We hold that the Court of Appeals correctly ruled that the exculpatory clause here at issue should not be struck down as a matter of law, and that the parties should be afforded a reasonable opportunity to obtain from the I.C.C., in an appropriate form of proceeding, a determination as to the particular circumstances of the tugboat industry which lend justification to this form of clause, if any there be, or which militate toward a rule wholly invalidating such provisions regardless of the fact that the carrier which seeks to invoke them is subject to prospective and retrospective rate regulations. "Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation." *Federal Maritime Board v. Isbrandsten Co.,* 356 U.S. 481, 498.

360 U.S. at 421

In 1966, the Commission addressed the issue of an exculpatory clause in the tariff of the New York Terminals Conference, in *Truck and Lighter Loading and Unloading Practices at New York Harbor,* 9 F.M.C. 505. The clause in that tariff provided:

> The Terminal Operator assumes no responsibility for delay to motor vehicles and no claims for such delay will be honored.

The Commission found at page 515:

> It is neither just nor reasonable for respondent to disclaim liability for all delays and their attempt to do so was invalid under section 17.

The Commission did recognize that the terminal operators should be allowed to disclaim liability for causes of delay beyond their control. The Commission determined that failure of the terminals to establish a rule to compensate truckers for unusual delay caused by or under control of the terminals constitutes an unjust and unreasonable practice under section 17 of the Shipping Act. This order of the Commission was upheld by the Court of Appeals in *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 389 F.2d 962 (D.C. Cir. 1968).

The Port in its brief points out that edible goods such as sesame seed if left on the dock or put in a transit shed are very difficult to protect from rodents and pigeons. These transit sheds are just what the name implies—goods are coming from the ships and into the sheds and going out and goods are also coming into the sheds for a short time before a ship docks to go out on. This means a cargo is being moved in and out by forklifts and trucks through the sheds during anytime that ships are docking for loading or unloading and this keeps the facility so open that pigeons can fly in. This is not true of the permanent warehouse facilities where the storage of goods is not on such a temporary basis and can be controlled as to type of goods in this location and as to need for undisturbed area.[6]

To the extent that the nature of the cargo and the operation of the Port's transit sheds is relevant to this proceeding, it cannot be stated too strongly that this initial decision does not presume to pass on the question of whether or not the Port was negligent with respect to the Lucidi cargo. The issue of negligence is to be resolved in the suit in the California court. The issues to which the initial decision relates are whether the Port may, by tariff, excuse itself from liability even if negligent.

It is noteworthy that the warehouse aspect of the Port's question is regulated by a California statute which does not permit exculpatory agreements and requires a warehouseman to comply with the standard of care set forth in the California Commercial Code §7204 (1) reading as follows:

> §7204. DUTY OF CARE; CONTRACTUAL LIMITATION OF WAREHOUSEMAN'S LIABILITY. (1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise

[6] Reply Brief of the Stockton Port District, pp. 4-5.

under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.
(Stats. 1963, c.819, §7204.)

The Port admits that under existing California Law, Item 85 would not be valid if the storage of the sesame seed had been removed to a warehouse rather than remaining in the transit shed on the wharf.[7]

The Port argues that there is a significant difference between the exposure to the Port for damage to cargo while on the wharf or in the transit sheds as opposed to cargo placed in protected warehouses. Therefore, it contends that the duty of providing insurance for such cargo should be placed on the shipper, who has control of its location if he does not choose to or cannot at the time of unloading immediately move his cargo away from the Port area. It is the Port's contention that if the shipper wants complete protection for the cargo, he can take advantage of California law holding warehousemen to the standard of care indicated by §7204 of the California Commercial Code.

The arguments of the Port beg the question whether a tariff provision exculpating the Port in the transit shed area from the standard of care similar to that imposed in the warehouse area is a just and reasonable tariff provision. Absent such a tariff provision and assuming §7204 is not applicable to the transit sheds, then whether the Port should be liable for damage to the cargo under the factual circumstances as they exist at the Port is for the California court to determine.

In support of the Port, Los Angeles argues that absent Item 85, which contemplates that each party bringing a particular cargo into the Port shall bear the responsibility for protecting that particular cargo against loss, the Port must recover costs of potential liability from the users of the Port either through increased tariffs or other methods of raising revenue. Increase in rates means an increase in the cost of goods moving through Stockton. Los Angeles contends this means that the general public will be paying for these costs rather than the shipper and his customers.

Los Angeles asserts that it is reasonable that the method utilized by the Port of Stockton (and also by the Port of Los Angeles) which provides that the Port will not be responsible for the loss of the cargo informs the shippers that if there is going to be a loss, even though that loss may be caused by the sole negligence of the Port, in order to protect themselves they should acquire their own insurance. This prevents the Port from having to spread the risks of the particular cargo among, if not all the users of the Port, certainly all the users of the Port that bring in that particular type of cargo. Los Angeles also says that requiring each shipper to be responsible for its own cargo has the added benefit of having the customer who uses that cargo in its ultimate form pay the actual charges for that cargo rather than having those charges paid for by other general users of the Port.

It is difficult to understand how the general public rather than the shipper and his customers would be paying the costs of increased tariffs at the Port. In any event, the cost of protecting cargo against loss, whether borne by the Port

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[7] Reply Brief of the Stockton Port District, p. 4.

and passed on as a cost of Port operation in the same manner or other costs of Port operation are passed on, or whether borne by the shipper, the cost of cargo protection ultimately is paid by the consumer.

In order to determine the legality of Item 85 of Stockton's tariff, it is necessary to ascertain whether the limitation or restriction of liability provisions of a terminal tariff are rules or regulations relating to or connected with the receiving, handling, storing, and/or delivering of property within the meaning of section 17 of the Shipping Act and the Commission's General Order 15.

The purpose of General Order 15 is to enable the Commission to discharge its responsibilities under section 17 by keeping informed of practices and rates of terminal operators, and by keeping the public informed. 46 C.F.R. §533.1. Terminal operators clearly must include in tariffs all rates, charges, rules and regulations in connection with and/or related to the receiving, handling, storing, or delivering of property. However, whether a rate, charge, rule or regulation, it must be just and reasonable.

There is no evidence that the rates and charges contained in its tariff were established on the understanding that they were related in any respect to the exculpatory provision of Item 85. The record here is to the contrary. Walter Meryman, the Port's Director of Marketing and Traffic, testified as to the ratemaking procedures of the Port.[8] The Port is a member of the California Association of Port Authorities (CAPA). CAPA's Committee on Tariffs and Practices meets usually every two months to discuss wharfage, dockage and related port services. The Port's NOS wharfage rate was increased each year from 1974 to and including 1978. Mr. Meryman, the Port's representative on CAPA's Committee on Tariffs and Practices, testified that these increases were discussed by and agreed to by the Committee.

Following its usual procedure, the Port adopted the rates as agreed to by the Committee. Further, Mr. Meryman testified that during the years he participated in CAPA rate discussions, there was never a discussion of Stockton's Tariff Item 85 or similar clauses in other port tariffs. Accordingly, the record contains nothing to support a finding that Tariff Item 85 could be justified under the theory suggested by the Supreme Court in the *Southwestern Sugar & Molasses Co. supra.*

CONCLUSIONS

Respondent Port of Stockton, a person subject to regulation by the Shipping Act, 1916, among other things provides terminal services including terminal storage and cargo handling.

In the operation of its terminal, the Port has published and filed a tariff relating to its terminal services which is designated Terminal Tariff No. 4. Included in Terminal Tariff No. 4 is Item No. 85, which provides, in essence, that the Port shall not be responsible for injury to freight on or in its facilities resulting from a variety of causes, including injury caused by animals, rats, mice, other rodents, moths, weevils or other insects.

[8] Deposition of Walter H. Meryman, Ex. 4.

To the extent that the provisions of Item 85 would relieve the Port from damage for liability to property caused in whole or in part by fault of the Port, and without a *quid pro quo* of any kind, such provisions are unjust and unreasonable, in violation of section 17 of the Act.

There is no evidence, and the Port does not contend that Item 85 was promulgated in consideration of any benefits otherwise conferred on users of the Port.

The provisions of Item 85 are against public policy insofar as such policy requires businesses affected with a public interest be precluded from taking unfair advantage of those who by necessity must use the facilities of such businesses. To permit the Port to isolate itself from liability, if such liability accrued by reason of the Port's negligence by the mere publication of an exculpatory tariff provision, is unjust and unreasonable, in violation of section 17 of the Act.

Item 85 of Terminal Tariff No. 4 is an unjust and unreasonable regulation and practice relating to or connected with the receiving, handling, storing or delivering of property in violation of section 17, Second Paragraph, Shipping Act, 1916.

Therefore, respondent shall cease and desist from the aforementioned unjust and unreasonable tariff provision by deleting Item 85 from Terminal Tariff No. 4 or, in the alternative, amend Item 85 as to clearly set forth that non-liability does not apply in the event that injury results from negligence by the Port.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON D.C.
June 4, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-51

PERRY'S CRANE SERVICE

v.

PORT OF HOUSTON AUTHORITY
OF THE PORT OF HOUSTON, TEXAS

NOTICE

July 27, 1979

Notice is given that the time within which the Commission could determine to review the June 21, 1979 order of discontinuance of the Administrative Law Judge in this proceeding has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-22

I. CHARLES LUCIDI, D/B/A LUCIDI PACKING COMPANY

v.

THE STOCKTON PORT DISTRICT, KILL-PEST, INC., DELK TERMINEX PEST CONTROL, TERMINEX INTERNATIONAL, INC., COOK INDUSTRIES, INC.

Finalized July 17, 1979

Respondent, Port of Stockton, is not in violation of section 16, First, in that it does not give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic.

Respondent, Port of Stockton, is not in violation of section 16, First, in that it does not subject complainant to any undue or unreasonable prejudice or disadvantage.

Respondent, Port of Stockton, is in violation of section 17 in that Item 85 of its Terminal Tariff No. 4 constitutes an unjust or unreasonable regulation and practice related to or connected with receiving, handling, storing or delivering property.

C. Richard Walters for complainant, I. Charles Lucidi d/b/a Lucidi Packing Company.
Edwin Mayall for respondent, Stockton Port District.
Frank Wagner for intervenor, Port of Los Angeles, California.
John Robert Ewers, Aaron W. Reese and *Bruce Love*, Hearing Counsel.

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

Charles Lucidi, d/b/a Lucidi Packing Company (Lucidi), complainant herein, filed a civil action in the Supreme Court of California against the Stockton Port District (Stockton or Port), respondent herein, seeking recovery for alleged damage to property of Lucidi while on the terminal facilities of Stockton. It was alleged that 25,710 bags of sesame seeds became infested with rodent and bird droppings while being stored on Stockton's terminal facilities.

[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 C.F.R. §502.227.

remanded the proceeding to the presiding officer to determine the amount of reparation for monetary damages suffered by complainant. In taking this latter action, the Commission recognized that complainant was "entitled to some degree of monetary restitution for losses occasioned by the unlawful practices" but that the extent of reparation could not be determined on the record which had been developed. F.M.C. Decision, p. 5.[1] The Commission instructed the parties to utilize the procedures set forth in Commission Rule 252 (formerly Rule 15(b)) which required complainant to prepare a statement itemizing damages which could form the basis for an award of reparation or for further hearing.

Following the Commission's decision, a number of events occurred which impeded progress toward conclusion of this proceeding and resulted in considerable delay which was not the fault of either complainant and respondent. In brief, although respondent cooperated in an effort to bring the question of reparation to a prompt conclusion, complainant's first counsel was unable to conduct the necessary investigation of facts in a timely fashion and, as I mentioned above, even disappeared for a time. Furthermore, three other similar complaints were filed.[2] Finally, after it appeared that complainant's first counsel was not able to develop the necessary information upon which settlement discussions could be based, despite numerous conferences, rulings, meetings, and the like, complainants in all four cases retained new counsel. This was done sometime in April or May of 1978. Thereafter, with new counsel, steps were taken to enable the parties to develop relevant evidence and to commence negotiations leading toward settlement. See Report of Special Conference and Rulings Made Therein, May 30, 1978. The process of developing this evidence was time-consuming and involved, among other things, checking of Port records and other records to determine "bumping" instances over a period of time extending from November 17, 1973, to March 23, 1977. Counsel's work was made more difficult because of the uncertain measure of damages in cases of this type and the extreme difficulty in determining instances when complainant had not obtained jobs because of the Port's first-call preferential practice. Nevertheless, after records had been checked, negotiations seeking settlement resumed, finally reaching a successful conclusion which has culminated in the filing of the subject motion.

THE SETTLEMENT AND REASONS SUPPORTING ITS APPROVAL

As the motion states, after all of the effort described above in which the parties checked and cross-checked records seeking to determine instances of

[1] Both the Commission and I wished to pursue the question of reparation although complainant had failed to furnish reliable and probative evidence at the hearing on this question despite having had several opportunities at the hearing to do so. However, furnishing proof of actual compensable damages is not easy in this type of case, and as became apparent late, part of the problem which complainant faced stemmed from the activities of his first counsel who actually seems to have disappeared for a period of time during the remanded phase of the proceeding. For a description of the problems in proving financial injury which complainant experienced at the hearing, see my Initial Decision, cited above, 16 SRR at 1487–1490.

[2] These were: Docket No. 76–57, *H & H Cranes, Inc. v. Port of Houston Authority*, 19 SRR 547 (1979), Docket No. 77–41, *Houston Gulf Crane, Inc. et al. v. Port of Houston Authority;* and Docket No. 77–42, *P & M Crane Service, Inc. v. Port of Houston Authority*, 19 SRR 997 (1979). Docket No. 77–41 has been terminated by the withdrawal of the complaint. Docket No. 76–57 is also nearing submission of a settlement. Docket No. 77–42 has not been settled and is proceeding toward hearing.

"bumping," the parties exchanged proposals for settlement. As noted, it was recognized that even if specific instances of "bumping" could be verified to the satisfaction of both parties, an enormously difficult problem remained if the parties were to determine those instances in which complainant never obtained jobs because a particular Port crane had secured the job through the Port's former preferential first-call practices. Under the Commission's decision, complainant was entitled to monetary restitution for injury caused by "bumping" from jobs actually commenced but also from jobs never obtained because the Port had required a stevedore to utilize a Port crane not equally suitable to one of complainant's. Even if all of these facts could be determined easily and a causal relationship established between the Port's practices and idleness of complainant's cranes, the question of items of damages to be considered compensable under section 22 of the Act remained to be argued.

In view of all of these difficulties of proof and expenses of continued litigation, the parties determined that further costs of litigation would outweigh any benefits that either party could derive from efforts to identify and prove monetary damages more precisely. Accordingly, both parties desire to compromise and settle complainant's claim by agreeing upon the amount of $9,727.41, to be paid by respondent, together with costs of the proceedings, if any, as have been assessed. By this means, the parties seek to bring this lengthy and exasperating litigation to an amicable close. To that I say amen! It only remains for me to determine under applicable principles of law whether there is any reason why this compromise and settlement should not be approved and why this old case should not be laid to rest. I find no such reasons as I now explain.

GOVERNING PRINCIPLES OF LAW

It has long been recognized by the Commission that the law strongly favors settlements and that settlements will be treated with indulgence and with presumptions that they are correct and fair. *Organic Chemicals v. Atlanttrafik Express Service,* 18 SRR 1536a, 1539 (1979), and cases cited therein. There are a few caveats which must be considered, however. As the Commission has stated, notwithstanding the strong policy favoring settlements, a presiding judge should not act as a rubber stamp and should be especially careful to ensure that the settlement does no violence to any statutory scheme. In a recent order in Docket No. 78-44, *Pierpoint Management Company and Retla Steamship Company v. Holt Hauling and Warehousing Systems, Inc.,* 19 SRR 435 June 13, 1979, the Commission stated as follows:

> The Commission is aware of and fully supports the policy which favors the settlement of disputes, but it is incumbent upon the decision maker to assure that the settlement proposed by litigants does not violate the law. As was stated in *Inter Equip, Inc. v. Hugo Zanelli & Co.,* 17 SRR 1232, at 1234 (1977):
>
>> The fact that parties seek approval of their settlement does not . . . mean that the presiding officer or the Commission must blindly approve and has no useful function to perform. Care must be taken to insure that no violence is done to any statutory schemes involved especially if there is a question concerning the applicability of Section 15 of the Act. . . .

The statutory scheme to which the Commission had reference in *Pierpoint* involved a possible agreement that required filing and formal approval under section 15 of the Act, i.e., a certain type of anticompetitive agreement among carriers or other persons subject to the Act. In such cases, settlements may be approved but they are subject to formal Commission processing under section 15. See *Pierpoint, supra; Massachusetts Port Authority v. Container Marine Lines,* 11 SRR 37, 40 (1969); *American Export Isbrandtsen Lines, Inc.,* 14 F.M.C. 82, 89 (1970). Another statutory scheme which requires special attention when settlements are submitted involves section 18(b)(3) of the Act. While permitting compromise and settlement in complaint cases alleging that carriers have overcharged in violation of that law, where the facts are not readily ascertainable, the Commission has been careful to ensure that the settlement is a bona fide effort to terminate a controversy and not a device to circumvent the strict requirements of tariff law. See *Organic Checmicals v. Atlanttrafik Express Service, supra,* 18 SRR at 1539–40.

The present case does not involve the complications which occurred in connection with the section 15 and section 18(b)(3) cases described. This case involves simply a compromise and settlement in which the problem presented was to fashion a reasonable measure of monetary damages arising out of discontinued practices which had been found to be unduly prejudicial and unreasonable within the meaning of sections 16 First and 17 of the Act. There is no concern that the settlement itself, which is not between two carriers or other persons subject to the Act and which does not establish ongoing anticompetitive conditions, need undergo section 15 processing. Moreover, there is no tariff policy which comes into play under section 18(b)(3). The case may therefore be evaluated under general principles favoring compromise and settlement in which a major consideration is the fact that the parties, after lengthy negotiations, have determined that whatever they could have achieved to vindicate their respective positions by means of continued litigation would be outweighed by the costs of such litigation and that the amount of settlement to which both have agreed represents a satisfactory compromise and succeeds in terminating a seemingly interminable proceeding.[3] Considering furthermore the extreme difficulty of identifying every "bumping" instance and every lost job attributable to the Port over a period of more than three years, as well as establishing a formula by which each compensable item of damages could be identified, the merits of entering into a compromise and settlement become more obvious. This case, therefore, falls into the customary pattern of the typical settlement which the law encourages in order to terminate complicated controversies and avoid wasteful litigation. See, e.g., *Old Ben Coal Company v. Sea-Land Service, Inc.,* 18 SRR 1085, 1091–1099 (I.D. 1978, F.M.C. adoption, December 29, 1978) for a full discussion of these principles and relevant case citations.

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[3] In respect to the particular amount of damages upon which the parties have agreed, the Commission has recognized that this is a matter for the parties to determine. In *Inter Equip, Inc. v. Hugo Zanelli & Co., supra,* 17 SRR 1232 at 1234 (1977), it was stated:

> The amount of the settlement . . . is a matter for the parties to determine and the Commission has in the past recognized the tradition. See *Lavatino & Sons, Inc. v. Prudential-Grace Lines, Inc.,* 12 SRR 1079, 1100–1102 (I.D.), affirmed in pertinent portion by the Commission, 14 SRR 1301 (1974).

CONCLUSION

On the basis of relevant principles of law governing compromises and settlements and considering the nature of the settlement entered into by the parties to this proceeding, I find, as in *Old Ben, supra,* that the settlement agreement which the parties have submitted for approval as a means to terminate this case is reasonable, violates no law or policy, and fully comports with the Commission's policy which strongly encourages settlements. Therefore, subject to Rule 227(c), as amended,[4] the settlement is approved and this complaint case is discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

June 21, 1979

[4] Rule 227(c), as amended, states as follows:

Whenever an administrative law judge orders dismissal of a proceeding in whole or in part, such order, in the absence of appeal, shall become the order of the Commission 30 days after date of service of such order (and the Secretary shall so notify the parties), unless within such 30-day period the Commission decides to review such order on its own motion, in which case notice of such intention shall be served upon the parties. 46 C.F.R. § 502.227(c); General Order 16, Amdt. 26, served October 25, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-7

PUERTO RICO MARITIME SHIPPING AUTHORITY

v.

SEATRAIN GITMO, INC. AND
TRAILER MARINE TRANSPORT CORPORATION

NOTICE

July 27, 1979

Notice is given that the time within which the Commission could determine to review the June 22, 1979 order of discontinuance of the Administrative Law Judge in this proceeding has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-7

PUERTO RICO MARITIME SHIPPING AUTHORITY

v.

SEATRAIN GITMO, INC. AND
TRAILER MARINE TRANSPORT CORPORATION

NOTICE OF WITHDRAWAL OF COMPLAINT AND DISCONTINUANCE OF PROCEEDING

Finalized July 27, 1979

By complaint served February 5, 1979, the Puerto Rico Maritime Shipping Authority (PRMSA) alleged that respondents Seatrain Gitmo, Inc. and Trailer Marine Transport Company (TMT) had violated section 15 of the Shipping Act, 1916, by entering into and carrying out an anticompetitive agreement as a result of a charter of a barge from a company known as Crowley Towing & Transportation Company to Seatrain Gitmo. PRMSA sought a cease and desist order and reparation. Respondents generally denied the allegations and asserted that the charter arrangement did not constitute a section 15 agreement.

By letter dated April 23, 1979, counsel for respondent TMT advised that settlement discussions had commenced. I instructed complainant to advise me of the status of these discussions. See Order to Furnish Status Report Regarding Possible Settlement, May 1, 1979. On May 30, 1979, counsel for PRMSA advised me by letter that PRMSA had decided to withdraw its complaint on the basis of representations of counsel for TMT that the charter in question would expire on or about May 20, 1979, and that there was no expectation that it would be renewed. PRMSA asserts, however, that all parties should understand that its withdrawal is without prejudice to the filing of a new complaint if respondents or related companies enter into similar charter arrangements in the future. No other party has replied to the letter announcing withdrawal.

A complainant has a right to file a complaint and generally to withdraw it if it sees no point in prosecuting it. I know of no doctrine of law that would authorize me to compel PRMSA to continue litigation concerning the status of an apparently expired charter agreement nor any principle of law that would prevent PRMSA from filing a new complaint should a similar charter be executed in the future.

Accordingly, in view of complainant's decision to withdraw its complaint, this proceeding is discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

June 22, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-27

TRAILER MARINE TRANSPORT CORPORATION—
GENERAL INCREASE IN RATES

DOCKET NO. 77-28

GULF CARIBBEAN MARINE LINES, INC.—
GENERAL INCREASE IN RATES

ORDER ADOPTING INITIAL DECISION ON REMAND

July 31, 1979

On December 19, 1978, the Commission remanded this proceeding to the Office of Administrative Law Judges for further hearings after determining that TMT's rate increases in Docket No. 77-27 could not be found to be reasonable without some inquiry into TMT's debt/equity structure and the effect of its through movement rates on its port-to-port rates. This proceeding is now before the Commission upon its determination to review the Initial Decision on Remand issued in this proceeding on April 18, 1979 by Administrative Law Judge Thomas W. Reilly.

On remand, the Presiding Officer found that the record was sufficient to allow a final determination as to the reasonableness of the subject rate increases, in conformity with directives of the Commission. Although he found the rates to be reasonable, sufficient evidence of such reasonableness was put into the record only as a result of the salutary efforts of the Commission's Bureau of Hearing Counsel. In contrast the Presiding Officer specifically noted that TMT had flatly refused to provide the information required by the Commission as part of a "deliberate calculated strategy".

Although the United States Court of Appeals for the District of Columbia has found that the Commission does not have jurisdiction over joint through rail-water rates to and from Puerto Rico, the right of the Commission to obtain any and all information concerning the operations of regulated carriers reasonably necessary to carry out its regulatory functions was upheld. *Trailer Marine Transportation Corporation v. Federal Maritime Commission,* 602 F.2d 379

(D.C. Cir. 1979). In light of this decision, the Presiding Officer's warning that "it is a perilous course for a regulated carrier to refuse to divulge the requested information" is completely supported by the Commission. Had an adequate record for determination of the reasonableness of these rate increases not been developed through the efforts of Hearing Counsel, they could well have been held to be unlawful due to the failure of TMT to sustain its burden of proof in this regard. See, *Commonwealth of Puerto Rico v. Federal Maritime Commission,* 468 F.2d 872 (D.C. Cir. 1972).

Because sufficient evidence supporting the ultimate disposition of this case as recommended by the Presiding Officer is contained in the record, his decision will not be disturbed. In the future, any carrier's refusal to comply with Commission orders may cause adverse inferences to be drawn or result in the imposition of appropriate legal sanctions.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted; and

IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77-27

TRAILER MARINE TRANSPORT CORPORATION—
GENERAL INCREASE IN RATES

No. 77-28

GULF CARIBBEAN MARINE LINES, INC.—
GENERAL INCREASE IN RATES

Adopted July 31, 1979

The respondents in this remanded consolidated proceeding were found to have produced sufficient additional evidence to meet their burden of proving that the new rates that went into effect on August 29, 1977 are just and reasonable within the meaning of § 18(a) of the Shipping Act, 1916.

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

INTRODUCTION

Pursuant to the Commission's December 19, 1978 Order of Further Investigation (OFI), this is the Initial Decision On Remand which the Commission directed be served after additional proceedings conducted under an accelerated schedule.

This consolidated proceeding was originally instituted on June 30, 1977 to determine whether identical (10.4%) rate increases filed by both Respondents are just and reasonable under § 18(a) of the Shipping Act, 1916 (46 U.S.C. § 817(a)). The increases, initially suspended by the Commission, eventually became effective on August 29, 1977. The Initial Decision found, in essense, that the Respondents had sustained their burden of proving that their rate increases were just and reasonable, as being based on a legitimate need for additional revenue. Although no party filed exceptions to that Initial Decision

[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 C.F.R. § 502.227).

(served June 27, 1978), the Commission reviewed *sua sponte* and concluded that a finding of reasonableness could not be made on the then-existing record. Because Trailer Marine Transport Corporation, Inc. (TMT) began offering through-movement service during the test period involved in the original proceeding (as evidenced by tariffs on file with the I.C.C. of which the Commission took official notice) but failed to mention this in its direct case, the Commission remanded for consideration of the relationship between TMT's through movements and its port-to-port service.

The second area remanded for further investigation was the methodology used to determine the reasonableness of TMT's and GCML's (Gulf Caribbean Marine Lines, Inc.) new rates. The Commission stated in its OFI that: "The method used to determine whether the proposed rates of both TMT and GCML are reasonable also appears to be incomplete. No rate of return was computed on the equity portion of the rate base of either carrier. Only the rates of return on total capital were used in arriving at the conclusion that the returns were not unreasonable in comparison with other U.S. businesses. . . ."

After the issuance of the Commission's OFI, the remanded proceedings formally commenced with a Prehearing Conference in Washington, D.C. on January 9, 1979, at which a schedule was worked out (later slightly revised). The parties ultimately agreed that no oral hearing would be necessary (consistent with the Commission's directions in this regard). The official record for decision in this remanded proceeding consists of the following:[2]

(1) Respondent's Direct Case, filed January 30, 1979;
(2) Hearing Counsel's Interrogatories to Respondents, January 12, 1979;
(3) Respondent's Replies to Hearing Counsel's Interrogatories, January 30, 1979;
(4) Depositions of William F. Roush, Craig A. Wallace & Donald C. O'Malley, February 1, 1979;
(5) Testimony of Robert A. Ellsworth, February 16, 1979;
(6) Affidavit of Robert A. Ellsworth, March 14, 1979.

The first five of the foregoing documents were submitted by Hearing Counsel on March 2, 1979 in connection with a Motion To Admit Evidence, which motion is hereby granted. (There was no opposition or reply to the motion by any other party.) The sixth was separately submitted on March 14, 1979, also with no opposition, and likewise it is admitted in evidence. In addition to the evidence, the parties filed the following briefs:

(a) Respondent's Opening Brief, March 2, 1979;
(b) Hearing Counsel's Opening Brief, March 9, 1979;
(c) Respondents' Reply Brief, March 16, 1979;
(d) Hearing Counsel's letter of March 19, 1979, disclaiming need for reply.

[2] Proposed testimony of Thomas L. Farmer, dated Feb. 16, 1979, was initially submitted by Hearing Counsel and later withdrawn by explanatory letter of March 9, 1979 (together with an affidavit from Mr. Farmer outlining the circumstances of the withdrawal of his testimony). It should be noted that Mr. Farmer also submitted earlier testimony in the first phase of this proceeding (January 1978), but I do not deem the subsequent events to have impaired in any way the validity of his earlier testimony.

DISCUSSION

I. The Effect Of TMT's Through-Movement Rates On Its Port-to-Port Rates

The Commission in its OFI questioned TMT's allocation of 100% of its rate base and expenses to port-to-port cargo in its G.O. #11 submissions which comprised TMT's direct case in the original proceeding. TMT began offering through-movement service during the test period but did not mention this fact in its direct case,[3] making no mention of any other cargo being carried on its vessels nor offering any explanation why portions of its rate base and expenses should not be allocated to the through-movement cargo. Thus, the Commission concluded that: "A finding that the all-water rates are reasonable cannot be made without reliable information as to the effect of TMT's through movement rates on its port-to-port rates" (OFI, 2–3). GCML does not participate in any through-movement rates, thus only TMT is concerned with this portion of the Commission's OFI.[4]

Hearing Counsel's proposed witness Thomas L. Farmer made an on-site review of the Respondents' work papers at the corporate offices of the parent corporation, Crowley Maritime Corporation (Crowley), in San Francisco; however, Mr. Farmer's testimony has been withdrawn (*supra,* fn.2) so that his testimony cannot and will not be relied upon or used in any way in this decision.

In addressing this first issue, the Respondents refused to supply any specific commodity data or through rate division data (ocean portion, etc.) either on their own as part of their direct case or support therefor, or in response to Hearing Counsel's Interrogatories. This was a part of the Respondents' deliberate calculated strategy first explicitly announced at the January 9, 1979 Prehearing Conference,[5] despite their acknowledgement that they had the burden of proof in this proceeding. The Commission expressly stated on pages 2 and 3 of the OFI that: "The 'rate divisions' of the through rate received by the ocean carrier are relevant to a determination as to the reasonableness of TMT's all-water rates . . . ." (and) "Initially, there must be an examination of the comparative levels of the water division of the through rate of the port-to-port rate." In view of those statements, it is a perilous course for a regulated carrier

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[3] Responding to the Commission's OFI criticism for ignoring TMT's through-movement cargo in its original direct case, Respondents now assert that it did not segregate revenues in the test year because at that time TMT did not know when, or even if, it would get a joint rail-water tariff adopted for filing at FMC or ICC, and even if it did, Respondents believed that the initial benefits of the tariff would be minimal for at least a year until it gained general acceptance and use. Resp.Dir.Case, at 3. TMT further asserts that historical facts now prove that the "omission was meaningless" because the amount of revenue derived from through-movement cargo "does not meet the criteria of Part 512.6(c)."

[4] Both in response to an Interrogatory of Hearing Counsel and in their Direct Case, Respondents state that GCML does *not* offer through service.

[5] See page 3, fn.2 of Hearing Counsel's Opening Brief; also statements of Mr. Roush at Prehearing Conference, tr.4 and 6:

> [i]t is our position . . . that we will show that the through rated traffic represents a very small portion of the traffic in total . . . which represents so small a portion that the regulations do not provide that we have to segregate that portion of traffic. (tr.4.)

> [w]e will not reveal any data that would give the Commission any insight as to what the ocean divisions are on the through rates. (tr.6.)

See also TMT's argument on pages 2–4 of Respondents' Direct Case as to why the Commission does not need, nor its Regulations require, the production of such further data. Also see Respondents' refusal to answer Hearing Counsel's Interrogatory #6, using assertion: "This information is not necessary to prove reasonableness of respondents' rates." Cf., OFI, at page 3 (last full sentence) and fn.3.

to refuse to divulge the requested information. As pointed out in my January 22, 1979 Ruling On Motion For Clarification, the fact that data requested by a regulatory agency deals with partly regulated and partly unregulated activity is no valid objection to that agency's request for such data.[6] Respondent's reliance on what the Commission ordinarily requires in carrier's regular reports under Part 512 of the Commission's Regulations (46 C.F.R. § 512) is equally inappropriate, having no relevance to what the Commission may require in a general rate increase proceeding.[7]

Nevertheless, Hearing Counsel did not pursue the issue of adamant refusal to turn over data in the form requested by Hearing Counsel[8] and suggested by the Commission in its OFI. Hearing Counsel now joins with Respondents in asserting that the material supplied should be sufficient for the Commission to reach a decision in this limited remand proceeding. Respondents point out in their Direct Case that while Part 512 is not directly applicable here, it does constitute an indication that revenues from other sources which comprise less than 5% of the revenues from the service over which the Commission has jurisdiction are not considered significant by the Commission with respect to requiring regular financial reports for such service (Resp.Dir.Case, at 2-3). Specifically, Respondents point to 46 C.F.R. § 512.6(c) as clearly dealing with only "gross revenue" when referring to revenue from "other cargo," and make the argument that the most that is required by Part 512 is to segregate "revenue and expenses" within the "Service" *only if* the gross revenue of "other cargo" exceeds 5% of the gross revenue from the "Service." TMT in the test year had port-to-port revenues of $53,332,000 compared to through-movement revenue of $1,647,000. Thus, TMT's "other cargo" produced only 3.0% of the gross revenue of the service and therefore, Respondents argue, there is no substantial reason to require a segregation of revenue and expenses for such a relatively insignificant amount of "other cargo." Respondents further showed, using August 1978 as an example, that through-movement cargo produced more revenue than expenses and thus could not be a burden on port-to-port traffic.[9]

Hearing Counsel tested Respondent's conclusions through Interrogatories, requests for production of documents and oral depositions of three company officials. Based on this investigation, Hearing Counsel concluded that they have no basis to argue that TMT's through movement service places any financial burden on its all-water service. The answers of Respondents' officials to deposition questions on transcript pages 29-38[10] add specific details of the nature of the through-movements, how billings are recorded and determined, and

[6] See *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 211, 215-16 (1912), cited and excerpted at page 3 of the above January 22 Ruling; see also discussion on pages 2-6 of same Ruling.

[7] See also Hearing Counsel's remarks on G.O. #11 applicability and adamance of Respondents in refusing to produce data specified by the Commission, Prehearing Conference transcript, 6-7.

[8] See fn.2, at 3 of Hearing Counsel's Opening Brief.

[9] Respondents' Direct Case, at 4-5.

[10] All 3 depositions are bound together under cover titled "Deposition of William F. Roush."

where the figures that Respondents used in their Direct Case originated.[11] On pages 8–9, Mr. Roush explained the source for and calculations made in determining the revenue produced for the through-movement.

II. The Method Used To Determine Reasonableness Of Rates

In the Commission's OFI, the Commission found that the parties' use of rate of return on total capital to determine reasonableness of rates was "incomplete." As stated by the Commission:

> No rate of return was computed on the equity portion of the rate base of either carrier. Only the rates of return on total capital were used in arriving at the conclusion that the returns were not unreasonable in comparison with other U.S. businesses. The rate of return on equity was not determined because "the respondents' complex corporate structure made this impossible". . . . [I]f such a critical analysis can be avoided by carriers which happen to have a "complex corporate structure" there exists the possibility that important aspects of their financial structure regarding the effect of debt management on profitability may go unexamined. When the financing structure of a subsidiary is unusually complex, an acceptable alternative may be the use of the debt-equity ratio and imbedded debt rate of the parent corporation in calculating the respective rates of return.

OFI at 4–5.

Once again, as in responding to the first remanded issue, the Respondents declined to present the Commission with the analysis it requested, arguing instead that they should not be required to make such analysis. This argument is repeated in Respondents' Direct Case (at 5–8). Respondents argue that only the G.O. #11 accounting methodology should be employed in determining the rate of return *unless* "the application of such rules and regulations create *unreasonable results*" (citing 46 C.F.R. § 512.3(g)).[12] Respondents cite the decision in *Sea-Land Service, Inc.—Gen. Increase in Rates, etc.,* Docket #71-53, 13 SRR 907, 921 (1973), as supporting their position.[13] However, I find nothing in that decision that in any way constricts or limits the Commission in its discretion to choose the most appropriate accounting methodology for use in a particular rate proceeding.

Even though the Respondents did not present debt and equity data in their Direct Case, Hearing Counsel points out that they did provide sufficient information to the staff expert witness, Dr. Robert Ellsworth of the FMC Bureau of Industry Economics, so that he could make the analysis required by the

[11] In its Direct Case, Respondents testify that through-movement cargo cannot burden its all-water cargo because the revenue produced from the through-rate division exceeds the related fully-distributed expenses. For the most current 12-month period available to TMT (through Nov. 30, 1978), total expenses were $39,814,099. During this same period, TMT handled 37,500 forty-foot trailers. That resulted in average expense per trailer of $1,061.71. Using the August 1978 example (the month chosen by Hearing Counsel in its Request for Documents), the revenue from the 347 through-movement trailers was $405,615—an average revenue of $1,168.91 per trailer. Thus, the through-movement cargo produced a margin over expenses of $107.20 per forty-foot trailer, ergo, no expense burden on the port-to-port traffic. Resp.Dir.Case, at 4–5.

[12] Respondents further contend that no unreasonable results occur by using G.O. #11 accounting methodology. "Respondents should not be subject to the uncertainty of submitting a financial report based on GO 11 requirements and having it judged by another accounting methodology. The mathematical exercises sought to be engaged in by the Commission serve little practical purpose as GO 11 makes provision for the inclusion in the rate base of the cost, less depreciation, of the assets used in the trade." (Res.Dir.Case, at 6.)

[13] That decision, though cited as a statement of the Commission in Respondent's Direct Case, was actually a decision of Administrative Law Judge Herbert K. Greer in a proceeding that was ultimately discontinued by the Commission on March 18, 1975 because two other proceedings were expected to deal with key issues from the Docket #71-53 proceeding. See 14 SRR 1569 (1975).

Commission. His analysis is set forth in his testimony[14] and is directed to the following areas: (a) rates of return on equity, (b) fair (maximum) rates of return on equity, (c) debt and equity ratios, and (d) tax savings arising from interest payments as a deductible expense. Again, as in the original proceeding, the ultimate conclusion as to reasonableness of the new rates is based upon a comparison with average rates of return for U.S. corporations, including a comparison with transportation industries as well as in "all industries," and also includes consideration of risk factors for TMT and GCML.

Dr. Ellsworth disagrees with the Respondent's argument that the Commission should utilize the same hypothetical debt and equity ratio concept that the CAB uses, but beyond that his analysis leads him to conclude that the general rate increases of TMT and GCML are reasonable when viewed in the light of the carriers' rates of return.

Dr. Ellsworth's analysis established embedded debt costs (8.32%: TMT, 8.57%: GCML) and then following the Commission's suggestion, used the debt and equity structure of the parent corporation (Crowley Maritime Corporation or CMC) as an indicator of the debt and equity structures for TMT and GCML. From this, the analysis proceeds to calculate rates of return on equity. After including the post-tax effect of the revenue TMT earned from its joint rail/water service, TMT yields a rate of return on equity of 12.34% and a 10.04% return on rate base. Dr. Ellsworth calculates that GCML should have realized a negative return on equity of −2.61% and a positive 3.75% return on rate base. (The negative return on equity results from the cost of meeting the imbedded debt being greater than the net income before interest.)

Dr. Ellsworth then determined what the maximum fair rate of return would be for the Respondents. Before arriving at that conclusion, he first details several factors he considered (Ellsworth, 8–16). Dr. Ellsworth calculates that TMT and GCML would be entitled to a maximum fair rate of return of 15%. Therefore, based on the documentation submitted and his analysis thereof, he concludes that the Respondents' new rates reflecting the new general rate increases are just and reasonable.

CONCLUSION

I find that based upon the additional evidence submitted in this remanded proceeding (including staff analysis thereof) the Respondents' new rates incorporating their new general rate increases are just and reasonable within the meaning of § 18(a) of the Shipping Act 1916 (46 U.S.C. § 817(a)).

(S) THOMAS W. REILLY
Administrative Law Judge

WASHINGTON, D.C.
April 17, 1979

[14] See also explanatory affidavit of Dr. Ellsworth dated March 14, 1979.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 606

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF NEPERA CHEMICAL, INC.

REPORT AND ORDER ADOPTING INITIAL DECISION

August 8, 1979

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

Sea-Land Service, Inc. filed an application pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817), requesting permission to waive $42,569.90 and refund $280.00 in freight charges to Nepera Chemical, Inc., in order to give effect to a rate negotiated between the parties but not filed in the appropriate tariff prior to shipment.

Administrative Law Judge Norman D. Kline rendered an Initial Decision denying the application on the ground that Sea-Land had failed to file a corrected tariff rate which conformed to the negotiated rate. Judge Kline based his decision upon the Commission's holding in *Munoz v Cabrero v. Sea-Land Service, Inc.,* 17 S.R.R. 1191 (1977), that secton 18(b)(3) absolutely requires the carrier, prior to applying for refund or waiver authority, to file a new tariff reflecting the intended tariff upon which a refund or waiver is to be based. Here he found that the new tariff filed by Sea-Land will result in a charge to Nepera of $18.25 per container more than the negotiated rate.

Sea-Land filed Exceptions to the Initial Decision arguing that the difference between the negotiated rate and the rate filed must be regarded as *de minimis* and, therefore, not a jurisdictional defect. Sea-Land's Exceptions admit that there is a variance between the negotiated rate and the rate filed, but argue that it results merely from the conversion from the rate negotiated in pounds to the rate filed in tons and the load factor of the particular commodity.

Discussion and Conclusion

The rate negotiated between Sea-Land and Nepera and the rate filed by Sea-Land pursuant to its application are clearly at variance. The rate filed would result in a charge to Nepera greater than the rate negotiated.

The Commission held in *Munoz, supra,* at 1193, that:

> Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which "such refund or waiver will be based." When read in conjunction with the statements in the House and Senate reports, it is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.
>
> [T]he authority granted by P.L. 90-298 to depart from the rigid requirements of Section 18(b)(3) of the Act and to make a rate applicable retroactively is strictly limited and in our opinion would not extend to approve a rate which was never agreed upon or intended to be filed.

No argument has been advanced that would justify a modification of that holding. *Munoz* reflects Congress' intention that the requirements of section 18(b)(3) special docket applications be strictly applied. A strict application does not allow even for a *de minimis* exception.

THEREFORE, IT IS ORDERED, That the Exceptions to the Initial Decision of Sea-Land Service, Inc. are denied; and

IT IS FURTHER ORDERED, That the Initial Decision served April 23, 1979 is adopted and made a part hereof; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) Francis C. Hurney
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 606

APPLICATION OF SEA-LAND SERVICE, INC. FOR
THE BENEFIT OF NEPERA CHEMICAL, INC.

Adopted August 8, 1979

Application for permission to waive and refund portions of freight charges denied.

Carrier applicant failed to publish specific commodity rate on a particular commodity after cancelling and republishing its tariff although its solicitor had indicated to the shipper that the specific rate would be carried over into the new tariff. This situation may have resulted in a tariff error of a clerical or administrative nature or constitute an inadvertence in failing to file a new tariff. However, the application is fatally defective because the carrier, in filing the new conforming tariff prior to filing the application, as required by law, filed a rate different from that quoted to the shipper and from the rate which had been published in the previous tariff.

Since the application was filed on the very last day permitted by law, it was too late to reject the application so that carrier could file a corrected, conforming tariff and new application.

INITIAL DECISION[1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

This is a special-docket application filed by Sea-Land Service, Inc. (Sea-Land), seeking permission to waive a total of $42,569.90 and refund $280.00 in freight charges for the benefit of the shipper, a company known as Nepera Chemical, Inc., located in Harriman, New York. Sea-Land seeks this permission in connection with two shipments of a liquid chemical known as "beta picoline"[2] carried in tank containers on the *SEA-LAND GALLOWAY,* which sailed out of Port Elizabeth, New Jersey on June 10, 1978, bound for the port of Barcelona, Spain. The first shipment consisted of two containers in which an aggregate of 73,680 lbs. of "beta picoline" were carried. The second shipment consisted of three containers in which an aggregate of 108,820 lbs. of this commodity were carried.

[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 C.F.R. § 502.227).

[2] This commodity is referred to as "picaline" in Sea-Land's tariffs but as "picoline" in Sea-Land's shipping documents, letters, and application. According to Webster's Third New International Dictionary at 1711, the correct spelling is "picoline" and "beta picoline" is a liquid used in making nicotinic acid. Sea-Land ought to correct the spelling in its tariff.

The application was mailed from Sea-Land's headquarters in New Jersey on December 7, 1978, exactly 180 days after the date of sailing, and is under consideration in accordance with the special-docket provisions of section 18(b)(3) of the Shipping Act, 1916 (the Act), and the procedures established under Commission rule 92(a), as amended. The sworn application is well documented with affidavits, inter-office memoranda, letters, bills of lading, freight bills, pertinent tariff pages, and a calculation of freight charges as billed and collected from the shipper on each of the shipments. All of this evidence appears to make out a case for the relief requested on the basis of tariff error of a clerical or administrative nature as well as inadvertence on the part of the carrier to file an intended rate prior to the time of the shipments in question as described in greater detail below. However, because the new tariff which Sea-Land filed to correct its error does not conform to the prior intended rate and because the application was filed on the very last day permitted under the applicable law and regulations so that a new filing is impossible, the application must regrettably be denied.

FACTUAL BACKGROUND

This case involves the failure of Sea-Land, when canceling a previous tariff and republishing a new tariff, to continue to publish in the latter tariff a specific commodity rate on "beta picoline" although Sea-Land's sales representative had indicated to the shipper that such rate would be continued in the later tariff.

The well-documented materials which Sea-Land has appended to its application tell the following story. Prior to December 31, 1977, Sea-Land had published commodity rates from U.S. North Atlantic ports to ports in Spain in its Freight Tariff No. 166 (FMC–43). That tariff had contained a rate on "Picalines, refined, mixed" of $6.85 per hundredweight, minimum 40,000 lbs. per container. Tariff No. 166, Item 9140. On December 31, 1977, Sea-Land cancelled this tariff and published a new tariff for tank trailers, namely Tariff No. 232 (FMC No. 104). This new tariff failed to publish a specific commodity rate for "picalines." Before the new tariff had been published, however, a Sea-Land sales representative, Mr. Karl Douglass, had requested Sea-Land's Pricing Department to continue the old rate of $6.85 per hundredweight, minimum 40,000 lbs. in the new tariff and, furthermore, Mr. Douglass had notified the shipper, Nepera Chemical Corp., that this old rate would be continued in the new tariff, by letter dated December 6, 1977. Somehow, however, the Pricing Department, which apparently did not know of these representations made to the shipper, did not cause a transfer of the old rate to the new tariff. The result was that when the shipments of "Beta Picoline" were carried on June 10, 1978, there was no specific rate for that commodity and the cargo, N.O.S. rate for liquid (non-hazardous), a higher rate of $631.25 per ton of 2240 lbs., minimum 40,000 lbs. per tank, was considered by Sea-Land to be applicable. Tariff No. 232, Item 10, 12th Rev. page 5.

Upon learning that the shipments were rated on the basis of the Cargo N.O.S. rate, Sea-Land's Pricing Department requested the Tariff Publications

Department to publish a specific commodity rate for this item. This was done. Effective June 21, 1978, only 10 days after the sailing, Sea-Land by telex filing, publsihed a rate on "Beta Picaline, in tanks" of $162.25, minimum 17 WT per tank container. Tariff No. 232, 6th Rev. page 5-A. Although the shipments were rated on the higher Cargo N.O.S. rate basis, the shipper did not actually pay the amount so rated. On the first shipment of two containers, the shipper paid $280.50 more than the freight charge which would be payable under the new rate of $162.25 per WT, minimum 17 WT. On the second shipment of three containers, the shipper actually paid $.25 less than the freight which would be payable under the new rate. Sea-Land wishes to retain only the total amount of freight calculated on the basis of the new $162.25 rate and if the application is granted, would in fact be refunding $280.25 to the shipper and would be waiving any amount of freight over a total of $13,791.25, which are the total freight charges calculated on the basis of the new $162.25 per ton rate which Sea-Land wishes to apply retroactively to the shipments. See "Calculation of Freight Charges on Shipments of Picolines from Elizabeth, N.J.," Ex. 7. The amount of the waiver would be over $42,000.

Discussion and Conclusions

As mentioned, this is a special-docket application filed under the provisions of section 18(b)(3) of the Act, as amended by P.L. 90-298. It has been recognized in numerous special-docket decisions of the Commission that this law is remedial and equitable in nature and is designed to relieve shippers of financial harm which would fall on them because of carrier error in tariff publishing and filing. See, e.g., *D. F. Young, Inc. v. Cie. Nationale Algerienne de Navigation,* 18 SRR 1645 (1979); *Ghiselli Bros. v. Micronesia Interocean Lines, Inc.,* 13 F.M.C. 179, 182 (1970); *Hermann Ludwig, Inc. v. Waterman Steamship Corporation,* 18 SRR 383, 385 (1978); *Westinghouse Trading Co. Division of Westinghouse Electric Corp. v. American Export Lines, Inc.,* 18 SRR 570, 572-574 (1978). Nevertheless, it is also well established that although the law is based on equitable principles, applications for relief must show that a bona fide error of the type contemplated by the law occurred and that certain other conditions have been met. For example, applications do not qualify for relief even under this remedial statute if a zealous solicitor makes unauthorized representations to a shipper which the carrier never intended him to make or if a rating clerk misreads a tariff or misquotes a rate in a tariff and the carrier never intended its tariff to conform to the unauthorized or mistaken quotation. See *Farr Co. v. Seatrain Lines,* 17 SRR 1463, 1467-1469 (I.D. 1977); 18 SRR 369 (F.M.C. 1978) and the legislative history to P.L. 90-298 cited in 17 SRR at 1467 n. 6. Equitable though this law may be, the advocates of the law made clear to Congress that if the Commission obtained the authority to grant special-docket applications it would act carefully to guard against rebating and would not treat these applications as matters to be rubber stamped. See remarks of Mr. John Mahoney and Chairman Harllee to the House Subcommittee on Merchant Marine and Fisheries cited in 17 SRR at 1467 n. 6. These remarks in the legislative history furthermore demonstrate the important fact that carrier intent to file a conforming tariff prior to shipment was considered necessary. Mr. Mahoney, a spokesman for the bill, even stated that "[i]f the Commission gets this power, it must be made clear that carriers and shippers alike will have a very heavy burden to show good cause for relief under these conditions." Hearings, at 103, cited in 17 SRR at 1467 n. 6. Chairman Harllee concurred with Mr. Mahoney's sentiments. Furthermore, the Chairman assured the Subcommittee that the proceeding would be carefully examined by an Administrative Law Judge (then called hearing examiner) to ensure that the applicant had established the fact that there has been a bona fide mistake. See colloquy between Chairman Harllee and Congressman Edwards. Hearings on H.R. 9473 before the Subcommittee on Merchant Marine & Fisheries, 90th Cong., 1st Sess., Sen. No. 90–11 (1967), at 88.

In addition to the above, it is clear that there are certain jurisdictional prerequisites which cannot be waived and which every applicant must meet before the Commission can grant the relief requested. Among them are the requirement that the application be filed no later than 180 days after date of shipment and that the new tariff showing the rate on which relief is based be filed before the application is filed.[3]

In this case, although not entirely free of doubt, it appears that there was an error in Sea-Land's new tariff published after December 31, 1977, because Sea-Land forgot to continue publishing the commodity rate on "picalines" which had appeared in its previous tariff. It also appears that Sea-Land may have inadvertently failed to publish this commodity rate in its later tariff because of a failure of communication between the solicitor who represented to the shipper that the old rate of $6.85 per hundredweight would be continued in the new tariff and Sea-Land personnel authorized to make good on his quotation. I qualify these findings because of the fact that it is not clear that Sea-Land conceived the intent to continue the old rate in the new tariff prior to the time of the shipment since the official, Mr. Kenneth D. Nenart, who apparently had authority to back up the sales representative and cause the old rate to be published in the new 1978 tariff was unaware of the quotation made to the shipper when publishing the new tariff and states that "had he known of the quotation made by K. Douglass to Nepera Chemical, [he] would have published same in the applicable tariff to protect booking made." Affidavit of Kenneth D. Nenart, Assistant Pricing and Conference Manager-Mediterranean Service of Sea-Land Service, Inc.

Although prior conceived intent by a carrier has been found to be a required element before the Commission could conclude that there was an inadvertent failure to file a tariff,[4] had there been no jurisdictional defect otherwise in the application, this application could have been granted perhaps by finding that the later ratification by Mr. Nenart of the original quotation demonstrated a

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[3] Section 18(b)(3) of the Act authorizes the Commission to grant special-docket applications but, among other things, provides that "the common carrier by water in foreign commerce . . . has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based" and provided that "application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment."

[4] See *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977), and the legislative history discussed in *Farr Co. v. Seatrain Lines, supra*, 17 SRR at 1467 n. 6.

policy of Sea-Land of backing up its sales solicitors, thereby establishing intent to publish the quotation in its later tariff. Cf. *D. F. Young, Inc. v. Compagnie Nationale Algerienne de Navigation,* 18 SRR 1645 (1979).[5]

However, it is not necessary to decide whether such a ratification by Mr. Nenart establishes either error in republishing Sea-Land's later tariff because of administrative or clerical error or inadvertent failure to file the quoted commodity rate in the later tariff. The reason for this statement is that the application shows that Sea-Land has failed to meet a requirement imposed by law, which requirement cannot be waived, and furthermore, that this fatal defect in its application cannot be cured because the application was not filed until the very last day permitted under the law.

The fatal defect relates to the second condition imposed by the applicable law. Thus, in pertinent part, section 18(b)(3) permits the Commission to grant applications *"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. . . ." 46 U.S.C. §817(b)(3). In this case, the application was filed, as I found above, on December 7, 1978, exactly 180 days after date of sailing. Prior to the filing, on June 21, 1978, only 11 days after sailing, Sea-Land filed its new tariff. The new tariff did indeed publish a specific commodity rate on "Beta Picaline, in tanks." However, consider the new rate that was published. This rate was not the previous rate which Sea-Land's sales representative had quoted to the shipper in his letter dated December 6, 1977. Nor was it the rate to which any of Sea-Land's officials referred in the several internal memoranda attached to the application. See Memo from Douglass to Nenart, November 30, 1977; Memo from Cash to Nenart, same date; letter from Douglass to Ms. Edith Soderberg, c/o Nepera Chem., December 6, 1978. The rate to which all of these gentlemen referred was $6.85 cwt min. 40,000 lbs." This was the exact rate previously published in the earlier tariff which Sea-Land had canceled. Tariff No. 166, Item 9140. This was also the quotation which Mr. Douglass made to the shipper, which quotation, as noted, Mr. Nenart states that he "would have published same in the applicable tariff to protect booking made." Affidavit of Kenneth D. Nenart; letter of Mr. Douglass to shipper, dated December 6, 1977.

But what was the actual rate which Sea-Land published in its new tariff for "Beta Picaline, in tanks?" This new rate, as noted, was $162.25 per weight ton of 2240 lbs., minimum 17 WT (weight tons). Tariff No. 232, Item 78, Ex. 6. Is this latter rate the same as the earlier rate which had been quoted to the shipper and which Mr. Nenart would have carried over into the later tariff? In its application Sea-Land explains this obvious change in numbers by stating

[5] In *D. F. Young,* the Commission granted a special-docket application when it was shown that a carrier member of a conference conference had agreed upon a rate with a shipper but had neglected to bring the matter to the conference's attention prior to shipment so that the conference could publish the agreed rate in the applicable tariff. Although the conference did not know of the carrier's negotiations prior to shipment, when it learned of the negotiations, it voted to file the corrective tariff after the shipment had taken place, in effect ratifying the rate agreement of its member carrier. The Commission found that there was an error in the conference's tariff of a clerical or administrative nature at the time of shipment although the conference never knew of its member's agreement with the shipper at that time.

that "[i]n publishing the new item, the previous rate of $6.85 per cwt. as shown in Sea-Land Tariff No. 166 was converted to the per ton basis and the minimum of 17 weight tons reflected the load factor of this commodity. This conversion represents a difference of $18.25 per tank." Application, third page, paragraph D. Had the new rate merely been an arithmetic conversion from hundredweight to tons with no change in minimum weight requirement, in substance it would have conformed to the earlier tariff rate and to the quotation made to the shipper by Mr. Douglass. But, as even Sea-Land notes, the new rate makes a substantive change, in effect amounting to an increase in freight charges of $18.25 per container.

Arithmetically, a rate of $6.85 per hundredweight simply does not convert to $162.25 per ton of 2240 lbs. Rather it converts to $153.44.[6] Furthermore, when the complete rate is considered by taking into account the 40,000 lbs. minimum for the earlier rate and the 17 weight ton minimum for the later rate, the discrepancy is further compounded. 40,000 lbs. converts to 17.86 long tons, not 17 tons. Thus, the total freight charge per container for the earlier rate amounts to $2,740 whereas the charge as per the latter rate amounts to $2,758.25.[7] The difference, as Sea-Land itself noted, is $18.25 per container. Thus, if the shipper was quoted and expected to be charged only $2,740 per container on the basis of the earlier rate, under the new tariff which Sea-Land later filed and on which it bases this application, the shipper will be charged $2,758.25 per container. Perhaps in numbers the difference is not significant. However, under governing law, the difference is greatly significant. The problem is that a carrier cannot quote one rate to a shipper and then file another rate which does not conform to the quoted rate nor to the understanding between shipper and carrier and seek to apply this later nonconforming rate retroactively to the shipment in a special-docket application. Such a change in the later tariff filed prior to the application is fatal to the application. Such is the current law. In *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977) the application was denied on precisely those grounds. In that case, Sea-Land had agreed to carry a shipment at a rate of $44 W/M instead of the higher rate provided in its tariff but failed to file the agreed rate prior to the shipment. Later, Sea-Land filed the corrective tariff prior to its special-docket application. However, the corrective tariff published a rate of $40 W/M, not the agreed rate of $44 W/M. The application was therefore denied. The Commission explained why it was forced to deny as follows:

> Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which "such refund or waiver will be based." When read in conjunction with the statements in the House and Senate reports, it is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.
>
> While we recognize that should the application be denied the consequences of the carrier's consecutive errors would fall upon the shipper, nevertheless the authority granted by P.L. 90–298 to depart from the rigid requirements of Section 18(b)(3) of the Act and to make a rate applicable retro-

[6] $\frac{2240}{100} \times \$6.85$ equals $153.44.

[7] $6.85 × 400 equals $2,740.
$162.25 × 17 equals $2,758.25.

actively is strictly limited and in our opinion would not extend to approve a rate which was never agreed upon or intended to be filed.

17 SRR at 1193.

The same type of situation has occurred recently in another special-docket proceeding. Special Docket No. 583, *Owens Illinois Company v. Trans Freight Lines, Inc.* (Initial Decision, served April 2, 1979), 19 SRR 170. In that case the carrier and shipper had agreed upon a rate of $1,800 per container, which was not timely filed. Prior to filing its special-docket application the carrier filed a new tariff but the rate filed in that tariff was $36 WM, minimum 2200 ft. per container, not $1,800 as earlier agreed. The application had to be denied. Judge Glanzer noted that the second proviso of section 18(b)(3) regarding the filing of a new tariff prior to filing the application is jurisdictional and cannot be waived, citing *Louis Furth, Inc. v Sea-Land Service, Inc.*, 17 SRR 1171, 1172 (1977), and *Henry I. Daty, Inc. v. Pacific Westbound Conference*, 17 SRR 1439, 1442 (1978). Initial Decision, case cited, at 4, 5.

For the above reasons, the application must be denied.[8] Since, as Sea-Land's documents show (Ex. 7), Sea-Land has not recovered the full amount of freight charges due under the tariff applicable at time of shipment, Sea-Land must take steps to recover that amount regardless of equities. See *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94, 97 (1915); *Southern Pacific Co. v. Miller Abattoir Company*, 454 F.2d 357, 359–360 (3d Cir. 1972); *Chicago B. & Q. R. Co. v. Ready Mix Concrete Co.*, 487 F.2d 1263, 1267 (8th Cir. 1973); *United States v. Associated Air Transport, Inc.*, 275 F.2d 827, 832–834 (5th Cir. 1960); *Farr Co. v. Seatrain Lines, supra*, 17 SRR at 1468, 1469; *United Nations et al. v. Hellenic Lines Ltd. et al.*, 3 F.M.B. 781, 786 (1952); discussion in 88 A.L.R. 2d 1375 (1963) and 83 A.L.R. 245 (1933).

Accordingly, within 30 days after this decision is adopted by the Commission or otherwise becomes administratively final, Sea-Land shall take steps to recover the full amount of freight and notify the Commission of the action which it has taken.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
April 20, 1979

[8] It is regrettable that the application must be denied. However, it should be noted that had Sea-Land not waited until the very last day on which it was permitted by law to file (mail) the application, it might have been possible to call Sea-Land's attention to the fatal jurisdictional defect so that Sea-Land could file a corrected conforming tariff and a new application before the statutory 180-day time period expired. However, by the time the application was actually received by the Commission (on December 8, 1978), it was already too late to cure the defect, the 180-day period having expired after December 7.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-14

CARGO SYSTEMS INTERNATIONAL (CSI)—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATION OF SECTION 44, SHIPPING ACT, 1916

NOTICE

August 10, 1979

Notice is given that no exceptions have been filed to the July 2, 1979, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-14

CARGO SYSTEMS INTERNATIONAL (CSI)—INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

Finalized August 10, 1979

John J. Montefusco for respondent Cargo Systems International (CSI).
Joseph B. Slunt, Charles L. Hunter, and *John Robert Ewers,* Director, Bureau Bureau of Hearing Counsel, Federal Maritime Commission.

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

This proceeding was instituted by a Commission Order of Investigation and Hearing served March 9, 1979, wherein the Commission specified that the issues to be resolved are:

1. Whether Cargo Systems International has violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities; and
2. Whether in light of the evidence adduced pursuant to the foregoing issue, together with any other evidence adduced, Cargo Systems International and its corporate officers, possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

At the request of Cargo Systems International (CSI), the Commission, in an effort to expedite matters, has limited the proceeding initially to the submission of Memoranda of Law and Affidavits of Fact. Opening Memorandum of Law and Affidavits of Fact were submitted by Respondent on March 14, 1979. Hearing Counsel filed Memorandum of Law and Affidavits of Fact in reply on May 7, 1979.

Neither Hearing Counsel nor Respondent have requested oral testimony and cross-examination. Accordingly, the Memoranda of Law and Affidavits of Fact

[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 C.F.R. § 502.227).

filed by Hearing Counsel and Respondent constitute the record in this proceeding and it is concluded that said record is adequate and appropriate for disposition and determination of this case.

FINDINGS OF FACT

1. Cargo Systems International (CSI) was incorporated under the laws of the State of New Jersey in April 1977. Created as a spin-off of Cargo Export Corporation (CEC), CSI was designed to act as a project forwarding concern. CEC placed two of its employees, Armand Ventura and Stephen Larzelere, at CSI to aid in marketing and operational functions. Richard Kesselman is the current president and sole stockholder of CSI. Kesselman Affidavit § 1; Decibus Affidavit § 8; Decibus Exhibit C.

2. During the early months of 1978, CSI and CEC entered into an arrangement whereby CSI would be able to forward ocean freight shipments under CEC's independent ocean freight forwarder license. Sada Affidavit II § 6; May Affidavit §§ 16–18. In accordance with this arrangement, CEC placed one of its employees, Rochelle Karmel, in CSI's office at 40 Rector Street, New York, New York. While performing ocean freight forwarding services at 40 Rector Street, Ms. Karmel remained on CEC's payroll. During this period, CSI's ocean freight shipments were forwarded under CEC's independent ocean freight forwarder license, FMC License Number 1498. Sada Affidavit II § 6.

3. In January 1978, Armand Ventura was employed by CSI on a limited basis as a commission salesman. During the preceding five years, Mr. Ventura had been employed by CEC as a vice president and director of marketing. Ventura Affidavit § 2–3.

4. During the early months of 1978, Edward A. Sada, Sr., the president and sole stockholder of Sada Trading Company, Inc. (STC), performed some limited ocean freight forwarding services for CEC. May Affidavit § 4, 8; Sada Affidavit II § 2. Prior to June 8, 1978, STC was the holder of FMC License No. 210. Due to financial difficulties, the volume of business conducted by STC had decreased substantially in late 1977. Mr. Sada was therefore compelled to accept outside employment with CEC. Sada Affidavit II § 4; May Affidavit §§ 17–18.

5. On May 1, 1978, Mr. Sada was hired by CSI to perform ocean freight forwarding services. Sada Affidavit II § 4; May Affidavit §§ 7, 8.

6. As an employee of CSI, Mr. Sada received a set weekly salary and conducted business at CSI's office at 40 Rector Street, Sada Affidavit II § 4; May Affidavit §§ 7, 8, 14.

7. While employed by CSE, Mr. Sada's duties included the preparation of ocean freight documents, including bills of lading, dock receipts, consular documents, export declaration, etc. Mr. Sada was authorized by CSI to sign such documents on its behalf. Sada Affidavit II § 5; May Affidavit § 8.

8. Although Mr. Sada, on behalf of CSL, regularly prepared invoices assessing brokerage on ocean freight shipments, he did not personally collect or

receive brokerage on any of these shipments. Sada Affidavit II § 7; May Affidavit § 10.

9. CSI solicited the shipments for which Mr. Sada prepared ocean freight documents. CSI also booked cargo space for all shipments except those bound for the Caribbean. Mr. Sada booked cargo space for Caribbean shipments Sada Affidavit II § 8; May Affidavit § 14.

10. During the months May through November 1978, Mr. Sada, as an employee of CSI, handled approximately twenty of thirty ocean freight shipments per month. Sada Affidavit II § 7; May Affidavit § 9. In his limited dealings with shippers and carriers, Mr. Sada represented himself as an employee of CSI. Payments for ocean freight forwarding services were made directly to CSI. Sada Affidavit II § 8, 9.

11. By letter dated May 10, 1978, Mr. Sada was notified by the Commission's Office of Freight Forwarders that STC's surety bond had been cancelled. He was further informed that unless a valid surety bond was filed with the Commission prior to June 8, 1978, STC's independent ocean freight forwarder license would be revoked. The cancellation of STC's surety bond was occasioned by the placement of a lien against the bond by Royal Netherlands Steamship Company. Sada Affidavit II § 10, May Affidavit § 4.

12. By Order of Revocation served June 20, 1978, the Commission revoked, effective June 8, 1978, FMC License Number 210. Sada Affidavit II § 11, May Affidavit § 4. Notice of the revocation appeared in the *Federal Register* on June June 26, 1978. Although CSI had advanced Mr. Sada sufficient funds to satisfy the lien placed against STC's surety bond, Mr. Sada was unable to secure a new surety bond by June 8, 1978. May Affidavit § 14; Sada Affidavit I § 3.

13. On July 5, 1978, CSI submitted an application for a license to operate as an independent ocean freight forwarder. That application listed Richard Kesselman as President/Treasurer and sole stockholder and Edward Sada, Sr., as Secretary. Mr. Sada was described as the present holder of "valid Ocean Freight Forwarder License #210." Also identified in the application, as employees, were Rochelle Karmel and Steven Larzelere. May Affidavit § 2; Kesselman Affidavit § 3.

14. Accompanying CSI's application were five letters of reference. Two of these letters appeared to suggest that CSI had been engaged in unlicensed ocean freight forwarding. May Affidavit § 3; May Exhibit 1.

15. By letter dated July 13, 1978, the Commission's Office of Freight Forwarders acknowledged receipt of CSI's application. CSI's attention was directed in that letter to the section 44 prohibition of unlicensed ocean freight forwarding. Letter of July 13, 1978, Charles L. Clow to Richard Kesselman, Attachment A.

16. The Commission's Office of Freight Forwarders, by letter dated July 26, 1978, requested that CSI explain the suggestions contained in the letters of reference, referred to above, that CSI had been engaged in unlicensed ocean freight forwarding. Letter of July 26, 1978, Charles L. Clow to Richard Kesselman, Attachment B.

17. In mid July 1978, Mr. Sada informed CSI that STC's independent ocean freight forwarder license had been revoked. He further advised CSI of

his belief that, upon the filing of a new surety bond, STC's license would be reissued retroactive to June 8, 1978. Sada Affidavit II § 13.

18. On August 14, 1978, the Commission's Bureau of Enforcement instituted a field investigation in order to resolve questions raised by the letters of reference submitted by CSI and the appearance of Edward A. Sada, Sr.'s name on CSI's application. May Affidavit § 4.

19. By letter dated August 29, 1978, Richard Kesselman informed the Commission's Office of Freight Forwarders that CSI had "not in any way been acting as a freight forwarder." Accompanying Mr. Kesselman's letter were two other letters signed by the individuals who had submitted the letters of reference referred to in Proposed Finding of Fact § 14. These letters were intended to dispel the impression created by the letters of reference that CSI had been engaged in unlicensed ocean freight forwarding. May Affidavit § 5; May Exhibit 2.

20. Joseph A. May, an investigator in the Commission's Atlantic District Office, interviewed Edward A. Sada, Sr., at CSI's office at 40 Rector Street on September 11, 1978. At the conclusion of the interview, Mr. Sada was requested to produce documents prepared for a sampling of ocean freight shipments he had handled for CSI. Mr. Sada supplied Mr. May with copies of six bills of lading and the accompanying invoices, dated June 30, 1978 through September 6, 1979. May Affidavit § 11.

21. Each of the bills of lading designated CSI as the forwarding agent and FMC License No. 210 as the governing license number. A CSI export reference number also appeared on the documents. The accompanying invoices carried a CSI letterhead and were signed by Edward Sada. All questions as to the charges assessed by the invoices were directed to "Freight Forwarder: Cargo Systems." These documents also listed a CSI export reference number. May Affidavit §§ 12–13; May Exhibit 3.

22. On September 22, 1978, Mr. Kesselman contacted the Atlantic District Office to inquire as to the status of CSI's application. During the course of the conversation, Mr. Kesselman reiterated his position that CSI was merely soliciting ocean freight business for STC. Further, Mr. Kesselman noted that Mr. Sada was paid a weekly salary by CSI to perform ocean freight forwarding services. May Affidavit § 14.

23. In late September 1978, the Commission's Atlantic District Office received information which indicated that CSI was a subsidiary of Cargo Export Corporation (CEC). May Affidavit § 15. In subsequent interviews, Mr. Kesselman and Gene Pagano, President of CEC, denied that any corporate relationship existed between the two companies. May Affidavit §§ 16, 8.

24. On October 18, 1978, Keith Crosson, Traffic Department, F.W. Hartman & Co., Inc., Agents for Hansa Lines, notified the Commission's Atlantic District Office that CSI had submitted a number of brokerage invoices to F. W. Hartman & Co., Inc., in conjunction with bills of lading which listed FMC License Number 210. The bills of lading identified CSI export reference number. The accompanying invoices carried a CSI letterhead and a CSI export reference number. May Affidavit § 20.

25. The following day, Mr. Crosson produced six bills of lading, dated September 13, 1978, through September 21, 1978, and five brokerage invoices, dated September 29, 1978, through October 9, 1978. Mr. Crosson stated that none of the $2,101.60 in brokerage assessed by CSI had been paid. May Affidavit § 21, May Exhibit 4.

26. Sophie Synicer, Traffic Department, Kerr Steamship Co., Inc. (Kerr) notified the Commission's Atlantic District Office on October 19, 1978, that Kerr had paid brokerage to CSI on four ocean freight shipments. Brokerage payments in the amount of $697.00 had been made by checks payable to CSI. Within a week thereafter, Ms. Synicer notified the Commission's Atlantic District that Kerr had secured the return of the brokerage checks paid to CSI. May Affidavit §§ 22–23.

27. On October 23, 1978, the Commission's Office of Freight Forwarders received a letter from Larry Phillips, Transportation Revenue Accounting, Sea-Land Services, Inc., which indicated that CSI was making use of FMC License Numbers 210 and 1498. Included with Mr. Phillip's letter were three bills of lading on which CSI was identified as the forwarder. One document, dated April 15, 1978, carried FMC License Number 1498, while the other two, dated July 1, 1978, and October 14, 1978, listed FMC License Number 210.

28. In late November 1978, Carey Brady of the Commission's Office of Freight Forwarders notified Mr. Sada that the Commission had not received a new surety bond for STC. Mr. Sada had, following the cancellation of STC's bond, undertaken to secure a new bond and had been notified by the Commission's Office of Freight Forwarders, by letter dated August 21, 1978, that a bonding company had issued and was submitting a surety bond for STC. Having learned that STC was not bonded, Mr. Sata notified CSI that he would no longer be able to perform ocean freight forwarding services. Sada Affidavit I § 9, Sada Affidavit II §§ 12, 15.

29. In the November 13, 1979 editions of *Shipping Digest* and *Shipper & Forwarder,* CSI placed advertisements in which it characterized itself as an international freight forwarder and export specialist. One of these advertisements listed the following services: "ocean consolidation, international freight forwarding, warehousing, thru door to door delivery (and) specialists in project type cargo."

30. In early December 1978, Armand Ventura discussed with Tonny Mosholt, Vice President of Freight Base, Inc. (Freight) and branch manager of Freight's New York Office (FBNY), an arrangement whereby FBNY would prepare ocean freight documents based on information supplied by CSI and bill CSI for all services performed (Mosholt Affidavit, May Affidavit § 34).

31. On or about December 15, 1978, Mr. Sada's employment at CSI was terminated. In late December 1978 and early January 1979, Mr. Sada completed the documentation on a number of ocean freight shipments that he had begun while employed by CSI. In accordance with CSI's instructions, he listed FMC License Number 1963 on these documents. Sada Affidavit II § 18; May Affidavit § 33.

32. By letter dated December 19, 1978, the Commission notified CSI of its intent to deny CSI's application for an independent ocean freight forwarder

license. Letter of December 19, 1978, Arthur Pankopf to Richard Kesselman.

33. By letter dated January 2, 1979, John J. Montefusco, Counsel for CSI, requested that CSI be granted a hearing to contest the intended denial of CSI's application. It was stated in that letter that Armand Ventura would be submitted by CSI as its new qualifying officer. Mr. Ventura had been made an officer and enlisted as the qualifying officer of CSI in December 1978. Ventura Affidavit § 2; Kesselman Affidavit § 6; May Affidavit § 33.

34. On January 15, 1978, the Commission's Office of Freight Forwarders received a second letter, dated January 10, 1979, from Larry Phillips, Transportation Revenue Accounting, Sea-Land Service, Inc., disclosing that CSI had attempted to collect brokerage from Sea-Land Services, Inc., utilizing FMC License Number 210. Mr. Phillips attached a brokerage invoice, dated November 13, 1978, which carried a CSI letterhead and export reference number.

35. In the course of a separate inquiry, the Commission's Atlantic District Office obtained two ocean freight documents which identified CSI as the forwarding agent and listed FMC License Number 1963 as the governing license number. Both documents, a bill of lading dated November 28, 1978, and a dock receipt dated January 5, 1979, also bore a CSI export reference number. The dock receipt was signed by Edward A. Sada, Sr., and carried the notation, "If need contact 'Eddie' at 21/227-7500." The phone number listed is that of CSI's office at 40 Rector Street. May Affidavit §§ 24-25; May Exhibit 6.

36. In early January, Mr. Mosholt was notified by Peter Allen of Freight's Chicago Office that a steamship company had inquired of Freight's Houston Office regarding a bill of lading on which CSI was identified as the freight forwarder and FMC License Number 1963 appeared as the governing license number. Mr. Mosholt received several other calls from Mr. Allen and from Seatrain Lines regarding CSI's use of FMC License Number 1963. Mosholt Affidavit.

37. Since Mr. Mosholt's meeting with Mr. Ventura, FBNY had received no information from CSI and had, therefore, prepared no ocean freight documents. Mr. Mosholt contacted Mr. Ventura and threatened to terminate the previously discussed arrangement. Mr. Ventura promised to rectify the situation. Mosholt Affidavit.

38. In order to facilitate the arrangement, Mr. Mosholt suggested to Mr. Ventura that Todd Randell, a CSI employee, be placed on FBNY's payroll. May Affidavit §§ 28, 36; Mosholt Affidavit.

39. Todd Randell had been employed by CSI since September 15, 1978. He was placed on FBNY's payroll sometime in January 1979. The first check issued to Mr. Randell by FBNY was dated February 1, 1979. May Affidavit §§ 28, 36, 39; Mosholt Affidavit.

40. Though employed by FBNY, Mr. Randell continued to work at CSI's office at 40 Rector Street. Mr. Randell's desk was in a room occupied by several other CSI employees. He received telephone calls via a central office telephone system. May Affidavit §§ 28, 35, 36, 42.

41. Mr. Randell's duties included the preparation of ocean freight documents and the booking of cargo space. Mr. Randell stated that he handled ten to fifteen ocean freight shipments per month as an employee of FBNY. Mr. Mosholt stated earlier that through early March FBNY had handled only five such shipments for CSI. May Affidavit §§28, 36.

42. Joseph A. May interviewed Mr. Mosholt at FBNY's office at 26 Broadway on March 5, 1979. At the conclusion of that interview, Mr. Mosholt produced FBNY's files on four of the ocean freight shipments FBNY had allegedly handled for CSI. Each folder contained only a copy of the ocean bill of lading and FBNY's brokerage invoice to the steamship company. Mr. Mosholt stated that all other documents pertaining to the shipments were maintained by Todd Randell at 40 Rector Street. May Affidavit §§27, 29.

43. The bills of lading produced by Mr. Mosholt identified Freight as the forwarding agent and listed FMC License Number 1963 as the governing license number. Both CSI's and Freight's export reference numbers appeared on these documents. Two of the brokerage invoices also appeared to list a CSI export reference number. The bills of lading were dated December 12, 1978 through January 27, 1979. May Affidavit §§29–30; May Exhibit 7.

44. On March 6, 1979, Mr. May interviewed Armand Ventura and Todd Randell at CSI's Office at 40 Rector Street. At the conclusion of the interview, Mr. Randell produced his files on the four shipments for which Mr. Mosholt had supplied documents. Among the documents produced by Mr. Randell were bills of lading, export declarations, dock receipts, consular documents and worksheets. One of the bills of lading, dated December 22, 1978, listed CSI as the forwarding agent and FMC License No. 1963 as the governing license number. A recut version of the same bill of lading supplied earlier by Tonny Mosholt listed Freight as the forwarding agent (May Exhibit 8).

45. On March 9, 1979, Todd Randell produced copies of CSI's invoices to shippers for those shipments previously documented by CSI and FBNY. CSI's letterhead and export reference numbers appeared on these documents (May Affidavit §43, May Exhibit 9).

46. In accordance with instructions from Freight's main office, FBNY fired Todd Randell on or about March 21, 1979. Mr. Randell's employment at CSI was also terminated at this time. May Affidavit §44; Mosholt Affidavit.

47. General Electric Supply Company, a Division of General Electric Company (GESCO), had dealt with CSI on over 250 ocean freight shipments since January 1978. On these shipments GESCO considered CSI to be the company providing ocean freight forwarding services. Davis Affidavit §§1, 2, 3, 5.

48. CSI received shipping instructions from GESCO; arranged for the transportation of GESCO cargo to the pier; booked cargo space for GESCO cargo; prepared all ocean freight documentation; and received payment of ocean freight charges from GESCO. GESCO dealt with the following individuals at CSI: Armand Ventura, Steve Larzelere, Edward Sada and Todd Randell. Davis Affidavit §§3, 4.

49. GESCO paid CSI directly for ocean freight forwarding services performed by CSI on GESCO shipments. Davis Affidavit §6.

50. GESCO ceased dealing with CSI in February 1979 because of confusion as to CSI's status as a licensed freight forwarder.

51. Foster Wheeler Energy Corporation (FWEC) entered into an agreement with CSI on January 23, 1979, whereby CSI agreed to perform ocean freight forwarding services on FWEC project shipments bound for Venezuela. CSI handled three ocean freight shipments for FWEC under this agreement. Decibus Affidavit § § 3-5.

52. Regarding the above shipment, FWEC considered CSI to be the party responsible for performing ocean freight forwarding services. CSI prepared all necessary ocean freight documentation and booked cargo space for FWEC's shipments. All payments for ocean freight forwarding services performed on these shipments were made directly by FWEC to CSI. Decibus Affidavit § § 4-6.

53. FWEC terminated its agreement with CSI on April 3, 1979. The agreement was cancelled when FWEC became aware that CSI was not a licensed independent ocean freight forwarder. Decibus Affidavit § 7.

54. Under the terms of the contract, FWEC held CSI "referred to as Forwarder, wholly responsible for coordination and prompt forwarding of all Project Equipment/material when ready and released." The bills of lading, dated February 24, 1979 through March 11, 1979, representing the three FWEC ocean freight shipments to Venezuela handled by CSI carried FMC License Number 1963 and CSI export reference numbers. One of the bills of lading bore the following notation, signed by Stephen Larzelere:

Cargo Systems International
As Forwarding Agents For Foster
Wheeler Energy Corporation.

The invoices accompanying these bills of lading, dated March 7, 1979 through March 16, 1979, carried a CSI letterhead and export reference number Decibus Exhibits A & B.

55. By letter dated March 30, 1979, Gene Pagano, President of Cargo Export Corporation (CEC), assumed "all liabilities and responsibility of Cargo Systems International and commitments made by Cargo System International" related to the purchase order referred to above. The letter further indicated that Armand Ventura, Stephen Larzelere and Gene Pagano would be responsible for handling FWEC's shipments. All correspondence regarding these shipments was directed to Mr. Ventura or Mr. Larzelere at CEC, "40 Rector Street, Suite 1829, New York, New York 10006, telephone # (212) 227-7500)." Decibus Exhibit C.

Discussion

As ordered by the Commission, the first issue to be determined is:

whether Cargo Systems International has violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

Section 44(a) of the Shipping Act, 1916 (46 U.S.C. § 841b), states, in pertinent part, that:

No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business . . .

Section 1 of the Shipping Act, 1916 (46 U.S.C. § 801), defines "carrying on the business of forwarding," as " . . . the dispatching of shipments by any person on behalf of others, by oceangoing common carriers . . . and handling the formalities incident to such shipments."

Respondent does not dispute the allegation that Edward A. Sada, Sr., performed ocean freight forwarding services during the period in question. Nor, for that matter, does Respondent deny that it was, at least, indirectly involved in supplying these services. Respondent does argue, however, that its involvement was limited to the solicitation of cargo and clients for Sada Trading Company Inc. (STC), and its president and sole stockholder, Edward A. Sada, Sr. Arguing for the existence of an agency relationship, Respondent asserts that it acted solely as a commission salesman. Respondent concludes, therefore, that it did not operate as an independent ocean freight forwarder.

It is necessary, therefore, to determine what was the relationship that actually existed.

The record reveals that Respondent's actual role in the relationship was not limited to the solicitation of cargo and clients for STC. Respondent was clearly Mr. Sada's employer. The relationship which existed between Respondent and Mr. Sada was that of Master and Servant.

In determining the relationship, factors to be considered are:

1. the extent of the master's authority to direct and control the nature of the servant's work and the manner in which that work is performed;
2. the authority of the master to engage and discharge the servant;
3. the provision by the master of the instrumentalities with which the work is performed and the place in which the work is performed;
4. the duration and time of the relationship entered into by the master and servant;
5. the connection between the work performed by the servant and the business normally engaged in by the master; and
6. the fact, manner and basis of payment made by the master to the servant.

See *Eagle Star Insurance Company, Ltd. v. Deal,* 474 F. 2d 1216, 1220 (8th Cir. 1973); *Tarboro v. Reading Company,* 396 F. 2d 941, 943 (3d Cir. 1968), *cert. denied,* 393 U.S. 1027 (1969), *Dovell v. Arundel Supply Corp.,* 361 F.2d 543, 544 (D.C. Cir.). *cert. denied,* 385 U.S. 841 (1966).

Applying the criteria outlined above to the relationship which existed between Respondent and Edward A. Sada, Sr., the record supports the conclusion that their relationship was one of Master and Servant or Employer and Employee. On May 1, 1978, Respondent engaged Mr. Sada to perform ocean freight forwarding services for it and demonstrated its authority to discharge Mr. Sada on or about December 15, 1978. As an employee of Respondent, Mr. Sada received a weekly salary. The salary received by Mr. Sada was of a predetermined amount and, therefore, did not vary according to the quantity of work performed. Further, Mr. Sada did not receive payments from shippers for forwarding ocean freight shipments nor did he collect brokerage on such shipments from carriers. An independent ocean freight forwarder would normally have received monies from both shippers and carriers.

Mr. Sada was employed by Respondent, not only to perform ocean freight forwarding services, but to serve as Respondent's qualifying officer. As Respondent's qualifying officer, Mr. Sada was considered by Respondent as an integral part of its future operations. Respondent anticipated that its association with Mr. Sada would be an extended one. Mr. Sada's duties were intimately related to Respondent's regular business, the providing of international freight forwarding services.

During the course of his employment, Mr. Sada worked at Respondent's office at 40 Rector Street, New York, New York, and utilized the facilities located therein. While working at 40 Rector Street, Mr. Sada's duties were determined by Respondent. Mr. Sada was directed to prepare all necessary documentation on ocean freight shipments handled by Respondent. Although the booking of cargo space is an accepted responsibility of ocean freight forwarders, Respondent directed Mr. Sada to perform this function only on infrequent shipments bound for the Caribbean.

Far from being the principal for whom Respondent argues that it served as soliciting agent, Edward A. Sada, Sr., was but an employee of Respondent. In his limited dealing with shippers and carriers, Mr. Sada always represented himself as such. Further, Respondent apparently held itself out as the party responsible for providing the ocean freight forwarding services performed by Mr. Sada.

As evidenced by the affidavit of Winston E. Davis, Respondent was considered by the shippers whose ocean freight shipments it handled as the ocean freight forwarder. General Electric Supply Company (GESCO) dealt with Respondent on a regular basis throughout the period in question. In the course of these dealings, GESCO relied on Respondent to perform all ocean freight forwarding services. GESCO looked to Respondent, not STC, for the receiving of shipping instructions, arranging for the transportation of cargo to the pier, for booking of cargo space, for preparing ocean freight documentation, and for collecting ocean freight charges.

Two of the letters of reference submitted by Respondent in conjunction with its application also suggest that Respondent was holding itself out and was considered by shippers and carriers to be an active participant in the ocean freight forwarding industry. The letters, from Seatrain Lines and Mercantile and Marine, Inc., referred to Respondent as a "valued customer." Seatrain further noted that it was "pleased to have freight forwarders in our industry of this caliber," while Mercantile and Marine added that it was delighted to have Respondent "contribute professionalism of this caliber to the industry." While letters of explanation denying any intent to imply that Respondent was engaging in unlicensed ocean freight forwarding followed they are inconsistent with the substance of the original letters.

That it was Respondent's intention that shippers and carriers should consider it to be the party responsible for performing ocean freight forwarding services is apparent from the contents of ocean freight documents prepared on Respondent's behalf. Bills of lading representing ocean freight shipments which

Respondent handled designate Respondent as the forwarding agent and often as the shipper/exporter as well. FMC License Number 210 is invariably listed as the governing license number on these documents.

Invoices assessing ocean freight forwarding charges to shippers and brokerage to carriers evidence a like intent to portray Respondent as the actual ocean freight forwarder. These invoices carry the heading:

CARGO SYSTEMS INTERNATIONAL
INTERNATIONAL FREIGHT FORWARDERS

under which Respondent's address and telephone number appear. All questions regarding collection are referred to "Freight Forwarder: Cargo Systems Intl." More importantly, both shippers and carriers who were invoiced by Respondent made their payments directly to Respondent.

Respondent characterized itself as an "international freight forwarder" and "export specialist" in advertisements taken out in trade journals. Clearly, such advertisements were designed to promote Respondent's name as a freight forwarder among shippers and carriers alike and are consistent with the conclusion that Respondent was holding itself out as carrying on the business of forwarding as defined by section 1 of the Act.

Respondent makes the argument that neither carriers nor shippers considered it to be an ocean freight forwarder. The evidence is to the contrary. GESCO, a substantial shipper client, considered Respondent to be the party responsible for forwarding its ocean freight shipments. Two letters of reference submitted by Respondent, itself, indicate that carriers perceived Respondent to be active in the ocean freight forwarding industry.

Respondent contends that it never held itself out as an independent ocean freight forwarder. Documents prepared on Respondent's behalf argue to the contrary. On ocean bills of lading and invoices to shippers and carriers alike, Respondent is characterized as the ocean freight forwarder.

Respondent asserts that it acted solely as a soliciting agent for STC and, therefore, did not function as an ocean freight forwarder. The record supports a contrary conclusion. The relationship entered into by Respondent and Edward A. Sada, Sr., was that of employer and employee. In light of the employment relationship in which Respondent and Mr. Sada engaged, Respondent was carrying on the business of an ocean freight forwarder. The activities engaged in by Mr. Sada and the other employees of Respondent during the course of their employment are those of Respondent.

FMC License Number 210 was held by STC and its president and sole stockholder, Edward A. Sada, Sr. Respondent hired Mr. Sada to prepare ocean freight documents and immediately thereafter began forwarding ocean freight shipments utilizing FMC License Number 210. Respondent thereafter held itself out as an ocean freight forwarder.

It was the intent of Congress that the Federal Maritime Commission should issue independent ocean freight forwarder licenses to applicants it found to be fit, willing and able to carry on the business of forwarding. 46 U.S.C. § 841b. Pursuant to that authority, the Commission established a licensing procedure whereby applicants would be screened by the Commission. 46 C.F.R. § 510. Respondent circumvented this process by hiring a licensee and utilizing his license number to engage in ocean freight forwarding.

Respondent cannot shift responsibility for its action onto the shoulders of Edward A. Sada, Sr. Claiming, in effect, that it was duped by Mr. Sada, Respondent argues that STC was performing the ocean freight forwarding services and Respondent is being penalized solely on the basis of its association with STC. In fact, Respondent's entire position is founded on the assumption that the unlicensed ocean freight forwarding activity in question began with the revocation, effective June 8, 1978, of STC's independent ocean freight forwarder license. The record reveals, however, that the unlicensed ocean freight forwarding activity was initiated by Respondent when it hired Mr. Sada on May 1, 1978, and thereafter began utilizing STC's license to forward ocean freight shipments. The question of when Respondent was notified of the revocation of STC's license is, therefore, irrelevant. If STC's license had been valid throughout this period, Respondent would still be guilty of carrying on the business of forwarding without a license.

Respondent's unlicensed ocean freight forwarding activities did not cease with the departure of Edward A. Sada, Sr., in December 1978. Immediately thereafter, Respondent continued to perform ocean freight forwarding services. In early December 1978, Respondent's current qualifying officer, Armand Ventura, discussed an arrangement with Freight whereby Freight's New York branch office (FBNY) would handle ocean freight shipments for Respondent. In accordance with this arrangement, FBNY would prepare ocean freight documents based on information supplied by Respondent and bill Respondent for this service.

Respondent proceeded to utilize Freight's independent ocean freight forwarder license, FMC License Number 1963, to forward ocean freight shipments. As evidenced by Tonny Mosholt's Affidavit, FBNY did not prepare any ocean freight documents for Respondent in November or December of 1978. Nevertheless, Respondent's name, as forwarding agent, and FMC License Number 1963 appeared together on ocean freight documents dated as early as November 28, 1978. Further, Respondent apparently directed Edward A. Sada, Sr., in late December 1978 and early January 1979, to utilize FMC License Number 1963 in completing the documentation process on shipments handled by him while employed by Respondent.

Upon receipt of protests from FBNY, Respondent placed one of its employees, Todd Randell, on FBNY's payroll. Though officially employed by FBNY, Mr. Randell continued to work at Respondent's office. Mr. Randell maintained the complete files representing ocean freight shipments forwarded by him at Respondent's office. All documents in these files carried export reference numbers assigned by Respondent.

FBNY's files on shipments forwarded by Mr. Randell contained only a copy of the ocean bill of lading and a brokerage invoice. FBNY had files pertaining to, and seemed to be aware of, only a limited percentage of the ocean freight shipments Mr. Randell handled.

The record establishes that Respondent arranged to have FBNY employ one of Respondent's employees and have him prepare Respondent's ocean freight documents. Through Mr. Randell Respondent continued to carry on the business of forwarding ocean freight shipments. FBNY's involvement in the ocean freight forwarding process was limited to the payment of Todd Randell's salary. Mr. Randell was responsible for performing precisely the same duties as an FBNY "employee" that he engaged in as an employee of Respondent. Throughout the period he was on FBNY's payroll, Mr. Randell worked at Respondent's office and utilized the facilities located therein. Respondent did not even bother to provide him with a separate office or telephone line. Of foremost importance, however, Mr. Randell remained subject to Respondent's control and direction. FBNY was apparently not even aware of a large number of the ocean freight shipments Mr. Randell forwarded while on its payroll.

All of the criteria normally referred to in determining the existence of an employment relationship, barring the payment of the employee's salary by the employer refute Respondent's argument that Respondent acted as an agent for Freight. FBNY's employment of Mr. Randell was purely *pro forma.* By designating Mr. Randell as an FBNY employee, Respondent and FBI effectuated a trade off. Respondent was allowed to utilize FBI's license number and FBNY collected brokerage on ocean freight shipments forwarded by Respondent.

Having secured access to FMC License Number 1963, Respondent continued to hold itself out as an ocean freight forwarder. Ocean bills of lading issued in November and December of 1978 listed FMC License Number 1963 but designated Respondent as the forwarding agent. Respondent's letterhead appeared on invoices to shippers, dated through March 1979. Shippers assessed by these invoices for ocean freight forwarding services naturally made payments directly to Respondent.

As evidenced by the Affidavits of Winston E. Davis and Frank J. Decibus, Respondent's shipper clients considered Respondent to be the party responsible for forwarding their ocean freight shipments. In late 1978 and early 1979, GESCO apparently detected no change in its course of dealings with Respondent. GESCO always perceived Respondent to be its forwarding agent.

Respondent contracted in its own name with Foster Wheeler Energy Corporation (FWEC) to perform ocean freight forwarding services on FWEC project shipments to Venezuela. The Purchase Order, representing that contract, identified to Respondent as the ocean freight forwarder. The following notation appeared on an ocean bill of lading prepared by Respondent for a project shipment forwarded in accordance with this contract:

Cargo Systems International
As Forwarding Agents For Foster
Wheeler Energy Corporation

In addition, invoices submitted to FWEC bore Respondent's letterhead. FWEC clearly considered Respondent to be the party responsible for forwarding its ocean freight shipments.

The extent of Respondent's involvement with Cargo Export Corporation (CEC) is unclear. The record in this regard is somewhat sketchy. Respodent was apparently created as a spin-off of CEC and staffed by employees drawn from that firm. Among the employees placed with Respondent by CEC were Armand Ventura, Respondent's current qualifying officer and Stephen Larzelere.

During the early months of 1978, Respondent and CEC entered into an arrangement whereby Respondent was able to forward ocean freight shipments utilizing FMC License Number 1498. Somewhat similar to the agreement later entered into with Freight, the arrangement with CEC, involved the placement of one of CEC's employees, Rochelle Karmel, in Respondent's office. In accordance with the arrangement, CEC continued to pay Ms. Karmel's salary. Ms. Karmel apparently designated Respondent as the forwarding agent and FMC License Number 1498 as the governing license number on ocean freight documents she prepared during this period. Following the arrival of Edward A. Sada, Sr., Ms. Karmel remained with Respondent and continued to receive her salary from CEC. She thereafter performed ocean freight forwarding services in conjunction with Mr. Sada. Her name appears on Respondent's independent ocean freight forwarder application.

Further indications of Respondent's arrangements with CEC surfaced in March 1979. CEC assumed the long term contract previously entered into by Respondent with FWEC. In so doing, CEC agreed to forward FWEC's project shipments to Venezuela. CEC indicated that among those responsible for handling these shipments would be Armand Ventura and Stephen Larzelere. In addition, CEC directed all correspondence regarding these shipments to Respondent's office. Respondent's telephone number was also listed by CEC.

Due to the limited amount of information available it cannot be concluded that Respondent's involvement with CEC clearly violated the statute.

The Commission noted in its Order of Investigation and Hearing that the ultimate issue to be determined in this proceeding was:

> whether . . . Cargo Systems International and its corporate officers, possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

Section 44(b), Shipping Act, 1916 (46 U.S.C. § 841b(b)) mandates, in pertinent part, that:

> A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is . . . fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder . . .

The question raised by Respondent's application for an independent ocean freight forwarder license is whether Respondent and its corporate officers, in view of the findings that Respondent repeatedly violated section 44(a) of the Shipping Act, 1916, meet the statutory standard for licensing.

The Commission has addressed the issue of the impact of past violations of the Shipping Act, 1916, on an applicant's "fitness" to be licensed on numerous occasions.

In a recent decision, *Concordia International Forwarding Corporation,* 18 SRR 1364, 1371 (FMC Docket No. 78-34, December 18, 1978), the Commission noted:

In determining whether an applicant possesses the requisite fitness, a past violation of the Shipping Act militates against the issuance of a license.

The Commission remarked in an earlier decision, *Independent Ocean Freight Forwarder Applicant—Lesco Packing Co., Inc.,* 16 SRR 1023, 1029 (FMC Docket No. 74-31, May 25, 1976), that:

[p]ast disregard for the shipping laws and the Commission's regulations, coupled with the absence of convincing evidence that positive steps have been taken to reasonably assure against the repetition of such incidents, is alone sufficient basis for not placing Lesco in the position of trust and responsibility enjoyed by licensed freight forwarders.

Elaborating as to the reasons for its reluctance to grant a license to an applicant who has violated section 44(a), the Commission concluded in *Independent Ocean Freight Forwarding Applicant—Fabio A. Ruiz D/B/A Far Express Company,* 15 F.M.C. 242, 243 (1972), that:

If the licensing statute is to achieve its desired ends, it necessarily follows that any applicant who conducts a freight forwarding activity without a license must do so at his peril.

Though past violations of law are not determinative of the question of an applicant's fitness (See *Independent Ocean Freight Forwarder Applicant—Air-Mar Shipping, Inc.,* 14 SRR 1250, 1252 (FMC Docket No. 71-85, November 27, 1974)), they are certainly a major factor in the Commission's decision to grant or deny a license application See *Harry Kaufman D/B/A International Shippers Co. of N.Y.,* 16 F.M.C. 256 (1973). In cases where it is found that applicants have engaged in carrying on the business of forwarding without benefit of a license issued by the Commission, the Commission will explore the context in which the violations occurred. Applicants are urged to present to the Commission any circumstances which would mitigate against the denial of their licenses on the basis of past violations. See *Independent Ocean Freight Forwarder License Application—Guy G. Sorrentino,* 15 F.M.C. 127 (1972). The Commission has, in the past, weighed such factors as the substance of, the extent of, and the motive for the violations in question.

During the preceding year, Respondent forwarded hundreds of ocean freight shipments without benefit of a license. In *Independent Ocean Freight Forwarder Application—Alvarez Shipping Co., Inc.,* 16 F.M.C. 78, 81 (1973), the the Commission distinguished between that case and two others in which licenses were granted on the basis that "Respondent's violations cover a much greater period of time (fourteen months) and a greater number of instances (at least 142)."

While the Commission has dealt leniently with those applicants whose violations stem from misunderstandings of the law (See *Bolton & Mitchell, Inc.—Independent Ocean Freight Forwarder License No. 516,* 15 F.M.C. 248, 255 (1972)), or whose motives were of an admirable nature (See *Independent Ocean Freight Forwarder License Application—L.T.C. Air Cargo, Inc.,* 13 F.M.C. 267, 277 (1970)), it has treated knowing and intentional violations less leniently. In *Concordia, supra,* at 1371, the Commission noted the knowledge and experience of the applicant and concluded that "the applicant knew or should have known that its activities were in violation of the Shipping Act." On this basis, despite arguments that applicant had been "acting as a good samaritan for stranded shippers," the Commission refused to issue the license.

The record in this case closely reflects that presented in *Independent Ocean Freight Forwarder Applicant—K & S Forwarder* (Initial Decision), 13 SRR 551 (FMC Docket No. 72-55, January 24, 1973). As in that case, "[t]here appears to be little doubt that (Respondent) was motivated principally by impatience to acquire a substantial number of freight forwarder accounts which were readily available and, thus, to establish and operate a lucrative business." 13 SRR at 555. The striking similarity between the two cases continues. Like K & S Forwarders, Respondent made a "deliberate and conscious" decision to forward ocean freight shipments without a license. However, it too "attempted to clothe continuance of (its) freight forwarding activities with legality." 13 SRR at 555. In denying K & S Forwarders' application, the Presiding Administrative Law Judge declared:

> To permit one to avoid the impact of section 44(a) by entering into the type of arrangement here involved with the avowed purpose of continuing what admittedly otherwise would constitute illegal freight forwarding, would be to vitiate the regulatory and remedial purposes of the statute.

13 SRR at 555

The Commission echoed this sentiment in *Concordia, supra,* when it asserted that it would "not countenance a flagrant disregard of the statutes (it is) charged with enforcing."

The Commission is obliged to maintain and preserve the integrity of the ocean freight forwarding industry. As it stated in *Sorrentino, supra,* at 128:

> [w]e are charged with maintaining the high degree of responsibility required in the profession of ocean freight forwarding. Congress has required us to review license applications and to limit access to the profession to those who are "fit, willing, and able." . . . We have therefore established a high standard of moral conduct to which an applicant . . . must conform.

CONCLUSIONS

In consideration of the record in this case and for all of the foregoing reasons it is concluded and determined that Respondent and its corporate officers have violated section 44(a) of the Shipping Act, 1916. It is further concluded and determined that Respondent is not fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules, and regulations of the Commission issued thereunder. Respondent's application for a license as an independent ocean freight forwarder should be and is hereby denied.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
June 25, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-57

H & H CRANES, INC.

v.

PORT OF HOUSTON AUTHORITY OF
HARRIS COUNTY, TEXAS

NOTICE

August 16, 1979

Notice is given that the time within which the Commission could determine to review the July 10, 1979, order of discontinuance of the Administrative Law Judge in this proceeding has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 76-57

H & H Cranes, Inc.

v.

Port of Houston Authority of
Harris County, Texas

MOTION FOR APPROVAL OF SETTLEMENT GRANTED; PROCEEDING DISCONTINUED

Finalized August 16, 1979

Complainant and respondent have filed a joint motion seeking approval of a settlement which they have reached and ask for discontinuance of this proceeding. This settlement, if approved, would bring to a conclusion another one of a series of cases which emanated from the Commission's decision in Docket No. 75-51, *Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas,* 19 SRR 517 (1979). Moreover, it would achieve this result without the need of continuing with complicated litigation in which considerable time and effort would have to be expended to determine the extent of financial injury which complainant experienced as a result of practices which respondent has long since discontinued, as I recently had occasion to note in issuing my ruling approving a similar settlement in Docket No. 75-51. See Docket No. 75-51, Motion for Approval of Settlement Granted; Proceeding Discontinued, June 21, 1979.

The reasons which support approval of the settlement in this case are similar to those advanced by the parties in the lead case, Docket No. 75-51, which was also settled. As in that case, the parties have canvassed records relating to instances of crane "bumping" and have attempted to verify and agree upon the number of such instances. However, the parties have recognized that if the proceeding were to continue with further litigation, they would have to enter into extremely complicated factual areas relating to the number of jobs which complainant might have lost to a Port crane which was not as suitable for a job as one of complainant's as well as items of expense or loss which complainant might have suffered. Furthermore, the relevant period of time for such facts extends over approximately two and one-half years, from October 1974 to

March 1977. All of these facts would have to be developed under the Commission's decision in Docket No. 75–51, which established that respondent's practices, which have long since been discontinued, were unlawful under sections 16 First and 17 of the Shipping Act, 1916 (the Act) because respondent had "bumped" private crane operators like complainant from jobs already commenced and had given Port cranes first call on jobs even though it was possible that a Port crane had not been equally suitable to one of complainant's cranes for a particular job. In addition to the above, there also remained the question under law of what items of complainant's expenses would be compensable under section 22 of the Act in cases of this kind.

Because of all of difficulties of litigation described above with attendant cost, which both parties wish to avoid, they have agreed to settle this case on condition that respondent pay complainant $5,500.00 with costs, if any. Again, as in my ruling in Docket No. 75–51, cited above, I find that this settlement comports with the principles of law followed by the courts and this Commission which favor settlements and that there are no complicating factors, such as the need to process the settlement under section 15 of the Act or to observe the requirements of tariff law under section 18(b)(3) of the Act, which might require that approval be withheld pending further study or investigation.[1]

Accordingly, I find that the settlement which the parties have submitted for approval as a means to terminate this case is reasonable, violates no law or policy, and fully comports with the Commission's policy which encourages settlements. Therefore, subject to rule 227(c), as amended (i.e., subject to Commission review), the settlement is approved and this complaint case is discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

June 10, 1979

[1] In the ruling cited in Docket No. 75–51, cited above, I examined case law which holds that settlements are favored and cited several decisions of the Commission which followed this principle, e.g., *Organic Chemicals v. Atlanttrafik Express Service*, 18 SRR SRR 1536a, 1539 (1979); *Old Ben Coal Company v. Sea-Land Service, Inc.*, 18 SRR 1085, 1091–1099 (I.D. 1978, F.M.C. adoption, December 29, 1978). Furthermore, I noted that in some cases, unlike this one, a settlement may constitute a section 15 agreement and must therefore undergo separate processing under that law or, if it involves tariff matters under section 18(b)(3), requires special scrutiny to ensure good faith. See, e.g., *Massachusetts Port Authority v. Container Marine Lines*, 11 SRR 37, 40 (1969); *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82, 89 (1970); *Organic Chemicals v. Atlanttrafik Express Service, Supra.* Finally, I followed the principle that the presiding judge must examine the settlement to ensure that it does no violence to any statutory schemes involved and that the amount to be paid in settlement is a matter for the parties to determine. See, e.g., Docket No. 78–44, *Pierpoint Management Company and Retla Steamship Company v. Holt Hauling and Warehousing Systems, Inc.*, (F.M.C. Order, June 13, 1979) 19 SRR 435; *Inter Equip, Inc. v. Hugo Zanelli & Co.*, 17 SRR 1232, 1234 (1977).

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-41

AGREEMENT NOS. 8200, 8200-1, 8200-2 AND 8200-3
BETWEEN THE PACIFIC WESTBOUND CONFERENCE
AND THE FAR EAST CONFERENCE

ORDER ON RECONSIDERATION

August 17, 1979

The Pacific Westbound Conference (PWC) and Far East Conference (FEC) have filed Petitions for Reconsideration of the Commission's April 18 order disapproving an interconference ratemaking agreement [1] between PWC member lines and FEC member lines.[2] For the reasons set forth below, the Petitions are denied.

FEC contends that the proceeding was before the Commission only on the Port of Seattle's exceptions to the Initial Decision, Seattle opposing but one provision in the Agreement. By reviewing and disapproving the entire Agreement without notice that it intended to do so, FEC alleges, the Commission deprived FEC of the opportunity to be heard other than on the issue complained of by Seattle.

The Commission's Rules of Practice and Procedure state at 46 C.F.R. section 502.227(a), in pertinent part:

> Where exceptions are filed to, or the Commission reviews, an initial decision, the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision.

As the Commission did not limit the issues for consideration in this proceeding, its review of the entire Agreement was proper under section 502.227(a).[3]

FEC also alleges an incorrect finding of fact, in that the Commission's decision states, at 11:

[1] Agreement Nos. 8200, 8200-1, 8200-2 and 8200-3 (collectively the Agreement).

[2] Intervenors the Port Authority of New York and New Jersey and the Maryland Port Administration concurred in FEC's Petition.

[3] We also note that at oral argument, the parties were questioned not only on Seattle's ground for protest but on other aspects of the Agreement as well.

On the other hand, there are several indications that destructive rate practices between the conferences are not likely to occur. The Agreement specifically does not apply to the relationship between PWC overland rates and FEC rates, yet the midwestern-source cargo, to which PWC overland rates are most likely to apply, is the most probable source of competition between the two conferences.

FEC characterizes this observation as a condemnation of the Agreement for not applying to PWC overland rates. FEC cites the large revenue figures on commodities moved pursuant to both conferences' tariffs, and the written testimony of PWC Chairman D. D. Day, Jr. to the effect that overland cargo is a relatively minor part of PWC's total cargo, and claims that the Commission's observation about overland rates is contrary to the record evidence.

FEC misconstrues the Commission's observation. Contrary to the conferences' contentions, the record does not indicate that the cargo movements covered by the Agreement are likely subjects of destructive rate practices. The sentence excepted to merely points out that, considering this absence of evidence, the only remaining source of genuine PWC-FEC competition is cargo which is not covered by the Agreement. Although large quantities of similar commodities are transported pursuant to the tariffs of both conferences, the particular commodities which would be likely to cause real competition between the two conferences are midwestern-source cargo, as opposed to cargo the source of which is the East or West Coast.

PWC's arguments, as well as the remaining arguments of FEC, are based on alleged violations of the principles of *United States Lines v. Federal Maritime Commission,* 584 F.2d 519 (D.C. Cir. 1978). The conferences argue that the Commission's citation of several "recent developments in the trades" constitutes improper reliance on extra-record information which the parties did not have the opportunity to address. Specifically, the conferences protest the statements that the recent growth of intermodalism diminishes the value of the Agreement; that PWC overland rates, which are not covered by the Agreement, are the most probable source of interconference competition; that there has been a decline in all-water transport from East Coast ports; and that there has been a change in PWC and FEC membership since the record closed.

The FEC membership, which now consists entirely of PWC members, is a proper subject for official Commission notice. *See* 46 C.F.R. § 502.226(a). That the Commission relied on this critical recent development as a major indication that destructive rate practices between the conferences are unlikely, does not violate *United States Lines, supra.* The Commission is not required to reopen a proceeding to obtain current conference membership information which is already filed with the Commission pursuant to 46 C.F.R. § 523.2. Similarly, the Commission properly took notice of another post-record event: that Agreement No. 10135–6 had been conditionally approved, and that it overlaps considerably the subject matter in the instant Agreement.

Moreover, the allegedly objectionable statements in the April 18 order are not essential to the Commission's determination. There are numerous grounds for disapproval of the Agreement. The Agreement provides but minimal assistance to the stability of the trades. The record reflects that the rate differential provisions have proven completely ineffective. The conferences have failed to produce evidence of a likelihood of destructive rate practices absent approval; indeed, the record indicates stability in the Far East trade during the 1965–1968 period when the Agreement was not in effect. The conferences' memberships are such that destructive competition is more unlikely than ever. All these factors sufficiently support the Commission's decision independently of the observations objected to by the conferences.

Nor is the Commission persuaded that this proceeding should be reopened in conjunction with Agreement Nos. 8200–5, which would cover overland cargo transportation, and 10135–6, the PWC-FEC Discussion Agreement. Agreement No. 8200–5 depends upon agreements which are disapproved, and cannot be considered in its present form. It should either be withdrawn, or redrafted and refiled with proper justification. We strongly urge continuation of the dialogue commenced in Agreement No. 10135–6 regarding the future of the trades in issue.

THEREFORE, IT IS ORDERED, That the Petitions for Reconsideration are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-14

AGREEMENT NO. 10116-3—EXTENSION OF POOLING ARRANGEMENT IN THE U.S. PACIFIC COAST/JAPAN TRADES

ORDER DENYING RECONSIDERATION

August 23, 1979

The proponents of Agreement No. 10116-3, have petitioned the Commission to reconsider its April 26, 1979 Order in the above-captioned matter.[1] It is contended that the Commission's April 26th Order was erroneous insofar as it found that Proponents had not filed a "complete copy" of Agreement No. 10116-3, as modified, on April 5, 1979.[2] In support of this position, Proponents argue that "Agreement No. 10116-3" is a term of art which describes only the brief document containing the most recent amendment to Agreement No. 10116, and that when the Commission has required the submission of a fully integrated document, it has more clearly said so.[3]

The Petition shall be denied. The use of the words "complete copy" sufficiently advised Proponents of the need to file the *entire pooling arrangement* under which they would be operating through August 22, 1980.[4]

A proposed amendment may be conveniently referred to during its processing stage as a document separate and distinct from the existing agreement which would be modified. However, once an amendment is approved by the Commission, there is only *one* agreement outstanding. In this instance, that agreement was designated as "Agreement No. 10116-3." Agreement No. 10116-3 fully incorporates the unaltered aspects of the Proponents' original pooling agreement as well as prior Amendments No. 1 and 2. Agreement No.

[1] The Proponents are six Japanese-flag common carriers in the foreign commerce of the United States. Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Yusen Kaisha, Showa Line, Ltd. and Yamashita-Shinnihon Steamship Co., Ltd.

[2] Proponents had submitted a two-page version of the modifications (Amendment No. 3) to their pooling arrangement, rather than a copy of the entire pooling agreement which incorporated the instant modifications as well as Amendment Nos. 1 and 2.

[3] *E.g.*, the April 13, 1978 Order conditionally approving Agreement No. 7680-36 contained the following language:

A complete copy of Agreement No. 7680, as amended through the 36th amendment thereto, as modified in accordance with clause (1) and (2) of this paragraph . . . .

[4] If nothing else, the very brevity of Amendment No. 3 (a simple extension of the agreement's term) should have put Proponents on notice that "complete copy" contemplated more than the submission of the amendment alone.

10116 exists only as a point of historical interest or as a useful generic reference.

The fact that the Commission's Rules (46 C.F.R. §522.4(b)) routinely require the submission of a complete copy of an agreement only after the agreement has been amended three times, does not preclude the Commission—on a case-by-case basis—from requiring a complete copy after a lesser number of amendments.

THEREFORE, IT IS ORDERED, That the Proponents' May 29, 1979 "Petition for Reconsideration" is denied.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–20

TERFLOTH AND KENNEDY, LTD.

v.

AMERICAN PRESIDENT LINES, LTD.

NOTICE

August 30, 1979

Notice is given that no appeal has been taken to the July 24, 1979, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-20

TERFLOTH AND KENNEDY, LTD.

v.

AMERICAN PRESIDENT LINES, LTD.

SETTLEMENT APPROVED; COMPLAINT DISMISSED WITH PREJUDICE; PROCEEDING DISCONTINUED

Finalized August 30, 1979

By joint motion filed May 9, 1979, the complainant, Terfloth & Kennedy, Ltd.—(T&K), and the two respondents, American President Lines, Ltd.—(APL) and Seaport Shipping Co. (Seattle)—(Seaport), request approval of a release and settlement agreement, dismissal of the complaint and discontinuance of the proceeding. In my judgment the release and settlement agreement should be approved, the complaint should be dismissed with prejudice, and the proceeding should be discontinued.

FACTS

T&K, a Canadian corporation, filed a complaint seeking reparation in the sum of $4,626.76 from APL, a common carrier by water in the foreign commerce of the United States. T&K alleged violations of sections 16 First, 17, 18(a),[1] 18(b)(5)[2] and 15 of the Shipping Act, 1916, 46 U.S.C. §§815 First, 816, 817(a), 817(b)(5) and 814, in connection with a shipment, consisting of two containers of frozen french fried potatoes, from Seattle, Washington, to Hong Kong under a bill of lading issued January 21, 1977. APL filed an answer in which, among other things, it denied it had violated any section of the Shipping Act.

[1] By its terms, section 18(a) applies only to shipments in interstate commerce. It was therefore jurisdictionally defective and incorrectly invoked in this proceeding.

[2] Even if the assailed rate were "so unreasonably high . . . as to be detrimental to the commerce of the United States" within the meaning of section 18(b)(5), there would be no right to reparation because the Commission's powers under section 18(b)(5) are prospective only. See *Federal Maritime Commission v. Carragher*, 364 F.2d 709 (2d Cir. 1966). In other words, section 18(b)(5) created no "justiciable legal right," *T.I.M.E. Incorporated v. United States*, 359 U.S. 464, 468-472 (1959), to reparation."

Subsequently, T&K filed an amended complaint seeking the same amount of reparation from Seaport, an independent ocean freight forwarder licensed by the Federal Maritime Commission,[3] alleging violations of 46 C.F.R. §510.23 and section 44(c) of the Shipping Act, 1916, 46 U.S.C. §841b(c).[4] Seaport's answer, among other things, denied liability for the amount claimed but accepted limited liability for damages in the sum of $525.16.

The agreement to settle was reached without any party engaging in the discovery procedures. Consequently all the particulars surrounding the transaction have not surfaced. However, there is general agreement on the following basic facts.

Sometime in November 1976, T&K asked Seaport for ocean freight rate quotations on frozen french fries and frozen vegetables to various places in the Far East, including Hong Kong. Seaport complied by telex on November 29, 1976. On December 14, 1976, T&K instructed Seaport by telex, to book two forty-foot refrigerated containers of frozen french fries at a rate of $150.00 per measurement ton for shipment in January 1977.

The rates which Seaport furnished to T&K in November 1976 were those which were published in Pacific Westbound Conference's Local Freight Tariff No. 4-FMC 12.[5] APL was at all pertinent times a member of the Pacific Westbound Conference (PWC). For a variety of reasons, including conversion of the PWC tariff to the metric system, the rate applicable to frozen french fried potatoes was constantly being changed and this unsettled rate situation apparently caused some confusion concerning the applicable rate on a given day.

On and before November 14, 1976, the ocean freight special contract rate was $136.00 per ton of 2000 pounds. There was also a terminal receiving charge of $5.50 per ton of 2000 pounds. While these rates were in effect, PWC member lines carried shipments of frozen french fried potatoes to Hong Kong. Also, while these rates were in effect, the comparable rate to Japan for frozen french fried potatoes was $125.00 per ton of 2000 pounds.

On November 15, 1976, the ocean rate and the terminal receiving charge were changed to a revenue ton basis (meaning that the shipper would be charged the greater of the weight or measurement of the shipment).[6] T&K alleged that this charge amounted to a 92.8% increase in freight and terminal charges and that while this rate was in effect there was no carriage of frozen french fried potatoes to Hong Kong by PWC member lines. T&K also alleged that while this rate was in effect the comparable rate to Japan remained at $125.00 per 2000 pounds.

Effective January 1, 1977, the tariff was converted to the metric system and the freight rate was set at $120.00 per W/M of 1000 kilos or cubic meter and

[3] License No. FMC 126.

[4] The amended complaint resulted from comments appearing in Order Allowing Leave to Amend Complaint, served September 14, 1978, and similar remarks made at the prehearing conference held February 15, 1979.

[5] Prior to January 1, 1977, frozen french fried potatoes' rates appeared at Item No. 054.6100 of PWC's Local Tariff No. 4. Thereafter those rates were shown at the same line item and number in PWC's Local and Overland Freight Tariff No. 5—FMC 13.

[6] Weight (W) = 2000 pounds; Measurement (M) = 40 cubic feet. Wherever a tariff provides a rate of W/M it means that the rate shall be applied to the greater of the two.

the terminal receiving charge at $5.50 per W/M of 1000 kilos or cubic meter. T&K alleged that the conversion retained the previous ocean rate but increased the receiving charge by 11.7%. T&K alleged that while this rate was in effect, the comparable Japan rate was $138.00 per 1000 kilos (no change on conversion to metric).

On January 19, 1977, the Conference met and decided to reduce the ocean rate, effective January 26, 1977, to $165.00 per 1000 kilos and the terminal charge to $5.50 per 1000 kilos. This lowered the ocean rate by 42.9% and the terminal cost by 58.5% below the rate which became effective on November 15, 1976. T&K claims that, as a result of this change, frozen french fried potatoes again began to move to Hong Kong via PWC member lines. PWC did not take any action in regard to the rate to Japan on January 19th. T&K alleged that after the metric conversion on January 1, 1977, there were shipments of frozen french fried potatoes to Japan at the $138.00 per 1000 kilo rate.

Believing that the PWC tariff action of January 19, 1977, was effective immediately, but without rechecking the tariff, one of Seaport's traffic clerks mistakenly thought that T&K's instructions could be followed by booking the shipment for the January 21st sailing of the *PRESIDENT TRUMAN*. Had he waited a few days, until January 26th, to make the shipment, the total charges would have been $5,992.05 instead of $10,618.81, the amount APL was required to charge under tariff rates in effect on January 21st. The difference between those two figures—$4,626.76—is the amount of reparation sought by T&K.

T&K paid charges of $10,618.81 in March 1977.[7]

One of the allegations made by T&K, but denied by APL, in effect claims that if a shipment similar to the one at bar had been made to Japan on January 21st, it would have cost only half as much as the one to Hong Kong.[8]

T&K claims against APL that by reason of the facts it was subjected to payment of rates for transportation and terminal services which were unduly and unreasonably preferential, prejudicial or disadvantageous in violation of section 16 First; were unjustly discriminatory and prejudicial in violation of section 17; and were unjustly discriminatory and unfair in violation of section 15.

Against Seaport, T&K claims that it was damaged because the licensed freight forwarder failed to "exercise due diligence to ascertain the correctness of any information which he imparts to a principal with reference to any forwarding transaction" in violation of 46 C.F.R. §510.23(d) and section 44(c).[9]

The Settlement

In order to avoid costly and time consuming litigation, Seaport and APL have agreed to pay T&K the sum of $1,550.00 each in consideration of T&K's release. All parties agree that nothing contained in their agreement shall be construed as an admission on the part of Seaport or APL that either violated the Shipping Act or regulations promulgated thereunder by this Commission.

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[7] Prehearing transcript, p. 4.

[8] See Exhibit B of complaint.

[9] Section 44(c) empowers the FMC to prescribe reasonable rules and regulations to be observed by freight forwarders. The cited regulation was promulgated pursuant to the rule making authority contained in section 44(c).

The parties also agree that the agreement shall be effective only upon approval by the Commission.

DISCUSSION AND CONCLUSION

It is well settled that legislative and Commission policy foster the settlement of administrative proceedings. The right to seek settlement of administrative proceedings carries the same Congressional mandate as the right to submit proposed findings of fact and legal arguments.[10] The Commission has implemented its mandate by rule[11] and thereafter emphasized "The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck Sharp & Dohme v. Atlantic Lines,* 17 F.M.C. 244, 247 (1973).

In furtherance of this policy the Commission has authorized settlements of administrative proceedings on the basis of a compromised reparation payment absent admissions of findings of violation of the Shipping Act. *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau,* 18 SRR 619 (1978); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.,* 18 SRR 744 (1978); *Old Ben Coal Co. v. Sea-Land Service, Inc.,* 18 SRR 1085 (1978); *Organic Chemicals v. Atlanttrafik Express Service,* 18 SRR 1536a (1979).

I find it to be in the public interest to accept the offer of settlement. This was a vigorously contested proceeding and would have required an evidentiary hearing had the complaint not been amended to bring in Seaport as a respondent. The respondents continue to adhere to the position that there has been no wrongdoing under the Shipping Act. Nevertheless, they engaged in good faith negotiations with the shipper and with each other and, as a result, struck a bargain by which all the parties bear an approximately equal share of the amount in dispute. Because there are novel legal aspects to this proceeding and because an evidentiary hearing would have entailed considerable expense to all parties, the settlement represents a realistic estimate of the costs of litigation and the likelihood of success. The settlement is not in the nature of a rebate or other violation of the Shipping Act.

THEREFORE IT IS ORDERED, That the terms and conditions of settlement are approved.

IT IS FURTHER ORDERED, That the complaint be dismissed with prejudice and the proceeding be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

July 24, 1979

[10] Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. §554(c)(1), provides: "The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit;"

[11] Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . ."

Pragmatically, even though unilateral offers of settlement seemingly are authorized in both investigation and complaint proceedings, it would appear that, in the exercise of its judgmental function, the Commission is more likely to look favorably upon joint or unopposed offers of settlement.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-54
FOSS ALASKA LINE INC. PROPOSED GENERAL
RATE INCREASE BETWEEN SEATTLE, WASHINGTON
AND POINTS IN WESTERN ALASKA

NOTICE

September 5, 1979

Notice is given that the time within which the Commission could determine to review the August 1, 1979, order of discontinuance of the Administrative Law Judge in this proceeding has expired. No such determination has been made and, accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-54

FOSS ALASKA LINE INC.—PROPOSED GENERAL RATE INCREASE BETWEEN SEATTLE, WASHINGTON AND POINTS IN WESTERN ALASKA

OFFER OF SETTLEMENT APPROVED; RESPONDENT ORDERED TO COMPLY WITH TERMS OF OFFER OF SETTLEMENT BY ROLLBACK/REFUND OF PORTION OF RATE INCREASE; MOTION TO TERMINATE PROCEEDING GRANTED; PROCEEDING DISCONTINUED

Finalized September 5, 1979

In accordance with an understanding reached at the hearing on July 11, 1979, on July 18, 1979, Foss Alaska Line, Inc. (FAL), respondent, submitted a written offer of settlement and motion to terminate the Commission's investigation of a general rate increase in the Seattle, Washington/Western Alaska Trade (hereafter alternately referred to as "Westward Alaska Service" or "Service" or "Trade"). On July 25, 1979, Hearing Counsel, the only other party in the proceeding, submitted a written response to the offer and motion endorsing the offer and supporting the motion.

In my judgment, the offer of settlement should be accepted, the motion to terminate the proceeding should be granted, and the proceeding should be discontinued.

THE BACKGROUND OF THE PROCEEDING, THE OFFER AND THE MOTION

The parties are in substantial, if not literal agreement, on all aspects of the proceeding, the offer and the motion. These are the pertinent facts concerning those matters.

On March 15, 1979, FAL filed a 7 percent general rate increase (with certain exceptions) on cargo transported in its Westward Alaska Service.[1]

[1] As initially filed, the increase applied to all rates and charges except those for gillnet boats (Item 551) and groceries (Item 810) listed in FAL Tariff FMC-F No. 18. Thereafter, effective May 18, 1979, the increase was withdrawn on rates and charges involving cargo moving to the town of Dillingham, Alaska.

FAL's Service is a seasonal tug and barge operation between Seattle, Washington, and points in Western Alaska, including Nome, Bethel and Dillingham. It is operated in direct competition with three other carriers in the same trade.[2] The long and severe winters of Western Alaska so limit the annual navigation season as to permit only three or four voyages by FAL.

No protests against the rate increase were filed with the Commission. The rate increase became effective on May 18, 1979. Thereafter, on May 22, 1979, the Commission ordered an expedited investigation of the rate increase, limited essentially to consideration of the two issues of rate of return and the proper method of allocating fixed vessel costs for the equipment used in the Service by FAL.[3]

Because the revenue to be derived from the increase was small in both absolute and relative terms (only $71,000), because FAL felt that then existing differences between FMC's Bureau of Industry Economics, Office of Financial Analysis (Staff) were not that great and should be resolvable, and because the cost and work effort involved in participating in a formal adjudicatory proceeding would be substantial, FAL immediately initiated discussions with the Staff and Hearing Counsel (sometimes referred to collectively as Staff) in an effort to settle the matter without the necessity of going to formal hearing. As a result of those discussions, FAL made several revisions to and updatings of the G.O.11 material which it had submitted.

While substantial progress was achieved in the discussions, FAL and the Staff ultimately were unable to agree on a settlement, and the matter was then set for hearing commencing July 11, 1979. Failure to reach agreement was based primarily on the different positions taken by FAL and the Staff with respect to the proper methodology to be employed in allocating fixed vessel costs to the Service.

In the period between the initial filing of its G.O.11 material and the date of the hearing, FAL experienced a precipitous increase in the cost of its fuel, an increase which could reasonably be expected to continue through the Westward Alaska navigation season. Accordingly, FAL again updated its G.O.11 filing to reflect these increases in fuel costs. The result of that updating was to reduce the difference between the allowable revenue under the allocation methodology utilized by the Staff (but not by FAL) and the amount of revenue produced by FAL's rate increase to a minimal amount—later agreed by the parties to be $31,852 in before tax revenue.

The Staff takes the position that FAL should be permitted to earn a return on investment of 12.27 percent, while FAL proposed a 14.4 percent return on investment. Utilizing the methodology proposed by the Staff for allocating expenses and investment and calculating return on investment, FAL's projected

[2] FAL's market share is estimated at 30% to 35%.

[3] The investigation related to tariff revisions in FAL's Tariffs FMC-F Nos. 17 and 18. The Commission stated the two issues to be:

1. The proper method of allocating investment and expenses applicable to the tugs and barges leased by FAL from its parent corporation, Foss Launch and Tug, and utilized by FAL in the Alaska trade.

2. Whether the proposed rates are unjust, unreasonable or otherwise unlawful in that they will provide FAL with an excessive rate of return as measured by accepted analytical methods.

rate of return on investment is 13.3 percent. The 1.03 percent differential separating the above figures translates into a dollar difference of $31,852. In its offer of settlement, FAL has proposed a 1.4 percent rollback/refund of its proposed general rate increase which reduces the above dollar difference to a mere $15,926. The resulting 5.6 percent adjusted rate increase will produce a projected rate of return on investment of 12.79 percent and a .515 percent differential.

Even though it was clear that FAL and the Staff had irreconcilable differences as to methodology, the narrowing of the dollar difference in revenue at issue, even under the methodology employed by the Staff, led FAL to initiate a further effort at settlement.[4] This was undertaken just prior to commencement of the hearing and continued under my supervision and with my support.

In the course of those further negotiations, FAL and the Staff agreed that the dollar difference between them was, as noted above, $31,852. Recognizing that the amount involved was far less than the costs which each would incur in litigating their irreconcilable differences in position as to allocation methodology, each side sought to avoid what would be a substantial and expensive litigation effort and to remove the uncertainty of the final outcome of litigation. FAL and the Staff agreed to compromise and settle their differences by means of a rollback/refund of the rate increase.[5]

That rollback/refund, which constitutes the major ingredient of FAL's offer of settlement, reduces the revenue estimated to be generated by the rate increase by one-half of the dollar difference between the parties—that is one-half of the difference in the amount of allowable revenue under the allocation methodology and rate of return utilized by the Staff and the amount of revenue which the rate increase was calculated to produce. This reduction of $15,926 ($31,852 divided by 2) is a 1.4 reduction of FAL's rate increase, and results in an adjusted rate increase of 5.6 percent.

JUSTIFICATION FOR OFFER OF SETTLEMENT

While there continues to be an irreconcilable difference between FAL and the Staff on the issue of what is the proper method of allocating fixed vessel costs for the equipment used by FAL in the Service, FAL and the Staff have

[4] Under the methdology espoused by FAL, FAL believes that the additional revenue generated by the rate increase would still leave FAL with a far from adequate return on its investment.

[5] The matter of allocation methodology was and would continue to be a hotly contested issue in the proceeding. In addition, because of the impact which such methodology has upon the level of carrier return on investment, FAL made it clear that if the Commission's ultimate decision were unfavorable to FAL, it would be compelled to appeal that decision to the courts.

Choice of methodology is not the only issue which would have to be litigated. Among other matters pertinent to the litigation is the question of inconsistent treatment by the Commission of rate increases by competing carriers in the same trade—a question which also bears upon the equities of this investigation and the resolution of the proceeding proposed herein. The Staff's I&S Memorandum No. 937, dated May 11, 1979, which was obtained through a Freedom of Information Act, 5 U.S.C. §552, (FOIA) request, makes no reference to the fact that increases of similar magnitude in the rates of FAL's competitors in the trade had previously been permitted to go into effect by the Commission without investigation. In response to a further FOIA request for copies of Staff I&S Memoranda dealing with the rate increases of FAL's competitors, FAL was advised there were none.

The upshot is that the proceeding would be prolonged by the introduction of evidence bearing on opposing, but compatible, legal philosophies which, on the one hand, hold that a regulatory agency is free to select out one person from others similarly situated for formal scrutiny, *United States v. Wabash R. Co.*, 321 U.S. 403 (1944), but on the other hand, hold that under certain circumstances, good sense requires a comparative hearing in the case of competing carriers, *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945); *Blue Bird Coach Lines, Inc. v. United States*, 328 F. Supp. 1331 (W.D.N.Y. 1971).

reached general agreement on the calculation of revenue which the rate increase will produce.

That calculation establishes there is but a small relative and absolute difference between the amount of additional revenue which FAL's rate increase would produce and the amount of additional revenue which the Staff would allow as reasonable, calculated according to the rate of return and fixed vessel cost allocation methodology which the Staff believes to be appropriate. That small difference ($31,852) forms the basis for the proposed settlement of this litigation. To settle the matter, FAL has proposed to roll back its rate increase from 7.0 percent to 5.6 percent.[6] This will reduce by half (to $15,926) the difference between the revenue generated by the increase and the Staff's calculation (untested at this point in the adversary process) of the permissable revenue level.

There can be no dispute that the cost of litigation to FAL and the Commission individually would far exceed the remaining dollar amount in dispute. Settlement on the proposed basis therefore eliminates for FAL and the Commission the cost, effort and uncertainty of litigation. As seen by FAL, this latter factor is signficant in at least three particular respects. First, any determination of the reasonableness of rates is certainly an imprecise exercise. That is why the courts, regulatory agencies and economists often speak of the reasonableness of rates not with specificity but rather in terms of a zone of reasonableness. Second, it is by no means settled that the allocation methodology utilized by the Staff, which has been employed as a benchmark for the purposes of settlement discussions only, would be utlimately upheld as the correct methodology to determine the reasonableness of FAL's rate increase.[7] Third, the density of the traffic at issue is so thin that the entire dollar amount at issue ($31,852) reflects the gross revenue of only about six containers. Since the projected traffic is of necessity merely an estimate, the actual results could depart from the estimated results by as much as, if not more than, the difference between the revenue targets of FAL and the Staff.

It is Hearing Counsel's position that acceptance of the offer and termination of the proceeding would serve the public interest because it would result in avoiding the expense of unnecessary litigation and at the same time provide a public benefit to ratepayers. Hearing Counsel explains:

> The Commission's resources, both in terms of funds and staff, are limited. These limited resources should be allocated so as to produce the optimum public benefit. It is Hearing Counsel's belief that additional expenditure of Commission funds and staff time in the present investigation would not produce a significant public benefit. As FAL has noted, the costs of litigation would far exceed the remaining dollar amount in dispute. Further, there can be little doubt that the ratepayers in the Western Alaska trade would utlimately bear the costs of this litigation. If, however, FAL's offer of settlement is accepted and litigation is thereby avoided, not only will these ratepayers be guaranteed a 1.4 percent rollback in FAL's proposed general rate increase, but they will benefit immediately from that adjustment.

[6] In furtherance of its offer of settlement, FAL has already filed supplements to its Tariffs FMC-F Nos. 17 and 18, effective August 24, 1979, providing for a 5.6 percent general rate increase.

[7] In making this statement, FAL does not intend to engage in a substantive dispute over methodology with the Staff, but merely to point out that even though that methodology has been used for settlement purposes, the issue of the appropriate methodology has not been resolved here, nor is it intended to be resolved by this offer of settlement. FAL, of course, does not agree that the Staff's methodology is the correct one. By endorsing the offer of settlement, Hearing Counsel does not also implicitly endorse FAL's methodology as the proper means of calculating FAL's rate of return on investment.

In addition to the relatively small amount of money involved in this proceeding, Hearing Counsel is mindful of the inexactness of the projected cost and revenue figures sumitted [sic] by FAL. As FAL has indicated, "the entire dollar amount at issue ($31,852) reflects the gross revenue of only about six containers." Given the margin of error necessarily involved in the calculation of projected results, coupled with the imprecision inherent in the science of economics, the remaining dollar amount in dispute appears all the less significant.

DISCUSSION AND CONCLUSIONS

It is well settled that legislative, judicial and Commission policy foster the settlement of administrative proceedings.

The right to seek settlement of administrative proceedings is expressly mandated by section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. § 554(c)(1), which provides:

The agency shall give all interested parties opportunity for—

(1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit;

The United States Court of Appeals for the District of Columbia Circuit perceives this provision and its legislative history "as being of the 'greatest importance' to the functioning of the administrative process."[8] *Pennsylvania Gas & Water Co. v. Federal Power Commission,* 463 F.2d 1242, 1247 (D.C. Cir. 1972). The court emphasized that "[t]he whole purpose of the informal settlement provision is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest." *Id.*

The Commission has implemented its mandate by rule[9] and reinforced the rule with the policy statement that: "The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck, Sharp & Dohme v. Atlantic Lines,* 17 F.M.C. 244, 247 (1973).

In furtherance of this policy, the Commission has authorized settlements of administrative proceedings on the basis of a compromised reparation payment

[8] Senate Judiciary Comm., Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 203 (1945). In considering the settlement provision in S. 7, 79th Cong., 1st Sess. (1945), which ultimately became Section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

Subsection (b) [now Section 554(c) of the Administrative Procedure Act] provides that, even where formal hearing and decision procedures are available to parties, the agencies and parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the Administrative process. . . . The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves.

S. Doc. No. 248, *supra,* at 24.

[9] Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . ."

Rule 94(a)(1), 46 C.F.R. § 502.94(a)(1) provides in pertinent part: "Prior to any hearing the Commission or presiding officer may direct all interested parties, by written notice, to attend one or more prehearing conferences for the purpose of considering any settlement under § 502.91 (Rule 91). . . ."

Rule 147(a), 46 C.F.R. § 502.147(a), provides, as relevant: "The officer designated to hear a case shall have authority to . . . hold conferences for the settlement . . . of issues. . . ."

absent admissions of findings of violation of the Shipping Act. *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau,* 18 SRR 619 (1978); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.,* 18 SRR 744 (1978); *Old Ben Coal Co. v. Sea-Land Service, Inc.,* 18 SRR 1085 (1978); *Organic Checmials v. Atlanttrafik Express Service,* 18 SRR 1536a (1979).

More particularly, there is Commission precedent granting a motion to discontinue a general rate investigation, unopposed by Hearing Counsel,[10] on the carrier's promise to effectuate a partial rollback of rates. Docket No. 1068, *Leeward & Windward Islands & Guianas Conference General Increase in Rates in the Atlantic/Gulf U.S. Virgin Islands Trade* (unreported, 1963).[11]

Settlement of rate proceedings is consistent with the policy of the Administrative Conference of the United States, which by its Assembly action adopted June 7–8, 1978, recommended:[12]

> Agencies charged with ratemaking responsibility should encourage the parties to controverted rate cases to settle them by agreement.

With the foregoing principles in mind, I find that the offer of settlement is in the public interest and merits approval.

The offer is an equitable solution to a difficult situation and represents a responsible approach to rate regulation. FAL has offered to give up a perceived need for certain revenues in order currently to conserve part, if not all, of the anticipated return from the general rate increase which otherwise would be consumed by litigation expenses. Thus, the ratepayers and consumers are immediately benefited by the roll/back refund. As Hearing Counsel has pointed out, there is a deferred benefit, too. The potential additional costs of litigation, because they will be eliminated, will not ultimately be borne by the ratepayers and consumers.

Hearing Counsel's endorsement of the proposal also reflects a sound and mature judgment in coping with the problem of bringing agency proceedings "within the bounds of reason and the agencies competence to deal with them." *Pennsylvania Gas & Water Co. v. Federal Power Commission, supra,* 463 F2d at 1246. The support given by Hearing Counsel offers pragmatic assistance to FAL's responsible initiative, and it does so by placing the using public's interest ahead of important, but technical, methodology issues without in any way abandoning Hearing Counsel's belief in the validity of its position. Moreover, Hearing Counsel's response to the offer permits the Commission and Staff to conserve considerable time and energy by obviating the need for formal resolution of a controverted rate case. This, too, is an appropriate factor to be considered by the Commission in determining whether and under what circumstances to terminate a rate proceeding. *Wisconsin v. Federal Power Commission,* 373 U.S. 294, 311 (1963).

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[10] The court, in *Pennsylvania Gas & Water Co. v. Federal Power Commission, supra,* upheld the right of a regulatory agency to approve a proposed settlement of a rate proceeding with less than unanimous consent (including opposition of the agency's staff). Reasoning further, the court stated that the particular agency concerned "*cannot refuse to consider* a proposal which appears, on its face at least, consistent with [its] duty [of protecting the ultimate consumer]." 463 F.2d at 1247–1252.

[11] It is interesting, historically, to note that movant's counsel was Harold Leventhal, now a Judge of the United States Court of Appeals for the District of Columbia Circuit.

[12] 1978 Report, Administrative Conference of the United States, at 36.

Accordingly, it is ordered[13] that:

1. Offer of settlement be approved.

2. FAL shall refund that portion of its general rate increase, already collected, which exceeds 5.6 percent.

3. Supplement No. 3 to FAL's Tariff No. 17 and Supplement No. 3 to FAL's Tariff No. 18, which became effective August 24, 1979, shall not be increased during the 1979 Seattle, Washington/Western Alaska navigation season without prior approval from the Commission.

4. The motion to terminate this proceeding is granted.[14]

5. The proceeding is discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

August 1, 1979

[13] "[I]f on examination [settlements] are found equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all the parties. . . ." *Pennsylvania Gas & Water Co. v. Federal Power Commission, supra,* 463 F2d at 1246.

[14] In recognition of the procedural time constraints established by the recent Public Law 95-475, amendments to sections 3 and 4 of the Intercoastal Shipping Act, 1933, FAL's offer states that if the Commission were to reject the offer, FAL would have no objection to ultimate decision of the matter within 240 days rather than 180 days. Hearing Counsel supports this position, noting that the Commission, in its discretion and for good cause may extend the 180-day time period for Commission action by 60 days and suggests that delay occasioned by a bona fide attempt to resolve controverted issues by settlement qualifies as a proper showing of good cause. I agree. However, because of those time constraints, it is suggested that the Commission consider whether to shorten the time period established by Rule 227, 46 C.F.R. §502.227, for review of this order.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 594(I)

GIRTON MANUFACTURING COMPANY

v.

HELLENIC LINES LIMITED

PARTIAL ADOPTION OF DECISION OF SETTLEMENT OFFICER

September 5, 1979

The Commission has undertaken a review of the decision of Settlement Officer James K. Cooper, served July 13, 1979, in which Girton Manufacturing Company (Complainant) was awarded reparation of $409.30 from Hellenic Lines Limited (Respondent). Complainant alleged, and the Settlement Officer found, that Respondent overcharged Complainant $409.30 by charging the rate for Cargo NOS, Nonhazardous instead of Machinery, NOS for a beverage crate washer transported by Respondent from Philadelphia, Pennsylvania to Dubai, United Arab Emirates on February 22, 1977. We agree with the ultimate conclusion of the Settlement Officer and his award of reparations for the reasons set forth in his decision.

We disagree, however, with the Settlement Officer's denial of Complainant's claim for interest on the amount of reparation. Respondent failed to respond to Complainant's overcharge claim filed April 3, 1978,[1] and to Complainant's three subsequent tracings in June, July, and September, 1978. No explanation for the application of the Cargo, NOS rate was made either to Complainant or to the Commission.

Award of interest, like award of reparations, is discretionary with the Commission. *Flota Mercante Grancolombiana v. Federal Maritime Commission*, 373 F.2d 674 (D.C. Cir. 1967). The Commission concludes that the facts of this case justify an award of interest on the reparation at 6% accruing from April 3, 1978, the date that Complainant filed its informal overcharge claim with Respondent.

[1] The Settlement Officer's decision erroneously notes this date as April 3, 1979.

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer is adopted except as indicated; and

IT IS FURTHER ORDERED, That interest on the reparation is awarded at 6% accruing from April 3, 1978, until payment is made; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 594(I)

GIRTON MANUFACTURING COMPANY

v.

HELLENIC LINES LIMITED

DECISION OF JAMES K. COOPER, SETTLEMENT OFFICER*

Partially Adopted September 5, 1979

Reparation Awarded

Girton Manufacturing Company (complainant) in a claim filed October 5, 1978, claims $409.30 as reparation from Hellenic Lines Limited (respondent) for a alleged overcharge on a shipment described on the bill of lading as "1 crate: Beverage Case Washer." The shipment moved on the respondent's vessel Hellenic Laurel, under bill of lading number P-001, dated February 22, 1977. The shipment had a weight of 4,260 lbs. and measured 490 cubic feet. The shipment was loaded on board the respondent's vessel at Philadelphia, PA, and moved to the port of Dubai, U.A.E. The freight charges were paid by the complainant on March 25, 1977.

The complainant states that the respondent rated the shipment as "Cargo NOS, nonhazardous," per Item 215 of Tariff No. 5, FMC 5 published by the "8900" Rate Agreement, of which respondent is a participating member.

The complainant states that the respondent should have rated the shipment as "machinery, NOS" per Item 565 of Tariff No. 5, FMC 5 published by the "8900" Rate Agreement.

The complainant stated the respondent failed to respond to its overcharge claim BZS-46 filed on April 3, 1979, and failed to respond to tracings dated June 26, 1978; July 19, 1978; and September 19, 1978.

*Both parties having consented to the informal procedure of 46 C.F.R. § 502.301-304 (as amended), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

According to the complainant, the overcharge is determined as follows:

Item 215, Cargo NOS, nonhazardous		
Rate $188.25 per 40 cubic feet		
plus surcharges	Total Charges	$3,805.00
Item 565, Machinery NOS		
Rate $168.00 per 40 cubic feet		
plus surcharges	Total Charges	3,395.70
	Overcharge	$ 409.30

A review of the complaint, supporting documentation and the involved tariff items confirms the complainant's overcharge allegation. The shipment was clearly described on the bill of lading as a "Beverage Case Washer." The supporting invoice and advertising material clearly indicate that the commodity in question was in fact a machine to be utilized for the purpose of washing cases and boxes. Therefore, the shipment would fall clearly within the description of Tariff Item 565, 5th Revised Page 96-A, effective January 24, 1977, which bears the heading "Machines and Machinery and Parts thereof, NOS, INDUSTRIAL," at a rate of $168.00 W/M.

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 under its applicable tariff. Accordingly, the complainant is awarded reparation in the amount of $409.30. The claim for interest on the amount of reparation is denied.

(S) JAMES K. COOPER
Settlement Officer

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 387(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

MOORE-MCCORMACK LINES, INC.

REPORT ON REMAND

September 12, 1979

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

This matter is now before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit.

The proceeding was instituted by a complaint filed by Pan American Health Organization (PAHO) alleging that Moore-McCormack Lines, Inc. (Respondent), had violated section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)), by collecting freight charges in excess of those provided in the applicable tariff[1] on a shipment described in the bill of lading as "stationery," carried from Baltimore, Maryland, to Rio de Janeiro, Brazil.

Respondent assessed the rate provided in the Tariff for "PAPER, VIZ.: Stationery."[2] PAHO contended that the description in the bill of lading was erroneous and that the shipment should have been described instead as "PAPER, VIZ.: Bond, Sulphite or Sulphite and rag mixed—see PRINTING PAPER" for which the Tariff provided a lower rate.[3]

With the consent of both parties, the proceeding was conducted under the Informal Procedure for the Adjudication of Small Claims provided in subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.301, *et seq.*).

[1] Inter-American Freight Conference—Section A Tariff No. 3 (FMC No. 7), hereinafter referred to as "Tariff."

[2] 7th Rev. page 148 effective April 1, 1975.

[3] 10th Rev. page 146, effective November 1, 1974, and 19th Rev. page 147, effective April 1, 1975.

In a decision issued October 14, 1977, the Settlement Officer awarded reparation upon finding that PAHO had sustained its burden of proving that the shipment consisted of sulphite bond paper and should have been so rated.

On review, the Commission reversed the Settlement Officer's decision and determined that the tariff description "PAPER, VIZ.: Stationery" was more specific than "PAPER, VIZ.: Bond, Sulphite . . . see PRINTING PAPER." It, therefore, concluded that the carrier had properly classified and rated the shipment and denied reparation.[4]

On September 8, 1978, PAHO filed with the United States Court of Appeals for the District of Columbia Circuit a Petition for Review of the Commission's Report. The Court by Order served July 18, 1979, remanded the record to the Commission for:

(1) an explanation as to why "'stationery' is a more specific description than 'PAPER, VIZ.: Bond, Sulphite and Sulphite and Rag Mix—see PRINTING PAPER;'" and

(2) a delineation of the scope of petitioner's burden on the question of the appropriate tariff description.

DISCUSSION

In determining which of the two descriptions at issue[5] is more specific, the Commission took into consideration the fact that while bond paper is commonly used for stationery, it may also be employed for other purposes such as, the making of documents,[6] or for printing, as contemplated in the Tariff, and could thus come in different shapes such as sheets or rolls. The making of stationery would require a further step in the manufacturing process, that is the cutting of the paper to specified sizes in order to obtain the end product. The finished article, therefore, rather than the raw materials used in its manufacture, provides a more specific basis for the tariff classification of the product. The conclusion that the carrier properly classified and rated the shipment rests on these grounds.[7]

With respect to the burden of proof, although the shipper is conclusively presumed to have knowledge of the carrier's tariff,[8] the Commission has recognized the bona fide errors may occur in the preparation of shipping documents, and a complainant seeking reparation under section 22 of the Shipping Act,

[4] A petition filed by PAHO requesting the Commission to reconsider its decision was subsequently denied.

[5] The description in the bill of lading is based on the Statistical Classification of Domestic and Foreign Commodities Exported from the United States, U.S. Department of Commerce, Bureau of the Census (1971), page 140, Schedule B commodity #642.3040, a copy of which is in the record.
The description "Stationery" is found on 7th Rev. page 148 of the Tariff, effective April 1, 1975.

[6] According to the Third New International Dictionary of the English Language Unabridged (1964), bond paper is:

a strong durable paper of a type orig. made for documents (as government bonds) and now commonly used for letterheads and other stationery. At p. 250.

[7] *U.S. v. Gulf Ref. Co.*, 268 U.S. 542 (1925); *Associated Press v. F.C.C.*, 452 F.2d 1290 (D.C. Cir. 1971) [p]rovisions under a specific tariff designation prevail over those included under a more general heading." at 1296; *Corn Product Co. v. Hamburg-Amerika Lines*, 10 F.M.C. 388 (1967).

[8] *Kansas City So. Ry. Co. v. Carl*, 227 U.S. 639, 653 (1913).

1916 for freight overcharges caused by such error, must set forth sufficient facts to prove with reasonable certainty and definiteness the validity of its claim by a preponderance of the evidence.[9] Here, in fact, the carrier is not denying that the office stationery was made of sulphite bond paper so that no facts are disputed and in need of further proof.

In the absence of disputed facts, the interpretation of the tariff becomes a question of law. Under section 304 of the Informal Procedure for the Adjudication of Small Claims the parties to a proceeding may file with their pleadings memoranda, briefs, arguments, citing legal authority and precedents in support of their position. 46 C.F.R. § 502.304(a) and (e). As is evident from the record, PAHO availed itself of this opportunity.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[9] *Olin Construction Company, Inc. v. Occupational S. & H. Rev. Com'n*, 525 F.2d 464 (2d Cir. 1975). McCormick on Evidence (1972 ed.) at 853.

The Commission held that once the shipment has left the custody of the carrier, and is no longer available for inspection, the shipper has a "heavy burden" of proving that the shipment is other than described on the bill of lading. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 S.R.R. 16 (1972). This, "heavy burden" however, relates to the shipper's difficulty in obtaining the necessary evidence rather than to the weight to be given to such evidence.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-56

WEST GULF MARITIME ASSOCIATION

v.

THE CITY OF GALVESTON
(BOARD OF TRUSTEES OF THE GALVESTON WHARVES)

An indemnification requirement in a terminal tariff which would relieve a port from liability for its own negligence is an unreasonable practice violative of section 17 of the Shipping Act, 1916.

A terminal tariff requirement that steamship agencies and stevedoring companies obtain general liability and property damage insurance is reasonable, especially in light of the recent history of accidents at the port.

A terminal tariff requirement that the port be reimbursed litigation expenses if the port succeeds in litigation, but which does not require the port to pay such expenses if it unsuccessfully initiates litigation, imposes a unilateral obligation which is unreasonable and a violation of section 17 of the Shipping Act, 1916.

A terminal tariff item which would permit application of a port user's payments of port charges to the account of another user is unreasonable and violative of section 17 of the Shipping Act, 1916.

Robert Eikel for West Gulf Maritime Association

Benjamin R. Powel and *Carl S. Parker, Jr.* for the City of Galveston (Board of Trustees of the Galveston Wharves).

David M. Schacter, Richard L. Landes, Robert W. Parkin and *Leslie E. Still, Jr.* for California Association of Port Authorities.

Charles H. Lombard for Alabama State Docks Department.

Aaron W. Reese and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

September 14, 1979

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

This proceeding was initiated upon the complaint of West Gulf Maritime Association (WGMA),[1] filed November 15, 1977, alleging that nine items of

[1] WGMA is a trade association composed of steamship agents and stevedore companies, using port facilities along the Gulf of Mexico.

Tariff Circuilar No. 4-D of the Galveston Wharves (the Port) violate sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§815, 816). Parties to the proceeding are WGMA, the Port, and Intervenors the California Association of Port Authorities (CAPA), the Alabama State Docks Department, and the Commission's Bureau of Hearing Counsel (Hearing Counsel).[2] Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision on May 1, 1979, in which he found three of the tariff items to violate section 17, three to be just and reasonable, and three to be "subjects for review and adjustment by the wharves."[3] The proceeding is now before the Commission on exceptions to the Presiding Officer's decision filed by WGMA, the Port, and CAPA. WGMA and Hearing Counsel filed Replies to these Exceptions.

DISCUSSION AND CONCLUSIONS

Although WGMA alleges section 16 and 17 violations in its complaint, it has neither persuasively argued its section 16 contentions in its briefs nor presented evidence during the hearings of undue preference or advantage. In fact, a WGMA witness testified that the provisions in issue have proved no disadvantage even to his three-person family enterprise. WGMA has failed to carry its burden in demonstrating any violation of section 16 of the Act. The remaining issues to be decided involve the allegations of section 17 violations.

In the discussion that follows, the tariff items at issue will be set forth *seriatim*, followed by the position of the parties and the Commission's conclusion on each.

Item No. 5(r):

"*USER, DEFINITION OF:* A user of the facilities managed and controlled by the Board of Trustees of the Galveston Wharves shall include, but not be limited to:

1. Any steamship agency and/or stevedoring company doing business on or in connection with such facilities.
2. Any person, partnership, corporation or other entity doing business on or in connection with such facilities.
3. Any person, partnership, corporation or other entity owning or having custody of cargo on or moving over such facilities."

The Presiding Officer found this item to be reasonable, to which finding WGMA excepts. WGMA argues that the definition of user is unnecessarily broad in that it includes steamship agents, persons without business connections with the Port, and persons not on the Port's premises. The Port, CAPA,[4] and Hearing Counsel argue that steamship agents are quite properly considered "users"; that the definition of user is not otherwise as broad as WGMA suggests; and that the definition is consistent with the Commission's decision in

[2] United States Lines, Inc. filed a petition to intervene on June 25, 1979, following the close of the hearing in this proceeding. When filed after hearings have been closed, a petition for intervention will not normally be granted. 46 C.F.R. section 502.72(a). Moreover, the petitioner's interest in the subject matter of the instant proceeding is adequately protected in Docket No. 78-15, *United States Lines, Inc. v. Maryland Port Administration*. Accordingly, the petition is denied.

[3] The context of these three findings indicates that the Presiding Officer found the items to be violative of section 17.

[4] CAPA concurs with the Port on every tariff item, except as otherwise indicated.

West Gulf Maritime Association v. Port of Houston Authority, 18 S.R.R. 783 (1978).

The Commission finds the definition of "user" to be a reasonable one. The rationale of *West Gulf Maritime Association v. Port of Houston Authority, supra,* is consistent with our finding that steamship agents are sufficiently involved in the use of port facilities to be subject to those tariff provisions which the Commission herein concludes are reasonable. Furthermore, the Commission has found, *infra,* that several of the tariff items in issue violate section 17, and this, too, diminishes the effect imputed to the definition by WGMA.

Item 98.1:

"*INDEMNITY:* Each User of the facilities of the Board of Trustees of the Galveston Wharves shall indemnify and save harmless the Board of Trustees of the Galveston Wharves and the City of Galveston from and against any and all claims, actions, damages, liability and expense, including reasonable Attorneys' fees and litigation expenses, in connection with loss of life, bodily injury and damage to property (including the property of such User), occurring in connection with the use of or arising from the use of any of the facilities of the Board of Trustees of the Galveston Wharves caused in whole or in part by any such User, such User's employees (including loaned employees), agents, contractors and invitees (other than those steamship agencies and stevedoring companies subject to Item No. 98.3), or arising from or incidental to such User's operations on the facilities of the Board of Trustees of the Galveston Wharves. Each User of the facilities of the Board of Trustees of the Galveston Wharves waives all claims such User may have against the Board of Trustees of the Galveston Wharves and/or the City of Galveston for loss or damage covered by any insurance policy or policies covering in whole or in part such Users' doing business on or in connection with the facilities of the Galveston Wharves, and each such User shall cause its insurance carrier or carriers to waive any right of subrogation with respect thereto and to so notify the Board of Trustees of the Galveston Wharves of such waiver."

The Port excepts to the Presiding Officer's finding that this item is unreasonable. The Port points out that indemnification is required only where the user is at least partially responsible for damage to cargo, and not where the Port is solely responsible. The Port argues that exculpatory clauses in tariff provisions are not void as a matter of law. It also contends that the subrogation clause in Item No. 98.1 is reasonable, because it requires a waiver only if the user is covered by an insurance policy, and properly places the risk of insured losses on the insurance company writing the primary coverage.

WGMA opposes Item No. 98.1, claiming that the item would require users to indemnify the Port against the Port's own negligence. Hearing Counsel concurs with WGMA that Item No. 98.1 is unreasonable, and emphasizes that the tariff item would require indemnification and waiver of claims and subrogation even when the Port is primarily negligent in an incident and the user but only slightly at fault.

It is well established that exculpatory clauses are invalid as a matter of law in common carrier and public utility relationships. *See, e.g., Bisso v. Inland Waterways Corp.,* 349 U.S. 85 (1955); *Express Co. v. Caldwell,* 21 Wall. 264 (1874). The Port relies heavily on *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.,* 360 U.S. 411 (1959), citing that case for the proposition that the *Bisso* rule does not apply to exculpatory clauses in tariffs filed with regulatory agencies. In *Southwestern Sugar,* however, the Court merely chose to let the Interstate Commerce Commission, rather than the Court, have the first opportunity to rule on the legality of the clause, and suggested that perhaps the towing rates in question reflected savings derived from application of the exculpatory clause. *Southwestern Sugar* is not authority for the permissibility of exculpatory clauses in tariffs such as the Port's. Moreover, the *Bisso* rule exception suggested in *Southwestern Sugar* does not apply in the instant proceeding. The record below does not indicate that any savings resulting from the exculpatory clause are passed on to users.[5]

Exculpatory clauses in terminal tariffs have been found by the Commission to violate section 17 of the Act. In *Truck and Lighter Loading and Unloading Practices at New York Harbor,* 9 F.M.C. 505, 515 (1966), the Commission found unreasonable a terminal operator's disclaimer of responsibility for truckers' delays, because the clause would exculpate the operator for delays for which it is at fault. The Commission's decision was upheld in *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 389 F.2d 962 (D.C. Cir. 1968). In *Lucidi v. Stockton Port District,* 19 S.R.R. 441 (June 8, 1979), a terminal tariff item which disclaimed responsibility for damage to cargo caused by rodents was found unreasonable. The Initial Decision, which became administratively final upon absence of review, stated:

> To permit the Port to isolate itself from liability, if such liability accrued by reason of the Port's negligence by the mere publication of an exculpatory tariff provision, is unjust and unreasonable, in violation of section 17 of the Act..

Lucidi, supra, 19 S.R.R. at 449

Although the Port's indemnification requirement in the instant proceeding would not apply if the Port were wholly responsible for an occurrence, it would apply in situations in which the Port were partially responsible, even if more so than the user. We find that the indemnity requirements and the waiver of claims and subrogation provisions of the Port's tariff are unreasonable for precisely the reasons enunciated in *Bisso, Truck and Lighter,* and *Lucidi,* and conclude that Item No. 98.1 is violative of section 17.

Item 98.3:

> *INSURANCE:* Each steamship agency and each stevedoring company doing business on or in connection with the facilities of the Board of Trustees of the Galveston Wharves shall keep in full force and effect Public Liability and Property Damage Insurance covering its operations to be carried out upon or in connection with the facilities of the Board of Trustees of the Galveston Wharves. The limits of liability shall be not less than $5,000,000 per occurrence. The Policy or Policies shall contain an endorsement insuring to such limits of liability the indemnity set forth in Item No. 98.1 of this Tariff, and shall contain a clause that the insurer will not cancel or change the insurance without first giving the Board of Trustees of the Galveston Wharves thirty (30) days prior written notice. Such insurance shall be placed in a company or companies having a current Best's General Policyholders Rating of A+ or A and a Best's Financial Rating of at least XII, or their equivalents, and a copy of the Policy or Policies of Insurance, or Certificate or Certificates of Insurance, shall be delivered to the Board of Trustees of the Galveston Wharves. Certificate or Certificates of Insurance so furnished shall certify that the Policy or Policies comply with the requirements of this item."

The Presiding Officer rejected Item No. 98.3 in its entirety. The Port excepts, contending that the item is a reasonable business necessity, especially in light of serious accidents at the Port in recent years resulting in payment of millions of dollars in settlements of claims. WGMA argues that Item No. 98.3

[5] *See also Dixilyn Drilling Corp. v. Crecent* Towing & Salvage Co., 372 U.S. 697, 698 (1963).

is unreasonable in requiring insurance of the indemnity set forth in Item No. 98.1, because no carrier or public utility may require a user to procure insurance for the carrier's or utility's benefit. Also, WGMA protests that the minimum $5,000,000 limit is excessively high. WGMA does not contest the general liability and property damage insurance requirements of the tariff item. Hearing Counsel considers the general insurance requirements and the $5,000,000 liability limit of Item No. 98.3 reasonable, but agrees with WGMA that the tariff item's requirement that users insure the indemnity set forth in Item No. 98.1 is unlawful.

For the reasons set forth in our discussion of Item No. 98.1, we conclude that the indemnity insurance requirement of Item No. 98.3 violates section 17. It is unreasonable to require a user to indemnify the Port against the Port's own negligence, and it is equally unreasonable to require the user to insure that indemnity. However, the record clearly establishes the need for users to obtain liability and property damage insurance. Accidents at the Port in recent years have caused millions of dollars in losses, and the Port has experienced increasing difficulty in obtaining sufficient insurance coverage. The record also reflects that obtaining insurance in the amounts required by the tariff has not proven prohibitive to users. It is concluded that the portions of Item No. 98.3 requiring steamship agencies and stevedoring companies doing business with the Port to obtain general liability and property damage insurance, and establishing a $5,000,000 minimum limit of liability, are just and reasonable practices.

Item 108.2:

"*LITIGATION EXPENSE*: In case suit shall be brought by the Board of Trustees of the Galveston Wharves through the City of Galveston to collect any monies due, enforce any provision or remedy any default under this tariff by a User of the facilities of the Board of Trustees of the Galveston Wharves, and the Board of Trustees of the Galveston Wharves through the City of Galveston shall prevail, such User shall pay all expenses incurred by the Board of Trustees of the Galveston Wharves through the City of Galveston in connection with such suit, including reasonable Attorneys' fees."

Item 108.3:

"*DELINQUENT INVOICES:* Any invoice unpaid on the last day of the month following the month in which the invoice was issued is delinquent. Delinquent accounts on which collection efforts require use of a legal counsel and/or litigation shall be assessed interest charges at the rate of ten percent (10%) per annum from the first date the invoice becomes delinquent, and in case of litigation, reasonable attorneys' fees (at least 10% of the amount due and owing) and litigation expenses will also be assessed."

Item Nos. 98.2 and 108.3[6] were ordered "reviewed and adjusted" by the Presiding Officer. WGMA argues that the litigation expense provisions of the items are invalid because each party to a dispute should pay only its own expenses. Hearing Counsel also challenges the litigation expense provisions.

[6] Item No. 98.2 was cancelled at the Port's June 27, 1979 Board of Trustees meeting, and Item No. 108.3 was revised, effective August 1, 1979, to read as follows:

Any invoice unpaid on the last day of the month following the month in which the invoice was issued is delinquent. Delinquent accounts upon which suit is filed for the collection thereof shall be assessed interest charges at the rate of ten percent (10%) per annum *from the first day the invoice becomes delinquent until paid. If Judgment is obtained, Attorneys' fees of ten percent (10%)* of the amount adjudged due and owing shall be assessed.

Hearing Counsel is of the opinion that because these provisions are not reciprocal and do not provide that the Port will pay a user's litigation expenses in the event the user prevails in court, they are unreasonable. Thus, Hearing Counsel also excepts to the Port's amendment to Item No. 108.3, noting that the item still requires an award of attorneys' fees if the Port obtains judgment, but does not require the Port to pay attorneys' fees if it loses.[7] Hearing Counsel agrees, however, with the Port's deletion of Item No. 98.2. The Port defends the items, claiming that requiring litigation expenses to be borne by those who wrongfully give rise to that litigation is just and reasonable.

These tariff items impose a unilateral obligation on one party—the user. They do not require the Port to recompense users if the Port unsuccessfully initiates legal action. The Commission has found comparable one-sided requirements to be violative of section 17.[8] We conclude that Item Nos. 98.2 and that portion of 108.3 dealing with attorneys' fees are therefore unjust and unreasonable within the meaning of section 17.[9]

Item 98.4:

"*CARE, CUSTODY & CONTROL OF CARGO:* The rates published in this tariff do not provide for, and the Board of Trustees of the Galveston Wharves does not accept care, custody and control of any cargo or other property while on or in the wharves, docks, transit sheds, warehouses or other facilities managed and controlled by the Board of Trustees of the Galveston Wharves; except for cargo delivered to and receipted for by Pier Point Packers Division of Galveston Wharves for subsequent crating and further handling."

The Presiding Officer ordered the Port to "review and adjust" this tariff item. WGMA contends that the item is unjust in that it would absolve the Port from the necessity to maintain its facilities properly. The Port alleges, and Hearing Counsel agrees, that the disclaimer of care, custody and control of cargo was not intended as an exoneration from liability for the Port's negligence but rather indicates that the Port does not become a custodian or bailee of inbound or outbound cargo.[10]

The Commission finds that Item No. 98.4 does not, contrary to WGMA's contentions, disclaim liability for the Port's negligence in its occasional loading and unloading of trucks and railcars. The item merely reflects that the Port is not an operating port; its personnel do not regularly perform typical terminal services, unless specifically requested to do so for a fee. The Port admits, and the record reflects, that the Port honors claims for cargo damaged by its negligent handling. With the understanding that this tariff item does not imply a disclaimer of liability for negligent cargo handling, it is concluded that it is not in violation of section 17.

[7] WGMA, however, expresses no opposition to the Port's revision of Item No. 108.3.

[8] *See, e.g., Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, 18 F.M.C. 140, 164 (1975), *aff'd, Cargill, Inc. v. Federal Maritime Commission*, 530 F.2d 1062 (D.C. Cir. 1976), *cert. den.*, 429 U.S. 868 (1976), in which a terminal operator's imposition of an indemnity requirement on stevedores for delays caused by failure to provide sufficient crews was found to be an unreasonable practice, because it awarded no compensation to stevedores for delays caused by the terminal operator.

[9] The revised version of Item No. 108.3 is also unacceptable, because it continues to require that attorneys' fees be paid only if the Port is the successful litigant.

[10] Except for cargo delivered to and receipted by the Pier Point Packers Division of the Port, as expressly noted in the tariff item.

Item 108.2(c):

"*PAYMENT OF CHARGES:*

(c) The Board of Trustees of the Galveston Wharves reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and/or agents, or other Users of the facilities."

This item was found unlawful by the Presiding Officer. WGMA, CAPA, and Hearing Counsel contend that it is unjust in that it enables payments made by an agent on one principal's account to be applied to another's. The Port argues the item's legality on the ground that a steamship agent should be the party held primarily responsible for port charges.[11]

We find Item No. 108.2(c) to be a violation of section 17, and reject the Port's contention that the Commission should take action only upon the tariff's "abusive application" rather than to find it unlawful on its face. This tariff item would permit a user's payment to the Port to be applied to another user's account, if the latter were delinquent in its payments and the two shared an agent. Despite the Port's assurances that such an effect was not intended, the unreasonableness of the provision is readily apparent.[12]

Item 108.4:

"*DELINQUENT LIST:* All vessels, their owners and/or agents, stevedoring companies, or other Users of the facilities of the Board of Trustees of the Galveston Wharves whose account becomes delinquent as set forth in Item No. 108.3 may be placed on the delinquent list and may be denied further use of the facilities until all such charges together with any other charges due, shall have been paid."

Item No. 108.4 was found lawful by the Presiding Officer, despite WGMA's and Hearing Counsel's contention that the item would subject an agent to denial of use of facilities when one of its principals' accounts becomes delinquent. The Port argues that the tariff item would impose such sanctions only on the delinquent parties.

The Commission does not interpret Item No. 108.4 to permit denial of use of facilities by users not actually delinquent in making payments. We interpret this tariff item to permit sanctions only on the actual deliquent parties, unlike Item No. 108.2(c), which, prior to revision, clearly authorized sanctions on users not actually delinquent. With this understanding, we find that Item No. 108.4 is reasonable and does not violate section 17.

Item 109.1(b):

"*CARGO STATEMENTS REQUIRED:*

(b) *Certified Pier Demurrage Statements*

All vessels, their owners and/or agents using the facilities of the Board of Trustees of the Galveston Wharves shall file with the Billing Department of the Galveston Wharves a Certified Statement of Pier Demurrage on all outbound cargo loaded from such facilities. Such Certified Statement of Pier Demurrage must be filed on the forms and in the manner prescribed by the Executive Director and General Manager. A supply of the prescribed form may be obtained from the Galveston Wharves Billing Department.

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[11] This tariff was also revised, effective August 1, 1979. Item No. 108.2(c) now reads:

The Board of Trustees of the Galveston Wharves reserves the right to apply any payment received against the oldest bill rendered against vessels, their owners and/or agents, or other users of the facility, except that payment made on behalf of specific vessels and/or owners will be applied, as specified by the payor.

[12] The Port's revision of this tariff item eliminates its fatal defect, however, and the Commission approves the amendment.

> In lieu of filing a Certified Statement of Pier Demurrage, the vessel, its owner and/or agent, may file a certified copy of the vessel's manifest of outbound cargo and copies of all Receiving Reports on cargo loaded aboard the vessel along with a sworn statement certifying that the copies furnished are true and correct copies of the Receiving Reports.
>
> The Certified Statement of Pier Demurrage, or in lieu thereof, copies of Receiving Reports and manifest of outbound cargo, must be filed not later than ten (10) days after sailing. Failure to file Certified Statement of Pier Demurrage, or Receiving Reports and manifest, within time specified shall constitute cause for suspension of preferential berth assignment, suspension of credit, or suspension of other vessel privileges until remedied."

WGMA, protesting the Presiding Officer's approval of this tariff provision, argues that the pier demurrage statement requirements are unjust in that they are ambiguous and permit suspension of privileges of vessels which are not delinquent. The Port and Hearing Counsel disagree, finding them reasonable in all respects.

We do not read Item No. 109.1(b) to permit suspension of vessel privileges of those not actually delinquent in submitting pier demurrage statements. We conclude, therefore, that the provision's requirements and sanctions for non-compliance are reasonable.

In conclusion, Item Nos. 98.1, 98.2, 108.2(c) (prior to amendment), the portion of Item No. 108.3 dealing with attorneys' fees and litigation expenses (even as amended), and the portion of Item No. 98.3 requiring insurance of the indemnity set forth in Item No. 98.1, are found to be unjust and unreasonable practices in violation of section 17 of the Shipping Act, 1916. Item Nos. 5(r), 98.4, 108.4, and 109.1(b), as interpreted by the Commission, are found to be reasonable, as are those portions of Item Nos. 98.3 and 108.3 not found unreasonable.[13]

THEREFORE, IT IS ORDERED, That Item Nos. 98.1, 98.2, 108.2(c), and those portions of Item Nos. 98.3 and 108.3 found unlawful, are cancelled, effective immediately; and

IT IS FURTHER ORDERED, That the Board of Trustees of the Galveston Wharves file an amended tariff within 30 days, deleting the provisions found to be unlawful; and

IT IS FURTHER ORDERED, That the Exceptions of West Gulf Maritime Authority are denied; and

IT IS FURTHER ORDERED, That the Exceptions of the City of Galveston (Board of Trustees of the Galveston Wharves) and of the California Association of Port Authorities are granted to the limited extent indicated, and denied in all other respects; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

[13] Exceptions not specifically referred to in this Order have nevertheless been fully considered by the Commission.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-17

FARRELL LINES, INC.

v.

ASSOCIATED CONTAINER TRANSPORTATION (AUSTRALIA LTD.)
REDERIAKTIEBOLAGET TRANSATLANTIC
PAD SHIPPING AUSTRALIA PTY. LTD.

NOTICE

September 17, 1979

Notice is given that no appeal has been taken to the August 10, 1979, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 79-17

FARRELL LINES INCORPORATED

v.

ASSOCIATED CONTAINER TRANSPORTATION (AUSTRALIA) LTD.;
REDERIAKTIEBOLAGET TRANSATLANTIC; AND
PAD SHIPPING AUSTRALIA PTY. LTD.

DISCONTINUANCE OF PROCEEDING

Finalized September 17, 1979

PAD Line moves that the subject proceeding be discontinued. Farrell Lines has withdrawn its complaint, and Columbus Lines has withdrawn its intervention. These withdrawals were the result of a "Stipulation of Settlement" entered into by Farrell, Columbus and PAD Line. This stipulation is self-contained and constitutes the only and complete agreement made by Farrell, Columbus and PAD to settle their differences. Blue Star Line, in its capacity as a member of the Pacific Coast Australasia Tariff Bureau (PCATB) also consents to the above stipulation.

Hearing Counsel were permitted to intervene. Hearing Counsel now request that the complaint be dismissed, but subject to any action the Commission may wish to take to review the allegations contained in the complaint. Hearing Counsel request that the Administrative Law Judge find that the Stipulation of Settlement entered into by the parties constitutes a section-15 agreement and that it requires Commission approval.

For reasons stated below, the motion to discontinue is granted, and it is further found that the "Stipulation of Settlement" does not contain any provisions which require filing and approval under section 15 of the Shipping Act, 1916 (the Act).

This complaint was filed by Farrell Lines against the three-named respondents, which operate a joint service, pursuant to FMC Agreement No. 9882, in the trade between the Pacific Coast of the United States and Australia. The three respondents (under the flags of the United Kingdom, Sweden, and Australia) operate their joint service under the trade name of Pacific Australia Direct Line (PAD Line). PAD Line was operating three ro/ro vessels, and had advised Farrell that PAD Line would introduce a fourth ro/ro vessel into the trade at the end of April or early in May 1979.

Farrell and PAD Line, as well as intervener Columbus, are members of the Pacific Coast Australasia Tariff Bureau (PCATB). PCATB[1] is a conference created pursuant to FMC Agreement No. 50, and fixes rates in the trade herein to Australia, New Zealand, and numerous Pacific Islands.

PAD Line had announced its intention to withdraw from PCATB as of May 14, 1979, about the same time as the fourth ro/ro vessel would be available for service in the trade. The only other operators in the trade (besides Farrell, PAD, Columbus and Blue Star) are two nonconference lines (Karlander Kangaroo Line and FESCO).

There were said to be as of March 13, 1979, eighteen common carrier vessels in the trade, PAD with three, Farrell four, Columbus four, Karlander four, and FESCO four.

Farrell believes that it and the other carriers in the trade were experiencing insufficient cargo at remunerative rates. Farrell alleged that the fourth vessel to be put into the trade by PAD would not be owned or chartered exclusively by PAD, but rather that it is owned or chartered, at least in part, by Seaboard Shipping Company (Seaboard).

Further, it was alleged that Seaboard is itself, or through an affiliate, a shipper of lumber from British Columbia to Australia, and that Seaboard would receive special rates from PAD Line, with such rates not available to any other shipper. Farrell alleged violations of sections 15, 16 and 17 of the Act.

The "Stipulation of Settlement" recites five covenants, which are hereby summarized as followed:

1. The parties to the settlement, (PAD Line, Farrell Lines and Columbus Line), as PCATB members have agreed on a current tariff of rates which are compensatory and permit these PCATB members to be competitive in the trade.
2. For PCATB to function better, communications amongst its members require improvement, and the needs of the trade should be kept under regular review.
3. PAD Line is withdrawing its pending resignation from PCATB.
4. Farrell Lines is withdrawing its "Petition for Order to Show Cause" filed with the FMC, and Farrell Lines and Columbus Lines are withdrawing respectively their Complaint and Intervention in the subject proceeding (No. 79-17).
5. Farrell Lines, Columbus Line, and PAD Line expressly reserve their rights to raise the matters and issues referred to in such Petition and in such Complaint and Intervention, and their withdrawals are "without prejudice."

However, so long as PAD Line remains a PCATB member, Farrell Lines and Columbus Line will not oppose the introduction of the fourth ro/ro ship in the PAD Line fleet.

[1] On or before May 14, 1979, Blue Star Line apparently also became a member of PCATB. Blue Star apparently was not a member when the complaint in No. 79-17 was filed March 13, 1979.

"In addition, as long as PAD Line remains a PCATB member and operates no more than its existing four ships (or replacement vessels of comparable tonnage) plus occasional spot charters of temproary duration, Farrell Lines and Columbus Lines will not raise the issues or matters referred to in such Petition and in such Complaint and Intervention."

From a careful examination of the "Stipulation of Settlement," it is found and concluded that the stipulation does not contain any provisions which require filing and approval under section 15 of the Act.

Paragraph 1 of the stipulation briefly says that PCATB conference members have agreed on compensatory rates. This agreement in no way changes or goes beyond the approved PCATB agreement.

Paragraph 2 of the stipulation merely expresses the desire to improve communication among PCATB members.

Paragraph 3 of the stipulation provides that PAD Line withdraws its pending resignation from PCATB. PAD Line retains the right to withdraw from PCATB at any time. PAD Line makes no pledge to remain or not to remain in the Conference.

Paragraph 4 of the stipulation contains only the withdrawal of the complaint, intervention, etc.

Paragraphs 1 through 4 of the stipulation clearly contain no terms requiring section-15 approval.

In paragraph 5 of the stipulation, the three parties expressly reserve the right to relitigate the matters and issues in their Petition and Complaint-Intervention.

In addition, in paragraph 5, and this is the main matter stressed by Hearing Counsel, the three parties agree that as long as PAD Line remains a member of PCATB and operates no more than its existing four ships plus occasional spot charters, Farrell and Columbus will not relitigate the matters raised in their Petition and Complaint-Intervention.

The stipulation in paragraph 5 does *not* say that PAD Line will or will not expand its fleet beyond four vessels. Further, the stipulation in paragraph 5 does *not* say that PAD Line will or will not remain a PCATB Member.

Thus, none of the parties has made any binding commitment or agreement concerning its future continuing operations. The FMC's jurisdiction under section 15 applies to agreements of a continuing nature, but not to agreements such as the one herein.

The agreement herein is merely a promise not to litigate and the policy of this agency generally is to encourage the termination of litigation.

The Petition and Complaint-Intervention referred to above have been withdrawn without prejudice.

The subject proceeding hereby is discontinued.

The "Stipulation of Settlement" is not subject to Commission jurisdiction under section 15 of the Act.

(S) CHARLES E. MORGAN
Administrative Law Judge

August 10, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-47

SEA-LAND SERVICE, INC. (SEA-LAND) PROPOSED FIVE PERCENT GENERAL RATE INCREASE IN SIX PUERTO RICO AND VIRGIN ISLANDS TRADES

NOTICE

September 19, 1979

Notice is given that no exceptions have been filed to the August 17, 1979, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 79-47

SEA-LAND SERVICE, INC. (SEA-LAND) PROPOSED FIVE PERCENT GENERAL RATE INCREASE IN SIX PUERTO RICO AND VIRGIN ISLANDS TRADES

Finalized September 19, 1979

A five percent general rate increase, filed by Sea-Land Service, Inc., applicable to six Puerto Rico and Virgin Islands trades found to be *just and reasonable.*

Donald J. Brunner for respondent, Sea-Land Service, Inc.
William Blum for protestant, Government of the Virgin Islands.
John Robert Ewers, C. Douglass Miller and *Polly H. Frawley* as Hearing Counsel.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[1]

Pursuant to authority of sections 18(a) and 22 of the Shipping Act, 1916, as amended, 46 U.S.C. §817(a) and sections 3 and 4 of the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. §§845 and 845a, the Commission instituted an expedited investigation[2] into the lawfulness[3] of a five (5) percent general rate increase filed by respondent, Sea-Land Service, Inc. (Sea-Land). The rate increase was proposed in tariff matter[4] filed January 26, 1979, and was scheduled to become effective April 1, 1979, but its effective date was postponed to May 1, 1979, to coincide with a similar increase filed by a competing carrier, Puerto Rico Maritime Shipping Authority.

[1] The 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 C.F.R. §502.227).

[2] The investigation was instituted by Order of Investigation and Hearing (OIH) served April 30, 1979.

[3] The statutory test of lawfulness is whether the increased rates are just and reasonable; see 46 U.S.C. §§817(a) and 845.

[4] The OIH placed the following tariff matter under investigation:

1. FMC-F No. 27 (applying between U.S. Atlantic and Gulf Ports and Virgin Island Ports); Supplement No. 6 and 49 specified revised tariff pages.
2. FMC-F No. 34 (applying between U.S. Atlantic Ports and Ports in Puerto Rico); Supplement No. 8.
3. FMC-F No. 36 (applying from U.S. South Atlantic Ports to Ports in Puerto Rico); Supplement No. 6.
4. FMC-F No. 37 (applying from Ports in Puerto Rico to U.S. South Atlantic Ports); Supplement No. 6.
5. FMC-F No. 40 (applying from U.S. Gulf Ports to Ports in Puerto Rico); Supplement No. 5.
6. FMC-F No. 41 (applying from Ports in Puerto Rico to U.S. Gulf Ports); Supplement No. 5.
7. FMC-F No. 45 (applying from Rail Carrier's Terminals at U.S. Pacific Seaport Cities to Ports in Puerto Rico and the U.S. Virgin Islands); Supplement No. 6.*

The second ordering paragraph of the OIH ordered that "The proceeding be limited to an investigation of [six] areas." Six questions posed by the Commission delineated those areas. The paragraph was properly construed to mean that within the context of the overall inquiry into the lawfulness of the rates, the Commission was stressing the need for factual development of areas of special concern in this proceeding.[5]

The OIH named the following as parties to the proceeding: Sea-Land was named the respondent; the Government of the Virgin Islands (Government or VI) and Puerto Rico Manufacturers Association (PRMA)[6] were named protestants; Hearing Counsel was named a party pursuant to Rule 42 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.42.

The OIH, among other things, also established a procedural schedule for the proceeding pursuant to P.L. 94–475, a law amending provisions of the Intercoastal Shipping Act, 1933.[7]

BACKGROUND

After the filing of the increase and General Order 11 submissions and before the investigation was instituted, the Commission's Bureau of Industry Economics (Staff) conducted an analysis of the financial data submitted by Sea-Land. The Staff detected certain errors which Sea-Land corrected after discussions between Staff and Sea-Land's financial representative. The OIH took notice of those events, stating, at 5, "a number of areas regarding Sea-Land's data have been clarified."

8. FMC-F No. 46 (applying from Ports in Puerto Rico and the U.S. Virgin Islands to Rail Carrier's Terminals at U.S. Pacific Seaport Cities).*
9. FMC-F No. 53 (applying between San Juan, Puerto Rico and Canadian Ports with Interchange at New Jersey—Intermodal Tariff); Supplement No. 2 and 32 specified revised tariff pages.**

*Prior to the hearing, Sea-Land filed a motion to discontinue that portion of the investigation involving tariffs FMC-F No. 45 and FMC-F No. 46. The motion was based upon the recent decision in *Trailer Marine Transport Corp. v. F.M.C.*, 602 F. 2d 379 379 (D.C. Cir. 1979) (*TMT* case), which held that the Interstate Commerce Commission has exclusive jurisdiction over rail-water movements in the domestic offshore trades. In its reply to the motion, Hearing Counsel urged (1) that the motion was not then ripe for decision because the time for filing a petition for writ of certiorari in the *TMT* case had not expired, and (2) that the cited tariffs, insofar as they provide for motor-rail-water routings (they also provide for rail-water routings), are distinguishable from the rail-water operations under review in the *TMT* case. Inasmuch as (1) the Commission has not sought certiorari in the *TMT* case and the time for doing so has expired, and (2) the physical transfer of shipments at the United States ports named in the motor-rail-water routings are, in fact, rail-water interchanges and the movements are thus regulated by the Interstate Commerce Commission as rail-water operations—the *TMT* case appears to be controlling. This, of course, means that the cited tariffs, insofar as the questions of the lawfulness of the rates is concerned, are beyond the jurisdiction of this Commission. Accordingly the motion to discontinue should be granted. Nevertheless, because the proceeding was tried on the theory that the water portion of the rail-water tariffs were subject to the jurisdiction of the Commission, this ruling will not disturb the factual presentation agreed to by the parties.

**The Commission has determined that shipments of goods by motor carrier from Canada to Elizabeth, N.J., and thence by water to San Juan, Puerto Rico, under a through bill of lading, are in the domestic offshore trade and not in the foreign commerce of the United States and are regulated under the Intercoastal Shipping Act, 1933, as amended. *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, 18 SRR 1697 (1979).

[5] The parties participating in the proceeding have agreed that Exhibit No. 3, as supplemented by portions of Exhibits Nos. 5 and 6, all of which were received in evidence, constitute the answers to the six questions. The full text of the questions and responses appears as an Appendix to this decision.

[6] PRMA notified Administrative Law Judge Stanley M. Levy, then the presiding judge in the proceeding, that it would not appear at the prehearing conference on May 10, 1979. PRMA did not thereafter participate in the proceeding.

[7] The rate increases were filed subsequent to the effective date of P.L. 95-475, but prior to the effective date of the Commission's Procedural Rules implementing P.L. 95–475. (The Commission Rules (46 C.F.R. §502.6) became effective February 14, 1979). Therefore, Sea-Land filed an historic General Order No. 11 submission covering the fiscal year ending November 30, 1978, and a projected General Order No. 11 submission commencing May 1, 1979, in accordance with the rules in effect on January 26, 1979, the date when the general increase was filed.

At the prehearing conference, Judge Levy issued a number of procedural orders (which led, ultimately, to a stipulated record and a shortened proceeding) and scheduled the hearing for June 25, 1979.

Following up on the prehearing conference, between May 21, 1979 and June 25, 1979, there were numerous contacts between Sea-Land, the Government, Staff and Hearing Counsel. (Hereafter, references to Staff may sometimes include Hearing Counsel). The purpose was to reconcile differences, to have Sea-Land provide additional data to Staff and the Government and to arrive at a stipulated record. Understandably, the problems of distance and communication between the contiguous states and the Virgin Islands hampered the parties' efforts to reach agreement on a stipulation prior to the hearing.

I presided at the hearing because Judge Levy was temporarily incapacitated by a physical injury. However, consistent with Judge Levy's undertakings and the initiative of the parties, I immediately recessed the hearings to permit the parties to continue discussions. The additional discussions were fruitful and led to a stipulated record and proposed findings of fact, jointly submitted by all parties. While Judge Levy was recovering from surgery, the case was reassigned to me for all purposes.

It should also be noted that the Government's petition for reconsideration of the OIH, filed May 22, 1979, which was opposed by Sea-Land and Hearing Counsel, was denied by Order of the Commission, served July 3, 1979. The petition sought to have the effect of the proposed rate increase on the economy of the Virgin Islands included as a specified issue in the proceeding.

FACTS

Sea-Land serves the United States Atlantic, Gulf and Pacific Coast ports and the offshore domestic trade of Puerto Rico and the Virgin Islands with five vessels on two separate itineraries. The first, called the Crescent service, serves the following ports, in sequence: Elizabeth, San Juan, Kingston (Jamaica), New Orleans, Houston, Kingston, San Juan, Elizabeth. The Crescent service is weekly and requires four ships. The second, called the South Atlantic service, serves the following ports, in sequence: Baltimore, Charleston, Savannah, Jacksonville, San Juan, Baltimore. The South Atlantic service is biweekly and requires one ship.

The West Coast/Puerto Rico–Virgin Islands tariffs are joint rail/water tariffs with the cargo moving via the port of Houston.[6] The Atlantic/Gulf Virgin Islands trade is served via transshipment at San Juan. The Canadian/Puerto Rico service is overland via rail or truck between Canada and Elizabeth and thence by water. All other services are port to port.

[6] See n. 4*, *supra*.

In its General Order No. 11 filing, Sea-Land computed its rate base in the trade as follows:

	Historic Year	*Projected Year*
Canada/Puerto Rico	$ 327,557	$ 241,000
East Coast/Virgin Islands	505,816	442,000
U.S. North Atlantic/Puerto Rico	6,503,812	4,852,000
U.S. South Atlantic/Puerto Rico	1,299,790	1,859,000
U.S. Gulf/Puerto Rico	3,815,816	3,672,000
U.S. Pacific/Puerto Rico Islands	5,610,619	4,170,000
Total	$18,063,455	$15,236,000

The net income and rate of return for the historic year and Sea-Land's forecast of net income and rate of return for the projected year are:

	Historic Year Net Income	*Rate of[9] Return*	*Projected Year Net Income*	*Rate of[9] Return*
Canada/Puerto/Rico	$ 32,736	10%	($55,620)	loss
East Coast/Virgin Islands	(33,408)	loss	(76,140)	loss
U.S. North Atlantic/ Puerto Rico	(637,905)	loss	(1,170,180)	loss
U.S. South Atlantic/ Puerto Rico	103,935	8%	129,060	6.94%
U.S. Gulf/Puerto Rico	(52,604)	loss	(103,140)	loss
U.S. Pacific/Puerto Rico-Virgin Islands	(830,086)	loss	(466,020)	loss
Total	($1,417,332)	loss	($1,742,040)	loss

Staff recomputed Sea-Land's projected rate of return by applying its projected volume to the historic data. The calculation involved multiplying the historic terminal and container expense by the projected volume factor to arrive at a projected terminal and container expense. This projected terminal and container expense was then used to recompute vessel operating expense, vessel operating expense relationship, administrative and general expense, and working capital. The Staff's computation does not include any factor for inflation which may have occurred from the end of the historic year (November 30, 1978) to the beginning of the projected year (May 1, 1979); nor does it consider a factor for increased expense due to inflation during the projected year. Staff

[9] Net income/rate base = Rate of Return.

shows the following rate base, net profit and rate of return for the projected year:

	Rate Base	*Net Profit*	*Rate of Return*
Canada/Puerto Rico	$ 238,000	$ 4,160[10]	1.74%
East Coast/Virgin Islands	460,000	3,640	.79
U.S. North Atlantic/Puerto Rico	4,659,000	[146,000]	loss
U.S. South Atlantic/Puerto Rico	1,927,000[11]	240,760[12]	12.49%
U.S. Gulf/Puerto Rico	3,653,000[11]	319,800	8.75%
U.S. Pacific/Puerto Rico Virgin Islands	4,160,000[11]	[34,000]	loss
Total	$14,642,000	$456,360	3.1%

Fair Rate of Return

The lawfulness of a general rate increase is measured by the fairness of a carrier's rate of return on equity. *Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*, 18 SRR 1351, 1354–1357 (1978) (hereafter, *Matson III*). John Shipman, a staff economist, was the only witness to testify on this issue.

His testimony demonstrates that, following accepted analytical methods approved by the Commission in *Matson III*, he determined that the projected rate of return on equity would be 17.3% and that this rate would be fair.

Mr. Shipman concluded that 17.3% would be the rate of return on equity by also finding the rate of return on rate base to be 12.73% (a rate that he found Sea-Land to be entitled); the imbedded cost of debt rate to be 9.86%; and Sea-Land's debt equity ratio to be 1.387. Where those three factors (rate of return on rate base, imbedded cost of debt rate and debt equity ratio) are known, the rate of return on equity is susceptible of computation by mathematical formula. *Matson III, supra*, 18 SRR at 1354 n. 8.

Knowing the rate of return on equity, however, does not establish its fairness. This remains to be determined under the tests established in *Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Those cases hold, in effect, that a carrier is allowed to earn a rate of return, equal to that generally made on investments in other businesses having corresponding risks, and which generates enough

[10] In response to Question 1 of the OIH, Sea-Land stated that the terminal & container expense in this trade was increased by $154,000 as a result of an accounting change in the treatment of overland costs. See Appendix, Attachment 1. In Staff's recomputation, this figure was subtracted from Sea-Land's income projections.

[11] In response to Question 3 of the OIH, Sea-Land stated that facility and crane investment for the projected year should not have been allocated evenly between South Atlantic and Gulf "locations," but that 20% of the investment should be charged to South Atlantic locations and 80% to Gulf locations. (See Appendix). As a result of this change in allocation, Staff shifted $474,000 in facility and crane investment from the U.S. South Atlantic/Puerto Rico trade to tbe U.S. Gulf/Puerto Rico trade. However, the $474,000 investment should have been allocated to both the U.S. Gulf/Puerto Rico and U.S. Pacific/Puerto Rico-Virgin Islands trades, with $227,000 allocated to U.S. Gulf/Puerto Rico and $246,000 to U.S. Pacific/Puerto Rico-Virgin Islands as each trade serves Gulf locations.

[12] Projected terminal and container expense in this trade was increased by $152,000 as a result of the addition of direct vessel calls at the port of Savannah, Georgia.

revenue to allow it to maintain its credit and attract capital. Mr. Shipman compared the 17.3% with industries analyzed by *Standard and Poors* for 1977 and found that Sea-Land would rank in the third decile for average return on equity for United States industries. He also compared the 17.3% with 1978 earnings of airlines (22.1%), common carrier trucking (18.4%) and total transportation 8.2%)[13] and again found the 17.3% to be fair, especially in view of the economic and business risks associated with the trades in which Sea-Land is engaged.

Mr. Shipman was not cross-examined because Sea-Land's rate of return for any individual trade under investigation does not exceed what Mr. Shipman considers reasonable. (Note, the Staff computes the average return for all the trades to be 3%—Sea-Land computes a loss for all the trades). Thus, for purposes of this proceeding, only, the parties concede the accuracy of Mr. Shipman's determinations that 12.73% is the maximum permissible (fair) rate of return on rate base and that 17.3% is the maximum permissible (fair) rate of return on equity for Sea-Land in the trades.

Discussion and Conclusion

In post hearing briefs all parties agree that the general rate increase is lawful. There is nothing in the record to the contrary. The preponderance of the evidence discloses that Sea-Land needs the additional projected revenues which the general rate increase was designed to produce.

Accordingly, I find that Sea-Land has met its "burden of persuasion" and has shown that the rates contained in the tariff matter under investigation are just and reasonable and, therefore, lawful.

I find, further, that the answers to the six specified questions which appear in the Appendix satisfy the Commission's special inquiry.

Additional Matters

Sea-Land submitted a post hearing brief for the purpose of showing that if Staff has included an inflation factor in Staff's projections, which Sea-Land considers to be on the conservative side, it would be shown even more conclusively that Sea-Land's rate of return on rate base and equity in the individual trades and for all trades were well within Staff's perimeters.

Hearing Counsel concedes that Staff's approach, which did not take any inflation factor into account, was conservative. It agrees that if the inflation factor were considered the result would be a lower than 12.73 percent return on rate base and lower than 17.3 percent return on equity.

The Government asks the inflation factor issue not enter into the decision because the allowable rate of return calculated by Staff has not been exceeded without taking inflation into account. It also notes affirmatively that inflation factors should not be considered because there is no foundation in the record to support various conclusions which might be reached, as urged by Sea-Land.

[13] Total transportation is not an apposite indicator because it includes the depressed rate of return (1.3%) of Class I Railroads.

The Government's position is well taken. Absent evidentiary support there is no basis for deciding what inflationary factor to use (among others, e.g., consumer or wholesale price index). Moreover, it would be a moot exercise inasmuch as the lawfulness of the general rate increase stands on the evidentiary record without the need for anything further.[14]

In the light of the foregoing findings and conclusions, the investigation is ordered discontinued.

(S) SEYMORE GLANZER
Administrative Law Judge

August 14, 1979

[14] The Government hes also commented on two other matters which it acknowledges are not central to the disposition of the case, but which it wishes to be brought to the attention of the Commission.

The first is procedural and refers to the presentation and distribution of data, beginning with the carrier's General Order No. 11 submissions. Some but not all of the problems encountered by the Government seem to have been corrected by the new Rules of Practice and Procedure governing general increase cases which went into effect after this proceeding began. See 46 C.F.R. §502.67.

The second comment refers to a substantive matter—Sea-Land's method for projecting its investment in vessels. The Government is concerned about Sea-Land's listing the class of vessel expected to be used rather than the specific vessel.

The final substantive rules (usually referred to as General Order No. 11 rules) implementing P. L. 95-475 have not been issued. It is understood that the last day for comment on the proposed substantive rules (46 C.F.R. §512) proposed in Docket No. 78-5 was August 8, 1979.

Because the matters raised by the Government are not essential for resolution of the issues in this proceeding and given the expedited nature of this proceeding under the time constraints of P.L. 95-475, it would be inconvenient to discuss them further here. However, the Government is not without recourse even though the procedural rulemaking proceeding implementing P.L. 95-475 hes ended and the substantive rulemaking proceeding has been closed for comment. Rulemaking proceedings are "open-ended," *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 242 (1973), and the standing Domestic Offshore Rates Committee, under its Chairman, Commissioner Leslie Kanuk, is open for business.

APPENDIX

AGREED ANSWERS TO THE SIX QUESTIONS POSED IN THE OIH

Question 1

What effect did Sea-Land's change in the treatment of overland costs from a reduction of revenue to an increase in "terminal and container expense" have on the calculation of projected revenue and, in light of the change, how can the projected revenue be compared with prior period revenues?

Answer

An analysis of Sea-Land's projected versus historical revenue (see Attachment 1) shows that after adjusting the projection for miscellaneous income, the projected 5% GRI, and accounting reclassification, projected revenues in all but one trade reflect a higher rate per load than has historically been attained. Overall, revenue declined by 10% and volume by 19%. This optimism is based on the need to improve returns by upgrading the mix of cargo carried. In the Canada-Puerto Rico trade, revenue declined by 7% more than the volume decline would justify. The remaining $35,000 rate variance is not enough to impact significantly the rate of return projected for this trade.

In addition to the $154,000 increase resulting from the accounting change, the projected terminal and container expense were further explained in Exhibit Nos. 5 and 6 as follows:

East Coast/Virgin Islands

The difference in terminal and container expense for this trade as originally reported was $317,780, but the actual historical expenses were understated by a total of $240,424—$133,610 for warehouse expense plus $106,814 for assessments (Appendix, Attachment 4). After increasing the base year for the amount of the understatement, the difference between the actual year and projected year is $77,356 or 15 percent.

U.S. South Atlantic/Puerto Rico

In addition to the 40 percent volume increase projected in this trade, the addition of the Savannah, Georgia facility for a full year in the projection (only partially reflected in the actual year) accounts for $152,000 of the difference in expense for this trade.

U.S. Pacific Coast/Puerto Rico and Virgin Islands

Omitted from Sea-Land's historic expenses were portions of the Houston, Texas terminal and container expenses allocated to this trade. The appropriate allocations are explained as follows:

Operating Statistics and Expense

Total loads handled at Houston during the period were 45,665. The service portion was 15,827 or 34.66% of the total. The trade percentages of the service were 27% for the Gulf trade (4,275 ÷ 15,827), and 45% for the West Coast Trade (7,145 ÷ 15,827).

The total terminal and container expense at Houston amounted to $10,534,551 and $3,651,275 was allocated to the service per the 34.66% factor noted above. By applying the West Coast Trade allocation factor of 45% to the service expense, after eliminating warehouse charges, (West Coast trade cargo not platformed at Houston), produces $1,377,033.

This figure is a product of the following calculation:

$$\$3{,}651{,}275 - \$591{,}202 = \$3{,}060{,}073$$
$$\$3{,}060{,}073 \times .45 = \$1{,}377{,}033$$

The effect of this adjustment is to raise the terminal and container expense reported in the historical G.O. 11 to $3,416,858 ($2,039,825 + $1,377,033), which, when compared to the projected level, shows a decline of $14,858.

Question 2

Why are direct vessel and port and cargo expenses in the South Atlantic/Puerto Rico trade projected to increase by 60% while the volume of traffic is projected to increase by only 40%?

Answer

Vessel expense increased by $358,972 or 64% over the level of expense in the actual year ending November 30, 1978. As the Order of the Commission noted, a substantial portion of the additional direct vessel expense arises from the projected volume increase in the South Atlantic trade of 40%. Through the allocation technique prescribed in assigning vessel expenses to the various trades, it is correct to expect a fairly proportionate increase of expense with increases in trade cargo volume, particularly when the capacity in the Service remains constant. In other words, while the overall trade direct vessel expenses are projected to decline by $280,445, the container-mile relationship for each trade increases or decreases in relation to the percentage trade container-miles bears to overall service container miles.

While the capacity in the Service is projected to remain constant, the daily cost of operating these vessels is increasing. For example, the average daily payroll cost of the class of vessels deployed in the Americas Service during 1978 was $5,284. This figure results from an average daily rate of $4,984 during the first six months of the year and $5,584 during the last six months. The comparable figure built into direct vessel expense for the projected year is $6,170 per day. Thus, for increased crew payroll costs alone, the projection is 16.8 percent higher than during the actual year. This economic assumption accounts for a large share of the difference in increased vessel expenses not accounted for by projected volume increase.

Port and cargo expenses are projected to be higher by $331,121, an increase over the base year of 59%. This increase in expense cannot be measured solely by the 40% increase in traffic volume because of significant operating differences between actual and projected results. The primary reason for the increase in port and cargo expenses in this trade is due to the fact that

Sea-Land commenced direct vessel calls at the port of Savannah, Georgia August 24, 1978.

As a result, the actual expenses for the Savannah location represented only three months of operation. By contrast, the projected port and cargo expenses include a full year experience operating at the port of Savannah. A comparison of the expense dollars both actual and projected clearly demonstrates the effect of serving Savannah in late 1978.

Sea-Land's actual operating results in the South Atlantic trade for the year ending November 30, 1978 include $182,634 of port and cargo expenses. Our projected expenses for similar categories of costs amount to $482,900. Thus, almost all of the projected increased expense $300,266 ($482,900–$182,634) can be attributable to the annual effect of operating at Savannah per the full year. The balance of additional projected expenses amount to $30,855 ($331,121–$300,266) represents an increase in port and cargo expense of only 5%.

Question 3

Why is there a projected 103 percent increase in "other property and equipment" as a rate base item in the South Atlantic/Puerto Rico trade?

Answer

Property and equipment accounts consist primarily of rolling stock (container, chassis, and power units) and facilities and cranes. A breakdown of this asset group together with their average investment value in the historical and projected year follows:

South Atlantic Trade Net Investment
In Other Property and Equipment

	History *12-1-77 to 11-30-78*	*Projection* *5-1-79 to 4-30-80*	*Percentage Change*
Rolling Stock	$774,300	$1,124,000	45%
Facilities & Cranes	165,236	790,000	378%
Total P & E	$939,536	$1,914,000	103%

While total Property and Equipment investment increased by 103%, the most substantial portion of the asset group, namely rolling stock, only increased by 45% which is reasonable in light of the 40% growth in traffic volume. The reason for the overall increase in asset value of 103% is a result of the inordinate increase in facilities and cranes from $165,236 in the base year to $790,00 in the projected year, a rise of 378%.

The facility and crane assets in the South Atlantic and Gulf operating area were not identified by specific location in the underlying data to Sea-Land's 1979 budget. Since an allocation was required to separate net investment to the South Atlantic trade (Charleston, Savannah, and Jacksonville) and the Gulf trade (New Orleans and Houston) an estimate was made to charge the investment equally between the two trades. Upon analysis, Sea-Land concedes that a more appropriate separation in view of the projected activity between the two coastal ranges is to charge 20% of the facility and crane investment to the South Atlantic locations and 80% to the Gulf locations. On an adjusted basis, the chart about would be revised to read as follows:

Adjusted South Atlantic Trade Net Investment
In Other Property and Equipment

	History *12-1-77 to 11-30-78*	*Projection* *5-1-79 to 4-30-80*	*Percentage Change*
Rolling Stock	$774,300	$1,124,000	45%
Facilities & Cranes	165,236	316,000	91%
Total P & E	$939,536	$1,440,000	53%

From the foregoing chart, the adjusted increase in property and equipment investment in the South Atlantic trades is $150,764 ($316,000 - $165,236), an increase of 91%. $46,745 of the additional investment can be accounted for by the projected volume growth in the trade which would be proportionately charged to the South Atlantic trade. For example, $73,347 of net investment included in the base year property and equipment category consisted of vessel leasehold improvements, gain or loss of sale and exchange of vessels, and vessel spare parts ashore. These assets were allocated to the trades on the basis of the container-mile ratios. Assuming that the 40% growth in South Atlantic projected volume would cause a corresponding increase in the allocation factor, an additional $29,339 ($73,347 × .40) would logically be assigned to the South Atlantic trade.

We have discussed the effect of rolling stock, facilities, and miscellaneous vessel assets in explaining the increased investment. We now turn to the portion of Sea-Land's assets located in Puerto Rico. In the base year $43,516 of net investment resulted in Puerto Rico. The shift in volume changes where some trades are projected to decline and others projected to increase will affect the assignment of Puerto Rico's net investment. The 40% increase in the South Atlantic trade in which all of the volume must move through Sea-Land's Puerto Rico facilities, will mean an additional allocation of $17,406 ($43,516 × .40) to the South Atlantic trade.

All of the foregoing explanation accounts for all of the increase in the property and equipment investment except for $104.019. In view of the fact that anticipated additional capital expenditures of $1.4 million (Attachment 2) was earmarked in Puerto Rico during 1979, it stands to reason that a portion of such new investment should be born by the South Atlantic trade. It should be noted that the projected year commences May 1, 1979. Thus, the majority of the increased capital expenditures will occur in the 2nd and 3rd quarter of the projected year (as opposed to the 3rd and 4th quarter of the budget year).

Question 4

Why is there a projected increase in "working capital" for all trades despite a decreasing volume of traffic in all but one trade?

Answer

Working capital requirements are not directly related to changes in traffic volume as the Order of Investigation seems to suggest. As may be noted in Schedule IV of Sea-Land's projected operating results, the notation "estimate" was indicated in Line 17, which shows the allocation to the various trades. The estimate was simply based on raising the working capital amounts in each trade in the base year to the highest ten thousand or hundred thousand as applicable. Sea-Land would have preferred to determine projected working capital pursuant to the requirements of General Order 11. However, the detail necessary to reflect voyage expenses after adjustment for insurance, was not available. Essentially, working capital is to provide sufficient funds to carry out business activity between any lag time that might exist between collection of receivables and payment of expenses. To the extent that at the end of the fourth period of the current year, approximately 50% of our San Juan receivable file ranges anywhere from over 30 days due to in excess of 365 days due, the amount of working capital projected by Sea-Land is not excessive.

We have, however, at the request of Hearing Counsel, attempted to calculate working capital for the projected year in Attachment 3 hereto, by utilizing the same relationship of insurance expense that existed in the base period. The results of that calculation reflect only small differences in the working capital originally estimated by Sea-Land.

Question 5

Why are direct vessel and port cargo expenses in trades other than South Atlantic/Puerto Rico trade projected to decrease by only 15% while the volume of traffic is projected to decrease by 29%?

Answer

Vessel expenses for the five trades other than the South Atlantic/Puerto Rico trade are projected to decline by 8% which is explained by two factors. First, total vessel expense for all trades declined to 97% of history. Secondly, the percent relationship of loads for the five trades to total loads for all six trades declined from 92% (actual) to 86% (projection). The overall decline can then be expected to equal 8.6% (92% × 100 less 86% × .97) assuming the mix of vessel miles in the percent relationship remained constant.

In all trades, other than the South Atlantic trade, port and cargo expenses in the base period and projected year amounted to $5,367,772 and $3,883,000 respectively. A recap and percentage change of this group of expenses is provided hereunder:

Port and Cargo Expenses and Volume of Cargo
In All Trades Excluding South Atlantic Trade

	Historical Year	*Projected Year*	*Variance*	*Percent Change*
Port and Cargo Expenses	$5,367,772	3,883,000	(1,484,772)	(27.7%)
Volume of Cargo (Loads)	25,237	19,016	(6,221)	(24.7%)

As might be expected, the reduction in projected port and cargo expenses closely parallels the reduction in projected traffic volume because changes in handling costs, which have a high degree of variability, change in almost direct proportion to changes in traffic volume.

Question 6

Why is the rate-of-return in the East Coast/Virgin Islands trade declining?

Answer

Analysis of the history for the East Coast/Virgin Islands trade revealed that two major factors contributed to an overstatement of the historical return on assets.

1) The historical warehouse cost is substantially understated. The historical cost calculation incorrectly assumed that San Juan loads are handled through the Elizabeth and Baltimore warehouses. This is not the case. The resulting impact was to reduce the allocation of warehouse cost to the East Coast-Virgin Island trade (see Attachment 4).

   In reevaluating the historical cost allocation, an amount equal to the projection of $159,000 is reasonable. This represents a $134,000 increase over the cost originally presented. Assuming that approximately 250 loads moving to the E/C-VI trade is LTL, the U.S. warehouse cost per load would be about $636, which is in line with expectations.
2) The historical assessment cost allocated to the East Coast/Virgin Islands trade of $52,000 is substantially understated. Using an assessment cost equal to the projection of $159,000 results in an average cost per load of $195 which is in line with expectations for the impact of actual tonnage and hourly assessments at Elizabeth. (See Attachment 4).

It should be noted that the projected revenue included $96,000 of miscellaneous income. After adjusting projected revenue by the $96,000 the resulting ocean revenue projection is about 3% lower than the historical figure. This is in line with expectations based on a 10% volume decline and a 5% rate increase.

The foregoing adjustments are reflected in the following schedule:

Comparison of Actual and Projected Operating Results for East Coast/Virgin Islands Trades after Revenue Reclassification and Certain Expense Adjustments

	Historical Year		*Projected Year*	
	As Reported	*Adjusted*	*As Reported*	*Adjusted*
Revenue	$1,021,181	$1,021,181	$1,090,000	$994,000[1]
Vessel Operating Expenses				
Vessel	235,868	235,868	262,000	262,000
Port & Cargo	165,310	165,310	111,000	111,000

[1] Reclassification of miscellaneous income to separate line item to reflect same basis as actual year.

Terminal & Container	260,220	500,642[2]	578,000	578,000
Brokerage	28,173	28,173	53,000	53,000
Miscellaneous Income	117,245	117,245	—	96,000[1]
Net VOE	572,326	812,748	1,004,000	908,000
A & G	123,576	145,000[3]	252,000	159,000[4]
Inactive Vessel	6,024	6,024	—	—
Depreciation/Amortization	84,667	84,667	68,000	68,000
Other Deductions	5,468	5,468	—	—
Total Expense—Net	792,061	1,053,907	1,324,000	1,135,000
Pre-Tax Income	229,120	[32,726]	[234,000]	[141,000]

The adjusted historical Profit and Loss statement shows a pre-tax loss of $32,726, compared with an adjusted projected pre-tax loss of $141,000. In view of the volume decline and economic cost increases, this declining performance is a reasonable expectation.

[2] To correct actual year terminal and container expense to reflect additional $133,608 of warehouse expense properly chargeable to LTL Trade; and to correct understatement of allocation of NYSA cost of $106,814 in line with actual experience.

[3] Estimated increase in A & G expenses attributable to adjusted increase in vessel operating expenses.

[4] A & G adjustment made by FMC staff.

ATTACHMENT 1

Analysis of Projected vs. Historical Revenue
($000)

	Canada/ P.R.	*E.C./ V.I.*	*N.Atl./ P.R.*	*S.Atl./ P.R.*	*Gulf/ P.R.*	*Pacific/ P.R.&V.I.*	*Total Trades*
Original Revenue Projection	$601	$1,090	$8,294	$4,242	$6,767	$8,051	$29,045
Adjustment:							
1) Misc. Income	(30)	(96)	(625)	(393)	(495)	(890)	(2,529)
Sub-Total	571	994	7,669	3,849	6,272	7,161	26,516
2) 5% GAL	(27)	(47)	(365)	(183)	(299)	(341)	(1,262)
Sub-Total	544	947	7,304	3,666	5,973	6,820	25,100
3) Accounting Change	(154)*	—	—	—	—	—	(154)
Adjusted Revenue Projection	390	947	7,304	3,666	5,973	6,820	25,100
Historical Revenue	519	1,021	9,790	2,380	6,124	7,978	27,812
Difference	(129)	(74)	(2,486)	1,285	(151)	(1,158)	(2,712)
% Change in Revenue	(25%)	(7%)	(25%)	54%	(2%)	(15%)	(10%)
Projected Loads	363	730	7,158	3,239	5,149	5,616	22,255
Historical Loads	443	813	10,989	2,318	5,846	7,146	27,555
Difference	(80)	(83)	(3,831)	921	(697)	(1,530)	(5,300)
% Change in Volume	(18%)	(10%)	(35%)	40%	(12%)	(22%)	(19%)

*This figure reflects payouts to truckers which are treated as an expense item in projected terminal and container costs. During the historical period, this was treated as a revenue reduction by Sea-Land.

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ATTACHMENT 2

Puerto Rico

				Type		1979				
						Quarter				
Location Name	*Budg. No.*	*Description*	*Foreign Currency*	*Maint.*	*New Venture*	*1st*	*2nd*	*3rd*	*4th*	*Total Year*
San Juan	4–42	Fac. maint. & improv.—new area		X				500	500	1000
	4–43	Replace 6 vehicles		X				33	33	66
	4–43	Replace pick-up vans		X				10	10	20
	4–44	Chassis rebuild program		X		74	74	74	78	300
		Total Puerto Rico				74	74	617	621	1386

ATTACHMENT 3

Sea-Land Service, Inc. Domestic-Offshore Trade Working Capital
Pro-Forma May 1, 1979–April 30, 1980

Item	*Canada/ PR*	*East Coast/ VI*	*US No. Atl./ P. Rico*	*US So. Atl./ P. Rico*	*US Gulf Coast/ P. Rico*	*US Pac. Coast/ PR & VI*	*Total Trade*
1. No. of Term. Voyage Days in the Period	1,025	1,825	1,825	1,825	1,825	1,825	
2. No. of Voyage Terminations	78	78	78	74	78	74	
3. Average Length of Term. Voyages (Item 1 ÷ Item 2)	23.40						
4. No. of Calendar Days in the Period	365	365	365	365	365	365	
5. Vessel Years (Item 1 ÷ Item 4)	5.0	5.0	5.0	5.0	5.0	5.0	
6. Gross Vessel Operating Expense (Sch. VI)	$73,876,000						
7. A & G Exp. Allocated (Per VOE Ratio)	11,680,000						
Total	$85,536,000						
8. Deduct Insurance Expense (Same as Appendix A)	1,053,835						
9. Net Operating and Overhead Expense	$84,482,065						
10. Voyage Expense Per Day (Item 9 ÷ Item 1)	46,292						
11. Average Expense Per Voyage (Item 10 × Item 3)	1,003,223						
12. Avg. Voy. Exp. Cacl. Insurance (Item 11 × Item 5)	5,416,165						
13. Insurance Expense Per Day (Item 8 ÷ Item 1)	577						
14. Insurance Exp. Per 90 Days (Item 13 × 90 Days)	51,930						
15. Avg. Voy. Insurance Expense (Item 14 × Item 5)	259,650						
16. Average Voyage Expense (Item 12 ÷ Item 15)	5,675,815						
17. Allocated to the Trade	$ 44,271	$77,191	$640,800	$242,925	$415,470	$544,878	$1,965,535

ATTACHMENT 4

Comparison of Actual and Projected U.S. Warehouse Expense and Assessments Showing Impact of Understatement in Actual Year Operating Results

East Coast/Virgin Islands Trade

	Warehouse Expense Originally Reported For Historical Year*	*Projected Year*	*Amount Understated*
Elizabeth	$19,392	$129,000	$109,608
Baltimore	5,098	29,100	24,002
Total	$24,490	$158,100	$133,610

	*Assessments** Originally Reported For Historical Year*	*Projected Year*	*Amount Understated*
Elizabeth	$52,186	$159,000	$106,814

*Note that $24,490 divided by 250 LTL trade loads would produce a warehouse cost of only $93 per load substantially below the typical cost per load for warehouse operations.

**Assessments of $52,186 divided by total trade loads resulted in a cost per load of $63 in the actual year. This was entirely too low in view of average NYSA tonnage charge of $5,85 per assessable ton during 1978.

FEDERAL MARITIME COMMISSION

46 C.F.R. CHAPTER IV

DOCKET NO. 79–18

EXEMPTIONS FROM PROVISIONS OF THE SHIPPING ACT, 1916
AND THE INTERCOASTAL SHIPPING ACT, 1933

September 21, 1979

ACTION: Discontinuance of Proceeding

SUMMARY: This proceeding was instituted by notice of inquiry published March 28, 1979 (44 Fed. Reg. 18537) requesting comments on proposed exemptions under section 35 of the Shipping Act, 1916. Comments have been received and are now being analyzed by the Commission.

It was not anticipated that any proposals would ensue from this particular proceeding. Rather, specific exemptions would be proposed in separate proceedings which will give further opportunity for comment thereon. Accordingly, this proceeding is discontinued.

SUPPLEMENTARY INFORMATION: None

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-76

DECLARATORY ORDER REQUEST RE: PACIFIC WESTBOUND CONFERENCE (AGREEMENT NO. 57-115)

ORDER OF DISMISSAL

September 24, 1979

By Petition for Declaratory Order filed July 19, 1979, Seatrain Pacific Services, S.A., requests the Commission to rule that the member lines of the Pacific Westbound Conference (PWC) invalidly adopted an amendment to their organic conference agreement by classifying the amendment as "procedural" rather than "substantive." This amendment (Agreement No. 57-115) would modify the conference's "independent action clause" by specifying that member lines must give 60 days advance notice for *all* reductions in intermodal rates, even when the rate in question is already being published as an independent rate and even when the reduction does not exceed earlier levels established by the publishing carrier.

Replies to Seatrain's petition were submitted by PWC and the Commission's Bureau of Hearing Counsel.

Agreement No. 57-115 was filed for approval on June 15, 1979. On July 26, 1979, Seatrain also filed a protest seeking disapproval of the proposed amendment for the reasons stated in the instant petition and on the additional ground that the 60-day notice period employed by the PWC Agreement is excessive.

Instructions have been given to bring Agreement No. 57-115 before the Commission on an expedited basis. Because the issues raised by the instant petition would be most clearly and efficiently resolved in the procedural context of acting on Agreement No. 57-115, Seatrain's petition will be dismissed without prejudice.

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of Seatrain Pacific Services, S.A., is dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By Order of the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 575(I)

GIRTON MANUFACTURING CO.

v.

PRUDENTIAL LINES INC.

NOTICE

September 27, 1979

Notice is given that upon review of the August 24, 1979, decision of the Settlement Officer in this proceeding, the Commission has determined to adopt that decision with the following modifications.

At page 5, line 13, the phrase "statutorily prescribed standard" should read "applicable standard".

At page 6, the table regarding Bill of Lading 32 should include "Bunker surcharge \$8,25 × 17.25" rather than "Bunker surcharge \$8.25"

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 575(I)

GIRTON MANUFACTURING CO.

v.

PRUDENTIAL LINES INC.

DECISION OF C. DOUGLASS MILLER, SETTLEMENT OFFICER[1]

Adopted September 27, 1979

Reparation Granted

The Girton Manufacturing Company (GMC), a company engaged in the manufacture and distribution of farm and laboratory equipment, claims $952.12 plus six (6) percent interest as reparation from Prudential Lines (PL) on two shipments described on Prudential Grace Lines Bills of Lading No. 32 and No. 35, dated October 27, 1976, as steel tanks and condensing units which were transported from Philadelphia, Pennsylvania to Valparaiso, Chile.

In rating the subject shipments, PL relied on the descriptions appearing on the Bills of Lading which were provided by GMC. The shipments were described by GMC as "Crates: Steel Tanks (Stainless)" and "Crates: Condensing Units."

The first shipment (Bill of Lading No. 35) consisted of eight (8) crates Stainless Steel Tanks weighing 12,400 pounds and occupying 1,873 cubic feet and eight (8) crates Condensing Units weighing 2,400 pounds and occupying 242 cubic feet.The second shipment (Bill of Lading No. 32) consisted of three (3) crates Stainless Steel Tanks weighing 4,650 pounds and occupying 591 cubic feet and five (5) crates Condensing Units weighing 1,250 pounds and occupying 99 cubic feet. Both Bills of Lading were dated October 27, 1976.

Ocean Freight charges were assessed pursuant to Atlantic and Gulf/West Coast of South America Freight Conference Freight Tariff S.B. SA-12, FMC 1. The stainless steel tanks were assessed the Class 10 rate of $119.75 per

[1] Both parties having consented to the informal procedure of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

40 cubic feet plus surcharges while the condensers were assessed a Class 9A rate of $124.50 per 40 cubic feet plus surcharges. The total freight charges paid by GMC for the two shipments were $7,000.64 and $2,286.35 respectively.

On April 3, 1978, GMC filed two overcharge claims with PL. They were incorrectly addressed and GMC refiled the claims on July 3, 1978. After receiving no response from PL, GMC filed an Informal Docket with the Commission pursuant to section 22 of the Shipping Act, 1916, in order to stay the running of the two-year statute of limitations.

The basis of the GMC claim is that, contrary to GMC's original description, the various pieces of equipment shipped were actually components of bulk milk coolers. GMC claims that PL should have assessed charges for Cooler, Milk. The index of the applicable tariff refers one to Item 735, Refrigerators NOS. The rate of Refrigerators N.O.S. is $106.75 per 40 cubic feet.[2] Applying this rate to the shipments, the total charges, including surcharges, for the two shipments are $6,284.53 and $2,050.34. GML claims overcharges of $716.11 and $236.01 or a total of $952.12. In addition, GML claims 6 percent interest from November 12, 1976, the date of payment.

PL has raised several defenses regarding the claims. First, PL argues that the Commission has no jurisdiction to order the return of an overcharge and that 46 C.F.R. § 502.301 *et seq.*, to the extent it is applied to overcharges, goes beyond the underlying statutory authority. Second, PL maintains that if the claim is considered under 18(b)(3) it is time barred by the 180 day limit in that section and by a six (6) month limit in the applicable tariff. Finally, PL points out that it was GMC's own description which caused the shipments to be rated as they were.

Section 18(b)(3) of the Act provides in pertinent part that no carrier or conference of carriers in the foreign commerce of the United States:

> [s]hall 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 the tariffs on file with the Commission and duly published and in effect at the time. . . .

A carrier violates the section by charging a rate for transportation of one commodity while actually transporting another. What is actually shipped determines the rate to be charged. Thus, the carrier may violate section 18(b)(3) even when it relies on a shipper-provided Bill of Lading description. The equities of the particular situations are not controlling in finding a violation. *Union Carbide Inter-America, Inc. v. Venezuelan Line,* 17 F.M.C. 181 (1973).

GMC's claim is based on an alleged violation of section 18(b)(3) which occurred when PL charged GMC the rates applicable to "Steel Tanks (Stainless)" and "Condensing Units" for transporting milk coolers. Section 22 of the Shipping Act, 1916, gives the Commission authority to investigate any violation of the Act and award reparations. The procedures set forth in 46 C.F.R.

[2] Rule 2(g) of the tariff provides that:

Whenever rates or ratings are provided for on articles named herein, the same basis will also be applicable on named parts of such articles, when so described on the ocean bills of lading, except where specific rates or ratings are provided for such parts.

§301, *et seq.*, permit the informal adjudication of small claims (with the consent of both parties) without resort to formal proceedings under section 22 of the Act. The claim for recovery of "overcharges" pursuant to 46 C.F.R. §301 *et seq.* is nothing more than a claim for "reparations" as that word is used in section 22 of the Act. "Overcharges," which are defined in 46 C.F.R. §502.302 as charges for transportation services in excess of those applicable under lawful tariffs, are simply a measure of the reparations that might be awarded for a violation of section 18(b)(3). Accordingly, it is concluded that the claims of GMC may be properly adjudicated pursuant to the procedures of 46 C.F.R. §502.301 *et seq.*

PL's argument that the claims are time-barred by the 180 day limit in section 18(b)(3) is without merit. The limitation applies only to applications by carriers for refunds or waivers which are based on clerical or administrative error. Clearly GMC is not making a claim on this basis.

The six (6) month limitation in the applicable tariff likewise is no bar. With respect to the six (6) month limitation, the Commission has held in previous decision that if a claim is filed by the shipper within the two (2) year statutory time period, the carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim. *Union Carbide Inter-America, Inc. v. Venezuelan Line,* 19 F.M.C. 86 (1976); *Kraft Foods v. Federal Maritime Commission,* 538 F.2d 445 (D.C. Cir. 1976); *Carborundum Co. v. Royal Netherlands Steamship Co.,* 19 F.M.C. 431 (1977). The record clearly indicates that the claim was filed within the two-year period.

The sole question remaining to be decided is what was the actual commodity shipped. In *Western Publishing Co. v. Hapag-Lloyd,* 13 S.R.R. 16, (1972) and other cases, the Commission said that in cases where the cargo was no longer available for inspection, a complainant had a "heavy burden of proof" to establish the fact of what was actually shipped. This of course, does not alter the statutorily prescribed standard which is "the preponderance of the evidence" of record. What the Commission was obviously alluding to was the difficulty in securing probative evidence in the absence of the cargo itself.

In connection with the instant shipment, complainant has provided an invoice indicating that the shipments comprised 24 crates of bulk milk coolers with condensing units. In addition, literature along with pictures showing the commodity's purpose and its uses have also been furnished. The information indicates that the actual commodity tendered to the carrier was milk coolers with condensing units and, therefore, it would qualify for the rate of $106.75 W/M as set forth in Item 795. Accordingly, GMC is entitled to reparations in the amount of the overcharges as calculated below:

Bill of Lading 32

Eight (8) crates Steel Tanks (Stainless) and Condensing Units (Milk Coolers):

5900 lbs. 690 cubic feet

$\frac{690}{40}$ cubic feet = 17.25

Rate $106.75 × 17.25 =	$1,841.44
Bunker surcharge $8.25 × 17.25	142.31
3% Chilean Tax	66.59
TOTAL	$2,050.34
Charges per Bill of Lading	$2,286.35
	$2,050.34
OVERCHARGE	$ 236.01

Bill of Lading 35

Sixteen (16) crates Steel Tanks (Stainless) and Condensing Units (Milk Coolers)

14,800 lbs.	2,115 cubic feet

$\frac{2,115}{40}$ cubic feet = 52.875

Rate of $106.75 × 52.875 =	$5,644.41
Bunker surcharge $8.25 × 52.875 =	436.22
3% Chilean Tax	203.90
TOTAL	$6,284.53
Charges per Bill of Lading	$7,000.64
	$6,284.53
OVERCHARGE	$ 716.11

The allowance of interest is a matter within the Commission's discretion and may be denied where principles of equity and justice demand. See *Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co.,* 295 F.53 (5th Cir. 1923) and *George Allison & Co. v. Interstate Commerce Commission,* 107 F.2d 180 (D. C. Cir. 1939). It was GMC's own description which led to the misapplication of rates. Moreover, GMC failed to notify PL that the shipments were misdescribed at the time the freight charges were paid. Accordingly, the award of interest in this case would be inequitable.

(S) C. DOUGLASS MILLER
Settlement Officer

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-77

CUMMINS ENGINE COMPANY

v.

Y. S. LINE (YAMASHITA-SHINNIHON
STEAMSHIP CO., LTD.) TTT SHIP AGENCIES

DOCKET NO. 79-78

CUMMINS ENGINE COMPANY

v.

MAERSK LINES, LTD.

DOCKET NO. 79-79

CUMMINS ENGINE COMPANY

v.

U.S. LINES, INC.

NOTICE

September 28, 1979

Notice is given that no appeal has been taken to the August 27, 1979, dismissal of the complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissals have become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 79–77

CUMMINS ENGINE COMPANY

v.

Y. S. LINE (YAHMASHITA-SHINNINHON
STEAMSHIP CO., LTD.) TTT SHIP AGENCIES

No. 79–78

CUMMINS ENGINE COMPANY

v.

MAERSK LINES, LTD.

No. 79–79

CUMMINS ENGINE COMPANY

v.

U.S. LINES, INC.

DISMISSAL OF PROCEEDING[1]

Finalized September 28, 1979

Respondents in these three cases have moved for their dismissal on the grounds that the basic issue in each case has already been decided adversely to

[1] Though these cases have not as yet been formally consolidated under Rule 148 of the Commission's Rules of Practice and Procedure, all three contain the same issues of fact and law. Accordingly, the three cases are disposed of in this single order.

the complainant and that those Commission decisions are *res judicata* here.[2] Complainant, subsequent to the motions to dismiss, filed motions to withdraw the three complaints.

Since complainant no longer desires to prosecute the complaints in these cases, the motions to withdraw the complaints in Nos. 79-77, 79-78, and 79-79 are hereby granted and the cases are dismissed with prejudice.

(S) JOHN E. COGRAVE
Administrative Law Judge

August 27, 1979

[2] *Cummins Engine Co. v. United States Lines,* Informal Docket 390(I) *et seq.*—April 5, 1979, 19 SRR 192; *Cummins Engine Co., Inc. v Y. S. Line,* Order on Reconsideration, Informal Docket 609(I) and 610(I) (Decision of Settlement Officer, July 3, 1979), 19 SRR 479.

FEDERAL MARITIME COMMISSION

46 C.F.R. CHAPTER IV

DOCKET NO. 79-50

NOTICE OF INQUIRY REGARDING THE UNITED NATIONS CONVENTION ON CODE OF CONDUCT FOR LINER CONFERENCES

October 5, 1979

ACTION: Discontinuance of Proceeding

SUMMARY: This proceeding was instituted by notice of inquiry published May 16, 1979 (44 Fed. Reg. 28724). Public comment was requested on a proposed international convention governing the conduct of steamship liner conferences (UNCTAD). The filing schedule has now been completed. The notice of inquiry indicated that it is not intended that a proposed rule will be issued from this proceeding. Inasmuch as no further action is contemplated in the context of this proceeding, it is appropriate that it be discontinued. It is so ordered.

SUPPLEMENTARY INFORMATION: None

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-49

EMILE BERNAT & SONS CO.

v.

UNITED STATES LINES, INC., ET AL.

ORDER OF ADOPTION

October 15, 1979

Administrative Law Judge William Beasley Harris issued an Order on August 17, 1979, in this proceeding dismissing the complaint and discontinuing the proceeding on the grounds that the Complainant had failed to appear for the scheduled hearing of this matter and had not submitted any evidence in support of its claims. The Commission by notice served September 20, 1979, determined to review the Presiding Officer's ruling.

After having fully reviewed the entire record in this proceeding the Commission finds that the Presiding Officer did not abuse his discretion in dismissing this complaint and discontinuing the proceeding. Giving due consideration to the fact that the Complainant is not represented by legal counsel, the Commission is of the opinion that the Presiding Officer handled this matter properly and afforded ample due process to all parties.

THEREFORE, IT IS ORDERED, That the Order (1) Dismissing Complaint (2) Discontinuing Proceeding, served in this proceeding on August 17, 1979, is adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-49

EMILE BERNAT & SONS CO.
v.
UNITED STATES LINES, INC., ET AL.

ORDER (1) DISMISSING COMPLAINT (2) DISCONTINUING PROCEEDING

Adopted October 15, 1979

The above-captioned case was (by order served June 22, 1979) set for a hearing to commence on August 15, 1979. Complainant's request for a further[1] postponement of the August 15, 1979, hearing was denied by order dated August 10, 1979, leaving the hearing to start as scheduled at 10:00 a.m. on Wednesday, August 15, 1979.

Complainant's representative in this matter had actual notice that the request for postponement had been denied and that the hearing (at which Complainant had the burden of proving its case) would commence as scheduled. Complainant chose not to attend the ordered hearing, thereby failing to provide any affirmative evidence of record to support Bernat & Son's claims for reparations and obviating the need for Respondents to defend against them.

As noted in an earlier procedural order the Presiding Officer "is keenly aware that Complainant is proceeding without counsel."[2] However, Complainant's election to be represented by one of its officers in this proceeding does not mean that Complainant may substitute the allegations in this complaint for affirmative evidence of its claims.

Also, Complainant's non-lawyer representative is not free to substitute his judgment for that of the Presiding Officer on when to appear and present his case.

Commission Rule 147, 46 C.F.R. § 502.147, provides that it is for the Presiding Officer to schedule the dates and regulate the course of hearings. Dismissal for failure to comply with such an order is certainly within the necessary

[1] Complainant Bernat & Sons had previously requested and been granted four separate postponements of the hearing date from March 21, 1979 to April 26, 1979, then to May 24, 1979, then to June 27, 1979, and finally to August 15, 1979.

[2] April 20, 1979, Order granting Complainant's second request for a postponed hearing date.

authority of the Presiding Officer. See, for example, FMC Rule 211(b)(3) on the Presiding Officer's authority to dismiss for failure to obey a discovery order; see also Rule 41 of the Federal Rules of Civil Procedure which provides that "For failure of Plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of any claim against him."

Wherefore, given the lack of any evidence record occasioned by Complainant's refusal to appear at the scheduled August 15, 1979, hearing in this matter it is hereby:

Ordered, that the complaint of Bernat & Sons, Co. for reparation against United States Lines, Inc.; Peabody & Lane; Atlantic Container-line Ltd.; Farrell Lines, Inc.; Dart Containerline, Inc.; Trans Freight Lines, Inc., and North Atlantic Westbound Freight Association, is dismissed for lack of proof and want of prosecution. And it is

Ordered, this proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

August 17, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENT NOS. 9929-3 ET AL.

ORDER DENYING FURTHER RECONSIDERATION

October 16, 1979

Now before the Commission are the "Petitions for Clarification and Reconsideration" of Sea-Land Service, Inc. and United States Lines, Inc. (Protestants), seeking withdrawal of the Commission's June 5, 1979 Order conditionally approving three agreements involving Hapag-Lloyd Aktiengesellschaft; Intercontinental Transport, B.V. (ICT); and Compagnie Generale Maritime (French Line). A reply in partial opposition was submitted by the three proponent ocean carriers. The Commission's Bureau of Hearing Counsel also replied to the extent of requesting that the June 5th Order be clarified in two respects.

Protestants contend that: (1) the parties to this proceeding had agreed that the agreements marked as Hearing Exhibits Nos. 39 and 40 should be approved and that it was improper for the Commission to have interfered with their understanding; (2) the revised agreements are unclear and may entitle Proponents to as many as five votes in the conferences serving the affected trades; (3) it is unreasonable for the Proponents to exercise more than one vote in U.S. Gulf/Europe conferences—if the Proponents had three votes they could preclude the seven-member U.S. Gulf/Europe conferences from taking any action which required a two-thirds majority; and (4) Agreement No. 10266-3 is unclear as to whether the ICT/French Line joint service will be immediately operative or whether it will take effect only upon termination of the Hapag-Lloyd/ICT/French Line space charter (Agreement No. 10374).

The petitions will be denied and the three agreements approved as modified on June 28, 1979.

The Commission intended that the ICT/French Line joint service (Agreement No. 10266-3) operate simultaneously with the space charter agreement (No. 10374) and that the joint service would be limited to 800 TEU's per week (averaged quarterly) at all times.[1] It was also intended that the parties to this

[1] More detailed limitations on the number of refrigerated containers or U.S. South Atlantic Coast containers to be carried by the ICT/French Line joint service were deemed premature in light of the Proponents' assertion that the joint service would be operating within the limitations of the three-party cross-charter (Agreement No. 10374) for the foreseeable future.

joint service would cast only a single combined vote in conferences to which the joint service may belong. These objectives are accurately reflected in the revised agreement filed by ICT and French Line on June 28, 1979.

The parties to the Combi Line joint service (Agreement No. 9929-6) are also limited to one conference vote. To the extent Hapag-Lloyd participates in conferences as an individual carrier (*e.g.*, when it operates as a container carrier under Agreement No. 10374), Hapag-Lloyd is also entitled to a single conference vote. The three parties to the three agreements may therefore cast a total of no more than three votes between them.

Voting restrictions attach only to the two joint service agreements (Nos. 9929-6 and 10266-3). Article 10 of the charter agreement (No. 10374) creates no voting privileges or restrictions whatsoever.[2] Although the language of Article 10 is potentially confusing and therefore best deleted by the Proponents, Agreement 10374 is nonetheless found to be in substantial compliance with the Commission's June 5th Order.

Protestants' contention that an arrangement which allows Proponents three votes in existing U.S. Gulf/Europe conferences is unfair and discriminatory is best examined in light of particular conference quorum and voting requirements and the actual voting patterns which may emerge once operations commence under the instant agreements. If conference voting practices related to the instant agreements produce conditions which are detrimental to United States Commerce, unfair between conference carriers or otherwise violative of the Shipping Act, the Commission can, after notice and hearing, adjust the conference voting requirements or prescribe other appropriate modifications to the agreements involved.

The instant agreements were approved because they offered improved services to shippers and, as restructured, would increase competition in the relevant trades to some extent. If all three Proponents were to cast a single conference vote, they would be directly fixing prices and generally acting more closely in concert than necessary to achieve the transportation benefits associated with their agreements.

The notion that the Commission must approve agreements in the form negotiated by private parties without independently analyzing the agreements' form, content and probable effect is erroneous. Indeed, it is clear that the Commission has an affirmative duty to independently evaluate all section 15 matters in light of relevant statutory criteria and may not rely upon the mere absence of objections as a basis for approval. *See, Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2nd 577, 584-587, 8 S.R.R. 475, 483-487 (D.C. Cir. 1969); *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2nd 519, 531, 15 S.R.R. 411, 425-426 (D.C. Cir. 1978).

Agreement Nos. 9929-6 and 10266-3 met the conditions of the June 5th Order as filed on June 28, 1979, but should be modified to reflect the change in effective date (*i.e.,* January 1, 1980), required by the Commission's July 25,

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[2] Article 10 states that the three parties to Agreement No. 10374 may act as single members in appropriate conferences, yet ICT and French Line operate in the trade only as members of a joint service. If the ICT/French Line joint service were dissolved before its stated expiration date, the presence of the cross-charter arrangements *alone* would not require conference voting restrictions under the test articulated in *Johnson Scanstar (Agreement No. 9973-3)*, 18 S.R.R. 807 (1978).

1979 "Order on Petition for Reconsideration" and the extension of Agreement No. 9929-3 adopted by the Proponents in response thereto.

THEREFORE, IT IS ORDERED, That the "Petitions for Clarification and Reconsideration" of Sea-Land Service, Inc., and United States Lines, Inc., are denied.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Chairman Daschbach and Commissioner Day dissent as to the denial of the "Petitions for Reconsideration and Clarification."

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-46

EXPEDITED SURCHARGES FOR RECOVERY OF CARRIERS' INCREASED FUEL COSTS IN THE FOREIGN COMMERCE OF THE UNITED STATES

October 16, 1979

Bunker surcharges applicable to cargo carried under dual rate contracts and effective on less than ninety days' notice found lawful under section 14b of the Shipping Act, 1916.

Ronald A. Capone, James W. Pewett and *Albert E. May* for Council of American-Flag Ship Operators, Delta Steamship Lines, Inc., and Waterman Steamship Corporation.

Edward M. Shea and *Donald J. Brunner* for Sea-Land Service, Inc.

Seymour H. Kligler and *Nathan J. Bayer* for American West African Freight Conference, U.S. Great Lakes and St. Lawrence River Ports/West Africa Rate Agreement, U.S. Atlantic & Gulf-Santo Domingo Conference, Leeward & Windward Islands & Guianas Conference, East Coast Columbia Conference, Atlantic & Gulf/West Coast South America Conference, U.S. Atlantic & Gulf-Jamaica Conference.

Charles F. Warren and *George A. Quadrino* for Japan/Korea-Atlantic & Gulf Freight Conference, New York Freight Bureau, Philippines North America Conference, Trans-Pacific Freight Conference (Hong Kong), Trans-Pacific Freight Conference of Japan/Korea, and Java/Pacific Rate Agreement.

F. Conger Fawcett and *David C. Nolan* for Latin America Pacific Coast Steamship Conference, Pacific Coast-Australasian Tariff Bureau, Pacific Coast European Conference, and Pacific Coast River Plate Brazil Conference.

John R. Mahoney and *Elkan Turk, Jr.* for Far East Conference, Atlantic & Gulf-Indonesia Conference, and Atlantic & Gulf-Singapore, Malaya and Thailand Conference.

Thomas E. Kimball and *Richard C. Jones* for Pacific Straits Conference, Pacific Westbound Conference, and Pacific/Indonesian Conference.

Howard A. Levy and *Patricia E. Byrne* for North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, North Atlantic Baltic Freight Conference, and Gulf/United Kingdom Conference.

Stanley O. Sher, Marc J. Fink and *Milton Babirak, Jr.* for Iberian/U.S. North Atlantic Freight Conference, Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, Mediterranean North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conference, and West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference.

Peter B. Hirshfield for Independent Wire Producers Association.

Aaron W. Reese, Paul J. Kaller, and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

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

This proceeding was initiated on April 26, 1979, by an Order of Investigation and Hearing (Order) directed to several carriers and conferences of carriers which had filed bunker surcharges effective on less than ninety days' notice and applicable to cargo carried under dual rate contracts. The investigation was to examine whether such surcharges:

1. are the result of any extraordinary conditions, which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers; whether they are outside or beyond the carrier's or carriers' control; and whether the carrier or carriers, using a high degree of diligence and sound business judgment, should have foreseen or anticipated the conditions upon which the surcharges are based; and
2. whether the imposition of such bunker surcharges on less than 90 days' notice violates section 14b of the Shipping Act, 1916.[1]

The Council of American-Flag Ship Operators (CASO), Delta Steamship Lines, Inc., Waterman Steamship Corporation[2] and the conferences and carriers listed in Appendix A to the Order were designated respondents.[3] The Order established 46 subdockets, representing the 46 separate tariffs for which bunker surcharges had been filed. On June 1, 1979, a supplement to the Order added two additional subdockets to this proceeding.[4] The Independent Wire Producers Association (IWPA) filed a petition for leave to intervene which has been opposed by respondents in subdockets 1–11, 19 and 21.

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* Commissioner Leslie Kanuk will issue a separate concurring opinion.

[1] 46 U.S.C. §813a.

[2] CASO, Delta, and Waterman had previously filed a joint petition requesting that the Commission authorize dual rate contract bunker surcharges on less than 15 days' notice. The Commission denied this request in the above-referenced Order.

[3] Respondents and their respective subdockets are as follows: American West African Freight Conference (subdockets 1–4); U.S. Great Lakes & St. Lawrence River Ports/West Africa Agreement 9420 (subdocket 5 and 6); U.S. Atlantic & Gulf–Santo Domingo Conference (subdocket 7); Leeward & Windward Islands & Guianas Conference (subdockets 8 and 9); East Coast Columbia Conference (subdocket 10); Atlantic & Gulf/West Coast of South America Conference (subdocket 11); New York Freight Bureau (Hong Kong) (subdocket 12); Latin America/Pacific Coast Steamship Conference (subdockets 13–15); Mediterranean–U.S. Great Lakes Westbound Freight Conference (subdocket 16); Atlantic & Gulf Indonesia Conference (subdocket 17); Pacific Straits Conference (subdocket 18); U.S. Atlantic & Gulf-Haiti Conference (subdocket 19); U.S. Great Lakes/South & East Africa Rate Agreement No. 9509 (subdocket 20); U.S. Atlantic & Gulf–Jamaica Conference (subdocket 21); Trans-Pacific Freight Conference (subdocket 22); Atlantic & Gulf–Singapore, Malaya and Thailand Conference (subdocket 23); North Atlantic French Atlantic Freight Conference (subdocket 24); Far East Conference (subdocket 25); North Atlantic United Kingdom Freight Conference (subdocket 26); North Atlantic Baltic Freight Conference (subdocket 27); Philippines North America Conference (subdocket 28); Japan/Korea–Atlantic & Gulf Freight Conference (subdocket 29); U.S. Atlantic & Gulf/Australia-New Zealand Conference (subdocket 30); Pacific Westbound Conference (subdocket 31); Pacific/Indonesian Conference (subdocket 32); Mediterranean North Pacific Coast Freight Conference (subdocket 33); West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference (subdocket 34); Iberian U.S. North Atlantic Westbound Freight Conference (subdocket 35); Marseilles North Atlantic U.S.A. Freight Conference (subdocket 36); Pacific Coast Australasian Tariff Bureau (subdocket 37); North Atlantic Mediterranean Freight Conference (subdockets 38–40); Japan/Korea–Atlantic & Gulf Freight Conference (subdocket 41); Pacific Coast European Conference (subdocket 42); Gulf/United Kingdom Conference (subdocket 43); India, Pakistan, Bangladesh, Ceylon & Burma Outward Freight Conference (subdocket 44); Med–Gulf Conference (subdocket 45); and Pacific Coast River Plate Brazil Conference (subdocket 46).

[4] The additional respondents are: Java/Pacific Rate Agreement (subdocket 47) and Java/New York Rate Agreement (subdocket 48).

Respondents have filed a total of 15 memoranda plus additional affidavits of fact in response to the Order. The Commission's Bureau of Hearing Counsel submitted a reply memorandum. IWPA also filed a memorandum of law, to which Sea-Land Service, Inc. and the respondents in subdockets 24, 26, 27 and 43 replied. No party has filed a request for discovery or for an evidentiary hearing. However subsequent to the filing of opening memoranda, the respondents in subdocket 24, 26, 27 and 43 did submit an "Offer in Evidence of Public Document."[5]

Discussion

A. *Preliminary Matters*

Dismissal

Hearing Counsel has filed a motion to dismiss on behalf of respondents in subdockets 16, 20 and 44. In addition, the respondent in subdocket 48 has moved for dismissal and Hearing Counsel has indicated support of it. The Java/New York Rate Agreement (subdocket 48) and the U.S. Great Lakes South & East Africa Rate Agreement (subdocket 20) do not have a dual rate tariff presently in effect. The Mediterranean-U.S.A. Great Lakes Westbound Freight Conference (subdocket 16) cancelled its dual rate system in 1978. Finally, the India, Pakistan, Bangladesh, Ceylon & Burma Outward Freight Conference (subdocket 44) has amended its tariff so that its bunker surcharge is effective on a full 90 days' notice. Based on these representations, it would serve no useful purpose to continue these parties as part of this proceeding. These four subdockets will, therefore, be dismissed.

Intervention

IWPA, a trade association of about 35 companies which fabricate steel wire and wire products, has petitioned for leave to intervene in this proceeding. It asserts that a substantial portion of foreign-manufactured wire rods purchased by its members are transported under one or more of the tariffs which are at issue and that, as a result, it will be adversely affected by any expedited bunker surcharges. Petitioner further avers that its interests will not be represented by the parties of record and that it can ensure the development of a sound record.

Respondents in subdockets 1-11, 19 and 21 oppose the petition primarily on the grounds that the petitioner lacks standing to intervene and that its inclusion would broaden the issues and unduly delay their resolution. They note that the petitioner has not identified its members nor has it represented itself to be a signatory to any of the dual rate contract agreements maintained by the conferences. Moreover, these conferences assert that none of their tariffs includes contract rates on wire rods transported *to* the United States.

With respect to the proceedings in subdockets 1-11, 19 and 21, this proposed intervenor does not possess the requisite "substantial interest," and as to these

[5] The document offered, the Commission's Domestic Circular Letter No. 1-79, issued on June 1, 1979, notifies carriers in the domestic offshore trades that the Commission will allow the filing of tariffs containing bunker surcharges constituting general rate increases on 30 days' notice rather than the 60 days' notice normally applicable.

subdockets intervention will not be granted.[6] However, intervention will be granted as to the remaining dockets because none of the other parties has objected to IWPA's intervention, IWPA has alleged that some of its raw materials are transported under the subject tariffs and the petition to intervene does not present grounds for intervention which would appear to unduly broaden the issues raised by the Commission's Order.[7]

B. *Merits*

The Order of Investigation provided that carriers seeking to invoke the emergency provisions of the Uniform Merchant's Contract to justify bunker surcharges on less than 90 days' notice would have the burden of proving " . . . that the emergency conditions actually exist, and (1) were beyond their control, (2) were not reasonably foreseeable and (3) significantly impede their operation" (Order at p. 5). The memoranda submitted generally respond to this directive.

Respondents[8] initially argue the existence of emergency conditions by noting that throughout 1978 the cost of bunker fuel remained stable, but during the first quarter of 1979 increased dramatically.[9] In addition to these dramatic price increases, respondents note a concurrent reduction in the supply of available fuel oil. Shipping companies which had projected their 1979 bunker expenses based upon 1978 costs quickly exceeded their budgets.[10] They argue that if they had to wait three months to impose a bunker surcharge rather than one month, their unrecouped expenses would be staggering and would necessitate severe mitigation measures—including, *inter alia*, reductions of speed and capacity, less frequent service and reduced scope of service.

Respondents contend that the increases in fuel costs were clearly beyond their control. The political and economic events which precipitated these increases were not subject to any form of manipulation or control by carriers or conferences of carriers. Moreover, efforts to alleviate the effects of these cost increases—*e.g.*, forward booking or stockpiling of fuel—are also allegedly unavailable to these carriers.

[6] Rule 72 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.72) states, in part, that:

(t)he petition will be granted if the proposed intervenor shows in his petition a substantial interest in the proceeding and the grounds for intervention are pertinent to the issues already presented and do not unduly broaden them . . . .

The respondents in subdockets 24, 26, 27 and 43 have also indicated, in a reply memorandum to IWPA, that they do not carry steel into the United States. Intervention will also be denied as to these subdockets.

[7] To the extent that IWPA's subsequently filed memorandum of law is not responsive to the issues raised by the Order of Investigation (as is argued by Sea-Land and the respondents in subdockets 24, 26, 27 and 43) it will not be considered.

[8] The various respondents generally raise the same or similar arguments and will, accordingly, be treated as one. The Commission has, however, thoroughly reviewed all individual responses.

[9] In the three month period commencing January 1, 1979, the cost of fuel oil in New York increased up to 47 percent. Similar increases occurred worldwide. These increases are primarily attributed to the revolution in Iran which occurred in the latter part of 1978. Iran, which had produced approximately 10% of the world's oil supplies, completely ceased production from December 1978 to March 5, 1979, and upon resumption of production has not approached prior export levels. Moreover, the Organization of Petroleum Exporting Countries (OPEC) instituted a 9% price increase effective April 1, 1979, six months earlier than had previously been announced. OPEC also permitted its individual members to impose additional surcharges over and above this price increase, and many did so.

[10] Sea-Land, for instance, exceeded its budgeted bunker expenses by $1.9 million in March 1979 and $2.2 million in April 1979.

Respondents further argue that the circumstances and events resulting in increased fuel costs (the Iranian revolution and accelerated OPEC price escalations) could not have been reasonably foreseen by them as prudent businessmen. They note that the United States Government, with its myriad agencies which specialize in predicting the course of political and economic events, was apparently surprised by the Iranian revolution and the subsequent dramatic rise in the cost of crude oil.

Finally, respondents have submitted affidavits which are intended to demonstrate that the emergency conditions are significantly impeding their operations. Among the impediments cited are the following: (1) total unavailability of fuel in certain areas; (2) shortages at some ports causing delays, last minute alternative arrangements, deviations and disruption of normal service patterns; (3) the need to purchase supplemental fuel at extraordinary prices; (4) reduction in vessel speeds with a concomitant increase in transit time; (5) severe economic harm to the carriers; (6) inability to carry out obligations under dual rate contracts; (7) removal of vessels from service; (8) cancellation of plans to introduce additional vessels into some trades; and (9) fewer calls at certain ports and in some cases complete elimination of service.

Some parties further contend that bunker surcharges can and should be imposed on less than 30 days' notice or that such surcharges are not at all subject to the Shipping Act provisions governing dual rate contracts.[11] In addition, the contention has been raised that arbitration under the Uniform Merchant's Contract is the proper or preferred forum for resolving any shipper complaints engendered by the bunker surcharges and not an investigation by the Commission.

Hearing Counsel agrees with respondents that: (1) The bunker surcharges are the result of extraordinary conditions; (2) the extraordinary conditions have impeded, obstructed, or delayed the obligations of these carriers; (3) the extraordinary conditions were outside or beyond the carriers' control; and (4) the carriers, using a high degree of diligence and sound business judgment, could not have foreseen or anticipated the conditions upon which the surcharges are based. In addition, Hearing Counsel points out that out of the tens of thousands of dual rate contract signatories, not one has served notice of cancellation, requested arbitration, or alleged any breach of the contract as a result of the imposition of the surcharges.

IWPA raises the only note of opposition to these bunker surcharges. It concedes that the increases in bunker fuel costs were beyond the control of the carriers, but nonetheless contends that these cost increases are not "extraordinary conditions," nor do they "unduly impede, obstruct or delay" the conferences' obligations under their dual rate contracts. IWPA also argues that by applying a high degree of diligence and sound business judgment the substantial increases in bunker fuel costs could have been anticipated without necessarily having had anticipated the specific cause of such increases. Finally,

[11] These arguments, which have been previously raised, were effectively disposed of in the Order (*See* Order at 4).

IWPA states that a bunker surcharge would increase "trigger prices" for imported carbon steel wire rods contrary to its and the nation's interests.[12]

Sea-Land submitted a memorandum in reply to IWPA stating: (1) that the interest of the intervenor in the proceeding is impossible to ascertain, and (2) that the argument concerning trigger prices is irrelevant and raises matters beyond the Commission's authority.

Section 14b of the Shipping Act requires dual rate contracts to:

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

The statute clearly contemplates circumstances in which rate increases could become effective on less than ninety days' notice—if they are not "under the control of the carrier or conference." In *The Dual Rate Cases*, 8 F.M.C. 16 (1964), the Commission affirmed this position and also prescribed specific contract clauses which would permit rate increases on less than normal notice under certain abnormal conditions. These contract clauses are presently embodied in the Uniform Merchant's Contract as paragraphs 14(a), 14(b), and 14(c) (46 C.F.R. §538.10). The first two apply where war or other governmental actions (*e.g.*, embargoes or blockades) interfere with a carrier's service, and permit suspension of the contract (Article 14(a)) or rate increases on not less than 15 days' notice to shippers (Article 14(b)). The latter clause, which applies to the circumstances of this case, provides:

> 14(c). In the event of any extraordinary conditions not enumerated in Article 14(a), which conditions may unduly impede, obstruct, or delay the obligations of the Carrier or Carriers, the Carrier or Carriers may increase any rate or rates affected thereby in order to meet such conditions: *Provided, however*, That nothing in this Article shall be construed to limit the provisions of section 18(b) of the Shipping Act, 1916, as amended, in regard to the notice provisions of rate changes.[13]

The criteria necessary to invoke the extraordinary conditions clause of the Uniform Merchant's Contract were set forth in *Surcharge at U.S. Atlantic and Gulf Ports*, 10 F.M.C. 13 (1966): (1) the condition must be outside or beyond the carrier's control; (2) the condition must impede or delay the carrier's service; and (3) there must be an emergency, an abnormal condition, or an extraordinary circumstance. The nature of the condition, *i.e.*, whether it is normal or abnormal (or emergency or extraordinary), is determined in large part by its "foreseeability"—whether the carriers, by exercising a high degree of diligence, could have anticipated the condition.

Based upon the complete record in this proceeding, the Commission finds that these bunker surcharges are the result of extraordinary conditions which were beyond the carriers' control and which were not foreseeable using a high degree of diligence. Certainly, the Iranian situation, the OPEC pricing decisions, the dramatic rise in fuel oil prices, and the severe reduction in supply are

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[12] Steel wire rods are subject to the "trigger price mechanism" adopted by the Department of Treasury in connection with its implementation of the Anti-Dumping Act of 1921 (19 U.S.C. §§160–173). This system establishes "trigger prices" which are based on the full costs of production and which are then used as a basis for monitoring steel imports into the United States. The trigger price mechanism was upheld in *Davis Walter Corp. v. Blumenthal*, 460 F.Supp. 283 (D.D.C. 1978).

[13] Section 18(b)(2) requires thirty days' notice of rate increases.

abnormal conditions which were not subject to any control by the carriers. Nor do these conditions appear to have been reasonably foreseeable by anyone—whether a governmental entity or a commercial carrier. There is no evidence that the carriers in this proceeding possessed sufficient information to enable them to anticipate these conditions. Moreover, the price increases occurred suddenly and not slowly and steadily over a significant portion of time, as did the increases in *Atlantic and Gulf/West Coast of South America Conference*, 14 F.M.C. 166 (1970).

The Commission also finds that these extraordinary conditions would unduly impede, obstruct or delay the obligations of these carriers. The primary impediments which these carriers have experienced are severe financial losses, delays, and disruption of service caused by cost and unavilability of bunker fuel. These occurrences would indeed impair the carriers' ability to carry out their obligations under the Uniform Merchant's Contract—particularly that of maintaining a steamship service which shall, so far as concerns frequency of sailings and carrying capacity of vessels, be adequate to meet the merchant's requirements (Article 2).

For the foregoing reasons, we find the bunker surcharges instituted by these carriers and conferences of carriers to be lawful under section 14b of the Shipping Act.

THEREFORE, IT IS ORDERED, That the Petition of the Independent Wire Producers Association for Leave to Intervene is granted to the extent indicated above; and

IT IS FURTHER ORDERED, That the Motions to Dismiss filed by the Bureau of Hearing Counsel and the Java/New York Rate Agreement are hereby granted and, therefore, the Mediterranean-U.S.A. Great Lakes Westbound Freight Conference, the U.S. Great Lakes/South & East Africa Rate Agreement, the India, Pakistan, Bangladesh, Ceylon & Burma Outward Freight Conference, and the Java/New York Rate Agreement are dismissed from this proceeding; and

IT IS FURTHER ORDERED, That, no violations of the Shipping Act having been found, this proceeding is hereby discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NOS. 79-21/22/23/24/25/26/31/32/ 33/34/35/37/38/39/40/41

FAILURE TO INCLUDE PROVISIONS FOR ADEQUATE SELF-POLICING AS REQUIRED BY GENERAL ORDER 7

Conference and rate-making agreements which failed to include provisions for adequate self-policing, as required by General Order 7, are found to be inadequately policed and are, therefore, disapproved.

Charles F. Warren and *George A. Quadrino* for Deli/New York Rate Agreement, Straits/New York Conference, Philippines/North America Conference, Java/Pacific Rate Agreement, Java/New York Rate Agreement, Deli/Pacific Rate Agreement, Japan/Puerto Rico & Virgin Islands Freight Conference, Atlantic & Gulf Indonesia Conference, Thailand/U.S. Atlantic & Gulf Indonesia Conference, Atlantic & Gulf/Singapore, Malaya & Thailand Conference, and Thailand-Pacific Freight Conference.

David C. Nolan for Hawaii/Europe Rate Agreement.

Stanley O. Sher for U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement.

Hubert Burstein for International Movers Rate Agreement.

Martin F. McAlwee, Paul J. Kaller and *John Robert Ewers* for Bureau of Hearing Counsel.

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

REPORT AND ORDER[1]

October 17, 1979

During April of 1979, the Commission issued sixteen Orders to Show Cause in the above-referenced proceedings.[2] These Orders stated that because the subject agreements failed to meet the minimum requirements for adequate

[1] These proceedings involve substantially the same issues and are, accordingly, consolidated for decision pursuant to Rule 148 of the Commission's Rules of Practice and Procedure. 46 C.F.R. §502.148.

[2] Respondents include the following rate-making groups and their individual members:

a. 79-21—Agreement No. 7190; Deli/New York Rate Agreement;
b. 79-22—Agreement No. 6010; Straits/New York Conference;
c. 79-23—Agreement No. 5600; Philippines/North America Conference;
d. 79-24—Agreement No. 191; Java/Pacific Rate Agreement;
e. 79-25—Agreement No. 90; Java/New York Rate Agreement;

self-policing, as set forth in General Order 7,[3] they were presumed not to meet the requirement of section 15 of the Shipping Act, 1916 that obligations under such agreements be adequately policed.[4] Respondents were thus ordered to show cause why their agreements should not be disapproved for failure to be adequately policed. The proceedings were limited to the submission of affidavits of fact and memoranda of law.

Three Respondents failed to file any affidavits of fact or memoranda of law or any other response to the Orders to Show Cause.[5] One Respondent requested cancellation of its rate agreement.[6] Another filed a "Petition for Exemption from the Self-Policing Provisions Set Forth in General Order 7" as its sole response to the Order.[7] Finally, a group of eleven Respondents, all represented by the same counsel, filed identical Responses to the Order to Show Cause.[8] The Commission's Bureau of Hearing Counsel, which had been made a party to these proceedings, filed reply memoranda in all dockets. The eleven Respondents filed identical responses to Hearing Counsel's replies.

DISCUSSION

Background

Section 15 of the Shipping Act, 1916 requires the disapproval of any agreement which must be filed with the Commission, "[o]n a finding of inadequate policing of the obligations under it. . . ."[9] To effectuate this provision, the Commission adopted rules governing self-policing of Commission approved agreements which prescribed "minimum standards for judging the adequacy of self-policing activities. . . ." 46 C.F.R. § 528.0(a). Because prior self-policing systems had generally proven inadequate, these rules impose as their central requirement the establishment of an independent self-policing body with broad investigatory powers and detailed reporting requirements. *See* 46 C.F.R. §§ 528.3 and 528.5.

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f. 79-26—Agreement No. 192; Deli/Pacific Rate Agreement;
g. 79-31—Agreement No. 8190; Japan/Puerto Rico & Virgin Islands Freight Conference;
h. 79-32 Agreement No. 8080; Atlantic & Gulf Indonesia Conference;
i. 79-33—Agreement No. 8100; Thailand/U.S. Atlantic & Gulf Conference;
j. 79-34—Agreement No. 8240; Atlantic & Gulf/Singapore, Malaya & Thailand Conference;
k. 79-35 Agreement No. 8410; Hawaii/Europe Rate Agreement;
l. 79-37—Agreement No. 8530; International Movers Rate Agreement;
m. 79-38—Agreement No. 8595; Great Lakes/Japan Rate Agreement;
n. 79-39—Agreement No. 8670; Japan/Great Lakes Memorandum;
o. 79-40—Agreement No. 9474;Thailand-Pacific Freight Conference; and
p. 79 41—Agreement No. 10025; U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement.

[3] General Order 7, which contains self-policing requirements for section 15 agreements, was published as a final rule on September 14, 1978 and became effective January 1, 1979. *See* 46 C.F.R. Part 528, General Order 7, Docket No. 73-64, Report and Order dated April 26, 1978, as amended by Order on Reconsideration served September 14, 1978.

[4] 46 U.S.C. § 814.

[5] Docket Nos. 79-38/39/41.

[6] Docket No. 79-35.

[7] Docket No. 79 37. In addition, several companies which had been named as respondents in the Order to Show Cause subsequently informed the Secretary, Federal Maritime Commission that they no longer were members of the International Movers Rate Agreement.

[8] Docket Nos. 79-21/22/23/24/25/26/31/32/33/34/40.

[9] 46 U.S.C. § 814.

The Commission's final order in this rulemaking proceeding has been appealed to the U.S. Court of Appeals for the District of Columbia Circuit.[10] One of the major issues raised is whether the final self-policing rules exceed the Commission's statutory authority. Concurrently, on December 8, 1978, members of the Trans-Pacific Freight Conference of Japan/Korea and 26 other agreements petitioned the Commission to stay the January 1, 1979 effective date of these revised self-policing regulations. The Commission denied the petition on February 16, 1979. Subsequent to the issuance of the show cause orders and over six months after the effective date of the rules, Trans-Pacific *et al.* filed an Application for Stay of the Commission's September 14, 1979 Order with the Court of Appeals. In a *per curium* opinion filed July 16, 1979, the court denied the application for stay.

Proceedings

With respect to those respondents who failed to file any responses to the Orders to Show Cause (Docket Nos. 79-38/39/41), Hearing Counsel recommends that each agreement be disapproved and that disapproval become effective 45 days from the date of this Order. The Commission would normally adopt Hearing Counsel's dispositional recommendation. However, events which occurred subsequent to the filing of Hearing Counsel's reply dictate a different result. The Commission has recently received notice that the Japan/Great Lakes Memorandum Agreement (Docket No. 79-39) and the Great Lakes/Japan Rate Agreement (Docket No. 79-38) have been cancelled. The Commission has also received notice that the U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement (Docket No. 79-41) has been amended to comply with the requirements of General Order 7. Under these circumstances, the Commission will dismiss the proceedings against these agreements.[11]

The three members of the Hawaii/Europe Rate Agreement (Docket No. 79-35) have requested that their agreement be cancelled. They have further requested that individual lines be granted time to prepare their own tariffs, before that cancellation becomes effective. Hearing Counsel concurs in these requests. The Commission will, accordingly, disapprove this agreement effective 60 days from the date of this Order.

In lieu of filing affidavits of fact or memoranda of law in response to the Order to Show Cause, the International Movers Rate Agreement (Docket No. 79-37) submitted an affidavit petitioning for an exemption from the neutral body requirement of General Order 7. Hearing Counsel avers that the representations made in the affidavit, if true, make a "credible" case for deferring consideration of an order of disapproval until the Commission determines the merits of the requested exemptions. However, this petition for exemption is non-responsive to the Commission's Order to Show Cause and must

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[10] *Trans-Pacific Freight Conference of Japan/Korea, et al. v. Federal Maritime Commission and the United States of America*, D.C. Cir., No. 78-2172; *Sea-Land Service, Inc. v. Federal Maritime Commission and the United States of America*, D.C. Cir., No. 79-1062.

[11] The "Motion to Dismiss Proceeding on the Grounds of Mootness" filed by the U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement will also be dismissed, as moot.

be denied, though we will do so without prejudice.[12] The Commission will consequently disapprove Agreement No. 8530, but will again defer the effective date of disapproval for 60 days.

In their responses to the Orders to Show Cause the eleven remaining respondents contend that they cannot possibly overcome the presumption of inadequate policing raised by the Orders except by full and complete compliance with revised General Order 7. They also maintain that, because the question of the validity of these regulations is currently on appeal, the Commission should not engage in proceedings which collaterally interfere with the judicial process. Hearing Counsel notes that these agreements are not in fact policed by a neutral body and are, therefore, presumed to be inadequately policed. Hearing Counsel also claims that respondents err in arguing that these show cause proceedings constitute collateral interference with the judicial process. In order to allow respondents to comply with General Order 7 or to permit individual member lines to file tariffs, Hearing Counsel recommends that disapproval take effect 60 days from the Commission's final order.

The Commission has recently received notice that two of these eleven agreements have complied with the requirements of General Order 7. The proceedings against the Thailand/U.S. Atlantic & Gulf Conference (Docket No. 79-33) and the Thailand/Pacific Freight Conference (Docket No. 79-40) will, therefore, be dismissed.

As to the remaining nine respondents, they have offered little support for their contention that the Commission should not resolve these proceedings because the validity of the self-policing rules is presently on appeal. Their only legal authority—28 U.S.C. § 2342—is inapposite; it merely states that the Court of Appeals has exclusive jurisdiction to determine the validity of final agency orders.[13] Moreover, the Court of Appeals has denied the petitioners' application for a stay of the self-policing rules. These cases can, therefore, be resolved without collaterally interfering with the judicial process.

These respondents readily admit that they have submitted no affidavits of fact or memoranda of law which would demonstrate that their agreements are adequately policed under the requirements of General Order 7 and section 15 of the Shipping Act. As a result, the Commission has no choice but to proceed to disapprove each of these agreements. However, the Commission will defer the effective date of disapproval for 60 days from the date of this Order to allow members of these agreements to file individual tariffs.

THEREFORE, IT IS ORDERED, That the proceedings against Agreements Nos. 8595 (Great Lakes/Japan Rate Agreement); 8670 (Japan/Great Lakes Memorandum); 10025 (U.S. Atlantic & Gulf/Red Sea & Gulf of Aden Rate Agreement); 8100 (Thailand/U.S. Atlantic & Gulf Conference); and 9474 (Thailand-Pacific Freight Conference) are dismissed; and

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[12] The Commission has determined that the filing of a petition for exemption does not relieve a conference or rate-fixing body from the independent neutral body requirements of section 528.3(b) of General Order 7 during the pendency of the petition. Statement of Federal Maritime Commission, released December 15, 1978.

[13] Because 28 U.S.C. § 2349(b) provides that, "[t]he filing of the petition to review does not of itself stay or suspend the operation of the order of the agency . . .," the rules would normally remain in effect during the process of appellate review.

IT IS FURTHER ORDERED, That the U.S. Atlantic and Gulf/Red Sea & Gulf of Aden Rate Agreement's Motion to Dismiss Proceedings on the Ground of Mootness is dismissed; and

IT IS FURTHER ORDERED, That the Petition for Exemption from the Self-Policing Provisions set Forth in General Order 7 filed by the International Movers Rate Agreement is denied, without prejudice; and

IT IS FURTHER ORDERED, That Agreements Nos. 7190 (Deli/New York Rate Agreement); 6010 (Straits/New York Conference); 5600 (Philippines/North America Conference); 191 (Java/Pacific Rate Agreement); 90 (Java/New York Rate Agreement); 192 (Deli/Pacific Rate Agreement); 8190 (Japan/Puerto Rico & Virgin Islands Freight Conference); 8080 (Atlantic & Gulf Indonesia Conference); 8240 (Atlantic & Gulf/Singapore, Malaya & Thailand Conference); 8410 (Hawaii/Europe Rate Agreement); and 8530 (International Movers Rate Agreement) are hereby disapproved; and

IT IS FURTHER ORDERED, That disapproval of these agreements shall become effective 60 days from the date of this Order; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER NO. 16, AMDT. 31; DOCKET NO. 79-49]

PART 502—RULES OF PRACTICE AND PROCEDURE

October 17, 1979

ACTION: Final Rule

SUMMARY: This amends the rule governing intervention in Commission proceedings to: (1) specify applicable standards for intervention; and (2) allow for limitation of intervenors' participation in Commission proceedings. Rule 24 of the Federal Rules of Civil Procedure has been used as a model for the Commission rule.

EFFECTIVE DATE: October 23, 1979

SUPPLEMENTAL INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking, 44 Fed. Reg. 28694-28696, to amend Rule 72 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.72) to conform to the intervention standards in Rule 24 of the Federal Rules of Practice and Procedure to the extent appropriate in Commission proceedings.

As proposed to be amended, Rule 72 would:

(1) incorporate the requirements contained in the existing Commission rule as to the form and procedure for submitting petitions for intervention. (Paragraph (a))

(2) establish the standards under which petitions for intervention would be considered. This provision would require petitioners to indicate whether they seek intervention as a matter of right or in the discretion of the Commission and the extent of participation sought. Intervention as a matter of right would require a showing of either specific statutory authority or an interest relating to the matter which is the subject of the proceeding and that the proceeding may materially affect that interest, and that such interest is not adequately represented by existing parties to the proceeding.

Permissive intervention requires a showing that the petitioner's interest involves a common issue of law or fact with the matter being litigated, its intervention will not unduly broaden or delay the proceeding, duplicate the positions of, or prejudice existing parties and its participation will contribute to the proceeding in some significant way. The timeliness of the petition would also be considered in determining whether intervention should be granted. (Paragraph (b))

(3) provide the mechanism for limited intervention, *i.e.*, the presentation of evidence on specific factual issues and/or the submission of amicus curiae briefs on selected legal issues, and would allow for continuing control over such participation. (Paragraph (c))

(4) incorporate the existing Commission rule on the limitation of discovery right for later intervenors. (Paragraph (d))

(5) provide that discovery may be limited in the same manner as petitioners' participation. (Paragraph (e))

(6) allow for Commission review of intervention rulings made by the presiding officer. (Paragraph (f))

Comments to the proposed rule were received from nine parties in six submissions. Commentators consist of six conferences, one shipper, one shipowners' association, and one government agency.

The Pacific Westbound Conference, the Pacific-Straits Conference and the Pacific-Indonesian Conference suggest that those seeking permissive intervention be allowed to intervene even if their position may be duplicative of another party. It is allegedly difficult to have a common question of law or fact which is not duplicative of another party's. These commentators further point out that it may also not be possible to determine at the very early stages of a proceeding if a given party's position is in fact duplicative.

The Council of European & Japanese National Shipowners' Association proposes three areas of clarification: (1) that the rule expressly not be made applicable to rulemaking proceedings; (2) that it not preclude the intervention of trade associations; and (3) that the prohibition against a permissive intervention prejudicing the rights of an existing party be made applicable only to the *adjudication* of the rights of *original* parties.

The Japan/Korea-Atlantic and Gulf Freight Conference and Trans-Pacific Freight Conference of Japan/Korea suggest that: (1) either the requirement that the petition be served on all parties or the requirement that the Commission be provided copies for distribution be deleted; and (2) the rule be amended to allow for replies to appeals to the Commission on intervention rulings.

Outboard Marine Corporation is of the opinion that the participation of Hearing Counsel as a party representing the "public interest" should not preclude the intervention of appropriate private interests even though such intervention may arguably be duplicative. To this end, it is suggested that the term "party" as used in the rule be defined to expressly exclude Hearing Counsel.

Interamerican Freight Conference takes the position that: (1) discovery procedures not be available to intervenors filing only amicus briefs and restricted to those factual issues to which the participation was limited; (2) the provision allowing for a statutory right of intervention be deleted as no such statute exists; (3) the requirement that an intervenor show that its interests will not be adequately represented by existing parties be deleted as such a provision would require adverse representations as to the abilities of counsel for existing parties in situations where only legal issues are being argued; and (4) the rule be amended to make clear whether copies of the petition for intervention are to be served on existing parties by the party seeking intervention or the Commission, with the latter alternative being urged.

The Department of Justice (DOJ) views the proposed revised rule as making two fundamental changes to the existing rule: (1) establishing categories of intervenor petitions with different requisite showings; and (2) limiting and controlling the extent of intervenor participation. No objection is made to the establishment of categories but limitations on the extent of participation of intervening parties is objected to as "clearly inconsistent with court precedent as well as practice in other regulatory agencies."

Each of the specific proposals advanced by the commentators will now be discussed.

1. *Duplication Of Positions By Permissive Intervenors Should Not Be Prohibited*

The requirement that the petitioner's position not be duplicative of another party is not as stringent as it is apparently perceived. Clearly, one can have a common issue of fact or law at stake but take a different position on that issue. Even if the position taken is similar this does not necessarily mean it is duplicative. Moreover, even when a position taken on a common issue is close to being duplicative of another party, if the petitioner can show that it will make a significant contribution to the proceeding, the Commission may, in its discretion nevertheless grant intervention. No amendment to the rule appears to be required under the circumstances.

2. *The Proposed Rule Should Not Apply To Rulemaking Proceedings*

The proposed rule would apply to formal rulemaking proceedings.[1] Such proceedings involve hearings almost identical in nature to adjudicatory proceedings. Therefore, the reasons for controlling intervention in adjudicatory proceedings applies with equal force to formal rulemaking proceedings. Accordingly, the rule will not be narrowed in scope as suggested by this proposal.

3. *Associations Should Be Allowed To Intervene*

This proposal is already accommodated by the Commission's Rules of Practice and Procedure. Rule 41 (46 C.F.R. § 502.41) permits intervention by

[1] 46 C.F.R. § 502.53 (Rule 53) governs participation in rulemaking and makes applicable the formal hearing requirements to rules "required by statute to be made on the record after opportunity for a hearing." As to those types of formal rulemakings, Rule 53 expressly provides that: "In those proceedings in which respondents are named, interested parties who wish to participate therein shall file a petition to intervene in accordance with the provisions of section 502.72 (Rule 72)."

associations.[2] Whether the interest of an "association" is one which will, in any given proceeding, warrant intervention in the discretion of the Commission is a matter that can only be determined on an *ad hoc* basis, and is not subject to special treatment in the rule.

4. *"Prejudice The Rights Of An Existing Party" Should Be Changed To "Prejudice The Adjudication Of The Rights Of Original Parties" In Paragraph (b) (2) (ii) Of The Rule.*

Because there appears to be some uncertainty as to what "rights" of existing parties this provision was intended to protect, the language of paragraph (b) (2) (ii) will be revised to more accurately reflect its true intent, *i.e.*, that of of protecting the rights of existing parties to a fair and speedy *adjudication* of the controversy. However, the prohibition against prejudice should extend to the adjudicative rights of prior intervenors as well as those of original parties. Accordingly, paragraph (b) (2) (ii) will only be modified by the insertion of the words "the adjudication of" after the word "prejudice" in paragraph (b) (2) (ii) of the rule.

5. *The Commission Should Serve Copies of Petitions To Intervene.*

While service copies of the petition for intervention required by the rule are for the existing parties to the proceeding, the 15 copies required to be filed with the petition are for the internal use of the Commission. The Commission will not undertake to serve copies of petitions on existing parties. Because the language of paragraph (a) (1) of the rule appears to be ambiguous on this point it will be amended to make clear that a petitioner must: (1) serve all the existing parties to the proceeding with copies of its petition, and (2) file an additional 15 copies of the petition with the Commission Secretary.

6. *The Rule Should Provide For Replies To Appeals From Intervention Rulings.*

Replies to appeals to the Commission from intervention determinations by the presiding officer are provided for by Rule 74(a) (46 C.F.R. § 502.74(a)).[3] No change in the rule is required in response to this comment.

Furthermore, while the Commission originally contemplated broadening the scope of review of such determinations to allow non-petitioner appeals and *sua sponte* Commission review, upon reflection it has determined that such expanded procedures may in fact result in delaying proceedings contrary to the underlying purpose of the rule. The existing appeal mechanism contained in Rule 227 (46 C.F.R. § 502.227) appears to be adequate for purposes of this rule. Accordingly, paragraph (f) of the proposed rule will be deleted.

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[2] Rule 41 defines the term "party" to specifically include *inter alia*, an "association."

[3] Rule 74 provides in pertinent part, "[a]ny party may file a reply to any . . . petition . . . permitted under the rules in this part within fifteen (15) days after date of service thereof. . . ."

7. *Hearing Counsel Should Not Be Included In The Term "Party"*

Irrespective of Hearing Counsel's participation, private interests with a general interest in a proceeding will not necessarily be precluded from intervening. Normally, a general public interest position will not displace a specific private interest. As has been discussed, a duplicative position should not be confused with a similar position and in close cases a showing of a potential significant contribution should militate in favor of the grant of intervention. In complaint proceedings, Hearing Counsel should be treated as any other petitioner seeking intervention. Therefore, under either situation, Hearing Counsel should be included within the meaning of the term "party" as used in the rule. No change in the language of the proposed rule is necessary in this regard.

8. *Discovery Should Be Restricted For Intervenors*

This is a matter that can be addressed under paragraph (c) of the proposed rule by the presiding officer. In order to protect the due process rights of intervenors the extent to which such discovery procedures will be available to them is a matter best left to the sound discretion of the presiding officer under the facts of the particular proceeding. This is not a matter that can readily be reduced to a rule of general applicability.

9. *A Statutory Right Of Intervention In FMC Proceedings Does Not Exist And Should Be Deleted From The Rule*

A statutory right of intervention is provided for in the Federal Rule and was therefore incorporated into the proposed rule. However, because the Commission is itself not aware of any provision of law granting a right of intervention in its proceedings, nor has any such provision been cited by a commenting party, the phrase "in the absence of an absolute statutory right of intervention" will be deleted from paragraph (b) (1) in the final rule.

10. *The Adequacy Of Representation Of A Petitioner's Interests By Existing Parties Should Not Be An Issue.*

The critical issue under paragraph (b) (1) (iii) is whether the existing party has such similar interest, position, perspective and resources that its participation in the proceeding will necessarily include anything that the petitioner is able to offer. The Commission will not presume that counsel for existing parties in Commission proceedings are incompetent nor will it make rules based on that presumption. The requirement in paragraph (b) (1) (iii) is a fundamental aspect of the rule and will be retained as proposed.

11. *The Participation Of Intervenors May Not Be Limited*

The objection to one of the fundamental aspects of the proposed rule, that of limiting the participation of intervenors in proceedings to the extent necessary to protect their interests, is rejected. The Commission, however, has no intention of depriving any petitioner of its due process rights. Nor does the rule prevent a petitioner from participating in a proceeding if it has something worthwhile to offer.

In *Pepsi Co., Inc. v. F.T.C.*, 472 F.2d 179 (2d Cir. 1972), *cert. den.* 414 U.S. 876 (1973), the court found the intervention standards of the Federal Rules of Civil Procedure applicable to intervention in agency proceedings. That decision clearly contemplates limitations on the participation of intervenors in agency proceedings beyond that normally utilized in formal court proceedings. 472 F.2d at 184. The Commission finds no legal impediment to such procedures and will not reverse its policy determinations as to this fundamental aspect of the proposed rule.

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. §841 (a)) section 502.72 of Title 46, Code of Federal Regulations, is amended as follows.

Section 502.72 Petition for Intervention

(a) A petition for leave to intervene may be filed in any proceeding and shall be served on existing parties by the petitioner pursuant to section 502.114. An additional fifteen (15) copies of the petition shall be filed with the Secretary for the use of the Commission. Upon request, the Commission will furnish a service list to any member of the public pursuant to Part 503 of these rules. The petition shall set forth the grounds for the proposed intervention and the interest and position of the petitioner in the proceeding and shall comply with the other applicable provisions of Subpart H of this part, and if affirmative relief is sought, the basis for such relief. Such petition shall also indicate the nature and extent of the participation sought, *e.g.*, the use of discovery, presentation of evidence and examination of witnesses.

(b) (1) Petitions for intervention as a matter of right will only be granted upon a clear and convincing showing that:

(i) the petitioner has a substantial interest relating to the matter which is the subject of the proceeding warranting intervention; and

(ii) the proceeding may, as a practical matter, materially affect the petitioner's interest; and

(iii) the interest is not adequately represented by existing parties to the proceeding.

(2) Petitions for intervention as a matter of Commission discretion may be granted only upon a showing that:

(i) a common issue of law or fact exists between the petitioner's interests and the subject matter of the proceeding; and

(ii) petitioner's intervention will not unduly delay or broaden the scope of the proceeding, prejudice the adjudication of the rights of or be duplicative of positions of any existing party; and

(iii) the petitioner's participation may reasonably be expected to assist in the development of a sound record.

(3) The timeliness of the petition will also be considered in determining whether a petition will be granted under paragraphs (b) (1) or (2) of this section. If filed after hearings have been closed, a petition will not ordinarily be granted.

(c) In the interests of: (1) restricting irrelevant, duplicative, or repetitive discovery, evidence or arguments; (2) having common interests represented by a spokesperson; and (3) retaining authority to determine priorities and control the course of the proceeding, the presiding officer, in his discretion, may impose reasonable limitations on an intervenor's participation, *e.g.,* the filing of amicus curiae briefs, presentation of evidence on selected factual issues, or oral argument on some or all of the issues.

(d) Absent good cause shown, any intervenor desiring to utilize the procedures provided by Subpart L must commence doing so no later than 15 days after its petition for leave to intervene has been granted. If the petition is filed later than 30 days after the date of publication in the *Federal Register* of the Commission's Order instituting the proceeding or notice of complaint filed, petitioner will be deemed to have waived its right to utilize such procedures, unless good cause is shown for the failure to file the petition within the 30-day period. The use of Subpart L procedures by an intervenor whose petition was filed beyond the 30-day period described above will in no event be allowed, if, in the opinion of the presiding officer, such use will result in delaying the proceeding unduly.

(e) If intervention is granted before or at a prehearing conference convened for the purpose of considering matters relating to discovery, the intervenor's discovery matters may also be considered at that time, and may be limited under the provisions of paragraph (c) of this section.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 647

APPLICATION OF AMERICAN PRESIDENT LINES, LTD.
FOR THE BENEFIT OF BEVERLY COAT HANGER COMPANY

REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISION

October 22, 1979

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

This proceeding was initiated pursuant to section 18(b)(3) of the Shipping Act, 1916, upon the application of American President Lines, Ltd. for permission to refund a portion of freight charges to Beverly Coat Hanger Company.

The Initial Decision of the Presiding Officer conditioned approval of the application upon the submission of evidence to the Commission showing the applicable tariff rates and dates of certain shipments for which the refund was requested.

The Commission determined to review the Initial Decision in view of the fact that a complete evidentiary record was not developed. The proper forum for receiving evidence in this proceeding was the administrative hearing before the Presiding Officer. Evidence upon which findings of fact can be made on these issues is indispensable to an ultimate decision on the application. Although existing procedures do not authorize a presiding officer to direct the submission of evidence to the Commission, the Commission has determined to review the supplemental evidence submitted in this case in order to avoid the unnecessary delay that would result from a remand.

The record establishes that the applicable tariff rate on file with the Commission on the dates of the shipments in question was $71.00 per cubic meter. All the sailing dates to which this application applies were within 180 days of the date of the application as required under the statute of limitations imposed by section 18(b)(3) of the Shipping Act, 1916.

All other findings in the Initial Decision are correct and are herein adopted by the Commission.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding July 16, 1979 is adopted insofar as it finds that American President Lines, Ltd. is granted permission to refund $1,355.58 to Beverly Coat Hanger Company; and

IT IS FURTHER ORDERED, That American President Lines, Ltd. publish immediatly in the Hong Kong Taiwan Freight Tariff No. 5, F.M.C. No. 67 at page 110, the following notice:

NOTICE OF REFUND AUTHORIZATION

Pursuant to authority granted by the Federal Maritime Commission in Special Docket No. 647, the tariff rate for clothes hangers, all kinds, is $62.00 per cubic meter, effective December 3, 1978 and continuing through January 16, 1979, inclusive.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 647

APPLICATION OF AMERICAN PRESIDENT LINES, LTD.
FOR THE BENEFIT OF BEVERLY COAT HANGER COMPANY[1]

Partially Adopted October 22, 1979

Request granted for permission to refund $1,355.58 portion of aggregate of $10,694.02 (+ $238.36 Destination Container Service Charges) freight charges actually collected provided APL supplies the Commission within 30 days with certain proofs. Failure to supply proofs will result in denial of this request for permission to refund.

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

The application in this special docket proceeding was received in the Commission June 1, 1979. The commodity involved is Wooden Clothes Hangers. The commodity was shipped in five (5) shipments under the following American President Lines, Ltd. (APL) Bills of Lading from Kaohsuing via Keelung to San Francisco:

Bill of Lading Number	*Bill of Lading Date*	*Name of Vessel and Voyage No.*	*Sailing Date*	*Measurement*
252925	12-3-78	Pres. Pierce V-42	12-17-78	51.32 M3
253107	12-11-78	Pres. Jefferson V-49	12-12-78	37.59 M3
253108	12-11-78	Pres. Jefferson V-49	12-12-78	15.87 M3
253295	12-17-78	Pres. Madison V-47	12-17-78	10.17 M3
253424	12-25-78	Pres. Johnson V-42	12-26-78	35.67 M3
			Total	150.62 M3

[1] This caption conforms to the revised format. Under date of June 5, 1979, the Secretary of the Commission sent the following letter to counsel for American President Lines:

Receipt is acknowledged of your recent special docket application on behalf of American President Lines. This application does not follow the revised format required by the Commision's recent amendment to its Rules of Practice. Inasmuch as the limitation period for filing has nearly passed, this application nonetheless will be accepted for processing. Forwarded herewith is a copy of the Commission's recent rule revision. Please consult this rule and supplement your application accordingly, to assure that all necessary information is before the Commission.

Processing of this application is being done on submissions to date.

[2] 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 C.F.R. §502.227).

The application is filed timely as to all shipments, having been received within 180 days of the sailing date of each. (Rule 92(a)(3) of Commission's Rules of Practice and Procedure, 46 C.F.R. §502.92 (a)(3)).

The Beverly Coat Hanger Company concurs in this application and certifies that freight charges of $1,355.58 on the shipments involved herein were paid and borne as such by Beverly Coat Hanger Co. and no other. It is the amount of $1,355.58 that APL seeks permission to refund. APL in the application states it actually collected from Beverly Coat Hanger Company $10,694.02 (+$238.36 Destination Container Service Charges) a total of $10,932.38; that the rate applicable at time of shipment was $71.00 per cubic meter as per APL Hong Kong-Taiwan Freight Tariff No. 5, FMC No. 67, Item 3030—15th Revised Page 161, effective December 27, 1978 (Wood Manufactures and Woodenware, NOS including Wooden Decorative Ceiling Boards and Beams; Wooden Figures, Wooden Towel Holders; Blocks for Trophy Stands, Mahogany Boards; Wooden Weaving Looms; Match Sticks, Ramie Loose but excluding Doors, Furniture and Woodcarvings). The aggregate measurements of the shipments was 150.62 cubic meters (150.62 cubic meters × $71 = $10,694.02 + $238.36 Destination Container Service Charges = $10,932.38).

The rate sought to be applied is $62.00 per cubic meter as per American President Lines, Ltd. Hong Kong-Taiwan Freight Tariff No. 5—FMC No. 67, Item No. 0620, 10th Revised Page 110, effective January 17, 1979 (Item 0620 was made effective December 27, 1978) (Clothes Hangers, All Kinds) (150.62 cu. meters × $62.00 = $9,338.44 + $238.36 Destination Container Service Charges = $9,576.80).

($10,932.38 − $9,576.80 = $1,355.58).

In support of this application APL states, *inter alia:*

> APL (pursuant to the terms of FMC Agreement 10107 and with the concurrence of the members of said agreement) agreed to establish a local rate for Clothes Hangers, all kinds in the amount of $62.00 per cubic meter effective December 3, 1978. A copy of APL's letter to the complainant is identified as Attachment D-1.[3] Through clerical oversight, the reduction was not published until December 27, 1978 (Attachment "C").

(Agreement 10107 referred to by APL is Trans-Pacific Freight Conference (HK)/Independent Lines Rate Agreement of which APL is a member. Trade to U.S. Pacific Coast Ports from Hong Kong and Taiwan. APL publishes its own tariff.)

Discussion, Reasons, Findings And Conclusions

The information in this proceeding is that APL intended to establish a local rate for Clothes Hangers, all kinds in the amount of $62.00 per cubic meter in its tariff effective December 3, 1978. The sailing date of each shipment is as

[3] In the letter dated November 27, 1978, APL wrote to the Beverly Coat Hanger Company the following:

> This confirms our previous telephone conversation concerning a new rate for clothes hangers from Hong Kong and Taiwan to local West Coast ports in the United States.
>
> We are pleased to announce that effective December 3, 1978 the rate for the above commodity will be $62.00 per cubic meter or thousand Kilos. It is hoped that our new rate amendment will serve to strengthen your position in product quotation to your buyers.

shown above. The $62.00 per cubic meter rate desired by APL to be applied became effective December 27, 1978. The application was filed June 1, 1979, so that the Commission received an effective tariff setting forth the rate on which refund would be based prior to the filing of the application. (46 C.F.R. §502.92 (A)(2)).

What is not clear is the rate applicable at the time of shipment. APL in the application says the rate applicable at time of shipment was $71.00 per cubic meter as per APL Hong Kong-Taiwan Freight Tariff No. 5, FMC No. 67, Item 3030 (Attachment "B"). Attachement "B" is a copy of that Tariff's 15th Rev. Page 161, effective December 27, 1978. As is seen above, the Bills of Lading as well as the sailing dates of the shipments involved all precede December 27, 1978. True, the application is under oath but the supporting evidence as to the rate applicable at the time of shipment has not been made clear. Too, the supporting evidence of the date of shipment has not been supplied.

The measurements of the individual shipments are shown on the bills of lading and have been shown above and totalled.

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

(1) The application received by the Secretary of the Commission on June 1, 1979, was within 180 days of the sailing date of each shipment involved, thus filed timely.

(2) There was filed with the Commission, prior to this application, an effective tariff setting forth the rate on which the refund would be based.

(3) There was an error of a clerical or administrative nature which resulted in the necessity of a refund as requested in the application; that comports with the requirements under special docket applications (Rule 92 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.92 and section 18(b)(3) of the Shipping Act, 1916, but supporting evidence as to the rate applicable at the time of shipment has not been made clear.

(4) The refund will not result in discrimination as between shippers.

(5) Permission to make the requested refund should be granted provided the applicant provides the information and/or documents to make clear the rate applicable at the times of each shipment involved and the supporting evidence of the date of each shipment.

Wherefore, it is ordered, that:

(A) Permission be and hereby is granted to American President Lines, Ltd. to refund a $1,355.58 portion of $10,694.02 (+ $238.36 Destination Container Service Charges) actually collected, for the benefit of Beverly Coat Hanger Company, provided the said American President Lines, Ltd. provides to the Commission within 30 days of the date of this initial Decision the evidence, satisfactory to the Commission to make clear the rate applicable at the time of each shipment involved and supporting evidence of the date of each shipment.

(B) Upon supplying the Commission with the evidence in (A) above, and providing the Commission is satisfied with what is submitted, the refund shall be made and this proceeding discontinued. Failure of APL to supply necessary proofs shall cause the request for permission to refund to be denied and the proceeding discontinued.

(C) APL at the proper time shall publish in its tariff an appropriate notice of this proceeding.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D. C.
July 8, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-85

TRAILER MARINE TRANSPORT CORPORATION—
PROPOSED REDUCED RATES ON SUGAR CANE &
REFINED SUGAR N.O.S.

DISCONTINUANCE OF PROCEEDING

October 25, 1979

This proceeding was instituted to determine the lawfulness of reduced rates on sugar cane and refined sugar, N.O.S., filed by Trailer Marine Transport Corporation (TMT).

TMT has appealed from a denial of the Presiding Judge of its motion to discontinue the investigation. The basis of that motion is that the rates under investigation herein have been cancelled.

The Commission is of the opinion that no further regulatory purpose would be served by continued investigation of the now-cancelled rates. Accordingly, the appeal is granted and this proceeding is discontinued. By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET No. 79–48

TRAILER MARINE TRANSPORT CORPORATION— PROPOSED GENERAL INCREASE IN RATES

Rate increase will not result in an excessive return on equity in comparison to other industries facing similar business and financial risks and is consequently just and reasonable.

The reasonableness of the revenue and tonnage projections was not specifically raised as an issue by the Order of Investigation and they must, therefore, be accepted for the purposes of this proceeding.

Michael Joseph for Trailer Marine Transport Corporation.
William L. Blum for Government of the Virgin Islands.
C. Douglass Miller, Charna J. Swedarsky, and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISION

October 26, 1979

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

This proceeding was initiated on May 2, 1979, by Order of Investigation and Hearing (Order) to determine the lawfulness of a 5 percent general rate increase filed by Trailer Marine Transport Corp. (TMT), to apply in the trade between U.S. Atlantic and Gulf Coast ports and ports in Puerto Rico and the Virgin Islands. Because of recent amendments to the Intercoastal Shipping Act, 1933,[1] the proceeding was specifically limited to an investigation of:

[1] P.L. 95–475, 92 Stat. 1494 (1978), imposes the following limitations on the Commission:
(1) The Commission shall not order a hearing pursuant to this subsection, on its own motion or upon protest, unless the Commission publishes in the Federal Register the reasons, in detail, why it considers such a hearing to be necessary and the specific issues to be resolved by such hearing. 46 U.S.C. §845(a).
(2) The Commission shall complete such hearing . . . within sixty days . . . and . . . shall issue a final decision thereon within one hundred and eighty days. 46 U.S.C. §845(b).

[2] Though PRMA protested TMT's general rate increase, it did not participate further in the proceeding.

1. Whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks; and
2. The allocation of line haul expenses and division of assets between TMT and Gulf Caribbean Marine Lines, both subsidiaries of Crowley Maritime Corporation (CMC) for tandem barge towing services between U.S. Gulf Coast ports and Puerto Rico.

This Order was subsequently clarified and amended to include the additional question of:

3. Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979 to March 31, 1980, as compared to TMT's actual period of December 1, 1977 to November 30, 1978? Order served July 5, 1979.

TMT was named Respondent and the Government of the Virgin Islands (GVI) and the Puerto Rico Manufacturers Association (PRMA) were named Protestants.[2] Expedited hearings were conducted on June 28 and 29, 1979, before Administrative Law Judge Seymour Glanzer,[3] resulting in a record consisting of a 296-page transcript and ten exhibits.

On August 21, 1979, Administrative Law Judge Stanley M. Levy issued an Initial Decision in which he concluded that TMT did not reasonably establish the volumes and revenues which may be anticipated by its rate increase and that, therefore, TMT had not met its burden of showing that its rates are just and reasonable. He thus found the rates in Supplement No. 1 to Tariff FMC-F No. 5 to be unlawful. Exceptions were filed by TMT, Sea-Land Service, Inc., Puerto Rico Maritime Shipping Authority (PRMSA), and GVI.[4] The Commission's Bureau of Hearing Counsel and GVI filed replies to exceptions. In addition, Hearing Counsel filed a "Petition to Strike" portions of PRMSA's argument, which GVI supports and to which TMT and PRMSA replied.[5] TMT's request for oral argument was denied.

DISCUSSION

TMT claims that the Initial Decision errs in concluding that:

1. TMT had the burden of proving that its rates are just and reasonable by proving that its forecast year revenue and tonnage projections are reasonable;
2. TMT's rates are unlawful without considering the fact that they are identical to those of its competitors;
3. TMT's rates are unlawful without considering its historical financial results; and

[3] Judge Glanzer conducted the hearings because Judge Levy was hospitalized recovering from an operation. However, Judge Levy conducted the prehearing conference and prepared the Initital Decision.

[4] Sea-Land and PRMSA filed concurrent petitions for leave to intervene, to which TMT filed supporting replies and GVI filed an opposition. The Commission's rules of practice and procedure state that petitions to intervene which are filed after the close of hearings will not ordinarily be granted. 46 C.F.R. §502.72. The petitions offer no compelling reason for deviating from this policy and will, therefore, be denied.

[5] In light of the disposition of PRMSA's petition for leave to intervene, Hearing Counsel's petition is moot and will, accordingly, be dismissed.

4. it cannot be determined why there is a projected increase in revenue despite a projected decrease in volume for the forecast year.[6]

TMT does not except to the conclusions concerning the tandem tow issue, and, in fact, asserts that if the cargo cube allocation method is employed, its projected rate of return on equity decreases from 16.15 percent to 14.29 percent.

GVI agrees with all the conclusions in the Initial Decision but notes that the Commission must enter a further order to effectuate those conclusions. It suggests that an order directing a refund of the full amount of the rate increase, plus a rollback of the rates to a reasonable level would be appropriate.

In reply to TMT's Exceptions, Hearing Counsel contends that:

1. TMT had the burden of proof on all issues, including the ultimate issue of the justness and reasonableness of its rates;
2. TMT had ample notice that its projected revenue and tonnage figures were contested;
3. TMT's offer of proof concerning its budgeted revenue figure would not cure all the deficiencies in TMT's direct case;
4. The rates of other carriers were not made an issue by the Order;
5. TMT should not be allowed to change its test period to look at its historical rates of return on rate base for a six-year period; and
6. TMT's corrections of two of its exhibits are untimely and should be rejected.[7]

Hearing Counsel further suggests that if the Commission finds TMT's general rate increase to be unjust and unreasonable, it must order the rate increase rolled back and a refund of all revenues collected as a result of the increase.

The Commission has reviewed the entire record in this proceeding and concludes that certain findings and conclusions set forth in the Initial Decision are not warranted and must, therefore, be modified or clarified by the following discussion. In all other respects, however, the Initial Decision is correct and shall be adopted by the Commission as its own.

The Presiding Officer concluded that, if TMT's revenue projections are accepted, a return on equity to TMT in the zone of 15.8 to 16.15 percent would not be excessive and its rate increase would not, therefore, be unlawful (Initial Decision at 6). However, the Presiding Officer further concluded that whether or not TMT's projected return on equity would exceed this zone of reasonableness could not be determined on the record, because TMT failed to establish a reliable projection of its net revenues (Initial Decision at 21, 22). The Commission finds that the Presiding Officer incorrectly based his decision on the reasonableness *vel non* of TMT's revenue and tonnage projections and concludes that, for the purposes of this proceeding, these projections were not in issue and must be accepted.

[6] TMT also asserts that the Presiding Officer's criticism of its correcting certain errors in its submissions is unwarranted. The Commission finds nothing prejudicial in these remarks, particularly in view of the decision reached herein, but does endorse the proposition that P.L. 95–475 "[p]laces a high degree of responsibility on the carrier seeking a rate increase to supply the information necessary to permit expeditious consideration." Initial Decision at 39.

[7] GVI's reply to exceptions raises several of the same points and is, therefore, subsumed in any discussion of Hearing Counsel's position.

The amended Intercoastal Shipping Act reflects a clear Congressional dissatisfaction with the lengths of time necessary to complete general rate cases. S. Rep. No. 95–1240, 95th Cong., 2d Sess. 9, 10 (1978). It prescribes strict time limits applicable to everyone involved in such rate proceedings—carriers, protestants, administrative law judges and the Commission. To enable the Commission to issue its final decision within 180 days of a rate increase taking effect, the formerly open-ended hearing process has been severely curtailed. Hearings on rate increases will not now be conducted unless the Commission details why a hearing is necessary and specifies the issues to be resolved by any such hearing.[8] 46 U.S.C. §845(a).

In compliance with P.L. 95–475's strictures, the Commission's Order of Investigation and Hearing limited the hearing to only two issues: (1) the excessiveness of TMT's return on equity, and (2) the allocation of expenses and assets for the tandem barge towing service. This Order expressly noted that in its protest to TMT's rate increase, GVI had requested that several additional issues be investigated, among them:

> Whether TMT's projection of the revenue that is designed to be produced by the proposed rates is reasonable.

But the Commission declined GVI's request. At a subsequent prehearing conference GVI requested discovery concerning TMT's revenue projections. The Presiding Officer denied this discovery request by stating:

> We will take for the purpose of this proceeding . . . [the] revenue projections as set forth in the submission to the Commisison and we will base the determination hereafter as to whether those revenues assuming those revenues are obtained, what are the consequences.
>
> And that's, in effect, what item 1 of the Commission's Order of Investigation asks.
>
> Prehearing Transcript at 23.

GVI then filed a "Petition for Clarification or Reconsideration" of the Commission's Order in which it requested that the Commission state that its intent was that the issue of revenue projections (or any other element of the rate of return on equity) not be excluded from the investigation if such issue is disputed. The Commission denied GVI's request by stating that:

> [b]ecause this was not and is not the Commission's intent, a clarification of this nature is inappropriate. . . .
>
> Order served July 5, 1979 at 2.

The Commission did, however, amend its Order to include a third issue—why is there a projected increase in revenue despite a decreasing volume of cargo for the forecast year?

In light of this chronology, the reasonableness of TMT's tonnage and revenue projections was not properly an issue in this proceeding. It was neither expressly delineated nor implicit in the scope of the first or third issues. Hearings under P.L. 95–475 must remain limited by only those issues which the Commission orders investigated. In appropriate cases the Commission may well order an investigation into the methodology employed by a carrier in projecting its revenues and volumes. This is not such a case, however.

[8] Regardless of the specific issues stated in an order of investigation, the ultimate issue in any proceeding involving a general increase in rates remains whether the rate increase is just and reasonable. *See* 46 U.S.C. §§817 and 845(b).

As mentioned earlier, the amended Order of Investigation and Hearing raised as the third issue:

> Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979 to March 31, 1980, as compared to TMT's actual period of December 1, 1977 to November 30, 1978?

Because he concluded that the record failed to establish projected volumes and revenues, the Presiding Officer further concluded that this third issue "cannot be determined." Initial Decision at 40. The Presiding Officer also stated that the main reasons offered by TMT to explain the decrease in tonnage—a shift to thru-tariffs and increased competition—were not supported by the record (Initial Decision at 34). The Commission disagrees with these conclusions and finds that TMT has adequately responded to and explained the third issue.

Within the context of TMT's operating revenue forecast (Schedule V of Exhibits 2 and 7) there are only two categories in which projected revenue tons decrease while projected revenues increase—automobiles and other. Regardless of the reasonableness of the underlying projections, the record does contain sufficient facts to explain the relationsip between tonnage and revenue for these two categories. The volume reduction for automobiles is predicated on manufacturers' automobile size reductions. However, this decrease in volume is more than offset by the general rate increase, resulting in an overall projected net increase in revenue. The "other" category is expected to decrease in volume by approximately 20 percent, due primarily to a shift to other TMT tariffs. This decrease will be offset by an increase in volumes of highly-rated tank and refrigerated cargoes which will again result in a net increase in revenues.

For the foregoing reasons, the Commission finds TMT's general increase in rates just and reasonable and not otherwise unlawful.

THEREFORE, IT IS ORDERED, That the Initial Decision in this proceeding, as modified and clarified by the above discussion, is adopted by the Commission; and

IT IS FURTHER ORDERED, That the Exceptions of Trailer Marine Transport Corporation are granted, to the extent indicated above, and the Exceptions of the Government of the Virgin Islands are denied; and

IT IS FURTHER ORDERED, That the Petitions for Leave to Intervene filed by Sea-Land Service, Inc. and the Puerto Rico Maritime Shipping Authority are denied, and the Petition to Strike filed by the Bureau of Hearing Counsel is dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-48

TRAILER MARINE TRANSPORT CORPORATION— PROPOSED GENERAL INCREASE IN RATES

Adopted October 26, 1979

The evidence fails to establish that the rate increase will not result in an excessive return on equity to TMT in comparison to other industries facing similar risks.

The cargo cube allocation of expenses and division of assets for the tandem barge towing service is the appropriate method of allocation.

The evidence fails to establish any reasonably accurate basis for determining volumes or revenues which may be anticipated by reason of the rate increase.

The evidence fails to establish any reasonably accurate basis for determining volumes or revenues which may be anticipated by reason of the rate increase.

The evidence being insufficient to permit a determination of volumes and revenues, it cannot be determined why there is a projected increase in revenue for the trade despite a decreasing volume of cargo to be carried.

Michael Joseph for respondent Trailer Marine Transport Corporation.

William L. Blum for protestant Government of the Virgin Islands.

John Robert Ewers, C. Douglass Miller and *Charna J. Swedarsky,* Hearing Counsel.

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

On January 31, 1979, Trailer Marine Transport Corporation (TMT) filed Supplement No. 1 to its Tariff FMC-F No. 5 proposing a 5 percent general increase in rates effective April 1, 1979. Under authority of Commission Special Permission No. 6317, TMT filed Supplement No. 2 to its Tariff FMC-F No. 5 postponing the April 1, 1979, effective date to May 1, 1979.

TMT Tariff FMC-F No. 5 establishes local, joint and proportional commodity rates between United States Atlantic and Gulf Coast ports and ports in the Commonwealth of Puerto Rico and the Virgin Islands via direct and transshipment service at Puerto Rico. The proposed 5 percent general increase would apply: to all ocean freight commodity rates to and from U.S. Atlantic and Gulf Coast ports and Puerto Rico; to the minimum ocean freight charge on a shipment under one bill of lading between terminals in Puerto Rico and U.S.

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[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 C.F.R. § 502.227).

Atlantic and Gulf Coast ports (TMT Freight Tariff No. 7, FMC–F No. 5, Rule 5 at 29); and to rates which apply "Per Trailer," i.e., except as otherwise indicated in individual tariff items, rates on shipments loaded in trailers by the shipper, unloaded by the consignee and have specified minimum and maximum interior capacities (TMT Freight Tariff No. 7, FMC–F No. 5, Rule 15 at 36). Supporting data, as required by Commission General Order No. 11 (G.O. 11) was submitted by TMT at the time of filing of the proposed increase.

Protests were received from the Puerto Rico Manufacturers Association (PRMA) and the Government of the Virgin Islands (GVI).

In its protest GVI contended that TMT, on the basis of its G.O. 11 report failed to provide sufficient justification that its proposed rates were just, reasonable, and lawful under section 18(a) of the Shipping Act, 1916, and under sections 3 and 4 of the Intercoastal Shipping Act, 1933, as amended. The GVI alleged TMT's data was insufficient to determine: (1) that part of the embedded debt cost of Crowley Maritime Corporation (CMC) (TMT's parent corporation) which should be allocated to TMT; (2) the debt and equity ratio of CMC; and (3) the rate of return on equity that should be attributed to TMT. Further, the GVI believed additional information was required of TMT to explain the revenue projections that are contained in its G.O. 11 for the forecasted year. The GVI requested that the Commission enter into a hearing and investigation and include at least the following issues:

1. Whether the proposed rates are unjust and unreasonable in that they will provide TMT (and/or CMC) with an excessive return as measured by accepted analytical methods;
2. Whether TMT's projection of the revenue that is designed to be produced by the proposed rates is reasonable;
3. What is a just and reasonable allocation of assets and expenses from CMC to TMT;
4. Whether the proposed rates are unjust and unreasonable in that their negative effect on the Virgin Islands' economy outweighs the carrier's need, if any, for increased revenues.

Despite GVI's protest, the Commission permitted the subject rate increase to go into effect without suspension in view of it being subject to section 3(c)(1)(B) of the Intercoastal Shipping Act, 1933, as amended, which provides in part that the Commission may not suspend "[a]n increase or decrease of 5 percentum or less and filed as part of a general increase in rates or a general decrease in rates. . . ." However, the Commission was of the opinion that TMT's proposed 5 percent increase, as proposed in Supplement No. 1 to Tariff FMC–F No. 5, should be made the subject of a limited public hearing to determine whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks. Moreover, the Commission reviewed data submitted by TMT regarding the tandem barge towing service with Gulf Caribbean Marine Lines (GCML—also a subsidiary of CMC) between U.S. Gulf Coast ports and Puerto Rico. This data showed that costs are divided equally between the two companies for the joint tow portion of a voyage. The Commission was of the opinion that an equal division of these expenses does not follow a benefits-received allocation principle. Therefore, it determined that this proceeding should also determine the allocation of line haul expenses and the division of assets between TMT and GCML for tandem barge towing between U.S. Gulf Coast ports and Puerto Rico.

Thereupon, the Commission ordered that an expedited investigation be instituted into the lawfulness of the tariff matters contained in Supplement No. 1 to TMT's Tariff FMC–F No. 5 for the purpose of making such findings as the facts and circumstances warrant, and further ordered that this proceeding be limited to an investigation of:

1. Whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks; and
2. The allocation of line haul expenses and division of assets between TMT and Gulf Caribbean Marine Lines, both subsidiaries of CMC, for tandem barge towing services between U.S. Gulf Coast ports and Puerto Rico.

Thereafter, GVI filed a "Petition for Clarification or Reconsideration" of the Commission's Order. GVI requested that the Commission clarify its Order by stating that it had been the Commission's intent that the issue of revenue projections (or any other element of the rate of return on equity) not be excluded from the investigation if such issue is disputed.

In its Order of Investigation and Hearing, served May 2, 1979, the Commission ordered that "this proceeding shall be completed within sixty (60) days of this order." Sixty days thereafter being July 1, 1979, the hearing was concluded on Friday, June 29, 1979, 58 days from the issuance of the Commission's order and 59 days from the day the rate increase became effective. On July 5, 1979, the Commission issued an order with regard to GVI's petition for clarification.

The Commission declined to state, in accordance with GVI's request, that it had been the Commission's intent that the issue of revenue projections (or any other element of the rate of return on equity) not be excluded from the investigation. Rather, it stated that: "Because this was not and is not the Commission's intent, a clarification of this nature is inappropriate, and GVI's request, must therefore be denied."

GVI requested alternative relief, however, as follows:

> That the Commission reconsider its Order of Investigation and Hearing and amend it to include the following issue: "Why does TMT project a decrease of 16% in the number of revenue tons carried between the historical and projected years?"

With respect to the alternative relief, the Commission was of the belief, however, that the question posed for hearing by GVI was within the original scope of the Order of Investigation and Hearing and that a clarification to that effect therefore was appropriate. Thereupon it ordered the Commission's Order of Investigation and Hearing of May 2, 1979, be clarified and amended to include the following question:

> Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979 to March 31, 1980, as compared to TMT's actual period of December 1, 1977 to November 30, 1978?

Although the Commission clarification order was not served until after the hearing was completed, the parties were aware that pursuant to GVI's petition, the matter of Commission intent was under consideration by the Commission. Administrative Law Judge Glanzer at the start of the hearing[2] stated:

I have been told that in the very near future, maybe not for a day or two, the Commission will issue an order, a written order, granting the petition for clarification as suggested by hearing counsel.

Will that create any problems for anyone in this proceeding? I think Mr. Joseph informed me earlier that he was quite prepared to go ahead with any decision that the Commission may have made in connection with the granting of that petition for clarification.

Mr. JOSEPH:[3] That is correct.

Hearings were held in this proceeding on June 28 and 29, 1979.[4] There are 295 pages of transcript and 10 exhibits.[5]

Without specific prior knowledge of how the Commission would treat the issue of revenue projections (or any other element of the rate of return on equity) considerable evidence was introduced at the hearing relating to TMT's revenue projections. The conclusion to be reached from such evidence is that, as set forth hereafter in detail, TMT's revenue projections cannot be relied upon to determine whether TMT's return on equity is excessive and consequently whether the rate increase is or is not just and reasonable and otherwise lawful.

Arithmetically, if one accepts the accuracy of the revenue projections, the return to TMT's equity is within the zone of reasonableness and as such the rate increase cannot be said to be unlawful.

Upon consideration of the evidence of record, there is set forth the following.

FINDINGS OF FACT

I.

Issue: Whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks.

1. Based upon statistics published by Citibank, the following rates of return on equity have been earned by non-financial enterprises in general and by that category of the transportation industry which includes shipping (i.e., "Misc. Transportation") for the periods shown:

	1969–73	*1974–78*	*1969–78*	*1978*
Non-financial	11.4%	13.8%	12.8%	14.8%
Misc. Transportation	11.6%	17.0%	15.0%	16.7%

2. For the years 1975–1978, TMT cannot be considered dominant in the overall Puerto Rican trade, although it has increased its market penetration during the last four years, a trend which is likely to continue.

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[2] Tr. 3.

[3] Counsel for TMT.

[4] At the time of the hearing, the undersigned was hospitalized and recovering from spinal surgery on June 27, 1979. Administrative Law Judge Seymour Glanzer presided over the presentation of testimony and introduction of evidence. The parties interposed no objections to the undersigned issuing an Initial Decision on the record adduced. Tr. 3.

[5] Also an Offer of Proof.

3. TMT leases many of the assets employed in the Puerto Rican Trade from related companies, consequently the debt obligations of these assets do not appear on TMT's books.

4. For rate of return purposes, the appropriate capital structure for respondent is that of its parent corporation, Crowley Maritime Corporation, which consists of 57.68 percent debt and 42.32 percent equity.

5. The objective measure of financial risk is determined by looking at the capital structure of the firm and hypothesizing that the more and expensive the debt the company has, the more volatile will be its return on equity. The equity investor is therefore subject to more risk in a highly leveraged firm.

6. The median debt/equity ratio for all industries surveyed by *Forbes* for the latest 12 months was 0.4; the surface transportation industry had a debt/equity ratio of 0.6, the air transportation industry 0.9, and the public utility industry a ratio of 1.0.

7. The CMC debt/equity ratio as of December 31, 1978, was 1.1 as computed on the basis of *Forbes.*

8. CMC has substantially more long-term debt to equity than the average firm and it, therefore, can be concluded that CMC is more leveraged than the average firm.

9. Due to CMC's more leveraged position than other companies based on median debt/equity ratios, TMT should be given a financial risk premium of 0.5 percent.

10. Using a variation in earnings test, based on TMT's five years of earnings, including financial data for the years December 1, 1977–November 30, 1978 and January 1, 1978–December 31, 1978, TMT appears to have a high business risk.

11. As the purpose of assessing a carrier a risk premium is to allow a return capable of attracting needed capital, on the basis that TMT is subjected to an above average business risk, CMC should be allowed a business risk premium of 1.0 percent.

12. The total appropriate adjustment to the ten year average rate of return on equity for non-financial corporations for business and financial risk should be 1.5 percent for TMT.

13. Based on the high cost of attracting capital, a 1.5 percent adjustment should be attached to the ten year average return on equity to bring that return up to a reasonable level which will account for current financial trends.

14. Given all of the above average risk conditions, TMT (or CMC) should be entitled to a rate of return on equity which is 3.0 percent higher than the ten year average for non-financial U.S. corporations of 12.8 percent.

15. The reasonable return on equity that TMT should be allowed to earn for the projected year March 1979–April 1980 is 15.8 percent.

II.

Issue: The allocation of line haul expenses and division of assets between TMT and Gulf Caribbean Marine Lines, both subsidiaries of CMC, for tandem barge towing services between U.S. Gulf Coast ports and Puerto Rico.

16. TMT's forecasts include an allocation of certain expenses, and division of assets, relating to tugs to be used to tow, in tandem, both a TMT barge and a barge of Gulf Caribbean Marine Lines (GCML), an affiliate of TMT. The barges are thus towed in tandem between Lake Charles, Louisiana, and San Juan, Puerto Rico.

17. One round voyage between Lake Charles and San Juan for TMT consumes twenty-one days, of which approximately sixteen days are actual steaming time during which a single tug is towing both barges. During the remaining approximately five days the tug remains with the TMT barge alone, as the GCML barge utilizes a separate tug while calling at various additional ports in both the continental United States and Puerto Rico.

18. While both TMT's and GCML's barges carry significant amounts of cargo southbound, TMT, whose trailers are compatible with the carriage of manufactured goods, also carried significant amounts northbound. GCML, on the other hand, rarely carries any cargo from Puerto Rico to the continental United States.

19. TMT's forecast assumes the utilization of three tugs for the entire year in the tandem towing service described above, and allocates the related expenses and assets 60 percent to TMT and 40 percent to GCML. TMT arrives at this 60/40 ratio by allocating 50 percent of the round voyage tandem steaming time (approximately eight days) each to TMT and GCML and 100 percent of the remaining approximately five days to TMT. Thirteen of the twenty-one days, or approximately 60 percent, of the expenses and assets respecting the three tugs are thus allocated to TMT, and the same percentage is applied on an annual basis.

20. TMT originally allocated $4,942,610 to TMT and $2,965,607 to GCML for the assets and expenses of the tandem barge towing services, producing a 62.5/37.5 percent time allocation.

21. TMT subsequently supplied a new total line haul expense figure of $4,942,610 and an allocation of $2,965,607 to TMT and $1,977,003 to GCML which produced a 60/40 percent time allocation.

22. At the hearing, TMT stated that the $4,942,610 figure appearing in staff witness Coleman's testimony which Mr. Coleman identified as "line haul expense" actually included expenses for a greater period than that involved in the actual tandem tow. Thereafter, TMT submitted a revised total allocation of $4,078,966 of tug expense for the tandem barge towing service.

23. With few exceptions, G.O. 11 prescribes the allocation of expense and division of assets on a volume basis.

24. G.O. 11 prescribes a vessel day allocation for cargo vessels employed in The Service for less than the entire reporting period. The General Order states in relevant part that:

> For such vessels the Adjusted Cost shall be allocated between Voyages in The Service and Voyages in Other Services on the basis of the relationship the number of days in each bears to the total of both.

This provision is inapplicable to the tandem barge towing service.

25. Under the requirements of G.O. 11, direct vessel expenses are accumulated for the service and allocated on a revenue ton mile relationship which is volume affected.

26. A cargo cube allocation is based on the tonnage of cargo carried on each carrier's respective barge. Cargo cube is a volume allocation.

27. During the period when there is no tandem barge towing, but only the towing of a TMT barge or lay-up time, assets and expenses are allocated on a revenue ton mile relationship.

28. Cargo cube method of allocation for assets and expenses of the tandem barge towing services produces an allocation of 63.7 percent for TMT and 36.3 percent for GCML.

29. The amount of cargo that each carrier carries on a round-trip voyage in the tandem tow is not reflected in a time formula allocation.

III.

Issue: Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979, to March 31, 1980, as compared to TMT's actual period of December 1, 1977, to November 30, 1978?

30. Donald C. O'Malley, Jr., Director of Tariff and Regulatory Affairs for the Caribbean Division of Crowley Maritime Corporation, prepared the projected revenue and tonnage estimates shown on Schedule V, Exhibits 2 and 7.

31. Mr. O'Malley is primarily responsible for preparation of Schedule V of Exhibits 2 and 7, the forecast of revenues on a commodity-by-commodity basis, subject to the supervision of Mr. Roush.

32. Neither of TMT's witnesses, Mr. Roush nor Mr. O'Malley, are involved in preparing the budget.

33. In developing Schedule V of Exhibit 2, Mr. O'Malley began with the total revenue figure of $48,792,000, which came from TMT's annual forecasted budget. Mr. O'Malley had nothing to do with the figures which were used to arrive at the $48,792,000. The $48,792,000 figure was first given to Mr. O'Malley at the time he was instructed to file for a rate increase.

34. The revenue and tonnage forecast as prepared by Mr. O'Malley for the fifteen leading commodities and shown on Schedule V of Exhibit 2 was not in existence at the time the forecasted budget figure of $48,792,000 was created. The budget figure became the revenue forecast and tonnage figures were adjusted to conform to the budget previously mandated.

35. Operating Revenue and tonnage for the historical year are as shown on Schedule V of Exhibit 1; these figures are taken from TMT's computer and reflect actual experience.

36. The percentage adjustments in projected cargo tonnage shown on Exhibit 5 were not used by TMT in making the original tonnage estimates shown on Schedule V, Exhibit 2. They were an "after-the-fact" calculation.

37. Mr. O'Malley does not remember how he calculated the tonnage projections for the fifteen leading commodities shown on Schedule V, Exhibit 2.

38. The forecast revenue amount figures for each of the fifteen leading commodities, as shown on Schedule V of Exhibits 2 and 7, were derived from the respective historical revenue amount figures shown on Schedule V of Exhibit 1.

39. A certain amount of cargo previously moving pursuant to the rates under investigation are now moving under through rate tariffs.

40. Mr. O'Malley adjusted the revenue figures for each of the fifteen leading commodities taking into account shifts in cargo to through rate tariffs, competition, and the proposed 5 percent increase. Mr. O'Malley could not recall the actual dollar amounts of the adjustments he made.

41. The record does not reveal the details of any calculations or analysis which may have formed the basis for the derivation of the forecast revenue amounts from the historical revenue amounts, and Mr. O'Malley could not recall how he calculated the projections for the fifteen leading commodities. However, rather than any separate analysis and calculation for each commodity, the revenue ton forecast on Schedule V of Exhibits 2 and 7 are susceptible of being derived mathematically from the figure in the revenue amount column as follows:

$$T = R \text{ divided by } (1.05 \times R'/T')$$

where T is the projected revenue tonnage figure,
R is the projected revenue amount figure,
T' is the historical revenue tonnage figure, and
R' is the historical revenue amount figure.
The 1.05 factor represents the 5% rate increase.

42. The "other" category represents all commodities carried by TMT in addition to the fifteen individual commodities producing the highest revenues.

43. Mr. O'Malley calculated the revenue figure for "Other" cargo (Schedule V, Exhibit 2) by subtracting the $27,580,588 total revenue of the fifteen leading commodities from the budget figure of $48,792,000. Mr. O'Malley does not remember how he calculated the 689,363 revenue tons for "Other" cargo as shown on Schedule V, Exhibit 2.

44. TMT's total projected revenue is higher than its total actual revenue for the actual twelve months ended November 30, 1978, despite the fact that its total projected cargo volume is lower than its total actual cargo volume for said twelve months.

45. Of the sixteen commodities categories in TMT's projection, only two—vehicles and "other"—involve both a projected increase in revenue and a projected decrease in cargo volume.

46. The reason for the projected revenue increase despite a projected volume decrease for vehicles is that while TMT projects a slight decrease in the cubic volume of vehicles as a result of manufacturers' automobile size reductions, the corresponding decrease in revenues is more than offset by the subject 5 percent rate increase. Although TMT's estimate of a 5.5 percent growth in number of vehicles carried would have resulted in an increase in both the projected revenue and the projected cargo volume over the actual 1978 results, the

vehicle size reductions (estimated at approximately 6 percent) brought about a decrease of both instead. While this resulted in a projected net decrease of .8 percent in volume, application of the 5 percent rate increase to the reduced revenue left a projected net increase in revenue for vehicles.

47. Although TMT calculated the revenue shown for "Other" cargo on Schedule V, Exhibit 2, by simply subtracting the revenue estimates for the fifteen leading commodities from the forecasted budget figure, TMT predicts that about 20 percent of the 1978 revenue and corresponding volume will move under other TMT tariffs not in the Trade, but that partially offsetting this decrease will be an increase in revenue and volume in relatively high-rated cargoes carried in tank and refrigerated trailers.

48. With the exceptions of refrigerated cargo and tank trailers, separate analysis and calculations were not performed to derive the revenue forecast for any commodities other than those within the top fifteen, rather a percent reduction for "all other" cargo was estimated not to exceed the revenue figure previously fixed.

49. TMT's market share in the U.S. Mainland-Puerto Rico trade has increased each year from 1975 through 1978, and TMT expects that its market share will continue to increase.

50. On the basis of the routine analysis of Schedule V, TMT's G.O. 11 staff witness Coleman calculated that the total revenue per ton increased from TMT's actual year to the projected year by 23 percent and that in the "Other" cargo category alone, revenue per ton increased approximately 49 percent.

51. On three separate occasions, Mr. Coleman requested Mr. Craig Wallace of CMC to explain why revenue per ton on individual line items on TMT's projected Schedule V increased from TMT's actual Schedule V on the average of about 5 percent, whereas the "Other" cargo category produced a 49 percent increase, resulting in an overall increase of 23 percent.

52. In response to a telephone inquiry of February 9, 1979, by Mr. Coleman as to why revenue tons increased 23 percent, Mr. Wallace responded that TMT would be carrying higher rated liquid tank cargo which is a low tonnage cargo.

53. In response to a telephone inquiry of March 2, 1979, by Mr. Coleman as to whether TMT included the general rate increase in its projections, Mr. Wallace responded yes, and further that the 5.94 percent increase in revenue is the result of the compounding effect of applying the 5 percent general increase, a 23 percent increase in revenue per ton, offset by a 13.88 decrease in revenue tons carried. The increase in revenue per ton is principally affected by "Other" cargo which consists of liquid or tank cargo which is low in tonnage and carried at a higher rate.

54. In response to Mr. Newton Frank, Supervisory Accountant, Federal Maritime Commission, on May 22, 1979, regarding TMT's decrease in projected revenue tons and increase in revenue, Mr. Wallace responded that tonnage was down due to the fact that more cargo was being carried under ICC tariffs. Mr. Wallace further responded that the revenue in "Other" cargo increased 48 percent, 38 percent of which is due to more reefer and special cargo which is high rated and low in tons. The remaining 10 percent is due to the projected mix in quantities.

55. On May 22, 1979, Mr. Coleman called Mr. Wallace regarding the conflicting information given Mr. Frank as compared to previous conversations regarding the increase in revenue per ton and decrease in revenue tons. Mr. Wallace stated that the 48 percent increase in revenue referred to was the revenue per ton increase of the total of "Other" cargo and that in addition to the increase in tank cargo, there is a projected increase in reefer cargo which he may have forgotten to mention earlier.

DISCUSSION

I.

Whether or not TMT's return on equity is excessive in comparison to other industries facing similar business and financial risks.

In a prior general rate increase proceeding, Docket No. 77-27, the Commission suggested using the capital structure of the parent company CMC and/or related companies as a better indication of the true debt/equity structure of TMT. This suggestion has been carried through, although updated, in this docketed proceeding. The capital structure of CMC as computed by the company consists of 57.68 percent debt and 42.32 percent equity as of December 31, 1978.

In the case of TMT, a wholly owned subsidiary of CMC, any attempt to directly measure the cost of equity capital is highly speculative because of the diverse nature of CMC which is the stock issuing entity in the corporate chain. Although the capital structure of CMC has been used in this proceeding as a surrogate for TMT, some measure of the cost of equity capital for TMT is required.

In lieu of a direct cost of equity study, a comparable earnings test is a reasonable alternative in determining TMT's fair rate of return. The comparable earnings test entails the determination of rates of return being earned by firms similar to TMT. Generally, the analysis is centered around determining average rates of return being earned by various firms and, thereafter, attaching a risk factor according to prevailing trends for the business and financial risk TMT faces vis-a-vis these other firms.

To determine a reasonable rate of return on equity, a long-run average of industry earnings is preferable. The use of a time series analysis smooths our variations in earnings which may fluctuate widely from year to year, avoids the possibility of allowing a carrier an inadequate return if current earnings are abnormally low, or conversely, permitting a carrier unjustifiably high profits if a temporary surge in earnings has occurred. In addition, a time series provides a better idea of the trend in earnings. Therefore, the initial determination of a fair rate of return for a carrier experiencing average risk should be based on the average rate of return on equity earned during the past ten years by non-financial U.S. corporations. Hearing Counsel's witness, Mr. Stilling, FMC Staff Economist, presented numerous schedules to that effect. For purposes of this proceeding, Mr. Stilling's initial determination of a fair rate of return for a regulated firm experiencing average risk was based on rates of return on stockholder's equity earned during the past ten years by non-financial U.S. corporations as reported by Citibank.[6]

For the ten-year period 1969 to 1978, non-financial corporations averaged 12.8 percent return on equity, and in 1978 the companies averaged 14.8 percent, indicating that returns are currently higher than over the past decade. Although during the past ten years there has been a trend of increasing returns on equity, between 1974 and 1975 average returns on equity dropped from 13.9 percent to 11.7 percent. On a moving average basis, the five-year median return on equity for U.S. industries has increased from 11.6 percent during the period 1970–1974 to 13.9 percent in the 1974–1978 period. Such higher nominal earnings reflect both a real component and an inflation component. As inflation rises, earnings and rates of return rise in large measure due to higher prices. It is, therefore, more reasonable to look at a ten-year period of time to determine trends in returns. On this basis, an appropriate starting point from which a determination can be made as to a reasonable rate of return on equity for TMT is the ten year, 12.8 percent average rate of return on equity of the composite, non-financial U.S. corporations.

TMT's witness Mr. Roush calculated the fair rate of return on equity for the projected year based on the 1978 *Fortune 500* average with a 2.6 percent adjustment which Dr. Robert Ellsworth, FMC Staff Economist used in a previous case. Although Mr. Roush selected the 1978 *Fortune 500* average as the basis for his calculation, he stated that such an average could not be used as an indicator of business conditions in 1979 or 1980, and he did not review the alternate sources of business data. Nor did Mr. Roush explain why Dr. Ellsworth's 2.6 percent adjustment should be applied to the 1978 *Fortune 500* average.

Adjustment to the ten-year average rate of return on equity, to account for current trends in returns on equity, cost of money, financial and business risk should be reflected in the return that any regulated firm would be permitted to earn if it was in a similar risk category as an average firm.

The objective measure of financial risk is determined by looking at the capital structure of the firm and hypothesizing that the more debt and the more expensive the debt the company has, the more volatile will be its return on equity. The equity investor is, therefore, subject to more risk in a highly leveraged firm.

To determine whether TMT had more financial risk (leverage) than the average U.S. corporation, schedules were prepared by staff witness Mr. Stilling which show the debt/equity ratios for those industries surveyed by *Forbes* for the latest twelve months. This data was then compared by Mr. Stilling to the debt/equity ratio of TMT to determine whether it is more or less leveraged than the average firm.

Mr. Stilling's data show that the median debt/equity ratio for all the industries surveyed by *Forbes* for the last twelve months was 0.4, the surface

[6] Non-financial corporations include all industries surveyed by Citibank, among them transportation, except financial institutions (commercial banks, investment funds, sales finance) which returns may not be accurately reflected.

transportation industry had a debt/equity ratio of 0.6, the air transportation industry 0.9, and the public utility industry a ratio of 1.0. From data provided by the carrier as of December 31, 1978, Mr. Stilling calculated the CMC debt/equity ratio to be 1.1.

On the basis of a comparison of the above debt/equity ratios, Mr. Stilling concludes that CMC has substantially more long-term debt to equity than the average firm and, therefore, CMC is more leveraged than the average firm. Because of CMC's more leverage position than other companies based on the median debt/equity ratios, Mr. Stilling judged that TMT should be given a financial risk premium of 0.5 percent.

The measure of business risk is a test of stability of earnings of a firm and is measured in terms of fluctuations in rates of return. Higher variations are viewed as symptomatic of higher levels of risk.

In order to determine business risk, Mr. Stilling applied a variations in earnings test. Using the variations in earnings test, based on TMT's five years of earnings, including the period December 1, 1977–November 30, 1978, and January 1, 1978–December 31, 1978, Mr. Stilling concluded that TMT appeared to have a high business risk. Mr. Stilling compared the financial data for TMT to the variations in rates of return for thirty industries surveyed by *Forbes* for the five-year period 1974–1978. The data, according to Mr. Stilling, indicates that TMT is in a high-risk position as compared to the industries surveyed.

However, in determining levels of risk, consideration must also be given to the subjective measures of risk. A less precise alternative to the variations in earnings test to estimate business risk is to analyze market shares. The larger the market share of the firm, the more dominant its position. A dominant firm with large market shares will normally be subjected to less risk because its position permits the firm to experience various economies of scale and thereby withstand the rigors of competition.

Based on an analysis of TMT's market share in the Puerto Rican Trade for the years 1975–1978, Mr. Stilling found that TMT cannot be considered dominant in the overall Puerto Rican Trade with a meaningful market share somewhat higher than 17 percent. However, TMT's profits have always been positive and its market penetration during the last four years has increased, a trend which Mr. Stilling believes is likely to continue.

The above factors indicate that TMT is subjected to more than average business risk, although TMT's profits have always been positive and the company has had little trouble in attracting new investment. On this basis, as the purpose of assessing a carrier a risk premium is to allow a return capable of attracting needed capital, Mr. Stilling allowed CMC a business risk premium of 1.0 percent. Therefore, based on Mr. Stilling's analysis, Hearing Counsel take the position that the total appropriate adjustment to the ten-year average rate of return on equity for non-financial corporations for business and financial risk should be 1.5 percent for TMT.

Another factor to be considered when determining the appropriateness of the ten-year average return on equity as an indicator of a fair return is the trend in money costs during the period. Information on the current and historical cost of money indicates whether the ten-year average return on equity is too conservative for the average firm which must compete in the money market for equity funds. Adjustments to the ten-year average return on equity to account for current trends and cost of money should, therefore, be reflected in the return that any regulated firm such as TMT would be permitted to earn if it was in a similar risk category as an average firm.

Mr. Stilling's analysis of current trends and the cost of money showed that a time series analysis underestimates the cost of capital and, therefore, an upwards adjustment to the average rate of return is necessary. Mr. Stilling found that currently money costs are significantly higher than they have been during the most recent ten-year period. Mr. Stilling's conclusions are based on the fact that current returns on equity are 2 percent higher than the ten-year average, average 1978 corporate bond yields were 0.76 percent above the ten-year average, and the average 1978 discount rate was 1.5 percent above the ten-year average.

To the extent that the use of average earnings data for historical periods is underestimated, and based on the above analysis of the high cost of attracting capital, Mr. Stilling concluded that a 1.5 percent adjustment should be attached to the ten-year average rate of return on equity to bring TMT's return up to a reasonable level which will account for current financial trends.

Given all of the above average risk conditions, Mr. Stilling concluded that TMT (or CMC) should be entitled to a rate of return on equity which is 3.0 percent higher than the ten-year average for non-financial U.S. corporations of 12.8 percent. On that basis, the reasonable return on equity that TMT should be allowed to earn for the projected year March 1979–April 1980 is 15.8 percent. A 15.8 percent return on equity will give TMT the opportunity to earn a rate of return which is higher than that actually earned by nearly 70 percent of those U.S. industries analyzed by *Standard & Poors* for 1977.

TMT's projected rate of return on equity for the forecast year is 16.15 percent. Considering the degree of judgment necessarily involved in both attempting to predict future business results and in determining what is within the zone of reasonableness, it believes it cannot fairly be concluded that a rate of return is excessive which is barely three-tenths of a percentage point higher than one expert's judgment of what is fair.

While TMT believes a higher rate of return would indeed be reasonable, it does not believe it would be productive here to continue that theoretical controversy, particularly since the forecast results are themselves based upon the similarly inexact "science" of predicting the future. Accordingly, TMT concedes to the staff's conclusion that 15.8 percent would be a reasonably allowable rate of return on equity for TMT.

In consideration of the foregoing, it is concluded that the record herein establishes that a return on equity to TMT in the zone of 15.8–16.15 percent would not be excessive in comparison to other industries facing similar business and financial risk.

It is further concluded that the record herein establishes that if TMT's net revenue projections are accepted, the return on equity to TMT would not exceed the zone of reasonableness and would not be excessive.

It is further concluded that it cannot be determined on this record whether or not the return on equity to TMT would exceed the zone of reasonableness because TMT has not met its burden of proof on this issue and no reliable projection of TMT's net revenues can be made.[7]

II.

We now proceed to a consideration of the allocation of line haul expenses and division of assets between TMT and Gulf Caribbean Marine Lines (GCML), both subsidiaries of Crowley Maritime Corporation (CMC), for tandem barge towing services between U.S. Gulf Coast ports and Puerto Rico.

In the U.S. Gulf Coast/Puerto Rican trade between Lake Charles, Louisiana, and San Juan, Puerto Rico, tugs are used by TMT to tandem tow a TMT barge and a GCML barge, an affiliate of TMT and both subsidiaries of CMC. The TMT barge sails only from Lake Charles to San Juan, whereas the GCML barge calls at other ports on the Gulf Coast and Puerto Rico and includes some foreign destinations. However, GCML employs its own tugs while loading and discharging cargo to move its barges among the various other ports it serves.

For the projected year's (March 1979–April 1980) allocation of expense and division of assets for the tugs used in the tandem towing service between Lake Charles and San Juan, TMT employed an allocation based on a time formula for a round-trip voyage. TMT's method allocated 50 percent of the actual steaming time in a round-trip voyage to each respective carrier and 100 percent of the remaining time not under tandem tow to TMT. On this basis, TMT asserts that this results in a 60/40 allocation ratio to be applied on an annual basis to TMT and GCML, respectively.[8] It is TMT's position that this time formula is based on benefits received and is a reasonable method of allocation for expenses and assets in the tandem tow service.

Hearing Counsel disagree with the use of a time formula allocation for the tandem tow expenses and assets. They contend that a volume method of allocation should be employed and that such method is required by G.O. 11.

The principles set out in G.O. 11 prescribe allocation of expense and division of assets on a volume basis. Under the requirements of G.O. 11, direct vessel expenses are accumulated for all voyages in the Service, and where allocation is necessary, allocated to the Trade on a revenue-ton mile relationship, which reflects volume. 46 C.F.R. §512.7(c)(2). The volume principle of allocation is carried through G.O. 11, and in particular to the Vessel Operating Expense (VOE) summary which provides operating results and allocations to the Trade based on a revenue-ton mile relationship where there is simultaneous carriage of other cargo. 46 C.F.R. §512.7(c)(3). A vessel day allocation is prescribed by G.O. 11 only in those cases of cargo vessels employed in the Service for less

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[7] See discussion *infra* for full development of issue of revenue projections.

[8] TMT based its time formula on a twenty-one day round-trip voyage between Lake Charles and San Juan during which sixteen days (eight days each direction) are actual steaming time. During the remaining five days the tug stays with only the TMT barge. Thirteen of the twenty-one days are allocated to TMT and eight days are allocated to GCML, thus producing TMT's 60/40 ratio.

than the entire reporting period, and this provision, argues Hearing Counsel, is inapplicable to the tandem barge towing service.

Mr. Coleman, FMC staff Financial Analyst, using the volume formula principle of G.O. 11, employed a cargo cube allocation for line haul expenses and division of assets for the tandem tow portion of a round-trip voyage between Lake Charles and San Juan. Mr. Coleman's cargo cube allocation is based on the tonnage of cargo carried on TMT's and GCML's respective barges during the tandem tow portion of a round-trip voyage. During the period when the barges were not in tandem tow, and only a TMT barge is towed or during lay-up time, expenses and assets are allocated on a revenue-ton mile relationship. Calculation of this allocation by Mr. Coleman produced a ratio of 63.7 percent for TMT and 36.3 percent for GCML.

The Commission has upheld the use of a volume allocation over a daily-time allocation for vessel expenses. In *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade,* 9 F.M.C. 220 (1966), a principal issue was a determination of a reasonable allocation of vessel expenses to the Puerto Rican common carrier service of Alcoa Steamship Co., Inc. (Alcoa). In general, Alcoa allocated vessel expenses between its southbound common carrier service and its northbound contract service on the basis of days operated in each service. The Commission found that the ton-mile method more closely approximated the assignable costs of Alcoa to its regulated service and should be employed as the proper method of computing vessel expenses. The Commission stated, in pertinent part that:

> The vessel-day basis, although superficially appealing, suffers from many built in faults.
>
> The benefit derived from a transportation service is that cargo (tonnage) is transported over distance (miles) to its receiver. As stated in a recent and definitive study, "The product which the transportation industry sells is the ton-mile in freight service . . . ." This has often been recognized by this Commission and its predecessors. As we noted in *Atlantic & Gulf Puerto Rico General Increase,* 7 F.M.C. 87, 98 (1962), "The basic factors contributing to vessel operating expenses [are] the tonnage and distance carried."
>
> * * * * *
>
> The ton-mile method is proper . . . because we believe it fairly allocates expenses which . . . should be borne by users in proportion to amount of their tonnage carried.
> 9 F.M.C. at 231-233.

The Commission further held that in those instances of unemployed legs of a voyage where no cargo is carried, the same volume method of allocation should be used. The Commission stated:

> Ballast leg and positioning leg days also should be allocated on the ton-mile basis. An attempt to allocate such days on a vessel-day basis shows another basic flaw in that method, the great possibility for arbitrariness an [sic] inconsistent positions.
> 9 F.M.C. at 232.

TMT argues that the concept of "benefits-received" should not be restricted to cargo carried. It believes that a carrier receives a benefit when its barge is towed from point-to-point irrespective of the amount of cargo carried. It contends that the GCML barge, which rarely carries any cargo northbound, would, under Hearing Counsel's method, receive the benefit of towage back to Lake Charles and bear none of the expenses of that towage. TMT says its method, which is directly related to the time the barges are under tandem tow, does not permit such an inequitable result and finds direct support in section 512.7(b)(1)(i)(b) of G.O. 11. TMT claims that from the standpoint of the real world, it is highly unlikely that a prudent carrier would enter into a business arrangement with a second independent carrier to share the expenses of a joint tow based upon respective cargo volume, for the poorer the fortunes of the second carrier the greater would be the first carrier's expenses, which he would thus be powerless to control. The result should be no different where the carriers happen to be affiliated.

Section 512.3(g) of G.O. 11 permits other methods of allocation of expenses in the G.O. 11 statement in those instances where a volume method would produce unreasonable results. In this case, however, the cargo cube allocation method fairly reflects the expenses and assets of the tandem barge towing service and will not, therefore, create unreasonable results. Following what Hearing Counsel characterized as a "benefits-received" principle in the case of the tandem barge towing service, it is more reasonable to conclude that the company which carries the greater amount of cargo receives the greater benefit. This benefit is reflected in Mr. Coleman's cargo cube allocation, as it is based on volume. Absent the volume principle underlying G.O. 11, TMT's time formula allocation could be regarded as based on "benefits-received." But as between what must be regarded as a cornerstone principle of G.O. 11 and another principle of allocation, the volume-oriented allocation underlying G.O. 11 must be utilized in preference to a time-oriented allocation.

For the foregoing reasons, it is concluded and found that the volume formula set forth by witness Coleman should be adopted for purposes of determining the allocation of expenses and division of assets between TMT and GCML for the tandem barge towing service.

III.

Why is there a projected increase in revenue for the trade despite a decreasing volume of cargo carried for TMT's projected period of April 1, 1979, to March 31, 1980, as compared to TMT's actual period of December 1, 1977, to November 30, 1978?

The ultimate issue which must be determined by the Commission is whether the rate increase is just and reasonable. One cannot predict with exactitude the amount of revenue that a particular set of rates will produce. However, based on known facts and reasoned projections, it is possible to set rates which can be expected to produce sufficient revenues to equal the cost of service.[9]

After ascertaining what rate of return is reasonable (Commission Issue No. 1), it is necessary to determine whether the rates to be charged will achieve that return. That determination, in turn, can only be reached by ascertaining what revenues can be anticipated. And revenue anticipation, in its turn, re-

[9] The cost of service is defined to equal the sum of operating expenses, depreciation expense, taxes, and a reasonable return on the net valuation of property. Garfield and W. Lovejoy, *Public Utility Economics* (1964) at 44.

quires a knowledge of rates to be charged times the volume[10] of cargo to be carried (Commission Issue No. 3).

The record establishes that a return of 15.8–16.1 percent on equity is a resonable return to TMT. The question then remaining is will the rate increase result in such return?

TMT's original revenue and revenue ton projections for the test year are found on Schedule V, Exhibit 2. The Schedule was originally prepared by Donald C. O'Malley, Jr., Director of Tariff and Regulation Affairs for the Caribbean Division of Crowley Maritime Corporation sometime after management decided to seek a general rate increase.

There is no evidence as to how CMC originally determined a forecast of revenue of $48,792,000 for TMT which, in turn, it contends, results from the imposition of a 5 percent general rate increase. No witness appearing on behalf of TMT could testify as to the basis or rationale by which the $48,792,000 was first arrived at.

The record establishes that Mr. O'Malley was given a projected total revenue figure of $48,792,000 from the forecasted budget which he understood would be the "bottom line" revenue figure on Schedule V. However, neither Mr. O'Malley nor Mr. Roush, TMT's other witness, took any part in the preparation of the forecast budget for TMT. Thus, no witness could explain how the management of TMT arrived at the revenue figure of $48,792,000, which it is claimed will result from TMT's general rate increase of 5 percent.

After obtaining the total revenue figure, Mr. O'Malley went to work to establish the rest of the figures shown on Schedule V, Exhibit 2. From a computer run, he obtained the historic revenue for the fifteen leading commodities. He then adjusted the revenue figures to account for shifts in cargo, increased competition and the rate increase. Mr. O'Malley could not remember how he determined or arrived at the actual amount of the adjustments he made and thus the reasonableness of those adjustments are unknown. After arriving at a total revenue figure for the fifteen leading commodities, Mr. O'Malley then simply subtracted this figure from the $48,792,000 total in order to obtain a revenue figure for "Other" cargo.

After setting forth the adjusted revenue figures, Mr. O'Malley then calculated the revenue tons of each of the fifteen commodity breakdowns. Again, as with his revenue adjustments, Mr. O'Malley could not remember how he did it. Arithmetic calculations seem to suggest that he divided historic average revenue per ton for each of the fifteen leading commodities (adjusted for the increase) into the total projected revenue for each commodity.[11]

Although the method by which TMT actually calculated the revenue tons shown on Schedule V, Exhibit 2, is unclear, the record establishes that the

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[10] In rate design, cargo mix is an integral aspect of volume.

[11] A formula which conforms to the O'Malley results is as follows:

$T = R$ divided by $(1.05 \times R'/T')$

where T is the projected revenue tonnage figure,
R is the projected revenue amount figure,
T' is the historical revenue tonnage figure, and
R' is the historical revenue amount figure.
The 1.05 factor represents the 5% rate increase.

management of TMT does not make forecasts of future volumes of cargo in terms of tonnage. Rather, it forecasts in terms of revenue. Whether or not last year's average rate per ton for a given commodity will approximate this year's depends in part on whether shippers tender the same size shipments. To complicate matters, carriers regularly change the minimum quantity requirements for a given trade. Rate adjustments may also affect the size of shipments tendered. Thus, the historic average revenue per ton for a given commodity during a past year may not be necessarily related to the average revenue per ton for a future year. The problems in using historic average revenue per ton increase in the case of the calculation for "Other" cargo. There, many commodities make up the average and the mix of commodities may change from year to year based on shifts in cargo, competition and rate increases. In short, the commodity mix for "Other" cargo is affected by all of the factors which Mr. O'Malley considered in adjusting the revenue figures for the fifteen leading commodities and compounded by the larger number of commodities involved. Hence, TMT's "correction" to the revenue tons attributable to "Other" cargo, based on historic average revenue ton, cannot be relied on.

The consequences of TMT's method of calculating projected revenue tons is of crucial importance in this proceeding because allocations in the Exhibits which form so great a part of the record are based on TMT's projection of revenue tons.[12]

Due to the weakness inherent in TMT's method of calculating revenue tons, Hearing Counsel and GVI contend that these Exhibits are not reliable indicators of TMT's projected financial condition and cannot form the basis of a Commission decision. Because of the inherent flaws in these Exhibits, they say, the Commission does not have a record before it from which it can conclude that the rates of TMT are just and reasonable.

TMT disputes that its revenue forecasts or information in support thereof is deficient or that it in any way has failed to furnish information timely.

TMT asserts that the commodity forecast set forth in Schedule V is not prepared by TMT for any business purpose other than to comply with the requirements of G.O. 11. In connection with the preparation of the original forecast,[13] those who prepared it were given a marketing department budget of $48,792,000 revenue for the twelve months ended March 31, 1980.[14] They then proceeded to determine, because TMT says it was required by G.O. 11, their best estimate of how much of that $48,792,000 would be derived from each of the fifteen leading commodities carried and how many revenue tons of each would be carried. Starting with historical data showing the actual revenue and tonnage for each of the fifteen, those data were adjusted to reflect their view, after further consultation with marketing personnel, of the future prospects as

[12] (1) Exhibit 2, Forecast April 1, 1979, through March 31, 1980.
(2) Exhibit 5, Analysis of Schedule V, TMT Projected Year April 1, 1979, through March 31, 1980.
(3) Exhibit 7, Forecast April 1, 1979, through March 31, 1980.
(4) Exhibit 8, Revised Computation of Return on Equity.
(5) Exhibit 10, Schedule 1, Testimony of Thomas J. Stilling, Revised Computation of Return on Equity.
(6) Exhibit 11 (Offer of Proof).

[13] Ex. 2.

[14] TMT Brief at 9-10. This revenue forecast made prior to any tonnage analysis is the basis for Hearing Counsel and GVI contention of unreliability.

to each commodity. Exhibit 5 shows, in general, what factors entered into the adjustments resulting in the differences between the actual dollar and tonnage figures on Schedule V of Exhibit 1 and the forecast dollar and tonnage figures on Schedule V of Exhibit 2 for each of the fifteen leading commodities.

TMT proceeded as follows to determine the remaining "other" dollar and tonnage figures. The revenue adjustments for the fifteen leading commodities resulted in an aggregate of $27,580,588 projected revenue for those commodities, which, when subtracted from the total marketing department budget of $48,792,000, left a remainder of $21,211,412 revenue, which by definition would come from all "other" commodities carried. Having allocated $21,211,412 to "other commodities," TMT then computed the corresponding tonnage figure necessary to realize the dollars. The method employed is set forth on page 2 of Exhibit 5. Marketing personnel predicted an increase of 41,607 tons and corresponding revenue of $3,371,270 from increased carryings of liquid and refrigerated cargo. They also predicted a general shift (decrease) of about 20 percent of the 1978 "other" revenue to TMT's through tariff and other tariffs. Since the total "other" forecast revenue had been computed at $21,211,412, of which $1,010,067 would result from the 5 percent rate increase and $3,371,270 by reason of increased revenue from liquid and reefer cargo, there remained $16,830,075 to account for. This sum was $4,016,997 less than (and about 20 percent of) the 1978 actual "other" revenue. It was then accounted for by assuming that the shift to other tariffs would reduce the prior year's "other" revenue by $4,016,997. Since the actual 1978 average revenue per ton for "other" cargo was $20.53, on the assumption that the cargo mix and other factors would not change, this figure was divided into the $4,016,997 in order to arrive at the corresponding volume reduction of 195,655 revenue tons. Subtraction of 195,655 from the 1978 actual "other" tonnage and addition of the expected increase of 41,607 tons of reefer and liquid cargo left a net tonnage figure of 861,213.[15]

Hearing Counsel and GVI dispute TMT's rationale and contend that TMT was required to adduce additional evidence as to the details underlying TMT's marketing department's budget and predictions. TMT argues that the Commission never ordered an investigation into the reasonableness of TMT's projections. If it had done so, TMT claims it would have been prepared to present more detailed evidence relating to the marketing department's basis for its budget and predictions. It never considered doing so, however, in view of the order of investigation.

One thing is clear from the record: Schedule V was not used to calculate the potential revenue figure because the schedule was not even in existence at the time the potential revenue [budget] was determined.[16] The evidence in this proceeding establishes that TMT built its rate design and cargo estimates to fit and justify a predetermined revenue figure.[17]

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[15] The change to this 861,213 figure (Schedule V to Exhibit 7) from 689,363 (Schedule V to Exhibit 2) is the only correction which TMT has made to its operating revenue forecast.

[16] Tr. 95-97.

[17] Neither Mr. O'Malley nor TMT's other witness, Mr. Roush, were involved in preparing the budget; thus, the record fails to show how the budgeted figure was determined.

The testimony of record reveals that once the total projected revenue figure was "given" to Mr. O'Malley by the accounting department, he went back to historical revenue dollar and tonnage figures for each of the fifteen leading commodities as shown on TMT's computer. From the historical revenue dollar figures he proceeded to derive, on a commodity-by-commodity basis, the projected revenue dollar figures. While Mr. O'Malley did not remember and did not testify how these individual projections were calculated, TMT argues that it probably was an evaluation of competitive factors, a shift to through tariffs, and the 5 percent rate increase which accounted for many of the adjustments between historical and projected years.

The revenue amount figure for the "other cargo" category was then "backed into"; i.e., it is a residual figure calculated by subtracting from the total budgeted figure ($48,792,000) the subtotal of the revenue amounts for the top fifteen individual commodities ($27,580,588) to arrive at $21,211,412 for "other cargo."

Having projected revenues, Mr. O'Malley then calculated the projected tonnage figures for the fifteen leading commodities.[18] While he did not remember how this calculation was performed, it appears from analysis of the figures that he used a mathematical formula based on the revenue per ton for each commodity.[19] Mr. Roush used a similar revenue-per-ton calculation to derive "other" revenue tons.[20]

TMT contends, at least with regard to the fifteen individual commodities, that revenue amount projections were predicated on historical figures adjusted for purported shifts to thru-tariffs and competitive factors. The record establishes that, in any event, the projection of "other cargo" and thus the total revenue ton figure have no basis in analysis. Mr. O'Malley admitted it was necessary to forecast for each commodity (not just the top fifteen) the effect that shifts to thru-tariffs and competition will have on projected cargo, because these factors affect each commodity differently, but he did not make individual forecasts;[21] rather a flat percentage was applied to the "other cargo" category, and even the details of this calculation are not revealed in the record. Thus, at least with regard to the "other" category and the total revenue tons, the cargo projections can be traced directly back to the predetermined budgeted total revenue amount figure which itself had no basis on volume but was forecast before volumes were ever considered. Hence, it is concluded that from the residual nature of the "other" revenue amount figure, and the subsequent calculation of the "other" revenue ton figure, that marketing information and known facts were not the basis for establishing the cargo projection.

To support its revenue dollar projection and ultimate rate of return, TMT should have analyzed each commodity individually in terms of cargo shifts and the competitive situation. This analysis should have been used to arrive at projected tons.

[18] See Schedule V of Exhibits 2 and 7.

[19] Fn. 11, *supra.*

[20] See Exhibits 5 and 7, Schedule V.

[21] Refrigerated cargo and tank trailers were apparently the only exception. (Exhibit 5, at 2, note (2); Tr. 49-50, 83, 138).

If this had been done, tariff rates could then have been applied to the tonnage figure for the respective commodities to determine projected revenue for every commodity. Then, the sum of the individual revenue figures would have produced a reasoned, supportable total figure for revenue. Rather, TMT proceeded as outlined above, and then produced Exhibit 5 as an after-the-fact justification of the result.

Assuming that with the rate increase total revenues would not exceed $48,792,000 because of lower cargo volume and thus that the return to TMT would not be greater than the 15.8–16.15 percent deemed proper, TMT has the burden of establishing by competent evidence those factors which it claimed would cause tonnage decreases.

A prime factor that TMT cites[22] as the basis for decreased tonnage projections is a shift to the so-called thru-tariffs and other tariffs. However, Mr. O'Malley, who prepared the forecast, never was aware of the percentage of cargo in the subject trade which moved on the thru-tariffs, nor did he utilize any historical data (or any kind of data whatsoever) to forecast the purported "shifts" of cargo to these tariffs. The following quotation from the record is illustrative:

Q—Mr. O'Malley, how did you determine the percentage shift to the through tariff and the other tariffs if you were unaware of the amount of traffic going to those tariffs?

A—This is a forecast, and I was theoretically forecasting how much I thought would be shifting in the forecast year. I have no idea what additional cargo will be added to those new tariffs in that year . . .

Q—Was there any data upon which you based that forecast?

A—No.[23]

It is concluded that TMT's assertion that part of the alleged decrease in volume was due to a shift to thru-tariffs and other tariffs is not based on historical data nor does it have any other factual support in the record. It should also be noted that the other major factor asserted by TMT as contributing to decreased tonnage, namely competition, also is not supported on the record by any specific figures or calculations. To the contrary, although TMT contends that its cargo volume will decrease in the projected year,[24] the record indicates that its volume (and thus its revenue) may well increase. TMT's market share in the Mainland-Puerto Rico trade has increased every year since it entered the trade, from 10.4 percent in 1975 to 17.7 percent in 1978,[25] and Mr. Roush expects that its market share will be increased.[26] Unless there is a decrease in overall traffic volume by all carriers to Puerto Rico, TMT's total cargo will probably increase, rather than decrease. There is no evidence that the Puerto Rican trade will decrease in volume.[27]

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[22] Tr. 101, 119. Exhibit 5.

[23] Tr. 124–125.

[24] Primarily by reason of cargo shifting to thru-tariffs. See discussion, *supra*.

[25] Exhibit 10 at 11.

[26] Tr. 175.

[27] Mr. Roush testified as to TMT's belief in the potential of that service and implied total volume would, if not increase, not decrease. Tr. 175.

In addition to the unreliability of the projected revenue as determined by TMT's methodology, another matter must be mentioned as further compounding the difficulty and dilemma of the Commission[28] in attempting to determine whether the rate increase is just and reasonable.

Although TMT submitted a number of eleventh hour "corrections," Hearing Counsel claim two stand out as being particularly unfair to the other parties. These are the revenue tonnage recalculation for "Other" cargo appearing on page 2 of Exhibit 7 and the figure for line haul expense appearing in Exhibit 11.

By a telephone conversation of June 5, 1979, between Mr. Roush and Mr. Coleman and letter dated June 6, 1979, correcting TMT's direct case, Mr. Roush supplied a new total line haul expense figure of $4,942,610 and an allocation of $2,965,607 to TMT and $1,977,003 to GCML which produced a 60/40 percent time allocation. Mr. Coleman used the total of $4,942,610 in his testimony which he identified as "line haul expense." Although Mr. Coleman's testimony was served on June 12, 1979, TMT waited until the hearing before announcing that the $4,942,610 figure was not the "line haul expense" but included other expenses as well. If there was a misunderstanding over the $4,942,610 it should have been resolved as soon as TMT received Mr. Coleman's testimony. TMT hardly needed to cross-examine Mr. Coleman on the $4,942,610—it was supplied by TMT in the first place.

The projected revenue tons for "Other" cargo provides another example of an eleventh hour "correction" which could and should have been made weeks before the hearing.

Mr. Coleman, as part of his regular function in connection with the 5 percent general rate increase, performed a complete analysis of the data in TMT's G.O. 11 statements, both actual and forecasted. In the process of this analysis, he calculated the average revenue per ton for all commodity line items including "Other" cargo on Schedule V of TMT's projected G.O. 11 statement. Mr. Coleman calculated that the total revenue per ton increased from TMT's actual year (Exhibit 1) to the projected year (Exhibit 2) by 23 percent and that in the "Other" cargo category alone, revenue per ton increased approximately 49 percent.

On three separate occasions, Mr. Coleman requested Mr. Craig Wallace of CMC to explain why revenue per ton on individual line items on TMT's projected Schedule V (Exhibit 2) increased from TMT's actual Schedule V (Exhibit 1) on the average of about 5 percent, whereas the "Other" cargo category produced a 49 percent increase, resulting in an overall increase of 23 percent.

In response to a telephone inquiry of February 9, 1979, by Mr. Coleman as to why revenue tons increased 23 percent, Mr. Wallace responded that TMT would be carrying higher rated liquid tank cargo which is a low tonnage cargo. In response to a telephone inquiry of March 2, 1979, by Mr. Coleman as to whether TMT included the general rate increase in its projections, Mr. Wallace responded yes, and further that the 5.94 percent increase in revenue is the result of the compounding effect of applying the 5 percent general increase, a

[28] Viewed in the light of the time constraints imposed by P.L. 95-475.

23 percent increase in revenue per ton, offset by a 13.88 decrease in revenue tons carried. The increase in revenue per ton is principally affected by "Other" cargo which consists of liquid or tank cargo which is low in tonnage and carried at a higher rate.

In response to Mr. Newton Frank, Supervisory Accountant, Federal Maritime Commission, on May 22, 1979, regarding TMT's decrease in projected revenue tons and increase in revenue, Mr. Wallace responded that tonnage was down due to the fact that more cargo was being carried under ICC tariffs. Mr. Wallace further responded that the revenue in "Other" cargo increased 48 percent, 38 percent of which was due to more reefer and special cargo which is high rated and low in tons and the remaining 10 percent due to the projected mix in quantities.

On May 22, 1979, Mr. Coleman called Mr. Wallace regarding the conflicting information given Mr. Frank as compared to previous conversations regarding the increase in revenue per ton and decrease in revenue tons. Mr. Wallace stated that the 48 percent increase in revenue referred to was the revenue per ton increase of the total of "Other" cargo and that, in addition to the increase in tank cargo, there is a projected increase in reefer cargo which he may have forgotten to mention earlier.

The record amply demonstrates that staff inquiries regarding the increased revenue, despite decreasing tonnage, specifically focused on "Other" cargo. Mr. Wallace understood staff interest by explaining that the apparent anomaly was due to the increase in reefer and liquid or tank cargo, which comports with the reason which appears in connection with "Other" cargo on TMT's Exhibit 5. There is no evidence that Mr. Wallace was not talking about "Other" cargo when he made the observation. Indeed, the only commodity in the fifteen leading commodities which showed a drop in tonnage coupled with an increase in revenue was automobiles. It is concluded that the staff repeatedly questioned the projected revenue tonnage for "Other" cargo and that TMT was aware of staff's concern.

Despite repeated questions, TMT did not recalculate the figure until three or four days before the hearing. Apart from the merits of the recalculation, timing of the "correction" is critical to the Commission's ability to consider the lawfulness of the rate increase.

The Commission in supporting enactment of Public Law 95-475 was extremely concerned about the time elements inherent in the development of a rate case. The testimony of Vice Chairman Moakley to the Senate Subcommittee on Merchant Marine and Tourism focused on this issue. In outlining the changes to the Commission's procedure that would be required in order to comply with the legislation, he made the following statement:

> First, the financial data which the carrier is required to file simultaneously with the filing of its general rate change will have to be essentially the evidence it will rely upon throughout the expedited proceeding. This means, at the very least, there can be no change in the test year used by the carrier in support of the rate increase. *Otherwise, the parties will not have a proper opportunity to test the carrier's evidence.*[29] (Emphasis added.)

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[29] *To Amend the Intercoastal Shipping Act, 1933, and For Other Purposes: Hearings on H.R. 6503 Before the Subcomm. on Merchant Marine and Tourism of the Senate Committee on Commerce, Science and Transportation,* 95th Cong. 2d Sess. 17 (1978).

This apparently provoked the following exchange:

SENATOR INOUYE. What makes you believe that you can cut a 6-year hearing period down to 180 days, as H.R. 6503 would require?

Mr. MOAKLEY. I think—I might take a quick look at what took place on the longest one, which was the *Matson* case, on which test years were changed, the financial information was changed, the whole basis of the case was constantly changed.

Now, we have clearly defined that at the time you apply for the rate increase you must submit the financial information which will be used to determine whether the rate is reasonable or unreasonable. That will not change. *Therefore, the opponent to it will have their financial information in the beginning and be able to analyze.*[30] (Emphasis added.)

Vice Chairman Moakley was not alone in this view. Chairman Daschbach addressed a letter dated October 3, 1978, to Senator Inouye in which he stated, *inter alia:*

Fourth, carriers have often made major changes to their evidence after a rate case has begun, including the changing of test years. The legislative history of H.R. 6503 makes it clear that the carrier must henceforth use the evidence submitted with its rate increase filling [sic] to justify its increase and cannot make major changes or additions to that evidence which would require further analyses, cross-examination and, possibly, rebuttal.[31]

The Committee Report, S.Rep. No. 1240, 95th Cong., 2d Sess. 9 (1978), lends support to the views expressed by the Chairman and Vice Chairman.

This is one of the very first rate proceedings to be conducted within the time constraints of P.L. 95-475 and despite ample time in which to furnish the information which would enable the Commission to properly consider the reasonableness of the increase, we find the carrier shifting and changing data at the last moment, making it virtually impossible for staff and protestants to evaluate the new information or prepare for cross-examination, let alone draw rational conclusions relating thereto. The statute places a high degree of responsibility on the carrier seeking a rate increase to supply the information necessary to permit expeditious consideration.

Review and consideration of the record in this proceeding leads to the conclusion that the volume factor is not reasonably accurately ascertainable on this record. Not knowing the volume, it is impossible to know what the revenues will be and hence whether such revenues will yield a return which will be a reasonable 15.8-16.1 percent or whether it will be something else.

CONCLUSIONS

Section 3(b) of the Intercoastal Shipping Act, 1933, 46 U.S.C. §845(b), as amended, states that at any hearing "the burden of proof to show that the rate . . . is just and reasonable shall be upon the carrier. . . ."

The evidence in this proceeding fails of proof that the rate increase will not result in an excessive return on equity to TMT in comparison to other industries facing similar risks.

[30] *Id.* at 18-19.

[31] *Id.* at 26.

The evidence in this proceeding establishes that the cargo cube allocation of expenses and division of assets between TMT and GCML for the tandem barge towing service is appropriate and in accordance with G.O. 11.

The evidence in this proceeding fails to establish any reasonably accurate basis for determining volumes or revenues which may be anticipated by reason of the rate increase.

Inasmuch as the record does not reasonably establish volumes and revenues which may be anticipated by the rate increase, it cannot be determined why there is a projected increase in revenue for the trade despite a projected decreasing volume of cargo to be carried for TMT's projected period of April 1, 1979, to March 31, 1980, as compared to TMT's actual period of December 1, 1977, to November 30, 1978.

Because the evidence does not reasonably reflect anticipated volumes or revenues or rate of return, respondent TMT has failed its burden of proof of showing that the rates in Supplement No. 1 to tariff FMC-F No. 5 are just and reasonable and otherwise lawful.

Because respondent TMT has failed to establish that the rates in Supplement No. 1 to tariff FMC-F No. 5 are just and reasonable, they are found to be not lawful.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D.C.
August 20, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-81

MARINE EXPRESS LINE, S.A.

v.

SEATRAIN INTERNATIONAL S.A.

NOTICE

October 31, 1979

Notice is given that no exceptions have been filed to the September 26, 1979, dismissal in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, that dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-81

MARINE EXPRESS LINE, S.A.

v.

SEATRAIN INTERNATIONAL S.A.

DISMISSAL OF COMPLAINT

Finalized October 31, 1979

By a "Notice of Dismissal" complainant Marine Express Lines has withdrawn its complaint in this proceeding. Accordingly, the proceeding is hereby dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

September 26, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-24

PACIFIC FREIGHT AUDIT, INC.

v.

SEA-LAND SERVICE, INC.

DOCKET NO. 78-25

PACIFIC FREIGHT AUDIT, INC.

v.

AMERICAN PRESIDENT LINES, LTD.

ORDER PARTIALLY ADOPTING INITIAL DECISION

October 31, 1979

These proceedings were initiated by separate complaints filed by Pacific Freight Audit, Inc. (PFA) against Sea-Land Service, Inc. and American President Lines, Ltd. (APL) alleging violations of sections 14, 16 and 18(b) (3) of the Shipping Act, 1916 (46 U.S.C. §§812, 815, 817(b) (3)). The proceedings were subsequently consolidated due to the similarity of the issues presented. The Trans-Pacific Freight Conference of Japan/Korea and the Commission's Bureau of Hearing Counsel intervened.

The gravamen of the complaints is that Sea-Land and APL, improperly refused to honor claims for refunds of ocean freight charges on shipments which were allegedly delivered to OCP destinations. Respondents interposed the defenses that the claims were to a large extent duplicative and fraudulent and in any event were not tendered with proper documentation or other proof of OCP movements.

Full evidentiary hearings were held and Administrative Law Judge William Beasley Harris issued an Initial Decision finding that: (1) Complainant had not sustained its burden of proof as to its allegations of violations of the Shipping Act; and (2) Respondents were justified in refusing to pay the OCP claims.

However, the Presiding Officer granted Complainant 60 additional days within which to submit sufficient proof of these OCP movements to the Respondents. Exceptions to the Presiding Officer's decision were filed by Respondents and Hearing Counsel. There were no replies to Exceptions.

DISCUSSION

Sea-Land argues that the Presiding Officer's decision is deficient in its findings of fact necessary to support the conclusion that the Complainant has failed to sustain its burden of proof and asks the Commission to find certain specific facts.[1] It also opposes allowing Complainant an additional 60 days to substantiate its claims on the grounds that the claims have already been adjudicated insufficient and this finding should in all fairness now be made final.

In addition to citing certain alleged drafting errors in the Initial Decision[2], APL objects to the 60-day extension afforded Complainant on the grounds that the Administrative Procedure Act requires decisions to make final determinations of the issues presented and that the ruling of the Presiding Officer would require the Respondents to violate the terms of their tariffs.[3]

Hearing Counsel agrees with the Presiding Officer and Respondents, that Complainant has failed to sustain the validity of its claims but objects to the 60-day extension afforded Complainant on the ground that the Commission should not, as a matter of policy, allow this proceeding to continue without a final determination.

After reviewing the full record in these proceedings, the Commission agrees with the ultimate conclusion of the Presiding Officer that Complainant failed to sustain its burden of proof as to the validity of the subject OCP claims and finds that the Initial Decision is sufficient to support that conclusion. Much if not all of the factual findings sought by Sea-Land are expressly incorporated in the Presiding Officer's decision and those not so incorporated are necessarily included in the Initial Decision's more general findings.[4]

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[1] Specifically, Sea-Land urges that the Commission find that: (a) the shipments in question moved under the proper port-to-port tariff rates; (b) such movements can be subsequently re-rated under an OCP rate upon fulfilling the necessary tariff requrements; (c) Sea-Land's tariff allows proof of an OCP movement by means of any one of six types of documents but in any event must include proof of the name of the vessel, the port of origin, the ocean carrier's bill of lading number, the vessel voyage number, the final OCP and the date of the actual OCP movement; (d) PFA's claims consisted solely of ocean carrier bills of lading with attached inland carrier bills but no inland bill contains any of the relevent and necessary information; (e) certain documents used by PFA to support its claims were duplicative; (f) commercially accepted inventory control systems different than that used by PFA's consignees would facilitate compliance with the stated tariff requirements; and (g) the subject tariff requrements were not complied with in that no direct correlation between a particular ocean carrier movement and a subsequent inland movement was established and that in fact nearly one in four claims included documents used in more than one claim.

[2] APL notes that: (a) Mr. James Mitchell, President of PFA, is characterized at one point in the Initial Decision as a complainant when in fact he is not a party to the proceeding; (b) two claims, 792 and 1097, were omitted in the list of claims against APL in which duplications were found; (c) the word "contact" in the quote of section 14 Fourth of the Shipping Act should read "contract;" (d) the reference to section 16, first Initial Paragraph should be to the second Initial Paragraph and section 16 First. These exceptions point out valid, albeit minor, errors in the Initial Decision and will be adopted.

[3] APL states that its tariffs require that OCP refund claims "must be submitted within 90 days from the date the final lot of the bill of lading is forwarded."

[4] See footnote 2: Sea-Land's proposed finding "(a)" is contained in lines 13-15 of page 11 of the Initial Decision, "(b)" is contained in paragraph numbered 11 on page 7, "(c)" is contained in paragraph numbered 22 on page 10, "(d)" is contained in paragraph numbered 17 on pages 8 and 9, "(e)" is contained in paragraphs numbered 13 and 14 on pages 7 and 8, "(f)" is contained by implication in the third complete paragraph on page 19, and "(g)" is contained in the last paragraph on page 14 and in the last paragraph on page 18.

However, the Commission agrees with Respondent that the Presiding Officer erred in according Complainant an additional 60-day period within which to submit to the Respondents further proof in support of its claims. Complainant has had every opportunity to prove the validity of its assertions and has simply failed to do so. There is no reason, equitable or otherwise, to allow Complainant any further opportunity to prove its case. Respondents have already been subjected to lengthy proceedings and fairness dictates that these proceedings now become final. Accordingly, that part of the Initial Decision granting Complainant an additional 60 days to submit proof in support of the subject OCP claims will be reversed.

One final matter needs be addressed. In his Initial Decision, the Presiding Officer advised that the Complainant in these cases bore "heavy burden of proof." While this statement is not necessarily inaccurate, it does require some clarification, particularly in light of the Commission's recent decision in *Pan American Health Organization v. Moore McCormack Lines, Inc.*, Informal Docket No. 387(I), Report on Remand, served September 12, 1979, 19 SRR 762. There the Commission explained that references in earlier decisions to an overcharge claimant's "heavy burden" related "to the difficulty in obtaining the necessary evidence rather than to the weight to be given such evidence." The applicable standard here is that the validity of the claims be established by a "preponderance of the evidence." From the Commission's review of the record it does not appear that the Presiding Officer imposed upon the Complainant in these proceedings any burden other than to prove its allegations by such a preponderance.

THEREFORE, IT IS ORDERED, That the Exceptions of Sea-Land Service, Inc., American President Lines, Ltd. and the Commission's Bureau of Hearing Counsel are granted to the extent indicated in this Order and are, in all other respects denied; and

IT IS FURTHER ORDERED, That the Initial Decision issued in these proceedings is, except to the extent modified by this Order, adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-24

PACIFIC FREIGHT AUDIT, INC.

v.

SEA-LAND SERVICES, INC.

No. 78-25

PACIFIC FREIGHT AUDIT, INC.

v.

AMERICAN PRESIDENT LINES, LTD.

Partially Adopted October 31, 1979

Although the complainant has failed to meet the heavy burden of proof necessary to sustain its case and relief is denied, the complainant is given 60 days from the date hereof within which to offer to respondents back-up documents and affidavits that will warrant payment of OCP refunds.

This consolidated proceeding and each docket No. 78-24 and 78-25 be and hereby are respectively discontinued.

William H. Carter of Carter & Monkman and *Thomas W. McLaughlin* for complainant Pacific Freight Audit, Inc.

J. Donald Kenny of Kenny & Finan for respondent American President Lines, Ltd.

John M. Ridlon, General Attorney, *Stephan T. Lanctot*, Associate Counsel, *F. A. Fleischer*, Registered Practitioner, and *Gary Ferrulli*, Director, Traffic and Regulatory Services, for respondent Sea-Land Service, Inc.

Charna Swedarsky, *John Robert Ewers* and *Paul J. Kaller*, Director and Deputy Director, respectively, of the Commission's Bureau of Hearing Counsel, for intervenor Hearing Counsel.

Charles F. Warren and *George A. Quadrino* of Warren & Associates, P.C., for intervenor Trans-Pacific Freight Conference of Japan/Korea and its Member Lines.

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

Complaint against respondent Sea-Land Service, Inc. (Sea-Land) in FMC Docket No. 78–24 was served June 19, 1978. Complaint against respondent American President Lines, Ltd. (APL) in FMC Docket No. 78–25 was served June 20, 1978. In each proceeding, complaint is made of respondents' alleged violations of section 18(b)(3) as well as sections 14 and 16 of the Shipping Act, 1916. Because they involve substantially the same issues, an order consolidating the two dockets was served June 22, 1978, pursuant to Rule 148 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.148.

On July 5, 1978, an Order was served granting enlargement of time requested by respondent Sea-Land to July 24, 1978, for parties to reply to the complaints herein. Respondent APL served its Answer to the complaint July 10, 1978, and a First Amended Answer on July 11, 1978. Respondent Sea-Land served its reply to the complaint July 21, 1978.

Intervention herein was granted to (1) The Trans-Pacific Freight Conference of Japan/Korea (TPFCJ/K) and (2) Hearing Counsel.

By order served August 15, 1978, pursuant to Rule 94 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.94, a prehearing conference was set for Tuesday, August 29, 1978. At the request of the complainant for a postponement, an order was served August 24, 1978, granting postponement of the prehearing conference to September 26, 1978. At the September 26, 1978, prehearing conference (the official stenographic transcript of which comprised 52 pages), hearings were set to commence December 12, 1978, in Los Angeles, California. The commencement of hearing was rescheduled December 1, 1978, to commence Wednesday, January 10, 1979. Hearings began in Los Angeles, California, on the latter date, continued on January 11 and 12, 1979, concluding on January 12, 1979.

At the hearings, the following briefing schedule was developed:

1. Opening brief by complainants to be mailed on or before Tuesday, February 20, 1979 (Tr. 464, 467, 471).
2. Reply briefs by respondents to be mailed on or before Tuesday, March 20, 1979 (*Id.*).
3. Closing brief by the complainant to be mailed on or before Friday, April 20, 1979 (Tr. 464, 468, 471).

Complainant's opening brief, served February 20, 1979, was received February 27, 1979. Respondent APL's reply brief, served March 27, 1979, was received March 28, 1979. Respondent Sea-Land's reply brief, served March 27, 1979, was received March 29, 1979. Intervenor Hearing Counsel's reply brief was served and received March 27, 1979. Intervenor TPFCJ/K and its member lines' reply brief served and received March 27, 1979. Complainant's closing brief, served April 26, 1979, was received April 30, 1979.

[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 C.F.R. § 502.227).

The complainant proposed seven findings of fact and four conclusions of law (opening brief). Respondent APL proposed twenty findings of fact. Intervenor Hearing Counsel proposed ninety-four findings of fact and four conclusions of law. Respondent Sea-Land proposed fifty findings of fact and six conclusions of law, and Intervenor TPFCJ/K proposed twenty-four findings of fact. These total 195 proposed findings of fact and fourteen conclusions of law. All proposals and requests have been considered carefully and granted, granted in substance, or denied as evidenced herein by the facts found and decisions made.

The official stenographic transcript of the hearing consists of three volumes, totaling 475 pages. Thus, the transcript of the prehearing conference and hearing total 527 pages. Forty-four (44) exhibits were identified, of which two were withdrawn (Exhibits for identification, Nos. 10 and 42); one was not offered (No. 36). All the rest were received in evidence. It is from the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding that the Presiding Administrative Law Judge finds the facts hereinafter and constitutes the exclusive record for this decision.

FACTS

1. During November of 1976, while in the employment of respondent Sea-Land as a sales representative, complainant James Mitchell began filing claims against Sea-Land for others for OCP refunds (Tr. 42). The said James Mitchell had come in contact with OCP claims on several occasions where Sea-Land customers he was calling on for Sea-Land were filing or were attempting to file with Sea-Land claims for OCP recovery and he assisted them in doing that (Tr. 83, 84). Sea-Land, upon discovering that James Mitchell represented or was PFA, terminated his services with Sea-Land about November 1, 1977 (Tr. 43) and stopped payments to PFA (Tr. 327).

2. Witness James Mitchell testified that PFA is a California corporation that was incorporated December 15, 1977; also that PFA was operating prior to incorporation under that trade name (Tr. 23); that it is a family business (Tr. 18) of which he is the president, his father Eli T. Mitchell is the vice-president, his mother Marion Mitchell is the treasurer, and his brother Perry Mitchell is secretary of the corporation. PFA, he stated, is engaged in the business of performing freight audits for customers anf filing claims with carriers for recovery of freight charges for customers (Tr. 17, 18). PFA, aside from family members, in 1977 and 1978 employed about five other persons (Tr. 33).

3. In early November 1976, the first claims of PFA were made to APL (Tr. 43). APL stopped paying OCP claims about the same time as Sea-Land.

4. The tariffs involved in this proceeding are:

(A) Trans-Pacific Freight Conference of Japan/Korea, Tariff No. 35, FMC No. 6 (Exh. No. 26), Agreement No. 150. APL and Sea-Land both are members. (TPFCJ/K publishes a port-to-port tariff in the Eastbound Japan/ Korea-U.S. Pacific Coast Trades, including both local and overland common point (OCP) rates.)

(B) Sea-Land Service, Inc., Tariff No. 245-A, FMC No. 138 (Exh. No. 27), from Ports in Hong Kong and Taiwan to United States Pacific Coast Ports named in Item 320 and Overland Common Points.
(C) American President Lines, Ltd., Hong Kong-Taiwan Freight Tariff No. 5, FMC No. 67 (Exh. No. 28), from Hong Kong and Taiwan to Honolulu, Hawaii and Pacific Coast Ports of the U.S.A.
(D) Philippines/North America American Conference Tariff FMC No. 11, Agreement No. 5600. APL and Sea-Land both are members. (Each carrier herein has on file an independent tariff under the aegis of Agreement No. 10107, covering the Eastbound Hong Kong/Taiwan U.S. Pacific Coast Trade.)

5. Clients represented by PFA in this proceeding and the date of contract or agreement between them are:

(a) Kennington—contract dated 2/2/77 (Exh. No. 1).
(b) Silton Brothers—contract dated 11/76 (Exh. No. 7), 5/31/78 and 7/10/78 (Exh. No. 6).
(c) Sportsclothes Ltd., Inc.—contract dated 6/1/78 and 7/14/78 (Exh. No. 4).
(d) American Pants (World Trading Co.)—contract dated 9/1/78 (Exh. No. 5).
(e) K. W. International—contract dated 3/3/77 by PFA and 3/16/77 by K.W. (Exh. No. 9); contract dated 5/31/78 (Exh. No. 8).
(f) International Set—contract dated 11/11/76. Does not now represent them. Tr. 19.
(g) California Prime, Inc.—contract dated 3/3/77 (Exh. No. 3). (Ceased to operate on or about end of 1978 (Tr. 241).)

6. Exhibit No. 25 is stipulated to contain the copies and are the claims made by PFA to APL which are listed in the complaint (Tr. 73, 74).

7. Sea-Land in its answer to the complaint admitted its address is 2150 Valdez, Suite 1901, Oakland, California 94666; that it is a corporation and common carrier by water engaged in the transportation of cargoes for hire from various ports in the Far East, including Manila, Hong Kong, Busan, Keelung and Kaohsuing to Long Beach, California, and as such is subject to the provisions of the Shipping Act, 1916, as amended, and the applicable tariff. Sea-Land describes itself as a U.S.-flag common carrier by water in the foreign commerce of the United States having its principal offices at Edison, New Jersey.

8. Sea-Land also admitted in its answer to the complaint that it has promptly processed and paid claims submitted by other freight audit companies for adjustment of ocean freight charges from local to OCP within 30 to 60 days of their submission and alleges that it also has processed and paid promptly proper claims submitted by complainant within the same time frame stated.

9. APL in its answer to the complaint admits its address is 1950 Franklin Street, Oakland, California 94612; that APL is a corporation organized and existing under the laws of the State of Delaware. APL is a common carrier by

water, subject to the Shipping Act, 1916, as amended, providing ocean transportation services between various ports in the Far East and ports in the United States.

10. APL in its answer admits that during the period set forth in the complaint, it received claims from the complainant requesting adjustment of freight charges from local freight rates to Overland Common Point ("OCP") freight rates pursuant to applicable tariffs. APL in its answer further admits that it has refused to refund freight charges to the complainant where insufficeint or false documentation has been presented to APL by claimant as support for an adjustment in freight charges.

11. Generally, cargo which is destined to OCP territories in conformity with the rules published in each conference or carrier tariff is entitled to the lesser OCP rates. OCP territory is defined in applicable tariff as all points in North Dakota, South Dakota, Nebraska, Colorado, New Mexico and states east thereof (Exh. 25, p. 20). Official notice is taken that the Commission has said "[O]CP territory which territory may be described, roughly as that part of the United States east of the Rocky Mountains." *Investigation of Overland and OCP Rates and Absorptions*, Docket No. 65-31, 12 F.M.C. 184, 187 (1969).

12. PFA's compensation from clients for recovery of OCP funds is based solely on the amount of the refunds PFA is able to collect from ocean carriers on behalf of its customers. PFA retains 50 percent of all such refunds and remits the remainder to the shipper or consignee. If the claim is denied, or if PFA decides not to submit a particular claim after review, PFA receives no compensation from any source regardless of the time or expense incurred (Tr. 220).

13. It was stipulated between complainant and APL that the following list of paid claim files were in fact paid by APL: PFA Claim Nos. 375, 368, 948, 376, 370, 401, 786, 400, 382, 402, 399, 974, 405, 403, 379, 378, 381, 958, 380, 369, 951, 950, 949, 947, 862 and 952—a total of 26 files (Tr. 350, 351, 360, 361, 363; Exh. 37).

14. There are 31 (34, 3 more added Tr. 213) PFA claim numbers contained in the documents in Exhibit 25 (duplication between submission to APL is noted by a green tab (Tr. 194)), which complainant and APL stipulated contain duplications of supporting documents (Tr. 196). The PFA claim numbers in which one or more duplications have been found are: 1021, 1109, 1110, 1111, 1128, 1130, 1020, 1019, 789, 790, 791, 793, 1002, 1003, 1004, 1005, 1006, 1043, 1044, 1048, 1049, 1066, 1079, 1098, 1099, 1100, 1359, 1047, 1033, 1017, 1508, 1507 (Tr. 194, 195).

15. The claims for OCP refunds filed by PFA with Sea-Land on behalf of six consignees were allocated among the consignees in the following amounts:

American Pants Co.	27 claims	$ 3,531.52
International Set, Inc.	42 "	8,792.62
Kennington Ltd.	295 "	53,089.90
K. W. International	43 "	5,972.92
Silton Bros., Inc.	32 "	7,294.03
Sportclothes Ltd., Inc.	11 "	2,553.35
		$81,234.34

The total number of claims submitted by PFA to Sea-Land, master file listing 1,123 claims, of which 450 are the subject of this action (Tr. 418).

16. The claims for OCP refunds filed by PFA with APL on behalf of six consignees are allocated in the following amounts:

American Pants Co.	1 claim	$ 47.62
California Prime, Inc.	1 "	103.41
Kennington Ltd.	16 claims	3,089.20
K.W. International	79 "	15,663.79
Silton Bros., Inc.	9 "	2,299.03
Sportclothes, Ltd.	2 "	396.62
		$21,599.67

17. The documents submitted by PFA to the ocean carriers in support of the claims, the subject of this proceeding, are a copy of the ocean bill of lading, copies of allegedly relevant domestic bills of lading of freight bills, together with the information which had to be affixed to each of the domestic bills of lading and PFA's cover sheets (Tr. 39). PFA does not keep copies of the claims submitted with the exception of PFA's cover sheet (Tr. 40) which has vessel, voyage number, ocean bill of lading number and the pounds. PFA has a stamp which places information as to the vessel, the voyage number, the ocean bill of lading number and the port of origin on the domestic bills of lading, which PFA says the tariff requires (Tr. 122).

18. PFA claims for OCP refunds were for refunds of 100%, 95% or 90% of the ocean lading quantity (Tr. 380). For example, 16 claims were filed against APL as to Kennington, Ltd; 12 of the 16 claims were for 100 percent moves to OCP; of the remaining 4, none were below 90% (Tr. 352). Too, in every claim as to Kennington, Ltd., all of the inland bills of lading for each claim would have been time-barred but for one inland bill of lading which was within the time frame permitted under the tariff (Tr. 353).

19. A representative of a claim submitted to Sea-Land by PFA is Exhibit No. 11. The same documents would be submitted to APL (Tr. 58). The documents comprise the claim and would ordinarily consist of cover sheet (prepared by PFA), ocean bill of lading, domestic bills of lading referenced to the ocean bill of lading (Tr. 56).

20. As in the case of American Pants (Tr. 59), OCP rates can apply either initially or after the fact. This importer brings goods in at the OCP rate and is in the position of having to provide proof of OCP movement to the carrier to retain that rate. The same proof is required in either instance (Tr. 59, 60).

21. Custom and practice of PFA as to OCP refunds:

1. meet with and work with people represented to obtain the necessary documents and information, specifically ocean bills of lading or copies of same, and domestic bills of lading or freight bills for cargo which they subsequently ship to OCP destinations.
2. segregate the bills of lading into date order and destination, whether OCP or non-OCP destination.
3. matching commodities, pounds of cargo moved, cartons, etc.

On that basis, PFA submits claims to the carrier within the confines of the tariff rule of the amount of time that can elapse that cargo can be warehoused before movement to OCP destination.

A claim PFA sends the carriers would consist of an ocean bill of lading and two or three domestic bills of lading to maybe a hundred or more in some cases, evidencing the OCP movement of imported cargo.

On the domestic bills of lading, PFA has to place information about the vessel that imported the goods, the bill of lading number, the voyage number of the vessel, and the port of origin of the cargo.

Claims are basically filed by weight. Tr. 33, 34.

22. Sea-Land would require that the vessel and voyage number be identical on the inland bill as well as the ocean bill; if they were *not*, the claim would be rejected. APL also would require customer's proof, invoices or inland bills, stating the necessary facts, such as vessel, voyage, weights and where it came from, etc., or the claim would be denied. Tr. 319, 332.

23. Witness Mitchell stated that with each claim for an OCP refund, he or PFA submitted a PFA cover sheet, the ocean bill of lading and domestic bills of lading. This information, where it appears in the inland carrier's bill of lading, is a result of its being stamped on these bills by a stamp fabricated by PFA which stamp attaches to these bills a vessel name, voyage number, port of origin and ocean bill of lading number.

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

Hearing Counsel sees the big issue in this proceeding as whether the complainant, on behalf of certain consignees, has established pursuant to the applicable tariff rules, "proof of movement" to OCP territory of cargoes imported in an ocean common carrier, so as to qualify for refund of monies for ready adjustment of local freight rates to OCP rate. It is Hearing Counsel's position that PFA has failed to introduce any evidence to sustain its burden of proof as required by law, and to establish with reasonable certainty the validity of its claim for OCP refunds.

Intervenor TPFCJ/K argues that the history and development of OCP rates, from their origin more than a hundred years ago, has been thoroughly documented by the Commission in *Investigation of Overland/OCP Rates and Absorptions*, Docket No. 65–31, 12 F.M.C. 184 (1969). TPFCJ/K says that none of the claims in this proceeding involved cargo transferred directly to an inland carrier; in all claims, PFA is seeking a refund of the difference between the local rates originally paid by its customers and lower OCP rates. Before an OCP refund can be paid, the consignees or his agent must demonstrate that the goods in question actually moved to a destination within the OCP territory in accordance with all applicable tariff rules.

TPFCJ/K contends (Brief at 17) that the documentation submitted by complainant, allegedly to demonstrate OCP entitlement, proves one and only one fact: Cargo described as wearing apparel was carried from warehouses in California to destinations in the OCP territories. Complainant's documentation, according to TPCFJ/K, does not establish that the cargo moving to OCP areas had originally been carried (1) by any particular ocean carrier, (2) under any particular ocean bill of lading, (3) in any particular vessel, (4) at any particular time, or (5) from any particular origin. Yet, all of this information is essential if OCP rates are properly to be applied.

Respondent Sea-Land (Brief at 16) also contends that the complainant has failed to adduce any evidence appropriate to proving complainant's case.

Respondent APL contends (Brief at 16) the complainant not only has failed to sustain the "heavy burden of proof" placed upon it, but also has failed to sustain the burden of proof under any measure whatsoever.

APL argues that the PFA case can be summarized as a group of ocean bills of lading and domestic bills of lading which do nothing to support the complainant's case and the testimony of Mr. Mitchell which indicates a total lack of effort on the part of PFA to properly support its claims.

The complainant (Closing Brief at 9) submits that it has established the validity of each and every claim for OCP refunds initially submitted to respondents under applicable tariffs and has satisfied the "heavy burden of proof" test set forth in *Western Publishing Co. v. Hapag Lloyd*, Docket No. 283(I), 13 SRR 16, 17 (May 4, 1972) and *Johnson & Johnson v. Prudential Grace Lines*, Informal Docket Nos. 303(F) and 304(F), 18 FMC 244 (1975).

The Presiding Administrative Law Judge, in dealing with this issue of burden of proof, first looked to the complaint in each docket. The allegations in the complaint in Docket No. 78-24 as to respondent Sea-Land and those in Docket No. 78-25 as to APL, save for amounts, are similar. It is alleged that the respondents' (Sea-Land in Docket No. 78-24 and APL in Docket No. 78-25) conduct in refusing to pay complainant the difference between local and OCP rates on the claims submitted to respondents is unlawful and constitutes a violation of the Shipping Act, 1916, as amended, section 18(b)(3), and the applicable tariff rules, with regard to adjustment of freight rates from local to OCP; that complainant's assignors have been subjected to the payment of rates for transportation of cargoes from ports in the Far East to Long Beach, which rates are unjustly discriminatory, prejudicial and unreasonable, all in violation of section 18(b)(3) of the Shipping Act, 1916, as amended, and the applicable tariff. Complainant alleges he is entitled to recover of Sea-Land \$81,352.88 and of APL \$21,599.67 in freight charges presently due complainant under the applicable tariff. Further, it is alleged complainant's business has, and will continue to suffer loss of goodwill and has been damaged as to Sea-Land in the amount of \$50,000, as to APL \$25,000, by reason of respondents' dilatory conduct and unjustified and unreasonable refusal to refund freight adjustment from local and OCP rates as mandated by applicable tariffs.

Also, complainant alleges that respondents have established over the year last past a pattern of unjustified, unreasonable and unwarranted discrimination against complainant in violation of the Shipping Act, 1916, as amended, sections 14 and 16, for which complainant claims entitlement to receive from respondent damages to complainant's business and loss of goodwill as to Sea-Land in the amount of \$50,000 and as to APL in the amount of \$25,000.

The complainant seeks an order directing respondents to cease and desist from the alleged violations of said act and tariffs and also pay to said complainant by way of freight adjustment from local to OCP rates the amounts set out above.

The complainant in support of its case called the following witnesses:

(1) James Mitchell, the president PFA and an employee of Sea-Land until it was discovered that while in Sea-Land's employ, he represented others in claims against Sea-Land for OCP refunds. This began in November 1976; Sea-Land terminated his service there in November 1977. PFA kept no copies of claims submitted (Tr. 39), but asserts a copy of the ocean bill of lading, copies of relevant domestic bills of lading or freight bills, together with information which had to be affixed to each domestic bill of lading, along with a PFA cover sheet, was submitted. He testified as to linkage necessary in OCP refund claims (Tr. 173); if it is not possible to reestablish the link between the OCP—the importation of the OCP movement—PFA would have no alternative but to decline an attempt to collect on either the original or the duplicate.

(2) Arthur Ting, employed as a manager by Daddy's Fashions, Inc. (Tr. 251).

(3) Perry Spanos, employed as import-export manager by Wallace Berry, Inc., a dealer in toys and novelties (Tr. 262).

(4) Earl Wayne Cox, employed as an import clerk by Sanyo Electric, Inc. (Tr. 269).

(5) Phillip C. Levin, comptroller and secretary-treasurer of Bardon, Inc., an importer of men's clothing (Tr. 277).

(6) Donald G. Hermansen, West Coast Pricing Manager, Pacific Division of Sea-Land (Tr. 312).

(7) Robert Bertagna, corporate credit manager of APL (Tr. 329).

The complainant then rested its case (Tr. 369).

APL in presenting its defense called the following witnesses:

(1) Kenneth E. Sivilich, corporate controller of Kennington Ltd., Inc.

(2) Walter Weitzmann, vice-president of Silton Brothers (Tr. 399).

(3) Richard J. Cohen (Tr. 411), vice president of operations for K. W. International (Tr. 412), who distributes a basically full line of junior and misses ladies' sportswear.

Sea-Land called the following witnesses:

(1) Donald G. Hermansen, Sea-Land's West Coast Purchasing Manager, Pacific Division (Tr. 379).

APL and Sea-Land then rested as to each (Tr. 451).

None of the above gave any testimony whatsoever as to PFA's claim for loss of goodwill and damages therefrom. None of the witnesses, including Mr. Mitchell, reestablished the link between the importation and the OCP movement. And, as Mr. Mitchell testified, if it is not possible to do this, PFA would have no alternative but to decline an attempt to collect. Could less be expected from the trier of fact? The Presiding Administrative Law Judge, as the trier of fact herein, *finds* and *concludes* that the complainant had a "heavy burden of proof" in this proceeding, especially in view of the fact the goods had left the carrier, but has failed to meet that burden of proof. The complainant kept no copies of the proofs submitted for claims made for OCP refunds. Further, the president of PFA, for example, testifying as to Silton Claim 1013, was asked to show (Tr. 148) the method whereby PFA would take the ocean bill of lading and identify inland bills of lading as referring to the same cargo that came in on the vessel *SS President Madison* from Hong Kong. This was a shipment of 100 percent moving OCP and the entire shipment stayed in Silton's warehouse for approximately eleven months before any of it was sent out.

Mr. Mitchell replied (Tr. 148, 149):

The best answer I could give you, lacking a recollection of this claim having been put together, is that this national motor freight classification number that you see that they used to describe their cargo is the motor freight classification for wearing apparel, which agrees in description with the ocean bill of lading commodity description of men's nylon parkas.

* * * * *

Clothing in and clothing out tells—it does not amount to a conflict in my mind and if there was a question at the time that claim was prepared, we would have verified the fact that it is in fact the same stuff.

The Presiding Administrative Law Judge asked (Tr. 150):

Actually your answer is, as to this particular claim, which is Silton's claim 1013, you are unable now, looking at it, to answer how a claim could be made that it had come in a particular vessel. Is that correct?

The witness (Tr. 150):

I am unable to recall that claim out of a couple of thousand that we have prepared, as to—

JUDGE HARRIS: Well, I will put my question again. From looking at this particular document that is before you dealing with Silton claim 1013, you are unable, simply by looking at this document, to tell how it was ascertained that the goods came in on the particular vessel. Is that correct?

THE WITNESS: I can tell you that the method employed would have put us in touch with the importer who could have given us the answer.

JUDGE HARRIS: Yes, but looking at these documents, really your answer is that you don't know at this point, by looking at these documents, how it was determined that a particular vessel brought these goods in and that then they went to an OCP point. You can't tell us now by looking at those documents?

THE WITNESS: I can't tell you, no, sir.

JUDGE HARRIS: But what you can tell is that the method that your company uses, that you will ask someone in Silton and they will tell you something about it and you put it together and you say we can make an OCP claim on this basis.

THE WITNESS: Yes, sir.

JUDGE HARRIS: That makes it clear to me. I just wanted clear in the record how this is arrived at. Mr. Kenny, I hope I didn't interfere too much with your cross.

MR. KENNY: No, I appreciate the clarification.

Every claim PFA would submit would have the cover sheet, the ocean bill of lading and domestic or inland bill of lading (Tr. 57). Exh. No. 11 is a typical claim folder. And, PFA stated (Tr. 176), PFA's system of identifying inland bills of lading to shipments is not error free.

As has been indicated above, this record is void of any proof as to loss of goodwill by the complainant, as well as to any proof of damages therefor. Any recovery by PFA against any respondent herein therefore is denied.

The complainant alleges violation of the Act for failure to make adjustment and settlement of claims. Under section 14, Fourth (c) of the Shipping Act, 1916, it is provided:

Sec. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due reqard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

The adjustment and settlement of claims was envisioned early on in these proceedings. The respondents at the prehearing conference promised, upon receipt of back-up documents on the claims herein and their satisfactory review of those claims, payment of the claims would start immediately (Prehearing Transcript at 24). This unfortunately did not happen. Under the circumstances of this case, the Presiding Administrative Law Judge *finds* and *concludes* the respondents were justified in withholding payment of OCP refund requests in view of the discovery of an employee of Sea-Land processing OCP refund claims against Sea-Land and the matter of compliance with the tariff as to eligibility for the OCP refund, and the aforesaid lack of back-up material showing compliance with the tariff for OCP refund.

The complainant in its closing brief contends (p. 7) that to have Mr. Mitchell prepared with back-up documents and testimony on each and every claim and bill of lading would have been an impossible task, straining the resources of PFA to financial ruin and aggravating to the fullest extent possible all PFA clients, especially where all claims and supporting bills of lading are so clearly within the spirit as well as precise wording of each tariff involved. In the next breath, PFA contends it has established the validity of each and every claim for OCP refund initially submitted to respondents under applicable tariff. The Presiding Administrative Law Judge is not persuaded that the complainant has done so or that it has met the heavy burden of proof necessary in such circumstances.

The Presiding Administrative Law Judge cannot find and conclude under the facts and circumstances of this proceeding that the complainant has established the bona fides of the claims nor that the matter of duplication is not an impeaching factor. The complainant in its closing brief (p. 2) submits the comparably minor amount of duplication in terms of number of documents and actual dollar amount represented by duplicate documents should not and does not impeach the validity of all of PFA's claims. To rule otherwise, argues PFA, would be to allow PFA's errors to deny innocent consignees from receiving substantial amounts of OCP refunds on bona fide claims.

The bona fides of the claims, a matter at issue in this proceeding, is and was important, yet the complainant did not present the consignees nor satisfactory documentation to prove such bona fides.

The Shipping Act, 1916, provides in:

Sec. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, 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.

Under the circumstances of this proceeding, the complainant has failed to prove that the respondents have violated this section of the Act, or the following section of the Act:

Sec. 18(b)(3). 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 transportaion 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; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

The complainant argues that only 24.04% of the total claims submitted to respondent Sea-Land ($21,352.88) have some duplicates, which dollar amount of these claims containing some duplicates equals $19,557.23. And, of the $19,557.23, only 14.96% would be actual duplicate proof, which amount equals $6,837.21. The complainant argues that using a percentage approach, $74,515.69 of the claims submitted to the respondent Sea-Land do not suffer from duplication; that if one assumes that the duplicates were only submitted twice, as is the case in the majority of the claims (see Exhs. 41 and 44), one-half of the amount of duplication would be valid, leaving only one-half of $6,837.21, to wit $3,418.61 as invalid.

As has been indicated above, the Presiding Administrative Law Judge is unpersuaded by this argument.

Unfortunately, early on efforts failed to have the complainant present satisfactory and adequate proof that would require payment of OCP refunds. Similarly, efforts to shorten the proceedings by the rise of representative samplings of claims made for OCP refund only served to prove that proof is needed to be presented as to every claim made herein, especially in the absence of agreement between the parties that such representative samples as were presented and the proofs thereof provided as answer that warrants payment of OCP refunds.

This case has been in process over a year, and in that time resolution between the parties has not been achieved totally. The matters brought to light as shown in this decision have eliminated some considerations and better focused others. Further, the complainant's argument, referred to above, that to have Mr. Mitchell (PFA) prepared with back-up documents and testimony on each and every claim and bill of lading would have been an impossible task, straining the resources of PFA to financial ruin and aggravating to the fullest extent possible all PFA clients, is lacking any proof in this record. Litigation herein undoubtedly has been costly to all despite the efforts herein to try to resolve this matter in the least time possible and at the least cost possible.

This is all leading up to granting the complainant 60 days to do that which they have not been able to do, that is within 60 days to present to the respondents any and all claims in this proceeding with back-up documents and affidavits, that the respondents, upon review and checking, are satisfied to pay forthwith. The Commission is to be kept fully informed of any and all progress and payments. At the end of this 60-day period, this proceeding will stand discontinued.

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

(1) The complainant has failed to meet the heavy burden of proof necessary to sustain its case.

(2) Relief should be denied and the complaints should be dismissed, but the complainant, as noted above, is given 60 days from the date of this decision to submit back-up documents and affidavits to prove any and all claims it can.

(3) This proceeding should be discontinued at the end of the 60-day period.

Wherefore, it is ordered that:

(A) Relief is denied, except within the 60-day period, back-up documents as to any claims may be submitted to respondents for payment and, if satisfactory, be paid by respondents.

(B) The complaints in Docket No. 78-24 and Docket No. 78-25 be and hereby, within 60 days of the date hereof, are dismissed.

(C) This consolidated proceeding and each Docket, No. 78-24 and No. 78-25, be and hereby, within 60 days of the date hereof, are respectively discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.
July 9, 1979

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 607 (I)

IDEAL TOY CORPORATION

v.

ATLANTIC CONTAINER LINE

ORDER REMANDING PROCEEDING

October 3, 1979

Ideal Toy Corporation filed this complaint alleging that Atlantic Container Line charged it rates in excess of the applicable tariff on file with the Commission.* On July 16, 1979, Settlement Officer James F. Carey, issued a decision dismissing Ideal Toy Corporation's complaint on the ground that the complainant had failed to meet its burden of proof. The Commission determined to review the Settlement Officer's decision.

The record in this proceeding does not disclose the commodity description of the tariff item applied nor does it reveal the description of the commodities actually shipped. In order to assure a correct disposition of the complaint, this proceeding is being remanded to the Settlement Officer for further evidence. Specifically, the Settlement Officer is directed to receive evidence showing the commodity description of the tariff item applied to the shipments at issue and the description of commodities actually shipped.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Settlement Officer for the taking of additional evidence and the issuance of a supplemental decision thereon; and

IT IS FURTHER ORDERED, That such supplemental decision be rendered within 60 days of the date of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* By consent of the parties the proceeding was conducted under the Commission's informal docket procedures [46 C.F.R. 502.301 *et seq.*].

224226

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 668

APPLICATION OF MAERSK LINE AGENCY FOR
THE BENEFIT OF MITSUI AND COMPANY

ORDER ON REMAND

November 1, 1979

This proceeding was instituted upon the application of Maersk Line Agency for permission to refund a portion of certain freight charges to Mitsui and Company pursuant to section 18(b)(3) of the Shipping Act, 1916.

The Administrative Law Judge rendered his Initial Decision on August 27, 1979, conditioning ultimate approval of the application upon the submission of evidence to the Commission establishing the date of the shipments in question.

Although no exceptions were filed, the Commission, on its own motion, determined to review the Initial Decision.

Among that which must be submitted to support a request for refund or waiver under section 18(b)(3) of the Shipping Act, 1916, is evidence establishing the dates of the shipments for which such authority is requested. Without the dates of the subject shipments, it cannot be determined whether the applicant has satisfied the 180 day statute of limitation imposed under section 18(b)(3) of the Act.

It is the Presiding Officer's duty to marshall the evidence necessary to make a decision whether to grant or deny an application. Should an applicant fail to provide satisfactory evidence to sustain its burden of proof then the Presiding Officer can require the submission of additional evidence *before* rendering an Initial Decision. If it is inappropriate to receive additional evidence and the applicant has not met its burden of proof then the Presiding Officer should render an initial decision denying the application. It is inappropriate for the Presiding Officer to render an Initial Decision conditioning approval of an application upon the submission of evidence to the Commission.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for the receipt of evidence establishing the date of the shipments upon which the application is based and the issuance of a supplemental Initial Decision.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 660

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF BDP INTERNATIONAL, INC. AS AGENT FOR CHAMPION INTERNATIONAL EXPORT CORPORATION

ORDER ADOPTING INITIAL DECISION

November 2, 1979

This proceeding was instituted upon the application of Sea-Land Service, Inc. to refund a portion of certain freight charges collected from BDP International, Inc., and independent ocean freight forwarder, as agent for Champion International Export Corporation.

Administrative Law Judge William Beasley Harris served his Initial Decision on August 10, 1979, granting Sea-Land's application. No exceptions were filed, but the Commission, on its own motion, determined to review the Initial Decision.

The findings and conclusions of the Initial Decision are well founded and correct and are herein adopted. However, when, as here, authority is granted to a carrier to refund freight charges to a freight forwarder acting as the agent for a shipper, the Commission must receive adequate assurances that the refund is paid over to the shipper.[1] The Commission is therefore requiring the submission of an affidavit from the agent certifying that it has remitted the refund to the shipper, or, if the remittance cannot or has not been made, an affidavit setting forth the reason or reasons therefor.

The Commission will also require the freight forwarder to adjust the amount of brokerage compensation it has received from the applicant. Therefore, contemporaneous with its affidavit certifying that the refund has been paid to the shipper, BDP International, Inc. shall certify that it has refunded to the applicant the excess brokerage compensation it has received by virtue of the adjusted freight charges.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted and made a part hereof; and

[1] *See* Special Docket Nos. 537, 538, 539, *Salentine & Co., Inc., et al. v. Europe Canada Laker Line,* 20 F.M.C. 542 (1978); Special Docket No. 519, *Buckley & Forstall, Inc. v. Gulf European Freight Association for Combi Line,* 20 F.M.C. 343 (1977).

IT IS FURTHER ORDERED, That BDP International, Inc. certify to the Commission by filing an affidavit within 45 days of this Order either that it has forwarded to Champion International Export Corporation the sum of $2,065.40 or explaining why such remittance has not been made.

IT IS FURTHER ORDERED, That BDP International, Inc. certify to the Commission, in detail, that it has refunded a proportionate percentage of brokerage compensation it has received for these shipments which was based on a percentage of the total freight charges; and

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

> Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 660 that effective December 14, 1978 and continuing through April 1, 1979, inclusive, the rate on waxed paper to Guatemala and Honduras under Item 1090, Tariff No. 283, F.M.C. No. 161, trailerload rate, is $82.00 per ton of 2,000 lbs., minimum of 37,000 lbs.

By the commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 660

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF BDP INTERNATIONAL, INC.
AS AGENT FOR CHAMPION INTERNATIONAL EXPORT CORP.

Adopted November 2, 1979

Permission granted to refund $2,065.40 portion of aggregate freight charges of $6,666.60 collected.

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

This is a special docket application by Sea-Land Service, Inc. (Sea-Land), a common carrier by water in foreign commerce which publishes its own tariff, No. 283, FMC No. 161, on rates for transportation of freight from U.S. North Atlantic Ports to Ports in Central America. BDP International, Inc., a freight forwarder (FMC 1127), paid aggregate freight charges of $6,666.60 to Sea-Land for transportation to two shipments of Paper, Viz: Waxed for shipper Chemical International Export Corp., from Baltimore to Puerto Cortes (destination en route changed to Tegucigalpa) and from Baltimore to Honduras. The commodity was described in one Bill of Lading as Wrapping Paper and in the other as Wax Paper.

In this application it is certified by applicant Sea-Land that this application was mailed to the Secretary of this Commission on July 5, 1979. Thus, that is the date of filing of this application. (Rule 92(a)(3), Rules of Practice and Procedure, 46 C.F.R. § 502.92(a)(3)). The involved shipments dates of sailing, according to applicant, respectively are January 10, 1979 (as to B/L No. 956744391) and March 10, 1979 (as to B/L No. 956747400). A special docket application must be filed within 180 days of the sailing date of the involved shipment. The instant application was and thus is filed timely.

The commodity is Paper on the two (2) shipments involved herein.

Shipment No. 1: In Sea-Land's Bill of Lading (bearing no date) No. 956744391 (Exh. No. 5, Page 3 of 22 attached to application) the goods are described as "35′ Container STC: 28 skids of 28 Rolls: Wrapping Paper."

[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 C.F.R. § 502.227).

Shipment No. 2: In Sea-Land's Bill of Lading (bearing no date) No. 956747400 (Exh. No. 5, Page 16 of 22 attached to application) the goods are described as 25 "Pallets STC 71 Rolls: Wax Paper."

The applicant states that the goods were properly described as wax paper in Shipment No. 2.

Upon receipt of the bill of lading as to Shipment No. 1, the shipper Champion International Export Corp. filed with Sea-Land an overcharge claim on the basis the commodity was actually Waxed Paper and not Wrapping Paper (Exh. No. 5, page 12 of 22 attached to application). On the basis of the sample submitted by the Shipper, a refund was authorized by Sea-Land's Rate Audit Department in the amount of $230.80 (*Id.,* at 15 of 22). This amount reflected the applicable Class 7 rate of $100.00 on Wrapping Paper and the $92.00 LTL rate published on Waxed Paper in Item 1090.

Thus, it is agreed that the commodity transported in each shipment is Waxed Paper.

Shipment No. 1, B/L No. 956744391 (bears no date), was loaded at Baltimore on Sea-Land's vessel *Tampa* (no voyage number given on B/L) for Puerto Cortes. No freight charges are shown on the B/L. Weight is shown as 41,880 lbs. Sea-Land's Home Office Accounting Copy Microfilm #6081558 shows the cubic measure 1154, weight 41880 rated as 2885 Rate $100. TM charge of $2,885; Port Dues rated as 2094 TN. MI. $26.18—Total charge of $2,911.18. The application states the voyage number for Shipment No. 1 is 267S and that shipment was made January 10, 1979, and the sailing date for it is January 10, 1979. Exhibit No. 4 at 1 of 2 attached to application, shows vessel *Tampa* voyage 267 sailed Baltimore, Md., on January 10, 1979, at 1512 hours.

While Shipment No. 1 was en route, the forwarder notified Sea-Land that the destination was to be changed from Puerto Cortes to Tegucigalpa which is an inland point. Supplemental freight bill No. 956–743392 (Exh. No. 5 at 9 of 22) in the amount of $489.96 was issued to reflect the additional charges. Both the original and supplemental freight bills were paid in full.

Shipment No. 2, B/L No. 956747400, sailed March 10, 1979, on the vessel *Tampa,* voyage No. 271S. The second shipment, which was properly described as Wax Paper was: billed at the $92.00 LTL rate; assessed the applicable inland charges to Tegucigalpa; and paid in full by the forwarder. Attached as Exhibit No. 5 is "Calculation of Freight Charges" which shows the: charges originally billed, including the supplemental; charges after refund authorized; charges based on the proposed rate; charges paid and the amount of refund if the application is granted. The bills of lading, freight bills, overcharge letter from the shipper and the tariff authority for the accessorial charges are made part of that exhibit.

The above information was derived from the instant application. Further information supplied by the applicant in support of the application is as follows:

Sea-Land publishes various commodity rates on Paper in Item 1090 to its Tariff No. 283, FMC No. 161, which apply from U. S. North Atlantic ports to Central America. Prior to December 14, 1978, a trailerload rate of $82.00 per ton of 2,000 lbs., minimum of 37,000 lbs. for Waxed Paper was published to Guatemala and Honduras, Central America, 12th Revised Page 154, effective November 27, 1978. Exhibit No. 1. Effective December 14, 1978, Item 1090 was amended to add a new rate on Wrapping, Kraft to apply to Guatemala and in the process of revising the tariff page, the $82.00 trailerload rate on Waxed Paper to Honduras was inadvertently deleted—see Exhibit No. 2. Attached is Affidavit of John Brennan, certifying that due to a clerical error the rate was omitted from the tariff. The error was discovered after the involved shipments moved and the omission was corrected by publication of 15th Revised Page 154 effective April 2, 1979—see Exhibit No. 3.

It was Sea-Land's intention to amend Item 1090 in its Tariff No. 283 to add a new commodity rate and to bring forward the Waxed Paper rates without change. However, due to a clerical error, a trailerload rate on Waxed Paper was deleted.

It is Sea-Land's position that the clerical error in inadvertently deleting the trailerload rate in Item 1090 is of the type within the scope of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

DISCUSSION

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* that he agrees with the applicant that a proper case has been made out by the applicant in accordance with section 18(b)(3) of the Shipping Act, 1916, and Rule 92 of the Rules of Practice and Procedure, 46 C.F.R. § 502.92. Therefore the application for permission to refund a portion of the freight charges should be granted.

For the reasons given in the application and upon consideration of all of the above, the Presiding Administrative Law Judge *finds* and *concludes*, in addition to the findings and conclusions hereinbefore stated:

(1) The application was filed timely.

(2) There was filed with the Commission, prior to this application, an effective tariff setting forth the rate on which the refund would be based.

(3) There was an error of a clerical or administrative nature which resulted in the necessity for refund.

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

(5) The application for permission to refund should be granted.

Wherefore, it is ordered that:

(A) The application be and hereby is granted.

(B) Sea-Land Service, Inc., is granted permission to refund a $2,065.40 portion of aggregate freight charge of $6,666.60 collected, to BDP International, freight forwarder (FMC 1127), as agent for Champion International Export Corp.

(C) Appropriate notice shall be published in the applicable tariffs.

(D) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

WASHINGTON, D.C.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–28

INTERNATIONAL TRADE & DEVELOPMENT, INC.
AND ROBERT H. WALL, INC.

v.

SENTINEL LINE AND ANCHOR SHIPPING CORPORATION

ORDER ADOPTING INITIAL DECISION

November 2, 1979

On September 26, 1979, the Commission determined to review the Initial Decision issued August 21, 1979 in the above-captioned complaint proceeding. In that decision, the Presiding Officer denied a complaint alleging violations of sections 16 First, 17 and 18(b) of the Shipping Act, 1916 (46 U.S.C. §815 First, 816 and 817(b)) arising out of a common carrier's failure to honor a cargo booking contract.

Upon examination of the record, the Commission shares the Presiding Officer's conclusion that the complainants failed to prove their case. Further comment is offered only to avoid any wrong impression which might result from the discussion of section 16 First at page 6 of the Initial Decision.

Page 6 contains citations from portions of the Commission's *North American Freight Conference* decision* which refer to the need for a *competitive relationship* between a prejudiced and a preferred shipper in order to establish a violation of section 16 First. Although correct as far as it goes, reliance solely upon the *North American* decision fails to reflect other rulings which have held that section 16 First can be violated without the presence of a competitive, commercial relationship between shippers. *E.g., Volkswagenwerk A.G. v. Federal Maritime Commission,* 390 U.S. 261, 278–280 (1968); *New York Foreign Freight Forwarders & Brokers Ass'n v. Federal Martime Commission,* 337 F.2d 289, 299 (2d Cir. 1964), *cert. den.,* 380 U.S. 910 (1965); *Freight Forwarder Bids on Government Shipments,* 19 F.M.C. 619 (1977); *Proposed ILA Rules on Containers,* 18 S.R.R. 553 (1978); *General Mills, Inc. v. State of Hawaii,* 17 F.M.C. 1 (1973); *Valley Evaporating Co. v. Grace Line, Inc.,*

* 11 F.M.C. 202, 209 (1967).

14 F.M.C. 16 (1970); *Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966).

These cases establish that a competitive relationship is not required when the facts reveal a clear comparative disadvantage or other type of "special injury" to the complaining shipper (or locality) which (1) goes beyond the simple payment of a higher rate; and (2) cannot reasonably be justified on the basis of traditional transportation factors. Because the complainants did not even establish that a particular shipper or shippers were unduly preferred, the Commission need not reach the question of whether a carrier's duty to honor cargo bookings is the type of conduct which would violate section 16 First in the absence of a competitive relationship.

THEREFORE, IT IS ORDERED, That, except as supplemented by the above discussion of section 16 First of the Shipping Act, 1916, the August 21, 1979 Initial Decision in Docket No. 78-28 is adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 78-28

INTERNATIONAL TRADE & DEVELOPMENT, INC. AND ROBERT H. WALL, INC.

v.

SENTINEL LINE AND ANCHOR SHIPPING CORPORATION

Adopted November 2, 1979

Complainants have failed to establish a violation of any provision of the Shipping Act upon which reparation can be granted.

Robert S. Hope for complainants.

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

By a complaint filed under section 22 of the Shipping Act, 1916, International Trade & Development, Inc. and Robert H. Wall, Inc. seek reparation of "at least $22,976.09" for Sentinel Line's "non-performance of its obligation as a common carrier."

Anchor Shipping Corporation, originally named as co-respondent in the complaint, moved for dismissal as to it on the ground that since Anchor was neither a "common carrier by water" nor an "other person" as defined in the Shipping Act, the Commission was without jurisdiction over it.[2] Anchor was a general agent and broker and as such was not a common carrier or other person against whom a complaint would lie.

Judge Reilly granted the motion and dismissed the complaint as to Anchor.[3] (See Order of October 30, 1978). On the same day as the dismissal of Anchor, Judge Reilly issued an "Order to Show Cause Why Proceeding Should Not be

[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 C.F.R. §502.227).

[2] Section 22 permits persons to file complaints only against common carriers and other persons.

[3] Section 1 of the Shipping Act defines other person as someone other than a common carrier "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Clearly Anchor was not an "other person."

Decided Without Oral Hearing." In that order Judge Reilly noted that Sentinel had not answered the complaint nor had it responded to any of the various motions, but nevertheless sought to give Sentinel one more opportunity to defend itself in the case. Sentinel was given 15 days to respond to the order to show cause. On November 17, 1978, Judge Reilly in noting that Sentinel had not responded to the order to show cause dispensed with oral hearing and ordered complainant to submit "such documentary evidence as it had in its possession which [would] support its claim of reparation against Anchor Line." Complainant filed its exhibits on December 20, 1978. In a covering letter, complainant stated:

> Although the complaint as to respondent Shipping Corporation was dismissed upon the representation of its counsel that it was acting only as General Agent for Sentinel it is the information and belief of complainants that Sentinel and Anchor are one and the same entity, owned and controlled by the same persons and should both be held responsible for payment of the reparations as set forth in the attached Affidavit, plus reasonable attorney's fees and costs of at least $6,000.00.[4]

On the next day December 21, 1978, the Commission in a notice announced that the time within which the Commission could determine to review the dismissal of Anchor had expired and that no review would be undertaken. On January 18, 1978, Judge Reilly wrote counsel for complainant posing certain questions and directing counsel to file a memoradum of law. The memorandum was filed on July 26, 1979.[5]

FACTS

International Trade & Development, Inc., is engaged in the export of various commodities in the foreign commerce of the United States. Robert H. Wall is an agent and broker of shipments in U. S. foreign commerce. Sentinel Line is or was a common carrier by water subject to the Shipping Act, 1916.

On February 7, 1977, International completed negotiations for the sale of 2,000 short tons of bagged rice to the Government of Haiti at a price of $13.45 a bag, CIF Port-Au-Prince, Haiti. On the same day, Food Corporation International, Ltd. of Houston confirmed to Robert H. Wall the sale of 40,000 one hundred pound bags of rice to International at a price of $11.40 a bag. The Government of Haiti on February 8, 1977, opened a letter of credit at Riggs National Bank in Washington, D.C. The letter was for $538,000 and was in favor of International. On the same day that the letter of credit was opened, Transchartering, Inc. of New York made a firm booking by telephone for the Sentinel vessel *M/V Omiris*. The cargo was booked at $37.65, full berth terms, the *Omiris* to be available for loading February 17–28, 1977. The telephone booking was confirmed by a booking contract dated February 8, 1977.

Wall is a subscriber to the "Transportation News Ticker" and on February 15, 1977, International learned from that service that the *Omiris* had been booked to carry 1834 metric tons of blended food to Kingston, Jamaica,

[4] Complainants have not, at least as far as this record shows, ever formally attempted to have Anchor restored as a respondent.

[5] The delay in filing the memorandum was due to illness of counsel. In the interim Judge Reilly left the Commission and thus became unavailable to render a decision in this case.

March 1-10, berth terms at a rate of $46.76 per short ton. The physical limitations of the *Omiris* and the scheduling made it impossible for the *Omiris* to satisfy both bookings.

Upon finding out about the Jamaica booking Wall contacted Transchartering and was assured that a substitute vessel would be furnished to meet International's loading dates. On February 14, Wall learned the *Omiris* had been arrested in the Dominican Republic. Transchartering, however, told Wall that the lien on the *Omiris* was to be lifted and the vessel would be at a U. S. Gulf port on February 28, 1978. As a precaution, International had the letter of credit extended to change the cancelling date of March 5, 1977. Several days later, Transchartering told Wall that the loading date for the *Omiris* would be March 8, 1977. The Government of Haiti agreed to a final extension of the letter of credit with the condition that the on board bills of lading be dated no later than March 10, 1977. Finally on March 7, 1977, after repeated requests for assurances that the *Omiris* would meet the March 8th loading date, Transchartering advised that the ship would not be able to perform the booking.

International, despite repeated efforts, could not find a vessel in a position to meet the loading date and the Government of Haiti cancelled the purchase contract and the letter of credit expired by its terms.

It is asserted that because of Sentinel's failure to perform its booking contract International suffered out-of-pocket expenses of $22,976.09 composed of:

(1) Loss of profit from sale of rice	$13,665.25
(2) Charges and interest levied	8,000.00
(3) Charges by Riggs National Bank	1,310.84

Complainant's request for reparation is grounded on the allegation that:

Sentinel has not only breached its obligation as a common carrier but has violated Section 16 of the Act by giving undue or unreasonable preference or advantage to other shippers, particularly the shipper of blended food in packages to Jamaica which acts resulted in undue or unreasonable prejudice or disadvantage to Wall and I.T. & D (International). Likewise upon information and belief, Sentinel and Anchor probably violated other provisions of the Act including Sections 17 and 18 thereof.

Complaint for International Trade & Development at 6.

Discussion and Conclusion

Complainants' entire argument on the merits of the case is:

1. "Common Carriers" cannot convert themselves to "Contract Carriers" by entering into preferential and exclusive contracts for one banana shipper for a forward period, while carrying common carriage cargoes on the balance of a particular ship or ships. Hence, the result was a violation of Sections 14 Fourth and 16 First of the Shipping Act, 1916.
2. Here, despite the firm booking to Complainants of the *M/V Omiris* on Full Berth Terms or by a substitute vessel, the respondent did not perform. This booking was confirmed both orally and in writing as to the *Omiris* then as to a substitute vessel. Respondents failed to perform with any vessel and did

not advise Complainants until it was too late to carry the bagged rice to Haiti.

3. The same cases mentioned above established that the Commission as the Agency with the expertise has the responsibility of determining the amount of reparations. Both the Court of Appeals and the Supreme Court found the Commission used the proper standards of measuring the damages, that is, as Chief Judge Bazelon stated:

> The Shipper's lost profits are the normal measure of damages in cases involving a refusal to carry, and the Supreme Court affirmed this principle in its rejection of our prior conclusion regarding equity of giving Consolo his lost profits in the circumstances of this case. . . .

Whatever the measure of reparation may be none can be awarded unless a violation of a specific provision of the statute is found. In its complaint, Sentinel mentions sections 16, 17 and 18 of the Shipping Act. In mentioning these sections the only specific allegation made is that Sentinel violated section 16 by "giving undue or unreasonable preference or advantage to other shippers, particularly the shipper of blended food in packages to Jamaica. . . " The difficulty with this allegation is that no where in the record is there any evidence that the *Omiris* was released from the custody of the Government of Santo Domingo in time to carry the Jamaican shipment or that the shipment was ever carried by Sentinel.

As if this were not enough the Commission has on any number of occasions spelled out the criteria for establishing a violation of section 16:

> This prohibition against under or unreasonable preference or prejudice is designed to deal with two or more competing shippers or localities receiving different treatment which is not justified by differences in competitive or transportation conditions. The classic case would be where the shippers at A & B are competitive in a common market at C . . . and the same competitive influences apply. . . .
>
> North American Freight Conference, 11 F.M.C. 202 at 209 (1967) and cases cited therein.

Complainants as shippers of rice were not competitive with the shipper of packaged blended foods and thus the two shippers were not similarly situated. Nor were the cargoes destined for a common market. The rice was destined for Haiti and the blended food was destined for Jamaica. Under the facts of this case no violation of section 16 can be found. Nor will the record sustain a violation of section 17:[6]

> [D]iscrimination arises when two shippers of like traffic, shipping [on the same line] between the same points under substantially similar circumstances and conditions, are charged different rates. 11 F.M.C. at 212.

For obvious reasons the facts of this case do not establish a violation of section 17.[7]

All of this is not to say that complainants have no forum. Sentinel appears to have breached the contract of carriage and the remedy for that lies in the courts not the Commission.

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[6] In mentioning section 17, it is presumed that complainants are concerned with discrimination since the "receiving, handling, storing or delivering of property" is not involved here.

[7] For equally obvious reasons, no violation of section 18(b) of the Act has been established. Since there was no actual carriage none of the provisions of 18(b) can be brought to bear.

Since complainants have failed to establish a violation upon which reparation can be granted, the case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

WASHINGTON, D. C.
August 10, 1979

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDERS NOS. 25 AND 30, REVISED; DOCKET NO. 79-66]

PART 504—COLLECTION, COMPROMISE AND TERMINATION OF ENFORMCEMENT CLAIMS

PART 505-COMPROMISE, ASSESSEMENT, SETTLEMENT AND COLLECTION OF CIVIL PENALTIES UNDER THE SHIPPING ACT, 1916, AND THE INTERCOASTAL SHIPPING ACT, 1933 (AMENDED)

November 19, 1979

ACTION: Final Rule

SUMMARY: This repeals obsolete regulations (Part 504) and amends and finalizes interim regulations (Part 505) which are enacted to implement recent amendments to the Shipping Act, 1916 which authorize the Federal Maritime Commission to assess or compromise all civil penalties provided in the act.

EFFECTIVE DATE: November 27, 1979

SUPPLEMENTAL INFORMATION

This proceeding was instituted by publication of Interim Regulations made immediately effective on July 5, 1979 (44 Fed. Reg. 39176), to amend 46 C.F.R. Part 505 (General Order 30) which, as amended, implements the assessment of civil penalty authorization provisions of Pub. L. 96-25.

Comments to the Interim Regulations were invited and were received from eleven parties in four submissions. Commentators consist of one attorney, one steamship company and nine conferences/agreements.

J. Alton Boyer, Esquire (Boyer) suggests clarification that both the finding of violations and assessment of penalties therefor be encompassed in a single proceeding, and clarification of the role of Hearing Counsel, the difference between compromise and settlement, if any exists, who makes the determination that a violation may have occurred, and the opportunity for judicial review. Boyer further raises questions concerning due process, the desirability of maximizing opportunity for settlement, the necessity for approval of settlement at three levels, too much formality in the compromise procedure, the desirability of using confess-judgment notes, and the public availability of internal settlement guidelines. Finally, Boyer suggests that the rules make clear that they are not intended to impose a harsher outcome than the previous rules.

Lykes Brothers Steamship Co., Inc., supports the interim regulations *in toto* and urges expedited approval.

Agreements 10107 and 10108, Japan/Korea-Atlantic and Gulf Freight Conference, Philippines North America Conference, Straits New York Conference,Thailand/Pacific Freight Conference, Thailand/U.S. Atlantic and Gulf Conference and Trans-Pacific Freight Conference of Japan/Korea (Conferences) suggest clarification of the presiding officer's authority to modify a settlement in an assessment proceeding, insist that compromise procedures be available to all on an equal basis, and agree that obsolete 46 C.F.R. Part 504 (General Order 25) need not be retained.

Inter-American Freight Conference (IAFC) suggests changes to clarify the role of Hearing Counsel and two other minor sections.

Each of the Specific proposals advanced by the comments will now be discussed:

1. *Repeal of General Order 25 as Obsolete.*

In the preamble of the Interim Regulations, the Commission indicated that it ". . . perceives no probable regulatory need for the retention of General Order 25 (46 C.F.R. Part 504) Collection, Compromise and Termination of Enforcement Claims which implemented the Federal Claims Collection Act of 1966. The need to retain such General Order will be considered by the Commission in connection with comments invited to these interim regulations." The only comment received on this point was from the Conferences, which agree that General Order 25 need not be retained. Accordingly, 46 C.F.R. Part 504 will be revoked.

2. *Finding of Violations and Assessment of Penalties in the Same Proceeding.*

As raised by Boyer, it is contemplated that both the issue of whether violations have been committed as well as the assessment of penalties for such violations may be encompassed in a single proceeding. Such a specific provision, however, is not necessary in view of the Commission's need for flexibility in structuring proceedings under section 22 of the Shipping Act and the Administrative Procedure Act.

3. *The Role of Hearing Counsel.*

IAFC suggests there is no need to define the role of Hearing Counsel because the duties of this Bureau are already defined in 46 C.F.R. § 502. Boyer, on the other hand, refers to the "newly assigned role of prosecutor" and the seeming inconsistency with the duty of Hearing Counsel "to act as he deems is required by the public interest . . . under 46 C.F.R. § 502.42."

The pertinent part of 46 C.F.R. § 502.42 reads "Hearing Counsel shall actively participate . . . to the extent required in the public interest. . . ." Whatever this may mean in other types of proceedings, Hearing Counsel have always been the staff attorney in Commission instituted cases to establish violations. The "prosecutorial" role was always there; the only "newly assigned" role under P.L. 96–25 is the ability to request assessment of civil penalties in such a proceeding.

In an assessment proceeding, as in violations cases before the enactment of P.L. 96–25, Hearing Counsel are subject to the direction of the Commission only as set forth in the order(s) instituting the case and are otherwise fully subject to the separation of functions as in all other adjudicatory proceedings. Also, as in previous violations cases, it is clear that Hearing Counsel have the burden of proof to establish such violations.

To clarify this provision somewhat, we will delete the phrase: "shall participate as attorney for the Commission" and related language in section 505.3. The remaining language will be retained to specifically provide that all negotiations for settlement will be with Hearing Counsel in assessment proceedings, and not with General Counsel as in compromise cases where no formal proceeding has been instituted.

4. *Settlement Procedures in Formal Proceedings.*

The difference between "compromise" and "settlement" was questioned by Boyer. Of course, in addition to the traditional legal connotation, a "compromise" proceeding as defined in section 505.2(c) is the informal process, while the "assessment" proceeding is a formal docket. (See section 505.2(a).) Settlements can be reached in either process with General Counsel or Hearing Counsel, as the case may be.

Boyer suggests that it is desirable to maximize opportunity for settlement ("compromise") in a formal proceeding but the rules "seem to tend in the opposite direction." He questions the necessity of having such settlements "approved" by three levels of officials, i.e., Hearing Counsel, the Administrative Law Judge (where referred) and the Commission itself.

The Commission intends no extraordinary impediment to settlements, keeping in mind that most formal proceedings will be the result of unsuccessful compromise efforts with the General Counsel. Hearing Counsel, as a party to the stipulation or settlement, will not be approving agreements but rather will be joining with respondents in submitting agreements for approval. The inclusion of the settlement agreement in the Initial Decision and final decision replaces findings of violations and assessment of penalties, and the Commission deems such limited formality necessary to its regulatory responsibilities.

The Conferences submit that the rules do not specify whether the presiding officer can amend, modify or simply reject a settlement. Such powers are implied in the requirement that the presiding officer approve such a settlement.

Accordingly, no other changes to section 505.3 are necessary.

5. *Compromise Procedures—Institution and Notice.*

Section 505.4 provides for institution of compromise procedures in certain instances "whenever the Commission has reason to believe that there has occurred a violation. . . ." Boyer questions the participation by the Commission in this determination as compromising its integrity as a quasi-judicial body. It is well settled, however, that an administrative agency's participation in the institution of a proceeding does not disqualify it from making an informed decision on the record as to whether violations are established.

On the other hand, the Conferences would urge the absolute right of any respondent to first utilize the compromise procedures before (or instead of) going to a formal proceeding, with the only possible exception being the case where the statute of limitations period is about to run. While such a procedure is intended to be used in the normal case, we do not interpret P.L. 96–25 or its legislative history as establishing it as a right and no such amendment will be added. (See section 505.5.)

IAFC suggests that the first demand letter inform respondents of the identity of the attorney in General Counsel who will negotiate the compromise. This is neither practical nor necessary.

Boyer suggests that the language "making a final determination" with respect to that stage when the compromise procedure is terminated may be too formalistic. The language is not intended to imply a determination similar to a final order of the Commission, but rather to specifically set a reasonable cut-off date beyond which the compromise procedures cannot continue. Since we can think of no more palliative language with the necessary import, no change will be made.

6. *Mutual Exclusiveness of Proceedings.*

IAFC suggests clarification of section 505.6(b) to remove ambiguity. Accordingly, we will insert the words "under section 505.4" to accomplish this clarification.

7. *Confession of Judgment Note Provisions.*

Boyer questions the desirability of requiring a confession of judgment provision in a promissory note in section 505.7(b) and in Appendix B. Where circumstances allow a promissory note instead of immediate payment of the penalty in the first place, such a provision is necessary to protect the government from delays in collection of debts and is common practice. It was provided for in both the original General Order 30 and General Order 25 which is being repealed.

8. *Opportunity for Judicial Review.*

Boyer suggests the rules should provide for judicial review and for protection during that review from "assessment proceedings or collection efforts." Where a final Commission order has been issued, however, the Hobbs Act (28 U.S.C. §2341 *et seq.*) provides for judicial review and the Courts of Appeals have the power to stay further agency action with respect to such orders. Since assessment proceedings will ordinarily result in a final order on both the existence of violations and the amount of penalties, and since compromise procedures are voluntary, we cannot understand the basis for Boyer's suggestion and do not see the need for any amendment.

9. *Guidelines for Compromise and Settlement.*

Boyer suggests that guidelines for compromise and settlement be published. Such an endeavor, however, if feasible after further experience, belongs in a policy statement rather than in the procedural regulations involved here.

10. *Protection Against a Harsher Outcome.*

Boyer urges that the "Commission should make it clear that nothing in these rules or in the Commission's administration of Public Law No. 96-25 is intended to or will be permitted to impose a harsher outcome with respect to penalties for violations or alleged violations occurring prior to the adoption of P.L. No. 96-25 and these rules than would have been the case without their adoption." Again, we have difficulty in understanding this suggestion, especially since the new statute substantially increased the penalties in sections 16 and 18 and provides for new penalties for operating under a suspended tariff. Thus, without some further definition of "harsher outcome" (if such is possible), no such amendment to these procedural rules appears feasible.

Therefore, pursuant to the provisions of Pub. L. 96-25 (93 Stat. 71), section 4 of the Administrative Procedure Act (5 U.S.C. §553) and sections 32 and 43 of the Shipping Act, 1916 (46 U.S.C. §§831 and 841a), Title 46 CFR Part 504 is hereby revoked and the interim revision of 46 CFR Part 505, published at 44 Fed. Reg. 39176, is amended by the revision of sections 505.3 and 505.6, is adopted as final, and shall read as follows:

PART 505—COMPROMISE, ASSESSMENT, SETTLEMENT AND COLLECTION OF CIVIL PENALTIES UNDER THE SHIPPING ACT, 1916, AND THE INTERCOASTAL SHIPPING ACT, 1933

Sec.

AUTHORITY: Sec. 3, 86 Stat. 653, Sec. 10(e), 93 Stat. 71, and Secs. 32 and 43 of the Shipping Act, 1916 (46 U.S.C. §§831 and 841a).

§505.1 *Purpose and Scope*

The purpose of this part is to implement the statutory provisions of section 3 of Public Law 92-416 (86 Stat. 653) and section 10(e) of Public Law 96-25 (93 Stat. 71) by establishing rules and regulations governing the compromise, assessment, settlement and collection of civil penalties arising under certain designated provisions of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, and/or any order, rule or regulation (except for procedural rules and regulations contained in part 502 of this chapter) issued or made by the Commission in the exercise of its powers, duties and functions under those statutes. Also, for the purpose of this part, the criteria for compromise, settlement, or assessment may include, but need not be limited to, those which are set forth in 4 CFR Part 101-105.

§505.2 *Definitions*

For the purposes of this part:

(a) "Assessment" means the imposition of a civil penalty by Order of the Commission.

(b) "Commission" means the Federal Maritime Commission.

(c) "Compromise" means the process whereby a civil penalty for a violation is agreed upon by the respondent and the Commission's General Counsel.

(d) "Person" includes individuals, corporations, partnerships, associations, and other legal entities.

(e) "Violation" includes any violation of sections 14b through 21 (except 16 first and third) and section 44 of the Shipping Act, 1916; section 2 of the Intercoastal Shipping Act, 1933; and/or any order, rule or regulation (except for procedural rules and regulations contained in part 502 of this chapter) issued or made by the Commission in the exercise of its powers, duties, and functions under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

(f) "Respondent" includes any person charged with a violation.

§505.3 *Assessment*

Assessment of civil penalties may be made only in a formal proceeding instituted by the Commission under section 22 of the Shipping Act, 1916 for the purpose of such assessment. Such proceeding shall be governed by the Commission's Rules of Practice and Procedure, 46 CFR 502. In such a proceeding, the Commission's Bureau of Hearing Counsel shall have full authority to enter into stipulations and settlements. Any such proposed settlement of penalties for violations which are the subject of a pending proceeding under this section must be negotiated with Hearing Counsel, shall be submitted to the presiding officer for approval, and the full text of every such settlement must be included in the final Order of the Commission in the proceeding.

§ 505.4 *Compromise Procedures*

(a) *Institution and Notice*

Except in pending assessment proceedings as provided for in section 505.3 above, whenever the Commission has reason to believe that there has occurred a violation for which a civil penalty is authorized and it is appropriate to invoke the procedures looking toward compromise of the statutory penalties, the General Counsel's Office will send a registered letter to the respondent informing him of the nature of the violation, the statutory and factual basis of the penalty, the amount of the penalty and the availability of Commission personnel for discussion of the penalty claim should the respondent so desire. Two written demands, at 30-day intervals, will normally be made unless a response to the first demand indicates that further demand would be futile or unless contrary action is indicated by the circumstances.

(b) *Request for Compromise*

(1) Whenever a person is advised in writing that the Commission has reason to believe that he has committed a violation, such person may submit any oral or written answer to the notification letter explaining, mitigating, showing extenuating circumstances, or, where there has been no formal proceeding on the merits, denying the violation. Material or information so presented will be considered in making a final determination as to whether to terminate the compromise procedure or whether to compromise the penalty, and if so, the amount for which it will be compromised.

(2) All correspondence, petitions, forms, or other instruments regarding the collection, compromise, or termination of any penalty under this section should be addressed to the General Counsel, Federal Maritime Commission, 1100 L Street, N.W., Washington, D.C. 20573.

(c) *Disposition of Claims in Compromise Procedures*

(1) When the penalty is compromised, such compromise will be made conditional upon the full payment of the compromise within 30 days or such longer period, and upon such terms and conditions as may be allowed by the General Counsel.

(2) When a statutory penalty is compromised and the respondent agrees to settle for that amount, a compromise agreement shall be executed. (One type of settlement agreement is set forth in Appendix A.) This agreement, after reciting the nature of the claim, will include a statement evidencing the respondent's agreement to the settlement of the Commission's penalty claim for the amount set forth in the agreement and will also embody an approval and

acceptance provision which is to be signed by the General Counsel. Upon settlement of the penalty in the agreed amount, a copy of the executed agreement shall be furnished to the respondent.

(3) Any offer of compromise submitted by the respondent pursuant to § 505.4(b) shall be deemed to have been furnished by the respondent without prejudice and shall not be used against the respondent in any proceeding.

(d) *Delegation of Compromise Authority*

The compromise authority set forth above is delegated to the General Counsel.

§ 505.5 *Assessment Procedures*

In addition to its discretion to institute an assessment proceeding or civil penalty action without need to resort to the compromise procedures, the Commission may, after initiation of compromise procedures, institute an assessment proceeding or civil penalty action when:

(a) The respondent, within the prescribed time, does not explain the violation, petition for compromise, or otherwise respond to letters or inquiries; or
(b) The respondent, having responded to such letters or inquiries, fails or refuses to pay the statutory or the compromised penalty.

§ 505.6 *Mutual Exclusiveness of Procedures*

(a) No assessment of penalties for violations shall be made by Order of the Commission, nor shall any assessment proceeding be instituted after a settlement agreement for the same violations under the compromise procedures has become effective.

(b) No compromise procedure for penalties under section 505.4 for violations shall be initiated after institution of a Commission assessment proceeding for the purpose of assessing penalties for the same violations.

§ 505.7 *Method of Payment of Penalty*

Payment of penalties by the respondent shall be made by:

(a) A bank cashier's check or other instrument acceptable to the Commission.
(b) Regular installments by check after the execution of a promissory note containing a confess-judgment agreement (Appendix B).
(c) A combination of the above alternatives.

All checks or other instruments submitted in payment of claims shall be made payable to the Federal Maritime Commission.

Effective date—The provisions of this part 505 will become effective upon publication in the *Federal Register.*

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX A

ONE EXAMPLE OF COMPROMISE AGREEMENT USED BY ______________________________, AND THE FEDERAL MARITIME COMMISSION

This Agreement is entered into between: (1) the Federal Maritime Commission and, (2) ___________, hereinafter referred to as respondent.

WHEREAS, the Commission is considering the institution of an assessment proceeding against respondent for the recovery of civil penalties provided under the Act for violations of Section ___________;

WHEREAS, this course of action is the result of practices believed by the Commission to have been engaged in by respondent to wit;

____

____

____

____

WHEREAS, the parties are desirous of expeditiously settling the matter according to the conditions and terms of this Agreement and wish to avoid the delays and expense which would accompany agency litigation concerning these penalty claims; and

WHEREAS, Public Laws 92–416 and 96–25 authorize the Commission to collect and compromise certain designated civil penalties arising under the Shipping Act, 1916, including the civil penalties which arise from the violations set forth and described above.

WHEREAS, the respondent has terminated the practices which are the basis of the violations set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate, discourage, and prevent these practices by respondent or its officers, employees and agents.

NOW, THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties under the Act arising from violations set forth and described herein, that may have occurred between __________________ and __________________, the undersigned respondent herewith tenders to the Federal Maritime Commission the sum of _______________________ ($______) [Payment will be made in one, or a combination of the following methods: (a) A banks cashier's check or other instrument acceptable to the Commission; (b) Regular installments by check after the execution of a promisoory note, a copy of which will be attached to this agreement and incorporated herein.] Upon the following stipulations and terms of settlement:

1. Upon acceptance of this agreement of settlement in writing by the General Counsel of the Federal Maritime Commission, this instrument shall forever bar the commencement or institution of any assessment proceeding or other

claims for recovery of civil penalties from respondent arising from the alleged violations set forth and described herein, that have been disclosed by respondent to the Commission and that occurred between __________________ and __________________

2. The undersigned voluntarily signs this instrument and states that no promises or representations have been made to the respondent other than the agreements and consideration herein expressed.
3. It is expressly understood and agreed that this Agreement is not to be construed as an admission of guilt by undersigned respondent to the alleged violations set forth above.

NAME OF COMPANY

By____________________________________

Date__________________________________

APPROVAL AND ACCEPTANCE

The Above Terms and Conditions and Amount of Consideration are hereby Approved and Accepted:

By the Federal Maritime Commission:

____

General Counsel

Date__________________________________

APPENDIX B

Promissory Note Containing Agreement for Judgment

For value received, ______________________, promises to pay to the Federal Maritime Commission (the Commission) the principal sum of ______________________ Dollars ($________) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

____

____

____

____

____

____

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date of this Promissory Note and be computed at the rate of ______ percent (______%) per annum.

If any payment of principal or interest shall remain unpaid for a period of 10 days after becoming due and payable, the entire unpaid principal amount of this Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under this Promissory Note, ______ does hereby authorize and empower any U.S. Attorney, any of his assistants or any attorney of any court of record, Federal or State, to appear for it, and to enter and confess judgment against for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State; to waive the issuance and service of process upon ______ in any suit on this Promissory Note; to waive any venue requirement in such suit, to release all errors which may intervene in entering up such judgment or in issuing any execution hereon; and to consent to immediate execution on said judgment. ________ hereby ratifies and confirms all that said attorney may do by virtue hereof.

This Promissory Note may be prepaid in whole or in part by ______ by bank cashier's or certified check at any time, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

NAME OF COMPANY

By ______________________

Date______________________

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 649

APPLICATION OF MAERSK LINE AGENCY
FOR THE BENEFIT OF NOMURA (AMERICA) CORPORATION

SPECIAL DOCKET NO. 652

APPLICATION OF MAERSK LINE AGENCY
FOR THE BENEFIT OF WESPAC CORPORATION

REPORT AND ORDER ADOPTING INITIAL DECISIONS[1]

November 20, 1979

These proceedings involve applications filed on June 11, 1979, by the Pacific Westbound Conference (PWC) and one of its members, Maersk Line, represented by the Maersk Line Agency, seeking permission to refund portions of freight charged on various shipments which moved under PWC tariffs. By Initial Decisions served August 21 and 22, 1979, Administrative Law Judge Norman D. Kline denied both applications. Exceptions to the Initial Decisions were filed by PWC.

In Special Docket No. 649, PWC prior to January 1, 1979 had published a rate on "Butyl Motor Tube Scrap" in the amount of $64 per weight ton of 1000 kilograms. PWC revised and republished this tariff effective January 1, 1979.[2] In the process the rate on "Butyl Motor Tube Scrap" was unintentionally deleted.[3] As a result any shipment of this commodity became subject to the commodity classification "Synthetic rubber . . . including the following: Butyl . . . ,"[4] which carried a rate of $96 per weight ton. Some time thereafter, PWC restored a rate on "Butyl Motor Tube Scrap", effective March 28, 1979. The rate which was published, however, was not the previous rate of $64, but rather a rate of $70 per weight ton.[5] On February 5, 1979, during the time in

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[1] Because of the similarity of parties and issues, these proceedings have been consolidated for decision.

[2] Local and Overland Freight Tariff No. 11—F.M.C. 19.

[3] Affidavit of Donald P. Griffith, Executive Assistant to the PWC, June 11, 1979.

[4] Local and Overland Freight Tariff No. 11—F.M.C.-19.

[5] PWC Tariff No. 11—F.M.C.-19, 3rd rev. page 742, effective March 28, 1979.

which the unintended rate of $96 per weight ton was in effect, the Nomura (America) Corporation shipped used butyl motor tubes. Because at the time the shipment was made Nomura expected to be charged the $64 rate, it requested that this rate be reinstated and applied.[6]

In Special Docket No. 652, PWC, in republishing its tariff to become effective January 1, 1979, inadvertently deleted the $104 W/M commodity rate for "Mineral Insulating Material, N.O.S." Consequently, any shipment of this material became subject to a rate of $201 W/M, under the commodity description "Non Metallic Minerals and Products, Except Ceramic Products and Glass and Glass Products, N.0.S."[7] PWC filed a corrective rate on April 25, 1979 of $114 W/M, rather than $104 W/M. This higher rate included a general rate increase which raised the rate from $104 to $114 as of April 1, 1979. During the time the $201 rate was in effect, and before the general rate increase was to be instituted, Wespac Corporation sent insulated materials to the carrier's terminal to be shipped. This shipment left port on April 6, 1979. The shipper was not aware of the 10% rate increase and requests that the $104 rather than $114 rate be applied.

The Presiding Officer denied both applications on the ground that PWC and Maersk had, prior to filing the applications, failed to file tariffs upon which a refund could be based. He found that in each case PWC had filed rates different from those the shipper had either been quoted or expected to be charged prior to the time of shipment.[8]

The Presiding Officer cites five recent cases to support his decision, including *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 S.R.R. 1191, 1193 (1977), where the Commission held:

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

In its Exceptions, PWC explains that, with respect to the rates at issue in Special Docket No. 649, it considered it more prudent to incorporate the general rate increase of 10% on March 28, 1979 than have a $64 wt. rate in effect for only four days which would have increased to $70 wt. on April 1, 1979.

The situation which gave rise to the application in Special Docket No. 652 is allegedly somewhat different. As to that application, PWC explains that when the oversight was discovered in April, 1979, the general rate increase had already been instituted. Therefore, the Conference allegedly reinstated the omitted commodity at the pre-April 1 general rate level and then incorporated the 10% increase that was in effect as of April 1, 1979.

In the alternative, if both of the above explanations are found not to justify granting the applications as submitted, PWC requests permission to publish in

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[6] Letter of H. Kimoshita, Assistant Secretary, Nomura Corporation, addressed to PWC Chairman Donovan D. Day, February 28, 1979.

[7] PWC Tariff No. 11—F.M.C. 19, 3rd rev. page 489, effective January 1, 1979.

[8] As late as June 25, 1979, the Presiding Officer advised PWC of the possible jurisdictional deficiency and suggested that it publish an appropriate corrective tariff and file a new application. *See* letter of Administrative Law Judge Norman Kline addressed to PWC Executive Assistant Donald Griffith, June 15, 1979.

its tariff notice that effective January 1 through March 31, 1979, for purposes of refunds or waiver of freight charges, the rates of $64 for "Butyl Motor Tube Scrap" and $104 for "Mineral Insulating Material, N.O.S." (subject to all rules, regulations, terms and conditions of these tariffs), would be applicable. PWC cites *Application of Pacific Westbound Conference for the Benefit of M-C International,* 19 S.R.R. 333 (1979), in which it claims that an application was granted under similar circumstances.

Discussion and Conclusion

A special docket application seeking a refund or a waiver must meet certain requirements set forth in section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)), and section 502.92(a) of the Commission's Rules (46 C.F.R. §502.92(a)). Included among these are the requirements that the error be *bona fide* and of a type contemplated by the statute, that applicant, prior to submitting the application, have filed a corrective tariff setting forth the rate on which the refund would be based, that the application be filed within 180 days of shipment, and that no discrimination among shippers result from the granting of the application.

We are concerned here with the condition that is set forth in the second proviso of section 18(b)(3), to wit:

> 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.* . . . [Emphasis added].

The rates negotiated between PWC and the shippers involved in these proceedings, and the corrective rates filed by PWC pursuant to its applications are clearly at variance. Consequently, PWC has failed to comply with the requirement of section 18(b)(3) as cited above. This finding is consistent with the Commission's holding in *Munoz, supra,* where it was explained that:

> Prior to applying for a refund or waiver the carrier must file a new tariff to reflect a prior intended rate. The Commission does not have authority to approve a rate which was never agreed-upon or intended to be filed.
> 17 S.R.R. at 1192.

PWC does not dispute the holding in *Munoz* but contends that an application was granted under the same circumstances existing here. In the case relied upon, *Application of Pacific Westbound Conference for the Benefit of M-C International, supra,* the Presiding Officer's decision became administratively final upon the passage of time allowed for exceptions or Commission review. Under the circumstances, the result in the *Pacific Westbound Conference* case is of questionable precedential value. In any event, however, to the extent that decision is inconsistent with the holding reached here, it is expressly overruled.

THEREFORE, IT IS ORDERED, That the Exceptions to the Initial Decisions of PWC are denied; and

IT IS FURTHER ORDERED, That the Initial Decisions served August 21, 1979 and August 22, 1979 are adopted and made a part hereof; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.
By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 649

APPLICATION OF MAERSK LINE AGENCY FOR THE BENEFIT OF NOMURA (AMERICA) CORPORATION

Adopted November 20, 1979

Application for permission to refund portion of freight charges denied.

Conference and carrier applicants unintentionally deleted a specific commodity rate on a commodity known as "Butyl Motor Tube Scrap" in the amount of $64 per weight ton when republishing their tariff with the result that a shipper of this commodity was required to pay additional freight costs. However, prior to filing this application, the conference filed a new, corrective tariff which published a rate of $70 for the commodity involved rather than the rate which had been deleted. Because this new tariff does not conform to the earlier rate, the application is jurisdictionally defective for failure to satisfy the second proviso of section 18(b)(3) of the Shipping Act, 1916.

If a new application preceded by a correct, conforming tariff is filed by these applicants within the 180-day time period prescribed by law, the application can be given favorable consideration.

Donald P. Griffith, for applicant Pacific Westbound Conference.
Bryce J. Herbst, for applicant Maersk Line.

INITIAL DECISION OF NORMAN D KLINE,[1] ADMINISTRATIVE LAW JUDGE

This is a special-docket application filed on June 11, 1979, by the Pacific Westbound Conference (PWC) and one of its members, Maersk Line, represented by the Maersk Line Agency, seeking permission to refund a portion of freight charged on a shipment of motor tube scrap which had moved under a PWC tariff which had undergone revision and republication. It is one of a series of five special-docket applications which were all filed on the same date. Three of these applications (Special Docket Nos. 648, 650, 651, *Application of Maersk Line Agency for the Benefit of CPC International Trading Corp., Firestone Tire & Rubber Co., and Kimberly-Clark Corporation,* 19 SRR 541 (1979)) were found to have fully qualified for relief under the applicable provisions of section 18(b)(3) of the Shipping Act, 1916 (the Act), as amended

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[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 C.F.R. § 502.227).

by P.L. 90-298. See Initial Decision, July 10, 1979. Another application (Special Docket No. 652, *Application of Maersk Line Agency for the Benefit of Wespac Corporation*) is not yet ripe for decision because of the lack of certain critical information which I am seeking to obtain from PWC. Decision in the present case has been delayed pending receipt of further information, as more fully described below. Now that this information has been received, however, I find that the application cannot be granted because of the failure of the applicants to satisfy one of the essential conditions set forth in that portion of section 18(b)(3) which governs this type of proceeding, namely, the condition that a carrier or conference applicant must publish and file a new, corrective tariff rate prior to the time of filing its application, which new rate must conform to the earlier rate which had been unintentionally deleted or had not been filed through inadvertence. As more fully discussed below, whenever the failure to meet this particular condition of law has been found applications have consistently been denied at least since the decision of the Commission in *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977).

Because of the apparent failure of the applicants to satisfy this requirement, I advised Mr. Donald P. Griffith, Executive Assistant of the PWC, who had filed the application, that I did not believe that I could grant the application because of the decision in *Munoz y Cabrero, supra,* and other decisions which have consistently followed and have confirmed the principle involved. I advised Mr. Griffith that applicants could continue to seek favorable action of their application before the Commission notwithstanding *Munoz y Cabrero* but that I would have to issue an initial decision denying the application. Alternatively, I advised that the PWC could cure the defect in the application by filing the correct, conforming tariff. See my letter to Mr. Griffith dated June 25, 1979. PWC has responded by letter dated July 9, 1979, and chooses to seek favorable action on the application on the basis of additional assertions and contentions. See letter addressed to me from Mr. Griffith, dated as mentioned. Having considered these additional assertions and contentions, however, I find that the application cannot be granted because PWC has still failed to satisfy the essential condition set forth in law and confirmed by *Munoz y Cabrero* and at least four other decisions which continue to confirm the validity of that decision. However, I repeat what I indicated in my letter to Mr. Griffith, namely, that if applicants would be willing to correct the jurisdictional defect regarding the failure to file a correct, conforming tariff, this application, if refiled timely, could be granted.

FACTUAL BACKGROUND

The error which gave rise to this application related to the fact that the PWC completely revised and overhauled one of its tariffs and in so doing unintentionally deleted a special rate on a commodity known as "Butyl Motor Tube Scrap." Prior to January 1, 1979, the pertinent PWC tariff (Local and Overland Freight Tariff No. 5—F.M.C.-13) had published a special rate on "Butyl Motor Tube Scrap" in the amount of $64 per weight ton of 1,000 kilograms. See tariff cited, 16th rev. page 267, effective September 20, 1978. PWC revised and republished this tariff, effective January 1, 1979, by publishing a new tariff (Local and Overland Freight Tariff No. 11—F.M.C.-19). This tariff was a substantial overhaul of the previous tariff in which both commodity descriptions and item numbers underwent revision. In the process the special rate on "Butyl Motor Tube Scrap" was unintentionally deleted. See Affidavit of Donald P. Griffith, Executive Assistant to the PWC, June 11, 1979. The result of this action was that any shipment of this commodity would be assessed under a new commodity item described as "Synthetic rubber . . . including the following: Butyl . . . " The special rate for this item was $96 per weight ton, a substantial increase (50%) over the previous rate of $64. This error was called to the PWC's attention by the shipper Nomura (America) Corporation by letter dated February 28, 1979. Some time thereafter PWC restored a special rate on Butyl Motor Tube Scrap, effective March 28, 1979. The special rate which was published, however, was not the previous rate of $64 but rather $70 per weight ton. See PWC Tariff No. 11—F.M.C.-19, 3rd rev. page 742, effective March 28, 1979. During the time in which the unintended rate of $96 per weight ton was in effect, the Nomura (America) Corporation shipped two containers laden with used butyl motor tubes which weighed 43,572 kilograms. The shipment sailed on February 25, 1979, from Long Beach, California, destined for Osaka, Japan. The shipper paid $5,344.54 in freight rated under the $96 rate including terminal receiving and currency adjustment charges.

PWC and Maersk now seek to refund $1,370.77 in freight on the shipment in question. If their application is granted, this would mean that Maersk would retain only that amount of freight (including the incidental charges) based upon a rate of $70 per weight ton, not upon the $64 rate which had been published before PWC changed its tariff on January 1, 1979. This $64 rate, furthermore, was the rate which the shipper, Nomura (America) Corporation, specifically requested to be applied retroactively to January 1, 1979, to eradicate the tariff error. See letter to H. Kinoshita, Assistant Secretary, Nomura (America) Corporation, addressed to Mr. D. D. Day, Jr., Chairman, PWC, February 28, 1979, attached to the application.

Discussion and Conclusions

This special-docket application is filed under the remedial provisions of section 18(b)(3) of the Act and the pertinent Commission regulation, Rule 92(a), 46 C.F.R. §502.92(a). It is true that since this law is equitable and remedial in nature and is designed to relieve shippers of financial burden which would fall on them because of carrier error in tariff publishing and filing, the law has been construed liberally in order to carry out its purposes. See, e.g., *D. F. Young, Inc. v. Cie. Nationale Algerienne de Navigation,* 18 SRR 1645 (1979); *Ghiselli Bros. v. Micronesia Interocean Lines, Inc.,* 13 F.M.C. 179, 182 (1970); *Westinghouse Trading Co. v. American Export Lines, Inc.,* 18 SRR 570, 572–574 (1978). However, it is also true that this law is an exception to the equally strong principle that tariffs have the force and effect of law and that any application seeking relief must show that it complies with the various conditions set forth in the law, i.e., that the error was bona fide and of a type contemplated by the statute, that applicant has filed a timely corrective tariff, has met the 180-day period of limitation, and that there will be no discrimination among shippers should the application be granted. See, e.g., *Farr Co. v. Seatrain Lines,* 17 SRR 1463, 1467–1469 (I.D. 1977), 18 SRR 369 (F.M.C. 1978), and the legislative history to P.L. 90–298, cited in 17 SRR at 1467 n. 6; Hearings on H.R. 9473 Before the Subcommittee on Merchant Marine and Fisheries, 90th Cong., 1st Sess., Sen. No. 90–11 (1967) at 88 (need to ensure that applicant establishes that a bona fide mistake has occurred); *A. E. Staley Mfg. Co. v. Mamenic Line,* 18 SRR 433 (1978) (need to show that the jurisdictional condition regarding actual filing of a new tariff prior to application has been satisfied); *Level Export Sales Corp. v. Sea-Land Service, Inc.,* 18 SRR 1084 (1978) (need to file application within 180 days after date of shipment).

It is important to bear in mind the fact that although denial of special-docket applications does indeed result in an additional financial burden for a shipper caused not by the fault of the shipper but by the fault of the carrier, denials did occur in the cases cited above. Furthermore, it is important to keep in mind the fact that when the Congress gave the Commission authority to depart from the prevailing tariff law in the exeptional circumstances occurring in these types of cases, Congress did so on the understanding that the Commission would exercise that authority with care, i.e., that each application would not be merely rubberstamped but would be carefully scrutinized by qualified judicial officers. For example, in response to a concern expressed by Congressman Edwards that the new legislation authorizing waivers and refunds from otherwise applicable tariffs would lead to rebating or other abuses and that such applications might merely mean "a shipowner writing out a check to the shipper," the then Chairman of the Commission reassured the congressman that in addition to other conditions and controls to be written into the bill, "the case would appear before the hearing examiner [now administrative law judge] 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." Hearings, cited above at 88.

One of the conditions which must be satisfied under the law in question is that set forth as the second proviso in the remedial portion of section 18(b)(3), as amended by P.L. 90–298. This condition is stated as follows:

> *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. . . .

It is this condition which is critical to the application because of the fact that the Conference in filing the "new tariff . . . which sets forth the rate on which such refund or waiver would be based" has filed a rate different from that which the shipper involved in this application had either been quoted or expected to be charged prior to the time of the shipment and which the shipper had specifically requested to be applied to the shipment by way of retroactive relief. There are now at least five decisions of the Commission or its administrative law judges which have become administratively final in which the principle has been clearly established that the new tariff filed to correct the error in the tariff applicable at the time of shipment must conform to the rate which had been quoted to the shipper or which the carrier or conference had deleted by mistake when publishing its tariff. At least one of these cases furthermore involved the PWC itself.

The first of these cases is *Munoz y Cabrero v. Sea-Land Service, Inc.,* 17 SRR 1191 (1977). In that case the carrier had negotiated a rate of $44 W/M for a shipment of glassware but inadvertently failed to file that rate prior to the time of shipment. When aware of the error, Sea-Land filed a corrective tariff and a special docket application but instead of filing the $44 rate, it filed a rate of $40. The Commission, after considering the legislative history of P.L. 90–298 and in full realization that denial of the application would mean that the carrier's errors caused the shipper to incur greater cost, nevertheless denied the application, stating:

> Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which "such refund or waiver will be based." When read in conjunction with the statements in the House and Senate reports, it is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.
> 17 SSR at 1193.

In every case since *Munoz y Cabrero* in which the fact that the carrier had filed a rate other than the prior intended rate was noted, the application has been denied. Thus, in *Henry I. Daty, Inc. v. Pacific Westbound Conference,* 17 SRR 1439 (1978), the PWC inadvertently increased a rate on ground clay when republishing a portion of its tariff, raising the rate from $56 W to $98 W, thereby causing the shipper to bear a greater cost. To correct this error the PWC filed a special docket application but, prior thereto, filed the new tariff in which the rate was not shown as $56 W but as $56 W subject to a minimum weight for 20-foot containers of 40,000 pounds. The shipment involved could not meet this minimum weight with the result that the new, corrective tariff not only did not correspond to the earlier flat $56 W rate but the freight also differed. The application was therefore denied for failure to meet the second condition set forth in the statute.

In *Owens Illinois Co. v. Trans Freight Lines, Inc.,* 19 SRR 170 (Initial Decision), F.M.C. Notice of finality, May 9, 1979, the carrier had agreed to file a lump sum rate of $1,800 per container for expansion tanks but failed to do so in time for the shipment. But before filing its application the carrier filed a new, corrective tariff in the amount of $36 WM, minimum 2200 ft. per container instead of the quoted $1,800 rate. The application was denied.

In *Application of Neptune Orient Line for the Benefit of Stauffer Chemical Co.,* 19 SRR 451 (Initial Decision, F.M.C. Notice of finality, July 23, 1979) the carrier filed a new tariff rate of $62 W on lactose instead of a rate of $58 per 1000 kilos which had been quoted to the shipper. This was one of the reasons for the denial of the application.[2]

[2] The other reason for denial related to the fact that the carrier was a "controlled" carrier under the Ocean Shipping Act of 1978 and the facts showed that because the carrier realized certain restrictions on its ability to file reduced rates, it could not show that there was an inadvertent failure to file an intended rate.

Most recently, in *Application of Sea-Land Service, Inc. for the Benefit of Nepera Chemical, Inc.,* 19 SRR 235 (Initial Decision, April 20, 1979) which decision has been "adopted" by the Commission according to a Commission press release dated June 27, 1979,[3] the carrier failed to conform its new tariff filed prior to the special application to the earlier rate which it had quoted and had intended to file prior to the shipment in question. The earlier rate had been $6.85 per hundredweight, minimum 40,000 lbs. However, the new, corrective tariff published a rate of $162.25 per weight ton of 2240 lbs., minimum 17 WT. On exceptions to the Commission Sea-Land explained that this new rate was really only slightly different from the previous rate considering Sea-Land's stowage factors and that relief should not be denied because of such a slight variance. Nevertheless, the Commission announced that it has "adopted" the initial decision. By this action Sea-Land will be required to recover over $42,000 in additional freight from the shipper. In that case, furthermore, Sea-Land had waited until the very last day of the 180 day period to file its application so that there was no time for it to file a proper corrective tariff and another application.

In view of these cases which consistently deny applications when the carriers failed to conform their corrective tariffs with the previously quoted or intended rates, it is clear that these two applications must also be denied. The fact remains that PWC did not file a $64 rate on butyl motor tube scrap which had been intended but which PWC had inadvertently deleted but filed a $70 rate instead. As mentioned above, I called this problem to PWC's attention by letter of June 25, 1979, to afford PWC an opportunity to pursue the application and seek to overturn the doctrine followed in the cases cited or in the alternative, to file a proper corrective tariff and a new application. PWC has chosen to seek approval of the application notwithstanding the case law and has called several matters to my attention.

PWC points out that it had given approximately six-months' notice to shippers that a rate increase would occur on April 1, 1979. This means that the shipper in this application was put on actual or constructive notice that the rate would increase from $64 to $70 on that date. PWC argues that had it not committed an error in republishing its tariff on January 1, 1979, the quoted rate would have been published as $64 subject to the April 1, 1979, general rate increase which brought the rate up to $70. All that PWC did was to advance the increase on the $64 rate to $70 effective March 28, 1979. PWC explains that the reason why it advanced the rate increase on the $64 rate from April 1, 1979, to March 28, 1979, was that "the Conference considered it more prudent to incorporate the general rate increase on March 28 for Item 771.1440.20 rather than have a $64 Wt. rate in effect subject to Supplement No. 2 which would have increased this rate to $70.00 Wt. on April 1." See letter of D. P. Griffith, PWC Executive Assistant, July 9, 1979.

Alternatively PWC suggests that the applications should be granted by allowing the $64 rate to apply from January 1 through March 27, 1979.

[3] See NR 79-68, Actions Taken at June 27, 1979, Commission Meeting, agenda item No. 8 at 2. The Commission's Report has been served on August 8, 1979.

Finally, PWC cites another special docket (Special Docket No. 631) in which it claims that the application was granted under similar circumstances.

Regrettably, I do not believe that this application can be granted on any of the grounds advanced by PWC and adhere to my earlier belief that the only proper way in which PWC could obtain favorable action would be to file a correct new tariff showing the $64 rate quoted to the shipper, prior to the filing of a new application. Even now there is time to do this since the 180-day period does not expire until August 24, 1979 (180 days after date of sailing which was February 25, 1979).

It is impossible to grant relief based upon the $64 rate on a retroactive basis, as PWC suggests in one alternative, because of the fact that the $64 rate is not on file with the Commission. Section 18(b)(3) requires in pertinent portion that prior to filing the application, the applicant must file "a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based." Failure to meet this requirement is a jurisdictional defect which cannot be waived. See *A. E. Staley Mfg. Co. v. Mamenic Lines,* 17 SRR 1522 (1978); *Louis Furth Inc. v. Sea-Land Service, Inc.,* 17 SRR 1171 (1977). In both of the cited cases applications had to be denied because there was no filing of the actual rate on which relief was requested prior to the time of filing the application.

PWC's reference to Special Docket No. 631 is not sufficient to justify granting its application. In Special Docket No. 631, *Application of Pacific Westbound Conference for the Benefit of M-C International,* 19 SRR 333 (Initial Decision, May 14, 1979) (F.MC. Notice of no review and administrative finality, June 28, 1979), the PWC inadvertently deleted a specific commoidity rate on playing cards when republishing its tariff on January 1, 1979. Upon receiving a letter from the shipper complaining of this mistake, the PWC reinstated the specific commodity rate on playing cards but, as in SD No. 649, filed the new corrective tariff effective March 28, 1979, and advanced the general rate increase which was scheduled to become effective on April 1, 1979, for playing cards, as compared to the previous rate which had been deleted. The facts seem to be the same as those in SD No. 649. However, neither the initial decision nor the Commission's notice, which merely announced that no review had been undertaken by the Commission, made any reference to the *Munoz y Cabrero* problem. Had there been any reference to this problem there might have been a different result or a decision that the *Munoz y Cabrero* doctrine should no longer be followed. With no reference to the problem by either the Commission or the presiding judge, however, I cannot conclude that this case means that the *Munoz y Cabrero* doctrine is no longer to be followed in the face of the fact that in at least five cases, cited above, where the problem has been specifically identified, *Munoz y Cabrero* has been expressly followed and where in the last of these cases, *Application of Sea-Land Service, Inc. for the Benefit of Nepera Chemical, Inc.,* 19 SRR 235, *supra,* the Commission's final decision, which will undoubtedly be issued in the near future, will come later than the notice of administrative finality issued on June 28, 1979, in Docket No. 631.

PWC's argument that all it did in this case was advance the general rate increase to $70 by a few days may seem appealing. Also the fact that the shipper would be happy to accept a $70 rate rather than the higher $96 rate in effect at the time of the shipment is no doubt a truism. However, these arguments still miss the point, namely, that all that PWC had to do to obtain favorable action was to refile a correct tariff rate with a new application so as to eliminate the *Munoz y Cabrero* problem. The excuse that the Conference considered it "more prudent" not to publish the $64 rate but to accelerate the increase to $70 is obviously not prudent, at least in terms of seeking special docket relief, if it means a hopeless collision course with the *Munoz y Cabrero* doctrine. PWC's standing to argue an exception to the *Munoz y Cabrero* doctrine is weakened moreover by several considerations. First, in the other three special docket applications to which I referred above (SD Nos. 648, 650, and 651) all involving mistaken deletions or typographical errors in PWC's republished tariffs, PWC showed itself perfectly capable of filing the new corrective tariffs to conform exactly to the rates previously deleted or intended. Secondly, in one of these cases (SD No. 648, for the benefit of CPC International Trading Corp.) PWC correctly published a new conforming tariff in the very same tariff involved in the two applications under consideration, namely, Tariff No. 11—F.M.C.-19, effective January 17, 1979. Apparently the reason why PWC did not include the April 1 general rate increase in the new tariff rate filed in SD No. 648 was that January 17 is not nearly so close to April 1 as is March 28, the effective date of the new tariff rate in SD No. 649, in which PWC did include the general rate increase in the new tariff. Thirdly, PWC is fully aware of the *Munoz y Cabrero* doctrine, having been denied relief in the case of *Henry I. Daty, Inc. v. Pacific Westbound Conference, supra,* 17 SRR 1439, only last year, in which case PWC made the same error of changing the new, corrective tariff so that it did not conform to the earlier rate which had been inadvertently deleted from the PWC tariff.

Nevertheless, PWC, despite the fact that it is aware of the *Munoz y Cabrero* doctrine and has been specifically advised in this application by my letter of June 25, 1979, that its application fails to satisfy the principle enunciated in *Munoz y Cabrero* and additional cases following that principle, chooses not to refile a correct new tariff with a new application. Perhaps the reason for this reluctance is the fact that if the new tariff were to be filed correctly with a rate of $64 as the shipper expected and requested, this rate would have to remain unchanged for 90 days in the tariff because of the 90-day notice requirement of section 14b(2) of the Act governing dual-rate contracts, since the rates concerned are contract rates. PWC has already manifested a desire to increase its rates generally in its Tariff No. 11 effective on April 1, 1979, and apparently is not inclined to favor the commodity involved in this application by granting it a rate reduction from $70 to $64 which would remain unchanged until some time in the autumn when the 90-day notice period would expire. That is a decision which PWC is entitled to make and, indeed, the entire special-docket statute does not require a carrier or conference to seek relief for shippers at all, which action, at least, PWC has initiated. However, if PWC believes it to be unwise to make the correction suggested so as to conform to prevailing law, there is nothing I can do to authorize permission to make a refund. Accordingly, notwithstanding the fact that PWC's tariff errors will result in the shipper's having to bear an additional $1,370.77 in freight, this application, under the present circumstances, cannot be granted.[4]

ULTIMATE CONCLUSIONS

This special docket application cannot be granted under the present circumstances. Although there did occur an error in the PWC tariff of a clerical or administrative nature because of unintentional deletion of a specific commodity rate and the shipper concerned was unable to enjoy the rate which it had believed would be applicable when booking the shipment, PWC and Maersk have failed to comply with an essential condition set forth in section 18(b)(3) of the Act, namely, the requirement that the new, corrective tariff filed prior to filing of the application set forth the identical rate which conforms to the earlier intention of the conference and carrier. Instead, PWC filed a new tariff which publishes a rate different from the unintentionally deleted rate which PWC had earlier intended to remain at $64 during the period January 1, 1979 through March 31, 1979, not $70, which was supposed to become effective on April 1, 1979, not earlier. Consequently, the subsequent idea to apply the increased rate retroactive to this earlier period of time does not conform to the earlier intent.

The application must therefore be denied, but it is still not too late for it to receive favorable consideration if PWC and Maersk would promptly file a correct, conforming tariff and a new application so that the essential jurisdictional condition regarding the conformance of the new tariff rate to the prior intended rate would be satisfied. If PWC also meets the 180-day time period (ending on August 24, 1979) and is willing to retain the correct conforming rate in its tariff increasing it to the $70 level on 90-days' notice, it would appear that the jurisdictional defect in its present application would be cured.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
August 8, 1979

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[4] In every case in which a special docket application has to be denied, of course, the result is that the shipper has to bear additional freight costs although not at fault. This has been recognized in the cases cited but cannot be helped. See, e.g., *Munoz y Cabrero v. Sea-Land Service, Inc., supra,* 17 SRR 1191 at p. 1193. In *Application of Sea-Land Service, Inc. for the Benefit of Nepera Chemical Co., supra,* 19 SRR 235, note that the denial meant that Sea-Land must seek an additional $42,000 in freight from the shipper. At least in the present application the amount of additional freight is relatively small by comparison (something over $1,000) and the shippers have already paid this amount so that there will be no need for applicants to bill them for additional sums.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 652

APPLICATION OF MAERSK LINE AGENCY FOR THE BENEFIT OF WESPAC CORPORATION

Adopted November 20, 1979

Application for permission to refund portion of freight charges denied.

Conference and carrier applicants unintentionally deleted specific commodity rate of $104 for insulating materials when republishing their tariff with the result that the shipper concerned was required to bear additional freight cost. However, prior to filing this special docket application, the conference filed a new, corrective tariff which published a rate of $114 rather than the rate which had been deleted, in order to incorporate a general rate increase into the new rate. Because this new tariff does not conform to the earlier rate which had been quoted to the shipper but deleted in republishing, the application is jurisdictionally defective for failure to satisfy the second proviso of section 18(b)(3) of the Shipping Act, 1916.

If a new application is filed preceded by a correct, conforming tariff filing which reinstates the $104 rate, and the application is filed within the 180-day time period prescribed by law, which still has considerable time to run, the application can be given favorable consideration.

Donald P. Griffith, for applicant Pacific Westbound Conference.
Bryce J. Herbst, for applicant Maersk Line.

INITIAL DECISION[1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

This is the last of a series of five special-docket applications all filed on June 11, 1979, by the Pacific Westbound Conference (PWC) and one of its members, Maersk Line, represented by the Maersk Line Agency, seeking permission to refund portions of freight charged on various shipments which moved under PWC tariffs which had undergone revision and republication. In all five of these cases the PWC had made errors of a clerical or administrative nature by deleting commodity rates or descriptions or by otherwise publishing erroneous matters in the tariffs with the result that various shippers were

[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 C.F.R. §502.227).

adversely affected. Three of these applications were found to have qualified fully for relief under the applicable provisions of section 18(b)(3) of the Shipping Act, 1916 (the Act), as amended by P.L. 90–298. See Special Docket Nos. 648, 650, 651, *Application of Maersk Line Agency for the Benefit of CPC International Trading Corp., Firestone Tire & Rubber Co., and Kimberly-Clark Corporation*, Initial Decision, served July 10, 1979, 19 SRR 541. Another application was found not to have qualified because of a jurisdictional defect relating to the fact that the PWC failed to file a correct, conforming tariff rate prior to the filing of the application, in contravention of the requirements of the second proviso of section 18(b)(3) and the doctrine enuciated by the Commission in *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977), and at least four cases which follow the *Munoz* doctrine. See Special Docket No. 649, *Application of Maersk Agency for the Benefit of Nomura (America) Corporation*, Initial decision, served August 21, 1979, 19 SRR 689.

In both Special Docket No. 649 and the instant case, I advised the PWC of the jurisdictional defect and gave PWC the option to continue to seek favorable consideration of the applications notwithstanding the *Munoz y Cabrero* doctrine or to file a new application preceded by a correct, conforming tariff which would reinstate the earlier deleted rates exactly as they had been quoted and published in the earlier tariffs. See letter which I addressed to Mr. Donald P. Griffith, PWC Executive Assistant, dated June 25, 1979. PWC responded and chose to continue to seek favorable consideration of both applications on the basis of certain statements and arguments. See letter dated July 9, 1979, from Mr. Griffith to myself. I have considered the matters discussed by Mr. Griffith in his letter and remain of the opinion that this application, as well as that in Special Docket No. 649. cannot be granted because the jurisdictional defect has not been corrected. However, as in No. 649, I reiterate that favorable consideration to the instant application could be given if PWC were to eliminate the defect by filing a correct, conforming tariff and a new application.

FACTUAL BACKGROUND

The facts in this case are relatively simple. It appears that PWC had published a tariff in 1978 for the carriage of cargo between Pacific Coast ports and ports in various Far East countries. This was PWC Local and Overland Freight Tariff No. 5—F.M.C.-13. Effective January 1, 1979, PWC overhauled and republished this tariff, changing commodity descriptions and item numbers. In the present case, PWC had published a special rate for "Mineral Insulating Material, N.O.S." in its previous tariff in the amount of $104 W/M, for local movements to Bangkok, Thailand. See tariff No. 5, cited, 11th revised page 392, effective September 1, 1978. In republishing the tariff, however, PWC inadvertently deleted this special commodity rate. Consequently, any shipment of the type of mineral insulating material in question became subject to a rate of $201 W/M moving to Bangkok, Thailand, under an N.O.S. commodity description published as "Non Metallic Minerals and Products, Except Ceramic Products and Glass and Glass Products, N.O.S." See PWC Tariff No. 11-F.M.C.-19, 3rd rev. page 489, effective January 1, 1979. PWC was notified of this tariff error by a shipper, Wespac Corporation, who had shipped this commodity while the $201 W/M rate was applicable. Wespac, by letter dated April 10, 1979, requested that the PWC file a special docket application to restore the $104 rate which the shipper had been quoted by Maersk in November 1978 and requested that the $104 rate be made retroactive to March 1979. See letter addressed to the PWC by Mr. John A. Carambat, dated April 10, 1978. The PWC responded to the request by publishing and filing a new special rate on the commodity in question, effective April 25, 1979, and after receiving a second letter from the shipper, by filing this special-docket application. However, as noted, the new special rate which PWC filed was not the $104 rate which the shipper requested but rather a rate of $114. The reason why the PWC published this latter rate rather than the lower rate requested was the fact that on April 1, 1979, there occurred a general rate increase which raised $104 to $114.

During the time in which the $201 rate was in effect, the shipper shipped 13.726 cubic meters of insulating material on a Maersk vessel which sailed from Oakland, California, on April 6, 1979. The shipment was destined for Bangkok, Thailand. The shipment, as rated under the $201 rate, was assessed $2,758.93 in freight exclusive of incidental charges. The PWC and Maersk wish to refund the amount of $1,194.17, which would result in Maersk's retaining freight charges calculated on the basis of the $114 rate, not the $104 rate which the shipper had been quoted and which the shipper had requested to be made applicable to the shipment.

DISCUSSION AND CONCLUSIONS

The principles of law which govern this case are precisely the same as those discussed in my initial decision in Special Docket No. 649, *Application of Maersk Line Agency for the Benefit of Nomura (America) Corporation*, *supra.* Very briefly, this application, like the other, cannot be granted because of the failure of the PWC to satisfy the second proviso of section 18(b)(3) of the Act and the principles of law enunciated in the five cases cited in that decision, beginning with *Munoz y Cabrero v. Sea-Land Service, Inc.* The proviso has to do with the requirement that applicants must file a new, conforming tariff prior to the time of filing their applications, which new tariff publishes the same rate which had been unintentionally deleted. This principle and the relevant cases are discussed in more detail in the other decision and need not be repeated here. The only distinction between the two cases lies in the fact that in this case the PWC filed the new tariff after the effective date of the general rate increase which as I mentioned, was April 1, 1979, whereas in the other case the PWC filed the new tariff a few days prior to the effective date of the increase. In both cases the PWC urges that I not follow the *Munoz y Cabrero* doctrine and argues that the shippers had notice of the April 1 increase approximately six months before that date so that retroactive application of the increased rates rather than the originally quoted rates should be permitted. I have discussed these arguments in my initial decision in Special Docket No. 649, to which the reader is referred, and see no need to repeat them here, In short, none of the PWC's assertions corrects the fact that the PWC has simply not filed the proper, conforming new rate and chooses not to refile its application with a corrected new rate. Under the circumstances, there is no way in which I can find that the application can be granted, notwithstanding the fact that the shipper will not be entitled to receive a refund for additional freight charges which were caused by carrier, not shipper error. So long as the PWC has filed only the $114 rate, rather than originally quoted $104, the only rate on which a refund could be based would be $114, since the statute requires the carrier or conference to file a new tariff "which sets forth the rate on which such refund or waiver would be based." The only conceivable way in which it could be argued that the shipper would be entitled to a refund on the basis of the $114 rather than the $104 rate would be the fact that the shipper was aware of the rate increase which was to take effect on April 1, 1979, and shipped on or after that date when the $114 rate would apply. However, these facts cannot be established. On the contrary, the shipper, in two letters, requests that the $104 rate be applied and that it be made retroactive to March, 1979. Furthermore, evidence which the PWC has furnished at my request quite honestly reveals that the shipper sent the shipment to the terminal prior to April 1, 1979.[2] Under the PWC tariff's effective date of rate change rule, a shipment received at the carrier's terminal prior to April 1 to be loaded on a vessel sailing within 10 days of that date, would be rated under the previous, unincreased rate. See Rule 3.1.2, PWC Tariff No. 11, 3rd rev. page 53. Therefore, the shipment would have qualified for the $104 rate had it been published in the PWC tariff. Had the shipment been received on or after April 1, 1979, it could be argued that the proper rate was $114 and that since this rate has been filed with the Commission by the PWC, the refund can be granted on the basis of the higher rate. I can understand that the PWC, when filing the new tariff of April 25, 1979, filed the rate subject to the April 1 increase, therefore inserting a rate of $114 into the tariff rather than $104. However, this business decision, while conforming to the longstanding intention of the PWC to increase its rates on April 1, 1979, does not conform to its earlier intention that a rate of $104 should apply from January 1 to March 31, 1979. That is so because the PWC is aware that if it wishes to apply the $104 rate to the period January 1 through March 31, 1979, by means of this special-docket application, the statute and case law require that it file the $104 rate.[3]

[2] Although the only way in which I believed it might be possible to grant this application with only the $114 rate on file would be if the shipment was received by the carrier at the terminal on or after April 1 under the pertinent effective date of rate change rule, Mr. Griffith, at my request furnished me with evidence that the shipment arrived at the terminal on March 27, 1979. See Port of San Francisco Fright Consolidation Station receipt No. 13212. Mr. Griffith has cooperated in an effort to give me a full and complete record even when the evidence does not help his position and has conscientiously striven to persuade me that the application should be granted. However, I cannot agree with his arguments and believe that under applicable principles of law his only recourse is to persuade the PWC to file the correct, conforming tariff rate.

[3] As I mentioned in my initial decision in Special Docket No. 649, the PWC was involved in one of the *Munoz y Cabrero* type cases in which its application had to be denied for failure to file the correct, conforming tariff rate. The case was *Henry I. Daty, Inc. v. Pacific Westbound Conference*, 17 SRR 1439 (1978). Moreover, in my letter and telephonic conversations with Mr. Griffith of the PWC, I advised him of these cases and the need, in my opinion for PWC to file the $104 rate if it wished to have the application granted. In fairness to Mr. Griffith, I should add that he has the right to urge the Commission to reverse or modify the *Munoz y Cabrero* doctrine and he has cited another special docket case (SD No. 631) in which an application was granted although the new tariff had also incorporated a general rate increase into the rate filed, thereby changing it from the previous rate which had been deleted. As I mentioned in my initial decision in Special Docket No. 649, however, it does not appear that the *Munoz y Cabrero* problem was noted in the decision in SD No. 631. Moreover, if applicants are allowed to change their rates

ULTIMATE CONCLUSIONS

The application in this case, as in a companion case, Special Docket No. 649, cannot be granted because of a jurisdictional defect relating to the fact that the PWC has not filed a new, corrective tariff which publishes a rate which conforms to the rate which had been quoted to the shipper and had been unintentionally deleted from the PWC's republished tariff. This defect is fatal because the second proviso of section 18(b)(3) and a least five decisions of the Commission and its administrative law judges emphasize that the new rate must conform to the earlier quoted or deleted rate. Unless the PWC is willing to file the quoted and deleted rate of $104 together with a new application, there simply is no way in which the shipper can be given a refund. The fact that the shipper will receive no refund though the PWC erred in publishing its tariff may be unfortunate but the remedy is for the PWC to refile a correct, conforming tariff with a new application. Any alternative solution would require the Commission to disregard the second proviso of section 18(b)(3) and five decisions arising thereunder so that special-docket applications can be opened to abuse and unsavory pressures.

Since the shipment sailed on April 6, the PWC can still refile its application preceded by a correct, conforming tariff at any time up till October 3, 1979, (180 days after April 6, 1979), in which event its application can be given favorable consideration if no further errors or defects appear.

The application must therefore be denied.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D. C.
August 13, 1979

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from those quoted or published earlier, on which shippers relied, the special-docket procedure could be open to abuse, for example, if shippers could insist that carriers file even lower rates than those quoted earlier for retroactive application and refunds in special-docket cases.