FEDERAL MARITIME COMMISSION

DOCKET NO. 79-15

WESTINGHOUSE ELECTRIC CORPORATION

v.

SEA-LAND SERVICE, INC.

ORDER

November 20, 1979

This proceeding is before the Commission upon its determination to review the Order issued by Administrative Law Judge William Beasley Harris, approving the settlement agreement and discontinuing the proceeding. The proceeding was initiated by a complaint filed March 12, 1979 by Westinghouse Electric Corporation alleging that Sea-Land Service, Inc. assessed an unreasonably high rate for a shipment of fluorescent bulbs in violation of section 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 817).

On March 7, 1977, Westinghouse delivered to Sea-Land in New York City 1875 cartons of fluorescent bulbs weighing 14,628 kilograms and measuring 4,000 cubic feet, to be shipped from New York to Bilbao, Spain. The applicable tariff was Tariff No. 166, FMC-43 ("U.S. North Atlantic Ports" to "Ports in Spain"), and the rate was $27 per 40 cubic feet, for a total charge of $2,700.

On March 18, 1977, Westinghouse delivered to Sea-Land in Houston, Texas 1791 cases of fluorescent bulbs weighing 13,973 kilograms and measuring 3940 cubic feet, to be shipped from Houston to Bilboa, Spain. The applicable tariff was Tariff No. 233, FMC-105 ("U.S. Gulf Ports" to "Ports in Spain") and the rate was $3.70 per cubic foot.[1]

Westinghouse alleged that the rate charged for this latter shipment was unreasonably high and violative of section 18(b)(5) of the Act, noting that the shipments were nearly identical (the latter shipment, in fact, was slightly smaller), and that the longer distance from Houston did not justify the Gulf rate exceeding by five times the Atlantic rate. Sea-Land denied that the rate was so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5). By Agreement of Settlement and Mu-

[1] Or $148 per 40 cubic feet.

tual Release, filed June 11, 1979, the parties agreed to settle the dispute upon Sea-Land's payment to Westinghouse of $4,000, and Sea-Land's modification of the Gulf Coast/Spain tariff item "as deemed by Sea-Land to be commercially sound."[2]

The Presiding Officer concluded that the settlement agreement

> does not constitute rebating or the use of unjust or unfair devices which would allow the complainant to obtain transportation at rates below those published in the tariffs. In other words the settlement itself is proper and does not violate any provision of law.

He noted in addtion that settlements are encouraged by the Commission's Rules of Practice and Procedure and the Administrative Procedure Act. The Presiding Officer granted the parties' Motion for Approval of the Agreement of Settlement and Mutual Release, and discontinued the proceeding.

Discussion And Conclusions

Section 18(b)(5) does not by its terms forbid any specific activity; it is purely prospective in nature.[3] In *Federal Maritime Commission v. Caragher,* 364 F.2nd 709, 717 (2nd Cir. 1966), the court stated that a carrier could be liable for penalties under section 18(b)(5) only if it continued to charge unreasonable rates *after* the Commission determined they were unreasonable. The *Caragher* rationale has been applied to awards of reparation as well as to assessment of penalties. Only after the Commission has determined a particular rate to be unreasonable under section 18(b)(5) may a carrier's continued assessment of that rate be considered a violation of section 18(b)(5) for which reparation may be awarded.[4] In the instant situation, no such determination of a violation has heretofore been made.

The Commission is then presented with the question whether it may approve the settlement of a proceeding in which no apparent relief is warranted. It is clear that no reparations may be awarded in this proceeding. Nor is disapproval of the challenged rates appropriate; the tariff item has been cancelled by Sea-Land. The only justification offered for the $4000 payment by Sea-Land is the avoidance of litigation. Under the circumstances present here, the Commission concludes that the avoidance of such litigation is insufficient to justify a cash settlement, particularly where, as here, no effective relief is available to the Complainant. As no other justification has been offered, the settlement is therefore disapproved, and the proceeding remanded to the Presiding Officer.

THEREFORE, IT IS ORDERED, That the Agreement of Settlement and Mutual Release of Westinghouse Electric Corporation and Sea-Land Service, Inc. is disapproved; and

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[2] The tariff item has been cancelled.

[3] Section 18(b)(5) reads:

> The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

[4] *Pacific Westbound Conference—Investigation of Rates Pertaining to Wastepaper*, 19 S.R.R. 19, 29 (1979); *Commodity Credit Corp. v. American Export Isbrandtsen Lines, Inc.*, 15 F.M.C. 171, 191 (1972); *Valley Evaporating Co. v. Grace Line, Inc.* 14 F.M.C. 16, 26-27 (1970).

IT IS FURTHER ORDERED, That this proceeding is remanded to the Presiding Officer.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 666

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF NEW ERA SHIPPING
AS AGENT FOR CENTRAL NATIONAL CORPORATION

ORDER ON REMAND

November 21, 1979

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), upon the application of Sea-Land Service, Inc., for permission to refund and waive a portion of certain freight charges to Central National Corporation through New Era Shipping Co., Inc., a licensed independent ocean freight forwarder, as agent for Central National Corporation. Administrative Law Judge Stanley M. Levy served an Initial Decision on September 5, 1979 granting Sea-Land's application. Although no exceptions were filed, the Commission, on its own motion, determined to review the Intial Decison.

In this case, the evidence presented satisfactorily shows that Sea-Land intended to charge a special rate of $69.00 W for the shipments in question. A higher rate was inadvertently put into effect when, on January 1, 1979, the Pacific Westbound Conference (PWC), of which Sea-Land is a member, republished its tariffs for the exclusive purpose of converting commodity item numbers to conform to the 1978 edition of Statistical Classification of Domestic and Foreign Commodities Exported from the United States. Because of a clerical error, the $69.00 special rate was deleted from the republished tariff resulting in a higher-than-intended rate on the commodity in question.

On March 29, 1979, the PWC filed a corrective tariff reinstating the $69.00 special rate effective March 30, 1979. Based upon this record, the reinstatement appears to conform to the intended rate level. However, the corrective tariff also adds a provision which is not explained in the record. This new provision canceled the special rate on the day after it became effective.

It is well settled that a corrective tariff must conform to the tariff originally intended. *Munoz y Cabrero v. Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977). Here, there is no evidence that the PWC intended to cancel the $69.00 special rate on April 1, 1979 when, effective January 1, 1979, it republished its tariff

(Exhibit No. 2). If, on January 1, 1979, the PWC did not intend to cancel the $69.00 special rate on April 1, 1979, then the corrective tariff (Exhibit No. 3) fails to conform to the PWC's intent and the application must be denied. Therefore, this proceeding is remanded for additional evidence regarding the corrective tariff filed by Sea-Land as Exhibit No. 3.

Consistent with Commission policy,* should Sea-Land's application ultimately be approved, New Era should also be required to certify that it has remitted to the shipper the refund granted or explain why such remittance has not been made. New Era should simultaneously certify that it has refunded a proportionate percentage of brokerage compensation it has received for these shipments.

One final point raised in the Initial Decision needs to be addressed. The Presiding Officer stated at page 3 of his decision: "The requested refund and waiver will apply only to the ocean portion of the through charge." Although not incorrect in the context of this refund and waiver, this statement is potentially misleading. The important fact in all special docket applications involving intermodal rates is that the refund or waiver not affect the land portion of the through rate.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for the receipt of evidence regarding the conformity of the corrective tariff and the issuance of a supplemental Initial Decision consistent with the directions of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* *Application of Sea-Land Service, Inc. For The Benefit Of BDP International, Inc. As Agent For Champion International Export Corporation*, ____ F.M.C. ____ (Special Docket No. 660, November 2, 1979).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 675

APPLICATION OF SEA-LAND SERVICE, INC.
PACIFIC WESTBOUND CONFERENCE FOR THE
BENEFIT OF CHURCH WORLD SERVICE

NOTICE OF ADOPTION OF INITIAL DECISION

November 21, 1979

The Commission by notice served October 30, 1979, determined to review the initial decision of the Administrative Law Judge in this proceeding. Upon review, the Commission has determined to adopt that decision with the following minor clarifications.

The headnote on page 1 and ordering paragraph (B) on pages 4 and 5 of the initial decision are clarifed to indicate that the authorized waiver is for a $10,186.37 portion of the $20,655.23 total otherwise applicable to the shipments. The $10,468.86 figure represents the total charge to be assessed under the rate authorized by this decision.

Applicant shall 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 675 that effective January 1, 1979 and continuing through May 29, 1979, inclusive the rate on 'Wheat Flour viz: Durum Flour and Semolina,' in bags donated for relief or charity is $100.00 W to Manila and $112.00 W to Busan, for purposes of refund or waiver of freight charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

Applicant shall waive charges within 30 days and furnish to the Secretary within five days thereafter evidence of such waiver along with a copy of the above described notice.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 675

APPLICATION OF SEA-LAND SERVICE, INC.
PACIFIC WESTBOUND CONFERENCE FOR THE
BENEFIT OF CHURCH WORLD SERVICE

Adopted November 21, 1979

Application granted to waive a $10,186.37 portion of aggregate freight charges of $10,468.86 sought to be applied due to administrative error.

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

This is a proceeding under section 18(b)(3) of the Shipping Act, 1916, and Rule 92 (special docket applications) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92.

The applicant-conference Pacific Westbound Conference who joined in this application with the carrier-applicant Sea-Land Service, Inc., certifies that the instant application was mailed at San Francisco, California, August 24, 1979, to the Secretary of this Commission. It was received in the Office of the Secretary August 27, 1979. Under Rule 92(a)(3) and such circumstances, said mailing date is the filing date of this proceeding.

The commodity shipped is given in the application as "Wheat Flour viz: Durum Flour and Semolina, in bags, donated for relief or charity." In the application the date of sailing of the two shipments involved is given as February 25, 1979, which is within 180 days of the filing of this application. Thus, the application is filed timely.

On Sea-Land Service, Inc. (Sea-Land), the applicant-carrier's bills of lading for each shipment is found:

(1) B/L No. 992-735034 dated February 22, 1979, 988 Bags "All Purpose Bread Flour" (100 lb. bags) "For Charitable Purposes Only," by Church World Service of New York shipped from Seattle on the vessel *McLean,* voyage 108W to Inchon. The gross weight was 99,541 lbs., 45,517 Kgs; measurements 2568.8 cu. ft., 72.70 cbm. Charges of 72.70 M^3 at $133 per cbm =

[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).

$9,669.10. AB 72.70 M^3 at 6.00 cbm = $436.20. CY 72.70 M^3 at 6.50 per cbm = $472.55. Total charges = $10,577.85.

(2) B/L No. 992-735030 dated February 22, 1979, 996 Bags "All Purpose Bread Flour" (100 lbs. bags) "For Charitable Purposes Only" shipped by Church World Service from Seattle to Manila on vessel *McLean* 108W, gross weight 100,347 lbs., 45,517 Kgs; measurements 2589.6 cu. ft.; 73.29 cbm. OF 73.29 M^3 at $131.00 per cbm = $9,600.99. CY 73.29 M^3 at $6.50 per cbm = $476.39. Total = $10,077.38.

The total charges for the two were $20,655.23 (B/L 992-735030 charge was $10,077.38 and B/L 992-735034 charge was $10,577.85).

Both shipments, one destined to Manila and other destined to Inchon, Korea, via Busan, sailed in the vessel *McLean*, Voyage 108W on February 25, 1979. The rate applicable at the time of shipment according to the application was to Inchon, Korea, $133.00 per cubic meter and to Manila, $131.00 per cubic meter, plus outport rate of $6.00 per ton as freighted. The bills of lading were rated on the basis of Cereal Grains per Item 001-0700-00 in Pacific Westbound Conference Local and Overland Freight Tariff No. 11, FMC-19, 2nd Revised Page 214, effective January 1, 1979 (Exh. No. 7, page 1 of 2 attached to application).

Sea-Land is a member of the Pacific Westbound Conference (PWC). PWC published rates to Far East destination on: Wheat Flour (except Meal and Groats) in Bags—Donated for Relief or Charity in Item 046-0110-03 on 8th Revised Page 218 of its Local and Overland Freight Tariff No. 5, FMC-13, effective November 29, 1978 (Exhibit No. 1 attached to application). The rate to Manila was $100.00 per ton (w) and the rate to Busan, Korean, was $112.00 per ton (w). Effective January 1, 1979, the PWC republished its Tariff No. 5 as Tariff No. 11, FMC-19. This is the rate sought to be applied in this proceeding, i.e., $100.00 per 1,000 kilos as to B/L No. 992-735030 and $112.00 per 1,000 kilos plus outport rate of $6.00 per 1,000 kilos as to B/L No. 992-735034. The charges then would be as to B/L 992-735030 $4,847.56 and as to B/L 992-735034 $5,621.30, a total of $10,468.86, which subtracted from the total charges of $20,655.23 would leave aggregate charges of $10,186.37 to be waived.

In its republishing of its Tariff No. 5 as to Tariff No. 11, FMC-19, it was PWC's intention to reissue its Local and Overland tariff to conform to the new 1978 Edition of Schedule B Commodity Classification and at the same time eliminate those commodities having very low movement. Due to an administrative oversight, the rates for large movements of Wheat Flour, viz: Durum Flour and Semolina donated for relief or charity were not carried forward and did not become effective until after the shipments had been made. Upon discovery of the error, the PWC issued 3rd Revised Page 219A effective May 30, 1979, to correct the omission by publishing a new commodity item 131-4010-04 (R) Wheat Flour, viz: Durum Flour and Semolina in Bags at the rate levels of $100.00W to Manila and $112.00W to Busan which had previously been in effect.

DISCUSSION AND CONCLUSIONS

In addition to the above information in support of this application for waiver, the applicants also asserted there are no other special docket applications or decided or pending formal proceedings involving the same rate situation. It is also asserted that there are no other shipments of other shippers of the same or similar commodity which (a) moved via applicants during the period of time beginning on the day the bills of lading were issued and ending on the day before the effective date of the conforming tariff and (b) moved on the same voyage of the vessel carrying the shipments decided above.

The administrative error on the part of the Pacific Westbound Conference, which resulted in a delay in publication of an existing rate into a new tariff was corrected.

In view of the applicants' explanation and information supplied herein and section 18(b)(3) of the Shipping Act, 1916, and Rule 92 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92, the Presiding Administrative Law Judge *finds* and *concludes* there was an error of an administrative nature; that the requested waiver will not result in discrimination among shippers; that the circumstances herein comport with the special docket requirements and that the application should be granted.

Upon consideration of the above and for the reasons given, 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 waiver would be based.

(3) There was an error of an administrative nature which resulted in the necessity for waiver.

(4) The waiver requested will not result in discrimination as between shippers.

(5) The application for waiver should be granted.

Wherefore, it is ordered that:

(A) The application be and hereby is granted.

(B) Sea-Land Service, Inc., and Pacific Westbound Conference are granted permission to waive a $10,186.37 portion of aggregate freight charges of $10,468.86 sought to be applied for the benefit of Church World Service, the shipper herein of Wheat Flour, viz: Durum Flour and Semolina, in Bags, Donated for Relief or Charity.

(C) Appropriate notice of this proceeding shall be published in the appropriate tariffs.

WILLIAM BEASLEY HARRIS
(S) *Administrative Law Judge*

WASHINGTON, D.C.
September 21, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-55
MATSON NAVIGATION COMPANY—PROPOSED BUNKER SURCHARGE IN THE HAWAII TRADE

REPORT AND ORDER ADOPTING INITIAL DECISION

This proceeding was instituted by an Order of Investigation and Hearing of the Commission served May 25, 1979, to determine the lawfulness of a 4.43% bunker surcharge filed by Matson Navigation Company. The surcharge became effective May 30, 1979 and although scheduled to expire in 120 days was superseded by a 5.90% surcharge effective August 25, 1979, which was made the subject of a separate Commission investigation in Docket No. 79-84. The fuel surcharge applied to all of Matson's tariff commodities with the exception of bulk sugar and molasses from Hawaii to the continental United States, which move under specially negotiated rates. It is this difference in treatment of fuel costs that prompted the Commission to institute this investigation. Specifically, the Commission put at issue:

1. The proper method of allocating Matson's increased fuel costs to the tariffs affected by the proposed bunker surcharge; and
2. Whether the proposed bunker surcharge is unjust, unreasonable, or otherwise unlawful in that it will provide Matson with an amount in excess of its increased fuel costs.

Matson was named Respondent in this proceeding and two of Matson's shippers, Oscar Mayer & Co., Inc. and George A. Hormel & Co. were named Protestants. The Commission's Bureau of Hearing Counsel was also made a party. The State of Hawaii intervened. Documentary submissions were received by Administrative Law Judge Norman D. Kline and an evidentiary hearing was held on July 23, 1979. Further written submissions were received and made a part of the record and an Initial Decision was issued by the Presiding Officer on September 21, 1979. Exceptions to that decision were filed by Respondent, Protestants and Hawaii. Replies to the Exceptions were filed by Matson and Hearing Counsel.

The Initial Decision found the surcharge unreasonable to the extent it exceeded 4.24%. In reaching this finding, the Presiding Officer rejected the methodology utilized by Matson in computing the instant surcharge and

adopted that advanced by the Commission's staff as being the most reasonable.[1] The Presiding Officer also rejected Protestants' split-voyage accounting methodolgies as having been disposed of in prior Commission proceedings as well as by Commission General Order 11 (G.O. 11). Hawaii's revenue projection methodology was dismissed as unreliable and its actual experience data was largely rejected save for the data regarding base fuel costs. Finally, the Presiding Officer held that Matson's collection of excess revenues derived from the levying of the 4.43% surcharge could be adequately remedied by applying such excess past recoveries against current fuel costs in any future surcharge (Commission Form FMC-274).[2]

Hawaii's only exception to the Initial Decision is procedural and concerns the modification of initial projections of the carrier with subsequent data of actual experience. It alleges that the Presiding Officer should have based his decision on the submissions of current operational data compiled as of the date of the evidentiary hearing, and in any event should have relied on the data available at the time the direct exhibits of all parties were submitted.

Oscar Mayer's exception advances three arguments: (1) vessel operating expenses must be allocated to segments of a voyage, *i.e.,* split-voyage accounting;[3] (2) interpreting G.O. 11 to require round-trip accounting is contrary to the requirements of section 16 of the Shipping Act, 1916 because an unfair portion of expenses would be allocated to headhaul cargo; and (3) such an interpretation is also contrary to the public interest in that it allows carriers to set commodity rates without regard to the costs of service.

Matson's exceptions reargue its position that the allocation of fuel costs in the Hawaii trade is fair and reasonable and should not be disallowed in favor of the arbitrary allocation methodology advocated by the Commission's staff. Matson contends that it is not seeking an excess recovery of fuel costs, and advises that if the Initial Decision is adopted, it will renegotiate the sugar and molasses carriage contracts to remove the fuel escalation clauses and apply Domestic Circular Letter 1-79 procedure to these commodities. This will allegedly result in these commodities paying less fuel costs and the balance of general cargo paying more.

Hormel excepts to the finding that the procedure prescribed in Domestic Circular Letter 1-79 will automatically adjust the overrecovery of fuel costs in future bunker surcharges. It is argued that Matson will attempt to levy the revenue deficits on general cargo shippers and that the Commission should order Matson to recover this shortfall from the sugar and molasses shippers who have heretofore enjoyed a preferential and prejudicial allocation of fuel

[1] Matson calculated the cost of unanticipated fuel price increases, from which it subtracted the amount of recovery under the sugar and molasses fuel escalation clauses and assessed the remainder to general cargo on a percentage of revenue collected basis. The Commission's staff, on the other hand, allocated the increased fuel costs between bulk sugar and molasses and general cargo on a measurement ton basis, and charged general cargo its share of these costs on a revenue-collected basis, leaving the remaining fuel costs to be either recouped by the sugar and molasses fuel escalation clauses or absorbed by Matson.

[2] The filing date of this surcharge, April 30, 1979, preceded the effective date of Domestic Circular Letter 1-79, June 6, 1979. However, this surcharge was filed pursuant to Special Permission Nos. 6312 and 6313 which closely parallel the Circular Letter. Also, all subsequent Matson surcharges will be subject to the requirements of the Circular Letter and not the Special Permission.

[3] *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic-Gulf Puerto Rico Trade,* 9 F.M.C. 220 (1966) is cited in support of this proposition.

costs resulting from the contractual fuel escalation clauses negotiated with Matson.

In its reply to exceptions Matson contends that: (1) Hormel's exceptions go beyond the scope of this proceeding; (2) Matson is precluded by Commission regulation from utilizing split-voyage accounting; and, (3) Matson's original data should be utilized in determining the reasonableness of its surcharge.

In its reply to exceptions, Hearing Counsel takes the position that: (1) Matson's "reasonable results" argument and its stated intended treatment of bulk sugar and molasses, should the Initial Decision be adopted, do not justify its unreasonable methodology; (2) Hawaii's procedural suggestions are unworkable; (3) Hormel's refund request is beyond Commission authority although a section 22 complaint would lie; and (4) Oscar Mayer's views on split voyage accounting and the percentage of revenue methodology of the Domestic Circular Letter are contrary to the Commission's regulations.

DISCUSSION

1. *Data Submission*

Reliance on the submission of current operational data collected after an investigation is ordered, as suggested by Hawaii, although theoretically appealing, fails to take into consideration the time limitation imposed by P.L. 95-475 on proceedings under section 3 of the Intercoastal Shipping Act. There is no allegation of a denial of due process with the procedure followed in this proceeding. The procedural methodology in this case was fair, reasonable and fully complied with the intent of Congress in enacting P.L. 95-475. Moreover, it follows Commission policy established prior to the implementation of P.L. 95-475. See *Matson Navigation Company—Rate Increases,* 18 S.R.R. 1441, 1444 (1978); *TMT Corp.—General Increase in Rates,* 18 S.R.R. 1374, 1375, n. 4 (1978).

2. *Split-Voyage Accounting*

The arguments advanced by Protestants in favor of split-voyage accounting and the allocation of expenses on that basis are not convincing. The Presiding Officer was correct in his interpretations of *Alcoa, supra,* the Commission's G.O. 11 and the fundamental transportation economic principles applied to this proceeding. In an imbalanced trade such as is the case with the Hawaii trade, a significant portion of the backhaul leg expenses must be allocated to headhaul cargo. Splitting the voyage expenses would impose transportation costs on backhaul cargo directly related only to the headhaul movement. Moreover, this approach would have an adverse effect on the economic viability of not only the carrier and the backhaul shippers but also on the economy of the State of Hawaii generally.

Oscar-Mayer's exceptions, however, do raise, albeit indirectly, a significant issue regarding Matson's overall rate structure. The pricing system in the Hawaii trade does appear to differentiate in favor of backhaul cargo based

upon value-of-service principles at the expense of headhaul cargo. See, *i.e., Matson Navigation Company—Increased Rates,* 18 S.R.R. 649, 657 (1978). However, such rate differentiation has been held to be lawful by the Commission based upon traditional transportation economic theory, *Id.* But, in any event, these considerations are beyond the scope of this proceeding as defined in the Order of Investigation.

3. *Fuel Cost Allocation*

The Initial Decision correctly finds that the most fair and reasonable method of allocating increased fuel costs between general cargo subject to a bunker surcharge and cargo subject to a specific fuel cost escalation clause is on the basis of respective measurement tons carried under the tariff provisions. Under this methodology the two types of cargo bear their fair share of the fuel costs as determined by sound cost of service principles.

Matson advises, however, that if the staff's methodology is adopted by the Commission, it will cancel the fuel escalation clauses applicable to bulk sugar and molasses and apply a surcharge as constructed in Domestic Circular Letter 1-79. This will result in those cargoes bearing an even smaller proportion of the total fuel costs than was required by the escalation clauses and impose an even greater burden on general cargo.

While the Initial Decision is equitable and reasonable, based upon the primacy of cost of service principles in fuel surcharges, unless the surcharge assessment mechanism contained in Domestic Circular Letter 1-79 is modified to reflect these principles, the intended result of this methodology can easily be frustrated in the future. The Domestic Circular Letter was promulgated on an emergency basis under crisis conditions. Under the circumstances the Commission could not reasonably anticipate all the potential operational difficulties that might arise with the application of the requirements of the Circular Letter. It is not surprising, therefore, that the application of the Circular Letter has shown a need for some revisions. Accordingly, while the Initial Decision in this case will be adopted, the Commission will undertake a review of the Domestic Circular Letter to determine what revisions may be necessary to bring the surcharge assessment procedures established in that Circular Letter in line with the principles enunciated in this decision.

4. *Remedies*

The Initial Decision relies completely on the mechanism provided in Domestic Circular 1-79 to adjust the "excess recovery" of fuel costs from commodities subject to this bunker surcharge. This will require Matson to absorb $42,860 in fuel costs by applying these funds to future fuel costs and proportionally reducing the level of subsequent surcharges. As discussed above, the assessment mechanism for such surcharges will have to be modified to some extent to ensure the effectuation of this intended result.

While Hormel's concern that Matson will attempt to evade the effects of this decision by imposing these costs on general cargo shippers is well founded in

light of its exception, the Commission can only deal with the specific actions actually presented in this case and cannot order any further remedies solely on the basis of such vague concerns of anticipated actions.

In any event, Hormel's suggestion that Matson be required to assess the misallocation of fuel costs against the bulk sugar and molasses shippers must be rejected as beyond the Commission's statutory authority. Similarly, because the excess fuel cost recovery in this case will be absorbed by Matson in succeeding surcharges, these funds could not thereafter be awarded in a section 22 complaint case as suggested by Hearing Counsel.

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

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision of Matson Navigation Company, Oscar Mayer & Co., Inc., George A. Hormel & Co. and the State of Hawaii are denied, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

*Commissioner Leslie Kanuk will issue a separate opinion.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-55

MATSON NAVIGATION COMPANY—PROPOSED BUNKER SURCHARGE IN THE HAWAII TRADE

Adopted November 23, 1979

Respondent Matson Navigation Company filed a 4.43 percent fuel surcharge effective May 30, 1979, later canceled by a 5.90 percent surcharge on August 25. Matson's original evidence, as adjusted to extract foreign cargo, supports 4.39 percent as reasonable. Hearing Counsel's evidence shows 4.32 percent while the State of Hawaii shows 3.87 percent. It is held that:

(1) Hearing Counsel's data, with a slight adjustment, are the most reasonable approximation of costs, being based upon accounting methodologies supported by law and General Order 11.

(2) Matson's allocation methodology using special sugar and molasses contracts is not shown to be reliable or valid.

(3) The State's position that any evidence showing later data should be introduced at any time to decide these expedited rate cases would frustrate the purposes of P.L. 95-475. Matson is entitled to rely upon its original evidence subject to reasonable corrections to eliminate errors in methodology, errors caused by oversight, or to incorporate obviously more reliable evidence.

(4) The State's later evidence, presented as an attachment to its posthearing brief, is untested, unexplained, relies on different time periods, and cannot therefore be found to be reliable in this proceeding.

(5) Any errors in forecasting or in data can be compensated by later adjustments according to the Commission's Form FMC-274.

(6) Protestants, two meat shippers, advocate totally different and unsound split-voyage accounting methodologies, fail to appreciate that G.O. 11 corrects any unfair allocation of costs among domestic shippers, and fail to establish that the percentage per revenue form of surcharge is unreasonable.

(7) Hearing Counsel's and the staff's evidence, as adjusted to utilize more reliable evidence of base fuel cost, shows that the allowable surcharge was 4.24 percent. This later evidence comports with FMC Form-274 and is admittedly more reliable.

David P. Anderson and *Peter P. Wilson*, for respondent Matson Navigation Company.
Wayne Minami, Lance Inouye, Barry M. Utsumi, and *R. Dennis Chong,* for intervener State of Hawaii.
John D. Kratochvil, for protestant Oscar Mayer & Co.
Harold M. Finch, for protestant George A. Hormel & Co.
John Robert Ewers, C. Douglass Miller and *Charles C. Hunter*, as Hearing Counsel.

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

This is an investigation begun by the Commission by its Order served May 25, 1979, to determine the lawfulness of a 4.43 percent bunker surcharge which was filed by respondent Matson Navigation Company (Matson) on April 30, 1979, as amendments to several of its tariffs. The surcharge became effective on May 30, 1979, and was supposed to expire in 120 days. However, the surcharge expired effective August 25, 1979, with the filing of another surcharge in the amount of 5.90 percent, which is under investigation in another proceeding, Docket 79-84, *Matson Navigation Company Proposed 5.90 Percent Bunker Surcharge Increase in Tariffs FMC-F Nos. 164, 165, 166, and 167*, Order of Investigation, August 24, 1979. The situation giving rise to this proceeding is described in greater detail as follows.

BACKGROUND TO THE PROCEEDING

The subject 4.43 bunker surcharge was filed as amendments to four of Matson's tariffs, FMC Nos. 164, 165, 166, and 167. These tariffs name commodity rates on non-containerizable and containerizable cargoes moving between Pacific Coast ports and the State of Hawaii and for forest products and related articles from Portland, Oregon, and Seattle, Washington, to ports in Hawaii. Since the 4.43 percent surcharge cancelled a previous surcharge in the amount of 3.54 percent which had been in effect since May 7, 1979, the effect of the new surcharge was to increase rates in the amount of .89 percent (4.43 less 3.54). The significance of this fact is that the Commission is not treating the subject surcharge as a so-called "general rate increase" as that term is defined in the amendments to the Intercoastal Shipping Act, 1933, enacted by P.L. 95-475, and the pertinent Commission regulations, General Order 11, 46 C.F.R. §512, and Rule 67, 46 C.F.R. §502.67. Accordingly, among other things, the proceeding is conducted under procedures governing non-general increases in rates with different consequences, such as the fact that the Commission cannot order refunds to shippers with interest as now provided in section 4 of the 1933 Act if it finds the surcharge to be unreasonable and excessive, and the carrier was not required to file the increase on 60-days' notice.

Although the surcharge applied to most of Matson's commodity rates, it did not apply to two of Matson's tariffs (No. FMC-F No. 168 and FMC-F No. 169). These two tariffs name rates for the carriage of raw sugar in bulk from Hawaii Ports to Crockett, California, and for molasses in bulk from Hawaii to Pacific Coast Ports. The reason why the across-the-board percentage surcharge did not apply to these two tariffs is the fact that they contain escalator clauses which increase or decrease rates published therein by a certain amount of cents per ton for each percentage increase in fuel cost. This particularized treatment of sugar and molasses under the escalator clauses is the product of negotiations between Matson and sugar and molasses shippers and has created one of the

[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).

major issues in this case, as I discuss below. The 4.43 percent surcharge, furthermore, is the third of five surcharges which Matson has effectuated this year. The first surcharge in the amount of 1.68 percent became effective on April 4, 1979; the second (3.54 percent) became effective on May 7, 1979; the subject surcharge (4.43 percent) became effective on May 30, 1979; the fourth (5.90 percent) became effective on August 25, 1979. This surcharge, as well as the previous 4.43 percent one, is under investigation in Docket No. 79-84, as mentioned. Finally, a fifth surcharge in the amount of 6.66 percent has been filed to become effective on October 1, 1979.

The subject surcharge was filed on April 30, 1979, with supporting data provided by Matson. The filing triggered two protests which were filed by two shippers of meat and meat products, Oscar Mayer & Co., Inc., and George A. Hormel & Co. These protestants claimed that the 4.43 percent surcharge was unjustified, unreasonable, and inflationary, among other things, and should be ordered cancelled or at least suspended and investigated. The filing also provoked a reaction from the Commission's staff which took exception to Matson's methodology in respect to its treatment of sugar and molasses when calculating the amount of surcharge that should be assessed shippers of other commodities. The staff advocated the use of a measurement ton allocation methodology which it believed to be authorized by the Commission's General Order 11, 46 C.F.R. §512, a methodology which Matson did not employ. The need to resolve this conflict in methodology was apparently a major factor in persuading the Commission to begin this formal investigation.

As a result of the protests and the methodological dispute between Matson and the Commission's staff, the Commission launched this proceeding on May 25, 1979, stating that it believed a hearing to be necessary "in order to resolve the issues specified in the second ordering paragraph below in order to determine whether the general rate increase (sic) is unjust, unreasonable or otherwise unlawful under section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933." See Order at 2. The Commission further narrowed the issues by stating that the proceeding was to be limited to the following areas:

1. The proper method of allocating Matson's increased fuel costs to the tariffs affected by the proposed bunker surcharge; and
2. Whether the proposed bunker surcharge is unjust, unreasonable, or otherwise unlawful in that it will provide Matson with an amount in excess of its increased fuel costs.

As is usually the case, these two ultimate issues have generated a number of subsidiary issues. For example, the effect of the Commission's Domestic Circular Letter No. 1-79, effective June 6, 1979 (44 Fed. Reg. 32369; 19 SRR 406), i.e., after the filing of the subject surcharge which establishes certain procedures and reporting forms (FMC-274 and 275) has been the subject of dispute among the parties. More particularly there is disagreement as to whether the provision for overrecovery by a carrier makes the methodology issue unnecessary to resolve. Furthermore, there is also disagreement as to the propriety of using certain means and dates to calculate increased fuel costs which would reduce the 4.43 percent surcharge because of the fact that these

means and dates were first enunciated in Domestic Circular Letter 1-79 and Form FMC-274, both of which were not in effect at the time Matson prepared its calculations and justifications for the surcharge. Another dispute involves the use of later data prepared by the State of Hawaii, whose petition for intervention, dated June 12, 1979, was granted by my order on June 21, 1979. The use of such data would serve to reduce the allowable surcharge from 4.43 percent to 3.87 percent if accepted. However, both Matson and hearing Counsel believe that the use of later data or methodologies which Matson could not be expected to utilize or to anticipate leads to inequities. Finally, protestants Oscar Mayer and George Hormel raise novel issues of methodology involving a totally different means of apportioning fuel costs between the westbound leg of the Hawaiian trade and the eastbound leg, as well as contending that the different treatment afforded sugar and molasses shippers under the negotiated contracts and escalator clauses is unjustly preferential and discriminatory. These issues will be described in greater detail below.

PROCEDURAL DEVELOPMENTS

Since the investigation is governed by Rule 67 (46 C.F.R. §502.67) under the provisions relating to non-general rate increases, the parties were instructed to exchange their written cases with underlying workpapers no later than 20 days after May 30, 1979, the effective date of the subject surcharge. The hearing was to close no later than July 29 (60 days after the effective date of the surcharge) and my initial decision was ordered to be served 60 days thereafter (September 27, 1979). A slight delay ensued as a result of the filing of a motion to dismiss by Matson. Matson filed its motion on June 7, 1979, in the belief that this proceeding would become moot because of its filing of a new surcharge and its willingness to utilize the methodology advocated by the Commission's staff and Hearing Counsel in order to effectuate a settlement. When the filing of the new surcharge on June 5, 1979, scheduled to become effective in early July, was rejected for technical reasons and Hearing Counsel as well as other protestants opposed dismissal, Matson withdrew the motion. See Notice of Withdrawal of Motion to Discontinue, June 21, 1979. Under a revised procedural schedule which was necessitated by the pendency of the motion and possibility of settlement, the parties exchanged their cases on June 27, prehearing statements and supplemental exhibits on July 6, and a prehearing followed by a hearing occurred on July 23, 1979. Further evidence necessary to complete the record was furnished by Matson and Hearing Counsel in response to my instructions and requests of the State of Hawaii by early August. See Admission of late-filed Exhibits, August 8, 1979. The parties filed their opening briefs on August 3 and reply briefs on August 15, 1979. See Notice of Post-Hearing Briefing Schedule, July 25, 1979.

FINDINGS OF FACT

Because the facts in this case are so interwoven with the issues and discussion of applicable law, it is more appropriate to set them forth in the discussion and

resolution of the issues. However, for a good general summary of critical facts those proposed by Hearing Counsel in their Opening Brief, with some modifications, should be consulted.[2] However, since the issues are somewhat technical and complex, the basic facts can perhaps be better appreciated after discussion and resolution of the issues.

Discussion And Conclusions

The Methodology Issue

The two ultimate issues as framed in the Commission's Order are:

(1) What is the proper methodology to be used in allocating Matson's increased fuel costs to shippers utilizing the four non-sugar and molasses tariffs cited above; and

(2) Will the subject surcharge provide Matson with an amount of revenue in excess of its increased fuel costs and thereby be unjust, unreasonable, or otherwise unlawful?

These two issues, as I have indicated, lead to a number of subsidiary issues dividing the parties. Because of the time constraints imposed by the amendments to the Intercoastal Act, 1933, as effectuated by P.L. 95-475, and the pertinent regulations, it is necessary to decide these complex issues expeditiously and it is impossible to consider and explore their many complexities and nuances at a more leisurely pace. In order to expedite the process and get directly to the essence of these issues, I believe the tables set forth below in this decision will be helpful since they will graphically illustrate the differences among the parties and facilitate an understanding of the issues.

As Matson has stated in its reply brief at page one, no party opposes in its entirety the imposition of the 4.43 percent surcharge under investigation. No party has disputed the fact that Matson has endured continual increases in costs of fuel for which its normal rate structure is not designed and that Matson has consequently been forced to resort to periodic rate adjustments in the form of surcharges in an effort to recover these uncontrollable costs. The objective of all the parties is not to deny Matson a fair and reasonable means of recovery but to determine what is a fair and reasonable means of recovery and how is it to be determined. On the means to devise a recovery and on the estimated results of the recovery the parties divide. Thus, Matson calculates that it needed 4.39 percent, after making adjustments to exclude foreign cargo (a concession from 4.43 which it originally advocated). Hearing Counsel (and perhaps George A. Hormel) and the Commission's staff believe that Matson only needed a 4.32 percent surcharge. The State of Hawaii believes only 3.87 percent was necessary. Oscar Mayer believes Matson has failed to justify anything near 4.43 percent because of its failure to assess eastbound shippers more equally in relation to westbound shippers.

In a nutshell, Matson, Hearing Counsel, and the state utilize the same simple ultimate formula to determine the permissible level of surcharge. Very simply,

[2] As will be apparent, however, I do not agree with Hearing Counsel's position that base unit cost of fuel should be $10.48 as proposed by Matson.

they estimate the amount of additional fuel costs which Matson is entitled to recover by a surcharge. Then they estimate the revenue which Matson should derive during that period of time which the surcharge was to be in effect. The first figure (estimated costs) divided by the second (estimated revenue) gives us the percentage for the surcharge. In calculating these basic figures, these three parties began with Matson's estimate of $2,928,156 as additional fuel costs for the four-month period (May 30 through September 30, 1979). Then each of the parties reduced that estimated figure by using different methodologies and applied the reduced figures representing their estimates of fuel costs against their own calculations of estimated revenue. In large measure, Hearing Counsel and Matson agree on basic figures but disagree on one area of allocation methodology. The State departs from both Hearing Counsel and Matson substantially by using different data as well as its own methodologies. The following table shows the basic figures and will aid in understanding the nature of the dispute.

BASIC FIGURES USED TO DERIVE THE PARTIES' RECOMMENDED SURCHARGE PERCENTAGES

$2,928,156—Matson's original estimated additional fuel costs reduced as follows:

Matson	*Hearing Counsel*	*Hawaii*
$ 2,792,984	$ 2,749,538	$ 2,557,493
Estimated revenue base:		
$63,617,200	$63,617,200	$66,000,000
Resulting surcharge by dividing reduced rates by revenue base:		
4.39%	4.32%	3.87%

The key to understanding the nature of the disputes among the three parties whose figures are shown in the above tables is a more detailed explanation showing how they each reduced Matson's originally proffered figures estimating additional fuel costs and how they changed the estimated revenues (actually only the State disputes Matson's estimated revenue figure). These changes are the result of different methodologies used to allocate the portion of fuel costs that should be borne by non-sugar and molasses shippers. Matson and the State choose to deduct revenue derived from sugar, molasses and foreign cargo from the original figure and use the remaining net figure as the numerator in their formula.[3] Hearing Counsel and the Commission's staff use the measurement ton ratio to deduct that portion of the gross figure represented by the measurement tons of sugar, molasses, and foreign cargo. The State also arrives at its net figure of recoverable fuel costs by modifying the unit costs of fuel and estimated barrel consumption, modifications which Hearing Counsel and the Commission's staff do not support. Finally, the State changes the estimated revenue figure by use of different data.

[3] However, even the State and Matson use the measurement ton ration methodology to exclude foreign cargo moving to the Marshall Islands.

In addition to the issues regarding the use of the contractual recovery for sugar and molasses rather than the measurement ton ratio advocated by Hearing Counsel and the Commission's staff, there is a fundamental issue arising out of the fact that the State has introduced data submitted in connection with later increases and later methods of calculation which were not made mandatory by the Commission at the time Matson prepared its written justification for filing on April 30, 1979. Both Matson and Hearing Counsel believe that it would be inequitable to impose upon Matson changes resulting from later data and methods when Matson had followed staff directions consistently and had relied upon them in filing not only the subject 4.43 percent surcharge but two previous surcharges this year which were not investigated. The State, however, argues that I and the Commission can rely upon methodological refinements and facts which were not available when Matson submitted its justification on April 30 and that we should consider all relevant and properly noticeable facts available prior to decision. Furthermore, the State argues that in calculating base unit fuel cost, we are free to use the methodology enunciated in the Commission's Domestic Circular Letter 1-79 because it is more reasonable than Matson's calculation regardless of the date of issuance of that Letter.

Of the three calculations of additional fuel costs, estimated revenue, and recommended permissible levels of surcharge, I find that the most reasonable approximation is that of Hearing Counsel and the Commission's staff.[4] Hearing Counsel's calculations are not only based upon reliable evidence for the most part but they correct a basic flaw which affects both Matson's and the State's calculations, namely, the device of allocating the burden of surcharge to non-sugar and molasses shippers by the use of the escalator clauses in the special sugar and molasses contracts.

The first ultimate issue in this case and indeed perhaps the major reason for the case is the question whether Matson's (and now the State's) allocation methodology is proper rather than that advocated by Hearing Counsel and the staff. For a number of reasons, I find that the staff's methodology is indeed more proper. It is firmly rooted in long-standing procedures established by the Commission's General Order 11, 46 C.F.R. §512. It recognizes that the additional fuel costs are joint costs which must be shared by all shippers on the same vessel in an across-the-board fashion. It recognizes the relationship between tons carried and additional costs of fuel. It avoids the pitfalls of utilizing special types of recovery for particular cargoes which appear to be discriminatory or preferential and were based upon negotiations which establish no such clear relationship between fuel costs and rate increase. It avoids argument over how much recovery should be calculated under the sugar and molasses escalator clauses (which the State's calculations create by inflating Matson's figures for such recovery). Finally, it corrects the effect of the use of the special sugar and molasses contracts by ensuring that all shippers will bear an even share of additional fuel costs based upon number of tons carried rather than relying upon the guesses of Matson and the sugar-molasses shippers as to how much additional revenue they should contribute in case of sudden increases in fuel

[4] I do, however, make one adjustment to Hearing Counsel's calculations relating to Matson's base unit cost of fuel, as I discuss later.

costs based upon a formula in special contracts whose derivation is unknown. Ironically, although the State's calculations use the Matson methodology of subtracting additional sugar and molasses revenue under the contracts to derive net additional fuel costs allocated to other shippers, even the State, in its brief, supports Hearing Counsel and the staff's method, stating:

> The State of Hawaii agrees with Hearing Counsel that measurement ton basis for allocating fuel costs is preferable to the use of contract fuel escalation provisions. The use of the measurement ton as a neutral variable removes an unnecessary, and unwarranted, challenge to the equitability of the allocation.

Hawaii, Opening Brief at 16.

Moreover, even Matson as well as the State have swung over to the measurement ton allocation method when removing foreign (Marshall Islands) cargo from the calculations to determine the portion of costs to be allocated to domestic shippers.

The entire allocation issue between sugar/molasses and general cargo shippers should have been unnecessary as Hearing Counsel note in their reply brief. It would have been far more simple and proper for all Matson's domestic shippers to bear the additional fuel costs evenly according to the volume of tons they shipped and allocation should only have been necessary to break out the minuscule portion of cargo which Matson carries to the Marshall Islands, which amounts to only .78 percent of all measurement tons carried by Matson from June through September 1979. Matson Reply Brief at 3. However, as Matson itself acknowledged in its opening brief:

> (I)f there were no fuel oil cost escalation provisions in Matson's molasses and sugar freight agreements and they were subject instead to the same bunker surcharges as all other commodities, there would be no allocation issue.

It is my opinion that any evidence or methodology presented by any party which is based upon reason, precedent, or some other test of reliability, should be accepted unless those parties advocating a different system, methodology, or evidence show that they are more reasonable and more reliable. Merely to present an alternative system does not mean that the first system or evidence should be discarded. The alternative must be superior and should be shown to be with reasonable certainty.

In this instance Matson is presenting an alternative system to that prescribed by the Commission's General Order 11, namely, an allocation method based not upon tonnage ratios but upon an arbitrary division among cargoes based upon specially-negotiated contracts with certain shippers. Very simply, Hearing Counsel have determined that general cargo carried by Matson in the Hawaiian trade consists of 93.90 percent of all cargo in measurement tons carried in Matson's combination vessels, i.e. vessels carrying general domestic cargo, sugar and molasses, and cargo to the Marshall Islands. See Attachment 1 to Hearing Counsel's Opening Brief. Therefore, according to Hearing Counsel and staff, shippers of general cargo in the Hawaiian trade should bear 93.90 percent of the additional fuel costs. Matson (and curiously the State in its calculations but not in its argument on brief as I have noted above) use a different ratio. Thus, Matson would allocate to general cargo shippers

95.38 percent of the additional fuel costs, not 93.90 percent. This percentage is not derived by determining the volume of tons carried for general cargo shippers as was Hearing Counsel's and the staff's. Rather the percentage is derived by determining how much cost is left for general cargo shippers after deducting estimated increases in revenue to be gained by the sugar and molasses escalator clauses. Thus, a ratio is derived which is not based on tons but merely on use of revenue recovery under special contracts. But even so, Matson (and the State) are not consistent because they throw in a measurement ton allocation together with the escalation revenue clause to arrive at their percentages. The following table illustrates graphically how Matson's allocation percentage differs from Hearing Counsel's.

DOMESTIC GENERAL CARGO
ALLOCATION PERCENTAGES—HOW DERIVED

Hearing Counsel		*Matson*	
Total MTs	3,352,583	Total fuel costs	$2,928,156
Less MTs of sugar/molasses and foreign cargo	178,271 26,316	Less sugar/molasses escalated revnue	112,332
		Less Marshall Islands Allocated Costs on MT Basis	22,840
Domestic General Cargo MTs	3,147,996	Domestic Cargo Costs Remaining	2,792,984
Ratio of Domestic MTs to Total	3,147,996 3,352,583	Ratio of Domestic Costs of Total Costs	$2,792,984 $2,928,156
Percentage	93.90%	Percentage	95.38%

Notice two significant features from the above table. First, Matson has determined what portion of total costs should be allocated to domestic general cargo shippers merely by deducting revenue recoveries under sugar/molasses contracts and other recoveries from Marshall Islands cargo. But the validity of such a method depends upon the validity of the formula used in the sugar/molasses contracts, which, as I mention below, merely determines that rates will increase by a certain number of cents per ton when fuel increases by a certain percentage. Hearing Counsel's method, on the other hand, corrects the special treatment afforded to sugar/molasses shippers, in effect, by putting everyone on a measurement ton basis. In other words, the general cargo shippers are allocated a portion of costs in relation to the volume of measurement tons they carry.

The second curious defect in the Matson system is that even Matson abandons the revenue-recovery-under-escalation-clauses-system in respect to the Marshall Islands cargo. Note that the figure which Matson has derived for such cargo ($22,840) is derived by applying the measurement ton ratio to total

fuel costs (.78 percent times $2,928,156). Matson thus uses Hearing Counsel's methodology. But in so doing, it derives a cost figure, not a revenue figure, which it throws in with a revenue figure derived from the escalation clauses in the sugar/molasses contracts ($112,332) and uses both to subtract from total fuel costs. So Matson not only uses Hearing Counsel's methodology itself with respect to Marshall Islands cargo but mixes it with the sugar/molasses revenue recovery under the escalation clauses. Since the State also uses the method of subtracting escalated revenue under the sugar/molasses contracts (and even inflates the amount of recovery from $112,332 estimated by Matson to $270,863), it also uses a defective methodology although, as I have said, on brief, it argues that the measurement ton ratio is more reasonable and fair. Even without further discussion illustrating the weaknesses and pitfalls of Matson's and the State's use of the escalation-clause revenue recoveries, the above curiosities should alone convince anyone that Matson's and the State's method of apportioning fuel costs to domestic general cargo shippers is at best strange and at worst unreasonable, unwarranted, and dangerously discriminatory. However, as I mentioned above, there are other reasons which demonstrate that the Matson methodology ought to be discarded and that the measurement ton method is far more reasonable.

If it is necessary to allocate expenses between one group of shippers and another, then joint expenses should be allocated by the tonnage ratio method. This principle has long been established with the Commission. In 1966 it was emphatically held in *Alcoa Steamship Co., Inc. General Increase in Rates in the Atlantic Gulf Puerto Rico Trade,* 9 F.M.C. 220, that joint costs should be allocated on a ton-mile ratio basis. (The carrier in that case had advocated a split-leg day basis combined with a revenue basis, which method was rejected by the Commission.) The ton-mile basis has been the prevailing method of allocation before the Commission before and after the *Alcoa* case. Moreover, it is codified by the Commission's General Order 11, 46 C.F.R. § 512. Section 512.7(c)(2)(i) of that General Order states:

> Vessel expense shall be allocated, where an allocation is necessary, to The Trade in the Revenue Ton Mile Relationship. This procedure will be required for all Voyages in the Service. Should any of the elements of Vessel Expense be directly allocable to specific cargo, such direct allocation shall be made and explained.

General Order 11 recognizes that some expenses may be assigned directly, as the above quotation demonstrates. However, if a direct assignment is made, there must be a justification or explanation which shows that the expense directly relates to the service or revenue-producing activity and is not a joint cost to be shared by all ratepayers. Hearing Counsel provides two examples of expenses that can be directly assigned, namely, advertising and port costs. H.C. Opening Brief at 8, 9. For example, if Matson served two trades, Hawaiian and Guam, its advertising pertaining solely to the Guam trade could be directly assigned to that trade to be borne exclusively by Guam shippers. Or, if Matson carried cargo destined to the Marshall Islands, port costs incurred by cargo at the Islands could be directly assigned to that cargo. As General Order 11, *Alcoa, supra,* and Hearing Counsel's staff expert witnesses, Mr. Walker, all

confirm, fuel costs on vessels carrying a variety of cargo, namely, sugar, molasses, general, Marshall Islands, are joint costs which are shared by all of the cargo moving on the vessel. Under such circumstances, the proportionate expense for fuel and other vessel operating expenses that should be borne by any one group of cargo varies according to the volume of cargo carried. (In Matson's case, the measurement ton ratio has been utilized with the approval of the staff in lieu of revenue tons since January 7, 1976.) Ex. 5 at 3; H.C. Opening Brief at 11, n. 1. Clearly it is settled that there is a correlation between vessel expense and volume of tonnage handled. But Matson wishes to substitute a different method of direct assignment of fuel cost to its sugar and molasses cargo even when carried on the same vessels as other types of cargo.

There is nothing in the record to persuade me that either in principle or in actual fact this alternative method is reliable. The tonnage ratio method has survived the test of time and is accepted by Matson itself elsewhere in Matson's General Order 11 filings (and, as noted, in the Marshall Islands allocation). Furthermore, Matson's alternative method, which is based upon negotiated contracts which establish that rates will increase by a fixed amount of cents per ton when fuel costs increase by a fixed percentage, shows no evidence of correlation between fuel costs and rate increases. The record does not explain how the fixed escalation clause figures were derived nor what principles of costs accounting were followed. But we do not need to rely merely upon lack of explanation or justification for the alternative methodology to determine that it must be rejected. There are positive fallacies attached to it, as Hearing Counsel have noted. H.C. Opening Brief at 9–10.

The fixed escalation clauses in the sugar and molasses contracts show no evidence of considering changes in total volume of cargo carried, changes in vessel speed, or alterations in vessel scheduling. By merely stating that rates will increase by so many cents when fuel increases by so much of a percentage, there is no accounting for increased fuel costs which shippers would have to bear if volume of cargo diminished but the number of sailings remained the same. Similarly, if the vessels increased speed or triangulated vessel routing, thereby consuming more fuel, the fixed escalator clauses would not reflect the increases in fuel costs stemming from these factors. But these factors, i.e., changes in volume of cargo, vessel speed and itineraries were considered by Matson when determining the level of surcharge which non-sugar and molasses shippers would be assessed. Tr. 96, Kane. This discussion suggests that there may be dangers inherent in the different treatment afforded one type of shipper (sugar and molasses) and the other type (domestic general cargo). The danger is not merely theoretical, i.e., that the recovery under the fixed clause *may* be too low with consequent additional burden thrust upon general cargo shippers. The record quantifies this concept by application of the tonnage allocation methodology. It shows that domestic general cargo shippers are asked to shoulder an additional $42,860.

Matson's main witness, Mr. Christopher A. Kane, Manager-Pricing, opposed Hearing Counsel's and the staff's position which he believed would tamper with Matson's dual system of recovery under the escalator clauses by cents per ton and recovery from general cargo shippers by percentage of rates.

He believes that Matson was bound by its contracts with the sugar and molasses shippers. Tr. 94. However, no one is telling Matson that it must breach its contracts for the period during which they were or are in effect. If Matson wishes to recover only a limited amount of additional fuel costs from these sugar/molasses shippers as calculated under the contracts, that is Matson's business and, indeed, this is a contractual obligation. But as Hearing Counsel assert and, I believe, correctly, Matson's adherence to its contractual obligations should not result in extra burdens being thrust upon domestic general cargo shippers. Matson and the contract shippers have estimated in some fashion how much more money these shippers should pay in the event of fuel increases. If their estimates are too low, as they are shown to be by the tonnage allocation methodology, why burden the other rate payers by casting the deficit upon them? If Matson wishes to guarantee sugar and molasses shippers a fixed escalation limit, there may be no harm, discriminatory though the practice may be,[5] provided that general cargo shippers do not pick up the tab in case of low recovery. I therefore agree with Hearing Counsel and the staff that the additional $42,860 which general cargo shippers were being called upon to pay, should be absorbed by Matson. This is the price which Matson must pay for deciding to rely upon a specially negotiated arrangement with particular types of shippers.[6] If it tires of absorbing costs because of wrong estimates or formulas in its contracts, Matson can renegotiate the contracts and place sugar and molasses shippers under the same type of recovery as all other domestic general cargo shippers. (Mr. Kane testified that these contracts are periodically renegotiated.) If so, all shippers could pay on a percentage surcharge basis rather than some paying by percentage and others by cents per ton, as under Matson's present system, thus removing the apparent discriminatory treatment among different shippers.[7]

[5] I do not reach the basic question whether Matson's system of negotiating escalator clauses in special sugar and molasses contracts is an unreasonable practice per se. Perhaps it is only unwise rather than illegal although the formula reached by negotiation seems unrelated to so many factors influencing costs of fuel. If the other shippers are not called upon to pick up deficits resulting from these negotiations, the only harm would be to Matson which would have to absorb the deficits itself. However, as I discuss in the body of the decision, Matson can always renegotiate the contracts and place sugar/molasses shippers on the same percentage surcharge basis by using form FMC-274 so as to avoid future problems of underrecovery or overrecovery.

[6] The price is really a rather small one to pay. If Matson absorbs $42,860, rather than passes it on to the domestic general cargo shippers, it absorbs this amount out of an estimated $63,617,200 revenue for the four-month period June through September 1979. In other words, the absorption is only seven-hundredths of one percent of revenue (.07 percent; $42,860 divided by $63,617,200).

[7] Matson has attempted to justify its recovery under the contractual clauses by contending that the actual recovery on a cents per ton basis translates to a percentage increase of 7.54 and 5.67 for sugar and molasses respectively and that the sugar and molasses rates are FIO (free in and out) respectively. FIO rates mean that the shippers pay for loading and unloading, i.e., stevedoring costs, and the carrier pays for vessel costs and other costs associated with line-haul transportation than cargo handling. Matson claims that FIO rates are more associated with fuel costs so that the higher percentage increase is understandable and in fact shows that sugar and molasses shippers may be paying more than a proper share, in other words, they may be "to some degree subsidizing" general cargo. Exhibit 1 at 5, 6 (Kane). Finally, Matson claims that Hearing Counsel's methodology would require Matson to convert its bunker surcharge assessment to a measurement ton basis. None of these contentions justifies Matson's use of its special contracts so as to burden general cargo shippers with an additional $42,860. The fact that recovery under the special contracts can be converted to a 7.57 and 5.67 percentage of rates (rather than 4.43 for general cargo shippers) does not necessarily mean that sugar and molasses shippers are paying more than they should. Even Matson argues that they are not. It may merely mean that the FIO sugar and molasses rates, like FIO rates generally, are lower than regular rates because the shippers pay cargo handling. (Indeed, they appear to be only $9.11 and $4.06 per ton according to Exhibit 1, "Exhibit 2.") Therefore, additional recovery is divided by a smaller base rate. More importantly, however, the measurement ton methodology, which Matson uses everywhere else in its G.O. 11 filings, shows that sugar and molasses are underpaying by $42,860. Finally, as Hearing Counsel correctly state (H.C. Opening Brief at 13) use of the G.O. 11 methodology does not require Matson to convert to a measurement ton basis in assessing sugar and molasses shippers. It only determines how much general cargo shippers should be required to pay on a percentage-of-rates surcharge basis. In other words, if Matson insists on continuing to use escalation clauses in special sugar and molasses contracts, the G.O. 11 methodology will ensure that general cargo shippers are assessed only their proper share. It will not otherwise affect the special contracts.

The Issue of the Proper Level of Surcharge

The preceding discussion involved a dispute primarily between Matson and Hearing Counsel (and the Commission's staff) on allocation methodology. To the extent that the State relied upon Matson's escalation-clause recovery method, the State would therefore also be in error. The remaining discussion centers upon the question as to whether the subject 4.43 percent surcharge was unreasonable because it was excessive and overrecovered costs. Because of Matson's and the State's departure from use of the G.O. 11 allocation methodology, this question has to some extent already been answered. As shown in the previous tables, after correction of Matson's data favoring the 4.43 percent surcharge, by application of G.O. 11 methodology, as adjusted by removal of Marshall Islands cargo, the proper level of surcharge would be 4.32 percent. In virtually every other respect, Matson and Hearing Counsel agree on figures and on the general methods now codified in FMC–274, by which percentage of surcharges are to be determined. However, the State disagrees with both Matson and Hearing Counsel in several significant ways and believes that the proper level of surcharge should only be 3.87 percent. I have examined the State's contentions and find them to be less persuasive than those of Matson and Hearing Counsel with one exception.

The State's Position Analyzed

As seen from the tables previously set forth in this decision, the State departs from Matson's supporting data to a much larger extent than did Hearing Counsel. Thus, the state reduced the amount of recoverable additional fuel cost from $2,928,156, as originally proffered by Matson, to only $2,557,493 (almost 200,000 lower than Hearing Counsel's and the staff's final calculation of allowable recovery). Furthermore, although Matson and Hearing Cousel agree on the estimated four-months' revenue base against which the above $2 million cost is to be applied to derive a reasonable percentage of surcharge, the State contends that the revenue base is significantly larger, specifically $66,000,000, rather than $63,617,200, the figure which both Matson and Hearing Counsel support. Therefore, contends the State, the allowable surcharge should have been only 3.87 percent, not 4.43 percent or 4.32 percent ($2,557,493 divided by $66,000,000). The State calculates these figures by using its own methodologies. If, as I find, for the most part, these methodologies have not been shown to be more reliable than Hearing Counsel's, then the State's ultimate figures cannot be accepted. I now examine these methodologies.

The State reduces the figure for allowable additional cost from that proffered by Matson by employing Matson's system of deducting recovery as calculated under the escalation clauses in the sugar and molasses contracts, modifying Matson's figures showing unit increases in fuel cost, and adjusting for Marshall Islands cargo. I have already explained why the method of deducting the recovery under the contracts is unreliable and need not repeat my discussion. I note, however, that the State has inflated the amount of recovery under those contracts from $112,332, which Matson shows, to $270,863. This alone illus-

trates one of the problems in utilizing the Matson method, namely, the additional arguments which it creates because one has to estimate the amount of recovery under these contracts before arriving at allowable recovery allocated to non-sugar and molasses shippers. Since, under G.O. 11 methodology, the amount of recovery under sugar and molasses escalation clauses is irrelevant, the dispute between the State and Matson is likewise irrelevant.[8] However, even if relevant, as Matson contends, the State may have inflated the original figure by employing figures supplied by Matson for a later period and a later surcharge. Matson Reply Brief at 10–11. And, as Hearing Counsel note, the State may have included revenue from the Matson vessel *Kopaa* incorrectly. H.C. Reply Brief at 7. Again, this illustrates the problem with Matson's and the State's methodology since there is additional uncertainty or dispute over the amount of recovery under the special contracts which must be resolved if that methodology is to be used.

The State also reduces the amount of additional fuel recovery by changing Matson's figures showing the additional unit cost of fuel per barrel of $6.04 per barrel, as shown by Matson (and accepted by Hearing Counsel and the Commission's staff) to only $4.88 per barrel. The State does this by raising the base unit cost from $10.48 per barrel to $10.59 and lowering the "present" unit cost from $6.52 to $16.47. It also changes estimated fuel consumption by removing Marshall Islands cargo by means of the measurement ton allocation methodology. The following table shows how the State restated Matson's data:

FUEL SURCHARGE JUSTIFICATION AS RESTATED BY THE STATE

Line No. (1)	*Description* (2)	*Matson* (3)	*Restated* (4)
1	Base Unit Cost of Fuel	$ 10.48	$ 10.59
2	Present Unit Cost Fuel	16.52	16.47
3	Fuel Cost Differential	6.04	5.88
4	Estimated Consumption for Next Four-Months	484,794	481,031*
5	Recoverable Fuel Costs	2,928,156	2,828,356
6	Recovery from Sugar and Molasses Contract on Combination Vessels	112,332	270,863
7	Unrecovered Fuel Costs	2,815,824	2,557,493
8	Revenue Base for Calculating and Surcharge	63,617,200	66,000,000
9	Surcharge Percentage	4.43%	3.87%

*Hawaii Service allocation (99.22%) of 484,794 barrels fuel consumption; reference Matson late-filed exhibit, Exhibit 8E.

I have no problem with the State's adjustment for removal of fuel cost allocable to Marshall Islands cargo. This was done by the State and indeed by Hearing Counsel and Matson by applying the measurement ton ratio for that foreign cargo (only .78 percent, as noted previously). As I explain later, I have

[8] The only value in determining recovery under the escalation clauses is to determine how much of an underrecovery results and how much additional cost will be cast onto general cargo shippers. This amount is $42,860, as shown by comparing recovery under the clauses with the measurement ton calculation.

little problem accepting the State's figure for base unit cost of fuel ($10.59 per barrel) which relies upon later and more reliable evidence, accords with the Commission's subsequent formula established by Domestic Letter 1-79 and FMC-274, and is opposed by Matson and Hearing Counsel mainly upon equitable grounds, not because it is unreliable. However, the State's restatement of "present" fuel cost ($16.47 per barrel) I have trouble accepting.

The State reduces the "present" or "effective" cost of fuel by five cents (from $16.52 to $16.47 per barrel) because it believes that Matson's (and Hearing Counsel's) figure reflects only a quoted cost on May 16, 1979, and previous study shows that quoted costs run about five cents higher than actual costs. The problem with this approach is that the "present" or "effective" cost of $16.52 does not in reality appear to be a figure merely quoted on that one day and secondly, the study upon which the State relies, which the State believes to show that the present quoted rates are higher than actual costs is a study going back to December and January of 1978-1979.

Matson's original filing on April 30, 1979, with the staff also shows a figure of $16.52 per barrel for "present" unit cost of fuel. The supporting papers show, however, that this figure was a weighted average cost between San Francisco and Los Angeles and reflected a series of continual increases in fuel and barging costs occurring between December 1978 and May 1979. Ex. 1, notes to "Exhibit A." Even the State's witness, Mr. Simat, states that this cost "is reasonable if adjusted for the small differences noted between quoted rates and the recorded costs of purchasing." Ex. 4 at 8. Then Mr. Simat reduces the present unit cost by five cents. *Id.* These "small differences noted" are shown in Hawaii's "Exhibit No. 4" attached to Exhibit 4. This exhibit does show that on four days in late December and early January of 1979 (December 27, 28, 29; January 2), quoted ("effective") prices were higher than what Matson apparently actually paid at that time. I do not know, however, whether this situation continued to prevail beyond early January 1979. Furthermore, even during the four dates shown on the exhibit, the amount by which the quoted (so-called "effective" price) exceeded apparent actual price varied widely from as low as 1.1 cent on December 29, 1978, to 7.3 cents on December 28, 1979. I cannot therefore find that the State's evidence based on those four days is so reliable and indicative of a consistent trend that I can accept Mr. Simat's decision to reduce Matson's (and Hearing Counsel's) "current" figure of $16.52 per barrel by five cents and reject that figure which Hearing Counsel and the Commission's staff had accepted apparently on the basis of the original submission on April 30, 1979, with its supporting data. I note furthermore that since we are dealing with an ongoing series of surcharges (the subject surcharge, which has already been superseded, being only the third of a series of five this year) any error favoring Matson at this time is subject to correction because of line 7 of FMC-274. In other words, if it does in fact develop that Matson and Hearing Counsel were wrong in estimating "present" unit cost of fuel at $16.52 per barrel, later submissions will show what the actual cost was and if $16.52 was too high an estimate and Matson consequently over-recovered, a subsequent adjustment had to be made when filing the later

surcharges with a reducing effect on later surcharges. While not a perfect solution to the problem, if it is a problem, line 7 is a partial remedy.

As I discuss below, however, the base unit cost which the State changed from $16.48 to $10.59 per barrel is a change which I find acceptable because it is clearly more reliable. This will result in a slight adjustment to Hearing Counsel's exhibits which I otherwise find to be reasonable and reliable, which adjustment I will discuss later.

The final significant change which the State would make to Matson's and Hearing Counsel's exhibits relates to the revenue base. The State estimates that Matson would derive $66,000,000 in revenue during the four-month period June through September 1979, whereas Matson and Hearing Counsel estimate $63,617,200. If the State's estimate is more reliable, obviously Matson's use of a 4.43 percent surcharge would result in significant overrecovery since Matson stood to derive approximately $2.4 million in extra revenue against which the surcharge could be applied.

The State originally inflated Matson's estimated revenue to $67,155,000. This was based upon Matson's original data showing an estimated increase in fuel consumption of 10.68 percent over the equivalent period in 1978. From this the State assumed that additional revenue would flow. Ex. 4 at 10; Tr. 120. There is no persuasive evidence in the record which would establish that revenue must necessarily increase if fuel consumption does. Or if there is some correlation, there is no showing as to how much revenue should increase in proportion to an increase in fuel consumption. As Hearing Counsel note (H.C. Opening Brief at 19), the theory assumes no change in efficiency. However, any number of factors could cause an increase in fuel consumption without affecting revenue to a corresponding degree. For example, additional voyages could be scheduled, vessel itineraries or speed could be altered, but with little additional cargo. If so, revenues might rise slightly but not in proportion to increases in fuel consumption. Mr. Simat's theory of revenue projection based upon fuel consumption may have merit but it is too incompletely developed to recommend it in this proceeding. More importantly, however, it is irrelevant because Matson revised its estimated fuel consumption to reveal that the number of barrels to be consumed would be virtually identical (35 more barrels) to those consumed during the equivalent period in 1978. Ex. 2, "Exhibit 3." Therefore, the State stopped applying this theory and accepted Matson's estimated number of barrels consumed (484,794) as adjusted to remove Marshall Islands cargo, although expressing some doubt about the figure as being "not consonant with other indications of an increasing volume of capacity and service." Hawaii Opening Brief at 15. Nevertheless, the State revised its original revenue projection downward to $66 million.

Having discontinued use of the fuel-consumption theory to project future revenue, the State relies upon other factors in revising Matson's (and Hearing Counsel's) revenue base. For example, it contends that Matson increased its rates three times to aggregate 6.75 percent over the equivalent 1978 four-month period. Then it contends that Matson's actual revenues are usually

shown to be higher than Matson's forecasts, judging from later Matson submissions in other cases. The State does not believe that these factors have been adequately considered by Matson.

As in the case of the allocation theory issue discussed earlier, if a party suggests that one theory or fact is less reliable than another, then such party ought to show that the second theory or fact is superior or more reliable before expecting the first one to be rejected, assuming the first theory or fact is based upon reason, precedent, or reliable evidence. In this case, the bases for Matson's and Hearing Counsel's estimate of $63,617,000 were explained by witnesses Miggins for Matson and Walker for Hearing Counsel. See Exhibit 9, Miggins; exhibit 10 (Walker). It is true that these exhibits came into the record after the hearing and at my request. See Order to Supplement the Reocrd, July 27, 1979. This situation may have occurred because the Commission's staff took no issue with Matson on its revenue projection and therefore made no request on Matson to submit formal explanations in testimonial form for the record and for cross-examination. However, the State does challenge Matson's projection and consequently I instructed both Matson and Hearing Counsel to fill in the record so that it would show the bases for those projections. Ideally, this evidence should have been presented before the close of the hearing so that cross-examination could have been utilized. However, the press of time under the newly mandated rapid procedures makes it difficult to develop every facet of the record as thoroughly as was the custom under the previous more leisurely procedures. In any event, no party objected to the admission of the post-hearing exhibits of Messrs. Miggins and Walker and they have provided the necessary explanations.

Without going into the details which are contained in exhibit 9, Matson's method is essentially a forecast of cargo volume based largely upon customer contacts conducted by its regional sales offices. See Ex. 10. Preliminary forecasts from these offices are transmitted to Matson's main offices in San Francisco where they are combined to arrive at projected cargo volume. Matson applies historic revenue figures for different classes of cargo and multiplies those figures by the forecasted cargo volume for each class of cargo. The regional sales managers moreover, in submitting their volume forecasts to San Francisco, not only make customer contacts but evaluate the competitive situation, analyze economic trends, and review past customer performances and historical trends. Ex. 9. In addition to considering volume forecasts applied to historic revenue figures for classes of cargo, Matson also adjusts revenue forecasts to reflect relevant rate increases.

This method of forecasting revenue has been used by Matson since approximately 1973. The method has been used in several Commission proceedings, namely, Docket Nos. 73-22, 75-57, and 76-43, and has been relied upon by the Commission in its decisions in those cases. The method has furthermore been used in forecasting numerous rate increases filed in 1977, 1978, and 1979, which were not formally investigated by the Commission. Matson also uses this method for internal planning purposes. Mr. Walker of the Commission's staff states that he has reviewed numerous rate increases filed by Matson which have used this method of forecasting and has found that the projected revenue

figures submitted by Matson "have been reasonably accurate." Ex. 10 at 2. As Hearing Counsel point out, furthermore, in Docket No. 76-43, *Matson Navigation Company—Proposed Rate Increasesin the United States Pacific Coast/Hawaii Domestic Offshore Trade*, 18 SRR 707, (1978), the presiding judge found that "Matson's revenue forecast for Constructive Year 1976 . . . was very close to the mark" and in fact noted that Matson's forecast "exceed(ed) the actual 1976 revenue . . . of $141,129,000 by $266,000, a margin of error of approximately .2 percent." 18 SRR at 713-14, quoted in Hearing Counsel's Opening Brief at 18.

Matson's revenue forecast of $63,617,200 amounts to an increase over revenue during the equivalent four-month period of 1978, which was $56,838,000, in the amount of 11.93 percent. Matson contends that considering two rate increases of 2.5 and 2.9 percent occurring in August 26, 1978, and February 1979, respectively, this leaves room for cargo growth in excess of 6 percent. Matson Opening Brief at 12. Matson argues that there is no evidentiary basis for accepting an alternative figure to that supported both by Matson and Hearing Counsel. Matson Reply Brief at 12. Hearing Counsel and the staff also accept Matson's figures and believe that the State is improperly using later data which Matson was not required to utilize when submitting its justification. H.C. Opening Brief at 16-18; H.C. Reply Brief at 5-7.

The State questions the reliability of Matson's forecast. It believes that certain factors such as the historic revenue factor used by Matson are not articulated or fully explained and states that the State's own examination of Matson's forecasts compared to actual revenue show that the forecasts have been too low. State, Opening Brief at 13-14. Also the State believes that rate increases alone will account for 6.75 percent increase in revenue while another 8.75 percent will result from increase in traffic volume. State, Opening Brief at 14-15. These assertions and contentions are contested by both Hearing Counsel and the State and what emerges is some confusion as to what was factored into the revenue forecasts or what should have been factored into the revenue forecasts by all parties. However, although Matson's and Hearing Counsel's explanation for the $63,617,200 forecast are not perfect, I am not persuaded that the method of forecasting employed by Matson and accepted so many times by the Commission and its staff must now be modified by more reliable evidence proffered by the State.

The State's criticisms of Matson's use of historic revenue factors seems to have some appeal. However, it is rather late to raise these questions on brief rather than at the hearing or at the time the State examined Matson's submissions. Or even after the hearing the State could have raised the point so that perhaps further questions could have been asked. None of this was done. Moreover, since Matson has consistently used this method in so many proceedings in which the State has participated and the State has had so many opportunities to explore and test Matson's method of forecasting, it is hard to believe that the State is so puzzled as to how Matson's forecasting method works or how the historical revenue figure is derived. The State, after all, is not a novice in Matson rate cases and has been exposed to Matson rate increases and its methods of forecasting revenue for many years in many cases.

The State furthermore injects into its arguments data from later Matson submissions and uses percentage figures for the first time in its brief without fully explaining what they are, where they come from, and why they should be relied upon. In effect, the State claims that Matson underestimates revenue because Matson's submissions relating to other rate increases shows that Matson's "actual" revenue exceeded its forecasts. But the evidence which the State cites is an attachment to its brief ("Attachment 2") and Hearing Counsel contend that the State may have improperly used data affected by other rate changes in deriving "actual" and "constructed" revenue. But the State compares the two revenue figures. For example, in "Attachment 2" to the State's Brief, "actual" revenue is compiled from submissions in connection with a Matson filing of June 1, 1979, relating to a later bunker surcharge and with a filing submitted in connection with a general rate increase on "August 15, 1979." This illustrates a point made by Hearing Counsel, that to a large extent, because of the extremely tight time schedule mandated by the new law and Commission regulations, Rule 67, it is not feasible to keep inserting into the record later data and that in large measure, a carrier is entitled to rely upon its case as originally submitted (in this case, on April 30, 1979) provided that obvious errors in methodology or obviously unreliable data can be corrected and corrected in timely fashion. Otherwise the procedural requirements cannot be met. See H.C. Opening Brief at 16, 17, and citations to the legislative history of P.L. 45-475.

In this instance I cannot determine whether the State has used irrelevant or distorted data in its figures purportedly showing "actual" or "constructed" revenue in its "Attachment 2." It is suggested by Hearing Counsel that they may have. "Attachment 2" was compiled by the State after the hearing and placed in its brief, leaving the parties not time to analyze and test it. The data does indeed seem to relate to other periods of time and to rate changes other than the surcharge under investigation in this proceeding. Hearing Counsel are also troubled and apparently puzzled by this "Attachment 2." They suggest that some of the data may improperly include the effects of later rate changes which should be filtered out to remove their effects in accordance with the decision in Docket No. 76-43, *Matson Navigation Co., etc.*, 18 SRR 707, (I.D.), affirmed, 18 SRR 1351 (1978). It appears that Hearing Counsel cannot remove the mysteries from this "Attachment 2" and bereft of proper explanation and analysis neither can I. There simply are too many unanswered questions about the data, comparison of different time periods, method of compilation, how figures were "interpolated" as the document mentions in one instance, etc., for me to accept its substantially different conclusions from those put forth by witnesses Miggins and Walker regarding the reliability of Matson's revenue forecasts.

I cannot therefore find that the State's contention that Matson's revenue forecasts are too low compared to actual results is based upon reliable, relevant evidence which has been submitted in timely fashion so that opportunity for testing has been afforded. It would appear that the proper place to test the reliability of the later data would be a proceeding for which the data were

submitted given the strict time constraints imposed by P.L. 95-475, Rule 67, and the Commission's Order.[9]

In the last analysis, the State arrives at its $66 million revenue projection by applying a factor of 3.7 percent to Matson's and Hearing Counsel's forecast of $63,617,200. Hawaii Opening Brief at 15-16. But this factor comes out of the previously discussed "Attachment 2" which is of doubtful relevance and reliability for the reasons noted. Furthermore, the 3.7 percent figure appears to stem from a comparison of one three-month period (March 31, 1979, through August 31, 1979). See "Attachment 2." The underlying revenue data which purportedly are "actual," as I have mentioned, are derived from later Matson submissions in connection with subsequent rate changes which may or may not be "actual," which relate to different time periods, and have been thrown into this case at a late hour on brief. I am totally without benefit of any examination of this data or "Attachment 2" and have no way of determining its reliability at this stage of the proceeding. I cannot therefore accept it in lieu of Matson's and Hearing Counsel's revenue forecasts.

I do not mean to say that Matson's and Hearing Counsel's forecasts are perfect or without defects. In rate cases, exactitude is impossible anyway and only a reasonable approximation is expected. See, e.g., *Sea-Land Service, Inc.—Increases in Rates in the U.S. Pacific Coast/Puerto Rico Trade*, 15 F.M.C. 4, 10 (1971); *TMT Corp.—Rates*, 19 SRR 177, 187-188 (I.D. 1979; F.M.C. May 16, 1979) and cases cited therein at 187-188. For example, the State claims that Matson and Hearing Counsel have not considered the fact that three general rate increases occurred in August 1978, February 1979, and July 15, 1979, aggregating 6.75 percent on a weighted average basis making allowance for the time each rate level was effective during June through September 1978 and June through September 1979, the relevant projection period for the subject surcharge. The record shows that Matson did include at least two of these rate increases in its projection but probably omitted the July 15, 1979, increase, as even Hearing Counsel concede. Tr. 161; H.C. Opening Brief at 18. Hearing Counsel's witness, Mr. Walker, furthermore, explained the Matson forecasting method by asserting that the effect of relevant rate increases is taken into account. Ex. 10, at 1.

I do not understand why the effects of the July 15, 1979, rate increase which occurred during the middle of the period for which the subject surcharge was supposed to be in effect could not have been used to make an appropriate adjustment to the revenue forecast for the period. Hearing Counsel's answer is that Matson is entitled to rely upon its original submissions in order that the expedited procedures under the new law can work. H.C. Opening Brief at 17. I am not certain when Matson knew that it would be filing a rate increase effective July 15, 1979, so that it could insert the effects of such increase into

[9] I also note that P.L. 95-475 now requires the Commission to specify issues more narrowly when launching investigations so as to ensure the timely completion of manageable cases. Injection of data from later cases at any time by an intervenor which relate to particular issues such as revenue projection not specified in the Commission's Order may be incompatible with the spirit and possibly even the letter of the new law. I do not, however, mean to imply that parties are forever precluded from raising legitimate issues which arise out of another party's evidentiary submission. I only mean that some rule or reason must be followed lest these rapid rate cases become chaotic and amorphous.

its original justification submitted on April 30, 1979, or in later exhibits presented in this case. However, if Matson should have accounted for this increase, no matter how minor the effect on its $63 million revenue projection, it would appear that it should also be allowed to account for increases in fuel costs which also occurred during the period, certainly after May 16, 1979, the last date used to determine "current" fuel costs. It is no secret that fuel costs continue to escalate far more rapidly than once every four months, judging from the five surcharges already filed by Matson this year, not to mention the two or three surcharges that were rejected for technical reasons after this case began.

Perhaps Hearing Counsel's position that constant tinkering with originally submitted data makes the new rate procedures impossible to follow is valid. Also, perhaps an answer to the problem has already been furnished by the Commission when it adopted Domestic Letter 1-79 and Form FMC—274. As noted before, line 7 of that form serves in large measure to correct erroneous estimates of costs or revenues by requiring a subsequent accounting for over-recovery in later surcharge submissions. Hearing Counsel suggest this also applies to the dispute over the revenue projections. H.C. Reply Brief at 7. Again, although the line 7 solution is not perfect, it is a substantial safeguard and given the practical difficulties of litigating the merits of constantly changing surcharges under strict time constraints, perhaps there is no better solution.[10]

To conclude, therefore, I find that I cannot reject or revise the Matson and Hearing Counsel revenue forecasts which are based upon methodologies previously used and accepted by the Commission and its staff and found to have been reasonably accurate and that the alternative forecast presented by the State is based upon later data prepared for a later proceeding, which data I am unable to find to be reliable and relevant in this proceeding.

Necessary Adjustments to Hearing Counsel's Exhibit

As I have indicated previously, I find that Hearing Counsel's and the staff's exhibits calculating the estimated recoverable fuel costs and estimated revenue to be the most reliable and the most reasonable approximation of Matson's costs and revenue justifying Matson's bunker surcharge among the various exhibits submitted. In only one respect, however, do I differ with Hearing Counsel and that is in regard to the staff's willingness to accept Matson's figure of $10.48 as the base unit cost of fuel from which Matson and the staff estimated a unit increase of $6.04 per barrel. This figure, when multiplied by estimated number of barrels (484,794) to be consumed during the four month

[10] The State also asserts that Matson understated its projections for increases in traffic volume. The State claims that traffic volume should increase by 8.75 percent after revisions made by the State, rather than the 7 percent which it claims that Matson forecasts or the 4.85 percent which it claims is "implicit in the Matson revenue projection." Hawaii Opening Brief, at 14-15. But this analysis stems from "Attachment 2" data which the State claims to show that current rates of traffic growth are running at a rate of about 10 percent annually. *Id.* However, a look at "Attachment 2" shows that the 10 percent figure derives from a five-month period (March 31, 1979, through August 31, 1979) and comes from the same data submitted by Matson in connection with later surcharges and rate changes which I have discussed above. Again, "Attachment 2" is untested, unexamined by the parties, relates to a different proceeding, and I am unable to verify its reliability.

period (June through September 1979), leads ultimately to overall estimated recoverable fuel costs. The State has argued that the amount of recoverable fuel has been overstated for several reasons. One reason is, as the State asserts, that the base unit cost is too low as seen by superior evidence submitted by Matson itself under the format approved by the Commission in Domestic Letter 1-79 and Form FMC-274. Matson has submitted its $10.48 per barrel figure which the staff is willing to accept as the "weighted average fuel cost" for December 1, 1978. See Ex. 1, "Exhibit A" and Notes attached. The State's expert witness, Mr. Simat, states that "[t]he base period used in Matson's April 28 justification is confined to fuel purchased only on December 1, 1978, without disclosing the location at which the fuel was purchased or the quantity purchased. The base cost of $10.48 per barrel is, therefore, less reliable and less valid than the restated cost of $10.59 taken from Matson's later justification." Ex. 4 at 8.

Matson's later base cost figures were submitted in connection with a later surcharge under the format required by Form FMC-274, i.e., the average for units purchased between December 25, 1978, and January 5, 1979. The State is not crazy about this methodology either because it is not sure that it captures a representative average base unit cost from the later information submitted by Matson. However, as the State says, "[t]he prescribed methdology is obviously superior to Matson's reliance on the quoted fuel oil cost per unit for one date in time and an arbitrary weighting of the Los Angeles and Oakland port prices." Hawaii Opening Brief at 9-10.

Neither Matson nor Hearing Counsel dispute the fact that the revised base figure ($10.59) is more reliable. Indeed, they could hardly fight it since it conforms to the Commission's own format and comes from Matson's own data. Rather both parties urge me to reject the revised base figure and stick to the original figure of $10.48 per barrel for December 1, 1978, purchases for equitable reasons. Matson argues that it would be a "gross inequity" to retroactively apply the base period set forth in Form FMC-274 to Matson's detriment when Matson acted in reliance on prevailing staff practice at the time it submitpted its justification on April 30, 1979. Matson cites *Mediterranean Pools Investigation,* 9 F.M.C. 264, 304 (1966) in support of its argument. Matson also explains that the $10.48 figure was derived from weighing purchases at San Francisco and Los Angeles during the month of December 1978, citing its Exhibit 8 C. Matson, Reply Brief, at 8.

Hearing Counsel agree with Matson and state that equitable considerations argue for the use of Matson's figure because at the time of Matson's submission of justification, the staff had believed that the December 1, 1978, unit cost figure was the better figure. H.C. Reply Brief at 5. However, Hearing Counsel admit "that from the present perspective the State's base unit cost may be preferable. . . ." *Id.*

I can well understand these equitable arguments. Certainly Hearing Counsel, speaking for the staff, (and maybe personally, I do not know) feels that the honorable thing to do is to accept Matson's original figures which were furnished to the staff in the manner which the staff itself had recommended. But now that we know that a better figure is available and unlike other data which

the State urges that I accept, relates to an actual past period, not a projected period, and conforms to the Commission's own Form FMC–274, is it entirely fair and reasonable for the Commission to ignore the superior figures? If that is done, the rate payers, in principle, are bearing some additional cost burden so that the staff and Hearing Counsel can do what they believe to be honorable and they are asking the Commission to be bound as well.

I am aware of the equitable doctrines of law and the cases which frown upon retroactive changes in policy which adversely affect parties who acted in reliance on previous policy. Such is *Mediterranean Pools Investigation, supra.* In that case the Commission refused to penalize parties who had relied upon previous precedent and in that one case were willing to grant retroactive approval to a section 15 agreement. 9 F.M.C. at 304. The Commission likened the situation to that involved in *N.L.R.B. v. Guy F. Atkinson Co.,* 195 F.2d 141 (9th Cir. 1952), wherein the court refused to allow a company to be punished when the N.L.R.B. suddenly changed its policy regarding jurisdiction over the company. *Id.* There are, of course, other cases in which some type of change in existing law coupled with an attempt to apply it retroactively has disturbed a court's conscience and sense of equity. Cf., e.g., *Arizona Grocery v. Atchison Ry.,* 284 U.S. 370, 389 (1932); *Wainwright v. National Dairy Products Corp.,* 304 F. Supp. 567, 573 (N.D. Ga. 1969). However, there are times when courts have permitted policy or rule changes to apply retroactively, especially if the new rule or policy appears to be reasonable. See, e.g., *General Tel. Co. of the S.W. v. U.S.,* 449 F.2d 846, 863 (5th Cir. 1971); *People of the State of California v. Simon,* 504 F.2d 430, 438–439 (TECA 1974); *South Terminal Corporation v. E.P.A.,* 504 F.2d 646, 678 (1st Cir. 1974); Davis, *Administrative Law of the Seventies,* § 5.08.

At one time it was believed that the Government could never be estopped, i.e., that regardless of staff or agency advice to a person, that person could later be found to be in violation of law if he followed the advice. See Davis, *op. cit.,* § 17.01 et seq. More recently, however, the courts have become concerned over equities so that even the government can be estopped if necessary to prevent a grave injustice, for example, to prevent a person from being deported or from losing valuable property. Davis, *op. cit.,* § 17.03. However, the courts also consider whether estopping the government will result in great cost to the public. Davis, *op. cit.,* at 406; *Union Oil Co. of Calif. v. Morton,* 512 F.2d 743, 748–749 (9th Cir. 1975). Also, bear in mind that the advice to submit a December 1, 1978, figure was given by the Commission's staff, not by any decision of the Commission or because of G.O. 11. Sometimes the Commission indicates that it will not follow the staff's decisions and even reverses them, affecting outside parties. See *Rejection of Tariff Fillings of Sea-Land,* 13 F.M.C. 200 (1970).

In the instant case, we clearly have better, more reliable evidence as to the base unit cost of fuel back in late December and early January 1979. This evidence has been submitted by Matson itself in accordinace with the Commission's own prescribed form. Instead of a base unit fuel cost confined to one day, December 1, 1978, the revised figure encompasses a broader period of time, December 25, 1978, through January 5, 1979. This formula is established in line 1 of Form FMC–274. The use of the improved formula shows that the

average unit cost of fuel during the specified period was $10.59, as compared to only $10.48 pertaining to one day in December of 1978. As I show below, the use of the better figure results in a lowering of added fuel costs to be borne by domestic general cargo shippers by $50,075. This is a minuscule amount of money compared to Matson's estimated revenue of $63,617,200, only eight-hundredths of one percent (50,075 divided by 63,617,200 times 100 equals .08 percent).

The requirement, in principle, that Matson absorb this minuscule amount, rather than pass it on to the domestic general cargo shippers, is hardly the type of penalty or hardship which the courts prevent in the equitable estoppel cases. In other words, in weighing the adverse effects on Matson with the public interest that the most reasonable evidence be used to ensure that correct allocation of costs is made, the public interest should take precedence if the private harm is so microscopic. We are not here talking about deporting a person, revoking a license, taking away valuable land, and such other drastic results which courts will prevent under modern concepts of equitable estoppel.

I am not undermining the principle that these expedited rate cases should be decided on the basis of original data submitted by Matson subject to reasonable modification to eliminate obvious errors in methodology or errors resulting from oversight, to the largest extent possible, so that the purposes of the new law can be effectuated. I am holding, however, that when there is obviously available more reliable data which the carrier and staff concede to be superior, it should not be ignored when the equities arguing against using that data are not strong in effect. In other words, if the use of the later figure based upon the staff's revised thinking and the Commission's Form FMC-274 were to have serious adverse effects on Matson, then perhaps principles of equity would dictate that the original figure be used and that the later figure be employed only in later cases dealing with later surcharges. But here, as noted, and as shown below, application of the revised figure has a microscopic impact on Matson and even there, one in principle only, if, as Matson contends, its subsequent filings show that it has underrecovered using the 4.43 percent surcharge and it is already applying a 5.90 percent surcharge as of August 25, which will become 6.66 percent on October 1, 1979, in order to make up for its alleged deficits. In contrast to the above situation, what might be inequitable would be a finding that Matson had violated the law by overrecovering substantial amounts (maybe a million dollars) although Matson followed Form FMC-274 and methodology recommended by the staff, because of a radical and sudden change in basic methodology with retroactive application. I do not believe that the slight modification resulting from changing from use of a one-day base period to one which uses a period of almost two weeks, an obviously more reliable test, is such a substantial shift of policy that it invokes principles of equitable estoppel especially when the retroactive impact is so tiny and may well be completely academic.[11]

[11] In balancing equities certain other facts benefiting Matson should not be overlooked. For instance, Matson has benefited by the fact that the Commission is treating Matson's bunker surcharges not as general increases in rates although they apply across-the-board to domestic general cargo shippers apparently because each incremental increase in surcharge is less than 3 percent. This means that the Commission cannot order refunds with interest if it finds the surcharge to have been unlawful. See section 3(c)(2) of the Intercoastal Shipping Act, 1933, as amended by P.L. 95-475. Also, the Commission has not suspended any of these surcharges, which it could have done since they are not treated as general increases in rates. Section 3(c)(1)(B), as amended. Moreover, although the surcharges now aggregate 5.90 percent (to increase to 6.66 percent on October 1 of this year), they are nevertheless not being treated as general increases in rates. Therefore, they can be and have been filed on only 30-days' notice and there has been no limitation imposed on the number of surcharges that can be filed in any one year.

The following table restates Hearing Counsel's exhibit by employing the more reliable base fuel cost figure:

RESTATEMENT OF HEARING COUNSEL'S CALCULATIONS

Hearing Counsel		*Restatement*	
1. Average fuel cost per unit purchased Dec. 1, 1978	$10.48	1. Average fuel cost per unit purchased between 12/25/78 and 1/5/79	$10.59
2. May 16, 1979 unit fuel cost	$16.52	2. May 16, 1979 unit fuel cost	$16.52
3. Difference (line 2 less line 1)	$ 6.04	3. Difference (line 2 less line 1)	$ 5.93
4. Estimated consumption of fuel barrels	484,794	4. Estimated consumption of fuel barrels	484,794
5. Estimated consumption times difference in unit cost (line 4 times line 3)	$ 2,928,156	5. Estimated consumption times revised difference in unit costs	$ 2,874,828
6. Measurement ton ratio (domestic general cargo divided by all cargo on combination vessels	93.90%	6. Measurement ton ratio domestic general cargo divided by all cargo on combination vessels	93.90%
7. Fuel cost allocated to domestic general cargo (line 6 times line 5)	$ 2,749,538	7. Fuel cost revised (line 6 times line 5)	$ 2,699,463
8. Estimated four-months' revenue	$63,617,200	8. Estimated four-months' revenue	$63,617,200
9. Percentage surcharge needed (line 7 divided by line 8)	4.32%	9. Revised percentage surcharge needed (line 7 divided by line 8)	4.24%

As can be seen from the above table, the necessary percentage surcharge, as revised, amounts to 4.24 percent rather than 4.32 percent recommended by Hearing Counsel, or a difference of only eight-hundredths of one percent. In principle, as I have found above, this means that the amount of fuel cost which Matson should not have allocated to domestic general cargo shippers amounts to only $50,075 ($2,749,538 less $2,699,463, line 7 in the table).

I conclude, therefore, on the basis of the most reliable evidence used to forecast the four-month period for which the surcharge was to have been in effect, that the subject 4.43 percent surcharge was excessive to the extent it exceeded 4.24 percent. If we are to follow the traditional principles in rate cases that carriers are held to reasonable forecasts and estimates in determining whether their decisions to increase rates were just and reasonable, then the decision to increase the previous surcharge to 4.43 percent was unreasonable in that it should have provided Matson with more revenue than needed to recover additional fuel costs. Subsequent evidence showing actual results to be otherwise or evidence submitted in later surcharge cases showing actual under-recovery does not change the finding that the carrier had made an unreasonable decision under these traditional principles. See, e.g., the situation described in *Alaska S.S. Co. v. F.M.C.,* 334 F.2d 810 (9th Cir. 1965) and the Commission's Order Denying Petition of Respondents in *Alaska Steamship Co.—Seasonal Rates,* 6 SRR 325 (1965). In that case the Commission had made its findings concerning the unreasonableness of the carrier's rates on the basis of evidence of estimated projections for the year 1962. The carrier, however, asked the Commission to reopen the record to take later evidence of actual experience beyond the year 1962 and asked the Court of Appeals to order the Commission to do this. The Court refused, however, leaving the matter up to the Commission. The Commission, following traditional principles governing rate cases, adhered to the earlier evidence of record and advised the carrier to file new rate increases if it wished to rely upon later evidence showing actual experience. The Commission believed that the integrity of the ratemaking process was at stake since these cases were to be decided expeditiously and therefore could not be reopened to take additional actual evidence indefinitely. The Commission noted that the introduction of later data would require extended proceedings for the purpose of proper cross-examination and that the requirements of expedition in rate cases would not permit such an exercise. Therefore, the Commission stated:

> The proper procedure for Alaska Steam to follow is to file new rate increases with the Commission if in its opinion such increases are warranted. These rates can then be adjudicated in a new rate proceeding in which Alaska Steam will be free to introduce any evidence of past operating results and future projections. The rate-making process does not envision that respondents be allowed to indefinitely prolong pending cases for the purpose of continually bringing the record up to date. If our suggestion is followed, the best interests of the carrier and the ratepaying public will be protected.
>
> 6 SRR at 328.

If the Commission took that position because of the need to conclude rate cases expeditiously, then it is all the more critical to adhere to such position under the new law which concerned the Commission in *Alaska Steam.* It should be noted, furthermore, that this principle of relying upon best estimates and projections in rate cases, not waiting for later experience, is still followed. In the three most recent Matson rate cases, Docket No. 73-22, 75-57, and 76-43, the Commission decided each one on the basis of the evidence and projections in each case rather than on later evidence introduced in the subsequent cases. Finally, the later evidence which the State wishes to use in

support of its position can be tested in the subsequent surcharge cases or, if not, line 7 of Form FMC–274 permits evidence of actual experience to be used to cause an adjustment so that future surcharges will be held down.

If the bunker surcharge problem however, were being treated by the Commission not under traditional rate case principles but only as a type of reporting to ensure that actual increases in fuel costs are being and have been passed through to shippers under proper accounting methodologies, then the question of reasonableness of Matson's decision to implement the 4.43 percent surcharge would be decided on the basis of actual results shown in Matson's later evidentiary submissions. If so, then Matson's current decisions would be found lawful or unlawful on the basis of facts to be developed later from actual experience regardless of what principles of forecasting Matson employed when making decisions to file surcharges or how reasonable they appeared to be at the time the decisions were made. This would seem to be inequitable. On the other hand, if the Commission decided that, to avoid this inequity, Matson should not be found to have acted unlawfully on the basis of later facts showing what actually happened under the surcharges, there would be less protection to shippers because Matson would be free to select surcharge levels without too much care subject only to reductions in subsequent surcharges in case of overrecovery. However, shippers paying such surcharges might not be around to enjoy future reductions and in any event would be overpaying while they were shipping. In the last analysis, therefore, apparently the Commission has decided that the best protection for shippers paying surcharges at any particular time is the guarantee that Matson has been required to follow reasonable forecasting techniques (failing which Matson would be liable to reparation cases) and that in the event of overrecovery there will be future reducing effects on subsequent surcharges. This discussion does not answer the question whether the present procedures allowing continual increases on as little as 30-day's notice and treating them as non-general rate increases are the best procedures that can be devised to deal with the continual surcharge problem, considering the fact that the carrier is allowed to project additional costs four months into the future to protect itself from falling behind in its attempts to have its revenues keep up with costs.[12]

Analysis of Positions of George A. Hormel & Co. and Oscar Mayer & Co.

As I mentioned earlier, the two protestants, George A. Hormel & Co. and Oscar Mayer, contended that the subject surcharge was unjustified, unreason-

[12] The State attached five orders of the Civil Aeronautics Board dealing with many general rate increases filed by air carriers during the period June 1976 through November 1977 These orders are very revealing. They show that up to September 1977, the C.A.B. had never allowed cost projections, which they called "anticipatory costs." (This Commission has allowed projections in rate cases for many years.) However, the C.A.B. was forced to reconsider this policy because it caused carriers to file rate increases repeatedly in order to try to keep up with cost increases since they were not allowed to publish rate increases to cover future costs. This policy was changed. (See September 22, 1977, Order of the C.A.B.) The C.A.B. now allows cost projections for three months beyond the effective date of the rate change but in return holds the carriers to only two rate increases a year, i.e., it freezes rates for six-month periods. The C.A.B. felt that this mandatory freeze would encourage carriers to operate more efficiently since they would have to live with their projections for longer periods of time. (The C.A.B. also stated that they wanted "current data," not "old data when current statistics will soon be available." C.A.B., Order of Nov. 1, 1977 at 2. However, the "current data" itself related to past periods not projected periods, and unlike the F.M.C. procedures, there will apparently be no *other* C.A.B. cases during the six-month period, in which later data can be tested.) The C.A.B., operating under different statutes, apparently treats the air carrier's barrage of rate increases as general rate increases and has no adjustment provision like line 7 of FMC Form FMC 274. A main advantage of the C.A.B. method is to hold down the number of rate increases per year.

able, and inflationary, and should be canceled or at least suspended and investigated. In their testimony (Exhibits 6 and 7), the very sincere witnesses for Hormel (Mr. Finch) and for Oscar Mayer (Mr. Gillings and Mr. Kratochvil on brief) elaborated upon these contentions.

Protestant Oscar Mayer is a substantial shipper of meat and food products from the West Coast to Hawaii. It ships an average of over 5.3 million pounds of its product a year in 193 containers. It pays significant amounts of freight and feels the impact of the 4.43 percent surcharge to be excessive. According to the written testimony of Mr. Gillings, Traffic Manager-Rates and Tariffs (Ex. 7), the application of the surcharge by Matson is unfair because it falls disproportionately on westbound shippers, prefers sugar and molasses shippers, and exceeds increases in fuel costs so that the previous 3.54 percent would have been sufficient. In its opening brief Oscar Mayer recommended that 47 percent of the additional fuel costs should be allocated to eastbound shippers and 53 percent to westbound. In its reply brief, Oscar Mayer suggests alternatively that the allocation ratio be 34 percent to eastbound shippers and 66 percent to westbound.

Like Oscar Mayer, George A. Hormel's witness (Mr. Finch) vigorously argued that Matson's allocation method preferred sugar and molasses shippers and consequently burdened westbound shippers unfairly. He calculated that his company's products would bear an additional $3.02 per ton whereas sugar and molasses would bear only $.69 and $.23 per ton respectively. Ex. 6. He also calculated how many barrels of fuel were used westbound to arrive at the extra cost on his shipments per ton. He concluded from his studies that the two previous surcharges imposed by Matson have recovered more than enough to recover increased fuel costs "with $21,411 left over." He also concludes that on a westbound leg extra revenue derived from the surcharge is well over costs of the westbound leg and indeed well over 50 percent of the eastbound fuel usage. Mr. Finch contends therefore that westbound shippers are paying a disproportionately high amount whereas eastbound shippers are not paying their fair share.

In his opening brief, Mr. Finch emphasizes that Matson's witness was not experienced in the sugar and molasses business to establish that 47 percent of the allocation of fuel costs to shippers of those commodities would be unduly harmful to them and he questions whether negotiations between Matson and its corporate relatives shipping sugar and molasses are really conducted at arm's length. Mr. Finch also questions why the sugar and molasses shippers are assessed under a different method (cents per ton) than other shippers who pay a percentage surcharge on rates when fuel costs increase and how the Commission's G.O. 11 can permit such a thing.

In his final brief submitted for George A. Hormel & Co., Mr. Finch continues questioning the different treatment of the sugar and molasses shippers and contends that such treatment is incompatible with the Commission's Domestic Circular Letter 1-79, forms and regulations. He again questions the good-faith negotiations between Matson and related sugar and molasses companies and questions Matson's witnesses's opinion that these shippers could not bear 47 percent of the fuel cost increases. Mr. Finch concludes that the

Commission should order Matson "to recover all cargo in the voyage on measurement ton flow basis." Hormel Brief, August 31, 1979, at 7.

Both Hearing Counsel and Matson disagree with protestants. However, it appears that some of the dispute between Hearing Counsel and protestants may be based upon their misunderstanding of the manner in which Hearing Counsel and the staff have removed any undue burden which would have been cast upon domestic general cargo shippers as a result of the special sugar and molasses contracts.[13] Both Hearing Counsel and Matson oppose protestants' different method of allocation which is based upon splitting legs of round voyages by assigning percentages of fuel costs to eastbound and westbound shippers using fuel consumed per leg or by applying measurement tons per leg.

I find upon examination of protestants' contentions that notwithstanding the sincerity with which they are argued, they proceed on a radically different and unsound basis of steamship accounting, fail to understand that Hearing Counsel and the staff have eliminated the preference given to sugar and molasses shippers, and otherwise lack support.

The idea espoused by Oscar Mayer, and to some extent suggested by Hormel in Mr. Finch's testimony, that Matson's voyages should be broken down into westbound and eastbound legs and that allocations of the costs of fuel should somehow be made to westbound and eastbound shippers after the splitting of the voyage marks a total departure from Commission case law and the G.O. 11 methodology, as Hearing Counsel and Matson point out.

In *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade,* 9 F.M.C. 220, 232 (1966), the carrier had attempted to allocate expenses by splitting its round voyages into legs and then applying a revenue ratio. This idea was emphatically rejected by the Commission in favor of the ton-mile ratio method applied against the total round voyage. The Commission stated:

> The nature of ocean transportation is, furthermore, such that these costs of operating vessels between points are mainly "joint costs" or costs which should be borne proportionately by the users of the services in both directions.

The Commission's General Order 11 codifies the above statement by defining "voyage" as follows:

> "Voyage" normally means a completed round voyage from port of origin and return to port of origin. In no case shall a Voyage be split to reflect outward and inward services separately.
>
> 46 C.F.R. §512.6(K).

Both Mr. Walker, Hearing Counsel's staff expert witness, and Mr. Kane, Matson's chief witness, testified in essence that round voyage accounting is the

[13] For example, in Mr. Finch's (Hormel's) opening brief, he makes the statement as follows: "Witness Walker presented Exhibit 5 which *confirmed* the Matson methodology of observing the restrictive measurement ton escalation clause of sugar and molasses and allocating the remainder of the bunkering fuel cost increase to the other cargo." (Emphasis added.) He then cites his questions to Mr. Walker in which he asked Mr. Walker "[w]hy do you agree that the recognition of the present contractual escalation clause on sugar is proper in this instance?" Hormel, Opening Brief at 5. But witness Walker did not "confirm" the sugar contract in the sense of approving it or agree that it was proper. He tried to explain, as I have done earlier and repeat below in the decision, that he and Hearing Counsel removed any harm resulting from the sugar and molasses contract by applying the measurement ton allocation methodology. Also, later in his brief Mr. Finch seemed to believe that Mr. Walker and Hearing Counsel were endorsing two simultaneous different methods of recovery of the fuel cost increases used by Matson, namely, the general surcharge and the special sugar and molasses method. They did not, however, do this. Again, as I have explained, they corrected any harm which may have befallen general cargo shippers stemming from this dual method by applying the measurement ton allocation methodology.

accepted and customary method of steamship accounting. Mr. Walker indeed explicitly testified that expenses may not be allocated to legs of a voyage. Tr. 147.

The problem with splitting voyages, as Matson's witness Mr. Kane demonstrated and Matson showed on brief, is that it leads to absurd and unfair results. In the Hawaiian trade, for example, westbound shippers, who ship the majority of the containers, expect to have them returned to the West Coast so that they can be filled again for more shipments eastbound. However, for voyages terminating in March 1979, as Mr. Kane testified (Ex. 1 at 9), 9,002 containers were carried westbound but only 2,305 were carried full eastbound. Although the westbound shippers have an obvious interest in the ship's returning to the West Coast with available containers, allocation by dividing numbers of containers into costs for each leg split evenly between legs would mean that westbound shippers would pay much less in vessel costs per container. Furthermore, the far fewer eastbound shippers would be paying for the return of the empty containers which were only shipped to Hawaii because of the westbound shippers.[14] But under round voyage accounting, the westbound shippers who use the greater amount of Matson's services must necessarily pay a share of the cost of the back haul. See also *Matson Navigation Co.—General Increase in Rates,* 16 F.M.C. 96 (1973). Back haul (eastbound) shippers are not given a free ride but pay a share of joint vessel costs under the rates they are charged. Ex. 1, "Exhibit 1," at 4. Therefore, any allocation based upon splitting the round voyage such as by applying 53 percent to westbound and 47 percent to eastbound legs on a fuel consumed basis as first suggested by Oscar Mayer or, alternatively, by 66 percent westbound and 34 percent eastbound on a "measurement ton flow basis" (Oscar Mayer Reply Brief, last page) is conceptually defective because of the refusal to recognize that voyages are joint ventures from beginning to completion having joint costs which all shippers must share regardless of legs.

Protestants' fear that sugar and molasses shippers are being preferred is unwarranted once Hearing Counsel's and the staff's remedial application of the measurement ton methodology is accomplished. As I explained earlier in this decision, the disproportionate burden which would be cast upon domestic general cargo shippers if we permitted Matson to calculate the level of surcharge by its own methodology based upon recovery under the sugar and molasses contracts, is relieved by means of the measurement ton methodology. As discussed, application of the methodology shows that an unfair burden in the amount of $42,860 would have been cast upon domestic general cargo shippers and that this amount must be absorbed by Matson if it wishes to adhere to the sugar and molasses escalation clauses in its sugar and molasses contracts. Thus, the entire argument about the relationship between Matson and sugar and molasses shippers and whether their negotiations were conducted at arm's

[14] As an example of what absurd results the split voyage method could lead to, consider an unbalanced trade in which 99 shippers shipped westbound and only one shipper shipped eastbound. If virtually the same fuel cost applies in both legs, (and assume it is $500,000 on each leg) the 99 shippers would share the $500,000 burden while the poor, single shipper eastbound would be asked to cough up the $500,000 for his leg all by himself. Almost equally absurd results would occur if we employ a tonnage ratio by split legs. For example, if the eastbound shippers only shipped 10,000 tons but the westbound shippers shipped 100,000 tons, the eastbound shippers would be responsible for ten times as much in fuel costs as the eastbound on a per tonnage basis although the entire voyage overwhelmingly benefits the westbound shippers.

length is immaterial. If Matson really tried to prefer those shippers (and there is no evidence that this is so),[15] only Matson would suffer because it would be forced to absorb any deficits because of underrecovery resulting from preferential contracts, i.e., Matson could not pass the deficit onto other shippers. Similarly, the fact that sugar and molasses shippers pay so many cents per ton under the escalation clauses rather than by flat percentage of rates has no practical significance as far as domestic general cargo shippers are concerned because any deficits under the contracts are not borne by those other shippers as a result of the corrective effects of Hearing Counsel's and the staff's measurement ton methodology. This leads to the final arguments of Oscar Mayer regarding their belief that westbound shippers will be burdened with 80 percent of fuel costs whereas eastbound shippers will carry only 20 percent of the burden, their confusion over the application of General Order 11 by the staff, and their belief that use of the two different methods of recovery (cents-per-ton for sugar and molasses shippers, percentage-of-revenue for domestic general cargo shippers) is not justified or lawful under governing regulations.

Oscar Mayer believes that there is an unfair burden on westbound shippers because they will have to bear 80 percent of the additional fuel costs. The short answer to this argument is that the shippers who use the bulk of Matson's service, i.e., who ship 80 percent of total tons between Hawaii and the West Coast would naturally be the greatest contributors to Matson's expenses on an overall basis just as they would be paying the bulk of Matson's overall revenue. The Commission recognized furthermore in *Alcoa, supra,* that there is a relationship between expenses and the quantum of service purchased. In the shipping industry, this was taken to mean that the more tons carried and miles involved in the service purchased, i.e., the quantum of the transportation service, the more expenses would be correspondingly involved. That is the basis for the ton-mile allocation methodology in which vessel expenses which are jointly shared on vessels moving in domestic and foreign trades are allocated between shippers in the domestic trade and shippers in the foreign trade. The alternative method which Oscar Mayer urges, however, is to split the domestic trade between two legs of the voyage and assign expenses and apparently to assign expenses on each leg independently of the other leg as if shippers should have no concern over the leg of the voyage in which their commodities are not moving. As mentioned, however, this is a fundamentally unsound concept in steamship accounting which G.O. 11 has long forbidden.

What Oscar Mayer and Hormel apparently do not appreciate is that after application of the G.O. 11 allocation methodology which was made necessary to remove the harmful effects of the special recovery clauses under the sugar and molasses contracts, all domestic general cargo shippers are placed on an even basis, paying the same percentage increase on an across-the-board basis so that the full fuel increase in fuel cost can be recovered. If the percentage

[15] The contention that Matson prefers sugar or molasses or pineapple shippers in negotiating rates has arisen a number of times in past cases and never seems to stand up to analysis. See, e.g., *General Increase in Rates,* 7 F.M.C. 260, 273, 279-281 (1962) in which the Commission found good-faith negotiations notwithstanding Matson's corporate connections with the shippers involved and also found the sugar contracts to be lawful. 7 F.M.C. at 279 281. Furthermore, Matson introduced Exhibit 3, a consent decree in *U.S. v. Alexander & Baldwin, Ltd., et al.* (U.S. District Court, Hawaii, Civil Action No. 2235, August 17, 1964), which places restrictions among Matson and its corporate family members to facilitate arm's-length transactions among them.

increase had been varied among general cargo shippers, perhaps Oscar Mayer or Hormel might have cause to complain unless such discrimination could be justified. But being evenly applied, their only complaint is that they and all westbound shippers end up paying the largest share of the fuel costs on an aggregate basis. But this is because they are all purchasing the vast bulk of Matson's services in an unbalanced trade where westbound tonnages vastly exceed eastbound.

Both Oscar Mayer and Hormel question the propriety of permitting a dual system of recovery under G.O. 11, Domestic Circular Letter 1-79, and pertinent Commission regulations. Either or both protestants believe that the Commission's staff has made an internal decision which should have been done by means of public rulemaking so that an alternative form of surcharge could have been approved by the Commission.

It is true that Form FMC-274 contemplates a percentage of revenue method for fixing bunker surcharges. See line 12 of the Form. There is, however, nothing shocking about this. Ocean carriers have long used either flat percentage surcharges or dollars-per-ton as the methods of imposing emergency rate increases. Each method has its proponents and good and bad points but both have been permitted. See, e.g., the discussion in *Surcharge on Cargo to Manila,* 8 F.M.C. 395, 397, 399-400 (1965) where dollars-per-ton was finally selected and *Surcharge at U.S. Atlantic & Gulf Ports,* 10 F.M.C. 13 (1966) where the flat percentage of rates method was used. See also F.M.C. Domestic Circular Letter No. 74-1, January 8, 1974, in which the percentage of rates method was prescribed. The present Form FMC-274 permitting the percentage method therefore is no sudden change in policy or departure from precedent which requires a rulemaking proceeding as a matter of law. Furthermore, it is well known that rules can be enunciated in adjudicatory proceedings as well as in rulemaking proceedings. Unless there is convincing evidence that a dollars-per-ton surcharge method is more reasonable or that the flat percentage-per-rates method is unjustly discriminatory, which evidence I have not seen, the percentage-of-rates method presently embodied in Form FMC-274 can be found to be proper in this proceeding. This assumes, maybe incorrectly, that the issue is open. As Hearing Counsel note, the Commission has indicated in its Order of Investigation in Docket No. 79-84 (the investigation of the subsequent 5.90 Matson bunker surcharge), that "an investigation is not the proper forum for discussion of the merits of Circular Letter 1-79, Form FMC-274 and General Order 11." Order, served August 24, 1979. As Hearing Counsel again note, if protestants are unhappy with current methodology, they can ask the Commission to reassess its position in a proceeding devoted to the problem. It is important to recall that the recent amendments to the Intercoastal Act, 1933, under P.L. 95-475 require the Commission to detail the "specific issues to be resolved" when commencing a formal proceeding under Sec. 3(a) of the 1933 Act, so that proceedings can be concluded expeditiously and unnecessarily lengthy and complex proceedings can be avoided. See Senate Report 95-1240, 95th Cong., 2d Sess., September 26, 1978, at 1. The issue of one form of recovery (dollars-per-ton) vis-a-vis another (flat percentage) was not specified by the Commission in its Order commencing this

case and may therefore be outside the scope of the proceeding.

I believe, however, to conclude the above discussion, that the important point which is being missed by protestants is that Matson's dual use of the flat percentage across-the-board method for domestic general cargo shippers as well as the cents-per-ton method for sugar and molasses shippers, while on its face questionable, in fact is harmless since application of the G.O. 11 (measurement-ton-ratio) methodology prevents Matson from allocating to those general cargo shippers cost burdens which they should not bear.

I cannot therefore conclude that protestants are being unfairly burdened because of preferences given to sugar and molasses shippers, or because of Matson's duel system of recovery, or that G.O. 11 methodologies are being misapplied or misinterpreted by the Commission's staff, or that Matson's voyages should be split into legs so that eastbound and westbound shippers can be separately evaluated to determine which portion of additional fuel costs should fall on each of them, or that there is anything intrinsically wrong with the percentage-of-revenue method of assessing a surcharge.

Ultimate Conclusions

Matson filed a surcharge in the amount of 4.43 percent effective May 30, 1979, which, although supposed to run until September 30, expired on August 25, 1979, with the publication of another surcharge amounting to 5.90 percent. Matson's original data supporting the subject surcharge, as revised by Matson to exclude a tiny portion of foreign cargo, supports 4.39 percent as the permissible level of surcharge necessary to recover additional fuel costs which have been escalating very rapidly, Hearing Counsel's and the Commission's staff's data shows that the level should be 4.32 percent while the State of Hawaii calculates 3.87 percent. Protestants Oscar Mayer and George A. Hormel do not believe Matson to have justified the 4.43 percent figure and believe that an entirely new method of accounting should be employed to determine the necessary level.

Hearing Counsel's and the staff's figure of 4.32 percent is the most reasonable approximation of what Matson needed compared to the other two calculations, and, as adjusted slightly to account for more reliable evidence of base unit cost, the permissible level should have been 4.25 percent. Hearing Counsel's figure is based upon the use of approved and established methodology which had to be employed to offeset the additional burden on domestic general cargo shippers ($42,860) which would result from application of Matson's allocation methodology based upon escalator clauses in Matson's special sugar and molasses contracts. The Matson method has not been shown to be more reliable than Hearing Counsel's methodology which is based upon the Commission's General Order 11 and previous case law. Indeed, there is no showing that Matson's formula devised for its sugar and molasses contracts shows a proper correlation between fuel costs and increased revenue needs. Furthermore, even Matson employs the G.O. 11 methodology in extracting foreign cargo from its calculations. The State also uses the erroneous Matson methodology in calculating its figure.

The State takes the position that all available evidence showing later data should be introduced into the record in this kind of proceeding before deciding what a reasonable maximum surcharge should be. Hearing Counsel, the staff, and Matson believe that evidence and data originally submitted should be relied upon to the fullest extent possible and that constant introduction of changing data will make it impossible to comply with the new rigid time constraints imposed on rate cases by P.L. 95-475. I find that Hearing Counsel's and Matson's position is sound but allow for some flexibility in the event that errors are uncovered in the original calculations whether because of incorrect accounting methodology or oversight or if obviously more reliable evidence becomes available which does not require testing by cross-examination or rebuttal evidence. Thus, in one respect only I have modified Hearing Counsel's calculations to allow for the use of evidence submitted by Matson for another surcharge which Hearing Counsel acknowledged may be "preferable" but feel honor-bound not to use against Matson under principles of equitable estoppel. I do not find that the Commission should be estopped from using the data which complies with the Commission's own Form FMC-274, after balancing all the interests, and, in any event, the adjustments resulting from use of the more reliable data are minimal and perhaps somewhat academic since Matson has already filed two subsequent surcharges allegedly showing underrecovery under the 4.43 percent and previous surcharges. I cannot, however, find that I can rely upon the State's data which it proffers as an "attachment" to its post-hearing brief. This data was never introduced into evidence so that the parties could have the opportunity of testing it by cross-examination or rebutting it with contrary evidence if necessary. The data shown in the "attachment" would make substantial changes in Matson's and Hearing Counsel's revenue projections but it relies upon underlying data submitted by Matson in connection with other rate changes, compares different periods of time, "interpolates" certain figures, and reaches significant conclusions without explanation as to how the "attachment" was constructed. If these conclusions are reliable, they should be tested together with the underlying data in the proper manner, by examination in the later proceedings. Without adequate examination in this proceeding, I find it virtually impossible to understand the bases for its conclusions or to evaluate its reliability. Moreover, if Matson's and Hearing Counsel's revenue projections are incorrect, line 7 of Form FMC-274 will provide some measure of compensation.

By using the later, more reliable data pertaining to a broader base period for unit cost of fuel, as now prescribed by Form FMC-274, and as urged by the State, I have adjusted Hearing Counsel's calculations to show that the maximum surcharge should have been 4.24 percent rather than 4.32 percent which Hearing Counsel support, or a difference of .08 of one percent. This amounts to $50,075 in revenue which Matson theoretically should not have cast onto domestic general cargo shippers and should have absorbed. This figure compares with $63,617,200 in revenue for the four-months' period for which the surcharge had been projected.

Protestants George A. Hormel and Oscar Mayer, but especially the latter, believe that entirely new methodologies should be employed to ensure that

westbound shippers are not unfairly burdened with the additional fuel costs as compared to eastbound shippers. However, these new methodologies would split round voyages into eastbound and westbound legs, an unsound method of accounting which the Commission has rejected in a previous case and which G.O. 11 forbids. When the G.O. 11 allocation methodology is applied, furthermore, any excess burden which domestic general cargo shippers might have had to bear will be eliminated and all domestic general cargo shippers will bear a proportionate share of costs of the round voyage depending upon the volume of cargo they ship in measurement tons. Protestants' belief, furthermore, that there is something harmful about the fact that Matson uses one basis for recovery of extra fuel costs on sugar and molasses shippers (cents per ton) while using another basis for domestic general cargo shippers (percentage of rates) is unwarranted since both bases have been used by carriers in the past and accepted by the Commission and application of the G.O. 11 allocation methodology ensures that domestic general cargo shippers are not bearing costs which should be allocated to sugar and molasses shippers.

The procedures which the Commission now follows to deal with continual filings of bunker surcharges provides for adjustment of overrecovery or underrecovery under line 7 of Form FMC–274. This adjustment does to some extent protect shippers against mistaken forecasts by Matson since if Matson overrecovers it will be required to reduce subsequent surcharges, although the procedure is not perfect and to some extent seems inconsistent with accepted principles of law in ratemaking cases followed by the Commission which decide whether a carrier's rates are just and reasonable by use of forecasts and estimates, not by retrospective historical experience. However, the merits of the present procedures are beyond the scope of this case. The new law, P.L. 95–475, requres the Commission to specify issues so that rate cases can be decided expeditiously, and the merits of the Commission's procedures shown in Domestic Circular Letter 1–79, Form FMC–274, or G.O. 11, have not been specified for determination. For the Commission's information, however, the Civil Aeronautics Board deals with continual rate increases in a somewhat different manner allowing three-month cost forecasts but holding carriers to their rates for six months and treating the many rate increases as general increases in rates, at least so it appears from various orders of the C.A.B. issued during 1976 and 1977.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D. C.
September 20, 1979

FEDERAL MARITIME COMMISSION

[46 C.F.R. §547; DOCKET NO. 79-12]

IMPROVEMENTS IN PREHEARING AND DISCOVERY PROCEDURES

November 27, 1979

ACTION: Discontinuance of Proceeding

SUMMARY: The Commission has determined that this proceeding which was initiated by Advance Notice of Proposed Rulemaking of March 13, 1979 (44 Fed. Reg. 14582) should be discontinued because the comments received demonstrate that there is no consensus that the Commission's discovery rules need amendment. However, the Commission will consider whether certain comments justify the institution of a rulemaking proceeding and is providing appropriate explanations to eliminate particular misunderstandings about some of the rules.

DATES: Effective November 30, 1979

SUPPLEMENTARY INFORMATION:

The Commission initiated this proceeding by Advance Notice of Proposed Rulemaking which was published in the *Federal Register* on March 13, 1979 (44 Fed. Reg. 14582). The purpose of the proceeding was to elicit comments to determine if there is a need to amend the Commission's rules relating to prehearing inspection and discovery in order to improve efficiency and eliminate undue delay in the conduct of formal proceedings. The Commission was aware that special committees of both the American Bar Association and the Judicial Conference of the United States had conducted studies and recommended that certain amendments be made to the federal rules of discovery followed by the United States district courts to which the Commission's discovery rules, in large measure, conform.

The comments generally demonstrate that there is no consensus that further amendments to the Commission's rules are necessary at this time. Furthermore, we note that the special committee of the Judicial Conference has withdrawn most of the recommendations relating to discovery and that the remaining recommendations are still subject to further consideration before

they may be presented to the Supreme Court.* Consequently it appears that there is no compelling reason to revise our discovery rules at this time. However, the Commission is interested in exploring any idea which may improve the discovery process and reduce delay in its proceedings. Some of the comments relating to the need for earlier rulings and elimination of unnecessary pleadings, in our opinion, deserve further consideration as does one of the remaining recommendations of the special committee of the Judicial Conference concerning early discovery conferences. Furthermore, because certain comments expressed concern about the operations and effects of certain of the Commission's rules, which comments were apparently based upon misunderstandings of the particular rules involved, the Commission believes that explanatory or clarifying remarks would be helpful.

One particular area of concern which appeared in the comments relates to the possibility that the present prehearing inspection and discovery rules might interfere with the expedited schedules mandated by Public Law 95-475, 92 Stat. 1494 (1978), which amended the Intercoastal Shipping Act, 1933. Matson Navigation Company, which commented on this problem, recommends that we amend our rules to provide that discovery procedures be "available in proceedings arising under Section 3 of the Intercoastal Shipping Act, 1933, only to the extent authorized by the Presiding Administrative Law Judge in his discretion." The Commission agrees with Matson that care must be taken to ensure that discovery procedures are not misused so as to create delay and prevent the prompt conclusion of the hearing and other phases of rate cases set forth in the law and pertinent Commission regulation (Rule 67, 46 C.F.R. §502.67). However, the regulations of the Commission already embody the controls which Matson wishes to have inserted by way of amendment. For example, Rule 67(g), 46 C.F.R. §502.67(g), states that the "Administrative Law Judge may employ any other provision of the Commission's Rules of Practice and Procedure, not inconsistent with this section, in order to meet this objective" (i.e., to complete a hearing within sixty days after the proposed effective date of the tariff changes and submit an initial decision within one hundred twenty days after that date). The Commission's rules contain numerous provisions eleswhere which authorize the presiding judge to curtail unnecessary discovery. See, e.g., Rules 201(b)(2), 201(b)(3), 204(b), 206(b). Moreover, if necessary to ensure that the proceeding progresses expeditiously, the presiding judge is authorized to waive any discovery rule. See Rule 10, 46 C.F.R. §502.10.

Another problem area which appears to be based upon a misunderstanding of the Commission's rules relates to the requirement in Rules 206(a) and 207(c) that a party filing a motion seeking an order compelling answers to interrogatories or requests for production of documents submit an affidavit certifying that counsel have conferred in a good-faith effort to resolve their differences. The Committee on Practice and Procedure of the Maritime Administrative Bar Association (MABA) states that conferences among counsel are seldom successful and most often waste time and suggest, furthermore, that if

* See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, February 1979, Vol. 461—No. 2, Federal Supplement.

such conferences are to be held, they should take place prior to the time of filing motions when there is still some likelihood of agreement among counsel. These comments misconceive the purpose of the requirement and the procedure to be followed.

The requirement that counsel meet in an effort to resolve differences prior to seeking a formal order is also imposed in several district courts and has salutary purposes. It recognizes that counsel have a duty to cooperate in an effort to fulfill the purposes of all discovery rules, namely, to seek narrowing of issues, avoidance of unnecessary trial-type hearings, and the elimination of surprise. Considering the broad scope and salutary purposes of discovery, the Commission does not believe that discussions among counsel conducted in a good-faith effort to achieve the above purposes should be a waste of time. On a number of occasions in formal proceedings, furthermore, counsel have been able to reach agreement in discovery matters without taking up the time of the Commission or presiding judge with formal motions and replies. The requirement that counsel certify that they have sought agreement informally and that they file an affidavit not later than the date set for replies to motions to compel answers does not mean, as MABA seems to believe, that such informal discussions among counsel can only take place after the motions are filed. On the contrary, the rules are intended to encourage these discussions as early as possible. Affidavits certifying that further discussions will be futile can therefore be filed at any time that such a fact becomes apparent (e.g., at the time counsel files a motion to compel answers) so long as they are not filed after the date set for the filing of replies to the motion.

The commentators have given careful thought to other possible problem areas which the Commission identified (e.g., the broad scope of discovery, the need for written justification for discovery, broader use of depositions, limitation on number of interrogatories). However, as noted above, there is no consensus that there really are problems in these areas and if some commentators believe that problems do exist, there is no agreement as to the remedy. Moreover, if appears that the Commission's rules are exceedingly flexible so that solutions to many if not all of the problems discussed can be devised by presiding judges and the parties as these problems arise.

Accordingly, the Commission is discontinuing this proceeding but will give further consideration to particular comments and, if we believe that they have merit, will institute an appropriate rulemaking proceeding.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-60

NEW YORK FREIGHT BUREAU INTERMODAL AGREEMENT (AGREEMENT NO. 5700-26)

Agreement proposing unrestricted intermodal ratemaking authority in Far East/U.S. Atlantic and Gulf trade found not justified under the *Svenska* doctrine and disapproved.

Charles F. Warren, George A. Quadrino and *John E. Ormond, Jr.* for the New York Freight Bureau and its member lines.

John Robert Ewers, Martin F. McAlwee and *John W. Angus, III* for the Bureau of Hearing Counsel.

REPORT AND ORDER

November 27, 1979

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

By Order served December 12, 1977, the Commission instituted an investigation into the approvability of Agreement No. 5700-26, an amendment to the conference agreement of the four ocean common carriers comprising the New York Freight Bureau (NYFB).[1] Amendment No. 26 proposes an indefinite extension of NYFB's authority to set rates for through intermodal transportation *via U.S. Atlantic and Gulf Coast ports* to inland points located anywhere in the United States. The Commission conditionally disapproved the Agreement on May 18, 1977. Thereafter, NYFB requested a further hearing limited to the exchange of memoranda and affidavits on the question of whether the Agreement's anticompetitive features are necessary to achieve transportation needs, public benefits or other objectives of the Shipping Act, 1916.[2] Now

[1] The NYFB carriers consist of Japan Line, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; and Yamashita-Shinnihon Steamship Co., Ltd., and serve the import trade from Hong Kong, Macao and Taiwan to United States Atlantic and Gulf Coast ports.

[2] *See Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 240 (1968). Agreement No. 5700-26 is a price-fixing arrangement and, as such, is violative of the Sherman Antitrust Act (15 U.S.C. §1) and unapprovable unless justified.

before the Commission are the memorandum and affidavit of NYFB and the "Reply Memorandum" of the Bureau of Hearing Counsel.[3]

The Commission first approved an amendment authorizing NYFB to establish intermodal rates on January 23, 1973[4] After three short-term extensions, this authority lapsed on April 21, 1977 without NYFB having carried any intermodal cargo or even filing an intermodal tariff. Since December 18, 1975, the NYFB carriers have had the right to operate independently as intermodal carriers until such time as the conference commenced a comparable service. None of them has availed itself of this opportunity. In fact, no carrier in the trade offers through intermodal service via Atlantic and Gulf ports. Any intermodal competition faced by NYFB is by carriers providing minilandbridge service through Pacific Coast ports of entry. The NYFB carriers themselves provide such a minilandbridge service.[5]

POSITION OF THE PARTIES

NYFB asserts that it has always intended to publish an intermodal tariff and has taken specific steps towards that end.[6] It further alleges that arranging for joint *interior point* service with inland carriers is especially difficult and that few conferences or carriers have successfully done so. During January, 1978, NYFB adopted a resolution to file promptly its draft intermodal tariff serving four interior points in the event the Agreement is approved. The through rates in this proposed tariff are essentially combinations of the separate rates presently charged by the participating rail and water carriers, rather than rate divisions specially negotiated to attract cargo to the through route.[7]

Proponents further contend that approval is warranted because the Agreement will:

1. Institute a new intermodal service to Chicago, Cleveland, Louisville and East St. Louis via U.S. Atlantic and Gulf ports;
2. Allow NYFB carriers to compete more effectively with the intermodal services of carriers using Pacific Coast ports and "preserve" the all-water route from Hong Kong to U.S. Atlantic and Gulf ports;[8]

[3] NYFB submitted a 13-page "Memorandum in Support of Approval," and a 12-page affidavit from the NYFB conference chairman to which is attached: (1) a 9-page letter dated June 10, 1975 from NYFB's counsel supporting an earlier intermodal amendment; (2) a "Pro-Forma International Tariff" offering joint through service, to four interior points east of the Mississippi River—East St. Louis, Chicago, Cleveland and Louisville; and (3) seven tables illustrating that intermodal carriers serving the Far East trade have established varying charges for seven ancillary activities connected with such service (*e.g.*, rail freight station, detention and free time, bill of lading).

[4] The intermodal aspects of Agreement No. 5700-14 were approved for a one-year term.

[5] The four proponent carriers plus Showa Line, Ltd., comprise the Transpacific Freight Conference (Hong Kong), and file an intermodal tariff under the auspices of that conference.

[6] NYFB states that between January, 1973 and April, 1977, it has: (1) organized an intermodal study committee; (2) retained consultants to work with the intermodal committee; (3) filed an interchange tariff to facilitate the interchange of cargo from ocean carriers to rail carriers; and (4) drafted model intermodal tariffs.

[7] NYFB states that its proposed intermodal tariff is modeled closely after the Japan/Korea Atlantic and Gulf Conference (JKAG) tariff in effect between 1977 and 1979 pursuant to FMC Agreement No. 3103-64. Affidavit of D. Dick, at 4-5. All NYFB members also belong to the larger JKAG.

[8] NYFB alleges that the rapid growth of minilandbridge service through Pacific Coast ports by carriers such as Evergreen Lines and Seatrain International, S.A., threatens its all-water service. American President Line has also filed a tariff offering service to interior points via Pacific Coast ports. NYFB wishes to "meet this intermodal competition before it becomes too entrenched." NYFB also mentions increased all-water competition to Atlantic and Gulf ports by nonconference carriers such as Evergreen and Seatrain, but fails to relate this competition to the present Agreement.

3. Ensure "uniform development" of interior point intermodal service in the NYFB trade. Without a single conference tariff there could be a widely varying and confusing array of ancillary charges (*e.g.*, free time and demurrage charges) connected with intermodal shipments.
4. Subject any intermodal service which NYFB carriers provide to the conference's self-policing system.

Finally, NYFB contends that the Agreement is similar to other permanent intermodal or overland/OCP authority amendments approved by the Commission. *E.g., Pacific Westbound Conference Intermodal Agreement*, 16 S.R.R. 159 (1975); *West Coast U.S./India Conference of Japan/Korea (Agreement No. 150–54)*, unpublished, 1972.

NYFB also opposes any modifications in the Agreement which would allow member lines to take "independent action" whenever they disagreed with the majority's rate decisions.[9] *Atlantic & Gulf/West Coast of South America Conference*, 13 F.M.C. 121 (1969), is cited in support of this position.

Hearing Counsel believes NYFB will promptly initiate a commercially accepted intermodal service, but would still condition approval of the Agreement upon NYFB's submission of the following amendments:

(1) that the Agreement expire in 18 months;
(2) that the so-called "independent action" clause contain the broader "comparable rates, terms, or conditions of carriage" language found in Agreement No. 5700–25;
(3) that the "independent action" clause further require the conference to employ the same"inland mode of transport" as its member lines;
(4) that NYFB submit quarterly reports describing its intermodal discussions, planning activities, services and cargoes carried.

DISCUSSION

NYFB may well file a draft intermodal tariff, but the publication of an implementing tariff cannot alone justify intermodal ratemaking authority. *See Seatrain International S.A. v. Federal Maritime Commission*, 584 F.2d 546, 549, 15 S.R.R. 445, 448 (D.C. Cir. 1978); *Seatrain International, S.A. v. Federal Maritime Commission*, 598 F.2nd 289, 15 S.R.R. 597 (D.C. Cir. 1979). The underlying activity itself must be justified.

In this instance, it has not been demonstrated that the intermodal service NYFB has devised after four years of study will fill a legitimate transportation need. The practice of combining existing rail and water rates and of selecting interior service points 400 to 800 miles from NYFB ports practically assures that NYFB's proposal will be unattractive to potential intermodal shippers.

[9] Articles 6(B) and (C) of the Agreement would allow member lines to operate independent intermodal services upon 120 days' notice to the conference, but only *unless and until* the conference files a preemptive tariff covering the "same origins, destinations and commodities." These provisions do not create a true right of independent action. They simply specify the conditions upon which the conference may publish its *initial* intermodal tariff when member lines have already begun intermodal services of their own. Articles 6(B) and (C) are better described as a "supercedence" clause than an "independent action" clause. NYFB's previous intermodal amendments (*e.g.*, Agreement No. 5700 25) allowed member lines to operate their own intermodal services until the conference filed a tariff with "comparable rates, terms and conditions of carriage."

Indeed, experience with the JKAG tariff upon which NYFB's draft tariff is patterned has proved this marketing approach to be an ineffective means of attracting cargo from either intermodal Pacific Coast competitors or all-water Atlantic and Gulf Coast competitors. *Conditional Disapproval of Agreement No. 3103–67*, served December 8, 1978, at 5. The JKAG tariff was in effect for over a year without inducing any cargo to move over a through intermodal routing.

Chicago, East St. Louis, Louisville and Cleveland are within the traditional "overland" territory of the Pacific Coast carriers.[10] Shippers located in these midwestern locations may find it convenient to receive port-to-port shipments from the Far East at Atlantic and Gulf Coast ports or at Pacific Coast ports depending on their prevailing needs and interests, yet the economic benefits of *through intermodal transport* are most obvious for shipments moving over the appreciably shorter Pacific Coast route. The potentially unrealistic geographic scope of the proposed Agreement readily distinguishes it from the conference agreements in trades with naturally developing intermodal traffic which have received unrestricted intermodal authority.

The Agreement would authorize NYFB to establish rates for Far East cargo destined to Seattle, Washington via the Port of New York. Service inefficiences of this magnitude have not been proposed by NYFB, of course, but the absence of a proposal to commence intermodal service to more geographically favorable areas like Dallas, Birmingham, Atlanta, Charlotte, Harrisburg or Hartford, suggests that the NYFB lines may not be seriously interested in offering their shippers viable intermodal alternatives to minilandbridge service.[11]

NYFB has the burden of justifying the Agreement's anticompetitive aspects under the *Svenska* doctrine. Under the circumstances, an adequate justification should include substantial evidence that the ratemaking authority it seeks will not be employed to insulate NYFB from competition via alternative intermodal routes, but to assist NYFB achieve a fair, stable and commercially viable intermodal service of its own. Evidence that significant quantities of NYFB's present containerized carryings are destined to the four inland points listed in its proposed tariff, that a significant number of shippers have requested a NYFB intermodal service to these points, or that NYFB faces significant intermodal competition from other carriers serving the designated points via Atlantic and Gulf ports would be most useful to NYFB's cause. The record contains no such evidence.

NYFB's contention that approval of the Agreement is warranted because it would subject any intermodal traffic carried under it to self-policing is not a sufficient justification for approval. Self-policing is an automatic adjunct of concerted ratemaking, a mandatory duty prescribed by Shipping Act section 15

[10] Most carriers serving the Far East via Pacific Coast ports offer reduced "Overland/OCP" rates for cargo originating from or destined to points east of the Continental Divide. These rates tend to equalize the cost of using Atlantic and Gulf Coast and Pacific Coast carriers.

[11] In *Seatrain International (II), supra*, 598 F.2d at 296, 15 S.R.R. at 604, the court indicated that overlapping membership in competing intermodal conferences was a matter requiring particular justification, and stated that:

The 12 JKAG members with access to the TPF intermodal tariff may have had limited incentives to generate an additional intermodal service and thereby compete with themselves. The possibility emerges, without refutation by the FMC, that the majority of the Conference members wanted no JKAG intermodal tariff at all.

and section 528 of the Commission's Rules. NYFB does not, and could not, claim that the inclusion of intermodal shipments within its ratemaking authority would eliminate *existing malpractices* associated with intermodal shipments because there is presently no intermodal cargo moving in the NYFB trade.

NYFB's argument that the Agreement is necessary to prevent the "destruction" of the all-water route between Hong Kong and U.S. Atlantic and Gulf ports is also unsubstantiated.[12] Even if cargo losses were documented and convincingly related to gains made by Pacific Coast intermodal carriers, there is no basis for concluding that these losses would be prevented by approval of the instant Agreement. That conclusion would require the existence of a sizeable market for NYFB's proposed interior point service to Chicago, East St. Louis, Louisville and Cleveland.

The Commission has found intermodal ratemaking by existing all-water conferences to be justified only when such further section 15 authority would have the probable effect of minimizing commercial disruptions incident to the employment of new technology and the development of new trade patterns associated with intermodalism. When such benefits to United States commerce were not demonstrated, intermodal amendments have been disapproved. *See Far East Conference Intermodal Amendment (Agreement No. 17–34)*, 18 S.R.R. 1685 (1979). The present record fails to establish that unlimited intermodal authority is necessary to secure transportation needs, public benefits or regulatory purposes in the NYFB trade.

THEREFORE, IT IS ORDERED, That Agreement No. 5700-26 is disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[12] NYFB also claims that approval may induce the nine non-conference lines which have entered into a rate agreement with NYFB (FMC Agreement No. 10108) to join the conference. Like self-policing, the enlargement of conference membership is not *itself* a justification for ratemaking authority.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-44

PIERPOINT MANAGEMENT COMPANY AND
RETLA STEAMSHIP COMPANY

v.

HOLT HAULING & WAREHOUSING SYSTEM, INC.

DISCONTINUANCE OF PROCEEDING

November 27, 1979

The Commission by order of June 13, 1979, in this proceeding required the parties to submit a revised settlement agreement for determination as to section 15, Shipping Act, 1916 applicability and if necessary approvability. The parties complied with this order and the agreement was processed pursuant to section 15 procedures.

The Commission has now approved the agreement in question which settles the complaint in this proceeding. Accordingly, no further proceedings in this matter are contemplated and the complaint is dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-44

PIERPOINT MANAGEMENT COMPANY AND RETLA STEAMSHIP COMPANY V. HOLT HAULING AND WAREHOUSING SYSTEMS, INC.

ORDER

June 13, 1979

This proceeding is before the Commission upon its determination to review the Order of Discontinuance of Administrative Law Judge William Beasley Harris (Presiding Officer).[1]

On October 30, 1978, Pierpoint Management Company and Retla Steamship Company jointly filed a complaint with the Commission against Holt Hauling & Warehousing System, Inc. pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) in which it was alleged that Holt violated sections 15, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 815 and 816). The Commission's Bureau of Hearing Counsel intervened in the proceeding.

Central to the resolution of this dispute is Agreement No. T-3323 (Agreement) to which Pierpoint, Retla, and Holt are signatories. The Agreement is a terminal lease arrangement by which Holt leased to Pierpoint the Pier Seven facility at Gloucester City, New Jersey.[2] According to the terms of the Agreement, Pierpoint, as the tenant, manages and operates the Pier Seven terminal facility, paying annual base rental in monthly installments to Holt. The Agreement provides a formula for adjustment in the event the annual tonnage calculated in the base rental (150,000 tons at $2.00 per ton) is less than 150,000 tons. The base rental applies only to wood and steel products carried or controlled by Retla. If an annual short fall of tonnage for wood and steel products occurs, the rental formula allows Retla to elect to treat other commodities as base cargo under the base rental formula. The tonnage allowable for election is determined by calculating the difference between 150,000 tons and the tons of base cargo actually carried during the lease year. The Agreement was approved by the Commission on August 26, 1976.

[1] Rule 227 of the Commission's Rules of Practice and Procedure permits Commission review of initial decisions on its initiative [46 C.F.R. § 502.227].

[2] The Agreement designates Retla, a common carrier by water, as the user of Pier Seven under a special rental arrangement.

In their complaint, Pierpoint and Retla allege that: Holt assigned its interest in Agreement No. T-3323 to the New Jersey Economic Development Authority without prior approval by the Commission or Pierpoint in derogation of section 15; changed competitive circumstances[3] have made the Agreement unjustly discriminatory, detrimental to the commerce of the United States, and contrary to the public interest, in violation of section 15; Holt has violated sections 16 and 17 by providing terminal services to Korean vessels carrying wood products at a terminal tariff rate substantially lower than Retla is required to pay as a result of its reduced carryings.

Complainants and Respondent advised the Presiding Officer at a January 1979 prehearing conference held in conjunction with this proceeding that they were negotiating a settlement agreement disposing of the complaint. Subsequently, on March 7, 1979, they submitted to the Presiding Officer a settlement agreement and a motion for its approval and discontinuance of the proceeding. The settlement agreement requires the Complainant Retla to pay the sum of $500,000.00 to the Respondent Holt and cancels Agreement No. T-3323. Hearing Counsel advised the Presiding Officer that it had no objection to the settlement agreement.

The Presiding Officer approved the settlement agreement on the basis that Agreement No. T-3323 grants the tenant a unilateral right of termination of the lease on 60 days notice and that the "law favors compromise and settlement." He than discontinued the proceeding.

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 S.R.R. 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. . . .

Here, the proposed settlement appears to modify the termination clause of the Agreement. It also appears to modify the payment terms of the Agreement. If the proposed settlement represents a modification of either of these provisions of the Agreement or any other of the Agreement's provisions, then it must be filed for Commission approval pursuant to section 15. However, the proposed settlement is too vague in regard to these essential clauses to allow for a definitive determination on the status of the settlement agreement under section 15. Before it can be considered for approval, the settlement agreement must be clarified in order that its applicability to section 15 may be determined. If applicable, the Commission must then determine whether or not the proposed settlement can be approved. *Inter Equip, Inc. v. Hugo Zanelli & Co., supra; accord American Export Isbrandtsen Lines, Inc., Order to Show Cause,* 14 F.M.C. 82, 89 (1970).

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[3] The changed competitive circumstances referred to in the complaint were allegedly caused by cargo restrictions imposed by the Korean Government and the entry of a Korean carrier into the trade carrying plywood previously carried by Retla under the terms and conditions of Agreement T-3323. The complaint also alleges that Holt may have entered into an unfiled section 15 agreement in connection with its performance of terminal services for Korean controlled cargo.

Neither the settlement agreement nor the record in this proceeding provides any indication as to what the proposed $500,000 payment by the Complainant Retla represents. The Commission must know, in detail, what preexisting obligation of the Complainant, if any, will be satisfied by this payment. If the obligation is a liquidated sum, *e.g.,* a rental arrearage, then the Commission must know whether the proposed settlement fully satisfies that obligation or whether it compromises any portion thereof. If it represents a compromise, the Commission must know the amount, identity of the obligation, and the accrual date of the obligation proposed to be compromised. In short, the settlement agreement should make clear what is the *quid pro quo* for the $500,000 payment.

Accordingly, any settlement agreement reached in this proceeding must be filed with the Commission for a determination as to its section 15 applicability and, if necessary, approvability. Such agreement must be complete and incorporate all of the terms and conditions of settlement. If determined to be subject to section 15, the agreement will be processed pursuant to the Commission's usual procedures.

This proceeding will be held in abeyance for a period of 30 days to allow the submission of a revised settlement agreement. If no settlement agreement is submitted within that time, the Commission will, by further order, direct the Presiding Officer to resume proceedings on the complaint.

THEREFORE, IT IS ORDERED, That the Presiding Officer's Order of Discontinuance approving the proposed settlement agreement is vacated; and

IT IS FURTHER ORDERED, That this proceeding be held in abeyance for a period of 30 days from the date of this Order to permit the submission of a revised settlement agreement.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-22

LAKES AND RIVERS TRANSFER CORPORATION

v.

THE INDIANA PORT COMMISSION

NOTICE

November 28, 1979

Notice is given that no appeal has been taken to the October 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. 76-59
AGREEMENTS NOS. T-3310 AND T-3311

No. 76-22

LAKES AND RIVERS TRANSFER CORPORATION

v.

THE INDIANA PORT COMMISSION

(1) TERMINATION OF NO. 76-22
(2) ENLARGEMENT OF TIME FOR REPLY BRIEF IN NO. 76-59

Finalized November 28, 1979

(1) By its order served August 28, 1979, the Commission approved a settlement agreement and six lease agreements (Nos. T-3762, T-3763, T-3764, T-3765, T-3766, T-3767 and T-3768) between the Indiana Port Commission, on the one hand, and on the other, the two principal stevedores, Ceres Marine Terminals, Inc., and Lakes and Rivers Transfer Corporation, at Burns Waterway Harbor.

Docket No. 76-22 is a complaint proceeding, which has been consolidated with Docket No. 76-59, an investigation instituted by the Commission.

Lakes and Rivers agreed to withdraw its complaint in No. 76-22, as part of the settlement agreement above.

Accordingly, it is appropriate now that the settlement agreement (T-3762) has been approved to note that the complaint in No. 76-22 has been withdrawn, and that proceeding (No. 76-22) has been terminated. As a caveat it should also be noted that the entire record in both proceedings remains the record for any factual determinations as to the remaining issues in No. 76-59.

(2) By motion filed October 12, 1979, at 4:37 p.m., Ceres, Inc., asks for an enlargement of the time within which to file its reply brief in No. 76-59 as to the remaining issues in that proceeding. Reply briefs were due on October 12, and Ceres' request is tardy. However, since this proceeding has been under way a long time, during which the parties have resolved many of the issues, and

during which time the Indiana Port Commission expanded its port facilities greatly at a large dollar cost, the additional ten days for Ceres to file its reply brief does not seem excessive. Accordingly, the request of Ceres is granted, without waiting the 15 days allowed in the rules for replies to such a motion, and with no objection having been received to date. When the reply brief of Ceres has been received and all matters have been duly considered, an initial decision on the remaining issues in No. 76-59 will be entered.

(S) CHARLES E. MORGAN
Administrative Law Judge

October 24, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-53

JOHN C. GRANDON D/B/A CONSULSPEED SERVICES
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 2011

Respondent's freight forwarder license revoked for failure to comply with the Shipping Act, 1916, and the Commission's Freight Forwarder Regulations.

John Robert Ewers, Joseph B. Slunt and *Alan J. Jacobson* for the Commission's Bureau of Hearing Counsel.

REPORT

November 30, 1979

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

By Order served May 18, 1979, John C. Grandon d/b/a Consulspeed Services (Consulspeed), a Commission licensed ocean freight forwarder, was directed to show cause why its forwarder license should not be revoked or suspended for permitting Air Wings International, Inc. (Air Wings), an air freight forwarder, to perform ocean freight forwarding services under Consulspeed's name and license number, in violation of section 44(e) of the Shipping Act, 1916 (46 U.S.C. §843(e)) and sections 510.23(a) and 510.24(e) of the Commission's Rules.[1] The hearing in this proceeding was limited to affidavits of fact and memoranda of law.

[1] 46 C.F.R. §510.23(a) reads, in part:

(a) No licensee shall permit his license or name to be used by any person not employed by him for the performance of any freight forwarding service. No licensee may provide freight forwarding services through an unlicensed branch office or other separate establishment without written approval of the Federal Maritime Commission.

46 C.F.R. §510.24(e) requires the licensee to certify on the ocean bill of lading before receiving compensation from a common carrier that it is operating under a license issued by the Commission and:

[h]as performed in addition to the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for such cargo, two or more of the following services:

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

Consulspeed applied for and was granted by the Commission independent ocean freight forwarder license No. 2011, effective November 23, 1977. At that time, Consulspeed was given written notice of the requirement that it must conduct its forwarding activities in accordance with the Shipping Act, 1916, and the Commission's Freight Forwarder Regulations (46 C.F.R. Part 510).[2]

A routine compliance check begun on August 2, 1978 by Commission investigators revealed a close business relationship between Air Wings, an air freight forwarder and Consulspeed.[3] The compliance check further disclosed that between March 18, 1978 and August 24, 1978, Consulspeed had collected from twelve ocean carriers $9,607.69 in brokerage fees. The fees involved approximately 229 shipments for which ocean freight forwarding services were performed not by Consulspeed but by Air Wings under Consulspeed's name and license number.[4] While Air Wings billed the shippers for the services rendered, Consulspeed collected compensation from the carriers on these same shipments even though it had not performed the services required by section 44(e) of the Shipping Act and section 510.24(e) of the Commission's Rules.[5]

Although Consulspeed did not deny the charges, it contends that it did not willfully violate the Commission's rules and argues that revocation of its ocean freight forwarding license would be too harsh a sanction.

The Commission's Bureau of Hearing Counsel submits that the number of shipments involved, the amount of money collected and the duration of the violations together warrant a revocation of Consulspeed's license.

DISCUSSION

The uncontroverted facts are that between March 18, 1978 and August 24, 1978, Consulspeed permitted Air Wings to use Consulspeed's name and license number in the performance of ocean freight forwarding services on approximately 229 shipments of Air Wings' clients. Consulspeed also collected brokerage fees on these shipments even though it had not performed freight forwarding services required by the Shipping Act and the commission's Rules.

[2] Prior to and at the time of the issuance of the license, the Commission's Office of Freight Forwarders sent Consulspeed copies of sections 1 and 44 of the Shipping Act, 1916 (46 U.S.C. §§ 801 and 843) and of 46 C.F.R. Part 510.

[3] In his affidavit, William L. Ausderan, a Commission investigator, states that Consulspeed, whose only employee appears to be Mr. Grandon occupies one room in Air Wings' offices for which Air Wings pays the rent and that Air Wings also keeps Consulspeed's records of freight compensation received and fees collected.

[4] The President of Air Wings stated, when interviewed by Mr. Ausderan, that with regard to those shipments Air Wings booked the cargo, prepared export documentation, provided drayage to dockside, arranged for packaging and crating services, advanced freight monies and invoiced the shippers. In return for the office space it occupied Consulspeed was expected, but apparently did not, provide messenger and banking services.

[5] Section 44(e) provides, in relevant part:

(e) A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, such person is licensed hereunder and has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services:

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

Consulspeed's argument that the violations were not willful is not convincing.[6] The principle is well established that an act is willful if it is intentional or if committed with careless disregard of statutory requirements.[7] Consulspeed does not contend that allowing the use of its name and license number or its own collection of brokerage fees were unintentional. Moreover, Consulspeed's ignorance of the Commission's rules appears to be due to its admitted failure to take the time to read them. Consulspeed's actions must be considered, therefore, as willful.

Consulspeed is therefore found to have willfully failed to comply with the Shipping Act, 1916 and the rules and regulations of the Commission promulgated thereunder. In view of the number and nature of these violations, F.M.C. License No. 2011 issued to John C. Grandon d/b/a Consulspeed Services, is hereby revoked.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[6] Shipping Act section 44(d) provides, in relevant part:

[A licensee's license] . . . may . . . be suspended or revoked for *willful* failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder. (Emphasis added.)

[7] *U.S. v. Ill. Central Ry.*, 303 U.S. 239, 242 243 (1938); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974), *cert. den.* 419 U.S. 830 (1974); *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954).

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-42

P & M CRANE SERVICE, INC.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

NOTICE

November 30, 1979

Notice is given that no appeal has been taken to the October 29, 1979 discontinuance of 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 discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 77-42

P & M CRANE SERVICE, INC.

v.

PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS

MOTION FOR APPROVAL OF SETTLEMENT GRANTED; PROCEEDING DISCONTINUED

Finalized November 30, 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 at long last a series of cases arising out of practices long since discontinued by respondent as a result of the Commission's decision in Docket No. 75-51, *Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas,* 19 F.M.C. 548 (1977). That case as well as another similar complaint was settled with my approval, and my rulings of approval became administratively final by subsequent notice of the Commission. See Docket No. 75-51, cited, Motion for Approval of Settlement granted, June 21, 1979, Commission Notice, July 27, 1979; Docket No. 76-57, *H & H Cranes, Inc. v. Port of Houston Authority of Harris County, Texas,* Motion for Approval of Settlement granted, July 10, 1979, F.M.C. Notice, August 16, 1979, 19 SRR 547.

As in the two previous settlements, the present settlement represents a successful effort on the part of both sides to avoid time-consuming and costly litigation which in all probability would benefit neither side economically regardless of who might have prevailed on the merits. As was the situation in the two previous settlements, the issue to be litigated here is that concerning the amount of reparation which should be awarded to complainant because of previous episodes in which he allegedly lost jobs and was displaced from jobs already commenced. As set forth in the Commission's decision in Docket No. 75-51, the measure of damages depends upon a determination of financial injury caused by "bumping" of complainant's cranes from jobs already commenced as well as loss of jobs because of respondent's previous preferential practices. Counsel for both sides have spent considerable time attempting to

identify "bumping" episodes and attempting to formulate a means to quantify the lost jobs aspect of the formula for damages. This has proved to be a sizeable task and should the matter have proceeded to a trial-type hearing, the many factual disputes and the need for subsequent pleadings, initial decision, exceptions, commission decision, etc., made it apparent that a settlement would be far the wiser course of action. Thus, complainant has determined that accepting a payment of $12,800 with costs as compensation for his injury would be more prudent than to pursue the uncertainties of prolonged litigation.

As I explained in greater detail in the two previous rulings approving settlements in Docket Nos. 75-51 and 76-57, the Commission and courts favor settlements and exert every effort to find them reasonable because of the strong policy discouraging needlessly expensive litigation. Again, as I explained in those previous rulings, a settlement such as the present one does not raise any questions under other provisions of the Shipping Act, 1916, i.e., it does not constitute an agreement subject to approval under section 15 of the Act and it does not involve tariff matters under section 18(b)(3). In short, all it does is attempt to settle an issue of damages arising out of respondent's discontinued practices which were found to be unlawful under sections 16 and 17 of the Act.

With approval of this settlement, the long history of litigation between various private crane operators and the Port of Houston which began in 1975 will come to an end and will do so amicably. The parties are commended for their sincere efforts to terminate these long controversies and in my opinion have acted in the best traditions of American law in so doing. Accordingly, as I found in the two previous cases which were settled for similar reasons, the settlement which the parties have submitted for approval 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

October 29, 1979

FEDERAL MARITIME COMMISSION

[45 C.F.R. PART 510; DOCKET NO. 78-53]

INDEPENDENT OCEAN FREIGHT FORWARDER BIDS ON GOVERNMENT SHIPMENTS AT UNITED STATES PORTS

December 5, 1979

ACTION: Discontinuance of proposed rulemaking

SUMMARY: On December 12, 1978, the Federal Maritime Commission published a notice of proposed rulemaking (43 Fed. Reg. 58098) with respect to practices of independent ocean freight forwarders who submit bids to United States Government agencies. After full consideration of the issues and comments from interested parties, the Commission has decided that the adoption of a new rule at this time is unnecessary.

SUPPLEMENTAL INFORMATION:

On March 18, 1977, the Commission issued a decision in Docket No. 74-10[1] holding that fees assessed the General Services Administration (GSA) for ocean freight forwarding services were, in certain instances, so low[2] as to be in violation of section 16 First, of the Shipping Act, 1916 (46 U.S.C. §815), and the Commission's General Order 4 (46 C.F.R. §510).

Section 16 First, of the Shipping Act, 1916, *inter alia,* makes it unlawful for a forwarder:

> To make or give 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. . . .

Rule 510.24(b) of General Order 4 provides:

> No (Forwarder) shall render, or offer to render, any forwarding service free of charge or at a reduced forwarding fee in consideration of . . . receiving compensation from an oceangoing common carrier on the shipment. . . .

However, in its decision in Docket 74-10 the Commission stated:

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[1] *Freight Forwarder Bids on Government Shipments at United States Ports—Possible Violations of the Shipping Act, 1916, and General Order 4,* 19 F.M.C. 619 (1977).

[2] Fees as low as four and one half cents were being bid on GSA shipments.

We are reluctant to establish binding rules of universal application governing the level of freight forwarder fees on the basis of the existing limited record. The important matter of what objective standards, if any, should be adopted to judge the acceptability of forwarding GSA bids under the Shipping Act, 1916, and the Commission's regulations, is one that requires considerably more study and analysis. We do not intend to take any precipitous action, no matter how well motivated, that might result in the establishment of requirements which could prove impossible of application or unduly or unnecessarily disruptive of the freight forwarder industry. Whatever standards are finally adopted must be well-reasoned, economically sound and consistent with responsible regulatory policy . . . We will therefore hold under advisement, pending further study and review, the issue raised in our Order instituting this proceeding, of 'whether the Commission's General Order 4 should be amended to include a rule governing the practices of forwarders bidding on GSA contracts and providing services thereunder.'. . .

After the above mentioned "further study and review" of the issue was concluded, it appeared that a new rule might be the most effective method of preventing the type of unlawful practice found in Docket 74-10.[3] The Commission therefore published a notice of proposed rulemaking (43 Fed. Reg. 58098) instituting the instant proceeding, Docket No. 78-53, on December 12, 1978.

After consideration of all the comments submitted and carefully weighing the advantages and disadvantages of the proposed rule, the Commission has determined that the benefits to be derived from a new rule do not currently justify the burdens which would be imposed on the forwarding industry. Accordingly, this proposed rulemaking proceeding will be discontinued.

The Commission now gives notice that it intends to monitor the level of forwarder bids submitted to GSA and take whatever action it deems appropriate on a case-by-case basis. Appropriate action includes civil penalties and license suspension or revocation.

THEREFORE, IT IS ORDERED, That Docket No. 78-53 is discontinued; and

IT IS FURTHER ORDERED, That notice of this Order be published in the *Federal Register.*

By the Commission

FRANCIS C. HURNEY
Secretary

[3] Despite the findings in Docket 74-10, GSA's next request for bids produced bids as low as one cent.

FEDERAL MARITIME COMMISSION

[46 C.F.R. §508; DOCKET NO. 78-33]

ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE UNITED STATES/ECUADOR TRADE

December 11, 1979

ACTION: Discontinuance of Proposed Rule

SUMMARY: The proposed rule in this proceeding was designed to counteract apparent unfavorable conditions to shipping in the U.S./Ecuador trade. An Ecuadorian Government decree appeared to preclude a Norwegian registered vessel (M.V. *Lionheart*) from competing on the same basis as other vessels. Temporary relief was afforded through U.S. Coast Guard waivers giving the vessel American registry status. These waivers are likely to continue until a replacement vessel is available and therefore no immediate need exists for continuing this proceeding.

DATES: Effective December 14, 1979

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by notice of proposed rule published September 28, 1978 (43 Fed. Reg. 44554). The proposed rule could have suspended tariffs of Transportes Navieros Ecuatarianos in the trade between the U.S. and Ecuador. The proposal was designed to counteract apparent unfavorable conditions to shipping created by the Ecuadorian Government in implementing its Decree 7/78 in such a way as to preclude a Norwegian registered vessel in that trade (the M/V *Lionheart*) from competing on the same basis as other vessels. Ecuadorian law appeared to favor carriage by Ecuadorian and U.S. flag vessels in this trade. Issuance of a final rule was deferred when the U.S. Coast Guard granted a temporary waiver of survey, inspection and measurement requirements for the vessel in question in order to admit the vessel to American registry, thereby qualifying it for more favorable treatment under Decree 7/78.

The U.S. Coast Guard on October 22, 1979 has extended the waiver for the M/V *Lionheart* through September 30, 1980, or until a replacement vessel is placed in operation, whichever occurs first. The Coast Guard also indicates that a replacement barge may be available as soon as March 1, 1980. Another new

vessel (*Ro-Ro*) to be built in West Germany, has been contracted for delivery scheduled for September 1, 1980.

The proposed rule was designed simply to afford the M/V *Lionheart* relief from Decree 7/78 in regard to its U.S./Ecuador operations. Coast Guard waivers have provided effective relief. It appears likely that such waivers will continue until such time as a U.S. registered permanent replacement vessel is available. If it turns out that this does not occur, the Commission could reissue a proposed rule for further comment. No purpose is served by continuing this proceeding and it is hereby ordered to be discontinued.

By the Commission.

FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-6

PUERTO RICO MARITIME SHIPPING AUTHORITY AND
TRAILER MARINE TRANSPORT CORPORATION
PROPOSED REDUCED RATES

ORDER ON APPEAL FROM DENIAL OF MOTION TO DISCONTINUE

December 11, 1979

This proceeding is before the Commission upon the appeal of Trailer Marine Transport Corporation (TMT), from the ruling of Administrative Law Judge Stanley M. Levy denying TMT's motion to discontinue the proceeding.

PROCEEDINGS

On December 22, 1978 and January 5, 1979, Puerto Rico Maritime Shipping Authority (PRMSA) filed revisions to PRMSA Tariff No. 6, FMC-F No. 7, which in effect, imposed upon Charleston, South Carolina the same rate structure applicable to the Jacksonville and Miami, Florida/Puerto Rico Trade. TMT protested PRMSA's tariff filings and in addition, reduced its trailer-load rates on Bakery Goods and Furniture, N.O.S. moving between Jacksonville and Miami, Florida and Puerto Rico. PRMSA protested TMT's rate reductions after proposing to reduce its trailerload rates on Bakery Goods and Furniture, N.O.S. in the Charleston, South Carolina/Jacksonville and Miami, Florida/Puerto Rico trade.

By Order of Investigation and Hearing, served February 2, 1979, the Commission instituted this proceeding to determine the lawfulness of the various tariff revisions submitted by TMT and PRMSA. Specifically, that Order put at issue: (1) the validity of the rationale of *Rates From Jacksonville, Florida to Puerto Rico,* 10 F.M.C. 376 (1967), cited by both TMT and PRMSA as controlling authority in this case, in light of changed circumstances since that case was decided; (2) the applicability of the Commission's decision in *Rates From Jacksonville* to the factual situation in this proceeding; and, (3) the compensatory level of PRMSA's reduced Charleston rates.

Subsequently, on February 28, 1979, TMT withdrew its protest to PRMSA's tariff revisions and filed a motion to discontinue the proceedings on grounds of

mootness, which motion was opposed by both PRMSA and the Commission's Bureau of Hearing Counsel. On the same date, TMT filed rate increases which restored the prior level of rates on bakery goods and furniture moving in the South Atlantic/Puerto Rico Trade. PRMSA, on March 12, 1979, filed similar rate increases on bakery goods and furniture moving in the South Atlantic/Puerto Rico Trade. The Presiding Officer, by Order served March 16, 1979, denied TMT's Motion to Discontinue.

TMT subsequently requested the Presiding Officer to reconsider his denial of TMT's Motion to Discontinue. This request was opposed by PRMSA and Hearing Counsel and denied by the Presiding Officer on April 9, 1979. The matter is now before the Commission on appeal.

THE PRESIDING OFFICER'S DECISION AND POSITION OF THE PARTIES

From the filing of TMT's Motion to Discontinue to the present there have been no less than fourteen (14) substantive filings in this matter. Rather than attempt to trace the development of the arguments and rulings through the record, a summary of the positions of the parties and the findings of the Presiding Officer should serve to fairly present the issues now before the Commission or disposition.

The basis of the Presiding Officer's refusal to discontinue this proceeding is that TMT has, since the institution of the proceeding, filed new intermodal rail-water rates on shipments of furniture and dry goods originating at 20 additional inland points which affect the matter under investigation. He explained that while he could not on the basis of the record determine whether TMT has in fact revived the rate differential it purported to have cancelled, he would not proceed further in this regard until the Commission advises whether it intends to assert jurisdiction over intermodal rates in this proceeding in view of the fact that this matter was not raised in the Commission's Order of Investigation. The Presiding Officer found that any inquiry into the efficacy of the *Rates From Jacksonville* precedent would be purely theoretical at this point and standing alone would not warrant continuation of this matter. He reached no decision, however, on the issue of the compensatory nature of PRMSA's reduced rates.

TMT has maintained that this proceeding is moot as there is no valid regulatory purpose to be served by its continuance. TMT notes that it has cancelled its port-to-port rate reductions and withdrawn its protest against PRMSA's rate reductions restoring rate parity on the port-to-port rates. It contends that its intermodal rates should not be made an issue in this proceeding because: (1) these rates are not below its port-to-port rates, precluding any possibility of cross-subsidization of services; (2) the Commission has no jurisdiction over its intermodal rates, not only as to filing such rates, but also as to being entitled to any information concerning them; and (3) PRMSA's institution of reduced through rates from the same inland points as TMT's shifts the focus of this proceeding to an issue concerning only through rate competition, a matter over which the Commission has no jurisdiction. Although TMT is willing to allow rate parity at this time, it reserves its "right" under *Rates From Jacksonville* to a rate differential in the future. TMT concludes that in any

event, no material issues of any practical effect allegedly remain to be decided in this proceeding.

PRMSA, on the other hand, urges the Commission not only to continue the present proceeding but to broaden it to a general inquiry into TMT's overall rate structure and the relationship between TMT's port-to-port rates and its through rates. PRMSA maintains that the cancellation of TMT's reduction of its port-to-port rates is a subterfuge and in fact TMT has revived the rate differentials by reductions in its through rates. PRMSA alleges that TMT has intentionally misled the Commission and that the reduced through rates seriously undercut PRMSA's port-to-port rates.

PRMSA further asserts that the Commission has jurisdiction over the water portion of TMT's intermodal rates,[1] and that the Commission does not need jurisdiction over the through rates to prevent the cross-subsidization of those rates by the port-to-port rates. PRMSA maintains that TMT continues to enjoy a rate differential under *Rates From Jacksonville* to which it is not entitled, is engaging in unlawful destructive price competition and discrimination, and is attempting to evade the Commission's regulation of its port-to-port rates through the use of intermodal rates. It further argues that even without jurisdiction over intermodal rates, the Commission has an obligation to regulate port-to-port rates and has the right to obtain information necessary to perform this function. This proceeding is allegedly sufficiently broad in scope to permit an inquiry into the effect of TMT's intermodal rates on the port-to-port rates. PRMSA believes that the *Rates From Jacksonville* issue is viable and that the Commission can in fact order TMT to establish a rate differential in PRMSA's favor.

Hearing Counsel opposes a discontinuance of this proceeding but does not agree with PRMSA that its scope should be expanded. It argues that this proceeding should not be discontinued until the principles established in *Rates From Jacksonville* are thoroughly reexamined. Hearing Counsel points out that while TMT has withdrawn the rate actions at issue in this proceeding, it nevertheless asserts continuing rights under that case. Hence, a valid regulatory purpose exists in pursuing this matter to a final conclusion.

As to the effect of TMT's intermodal rate reductions on its port-to-port rates and the competitive effect of such action on PRMSA, Hearing Counsel is of the opinion that while there may be validity to PRMSA's contentions in this regard, these matters could not be addressed without a restructuring of this proceeding, or the institution of a new proceeding. Hearing Counsel suggest that if the Commission is inclined to address this matter further, it should consider the impact of the court's stay order in *Trailer Marine Transport Corporation v. Federal Maritime Commission,* 602 F.2d 379 (D.C. Cir. 1979).[2]

[1] PRMSA cites *In re: Trailer Marine Transport Corporation—Joint Single Factor Rates, Puerto Rico Trade,* 20 F.M.C. 524 (1978).

[2] Further argument was advanced by Hearing Counsel regarding the impact and effect of the court's stay in that proceeding. However, in light of the court's intervening decision on the merits in the case, discussed *infra,* further discussion on this point is unnecessary.

Finally, Hearing Counsel notes that even if it is assumed that TMT's port-to-port rates are subsidizing the intermodal rates the only available remedy would be a reduction in TMT's port-to-port rates, an action which would reestablish the rate differentials challenged in this proceeding.

DISCUSSION

Intermodal Rates

This case does not involve a question of whether the local rates at issue are unreasonably high in relation to through rates but whether they are, standing alone, unreasonably low. The reasonableness of any rate differential between TMT's through rates and its port-to-port rates is a matter beyond the scope of this investigation. Therefore, the reduced rates of TMT having been cancelled and its protest against PRMSA's rates having been withdrawn, the Commission perceives no valid regulatory purpose in continuing this proceeding on this issue.

However, even if the Order of Investigation in this proceeding had included an examination of TMT's through rates, it would still be affected by the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Trailer Marine Transport Corporation v. Federal Maritime Commission, supra,* reversing in part and remanding in part the Commission's order in *In re: Trailer Marine Transport Corporation—Joint Single Factor Rates, Puerto Rico Trade, supra.* The court held that the Federal Maritime Commission lacks jurisdiction over joint through rail-water rates in the Puerto Rican domestic offshore trades beginning or ending at an inland U.S. point and cannot require a carrier to file such rates with it. The court also determined that any demand by the Commission for information concerning intermodal through rates must articulate a basis therefor sufficient to allow a reviewing court to determine that the Commission has " 'given reasoned consideration to all the material facts and issues' and 'pertinent factors' at stake in the agency's order." This court decision clearly limits the Commission's authority to examine TMT's through rates in this or in any other proceeding.

The question remains, however, as to the manner and extent the Commission may examine and consider through rates in its investigations of port-to-port rates, such as the subject proceeding. Local rates set at unnecessarily high levels merely to facilitate the movement of cargo under through rates from inland points could be prejudicial to cargo originating at ocean ports, and would present a situation that the Commission can and should regulate.

Considered in the context of this proceeding, however, the only apparent remedy available to the Commission to prevent cross-subsidization would be to order TMT to *lower* its local rates, an action which would restore the very rate differential protested in this matter. Without the authority to directly regulate through rates, the Commission's ability to prevent unreasonable cross-subsidization of rates becomes somewhat tenuous. In any event, this proceeding is not the proper vehicle for the Commission to deal with the matter of the

cross-subsidization of rates in a comprehensive and effective manner. Legislative action may be required to resolve this matter completely.

Application of Rates From Jacksonville

The cancellation of the rate differential put at issue in this proceeding obviates the need for any further hearing on the applicability of *Rates From Jacksonville.* PRMSA's contention that the cancelled differential has been revived in the form of through rates is somewhat undermined by its own action in instituting reduced through rates in the South Atlantic/Puerto Rico Trade. In terms of *carrier competition,* which was the primary concern of *Rates From Jacksonville,* through rates generally compete with through rates and local rates generally compete with local rates. It is only in terms of the internal revenue needs of carriers and the potential discriminatory effect of their rate structures that the through-rate-to-local-rate relationship and the overall rate structure of the carrier become relevant. Therefore, even if it is assumed that TMT has instituted through rates substantially lower than PRMSA's local rates this does not necessarily put *Rates From Jacksonville* at issue. Moreover, it is clear that the Commission may not order TMT to increase its through rates to prevent such a differential. PRMSA's suggestion that the Commission order TMT to increase its local rates is without merit in terms of remedying a through rate differential. Furthermore, such a remedy could only be ordered by a finding that PRMSA, rather than TMT, is entitled to a favorable rate differential under *Rates From Jacksonville,* an inquiry not contemplated by the Order instituting this proceeding.

The applicability of the principle established in *Rates From Jacksonville* is based, to a large extent, upon the factual circumstances presented in that case.[3] It does not stand for the proposition that TMT has a right to a discretionary rate differential. Clearly, TMT has not, and, in view of its motion to discontinue, will not allege facts in this case to bring it under the rationale of that precedent. We agree with the Presiding Officer that a continuation of this proceeding is not warranted solely for the purpose of further examining this theoretical legal issue.

PRMSA'a Reduced Rates

There remains the matter of the legality of PRMSA's reduced rates from Charleston, South Carolina. Because these rates are now in effect, Commission action on these rates could still have a practical consequence. However, these rates were investigated to determine the validity of TMT's allegations in its protest against them. Although the withdrawal of TMT's protest does not of itself moot the issue, it does remove the principal motivation for the inquiry into

[3] In *Rates From Jacksonville,* the Commission ordered a rate differential under circumstances where: (1) a service-handicapped carrier had reduced its rates to a compensatory minimum; (2) the carrier had been put into receivership and might have been forced to discontinue service; and (3) the service of that carrier was deemed to be essential to the public interest. The general principle involved in that case, that the Commission may regulate rates so as to preserve and foster meaningful yet stable carrier competition, can not seriously be questioned. However, difference in quality of service alone, in any case, is not sufficient to justify the prescription of a rate differential. *Reduced Rates—Atlantic Coast Ports to Puerto Rico,* 9 F.M.C. 147 (1965).

the rates. Moreover, the matter does not appear to be of immediate or significant concern to either TMT or Hearing Counsel. Under the circumstances, pursuing this matter would not appear to serve any valid regulatory purpose or warrant the expenditure of resources that such further proceeding would entail. These considerations warrant the discontinuance of the investigation of PRMSA's reduced rates.

THEREFORE, IT IS ORDERED, That the Presiding Officer's ruling of April 9, 1979, denying TMT's Motion to Discontinue this proceeding is vacated, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 671

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF ALIMENTA (USA), INC.

ORDER ON REMAND

December 11, 1979

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), upon the application of Sea-Land Service, Inc., for permission to waive a portion of certain freight charges to Alimenta (USA), Inc. Administrative Law Judge Joseph N. Ingolia served an Initial Decision on August 29, 1979 granting Sea-Land's application. Although no exceptions were filed, the Commission, on its own motion, determined to review the Initial Decision.

It appears from the Initial Decision that the shipment at issue may have predated the negotiation of a modified rate. If so, the waiver requested must be denied. The purpose of the proviso clauses in section 18(b)(3) is to allow the ocean carrier to correct tariff filing errors which result in freight charges other than those intended.[1] Clearly this section requires that the carrier be legally able to file the rate negotiated in the first instance. If, for example, a shipment has already commenced before a lower rate is negotiated, the tariff rate charged is not only not being assessed as a result of an error, but the carrier cannot publish, *post hoc,* a tariff rate which would apply to that shipment.[2] In this example, the carrier would be charging and the shipper would be paying exactly the tariff rate understood to be applicable. If such is the case in the proceeding here under consideration, then the relief requested, *i.e.,* waiver of the difference in freight charges, cannot be granted.

[1] House Report No. 920, November 14, 1967 [to accompany H.R. 9473, 90th Congress 1st Sess. (1967)], which amended section 18(b) to grant waiver and refund authority, states:

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

[2] In *Munoz y Cabrero v. Sea-Land Service, Inc.,* 20 F.M.C. 152, 153 (1977), the Commission said:

. . . [I]t is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after shipment.

Here the tariff rate assessed was a joint intermodal rate for a through land-ocean movement. The shipment in question was being loaded in Jacksonville, Florida, to begin the ocean leg of the through movement, on February 21, 1979, six days after a new tariff rate had been negotiated between Sea-Land and Alimenta. The record does not show the date of shipment of the land leg of this through movement from Panama City, Florida to Jacksonville. Therefore, in order for the Commission to adequately determine whether this shipment had, for the purposes of section 18(b)(3) applicability, already begun when the new rate was negotiated, additional facts are necessary.

A final point requires discussion. The Presiding Officer found that "the waiver only applies to the ocean portion of the through charge." However, the rate applicable to the shipment in question absent a waiver and the rate sought to be applied are through intermodal rates. Nowhere in the decision is there a discussion of the portion of this rate which accrues to the ocean carrier and we are of the opinion that it is unnecessary to focus on the ocean portion. Recently, in its Order on Remand in Special Docket 666—*Application of Sea-Land Services, Inc. for the Benefit of New Era Shipping as Agent for Central National Corporation,* served November 21, 1979, the Commission pointed out that similar language was potentially misleading, advising that: "The important fact in all special docket applications involving intermodal rates is that the refund or waiver not affect the land portion of the through rate." This statement, which applies equally here, is intended to make clear that the division accruing to the land carrier participating in the intermodal movement, over which the Commission has no regulatory jurisdiction, can in no way be altered by the grant of an application for waiver or refund.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for the receipt of evidence regarding the date on which the shipment in question was tendered to the first participating carrier and accepted by that carrier for commencement of the through movement and the issuance of a supplemental Initial Decision consistent with the directions of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-80

SALOU TRADING CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE

December 14, 1979

Notice is given that no appeal has been taken to the November 9, 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. 79-80

SALOU TRADING CORPORATION

v.

SEA-LAND SERVICE, INC.

MOTION TO DISMISS GRANTED

Finalized December 14, 1979

On July 27, 1979, the complainant, Salou Trading Corporation, filed a claim for overpayment of freight against the respondent, Sea-Land Service, Inc., in the amount of $5,370.70, under section 18(a), Shipping Act, 1916, 46 U.S.C. §817. It alleged that the respondent had charged the incorrect rate for the transportation of feathermeal, in bulk, in containers.

The parties agreed to the shortened procedure set forth in Subpart K of the Commission's Rules of Practice and Procedure and an amended complaint was filed. On October 16, 1979, prior to the filing of a response the complainant moved to dismiss his complaint. He states:

> Since the time of this shipment, petitioner is informed and believes that the tariff has been amended and the amendments have corrected many of the problems which gave rise to the misapplication of the tariff as alleged in this action. As a result of these changes, petitioner believes continuation of the present proceeding would not be in its best interests. It therefore respectfully requests that the action be dismissed with each party to bear its own costs, if any.

Wherefore, since the complainant's motion to dismiss is unopposed by the respondent, and since the issue is a narrow one involving no other parties or intervenors, it is

Ordered that the motion to dismiss is granted and the proceeding is discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

November 9, 1979

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

[DOCKET NO. 79-52; GENERAL ORDER 16; AMDT. 33]

PART 502—RULES OF PRACTICE AND PROCEDURE

FILING OF PETITIONS FOR RECONSIDERATION AND STAY

December 21, 1979

ACTION: Final Rule

SUMMARY: Rule 261 is revised to limit the grounds upon which petitions for reconsideration of final decisions or orders of the Commission may be sought and to restrict the filing of petitions for stay of Commission orders. A petition for reconsideration will be subject to summary rejection unless it specifies that (1) there has been a change in material fact or applicable law which has occurred after issuance of the decision or order; (2) such decision or order contains a substantive error in material fact; or (3) it addresses a matter on which the party had not previously had the opportunity to be heard. A petition for stay of a Commission order directing the discontinuance of a statutory violation will not be received.

EFFECTIVE DATE: February 8, 1980

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by a Notice of Proposed Rulemaking published in the *Federal Register* on May 23, 1979 (44 Fed. Reg. 29936-37). The Commission proposed to limit the grounds upon which petitions for reconsideration and stay would be entertained. In response to the notice, comments were received from Matson Navigation Company; Military Sealift Command; Maritime Administrative Bar Association; Sea-Land Service, Inc.; the law firm

of Coles and Goertner; Cummins Engine Company, Inc.; and four conferences* in a joint comment.

Matson would add language to the proposed rule which would permit reconsideration of a finding or conclusion which was not addressed in the briefs or arguments of the parties or to which reply was not afforded. MABA takes a similar position and suggests specifically that the Commission's proposal should not apply to conditional approvals of section 15 agreements where the parties have not had the opportunity to address the conditions imposed by the Commission and to final rules which contain provisions upon which the public has not had the opportunity to comment. We agree that petitions for reconsideration may be appropriate in such instances and, as the parties indicate, may avoid costly court litigation of issues which the Commission should first consider. We have therefore modified the rule to provide for such petitions in instances where the Commission's order contains a finding, conclusion or other provisions upon which the parties have not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party.

MSC's three recommendations can be considered together. They would restrict our proposal even further, limiting reconsideration to matters which could not be raised in a petition to reopen. Concurrently with this, they would create a new right to file a supplementary memorandum of law and clarify that a motion to reopen can be based only on a change in law. These proposals are unnecessary. A supplementary memorandum can be made under existing rules to the Presiding Judge or the Commission. MSC's interpretation of the basis for reopening a proceeding is erroneous; the Commission's Rule 230(a) makes clear that reopening can be made solely upon a change in *fact* or *law*. MSC's proposed revision is therefore more restrictive than our proposal and is rejected.

In addition to the comments addressed above, MABA also wants to preserve the right of petition for reconsideration in the event the Commission takes official notice of matter in its decision. This concern is adequately covered by Rule 226.

The conferences' primary recommendation is that counsel submit a certificate that the petition for reconsideration or stay is submitted in good faith. While the Commission's rules on discovery require such a certificate in certain instances, it is based on the *fact* of negotiations between counsel for various parties. A certificate based on any attorney's *subjective* judgment is quite a different matter and would not necessarily eliminate repetitious argument. The conferences' recommendation is therefore rejected.

Sea-Land seeks to expand the rule to provide for reconsideration where there is a substantive error of *law* or fact in the Commission decision or order. To adopt Sea-Land's suggestion in full would frustrate the intent of this proposal to prevent the filing of petitions containing repetitive arguments over divergent legal interpretations. However, Sea-Land's proposal has some merit insofar as it would base a petition on a substantive error of fact. Accordingly, the final rule will incorporate this provision.

*Far East Conference; Inter-American Freight Conference; Atlantic and Gulf/Indonesia Conference; and Atlantic and Gulf/Singapore, Malaya and Thailand Conference.

Coles proposes three bases for a petition for reconsideration. The first is "new" matter which is described a "new matters or new issues." It is difficult to see how this differs from the language of the proposed rule which provides for consideration of a petition for reconsideration upon a "change in material fact or applicable law." We perceive no difference between "new" and "changed" matter. The other two comments by Coles deal with petitions based on errors in fact and the use of official notice, subjects which have already been dealt with in the discussions of the comments filed by Sea-Land and MABA, respectively.

A further Coles' comment relates to the proposal that petitions for stay will not be entertained if a violation of the shipping statutes has been found. Coles points our that such a finding can involve a close question of fact or law. The firm also points out that at least some Federal courts require that a petition for stay be made to the agency before it can be filed with the court. Insofar as court practice is concerned, it is doubtful that a court would require a party to file a petition for stay when the filing of such a petition is expressly precluded by agency rule. We remain unpersuaded by the basic thrust of Coles' argument. As we stated in the Notice of Proposed Rulemaking, the public interest requires that practices violative of the law should not be permitted to continue. We have reworded the final rule to specify that the rule applies in proceedings where the Commission has directed the discontinuance of conduct found to be violative of the law.

We have also eliminated reference to orders and decisions of the Administrative Law Judges; this rule is not applicable to those orders and decisions.

Cummins would retain the right of petition for reconsideration in informal dockets. Upon reflection, we agree that petitions for reconsideration in informal dockets should be governed by the general rule and have modified our proposal accordingly.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 553) and sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 821 and 841(a)), section 261 of Part 502 is revised to read as follows:

§ 502.261 Petitions for Reconsideration and Stay.

(a) Within 30 days after issuance of a final decision or order by the Commission, any party may file a petition for reconsideration. Such petition shall be served in conformity with the requirements of Subpart H of this Chapter. A petition will be subject to summary rejection unless it: (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order; (2) identifies a substantive error in material fact contained in the decision or order; or (3) addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. A petition shall be verified if verification of original pleading is required and shall not operate as a stay of any rule or order of the Commission.

(b) A petition for stay of a Commission order which directs the discontinuance of statutory violations will not be received. (Rule 261)

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 664

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF HAYNES FURNITURE CO., INC., ET AL.

REPORT AND ORDER ADOPTING INITIAL DECISION

December 27, 1979

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817), upon the application of Sea-Land Service, Inc. for permission to waive $1,257.24 of the applicable freight charges on 10 shipments of furniture parts and components, shipped between January 31, 1979 and March 3, 1979 from Taipei and Kaohsuing, Taiwan, via ocean carrier to Oakland and Long Beach, California, then via rail carrier to the Ports of New York, Philadelphia, Norfolk, and Savannah.

Administrative Law Judge Charles E. Morgan served his Initial Decision on October 22, 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, correct and are adopted. However, amplification is needed concerning a point raised in the Initial Decision. The Presiding Officer found that: "The requested waiver will apply only to the ocean portion of the through charge." However, the rate applicable to the shipment in question absent a waiver and the rate sought to be applied are through intermodal rates. Nowhere in the decision is there a discussion of the portion of this rate which accrues to the ocean carrier and we are of the opinion that it is unnecessary to focus on that portion. Recently, in its Order on Remand in Special Docket 666—*Application of Sea-Land Service, Inc. for the Benefit of New Era Shipping as Agent for Central National Corporation,* served November 21, 1979, 19 SRR 1088, the Commission pointed out that similar language was potentially misleading, advising that: "The important fact in all special docket applications involving intermodal rates is that the refund or waiver not affect the land portion of the through rate." This statement, which applies equally here, is intended to make clear that the division accruing to the land carrier participating in the intermodal movement, over which the Commission has no regulatory jurisdiction, can in no way be altered by the grant of an application for waiver or refund.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding, as clarified by the above discussion, is adopted; and

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

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 664, that effective January 31, 1979, for purposes of refund or waiver of freight charges on any shipments which have been shipped during the period from January 31, 1979 through March 16, 1979, the rate from Taiwan on furniture parts and components is $67M, subject to all rules, regulations, terms and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 664

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF HAYNES FURNITURE CO., INC. ET AL.

Adopted December 27, 1979

Application for permission to waive $1,257.24 of the applicable freight charges granted.

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

By application timely mailed on July 27, 1979, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), the applicant, Sea-Land Service, Inc., seeks permission to waive a total of $1,257.24 of the applicable freight charges on ten shipments of furniture parts and components, shipped from Taipei (port of loading—Keelung) and from Kaohsiung (port of loading—Kaohsiung), Taiwan, via ocean carrier to the Ports of Oakland and Long Beach, California, thence via rail carrier to the Ports of New York, Philadelphia, Norfolk, and Savannah, bills of lading dated January 30, 1979, and later (latest bill of lading dated March 2, 1979), and sailing dates, January 31, 1979, and later (latest sailing date March 3, 1979).

The application is for the benefit of the consignees, the Haynes Furniture Co., Inc., Norfolk, Virginia (one shipment), L & B Products Corp., Bronx, New York (one shipment), Manow International Corporation, New York, New York (one shipment), Marlon Creations, Inc., Long Island City, New York (one shipment), Rachlin Furniture, Inc., Philadelphia, Pennsylvania (one shipment), and Universal Furniture Industries, Inc., North Brunswick, New Jersey, and Atlanta, Georgia (five shipments).

The consignees listed above paid total freight charges on the ten shipments of $22,262.93, except that Rachlin Furniture, Inc., did not pay, and instead freight charges on its shipment were prepaid by the shipper, Jardine Enterprise, Ltd., in the amount of $2,583.16 (bill of lading No. 970-190051).

[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 requested waiver will apply only to the ocean portions of the through charges on the ten shipments.

At the time of movement of the shipments, the applicable basic freight rate was $71 per ton of one cubic meter (M) or $88 per ton of 1,000 kilos (W), whichever produces the greater revenue. Generally, measurement tons were over three times as great as the weight tons of the ten shipments, and in all cases the $71 M ton rate was applicable (item No. 0990–75 of the pertinent tariff of Sea-Land).

The rate sought to be applied on these shipments is $67 M, intended to be effective January 25, 1979. This rate was intended to match the all-water $67 M rate of the New York Freight Bureau (HK) Independent Lines Rate Agreement, FMC Agreement No. 10108. Sea-Land is a member of Agreement No. 10108, but Agreement No. 10108 lacks intermodal (ocean-rail) authority. Prior to March 1, 1979, Sea-Land published its own all-water tariff, but with the filing of a common tariff for all members of Agreement No. 10108, Sea-Land's all-water tariff was canceled effective March 1, 1979.

A telegraphic message was transmitted on January 22, 1979, from Sea-Land's Hong Kong office to its Tariff Publications office in Menlo Park, New Jersey, requesting publication of various rates to match No. 10108, including the publication in item 0990–75 of a special rate of $67 M on furniture parts and components to be published in both the all-water and minibridge (ocean-rail) tariffs of Sea-Land. However, because of clerical error, only the all-water tariff was amended.

The clerical error of non-publication of the $67 M rate in the minibridge tariff was discovered, and subsequently, corrected, effective March 16, 1979 (14th revised page 120, Sea-Land Freight Tariff No. 325, F.M.C. No. 148). This was after the subject shipments had moved and before the subject application was filed. Also, effective July 26, 1979, 22nd revised page 120 of the minibridge tariff deleted an expiration date for the $67 M rate and its geographical restriction to Taiwan, thus making item 0990–75 the same geographically as it was before the shipments moved and when they moved.

In the application as originally filed Sea-Land stated that it was conducting an internal audit to determine if additional shipments of the same commodity herein were made during the period in issue. By letter dated August 30, 1979, from Mr. Frank A. Fleischer, Sea-Land states that only the ten shipments listed in this application were affected by the delayed filing of the $67 M reduced rate.

In addition to the ocean-rail freight charges, one shipment was subjected to a container handling charge at the origin port which was prepaid by the shipper, and four shipments were subjected to a container service charge at destination points paid by the consignees. These charges are not in issue herein.

The furniture parts and components measured as follows:

Original Bill of Lading No.	*Cubic Meters*
980-143923	32.81
970-189158	32.99
970-186309	29.08
970-188202*	0.79
970-190051*	14.44
980-141958	40.50
980-141959	40.77
980-143581	35.50
980-144632	43.22
980-144677	44.21
Total	314.31

*Note: On two bills of lading there were other commodities listed, which are not affected by this decision. Their measurements totalled 25.56 cubic meters.

The total cubic meters above of 314.31 times the $4 per ton (M) difference (in the applicable rate of $71 and sought rate of $67) results in $1,257.24, the total waiver sought.

The statutory requirements have been met. It is concluded and found that there were errors of administrative or clerical nature in that the Sea-Land intended rate of $67, meant to match the Agreement No. 10108 rate of $67, was not published in Sea-Land's intermodal (ocean-rail) tariff prior to the movements of the ten shipments in issue; that the intended rate was made effective after the ten shipments moved and prior to this application; that the application was timely filed; and that the authorized waiver herein will not result in discrimination among shippers.

The applicant is authorized to waive a total of $1,257.24 of the applicable freight charges. Charges on the sought basis have been collected. An appropriate notice of this matter and of the rate on which the waiver is based shall be published in the pertinent tariff.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D.C.
October 17, 1979

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 655

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF TRADE WINDS IMPORTING CO.

Adopted December 27, 1979

Application for permission to waive $708.29 of the applicable freight charges granted.

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

By application mailed on June 29, 1979, and timely filed on Monday, July 2, 1979, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), the applicant, Sea-Land Service, Inc., seeks permission to waive $708.29 of the applicable freight charges on two shipments of footwear, all kinds, from Singapore via ocean carrier to Oakland, California, thence via rail carrier to Norfolk, Virginia, bills of lading dated January 2, 1979, and sailing date the same.

The application is for the benefit of the consignee, the Trade Winds Importing Co., of Lynchburg, Virginia, which paid freight charges on the two shipments in the aggregate amount of $4,654.25.

The requested waiver will apply only to the ocean portion of the through charge.

At the time of movement of the two shipments the applicable basic rate on the footwear was $81 M (per cubic meter), subject to container service charges to cover handling at the destination ports. In addition, one shipment was assessed a container handling charge at the port of Singapore, which charge was prepaid by the shipper, Ace Rubber, MFY. PTE. LTD., and this charge is not in issue herein. The issues relate to the ocean freight charges and destination charges paid by the consignee, Trade Winds Importing Co.

One of the two shipments measured 14.39 cubic meters. Basic applicable charges on this shipment at the $81 M rate are $1,165.59. The destination container service charge of $5 per revenue ton applied on "cargo delivered ex

[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).

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding, as clarified by the above discussion, is adopted and made a part hereof; and

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

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 655, that effective January 2, 1979, for purposes of refund or waiver of freight charges on any shipments which have been shipped during the period from January 2, 1979 through January 12, 1979, the rate from Singapore on footwear, all kinds is $70W, subject to all rules, regulations, terms and conditions of said rate and this tariff.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 655

APPLICATION OF SEA-LAND SERVICE, INC.
FOR THE BENEFIT OF TRADE WINDS IMPORTING CO.

Adopted December 27, 1979

Application for permission to waive $708.29 of the applicable freight charges granted.

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

By application mailed on June 29, 1979, and timely filed on Monday, July 2, 1979, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), the applicant, Sea-Land Service, Inc., seeks permission to waive $708.29 of the applicable freight charges on two shipments of footwear, all kinds, from Singapore via ocean carrier to Oakland, California, thence via rail carrier to Norfolk, Virginia, bills of lading dated January 2, 1979, and sailing date the same.

The application is for the benefit of the consignee, the Trade Winds Importing Co., of Lynchburg, Virginia, which paid freight charges on the two shipments in the aggregate amount of $4,654.25.

The requested waiver will apply only to the ocean portion of the through charge.

At the time of movement of the two shipments the applicable basic rate on the footwear was $81 M (per cubic meter), subject to container service charges to cover handling at the destination ports. In addition, one shipment was assessed a container handling charge at the port of Singapore, which charge was prepaid by the shipper, Ace Rubber, MFY. PTE. LTD., and this charge is not in issue herein. The issues relate to the ocean freight charges and destination charges paid by the consignee, Trade Winds Importing Co.

One of the two shipments measured 14.39 cubic meters. Basic applicable charges on this shipment at the $81 M rate are $1,165.59. The destination container service charge of $5 per revenue ton applied on "cargo delivered ex

[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).

containers at carrier's freight station." This charge amounts to $71.95, making total applicable charges payable by the consignee on this shipment of $1,237.54.

The second of the two shipments measured 50 cubic meters, and basic applicable charges at the $81 M rate were $4,050. The destination container service charge of $1.50 per revenue ton applied on "cargo delivered in containers at carrier's yard." This charge amounts to $75, making total applicable charges payable by the consignee on this shipment of $4,125.

Aggregate applicable charges payable by the consignee on the two shipments herein are $5,362.54. The consignee paid total charges on the basis sought herein of $4,654.25. Thus the application seeks waiver of the difference which is $708.29.

The basic rate sought to be applied is $70 W, per cubic meter, and charges on this basis, plus applicable destinations charges, result in the total sought charges on the two shipments of $4,654.25.

Sea-Land Service is a member of the Straits/New York Conference (SNYCON), FMC Agreement No. 6010, which governs the all-water trade from the Republic of Singapore and West Malaysia to U.S. Atlantic and Gulf Ports. SNYCON lacks intermodal (ocean-rail) authority. Consequently intermodal (ocean-rail) shipments, such as the two shipments herein, move under Sea-Land's own tariff. This tariff generally reflects the same level of rates as published by the all-water conference (SNYCON).

During December 1978, SNYCON published a reduced rate on footwear, all kinds, of $70 M, effective January 1, 1979,. Reacting to this action, Sea-Land's Hong Kong office requested Sea-Land's Menlo Park, New Jersey, office to match the SNYCON rate effective January 1, 1979. Telex message accordingly was sent on December 21, 1978, and received the same date in New Jersey, and was forwarded the same day via interoffice mail to the Tariff Publications office of Sea-Land.

Normally the Tariff Publications office received telex proposals between one and four hours after their receipt in the telex room. But, in the present case the telex proposal was stamped in the Tariff Publications office one week later on December 28, 1978.

Even then there was time to meet the requested effective date for the $70 rate of January 1, 1979, but there was a second delay or second error in that the proposed rate was assigned an effective date of January 12, 1979.

Applicant states that there are no other shipments of the same or similar commodity which moved on its line during the same period of time as the two shipments in issue.

The statutory requirements have been met. It is concluded and found that there were errors of administrative or clerical nature in that the rate in issue was not made effective prior to the movement of the two shipments; that the intended rate was made effective after the two shipments moved and prior to this application; that the application was filed timely; and that the authorization of a waiver herein will not result in discrimination among shippers.

The applicant is authorized to waive $708.29 of the applicable freight charges. An appropriate notice of this matter and of the rate on which this waiver is based shall be published in the pertinent tariff.

(S) CHARLES E. MORGAN
Administrative Law Judge

WASHINGTON, D. C.
October 1, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-11

DEL MONTE CORPORATION

v.

MATSON NAVIGATION COMPANY

NOTICE

December 27, 1979

Notice is given that no appeal has been taken to the November 20, 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. 79-11

DEL MONTE CORPORATION

v.

MATSON NAVIGATION COMPANY

SETTLEMENT APPROVED; COMPLAINT DISMISSED

Finalized December 27, 1979

On February 23, 1979, Del Monte Corporation, a shipper and the complainant, initiated this proceeding by filing a complaint against Matson Navigation Company, a common carrier by water between California, Guam and the Philippine Islands and the respondent, alleging violations of section 14 Fourth (c) of the Shipping Act, 1916, 46 U.S.C. §812. The cited section of the Shipping Act proscribes unfair treatment of or unjust discrimination against a shipper by a common carrier in adjusting or settling claims. Matson's answer denied the alleged violations and set up eight affirmative defenses.

Thereafter, Del Monte and Matson filed a joint motion on November 9, 1979, seeking approval of an agreement settling all of Del Monte's claims against Matson and asking, further, that the complaint be dismissed with prejudice. Hearing Counsel, an intervenor, interposed no objection to the motion.

As explained in the discussion which follows, in my view the motion should be granted.

FACTS

A brief statement of Del Monte's version of the facts as reconstructed from various filings, which comprise an already considerable administrative record, will be helpful.[1]

In early 1976, Matson carried a number of Del Monte's pineapple product shipments from Bugo, Philippine Islands, to Apra Harbor, Guam, and thence

[1] The "facts" recited in the text should not be construed as findings of fact. Matson does dispute some of the "facts." The purpose of the statement of "facts" is to place the proposals of the parties in proper perspective.

to Los Angeles and Alameda, California. The shipments were received at Bugo in good order and condition but were delivered at destination "short, dented, crushed, wet and otherwise damaged." The reason for the deteriorated condition of the cargo at destination was Super Typhoon Pamela which struck Guam with devastating force in May, 1976.

Apparently, Matson refused to honor Del Monte's claims for damage or even grant further time extensions on those claims whereupon Del Monte filed a complaint against Matson in the United States District Court for the Northern District of California. In that lawsuit, Civil Action No. C77-2069 RFP, filed September 15, 1977. Del Monte asked for damages in the amount of $320,527.87.

During the course of discovery and inspection in the court action, Del Monte learned that at various times between July 27, 1976 and June 15, 1977, Matson paid 13 other shippers for cargo allegedly discharged damaged or short because of Pamela.[2] It is alleged that one of those shippers was Castle & Cooke Foods, one of Del Monte's principal competitors. Castle & Cooke was purportedly paid $25,354.41 for damage to the same type of pineapple cargo, carried at the same time and in the same vessels and damaged in the same storm as was Del Monte's cargo.

When it learned of these other payments, Del Monte sought to amend the complaint in the court action by adding a claim based upon section 14 Fourth (c). However, Judge Beeks, who is presiding over the court action, agreed with Matson that because of primary jurisdiction considerations, the section 14 Fourth (c) issue be referred to the Federal Maritime Commission. The instant proceeding thus ensued.

It should be noted that at or before the commencement of this proceeding control over the litigation passed from the hands of the named complainant and respondent to their insurance carriers. As is evident from the names of the signatories to the "Receipt and Release with Warranty,"[3] Fireman's Fund Insurance Company became subrogated to Del Monte's interest. Matson's interest is represented by St. Paul Fire and Marine Insurance.

The "Settlement Agreement" is a two part document. The first, attached as Appendix A, hereto, releases Matson and, among others, its underwriters, from any claims arising from the pineapple shipments, including any claims asserted in this proceeding, without any admission of liability on the part of Matson. The second, attached as Appendix B, hereto, is designed to accomplish the same result in the court action, also without any admission of liability on the part of Matson. Although the existence of two releases make it appear that Matson (and/or its insurance carrier) is paying $200,000 for each, the entire consideration for both releases is $200,000.[4]

[2] Some of the damage occurred on land and some at sea. Matson's vessel, *Hawaiian Legislator*, arrived at Apra Harbor on its Voyage 213 on May 11, 1976, to pick up Del Monte's cargo and the cargo of a number of other shippers. The vessel was unable to complete loading prior to the onset of Pamela and was forced to go partly loaded out to sea to avoid the storm. After the storm, the vessel returned to port to complete loading.

[3] That is the title of the document referred to in the motion as the "Settlement Agreement."

[4] See p. 2 of the joint motion, which also states that the parties were able to stipulate damages in the court action at $280,000.

THE MOTION

The joint motion makes the following statements pertinent to the settlement:

The parties to this proceeding submit that it would be in the public interest for their Settlement Agreement to be accepted and approved. This would undoubtedly be an expensive proceeding to litigate to a conclusion, the costs of which would far exceed the settlement payment agreed upon by the parties. No violation of the Shipping Act would result from this settlement.

This proceeding has already involved extensive discovery, including numerous depositions and time-consuming and expensive interrogatories, document production and motion practice. Further discovery, including several more depositions, as well as an evidentiary hearing, would be required should the settlement be disapproved. The parties have estimated the hearing as likely to take two weeks.

Furthermore, in view of the unique and precedent-setting nature of these proceedings, an appeal by the losing party may be anticipated to the full and beyond. (Footnotes omitted.)

The central statutory standard in this proceeding, section 14 Fourth(c) (46 U.S.C. §812 Fourth(c)), has to our knowledge never been definitively construed. The parties submit that in view of the novel legal aspects of this proceeding and of the udoubted need for an evidentiary hearing should this matter proceed, the settlement represents a realistic estimate of the costs of litigation and the risks and uncertainties inherent in the court and administrative proceedings.

In connection with the actual payment of the settlement funds, Del Monte's insurer has satisfied Del Monte's claim and now proceeds under a subrogation agreement. All the monies to be paid by Matson under the proposed settlement would be received and retained by Del Monte's subrogated insurer.

The parties are aware of no other claims arising out of Voyage 213 of the *HAWAIIAN LEGISLATOR*, Eastbound, and the limitation periods for purposes of the Carriage of Goods by Sea Act, 46 U.S.C. §§1300, *et seq.*, as well as for the purposes of Section 22 of the Shipping Act, 1916, 46 U.S.C. §821, have expired. [5]

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 views this provision and its legislative history "as being of the 'greatest im-

[5] Section 22 provides in pertinent part, "The (Commission), if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation." The "limitation in section 22 is a non-waivable jurisdictional prerequisite for the filing of a complaint seeking reparation." *Celanese Corporation, etc. v. The Prudential Steamship Company*, 18 SRR 747 (1978), FMC Docket No. 78-14, Ruling on Motion for Partial Summary Judgment Deferred, etc., Served August 1, 1978, at 2-3, and cases cited therein. For some causes of action, such as those alleging a violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. §817(b)(3), e.g., overcharges, the cause of action accrues upon payment of freight charges. *Id.* Because of the novelty of a section 14 Fourth (c) proceeding it cannot be said with certainty when a cause of action under that section accrues. However, I cannot perceive any jurisdictional obstacle in the instant proceeding. Fairness, alone, would seem to require that at the earliest, the statute would begin to run on June 15, 1977, when the last of the 13 other claims was paid. Given the nature of the violation, perhaps it would be more equitable to hold that the cause of action accrues when a shipper learns of the unfair treatment or discrimination. In any event, I am satisfied that section 22 poses no problem insofar as a settlement is concerned. But, for the reasons expressed in this note, I cannot agree with the implied statement made in the motion that no other claims of this type can presently qualify under section 22.

portance' to the functioning of the administrative process."[6] *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[7] 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 full or adjusted payment absent admissions or findings of violations of the Shipping Act. *Foss Alaska Line, Inc. Proposed General Rate Increase Between Seattle, Washington and Points in Western Alaska*, 19 SRR 613 (1979), FMC Docket No. 79-54, Offer of Settlement Approved, etc., Served August 1, 1979, Notice of Administrative Finality Served September 5, 1979 (partial refund and rollback in investigation of a carrier's domestic offshore general revenue increase); *Terfloth and Kennedy, Ltd. v. American President Line, Ltd.*, 19 SRR 581 (1979), FMC Docket No. 78-20, Settlement Approved, etc., Served July 24, 1979, Notice of Administrative Finality Served August 30, 1979 (less than full amount of claims for alleged violations of 46 U.S.C. §§814, 815 First and 816 by a carrier and 46 U.S.C. §841b(c) and 46 C.F.R. §510.23 by a freight forwarder); *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau*, 18 SRR 619 (1978), FMC Docket No. 71-83, Approval of Settlement, etc., Served June 29, 1978, Notice of Determination Not to Review Served July 27, 1978 (less than full amount of claims for alleged violations of 46 U.S.C. §§812, 814, 815 First and 816 by a conference and its members); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.*, 18 SRR 744 (1978), FMC Docket No. 75-22, Settlement Approved, etc., Served July 31, 1978, Notice of Determination Not to Review Served August 8, 1978 (less than full amount of claims for alleged violations of 46 U.S.C. §§814, 815, and 816 by a carrier and settlement of companion court action); *Old Ben Coal Co.*

[6] Senate Judiciary Comm., Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2nd 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 the 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.

[7] 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. . . ."

v. Sea-Land Service, Inc., 18 SRR 1085 (1978), FMC Docket No. 78-13, Initial Decision served October 11, 1979, Notice of Determination Not to Review, Served November 29, 1979 (full amount of claims for alleged violations of 46 U.S.C. §816 by a carrier); *Organic Chemicals v. Atlanttrafik Express Service and Organic Chemicals v. Farrell Lines, Inc.*, 18 SRR 1536a (1979), FMC Docket Nos. 78-2 and 78-3, Order on Appeal, Served January 25, 1979, *Organic Chemicals v. Farrell Lines, Inc.*, 18 SRR 1536a (1979), FMC Docket No. 78-3, Settlement and Dismissal of Complaint, Served March 14, 1979 (full amount of claims for alleged violations of 46 U.S.C. §817(b)(3) by a carrier); *Perry's Crane Service v. Port of Houston Authority of the Port of Houston, Texas*, 19 SRR 517 (1979), FMC Docket No. 75-51, Motion For Approval of Settlement Granted, etc., Served June 21, 1979, Notice of Administrative Finality Served July 27, 1979 (less than full amount of claims for alleged violations of 46 U.S.C. §815 First and 816 by a terminal operator); *H & H Cranes, Inc. v. Port of Houston Authority of Harris County, Texas*, 19 SRR 547(1979), FMC Docket No. 76-57, Motion For Approval of Settlement Granted, etc., Served July 10, 1979, Notice of Administrative Finality Served August 16, 1979 (less than full amount of claims for alleged violations of 46 U.S.C. §815 First and 816 by a terminal operator).

As implied by the foregoing references to the statements contained in the motion, I agree with the analysis of the benefits to be obtained by approval of the settlement. I find that the settlement is a bona fide and realistic means of resolving the dispute between the parties and that the settlement will not result in any violation of the Shipping Act nor does it appear to do violence to the regulatory scheme. Accordingly I find that the settlement is well within the public interest and merits approval.

The order of approval and dismissal will be conditioned upon the following consideration. While it is not entirely clear whether Judge Beeks' instructions for the institution of a complaint proceeding before this Commission were tantamount to a mandatory reference, I will require the parties to obtain assurance from the district court, in the form of an order or other writing, that the Commission is under no further obligation to the court in Civil Action No. C77-2069 RFP.[8] The assurance shall be filed not later than the time fixed by Rule 227(d) of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.227(d) for review of an order of dismissal upon the Commission's own initiative.[9]

Therefore, it is ordered that the "Settlement Agreement" be approved and that the complaint be dismissed with prejudice.

(S) SEYMOUR GLANZER
Administrative Law Judge

November 20, 1979

[8] See *Clipper Carloading Company v. Trans-Pacific Freight Conference of Japan, et al.*, FMC Docket No. 72-20, Order of Dismissal, served July 21, 1975.

[9] Subsequent to the preparation of this order, I received a letter from counsel for Del Monte to which was attached a proposed "Order for Dismissal with Prejudice" in Civil Action No. C77-2069 RFP. The proposed order contains the assurance referred to in the text. The letter advises that the proposed order will be presented for Judge Beeks' signature on December 7, 1979. Should he approve and sign the proposed order, the parties should have no difficulty in complying with the schedule established in the text.

APPENDIX A

RECEIPT AND RELEASE WITH WARRANTY

The undersigned hereby acknowledge receipt from Matson Navigation Company of the sum of Two Hundred Thousand Dollars ($200,000) in full satisfaction of any claims they now have, ever had or ever shall have on account of damage to or loss of cargo shipped on the vessels TRANSONTARIO (V. 14 and 15), HAWAIIAN LEGISLATOR (V. 213) and TRANS-CHAMPLAIN (v. 19) in or about the year of 1976 from Bugo, Philippine Islands and Apra Harbor, Guam to Los Angeles and Alameda, California under bills of lading Nos. BG 1 and 2 (TRANSONTARIO, V. 14), BG 1 through 8 (TRANSONTARIO, V. 15), E-17240 through E-17247, E-17454, E-17455, E-17487, E-17499 through E-17505, E-17240-D, E-17241-E, E-17242-F, E-17247-I (all HAWAIIAN LEGISLATOR, V. 213), E-17118-A, E-17119-B, E-17123-C, E-17245-H, E-17244-G (TRANS-CHAMPLAIN, V. 19) and hereby fully release and forever discharge said vessels, their owners, charterers, operators, agents, underwriters, master and crew, and said Matson Navigation Company, its employees and agents, of and from any and all such claim or claims, damages suits or causes of action whatsoever, now known or unknown, in connection with or arising out of said aforesaid shipments, including but not limited to all claims asserted in that certain proceeding Docket No. 79-11 in the Federal Maritime Commission which the undersigned agree to cause to be dismissed concurrently with the execution hereof, without any admission of liability on the part of MATSON NAVIGATION COMPANY.

In executing these presents, the undersigned represent and warrant that they are duly authorized and empowered to give a full and valid release and acquittance in respect to all of the aforesaid matters and claims and agree to indemnify the aforesaid parties for any breach of said warranty.

DEL MONTE CORPORATION

Dated: October 22, 1979

By _____

Its _____

FIREMAN'S FUND INSURANCE COMPANY

Dated: 10/23/79

By _____

Its _____

APPENDIX B

RECEIPT AND RELEASE WITH WARRANTY

The undersigned hereby acknowledge receipt from Matson Navigation Company of the sum of Two Hundred Thousand Dollars ($200,000) in full satisfaction of any cliams they now have, ever had or ever shall have on account of damage to or loss of cargo shipped on the vessels TRANSONTARIO (V. 14 and 15), HAWAIIAN LEGISLATOR (V. 213) and TRANS-CHAMPLAIN (v. 19) in or about the year of 1976 from Bugo, Philippine Islands and Apra Harbor, Guam to Los Angeles and Alameda, California under bills of lading Nos. BG 1 and 2 (TRANSONTARIO, V. 14), BG 1 through 8 (TRANSONTARIO, V. 15), E-17240 through E-17247, E-17454, E-17455, E-17487, E-17499 through E-17505, E-17240-D, E-17241-E, E-17242-F, E-17247-I (all HAWAIIAN LEGISLATOR, V. 213), E-17118-A, E-17119-B, E-17123-C, E-17245-H, E-17244-G (TRANS-CHAMPLAIN, V. 19) and hereby fully release and forever discharge said vessels, their owners, charterers, operators, agents, underwriters, master and crew, and said Matson Navigation Company, its employees and agents, of and from any and all such claim or claims, damages suits or causes of action whatsoever, now known or unknown, in connection with or arising out of said aforesaid shipments, including but not limited to all claims asserted in that certain Action No. C-77-2069 RFP in the Northern District of California which the undersigned agree to cause to be dismissed concurrently with the execution hereof, without any admission of liability on the part of MATSON NAVIGATION COMPANY.

In executing these presents, the undersigned represent and warrant that they are duly authorized and empowered to give a full and valid release and acquittance in respect to all of the aforesaid matters and claims and agree to indemnify the aforesaid parties for any breach of said warranty.

DEL MONTE CORPORATION

Dated: October 22, 1979

By _____

Its _____

FIREMAN'S FUND INSURANCE COMPANY

Dated: 10/23/79

By _____

Its _____

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-3

L. H. FEDER D/B/A/ PIONEER
INSTITUTIONAL TRADING COMPANY

v.

ELDER DEMPSTER LINES, LTD.

NOTICE

December 27, 1979

Notice is given that no appeal has been taken to the November 20, 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. 76-3

L. H. FEDER D/B/A PIONEER
INSTITUTIONAL TRADING COMPANY

v.

ELDER DEMPSTER LINES, LTD.

ORDER (1) WITHDRAWING COMPLAINT ON DECISION OF COMPLAINANT; (2) DISMISSING COMPLAINT WITH PREJUDICE; (3) DISCONTINUING PROCEDING

Finalized December 27, 1979

The complaint in this proceeding was served January 29, 1976. The answer to the complaint, after an extension of time within which to answer, was served March 1, 1976. By notice served March 9, 1976, prehearing conference was set for Tuesday, March 30, 1976; subsequently by notice served April 6, 1976, prehearing conference was reset for Tuesday, April 20, 1976; further rescheduling was made as to prehearing conference by notice served April 16, 1976, setting date for same on May 25, 1976. The prehearing conference finally was held on the latter date. By order served May 26, 1976, this proceeding was stayed pending disposition of case No. 75, Civ. 4248, between the parties in the United States Court for the Southern District of New York, in which the respondent in this Commission proceeding is the plaintiff (through Atlantic Overseas Corporation, its general agent, through whom it conducts business in New York) in the U.S. District Court pursued the matter of its indemnity claim to recover sum paid Ivory Coast Customs authorities in settlement of fine imposed upon vessel for under-declaration of weight with respect to cargo of used clothing. The District Court, Bonsal, J., held that carrier, which established that shipper breached its warranty as to accuracy of weight of cargo, that shipper had no defenses against indemnity claims, and that settlement of fines with Customs was reasonable, was entitled to indemnity against shipper for amount which carrier paid in settlement of fine imposed by Customs. There was judgment for the plaintiff carrier in the sum of $65,520. *Atlantic Overseas Corporation v. Feder,* 452 F. Supp. 347 (1978). On appeal to the 2nd Circuit United States Court of Appeals, the lower Court was affirmed. *Petition for Certiorari*

to the United States Supreme Court (Pet. No. 78-1647) was denied October 3, 1979. *L. H. Feder Corp. v. Atlantic Overseas Corp., cert. den.*, 444 U.S. 829 (1979).

By order served October 10, 1979, the Presiding Administrative Law Judge directed the parties within ten (10) days of that date to file a status report as regards these proceedings now that *certiorari* has been denied.

On behalf of the respondents, a letter dated October 19, 1979 (received October 22, 1979), stated:

In accordance with Your Honor's order of October 10, 1979, we wish to advise that as a result of the Supreme Court's decision on October 3, 1979, to deny L. H. Feder's *Petition for Certiorari*, we have been advised by counsel for the Petitioner that it will withdraw the captioned action before the Federal Maritime Commission in the very near future. Respondent consents to a withdrawal made with prejudice.

On behalf of the complainants, a letter dated October 19, 1979 (received October 23, 1979), stated:

Further to your Order of October 10, 1979, requesting the parties to the captioned proceeding to file another status report, we hereby confirm that as stated in your order, the United States Supreme Court denied L. H. Feder Corp.'s *Petition for Certiorari* to the Second Circuit Court of Appeals on October 3, 1979.

We have arranged a meeting with our client early next week at which time a decision will be made as to whether we should proceed forward or discontinue this proceeding. In view of this, we respectfully request an extension of time until Friday of next week (October 26, 1979) within which to respond to your order to file a status report.

In a letter dated October 31, 1979 (received November 5, 1979), the complainants stated:

Further to your order of October 10, 1979, requesting a status report on the captioned proceeding and our letter of October 19, 1979, requesting an extension to reply to said Order, this is to advise that the complainant has decided to discontinue this proceeding. We have already advised counsel for respondent on this decision and counsel for both parties shall jointly submit to you a stipulation of discontinuance.

DISCUSSION

Since the October 31, 1979, letter from complainant received November 5, 1979, nothing further has been heard or received from the parties to this proceeding. The complainant has given its decision to discontinue this proceeding and communicated the same to all concerned. The respondent would like such withdrawal to be "with prejudice." There is no need for a joint stipulation of discontinuance. Under the circumstances of the case, there seems to be no regulatory purpose which would be served in awaiting further for a stipulation of discontinuance or delaying discontinuance of this complaint case which was served January 29, 1976.

Whereupon, upon consideration of the above and cognizance of the complainant's decision to withdraw the complaint herein, it is deemed that withdrawal of the complaint should be honored. There is no reason present in this proceeding why the withdrawal of the complaint should be questioned or dismissal of the complaint and discontinuance of this proceeding further delayed.

Wherefore, it is ordered,
(A) The complaint is withdrawn on the decision of the complainants.
(B) Having been withdrawn, the complaint is dismissed with prejudice.
(C) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

November 20, 1979

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 487(I)

POIRETTE CORSETS, INC.

v.

CONSOLIDATED EXPRESS, INC.

REPORT AND ORDER

December 28, 1979

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

This proceeding was instituted upon the complaint of Poirette Corsets, Inc., filed December 27, 1977, alleging that Consolidated Express, Inc. charged it rates in excess of the applicable tariff on file with the Commission.[1] On September 25, 1979, Settlement Officer John L. Sheppard, issued a decision awarding Poirette $4,668.62 in reparations. On October 1, 1979, the Settlement Officer issued a supplemental decision awarding Poirette interest from the date of the complaint. The Commission determined to review the Settlement Officer's decisions.

The Settlement Officer found that the evidence submitted by Poirette does not, standing alone, sustain its allegation that it was overcharged on shipments of knock down cartons. The Settlement Officer went on, however, to take official notice of the *Puerto Rico-Virgin Islands Trade Study*[2] which sets forth density ranges, expressed in cubic feet per short ton, for particular commodities including cardboard boxes. After comparing the volumes contained in the carrier waybills here in evidence with the density ranges set forth in the study, the Settlement Officer determined that 15 of the carrier waybills show volumes outside the ranges contained in the study. The Settlement Officer found that this disparity indicates that the volumes contained in the bills of lading are

[1] By consent of the parties the proceeding was conducted under the Commission's informal docket procedure [46 C.F.R. § 502.301 *et seq.*].

[2] *Puerto Rico-Virgin Islands Trade Study, A Regulatory Staff Analysis,* G.P.O., Washington, D.C. 1970.

incorrect. On this basis, the Settlement Officer concluded, as a matter of construction, that the measurements alleged in Poirette's complaint are correct.

Upon review, the Commission concludes that the *Puerto Rico-Virgin Islands Trade Study,* upon which the Settlement Officer's decision heavily relies, does not have sufficient probative value to establish the actual cubic measurement of the commodity here in question. Assuming, *arguendo,* that the density ranges set forth in the trade study are sufficiently precise to rely upon in concluding that the cubes shown in the carrier's waybills are incorrect, it does not necessarily follow that the complainant's allegations are true. Here the Settlement Officer has confused a question of fact with a question of construction by accepting as fact the allegations of the complainant solely upon the finding that the respondent's calculations were incorrect. A finding that one calculation is wrong does not, *a fortiori,* make another calculation correct. Here, the complainant has not satisfied its burden of proving the facts essential to an award of reparations, *i.e.,* the actual measurements of the commodity shipped.

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer is reversed and the complaint of Poirette Corsets, Inc. is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-11

IN RE: AGREEMENT NOS. 150 DR-7 AND 3103 DR-7

The Federal Maritime Commission may authorize ocean carriers to employ dual rate contracts pertaining to through intermodal transportation as well as to port-to-port transportation.

Dual rate contracts pertaining to through intermodal transportation may allow a discount calculated on the entire through rate paid by the shipper, provided that the entire amount of this discount is absorbed by the ocean carrier from its revenue share.

Proponents of dual rate agreements have the burden of justifying such agreements under the *Svenska* doctrine, but this burden can ordinarily be met by a lesser showing of need, benefit or purpose than would be required for the use of anticompetitive arrangements which were not expressly contemplated by statute.

A conference which lacks authority to establish intermodal rates may not employ an intermodal dual rate contract.

A conference which does possess authority to establish intermodal rates, which regularly provides intermodal transportation services, and which is faced with existing intermodal competition has justified the use of a dual rate contract for intermodal shipments.

The use of a single dual rate contract applicable to all (both port-to-port and intermodal) shipments of the Trans-Pacific Freight Conference of Japan/Korea is unjustified.

A dual rate contract covering intermodal shipments may not purport to bind shippers using different inland modes of transportation than those offered by the conference.

Charles F. Warren, George A. Quadrino, and *John E. Ormond, Jr.,* for Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic Gulf Freight Conference, and their member lines.

Neal M. Mayer, Charles L. Haslup, III, Paul D. Coleman and *Robin T. Waxman,* for Seatrain International, S.A.

Elkan Turk, Jr., for the Far East Conference and its member lines.

Howard A. Levy, for ten North Atlantic trade steamship conferences and their member lines (excluding Seatrain International, S.A.).

Stanley O. Sher and *David C. Shonka,* for the Iberian/U.S. North Atlantic Westbound Freight Conference, Marseilles/North Atlantic U.S.A. Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conferences, and their member lines.

David C. Nolan, for the Pacific Coast European Conference and its member lines.

Donald L. Flexner, Elliott M. Seiden, Stanley M. Gorinson, Paul A. Mapes and *Janice M. Reece,* for the United States Department of Justice.

John Robert Ewers, Martin F. McAlwee, C. Douglass Miller and *Charna Jaye Swedarsky,* for the Bureau of Hearing Counsel.

REPORT AND ORDER

December 31, 1979

BY THE COMMISSION:

The Commission instituted this proceeding to investigate the approvability of amendments to the respective dual rate or "merchant's" contracts currently utilized by ocean carriers belonging to the Trans-Pacific Freight Conference of Japan/Korea (TPFC) and the Japan/Korea-Atlantic and Gulf Freight Conference (JKAG).[1] The subject agreements, 150 DR-7 and 3103 DR-7, would add intermodal shipments to U.S. inland points to the port-to-port shipments currently covered by both conferences' merchant's contracts.[2] Agreement No. 150 DR-7 would establish a single TPFC contract covering all shipments entering the United States via West Coast ports and Agreement No. 3103 DR-7 would establish a single conference contract covering all shipments entering the United States via Atlantic and Gulf Coast ports. Each Agreement would permit a 9.5 percent discount from the intermodal through rate to be granted to shippers which agree to commit their business exclusively to the conference. Provision of this discount would be the sole responsibility of the participating ocean carriers.

Seatrain International, S.A., a nonconference carrier in the subject trades, the U.S. Department of Justice, and the Commission's Bureau of Hearing Counsel oppose approval of the Agreements.[3] Carriers from several steamship conferences intervened in support of the Agreements.[4]

Administrative Law Judge Charles E. Morgan conducted evidentiary proceedings and issued an Initial Decision on October 30, 1978. The decision held that the Agreements were properly subject to the Commission's jurisdiction under section 14b of the Shipping Act, 1916 (46 U.S.C. §813a) and that the anticompetitive aspects of both Agreements had been sufficiently justified to warrant approval.

Separate Exceptions to the Initial Decision were filed by Seatrain, DOJ and Hearing Counsel. Proponents and two of the four groups of intervenors submitted replies in which they fully supported the Initial Decision.[5] Oral argument was held before the Commission on February 27, 1979.

[1] The proposed amendments to the respective dual rate contracts are hereafter referred to as the "Agreements." The member lines of TPFC and JKAG are referred to as the "Proponents."

[2] The JKAG Agreement also includes shipments from inland points in Japan and Korea.

[3] Seatrain, Hearing Counsel and DOJ are collectively referred to as "Protestants." Several shippers originally filing protests to the Agreements were designated as parties to this proceeding but were later dismissed when they failed to participate. DOJ was granted special leave to intervene on December 15, 1978, after the issuance of the Initial Decision.

[4] The intervenors include the members of: (1) the Far East Conference; (2) nine North Atlantic/Europe conferences; (3) the Iberian/U.S. North Atlantic Westbound Freight Conference, Marseilles/North Atlantic U.S.A. Freight Conference, and U.S. Atlantic & Gulf/Australia-New Zealand Conference; and (4) the Pacific Coast European Conference. The lattermost group of carriers and the Department of Justice were granted leave to intervene for the limited purpose of arguing the jurisdictional issues *raised* by the Initial Decision.

[5] The carriers belonging to the Iberian/U.S. North Atlantic, Marseilles/North Atlantic U.S.A., and U.S. Atlantic and Gulf/Australia-New Zeland conferences did not file a reply to exceptions.

POSITION OF THE PARTIES

Protestants

Protestants argue that the Initial Decision is erroneous for the following reasons:

1. A merchant's contract discount which applies to through intermodal traffic is unapprovable under section 14b as a matter of law because the Commission's jurisdiction is limited to port-to-port transportation.
2. Dual rate contract systems approved by the Commission are immune from antitrust law prosecution, and any exemptions from the antitrust laws should be narrowly construed.
3. Joint through intermodal transportation is an *indivisible* undertaking by both inland and ocean carriers, not an offering of the water carrier alone. The Commission lacks authority to approve a merchant's contract discount which is *computed* as a percentage of the through rate because such a practice would improperly subject the inland portion of the rate to substantive regulation under the Shipping Act.
4. Section 14b requires that a merchant's contract discount applicable to joint through intermodal transportation be absorbed entirely from the ocean carrier's "division" and that the amount of the discount should not exceed 15 percent of that "division."
5. The Agreements are inconsistent with the Commission's tariff filing and dual rate contract regulations because maintenance of a constant 9½ percent discount from the ordinary through rate requires the percentage discount absorbed from the ocean carrier's share to vary from commodity to commodity, and even from shipment to shipment, depending on the exact amount received by the inland carrier.[6]
6. The Agreements violate policies of the Interstate Commerce Commission by permitting railroads to tie shippers to a particular inland routing. Section 33 of the Shipping Act prohibits the Commission from authorizing conduct which the ICC has disapproved.
7. The Presiding Officer erroneously concluded that the Agreements are best viewed as supplementing Proponents' existing ratemaking authority and dual rate contract system and that the Agreement could therefore be justified by a lesser degree of proof than would otherwise be the case.
8. The evidence offered by Proponents is insufficient to justify the Agreements. This is particularly true of the JKAG Agreement, which the Presiding Officer failed to analyze separately from the TPFC Agreement, but additional details concerning the implementation and practical effect of both Agreements are necessary.
9. The Presiding Officer made findings of fact relating to competitive conditions which were either erroneous or unsupported by the record, and he

[6] Inland carrier shares may vary with the inland routing chosen to reach a given interior point. Moreover, the Commission accepts intermodal tariffs which state the inland "division" on a per container basis subject to annual volume discounts and therefore prevent exact calculation of the ocean "division" until cargo has actually been transported, *See Report in Docket No. 72-19*, 40 *Fed. Reg.* 47770, 47775-6 (1975); *Report on Reconsideration of Docket No. 72-19*, 42 *Fed. Reg.* 59265-59266 (1977).

also failed to make findings of fact which were clearly established by Protestants.[7]

10. The Initial Decision reveals an unsupportable bias in favor of intermodal transportation by conference rather than independent carriers.
11. The Presiding Officer failed to delineate the specific evidence used to support each conference's Agreement and did not make a rational connection between the facts found and his ultimate decision.
12. The Presiding Officer improperly allowed Proponents to modify the Agreements during the proceeding. The modifications should have been published in the *Federal Register.*

Proponents and Intervening Conferences

The "Replies to Exceptions" raise the following arguments in opposition to the various positions taken by Protestants:

1. Section 14b applies to all "rates" paid by shippers. The statute contains no explicit exclusions, and there is nothing in the legislative history of the Shipping Act which requires a narrow construction. The Commission may properly exercise jurisdiction over a ratemaking practice without exercising substantive authority over all aspects of the transportation reflected by the rate in question.
2. Section 14b does not forbid ocean carriers from applying a dual rate discount to the entire joint through rate. This provision does not conflict with the Commission's regulations because the same amount is paid and the same discount is received by all similarly situated shippers using Proponents' service.
3. The Agreements would not authorize ICC carriers to tie shippers to their services but would merely establish an arrangement whereby ICC carriers may concur in rates established by ocean carriers. The proposed dual rate contracts are between the shipper and the ocean carrier *only.*
4. The *Svenska* doctrine requires that anticompetitive arrangements be justified by legitimate transportation objectives, which Proponents have accomplished by demonstrating that the Agreements will add a useful element of stability to their trades.
5. Details regarding the commodities and localities to be affected by Proponents' intermodal service are irrelevant, in light of Proponents' statements that shippers will not be bound until a particular service begins. The level of Proponents' intermodal rates is also irrelevant; only the reasonableness of the proposed 9.5 percent spread is in issue.
6. The Presiding Officer properly gave minimal weight to the testimony of the nine shippers which opposed the Agreements. Their testimony simply reflects dissatisfaction with Shipping Act policy reflected in section 14b.
7. There is no reliable evidence that the Agreements will deprive Seatrain or any other nonconference carriers of a demonstrable portion of their present intermodal cargo carryings.

[7] The factual matters in question and the Commission's disposition of each are set forth as an Appendix.

8. A single contract for both port-to-port and intermodal cargo is consistent with the findings in *Pacific Westbound Conference*, 18 F.M.C. 308 (1975), which holds that OCP cargo and local cargo moving in the same geographical trade may be subject to a single dual rate contract once a need for extending the dual rate system to OCP cargo is established.
9. The Presiding Officer's statement concerning the burden of proof was merely dictum; the full measure of justification was provided by proponents.
10. The disputed amendments to the Agreements were prompted by Protestants' objections to the "natural routing clause" originally submitted. These amendments raised no new issues, and were introduced into the proceeding in a manner which afforded all parties an adequate opportunity to be heard.
11. It is unnecessary for an Initial Decision to substantiate every finding of fact with references to the record. It is sufficient that there be a record basis for each finding and that there be a rational connection between the findings made and the ultimate conclusions reached.

The issues presented can be placed into three categories—jurisdictional matters, sufficiency of justification, and procedural matters, each of which will be discussed in turn.

DISCUSSION

Jurisdictional Matters

Joint through intermodal transportation in foreign commerce is a recent commercial development, primarily attributable to the containerized cargo technology which has grown to dominate ocean liner shipping since the late 1960's.[8] Because this type of transportation involves both FMC and ICC-regulated carriers operating under a single through bill of lading, it is not susceptible to the application of traditional regulatory labels.[9] Participation in intermodal transportation is an activity closely and naturally related to the performance of ocean common carriage, and the Federal Maritime Commission's authority to regulate activities reasonably ancillary to ocean transportation service is clear.[10]

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[8] Through transportation arrangements involving ocean and inland carriers have existed for many years, *see* House Committee on Merchant Marine and Fisheries, *Investigation of Shipping Combinations*, 63d Cong., 2d Sess. (1941), at 419, but joint through rate tariffs and ocean/inland bills of lading were not developed until early in 1972, when Seatrain, a Protestant in the instant proceeding, filed the first intermodal tariff with the FMC.

[9] This problem was recognized by the Court of Appeals in *Commonwealth of Pennsylvania v. Interstate Commerce Commission*, 561 F.2d 278 (D.C. Cir. 1977), when it affirmed the ICC's international through route tariff regulations and stated that:

> Petitioners are unduly concerned with the labels employed . . . . The use . . . of the word "division" . . . does not mean that an inland "division" of a joint international rate means the same thing or produces the same legal consequences as a "division" of a purely inland joint rate.
>
> 561 F.2d at 292

The arrangement affirmed by the Court recognizes that neither the FMC nor ICC has exclusive authority over through intermodal transportation and calls for each agency to regulate those aspects of the through movement which appropriately fall within its established jurisdiction.

[10] This authority does not extend, of course, to situations where a particular Commission action would conflict with other federal statutes such as the Interstate Commerce Act or the National Labor Relations Act. *See generally, Pacific Maritime Association v. Federal Maritime Commission*, 435 U.S. 40 (1978).

nduct which is not itself a matter for Shipping Act regulation may mately come within the Commission's jurisdiction when performed by a to whom the statute does directly apply.[11] It has been established for years that the Commission may order ocean carriers to adjust their ices with regard to the payment or absorption of shippers' inland trans- tion costs, even though the transportation in question is fully subject to regulation. *E.g., Pacific Far East Line, Inc. v. United States*, 246 F.2d 711 . Cir. 1957); *Sea-Land Service, Inc. v. S. Atlantic & Caribbean Line, Inc.*, M.C. 338 (1966). The regulatory scope of sections 14b and 15 of the ping Act (46 U.S.C. §§813a and 814) is no less broad than other provi- of that statute, except where specific limitations are explicitly stated. Two ore ocean carriers must therefore obtain Commission approval if they ertedly agree to any one of a broad range of activities *in connection with transportation* which is directly regulated under the Shipping Act.

though sections 14b and 15 operate to exempt certain concerted activities the antitrust laws, the Shipping Act also requires the Commission to der the antitrust implications of these activities. Any policy favoring w construction of antitrust exemptions provides no blanket basis for ing the intended remedial objectives of the Shipping Act. *Volks- nwerk A.G. v. Federal Maritime Commission*, 390 U.S. 261, 273–274).

e one occasion when the Supreme Court did adhere to the "narrow ruction of antitrust exemptions" policy in construing section 15 is clearly guishable from Protestants' present allegations relating to intermodal . In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 1973), the Court held that agreements to merge or acquire specific assets not among the types of agreements enumerated in section 15, and cited al indicia of a legislative intention to limit section 15 to matters requiring ng Commission supervision. By contrast, there is no indication Congress d to preclude Commission regulation of ongoing agreements which relate rticipation in through transportation.

terms of FMC jurisdiction, an agreement by ocean carriers to set rates or e to a dual rate system for all-water transportation is not substantively ent from an agreement to perform the same activities with regard to nodal transportation. Both directly relate to the terms and conditions which steamship lines will perform ocean transportation services.

rrier's use of this simplified technique for marketing their through trans- tion movements does not improperly "extend" the Commission's jurisdic- o inland carriage or exclude the intermodal pricing activities of ocean ers from Shipping Act regulation. *Atlantic and Gulf/West Coast of South ica Conference Agreement No. 2744–30,* 13 F.M.C. 121, 129–131

Pacific Far East Line, Inc. v. Federal Maritime Commission, 410 F.2d 257 (D.C. Cir. 1969), where an ocean carrier was d from awarding profitable bunker fuel contracts to a dairy products shipper not otherwise in the oil business.

(1969). It is therefore concluded that section 14b, like section 15, is applicable to through intermodal transportation.[12]

The novel question presented by the instant case is whether the Commission's jurisdiction over international ocean/rail transportation is broad enough to permit Proponents to publish merchant's contract rates containing discounts expressed in terms of a percentage of the *through rate* paid by the shipper rather than the ocean carrier's "division." it is argued that such a practice would conflict with the ICC's regulation of inland carriers and exceed express limitations in the scope of section 14b.

The first contention has little merit. Although the proposed 9½ percent spread is calculated on the through rate, this amount would be absorbed solely from the ocean carrier's "division." The ICC regulated "division" would remain constant and unaffected by this method of computation. Inland carriers would neither be parties to the exclusive patronage contract signed by intermodal shippers, nor would they be subject to FMC regulation by virtue of their association with ocean carriers using such contracts.[13] The Federal Maritime Commission's approval of an intermodal dual rate contract system is not intended to preclude appropriate regulation by the ICC.

Inland carriers negotiate the terms of their participation in intermodal through ratemaking established by ocean conference carriers in the same manner they negotiate with nonconference carriers such as Seatrain. This process would not be altered by the Agreements.

Because the Commission has disavowed Shipping Act authority over the entirety of joint intermodal transportation, Protestants claim the term "rates," as it appears in section 14b(7), must be construed as the amounts received by ocean carriers for port-to-port segments of through intermodal transportation and cannot include the through rates paid by shippers.[14] However, a determination of whether section 14b was intended to preclude an ocean carrier from absorbing more than 15 percent of the revenues it receives for participating in intermodal through transportation requires consideration of more than the parties' extended arguments regarding whether the ocean carrier's share of

[12] Over the past ten years, the Commission has approved two dual rate systems and over 50 section 15 agreements pertaining to through intermodal transportation. *E.g., Agreement No. 7100 DR-4,* served October 31, 1972; *Agreement No. 57-96,* 16 S.R.R. 159 (1975); *Agreement No. 57-109,* served March 16, 1978. The courts have implicitly recognized FMC jurisdiction over agreements concerning transportation by both FMC and ICC carriers. *E.g., Seatrain International, S.A. v. Federal Maritime Commission,* 584 F.2d 546, 548 (D.C. Cir. 1978); *Investigation of Overland and OCP Rates,* 12 F.M.C. 184, 215-217 (1969), *aff'd sub. nom. Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663, 667-668 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971).

[13] Through intermodal transportation is not an indivisible joint undertaking from a practical or commercial viewpoint. Regardless of the tariff format employed, the shipper deals primarily with the ocean carrier and the ocean carrier views the inland carrier's "division" as an expense. The specially stated inland carrier "divisions" employed in most mini-landbridge tariffs (see note 6, *supra*) are further evidence of this fact.

[14] Section 14b(7) provides, in pertinent part, that:

[T]he spread between ordinary rates and rates charged contract shippers . . . shall in no event be more than 15 per centum of the ordinary rates.

The Commission's tariff regulations state that the ocean carrier's "[d]ivision, rate or charge *shall be treated as a proportional rate* subject to the provisions of the Shipping Act, 1916." 46 C.F.R. § 536.8, adopted as Amendment No. 4 to Part 536, 35 *Fed. Reg.* 6397 (1970). (Emphasis supplied). *Accord Commonwealth of Pennsylvania, supra,* at 292.

ıtermodal through rate is best categorized as a "division" or a "propor-ıl rate."

ection 14b predates the technological advances associated with containeriz-ı that made joint intermodal transportation economically practical.[15] Con-s' failure to address the applicability of dual rate systems to intermodal ıc simply reflects the fact that intermodal traffic had not yet developed in . It does not represent a deliberate exclusion of intermodal movements. ough the legislative history of the Dual Rate Law is silent concerning modal transportation, section 14b was written to apply to any arrangement hich shippers commit "all or any fixed portion" of their patronage to a erence. The use of the word "all" is sufficient to include *joint through* ments as well as local shipments within a dual rate system, particularly the other provisions of the Dual Rate Law expressly provided for the lation of joint through rates.[16]

int through rates may be established between ocean carriers alone or een ocean carriers and inland carriers. *Commonwealth of Pennsylvania, a.* Neither the statute nor the Commission's rules address the question of her two *ocean* carriers participating in a joint through movement must rb from their individual revenue shares the same percentage discount that fered to the dual rate shipper.[17] Unequal absorptions are not prohibited.[18] e is no reason to treat intermodal transportation differently. Most confer-shippers readily become dual rate contract signatories. Conferences use lual rate percent discount as a tying device to ensure stability, but rarely it necessary to use it as a competitive device against other carriers.

ongress unquestionably intended to prescribe a maximum "rate spread" of ercent,[19] but did not give any indication that "divisions" received under through arrangements are also subject to this limitation. Thus the dual spread may be greater than 15 percent of one carrier's portion of the ugh rate under such an arrangement. Because the statute and its legislative ry focus on the uniformity and fairness of the contract rates *offered to ers,* it is concluded that a merchant's contract discount based upon a entage of the through rate paid by the shipper is consistent with the oses of section 14b.

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ction 14b was enacted as section 1 of the Dual Rate Law Amendments to the Shipping Act, P.L. 87-346, 75 Stat. 762, October 3, 1961, referred to hereafter as the "Dual Rate Law."

ction 4 of the Dual Rate Law contained the tariff filing requirements for foreign commerce carriers now found at 46 U.S.C.). These simultaneously enacted provisions call for the filing of all rates

ansportation to and from United States ports and foreign ports *between all points on [a carrier's] route and on any through hich has been established.* (Emphasis supplied).

s of the same statute are construed consistently with each other whenever possible. *Clark v. Ubersee Finanz-Korporation,* S. 480 (1947); *see Erlenbaugh v. United States,* 409 U.S. 239, 243-244 (1972).

, when shippers are offered a through rate discount of 15 percent, there is no requirement that participating ocean carriers this discount by uniformly absorbing 15 percent from *each* carrier's noncontract "division."

e generally Part 524 of the Commission's Rules which authorizes nonexclusive transshipment agreements without requiring ntee of proportional reductions when the through rate is subject to a dual rate discount. 46 C.F.R. §524.

e Index at 20-21 (1962), which chronicles the rejection of a proposal authorizing the Commission to fix a reasonable rate on a case-by-case basis.

Sufficiency of Justification

Dual rate contract systems have traditionally been employed by steamship conferences. When a 1958 decision of the Supreme Court rendered the lawfulness of dual rate contracts doubtful under the Shipping Act as written at that time,[20] Congress promptly took protective steps to permit continuation of a system it found essential to a stable foreign commerce culminating in the adoption of section 14b in 1961.[21]

However, under section 14b, conferences and individual carriers may only use dual rate contract systems which meet specified conditions and are not found to be otherwise unlawful or "contrary to the public interest."[22] Because this "public interest" standard requires consideration of U.S. antitrust policy and because concerted methods of tying shippers to common carriers by means of discriminatory pricing devices is a *per se* violation of the antitrust laws, conference dual rate systems cannot be approved unless appropriately justified under the *Svenska* doctrine.[23]

Under this doctrine an anticompetitive agreement will be disapproved unless its proponents produce evidence revealing its probable impact upon competition and demonstrating that any practical anticompetitive effects will be outweighed by positive public interest factors. *Agreement No. 10116–1 (Extension of Pooling Arrangement),* 19 S.R.R. 1, 2 (1979). The public interest factors recognized by the Commission are described as "transportation needs," "public benefits" and "regulatory purposes." The nature and extent of the offsetting need, benefit or purpose sufficient to obtain approval of a given agreement will vary from case to case. Because dual rate systems have been found presumptively acceptable by Congress, a less stringent justification is required to secure their approval.[24]

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[20] *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

[21] The Dual Rate Law replaced the Moratorium Act of 1958, P.L. 85-626, 72 Stat. 574, as amended. The legislative history of the bill which became the Dual Rate Law reveals that Congress acted in response to the following findings:

1. *Conferences need the right to use dual rate contracts.* If ocean common carriers and conferences are to serve the United States' foreign commerce on a regular, dependable, and nondiscriminatory basis, they must be allowed, as they are throughout the rest of the maritime world, to enter into dual rate contracts with shippers and consignees. Otherwise, the economics of ocean shipping will force competing lines into rate wars that might result in the destruction of ocean common carriage. If that happens, the high-cost U.S.-flag lines will be the hardest hit.

2. *Primary parties in interest strongly favor legalization of dual rate contracts.* The great majority of United States importers and exporters who use ocean common carriers, all United States-flag ocean common carriers, all foreign-flag conference lines, all interested foreign governments, and the U.S. Departments of State and Commerce favor legalization of dual rate contracts.

3. *A 15 percent difference in rates is fair and reasonable.* A contract-noncontract spread of 15 percent will assure a nucleus of cargo for established carriers without imposing a penalty on or discriminating against the nonsigner.

See Index, at 119, 209-210.

[22] Among the conditions for approval of a merchant's contract under section 14b are the availability of the contract to all shippers on equal terms and conditions and the maintenance of a spread between ordinary rates and contract rates that does not exceed 15 percent of the noncontract rate.

[23] *See Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968); *Agreement No. 8660,* 12 F.M.C. 149, 160 (1969), *aff'd sub nom. Latin America/Pacific Coast Steamship Conference v. Federal Maritime Commission,* 465 F.2d 542 (D.C. Cir. 1972), *cert. den.* 409 U.S. 967 (1972).

[24] The Senate Committee Report on H.R. 6775 states that:

Your committee believes that if the eight specific requirements [of section 14b] are met by [a] proposed contract, it should be entitled to Commission approval unless the Commission finds that the contract would be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair. We believe that any contract which contains the right safeguards expressly required by the amended bill makes out a prima facie case that the contract is not detrimental to our commerce, or contrary to our public interest, or unjustly discriminatory or unfair. *Index,* at 222.

ecause of the Congressional intent underscoring the public benefits of dual contract systems, it is usually sufficient for a conference to demonstrate it is actually offering the service to which the proposed merchant's contract apply and that significant nonconference competition exists with regard to service.[25] An important distinction is recognized, however, between the lication of a dual rate system to a particular service and the inclusion of erent services under a single merchant's contract. *Agreement No. 8660, ra* at note 9, 14 F.M.C. 172, 179–180, 184–185 (1970). When shipments ifferent geographic or economic trades are to be included under a single ract, the burden of justification on the carrier is increased.[26]

pplication of these standards to the present case quickly reveals that JKAG ld be unable to meet its burden of justification in this instance. That ference's authority to set intermodal rates expired on November 24, 1978, out any of its member lines ever having carried an intermodal shipment.[27] ough JKAG did publish an intermodal tariff in late 1977, this tariff offered ice to four inland points at rates which combined existing local railroad and mship rates. These rates did not achieve commercial acceptance. The vailability of a commercially reasonable JKAG intermodal service in itself ents the approval of an intermodal merchant's contract for that conference matter of law, and Agreement No. 3130 DR-7 will therefore be dismissed oot. Even if JKAG were actively engaged in the provision of intermodal ice, it is not faced with existing intermodal competition through Atlantic Gulf Coast ports.

he TPFC Agreement presents a considerably different situation. That Conce has a well established mini-landbridge service to U.S. East and Gulf st port cities and is faced with vigorous intermodal competition from sev- of the nonconference container cargo carriers serving the trade, including rain, the Far East Shipping Company (FESCO) and Evergreen Marine poration. *E.g.,* Ex. 1 Apps. 16–17; Ex. 22, Ex. 30, Ex. 33 App. 2, Ex. 48. eatrain claims the TPFC Agreement will negatively affect competition by nneling substantial quantities of intermodal cargo away from independent iers and by tying shippers to an indefinite, overly broad range of conference ices.

he availability of an intermodal dual rate contract has been portrayed as itical factor in TPFC's ability to participate effectively in the trade gener- and the intermodal cargo market in particular. Seatrain claims that the *availability* of such a contract is an equally critical factor in its own

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e first version of P.L. 87-346 was H.R. 4299. This bill authorized dual rates upon a finding that the contract "is not d, and will not be reasonably likely, to cause the exclusion of other carriers from the trade." The same provisions were ed in the "clean" bill passed by the House (H.R. 6775). The Senate Commerce Committee deleted this language from the owing statements by Senator Engle favoring the conference system's natural tendency to reduce competition. *See Index* 2, 399–400. The Commission may nonetheless disapprove a dual rate system if opposing parties establish that the intent ely effect of the proposed contract is to directly and unreasonably eliminate competition.

., Pacific Westbound Conference (Agreement No. 57 DR-4), supra, at 319, 323, where the proponent carriers successfully l a proposal to place OCP and local cargoes under a single merchant's contract.

AG first received intermodal ratemaking authority on January 18, 1973. On December 8, 1978, the Commission issued er advising JKAG that its fifth request to extend this authority (Agreement No. 3103-67) could not be approved without ng. JKAG subsequently requested that a hearing be held. An earlier Commission Order extending JKAG's intermodal ly on an interim basis was reversed by the Court of Appeals in *Seatrain International, S.A. v. Federal Maritime ssion,* 598 F.2d 289 (D.C. Cir. 1979), a decision which stressed that the conference's intermodal offerings to date had not ible, particularly in comparison with the rates of TPFC.

effective participation. Both parties allege that the Commission's decision in this matter will have a major impact on the degree of their commercial success. The evidence does not support these allegations.

Seatrain and the TPFC carriers both operate modern containerships with high levels of container space utilization.[28] Over half of Seatrain's carryings are mini-landbridge cargoes. A majority of TPFC's carryings ultimately move to inland destinations and are subject to carriage under intermodal rates.[29] Since it commenced intermodal operations in mid-1974, TPFC's OCP carryings, which are subject to its present port-to-port dual rate contract have declined but its mini-landbridge carryings have increased. Several shippers testified that they had abandoned or curtailed their use of conference merchant's rate services to obtain the more favorable rates offered by nonconference intermodal carriers, yet overall TPFC carryings increased between 1974 and 1976.

Seatrain commenced the first Far East mini-landbridge service in 1972 and has since become the major intermodal carrier in the trade. Seatrain withdrew from TPFC in 1974 and doubled its intermodal carryings between 1974 and 1975 even though 1975 was a depressed year for ocean shipping. During 1977, Seatrain introduced a fourth vessel into the TPFC trade and made other modifications in its Far East operations which effectively doubled its 1975 container capacity. Ex. 40; Tr. at 636. Seatrain's port-to-port carryings have increased significantly since 1974 (Ex. 22) despite TPFC's implementation of a port-to-port merchant's contract in August, 1973 which attracted over 6,200 signatories by 1976 (Ex. 1 at 4–5). During 1975, TPFC's total revenue tonnage decreased by 23 percent while Seatrain's increased by 100 percent. Ex. 1 App. 27; *see also* Ex. 30 at 7–8.

These facts indicate that the independent and conference carriers alike have established strong commercial positions in the trade. Neither Seatrain nor TPFC has demonstrated that the availability of an intermodal dual rate contract would have a critical impact on their respective commercial operations,[30] as they have alleged, or would undermine their relatively strong position in the trade. There is, however, sufficient unused container capacity to conclude that the trade is somewhat overtonnaged, subject to vigorous nonconference competition, and vulnerable to malpractices prejudicial to shippers and carriers alike.[31] A TPFC intermodal dual rate contract would therefore diminish the trade's potential for rate instability.

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[28] Approximately 85 percent of TPFC's and JKAG's combined container capacity was engaged in 1977. Separate figures for TPFC were not provided, but because TPFC is the conference offering the wider range of service, its figures are unlikely to be lower than the combined results. *See* Ex. 1 App. 12 and 15. Seatrain has enjoyed over 95 percent container cargo utilization in recent years (Ex. 30 at 11).

[29] Mini-landbridge cargo represented about 22 percent of TPFC's carryings in 1975 and approximately 25 percent in 1976. OCP cargo carried under special proportional rates to destinations east of the Rocky Mountains represents another 25 percent. In addition, much of TPFC's local cargo moves beyond port terminal areas. Ex. 1 at Apps. 7, 10, 13, 14; Ex. 30 App. 1.

[30] The number of TPFC signatories regularly shipping with Seatrain, the revenues derived from their business, and their intentions as to signing TPFC's proposed intermodal contract is not known. The shipper testimony presented does not support the conclusion that Seatrain will lose any particular number or type of accounts.

[31] The large capital outlays and high fixed costs associated with containership operations can result in unprofitable voyages even with utilization levels in excess of 80 percent. Ex. 33 at 2, Ex. 40 at 12–13. The 15 percent excess capacity reported by TPFC is therefore a matter of legitimate competitive concern. In recent years the Commission has frequently had occasion to recognize the presence of unstable and unlawful conditions in the Far East trade. *E.g., Agreement No. 10016–1, supra,* and 18 S.R.R. 1285 (1978).

eatrain vigorously opposes the proposition that TPFC should be allowed to an intermodal merchant's contract simply to assure itself a "stable cargo ." Seatrain alleges that public policy favoring competition requires that onference carriers be given a preference when it comes to the development "stable cargo base." This notion is contrary to the purpose of section 14b.

ne unsubstantiated *possibility* that TPFC's use of an intermodal dual rate ract may adversely affect Seatrain's operations is not a sufficient basis for proving the Agreement. Congress was aware that dual rate contracts *tend* xclude independent carriers, and, by adopting section 14b, determined theless that conferences should be free to employ conforming contracts pt when a more specific detriment to the public interest is shown. Further- e, it cannot be assumed that merchant's contracts *invariably* weaken the petitive posture of nonconference carriers, since independent carriers have l rights under section 14b to employ loyalty devices.

eatrain's objections concerning the indefinite scope of TPFC's proposed ract and its potential for tying shippers to inefficient or even nonexistent ces are less readily dismissed.

PFC has stated that it does not intend to bind shippers unless the confer- offers an intermodal service covering a particular intermodal movement,[32] the Agreement, as orally amended, expressly allows signatories to use ces involving vessel calls at U.S. Atlantic or Gulf Coast ports. However, le 6 fails to indicate that shippers may select alternate *inland* routes or portation modes between ports of entry and points of destination whenever a route or mode is not provided by the conference. In fact, Article 6 fails ention service to inland points at all.

PFC does not presently serve interior points, although it is authorized by Commission to do so.[33] Intermodal shippers located at places such as ago or St. Louis should therefore not be bound by the Agreement. Other- the conference could refuse to serve an interior area and, by using a ry (port-to-port and intermodal) dual rate contract, effectively preclude petitors from establishing a foothold in that area as well. The conference's et power over port-to-port shipments could thereby be employed to stifle portation innovations and efficiencies, a result contrary to the public est and detrimental to the commerce of the United States. A similar ompetitive effect could be achieved if TPFC were to offer an interior point ce at rates too high to achieve commercial acceptance. TPFC has not yet ed a rate structure for interior point services (Ex. 37 at 5–7, Tr. 878–80), shippers testified that the conference should be required to offer separate modal and port-to-port dual rate contracts. Exs. 16–19, Tr. 468.

ini-landbridge service attracts cargo which either did or could have moved U.S. Atlantic and Gulf ports, and is therefore most appropriately viewed as ce to a new TPFC trade area, rather than an integral part of the same

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eptions at 46.

FC's mini-landbridge service is a true intermodal service from ports in Japan and Korea to *points* on the U.S. East and asts. As used here, the word "interior" describes those inland points not served by mini-landbridge.

trade.[34] This "East Coast" cargo should not be tied to "West Coast" cargoes in the absence of a clear showing of transportation need, public benefit or regulatory purpose.

Agreement No. 150 DR-7 will therefore be disapproved unless it is modified to allow shippers the choice of signing either an intermodal contract or a port-to-port contract (or both), and to release shippers employing different inland modes of transportation or different inland routes than those offered by TPFC.[35] Article 6 of the intermodal merchant's contract must also be formally amended to refer to the term "points" and to exclude carriage via U.S. Atlantic or Gulf ports.[36]

Procedural Matters

Seatrain claims the Presiding Officer should not have accepted into evidence the January 31, 1977 direct testimony of TPFC's Conference Chairman which states that Article 6 of Agreement No. 150 DR-7 has been modified to exclude transportation via Atlantic and Gulf Coast ports from TPFC's proposed merchant's contract. It is argued that an administrative law judge lacks authority to modify agreements which are under investigation unless the modification in question has been published in the *Federal Register.*

The recommendations of an administrative law judge regarding the approvability of agreements are not binding upon the Commission, and the Commission's decision in *Agreement No. 6010–14,* 11 S.R.R. 617, 737 (1970), cited by Seatrain merely confirms this fact. In most instances, agreement modifications must be consolidated with a pending investigation of the basic agreement.[37]

Federal Register notice of an amended agreement is a separate matter from the consideration of proposed modifications in an investigatory proceeding. Provision of such notice is a matter within the sound discretion of the Commission, not the administrative law judge. When a proposed modification practically and substantively affects a pending agreement, it is noticed to assure

[34] Some 16 percent of TPFC's OCP cargo was destined for Atlantic and Gulf Coast points prior to the introduction of mini-landbridge service and TPFC now estimates that it carries no such OCP cargo. Ex. 1 at 12 and App. 9. Yet, a larger percentage of mini-landbridge cargo was previously carried by JKAG's all-water service (Ex. 1 App. 8, Tr. 123).

[35] "Inland transportation mode" refers broadly to transportation accomplished by either rail, motor, water or air, and not to the services of any particular inland carrier operating within one of these basic modes. The Commission has held that conferences with intermodal ratemaking authority may not preclude member lines from taking independent action with respect to services via a different mode of inland transport. *Agreement No. 3103–64,* Order of Conditional Approval, served May 18, 1977, and Order on Remand, served November 24, 1978, *reversed on other grounds, Seatrain International, S.A. v. Federal Maritime Commission, supra,* note 27.

[36] Protestants argue that Article 5 of Agreement No. 150 DR-7 must be amended to allow shippers to choose the inland carrier they wish to employ and to release shippers from the contract whenever the inland carrier selected does not have space available. Because the shipper contracts only with the water carrier, it is unnecessary that Article 5 release the shipper if a requested inland carrier is not provided. It is sufficient that nonperformance of agreed upon services result in liability under the through bill of lading. A different situation is presented, however, when the ocean carrier *has reason to know* at the time cargo is tendered to it that it cannot perform the through transportation held out in its tariff in timely fashion because a particular inland routing, terminal facilities, or similar critical element of the through movement is unavailable. In such case, Article 5 must be construed to release the shipper when the ocean carrier is aware that timely performance of any aspect of the through movement cannot be achieved, just as it does when steamship space is unavailable. *See* 46 U.S.C. §813a(1).

[37] *See generally* the Commission's February 3, 1978 order entitled "Modification of Order of Investigation and Hearing" in Docket No. 77–4, reconsideration denied, June 19, 1978, where proposed amendments to a joint service agreement were incorporated into a pending evidentiary proceeding.

that any additional interested parties are furnished an appropriate opportunity to express their views. When, as in the instant case, the amendment offered is plainly of a clarifying or technical nature, supplemental *Federal Register* notice is unnecessary. Further notice was required by the Commission in *Agreement No. 6010–14, supra,* because an investigatory proceeding had been resolved by private settlement negotiations, the terms of which had not been included in the public record or the hearing process.[38]

The amendment to Article 6, however, was introduced early in the present proceeding as a clarifying measure and was offered in direct response to arguments raised by Seatrain concerning the allowable scope of that provision. All parties were provided ample opportunity to raise arguments concerning the amendment and its effect. The Presiding Officer's acceptance and consideration of evidence concerning the Article 6 amendment is fair and reasonable. It is also analogous to the procedures affirmed by the United States Court of Appeals in *States Marine Lines, Inc. v. Federal Maritime Commission,* 376 F.2d 230, 234, note 6 (D.C. Cir. 1967).[39]

Finally, Seatrain contends that the Initial Decision must be reversed because the Presiding Officer failed to accompany his findings of fact with specific citations to the record—including citations to conflicting facts.[40] This argument appears intended more for the purpose of emphasizing objections to particular findings than to express a *bona fide* belief that existing Commission practices are invalid in this regard.[41]

The Commission's regulations echo the Administrative Procedure Act by requiring that all decisions "include a statement of findings and conlcusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 46 C.F.R. § 502.225; 5 U.S.C. § 557(c). This provision has not been interpreted as mandating a recitation of all conflicting evidence regarding material questions of fact accompanied by a statement explaining which evidence was found to be probative and which was not. It is sufficient that the decision reveal all factors considered by the agency in making its choice and that there be articulated a rational basis between the facts found and the result reached. The Commission believes the instant Report achieves these accepted standards and would not thwart meaningful judicial review within the meaning of *United States Lines, Inc. v. Federal Maritime Commission,* 584 F.2d 519 (D.C. Cir. 1978).

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[38] *See also Pierpoint Management Co. and Retla Steamship Co. v. Holt Hauling and Warehousing Systems, Inc.,* 19 S.R.R. 435 (1979).

[39] Although the Presiding Officer's consideration of Proponents' testimony that Article 6 had been "modified" was proper, Agreement No. 150 DR-7 can only be amended by submitting a signed agreement to the Commission. It would have therefore been more appropriate for the Initial Decision to have recommended that the Agreement be approved on the condition that Proponents submit an amendment clarifying Article 6. The Presiding Officer could also have conditioned his acceptance of evidence concerning Article 6 upon Proponents' submitting a formal amendment to their Agreement.

[40] Exceptions at 4, note 1.

[41] Section 502.221 of the Commission's Rules requires parties to include record citations with their proposed findings of fact, but does not impose the same obligation on the Presiding Officer. Factual errors in an Initial Decision may be addressed by the persons most familiar with the record in the form of exceptions filed pursuant to section 502.227(a), which also requires record citations.

In any event, by not adopting the Initial Decision and by variously granting or denying Seatrain's exceptions to the findings of the Presiding Officer, the Commission has effectively provided Seatrain with the relief it sought.

THEREFORE, IT IS ORDERED, That the Exceptions of the Department of Justice are denied; and

IT IS FURTHER ORDERED, That the Exceptions of the Bureau of Hearing Counsel and Seatrain International, S.A., are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Agreement No. 3103 DR-7 is dismissed as moot; and

IT IS FURTHER ORDERED, That Agreement No. 150 DR-7 is disapproved pursuant to section 14b of the Shipping Act, 1916, effective , unless the Commission receives at its offices in Washington, D.C., on or before , a modified version of that Agreement, complete in all respects, signed by all parties thereto, and appropriately modified to:

1. Clearly allow shippers the choice of binding only their port-to-port shipments or only their joint through intermodal shipments to the conference; and

2. Amend Article 6 of the TPFC intermodal merchant's contract to read as follows:

6. This Agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by the Conference where direct carriage is available. *Provided, however,* that where the Carriers provide service between ports or point within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the Carrier's service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert its rights under this Article, to use a carrier which is not a party hereto, and the port or point through which Merchant intends to ship or receive his goods is not within the scope of this Agreement, Merchant shall first so notify the Conference in accordance with the provisions of Article 5 hereof. *Provided further, however,* that notwithstanding any language herein to the contrary, this contract will not be violated if the Merchant: (1) ships to destinations within the scope of this Agreement via U.S. Atlantic or Gulf Coast ports; or (2) ships via a through intermodal route or utilizes a major inland transportation mode (*i.e.,* rail, motor, water or air) not offered by the Conference. No notification to the Conference of such shipments shall be required.

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 150 DR-7 shall be approved.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX

DISPOSITION OF SEATRAIN'S EXCEPTIONS RELATING TO FINDINGS OF THE PRESIDING OFFICER

1. The Presiding Officer erroneously found that the port-to-port services of independent carriers have flourished in the TPFC trade since 1973, despite the presence of a TPFC dual rate contract.

   Granted in part. There is no evidence that nonconference carrier port-to-port services have "flourished" in an economic sense and no evidence measuring the exact competitive impact of TPFC's present dual rate contract on these services. The record does clearly show, however, that over ten independent container carriers compete in the trade and several of them have increased their capacity since 1973. Moreover, there is no basis for finding that these independent container services have persisted only because TPFC's merchant's contract is inapplicable to intermodal cargo. Although this fact *may* have been beneficial to Seatrain, only a minority of the nonconference container operators in the TPFC trade presently offer intermodal service.
2. The Presiding Officer erroneously found that a "division" is not usually found in a tariff.

   Denied. The Presiding Officer clearly stated that present joint through intermodal tariffs separate the ocean and inland carriers' revenue shares and the discussion of Interstate Commerce Act divisions found in *Commonwealth of Pennsylvania v. Interstate Commerce Commission, supra,* at 281–282 and 291–292, supports his statements concerning "usual" (*i.e.,* nonintermodal) joint through rate procedures.
3. The Presiding Officer erroneously found that the ocean carrier collecting the freight charges from the merchant will arrange to pay a fee or division to the railroad or railroads utilized for inland movement.

   Denied. The Presiding Officer accurately described the procedures ordinarily followed, although an agent of the inland carrier may also collect the through freight and distribute the "divisions". Seatrain claims this practice is inconsistent with the theory that joint rates are an indivisible offering of more than one carrier. As explained in this Report, joint through intermodal transportation is more realistically viewed as an offering of the ocean carrier despite the tariff filing procedures employed by the FMC and ICC to accommodate their enabling statutes.
4. The Presiding Officer erroneously found that a "division" is not a charge to the merchant.

   Denied. As is the case with Item 3, above, Seatrain disagrees with the theoretical framework of the statement and not with the accuracy of the facts recited. Shippers are billed only for the through rate and receive no separate invoice or breakout of intermodal transportation "division", although such a breakout is published in the carriers' tariff.

5. The Presiding Officer erroneously found that the shipper is primarily interested in the through rate or cost.

   Denied. Although the record does not contain shipper testimony on the general topic of joint through rates, the challenged statement does accurately express the philosophy upon which joint through rate pricing has historically been based and reflects the opinion of Seatrain's principal witness. Ex. 40 at 9–10; Tr. 655, 660–661.

6. The Presiding Officer erroneously found that the Commission regulates conference authority over joint through rate arrangements with inland carriers under section 15.

   Granted in part. To the extent the statement implies that steamship conferences concertedly establish rates with inland carriers, it is incorrect. The Commission approves intermodal rate agreements which allow conference member lines to concertedly set through rates and the ocean portions of those rates. Each member line then negotiates its own inland carriage arrangements with ICC carriers. This fact is correctly noted elsewhere in the Initial Decision (at 44).

7. The Presiding Officer erroneously found that the Commission has exercised jurisdiction over conference intermodal rates under sections 16 and 17 of the Shipping Act.

   Denied. Section 16 and 17 complaints based on intermodal service have been adjudicated by the Commission (*e.g.,* Docket Nos. 73–38, 73–42, 77–50). The reasonableness of such *services* cannot be determined without reference to the rates charged. The Commission therefore exercises jurisdiction over through intermodal rates in this Report and Order. *See Canada Packers, Ltd. v. Atchison T.S.F. Ry.,* 385 U.S. 182 (1966); *Porter Co. v. Central Vermont R. Co.,* 366 U.S. 272 (1961).

8. The Presiding Officer failed to recognize that Agreement No. 150 DR–7 would injure Lykes Bros. because Lykes competes with TPFC, albeit via Atlantic and Gulf ports, as well as with JKAG.

   Denied. Lykes Bros. did not establish that it would be directly or immediately harmed by competition from TPFC carriers, expecially since the Agreement, as conditionally approved, does not bind shippers using Atlantic and Gulf Coast ports. Moreover, Lykes Bros. is now a member of TPFC.

9. The Presiding Officer erroneously found that Proponents are pressing their applications to include intermodal cargo in their dual rate contracts.

   Granted in part. TPFC is clearly "pressing" its instant application for approval of Agreement No. 150 DR–7. However, Proponents have not yet applied for similar authority from the Japanese Fair Trade Commission.

10. The Presiding Officer erroneously found that if TPFC institutes an interior point intermodal service, further cargo subject to the conference's present contract will move outside the contract.

    Denied. The statement is correct because the present TPFC contract does not apply to intermodal carriage of any kind. The Presiding Officer did not

find that interior point cargo would necessarily move on nonconference carriers.

11. The Presiding Officer erroneously found that there is no reason to believe merchant shippers and consignees will be harmed by the Agreements.

Granted in part. Several shippers testified that they *did not wish to be faced* with the choice of signing a single TPFC merchant's contract for port-to-port and intermodal service, and that they *believed* they would pay higher intermodal cargo rates if they did sign such a contract. A loss of flexibility does not in itself constitute "injury," especially in light of the legislative history of section 14b. Seatrain did not establish that particular shippers would be unfairly *compelled* to sign an expanded TPFC contract or that such signatories would necessarily be charged higher intermodal rates or otherwise be injured if they did. Shippers which did not favor dual rate contracts need not sign them (*e.g.,* Associated Merchandising Corporation). The instant decision only approves TPFC's use of separate port-to-port and intermodal dual rate contracts.

12. The Presiding Officer erroneously found that Evergreen Marine Line does not feel threatened by potential conference intermodal competition.

Granted in part. There is no evidence as to whether Evergreen's management does or does not feel "threatened" by the proposed Agreements. The record does show that Evergreen has expanded its operations in the TPFC trade since 1973.

13. The Presiding Officer failed to make complete findings concerning the status of conference and nonconference carriers in the trade.

Granted in part. Although the nonconference carriers were listed, the Presiding Officer did not list the members of TPFC. There are currently twenty conference members.

14. The Presiding Officer erroneously concluded that approval of Agreement No. 150 DR-7 would foster competition between ocean carriers.

Granted. The instant proceeding does not compel a finding that approval of Agreement No. 150 DR-7 would "foster" short run competition between ocean carriers, and the record was not developed to permit such a finding, since it is not essential to the determination at hand. The Presiding Officer's statement correctly reflects the Congressional policy that the employment of *reasonable* dual rate systems by conferences will best preserve competition in the long run in the ocean shipping industry.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-27

MERCK SHARP & DOHME INTERNATIONAL

v.

KAWASAKI KISEN KAISHA, LTD. A/K/A "K" LINE

DOCKET NO. 79-42

MERCK SHARP & DOHME INTERNATIONAL

v.

MITSUI O.S.K. LINES, LTD.

DOCKET NO. 79-43

MERCK SHARP & DOHME INTERNATIONAL

v.

JAPAN LINE, LTD.

Shipments of feed supplements were properly rated as pharmaceuticals rather than as animal feed. Reparation denied.

William Levenstein for Merck Sharp & Dohme International.
F. Conger Fawcett and *Charles Lagrange Coleman III* for Kawasaki Kisen Kaisha, Ltd.
K. Aizaki and *Charles Lagrange Coleman III* for Mitsui O.S.K. Lines, Ltd.
David Snow and *Charles Lagrange Coleman III* for Japan Line, Ltd.

REPORT AND ORDER

December 31, 1979

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

These proceedings were instituted by complaints filed by Merck Sharp & Dohme International against three carriers, Kawasaki Kisen Kaisha ("K" Line), Mitsui O.S.K. Lines, and Japan Line, all of whom assessed charges for various shipments of Nicrazin 25% and/or Vitamin B12 Mixture under rates for medicinal pharmaceuticals or chemicals. Complainant alleges that the carriers violated section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817), in that the shipments should have been charged under the lower rates for "Animal Feed, Prepared." In his Initial Decisions, Administrative Law Judge John E. Cograve awarded reparation in all three proceedings. The proceedings are now before the Commission on the carriers' Joint Exceptions to the Initial Decisions.[1]

BACKGROUND

Docket No. 78-27 involves Complainant's shipments of Nicrazin 25% and Vitamin B12 Mixture which moved by "K" Line from Oakland, California to Kobe, Japan. The shipment was rated under the "Medicinal and Pharmaceutical Preparations, Compounds or Mixtures of two or more products, Bulk Form, N.O.S." classification in Pacific Westbound Conference Overland Freight Tariff No. 6, F.M.C. No. 13.[2]

In Docket No. 79-42, another shipment of Complainant's Nicrazin 25% moved from Oakland to Kobe on Mitsui O.S.K. Lines pursuant to a bill of lading dated April 21, 1977. This shipment was rated under Pacific Westbound Conference Local and Overland Freight Tariff No. 5, F.M.C. No. 13, as "Synthetic Organic Medicinal Chemicals, In Bulk Form, N.O.S."

In Docket No. 79-43, a third shipment of Nicrazin 25% moved from Oakland to Kobe and Osaka, Japan on Japan Line, pursuant to a bill of lading dated January 20, 1978. This shipment was rated under Pacific Westbound Conference Local and Overland Freight Tariff No. 5, F.M.C. No. 13, as "Chemicals, N.O.S."

INITIAL DECISIONS AND POSITIONS OF THE PARTIES

In his Initial Decision in Docket No. 78-27, served July 20, 1979, the Presiding Officer found that "K" Line had improperly classified both Nicrazin 25% and Vitamin B12 Mixture. He stated that the classification "Animal Feed, Prepared" is broad enough to include "almost any preparation which is feed

[1] Because all three proceedings involve the same Complainant and identical issues, the proceedings are consolidated.

[2] All three carriers are members of the Pacific Westbound Conference.

(sic) to animals," and concluded that because the commodities could be classified under two tariff items, Complainant was entitled to the tariff item with the lower rate. Accordingly, reparation in the amount of $8,304.51 was awarded. The Initial Decisions in Docket Nos. 79-42 and 79-43, served July 25 and 26, 1979, respectively, cited the Initial Decision in Docket No. 78-27 as precedent and awarded reparations in those cases as well, in the amount of $9,199.46 from Mitsui O.S.K. Lines and $8,661.25 from Japan Line.

In their Joint Exceptions to the Initial Decision, the carriers argue that the commodities were properly classified as pharmaceuticals or chemicals. They claim support for their position from Complainant's sales literature, which identifies Nicrazin 25% and Vitamin B12 Mixture as feed additives and feed supplements. The carriers point out that an additive or supplement to animal feed is distinct from feed itself. They note that the purpose of the commodities as indicated by the literature is not to feed or provide nutrients to animals, but rather to prevent the disease coccidiosis in chickens, in the case of Nicrazin 25%, and to aid in "fast, healthy growth and reproduction" of poultry and pigs in the case of Vitamin B12 Mixture. The carriers also point out that the literature identifies Nicrazin 25% as a "drug" and "medication," and that Nicrazin 25% and Vitamin B12 Mixture are to be administered only after being mixed into animal feed in very small ratios.[3] Purchasers are also instructed not to administer Nicrazin 25% to "laying birds" or to birds within four days of marketing for human consumption.

The Joint Exceptions raise these specific points:

(1) The value of the commodities in issue is considerably (allegedly 10 to 25 times) higher than that of animal feed.

(2) Complainant's literature refers to the commodities as a drug, not animal feed, and gives instructions for dosage, dilution, and discontinuation of use.

(3) The purpose of the commodities is to control disease, not to feed animals.

(4) The recipient indicated on each of the bills of lading was either another affiliate of Complainant's or a pharmaceutical company, not a feed and grain dealer or consumer.

(5) Complainant's Export Declarations classify the goods as chemicals or pharmaceuticals under the Department of Commerce "Schedule B" classification system.

(6) The Pacific Westbound Conference tariff states that the Department of Commerce "Schedule B" numerical classification system is the basis for the tariff classification.

(7) The bills of lading classify the goods as chemicals or pharmaceuticals, not as animal feed.

(8) Complainant bears the heavy burden of proof.

(9) These products have never been classified as animal feed by a common carrier and Complainant has twice previously been unsuccessful in Commission proceedings in obtaining lower commodity rates for its chemical products.

[3] The maximum recommended ratio of Nicrazin 25% to chicken feed is 1.6 pounds of Nicrazin 25% to one ton of feed. Vitamin B-12 Mixture is to be combined in amounts of 7.6 grams for chickens, to 45.5 grams for baby pigs, per one million grams of feed.

In its Reply to Exceptions, Complainant states that the tariff description "Animal Feed, Prepared" applies to any preparation fed to animals, including feed additives and supplements, and that therefore it is broad enough to cover the commodities in question. Complainant emphasizes that Nicrazin 25% contains its active ingredient, the drug nicarbazin, at only a 25% intensity level, and that the product contains wheat middlings and soybean oil as well. Similarly, Complainant notes, the literature indicates that Vitamin B12 Mixture contains ground rice hulls and soybean oil. The presence of these added materials in the products, Complainant argues, establishes that the products are not medicines or pharmaceuticals, as they might be were they in an undiluted state.

Complainant argues that the ambiguity created by the breadth of the tariff description should be resolved in Complainant's favor. Complainant challenges the carriers' emphasis on the value of the articles shipped by noting that the tariff contains no value restrictions. It also argues that arguments regarding "Schedule B" are inappropriate because "Schedule B is not a tariff and is not at issue."

Discussion And Conclusion

Where a tariff is ambiguous or doubtful it should be construed against the carrier who prepared it. *United States v. Hellenic Lines, Ltd.*, 14 F.M.C. 255, 260 (1971). In the instant proceeding, the question of ambiguity in the tariffs turns on whether the category "Animal Feed, Prepared" is so broad as to include medications not in a 100% active ingredient form. If so, there would be more than one reasonably applicable tariff description, and the resulting ambiguity should be resolved by application of the tariff description with the lowest rates. The Presiding Officer's awards of reparations were based on his findings that the commodities at issue could reasonably be described as "Animal Feed, Prepared," as well as by the tariff descriptions applied by the carriers. We conclude that these findings are contrary to the weight of the record evidence.

The parties appear to agree that shipments of nicarbazin and of Vitamin B12, undiluted, would properly be considered "pharmaceuticals" and could not reasonably be classified as "Animal Feed, Prepared." Complainant contends, however, that the addition of soybean oil, wheat middlings and ground rice hulls to those products converts them to mere animal feed. The record does not support Complainant's argument. The sales literature for Nicrazin 25% describes it as "for use *in* poultry feeds as an aid in prevention of coccidiosis." (Emphasis added.) It goes on to explain that the purpose of its being supplied as a premix (that is, the nicarbazin is already mixed with soybean oil and wheat middlings) is "for convenience in handling and uniform incorporation in feed." The soybean oil and wheat middlings are described as the "carrier and/or diluent" for the nicarbazin, the active ingredient in Nicrazin 25%. Both Nicrazin 25% and Vitamin B12 Mixture are to be administered to poultry and pigs only after being mixed into extremely larger quantities of animal feed.

Moreover, the sales literature describes the products as feed supplement, feed additive, drug, and medication. They are never referred to as "feed"; the term "feed" is used exclusively as that into which the products are to be mixed.

The literature makes it clear that Nicrazin 25%'s purpose is not to provide nutrients to animals, but to prevent a particular disease. Vitamin B12 Mixture is to improve weight gains, feed conversion, carcass yield, egg production and hatchability, growth rates, and to increase number of pigs per litter. The warnings not to administer Nicrazin 25% to laying birds or to birds within four days of marketing for human consumption further indicate the pharmaceutical nature of the products and belie Complainant's contention that they can be considered animal feed. In short, Complainant's interpretation of the tariff item "Animal Feed, Prepared" to include the products at issue requires a strained and unnatural construction of the tariff language which will not support an award of reparations. *See Thomas G. Crowe v. Southern Steamship Co.*, 1 U.S.S.B. 145, 147 (1929).

It is further concluded that the appropriate tariff description for the commodities at issue is "Medicinal and Pharmaceutical Preparations, Compounds or Mixtures of two or more products, Bulk Form N.O.S."[4] This is the commodity description applied by "K" Line in Docket No. 78-27. Although not applied by Mitsui O.S.K. Lines and by Japan Line in the other two proceedings, the "Medicinal and Pharmaceutical . . ." commodity description was also appropriate for those shipments.[5] As the rates for "Medicinal and Pharmaceutical . . ." were higher than the rates actually charged Complainant for the two latter shipments, reparations in all three proceedings are denied.

THEREFORE, IT IS ORDERED, That the Complaints of Merck, Sharp & Dohme International in Docket Nos. 78-27, 79-42, and 79-43 are dismissed; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

(S) FRANCIS C. HURNEY
Secretary

[4] Complainant argues that the word "products" in this commodity description refers to medicines or pharmaceuticals, and excludes soybean oil, wheat middlings and ground rice hulls. The Commission rejects this restrictive interpretation of the commodity description's language.

[5] Pacific Westbound Conference Overland Tariff No. 6—F.M.C. 13, in which appeared the "Medicinal and Pharmaceutical . . ." description at the time of the shipment in Docket No. 78-27, was cancelled on January 1, 1977. That same commodity description appeared in Pacific Westbound Conference Local and Overland Freight Tariff No. 5—F.M.C. 13 at the time of the subsequent shipments in Docket Nos. 79-42 and 79-43, however.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-56

WEST GULF MARITIME ASSOCIATION

v.

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

ORDER ON RECONSIDERATION

January 8, 1980

The City of Galveston (the Port) has filed a Petition for Reconsideration of the Commission's September 14, 1979 Order, 19 S.R.R. 779, finding unlawful certain of the Port's terminal tariff provisions.[1] For the reasons set forth below, the Petition is denied.

The Port challenges the Commission's conclusion regarding one tariff item, Item No. 98.1, which the Commission found unreasonable. The Port contends that the portion of Item No. 98.1 requiring waiver of insured claims and waiver of subrogation is reasonable.[2] Specifically, it alleges error in the Commision's finding that:

> [T]he indemnity requirement 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.[3]

The Port cites two cases from the Fifth Circuit Court of Appeals and a district court in that Circuit, in which *Bisso* was not applied to waiver of subrogation clauses.[4] It argues that consequently, the Commission's citation of *Bisso* invalidates its finding that the waiver of subrogation and insured claims provisions violate the Shipping Act.

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[1] Of nine tariff items alleged to violate the Shipping Act, 1916, the Commission found three, and portions of two others, violative of section 17.

[2] The Petition relates only to the second sentence of item No. 98.1 which reads:

> 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 Tustees 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 User's 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.

[3] The cases cited are *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966); and *Lucidi v. Stockton Port District*, 19 S.R.R. 441 (1979).

[4] The Court in *Bisso* invalidated a towing contract provision which would have released a towboat from liability for its own negligence.

Bisso is not, of course, controlling as to the lawfulness of the waiver of claims and subrogation provisions under the Shipping Act. However, a regulatory agency may look to court decisions regarding common or judicial law even though those decisions are not controlling on the issues before the agency.[5] To this end, the Commission cited *Bisso*, and applied its rationale to both the indemnification and waiver issues.[6] The Commission concluded that the tariff provisions are unreasonable under section 17 of the Act in that they impose restrictions on and require expenses of users irrespective of those users' actual culpability for an occurance, and benefit a potentially negligent port. Also, the requirements on the users are unilateral, and are not imposed upon the Port itself.[7]

The Commission is not barred from applying the *Bisso* rationale in its consideration of Shipping Act issues simply because of the Fifth Circuit Court of Appeals' interpretation of *Bisso*. Moreover, the Commission's ruling on the waiver issues is consistent with its decisions in *Trucker and Lighter* and *Lucidi*, neither of which is commented upon in the Port's Petition.

Furthermore, the two Court of Appeals decisions cited by the Port are distinguishable from the instant proceeding. In *Fluor Western, Inc. v. G & H Offshore Towing, Co.*, 447 F.2d 35 (5th Cir. 1971), the cargo owner did not waive its right to proceed against a wrongdoer in the event the cargo owner's insurance underwriters had failed for whatever reason to reimburse it for any loss caused by the wrongdoer. The Port's Item No. 98.1 would require a waiver of any claim covered by insurance regardless of whether the insured actually received payment. No rights were actually waived in the towage contract in *Fluor Western;* the court emphasized that rights were waived only by a subsequent, independent agreement between the cargo owner and its underwriters. 447 F.2d 39-40. The Port's Item No. 98.1 states: "Each User . . . waives all claims such User may have" for losses covered in its insurance policy.

In *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974), the waiver of subrogation requirement was a reciprocal one, in which both tug and tow were required to obtain waiver of subrogation clauses in their respective insurance policies and to designate each other as an additional insured. This mutuality is not present in Item No. 98.1.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration filed by the City of Galveston is denied; and

IT IS FURTHER ORDERED, That the Commission's Report and Order is affirmed in all respects.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[5] *See Klicker v. Northwest Airlines, Inc.*, 563 F.2d 1310, 1313 (9th Cir. 1977), in which the court cited a *Bisso* line of cases as not directly applicable in the case of tariffs in a regulated industry, but approved of an agency's referral to those decisions for the standard of reasonability employed by the courts.

[6] The Court in *Bisso* stated:

> The two main reasons for the creation and application of the rule [invalidating contracts releasing towers from liability for their own negligence] have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. 349 U.S. at 91.

These considerations are useful with regard to the terminal tariff items in this proceeding.

[7] *See* the Commission's comments in this proceeding regarding one-sided requirements and obligations in terminal tariffs, at 19 S.R.R. 785.

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 42, DOCKET NO. 78-46]

PART 514. FINANCIAL EXHIBITS AND SCHEDULES NON-VESSEL OPERATING COMMON CARRIERS IN THE DOMESTIC OFFSHORE TRADES

January 14, 1980

ACTION: Final Rules

SUMMARY: The Federal Maritime Commission hereby adds a new Part 514 of Title 46, Code of Federal Regulations, in order to publish substantive guidelines for determining what constitutes a just and reasonable rate of return or profit for non-vessel operating common carriers in the domestic offshore trades and to provide for the orderly acquisition of data in the event the Commission institutes a formal investigation and hearing. The annual reporting requirement has been eliminated as have the reports which are submitted concurrently with every general rate change. The methodology adopted by the Commission, as reflected in the final rules, includes the utilization of operating ratio as the comparative test of reasonableness. "Normalized" tax accounting, cargo cube allocation (using outside dimensions of containers) and other substantive methods of data reporting have also been adopted to conform with the Commission's regulations concerning financial reports by vessel operating common carriers in the domestic offshore trades (Part 512 of Title 46), issued concurrently with these final rules.

EFFECTIVE DATE:

March 28, 1980

SUPPLEMENTARY INFORMATION:

In November 1978, the Federal Maritime Commission's regulatory responsibilities in the domestic offshore trades were substantially altered by the enactment of Public Law 95-475. The amendments to the Intercoastal Shipping Act, 1933, impose strict time limits on Commission investigations of rate changes. The Commission is required by P.L. 95-475 to:

[W]ithin one year after the effective date of this sentence, by regulation prescribe guidelines for the determination of what constitutes a just and reasonable rate of return or profit for common carriers by water in intercoastal commerce.

On November 15, 1978, the Federal Maritime Commission served an Advance Notice of Proposed Rulemaking which sought comments from governmental bodies, shippers and carriers regarding the nature, scope and feasibility of substantive guidelines for determining just and reasonable rates of return or profits for common carriers by water in the domestic offshore trades. In addition to this request for written comments, the Commission convened a series of informal hearings at various cities throughout the country. Commenting parties were requested to address fourteen specific issues as well as any additional matters considered to be relevant.

Proposed rules governing financial requirements and standards for evaluating proposed rate changes by non-vessel operating common carriers (NVO's) in the domestic offshore commerce were published for comment on November 6, 1979.

The proposed rules (a) require NVOs subject to the Intercoastal Shipping Act, 1933, to submit standard-format financial data and (b) establish procedures by which the Commission will evaluate proposed rate changes. The annual report has been eliminated as has the justification which is submitted concurrently with every general rate change. General rate changes filed by NVO's rarely become the subject of a docketed proceeding. Competition among NVO's and competition with vessel operating common carriers offering a less-than-containerload service tend to place a ceiling on the rates of an NVO. The freight-all-kinds rate of the underlying carrier generally provides a floor. It is felt that the current reporting requirements are too burdensome in view of these market constraints on the NVO's ability to raise or lower rates at will.

The proposed rules would only require an NVO to submit standard-form financial data in the event the Commission instituted a formal investigation and hearing. In such proceedings the burden of proof is on the NVO to establish that its proposed general rate change is just and reasonable. The exhibits and schedules required by the proposed rules would be an essential element of the NVO's justification in support of the general rate change. In determining whether or not the NVO had met its burden of proof, the Commission would give great weight to the material submitted in compliance with the proposed rule.

The proposed rules adopt the operating ratio as the primary method to be used in evaluating NVO rate changes. This approach is consistent with past

practice and reflects the Commission's view that the nature of NVO operations is in many ways distinct from the operations of vessel operators.

Comments to the proposed NVO rules were submitted by the following parties:

Dependable Trucking
Guam Freight Forwarders and Consolidators
Hawaiian Distribution System
Pacific Coast Tariff Bureau
PRF Express Corporation

Additionally, all FMC Bureaus were requested to submit comments to the Secretary and such comments were received from the Commission's Pacific District and Puerto Rico District Offices as well as the Office of General Counsel. These documents have been made a part of the official record of this rulemaking proceeding.

All comments received from private parties, except for the comment of Guam Freight Forwarders and Consolidators, generally supported the rule as proposed, and especially supported the reduced level of reporting proposed in the rule. Guam Freight Forwarders and Consolidators opposed the reduced reporting requirements on the basis that the annual reports "had the tendency to weed out some of the more marginal operators that have given the bad reputation to the NVOCC industry." The Commission rejects this reason as a justification to retain the burdensome and unnecessary annual reporting requirements for NVOCC's. Free market competition is viewed by the Commission as the proper mechanism to eliminate marginal operators from the industry.

PRF Express Corp. also submitted supplementary comments asking that NVO's be allowed to file a company balance sheet as of a date not more than three months prior to the date of filing proposed rates as opposed to the proposed two month requirement of section 514.2(b)(1), or, alternatively, that the rule provide a procedure for a waiver of strict compliance with the reporting requirements as exists in the VOCC rule. This suggestion is intended to accommodate NVO's who prepare balance sheets on a quarterly basis and the Commission agrees that such a change would further reduce the regulatory burden on the NVO industry. Accordingly, section 514.2(b)(1) has been changed to incorporate PRF's suggestion.

In considering the VOCC rule in this proceeding, the Commission made certain policy determinations which altered some substantive reporting requirements in that rule, and has decided to make similar changes to the NVO rule to the extent these policy determinations affect the NVO industry. Accordingly, substantive conforming amendments have been made to sections 514.3, 514.4(b), 514.4(d), 514.5(e), 514.6(c)(2), 514.6(c)(9), 514.6(c)(11) and 514.6(d)(2). The bases for these changes are fully explained in the supplementary information accompanying the VOCC rule and need not be repeated herein. Any other changes from the proposed rule are stylistic.

The Commission recognizes that, from time to time, an NVO may submit schedules and exhibits which deviate in minor respects from the requirements of these rules. While we will require compliance with these rules in all material

respects, we have no intention of penalizing NVOs for minor deviations which are not material. Section 514.2(d) has been amended accordingly.

Pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 553), sections 18, 21, and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 817, 820, and 841(a)), and sections 1, 2, 3(a), 3(b), 4, and 7 of the Intercoastal Shipping Act, 1933, the Federal Maritime Commission amends Title 46, C.F.R. by deleting Subpart B of Part 512 and by adding a new Part 514, Financial Exhibits and Schedules, Non-Vessel Operating Common Carriers In The Domestic Offshore Trades as follows:

PART 514—FINANCIAL EXHIBITS AND SCHEDULES NON-VESSEL OPERATING COMMON CARRIERS IN THE DOMESTIC OFFSHORE TRADES

Sec.

AUTHORITY: Sections 514.1 to 514.6 issued pursuant to sections 18, 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 817, 820 and 841(a)) and sections 1, 2, 3,(a), 3(b), 4 and 7 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 843, 844, 845, 845(a) and 847).

§514.1 Purpose

The purpose of this Part is (a) to establish the methodology that the Federal Maritime Commission (Commission) intends to follow in evaluating proposed rate changes in the domestic offshore trades submitted by non-vessel operating common carriers (NVO's) subject to the provisions of the Intercoastal Shipping Act, 1933, and (b) to provide for the orderly acquisition of the data required for the methodology so established. The Commission will employ the operating ratio methodology when evaluating proposed rate changes by NVO's, except in any instance where, in its opinion, the application of the operating ratio creates an unreasonable result.

§514.2 General requirements

(a) The rules contained herein are those issued by the Commission to meet the specific requirements of the Intercoastal Shipping Act, 1933, as amended, and will be used to evaluate proposed rate changes in the domestic offshore trades. However, the Commission reserves to itself the right to employ other bases for allocation and calculation in any instances where, in its opinion, the application of the rules and regulations prescribed herein create unreasonable results.

(b) Whenever the Commission institutes an investigation and hearing to determine whether or not an increase or decrease in rates which would affect not less than 50 percent of the tariff items of that NVO in a particular Trade, or which would result in an increase or decrease of not less than 3 percent in its gross revenues in that particular Trade, is just and reasonable, the NVO shall file in duplicate, within 30 days of the publication in the *Federal Register* of the order instituting the investigation and hearing, the following:

(1) An *actual* company wide balance sheet (Exhibit A-a) as of a date not more than three months prior to the date of filing the proposed rates.

(2) An *actual* statement of income (Exhibit B-a) and supporting schedules covering a 12 month period ending the same date as the balance sheet required in subparagraph (1) above.

(3) A *projected* statement of income (Exhibit B-p) and supporting schedules for the 12 month period commencing on the first day of the month following the date on which the changed rates are proposed to become effective (taking into account the effect of the proposed rate changes); and

(4) *Actual* and *projected* operating ratios described in section 514.6(d) coinciding with the time periods covered by the statement of income required in subparagraphs (2) and (3) above.

(5) A supplementary data exhibit (Exhibit C) described in section 514.6(e) corresponding to the date of the balance sheet furnished in response to section 514.2(b)(1).

(6) The work papers described in section 514.4(b).

(c) Revenue (except Other Revenue) and costs shall be assigned directly whenever possible, otherwise allocation shall be made in the manner prescribed in section 514.6 of this part. However, if the gross revenue from Other Operations does not exceed 5 percent of the total company gross revenue, no segregation of revenue and expenses between Other Operations and the Trade (see definitions, sections 514.5(b) and (c)) is required by this part.

(d) All NVO's subject to these requirements must comply in all material respects with the instructions outlined herein, both as to the submission of the specified exhibits and schedules and as to compliance with the methods prescribed for their preparation. If an NVO has nothing to report on a required schedule, it must submit the schedule with the word "NONE" printed across its face.

(e) All percentage calculations required by allocations herein shall be carried to two places beyond the decimal point, e.g., 97.54 percent.

§514.3 Certification

The data required by this part shall be accompanied by a certification by the corporate officer responsible for the maintenance and accuracy of the books, accounts and financial records of the NVO, stating that:

(a) The books and accounts have been maintained in accordance with an appropriate system of accounts;

(b) The exhibits and schedules have been prepared from the regularly maintained books and records of the NVO;

(c) The records so maintained conform to, are reconciled to, or represent the actual financial data subject to the annual independent financial audit;

(d) The allocations have been made in accordance with the rules promulgated in this part; and,

(e) The financial and statistical data used are supported by an appropriate information gathering system having proper internal controls which have been tested for accuracy.

§514.4 Access to and audit of records

(a) Every NVO shall maintain its records and books of account in an orderly and systematic manner. These records must be kept in such manner as to permit the timely preparation of the exhibits and schedules described in section 514.6(a). As a minimum requirement, every NVO shall retain those records necessary to prepare the documents described in section 514.6(a) for a period of 3 years.

(b) Exhibits and schedules submitted as part of this requirement are to include: (1) all work papers, properly cross-referenced and indexed, which were prepared in support of the exhibits and schedules, and (2) a detailed description of the methods employed in projecting revenues.

(c) In addition, the books and records of the NVO and those of any related company whose financial data is included in any of the exhibits or schedules shall be made available upon request for examination by appropriate Commission personnel. Commission personnel shall be permitted to make copies of these records to the extent they deem necessary.

(d) All exhibits and schedules submitted as part of the filing requirements are to include the work paper reference numbers so that amounts shown can be readily traced to the appropriate work paper.

§514.5 Definitions

For the purpose of this part the following terms are expressly limited to the definitions listed below:

(a) *The Service*—All activities and operations of the NVO, including those regulated by the Commission.

(b) *Other Operations*—That part of the Service not subject to the Commission's jurisdiction under 46 CFR 531, such as cargoes moving in the foreign commerce of the United States or those regulated by the Interstate Commerce Commission.

(c) *The Trade*—That part of the Service subject to the Commission's jurisdiction under 46 CFR 531, and as defined under "Domestic Offshore Trade" (below).

(d) *Domestic Offshore Trade*—The transportation and handling of common carrier cargo under the terms of a tariff(s) on file with and regulated by the Commission between any one of the five areas of the Continental United States listed in subparagraph (1) and one non-contiguous area of the United States listed in subparagraph (2) or between two non-contiguous areas of the United States. Where service is offered to or from two or more areas at the

same rates (e.g., Atlantic Coast to Puerto Rico and the Virgin Islands) and listed as such in a single tariff, the carriage of cargo to or from those two or more areas may be treated as one domestic offshore trade for the purposes of this part.

(1) The five areas of the Continental United States are:

(i) North Atlantic (Maine to, but not including Hatteras, North Carolina);

(ii) South Atlantic (Hatteras, North Carolina to, but not including, Key West, Florida);

(iii) Gulf (Key West, Florida to and including Brownsville, Texas);

(iv) West Coast; and

(v) Great Lakes.

(2) The non-contiguous areas of the United States (including, but not limited to those) to which service is offered under the terms of tariffs on file with the Commission as of December 31, 1979 are:

(i) American Samoa;

(ii) Commonwealth of the Northern Marianas;

(iii) Guam;

(iv) Johnston Island;

(v) Midway Island;

(vi) Puerto Rico;

(vii) State of Alaska;

(viii) State of Hawaii;

(ix) U.S. Virgin Islands; and

(x) Wake Island.

(e) *Cargo Cube*—The product of the outside dimensions of a unit of cargo expressed in cubic feet. In computing cargo cube for containerized cargo, the outside dimensions of the container, trailer or other equipment shall be used. The height of equipment moving on wheels shall be measured from the ground to the highest point on the equipment. Empty equipment, such as containers, shall be included in the computation of cargo cube only if they are revenue-producing units of cargo. Where a NVO finds it more convenient to accumulate such data in terms of twenty-foot equivalent units (TEU's) or metric quantities, these units may be used instead of cargo cube in all instances where cargo cube is cited in this part. Where any of these options are exercised, the NVO shall modify the headings on the prescribed reporting forms to indicate the units in which the data is being reported. For purposes of this part, NVOs are not required to tape measure each unit (e.g., container, trailer, box, carton). However, the computation of cargo cube must be developed after careful consideration of all evidence available to the NVO, including loading documents, the opinions of experienced operating personnel, and sample measurements. In calculating the cube of containers, trailers, or other similar equipment, the NVO may assign a standard length, width and height to a given class of equipment, provided that the actual dimensions of each piece of equipment in the class vary no more than a foot from the standard dimensions.

(f) *Measurement Ton*—Equals forty (40) cubic feet.

(g) *Metric Measurement Ton*—Equals 35.31 cubic feet or 1 cubic meter.

(h) *Twenty-foot Equivalent Unit (TEU)*—Equals 1,280 cubic feet, based on the standard 20′ × 8′ × 8′ container.

(i) *Cargo Cube Relationship*—The ratio of total cargo cube for all cargo carried in the Trade to total cargo cube for all cargo carried in the Service.

(j) *Line-Haul Transportation*—All transportation of freight on land other than pickup and delivery and local terminal operations. An example of this would be substituted service, i.e., charging the water rates but moving the cargo part of the way by land.

(k) *Pickup and Delivery*—The service provided by the NVO, or its agent, of picking up and delivering cargo from or to a shipper's or consignee's place of business or other location designated by the shipper or consignee pursuant to the NVO's tariff(s) on file with the Commission and not subject to regulation by any other regulatory body.

(l) *Related Company*—Companies or persons that directly or indirectly (through one or more intermediaries) control, or are controlled by, or are under common control with, the reporting NVO. The term "control" shall include actual as well as legal control, whether maintained or exercised through (or by reason of) the circumstances surrounding organizational structure or operation, through (or by) common directors, officers, stockholders, a voting trust(s), a holding or investment company or companies, or through (or by) any other direct or indirect means, including the power to exercise control.

(m) *Total Trade Operating Expenses*—The total amount allocated to the Trade for the following expenses: Ocean Transportation, Line-Haul Transportation, Pickup and Delivery and Terminal.

(n) *Total Company Operating Expenses*—The company-wide total of the following expenses: Ocean Transportation, Line-Haul Transportation, Pickup and Delivery and Terminal.

(o) *Operating Expense Relationship*—The ratio of total Trade operating expenses to total Company operating expenses.

§514.6 Forms

(a) *General:*

(1) The information required by this part shall be submitted in the prescribed format and shall include:

Exhibit A—Balance Sheet
Exhibit B—Statement of Income and Supporting Schedules
Exhibit C—Supplementary Data

(2) The required exhibits and schedules are described in sections 514.6(b), (c), (d) and (e).

(b) *Balance Sheet (Exhibit A)*:

The balance sheet shall be prepared from the NVO's books and records in accordance with generally accepted accounting principles and shall be accompanied by the appropriate footnotes.

(c) *Statement of Income (Exhibit B)*:

(1) A statement of income shall be prepared showing operating results of the Total Company, Other Operations and the Trade.

(2) *Operating Revenue* (*Schedule B-I*):

(i) Revenue allocated to the Trade shall only be revenue earned from the common carriage of cargo in the domestic offshore trade during the period and other revenue as shown on Schedule B-I, except that minor amounts of other cargo may be considered Trade cargo in accordance with section 514.2(c). Revenue figures shall be reported in total for the Trade and separately for each of the 15 inbound commodities (listed by tariff descriptions) producing the highest revenues for the inbound portion of the Trade, and for each of the 15 outbound portion of the Trade. Where fewer than 15 commodities account for at least 90 percent of the total revenue for either the inbound or outbound portion of the Trade, only those commodities need be separately reported. Where the same commodity is carried under several tariff designations having different rates (e.g., potatoes refrigerated, potatoes non-refrigerated, potatoes in bags, potatoes in containers), each of these tariff designations shall be considered as an individual commodity.

(ii) Where the applicable tariff establishes a single freight-all-kinds (FAK) rate for containers that may hold more than one commodity, individual commodity designations shall be disregarded in considering that tariff item for purposes of subparagraph (i) above.

(3) *Ocean Transportation Expenses* (*Schedule B-II*):

This schedule shall set forth the number of containers, cubic feet of cargo shipped and amounts paid or owed to each underlying ocean carrier for ocean transportation purchased for the carriage of cargo in Total, for Other Operations and for the Trade.

(4) *Line-Haul Transportation Expenses* (*Schedule B-III*):

This schedule shall set forth the number of cubic feet of cargo carried and amounts paid or owed to motor carriers, railroads or other land carriers for the line-haul transportation of cargo in Total, for Other Operations and for the Trade.

(5) *Pickup and Delivery Expenses* (*Schedule B-IV*):

This schedule shall set forth expenses incurred in the pickup and delivery of cargo in Total, for Other Operations and for the Trade. Assignments to the Trade shall be direct where possible; otherwise, on the cargo cube relationship by location. This schedule shall also set forth the basis under which pickup and delivery charges are assessed for the Trade (e.g., included in base rate or separate charge) and the amount of any charges paid to a related company for pickup and delivery services.

(6) *Terminal Expenses* (*Schedule B-V*):

This schedule shall set forth in detail all expenses incurred in terminal operations for the loading and unloading of containers, the switching and transfer of cargo within the terminal area and any local trucking operations not included in line-haul or pickup and delivery expenses (e.g., between underlying carrier's terminal and the NVO's terminal) in Total, for Other Operations and for the Trade. Assignments to the Trade shall be direct where possible; otherwise, on the cargo cube relationship by location.

(7) *Administrative and General Expenses* (*Schedule B-VI*):

This schedule shall set forth all administrative and general expenses, including advertising and miscellaneous taxes. Depreciation of equipment and amortization of leasehold improvements not assignable to pickup and delivery or terminal expenses shall be included in this schedule. Expenses not directly assigned to the Trade or Other Operations shall be allocated to the Trade on the operating expense relationship. Charitable contributions shall not be allocated to the Trade.

(8) *Other Income or Expense* (*Schedule B-VII*):

Any other elements of income or expense shall be fully explained and supported by schedule Schedule B-VII "Other Income or Expense." Assignments to the Trade shall be direct where possible; otherwise, on the operating expense relationship. Should this type of assignment appear to be inequitable to either the Trade or Other Operations, a more equitable method shall be employed and the reasons fully explained.

(9) *Provisions for Income Taxes:*

Federal, State, and other income taxes shall be listed separately. If the company is organized outside the United States, it shall indicate the entity to which it pays income taxes and the rate of tax applicable to its taxable income for the subject year. Federal, State and other income taxes shall be calculated at the statutory rate.

(10) *Extraordinary Items:*

Income or losses of an extraordinary nature shall be set forth and described in an appropriate schedule which is reconcilable to the statement of income. Classification as an extraordinary item shall be in accordance with generally accepted accounting principles. In general, these amounts shall not be assigned or allocated to the Trade.

(11) *Related Company Transactions* (*Schedule B-VIII*):

The net income (loss) after Federal income taxes from transactions in the Service with related companies shall be allocated to the Trade. Such allocations shall be made on the same basis as the specific expense was allocated to the Trade. Income taxes should be assigned to related company transactions based on the statutory tax rate. The methods employed shall be fully explained in Schedule B-VIII, "Related Company Transactions."

(d) *Operating Ratio:*

(1) The operating ratio will be computed by *dividing* total Trade expenses (adjusted for related company transactions) *by* total Trade revenue.

(2) The reasonableness of an NVO's operating ratio will be determined by comparing it to the operating ratios of other regulated and non-regulated companies, adjusted for relative risk. In conjunction with the operating ratio, the staff may also consider other financial ratios, such as (1) current, (2) leverage and (3) turnover. The NVO's stability in earnings as compared to that of other firms will also be considered.

(e) *Supplementary Data* (*Exhibit C*):

The supplementary data shcedule shall set forth information concerning the identity of and services offered by the NVO. Specific details are set forth in Exhibit D.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-90

ERNEST R. LEVINE D/B/A GERALD EXPORT & IMPORT COMPANY

v.

HAPAG-LLOYD, A.G.

ORDER

January 18, 1980

On November 7, 1979, Administrative Law Judge Charles E. Morgan dismissed the complaint of Ernest R. Levine d/b/a Gerald Export & Import Company (Levine) against Hapag-Lloyd, A.G. No appeals were taken from this action, but the Commission determined to review the matter on its own motion.

Levine is a shipper of carpets located in Chicago, Illinois. The instant complaint arose out of a legal action by Hapag-Lloyd, a common carrier by water in the foreign commerce of the United States, to collect freight charges from Mr. Levine. *Hapag-Lloyd, A.G. v. Levine*, 473 F.Supp. 991 (N.D. Ill. 1979). In that proceeding, Levine alleged that the freight charges owing Levine were based upon rates unlawful under the Shipping Act, 1916 (46 U.S.C. §801 *et seq.*) The United States District Court entered immediate judgment for Hapag-Lloyd on its freight collection claim on June 14, 1979. The court found that Levine's counterclaim raised separable matters within the primary jurisdiction of the Federal Maritime Commission, which would be deferred until Levine's allegations could be considered by the Commission.

Levine subsequently filed a Shipping Act complaint, alleging violations of sections 15, 16, and 18(b) of the Shipping Act by Hapag-Lloyd and unnamed co-conspirators, based upon discriminatory pricing and failure to adhere to published tariffs. Although the complaint was unclear as to the exact conduct alleged to be discriminatory, the complained of activities were not necessarily limited to the use of a Commission approved dual rate merchant's contract. The complaint also include references to rebating and failure to adhere to published tariffs.

Upon receiving Levine's complaint, Hapag-Lloyd filed a "Motion to Dismiss" stressing the lawfulness of the dual rate system employed by it and the

North Atlantic United Kingdom Freight Conference to which it belongs. Levine did not respond to this motion. Under such circumstances, it was not improper for the Presiding Officer to construe the complaint against Levine and dismiss it for failing to adequately state a cause of action. The November 7, 1979 "Order of Dismissal" is essentially a default judgment in favor of the respondent from which no appeal has been taken.

THEREFORE, IT IS ORDERED, That, consistent with the above discussion of the Complainant's failure to prosecute its claim, the November 7, 1979 "Order of Dismissal" 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

46 C.F.R.; CHAPTER IV, DOCKET NO. 79-36

SELF-POLICING OF INDEPENDENT LINER OPERATORS

January 21, 1980

ACTION: Discontinuance of Proceeding

SUMMARY: This proceeding was instituted by advance notice of proposed rulemaking published April 16, 1979 (44 Fed. Reg. 22487). Public comment was requested on whether to adopt rules requiring independent ocean carriers to participate in self-policing programs and if so the appropriate nature, scope and feasibility of a policing requirement. Upon consideration of comments received we have determined not to promulgate a proposed rule at this time. Accordingly, proceedings in this matter are hereby discontinued.

SUPPLEMENTARY INFORMATION: None

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-15

WESTINGHOUSE ELECTRIC CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE

January 23, 1980

Notice is given that no appeal has been taken to the December 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) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

No. 79-15

WESTINGHOUSE ELECTRIC CORPORATION

v.

SEA-LAND SERVICES, INC.

NOTICE OF (1) DISMISSAL OF COMPLAINT (2) DISCONTINUANCE OF PROCEEDING

Finalized January 23, 1980

By notice served November 21, 1979, the parties in this proceeding were directed to submit on or before Monday, December 3, 1979, a prehearing statement pursuant to Rule 95 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.95. To the date of this notice, no party has submitted the requested prehearing statement, nor has the Presiding Administrative Law Judge granted waiver of the filing thereof. Consequently, under the circumstances, the failure to file is deemed a failure of prosecution of the complaint, as well as a dismissal of the parties to the proceeding, pursuant to said Rule 95.

Whereupon, upon consideration of the above, it is *ordered* that,

(A) The complaint is dismissed;

(B) The parties are dismissed from this proceeding;

(C) The proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

December 10, 1979

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 693(I)

DORF INTERNATIONAL LIMITED

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

ORDER ON RECONSIDERATION

January 24, 1980

This proceeding is before the Commission on petition from Respondent Flota Mercante Grancolombiana requesting that the Commission reconsider its determination not to review the decision of the Settlement Officer granting reparation to Complainant Dorf International Limited for alleged freight overcharges on a shipment of cardboard paper carried by Respondent from New York, New York to Cristobal, Panama.

The Commission decided to grant the Petition for Reconsideration in this instance because of the clearly erroneous allegation in the Settlement Officer's decision that the Respondent had not disputed the merits of the claim.

The complaint alleges that Respondent assessed freight on a measurement basis of 337 cft whereas according to the shipper's packing list the 43 cartons of cardboard measured 131.38 cft. The Settlement Officer found that the evidence supported Complainant's claim and on that basis awarded reparation.

It appears, however, that the Settlement Officer overlooked the fact that the 43 cartons which measured 131.38 cft when delivered to Complainant were subsequently placed in five pallets for delivery to the terminal and the carrier. As shown by the dock receipt and the bill of lading the five pallets measured 377 cft. The applicable tariff provided that freight must be assessed on the over-all measurement of each package. Consequently, by assessing freight on the measurement basis of 377 cft, Respondent properly rated the shipment.

Therefore, the decision of the Settlement Officer must be and is hereby reversed, reparation denied and the complaint dismissed.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-15

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY, ET AL.

ORDER ADOPTING INITIAL DECISION

January 28, 1980

This proceeding was initiated upon the complaint of West Gulf Maritime Association (WGMA),[1] filed April 15, 1974, alleging that several terminal tariff provisions published by Respondents, seven ports on the Texas Gulf Coast, [2] violated sections 15 and 17 of the Shipping Act, 1916 (46 U.S.C. §§814, 816). The Port of New Orleans, the California Association of Port Authorities, the Virginia Port Authority, the Maryland Port Administration, and the Commission's Bureau of Hearing Counsel intervened. Administrative Law Judge Seymour Glanzer issued an Initial Decision,[3] served September 26, 1979, which is before the Commission on WGMA's Exceptions. Respondents filed a Joint Reply to Exceptions, and Hearing Counsel also replied.

TARIFF PROVISIONS

The text of the tariff provisions in issue is attached as Appendix A to the Initial Decision. The tariff provisions are largely duplicative, with many of the ports' tariffs using identical language. Although approximately 35 tariff provisions are challenged in this proceeding, they may be categorized into four major groups:

1. Each of Respondents' tariffs provides that use constitutes consent to the terms and conditions of the tariffs, and that vessel agents are "users" of the

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

[2] Respondents are the Port of Houston Authority, the City of Galveston, the Port of Beaumont, the Port of Port Arthur, the Port of Corpus Christi, the Brownsville Navigation District of Cameron County, and the Orange County Navigation and Port District.

[3] 19 S.R.R. 859 (1979).

ports' facilities. The ports bill the vessel agents and hold them liable for dockage, wharfage, and outbound cargo demurrage charges.

2. A tariff provision published only by Galveston provides that when cargo cannot be removed from piers or transit sheds because of strike interference, cargo already in penalty or compensatory demurrage status will be subject to compensatory rates.

3. Six of the Respondent ports publish tariff provisions stating that the ports are the "interpreter," "sole interpreter," or "sole judge" of the tariffs.

4. Three ports publish tariff items requiring stevedores who rent port-owned cranes to assume liability for the negligent actions of the port-provided crane operators, while under the control and supervision of the stevedores.

DISCUSSION AND CONCLUSIONS

The Presiding Officer found that the provisions stating that the ports were the sole interpreter of the tariffs were unjust and unreasonable under section 17. No exceptions to this finding were filed. The Commission concludes that this finding of the Presiding Officer is correct, and it is therefore adopted.

The Presiding Officer also found that the remaining tariff provisions complained of by WGMA were lawful and reasonable. To these findings WGMA filed 59 exceptions, 54 of which were unaccompanied by references to the record, as required by the Commission's Rules of Practice and Procedure, 46 C.F.R. section 502.227(a). WGMA's Exceptions consist of a list of general disagreements with the findings of fact and conclusions of law made by the Presiding Officer. For the reasons stated below, the Commission finds that the exceptions are without merit and that the findings and conclusions of the Initial Decision are proper and well-founded. Accordingly, the Commission adopts the Initial Decision as its own.

The "use equals consent" provisions merely inform users of their responsibilities and impose no disadvantage or unreasonable practice upon them. The Commission has previously found that "consent" language adds no independent validity to provisions imposing liability. *West Gulf Maritime Association v. Port of Houston Authority*, 18 S.R.R. 783, 789 (1978),[4] *aff'd mem. sub nom., West Gulf Maritime Association v. Federal Maritime Commission*, No. 78-2021 (D.C. Cir., Dec. 31, 1979). That finding applies to the instant tariff provisions as well.

Similarly, the issue whether vessel agents can be held responsible for various port charges was already decided in the affirmative in *WGMA v. PHA*. Additionally, in *West Gulf Maritime Association v. City of Galveston*, 19 S.R.R. 779 (1979), the Commission found that tariff provisions defining "users" to include steamship agents were reasonable and lawful. Accordingly, the Commission concurs with the Presiding Officer's conclusion that the port charges for which the vessel agents are made liable are reasonably related to the vessel interests' use of the ports, and are therefore reasonably borne by the vessel agents.[5]

[4] Hereinafter cited as *WGMA v. PHA*.

[5] The Commission also concurs with the finding in the Initial Decision that the statute of frauds issue raised by WGMA is

The application of compensatory rates to cargo in a penalty or compensatory demurrage status at the time of strike interference, is consistent with the principles enunciated in *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89 (1948).[6] The Commission concludes, therefore, as did the United States District Court for the Southern District of Texas,[7] that this demurrage practice is reasonable and nondiscriminatory.[8]

Finally, the Commission finds that the tariff items involving liability for the negligence of crane operators are reasonable. WGMA's contention that the tariff items violate the principle of *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) is unfounded.[9] The record indicates that the monopolistic conditions which were present in the towing industry at the time of *Bisso* and were crucial to the Court's decision, are not present with respect to the instant crane rental operations. Port users can and do obtain crane services other than from the ports. Both a federal and a state court found similar crane rental operations not to offend state and common law principles,[10] and the Commission affirms the lawfulness of the provisions under the Shipping Act.[11]

In conclusion, the findings of the Presiding Officer, contrary to the allegations in WGMA's exceptions, are amply supported by the evidence of record.[12]

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

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

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[6] The Commission there stated: "When property lies at rest on a pier after free time has expired, and consignees, through reasons beyond their control, are unable to remove it, . . . [penal charges] are a useless, and consequently unjust burden upon consignees, and a source of unearned revenue to carriers . . . . The carrier is entitled, however, to fair compensation for sheltering and protecting a consignee's property during the period of involuntary bailment after expiration of free time." 3 U.S.M.C. 107–108.

[7] *City of Galveston v. Kerr Steamship Co., Inc.*, 362 F. Supp. 289 (S.D. Tex. 1973), *aff'd*, 503 F.2d 1401 (5th Cir. 1974), *cert. dened*, 420 U.S. 975 (1975).

[8] Galveston's practice is also consistent with that mandated by the Commission for import cargo at the Port of New York (46 U.S.C. section 526.1(d), (f)), and for export cargo at the Ports of New York and Philadelphia (46 U.S.C. section 541.1(f)).

[9] In *Bisso*, the Court dealt with the general rule forbidding common carriers and utilities from stipulating for immunity from their own negligence. The Court explained the justifications for the rule as being:

(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains.

349 U.S. at 91.

[10] *Southern Steamship Company v. Meyners*, 110 F.2d 376 (5th Cir.), *cert. denied*, 311 U.S. 674 (1940), and *Rorie v. City of Galveston*, 471 S.W. 2d 789 (Tex. 1971), *cert. denied*, 405 U.S. 988 (1972).

[11] The Commission notes that users of the crane services benefit financially from the use of the ports' cranes; that the users are in operational control of the crane operators; that stevedores may and do choose specific operators; and that the tariff items' terms are similar to those offered by competing private crane rental companies.

[12] All exceptions of WGMA have been carefully reviewed and considered, and found to be without merit.

FEDERAL MARITIME COMMISSION

No. 74-15

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY, ET AL.

Adopted January 28, 1980

Tariff provisions which charge vessels agents with liability for payment of vessel charges, including wharfage, dockage, wharf demurrage and strike demurrage do not violate sections 15, 16 First or 17 of the Shipping Act, 1916. Galveston Wharves strike demurrage tariff provision does not unduly or unreasonably prefer or discriminate against types of cargo, shippers, carriers or their agents in violation of sections 16 First or 17 of the Shipping Act, 1916.

Tariff provisions which purport to allow the ports to interpret provisions of their tariffs are unjust and unreasonable practices relating to or connected with the receiving, handling, storing or delivering of property in violation of section 17 of the Shipping Act, 1916.

Tariff provisions which make crane operators the borrowed servant of the crane user and make the crane user liable for the negligence of the crane operator while under the supervision, direction and control of the user are not unjust and unreasonable and do not violate sections 15 or 17 of the Shipping Act, 1916.

Robert Eikel and *J. T. Davey* for complainant, West Gulf Maritime Association.

F. William Colburn for respondent, Port of Houston Authority.

Benjamin R. Powel for respondent, City of Galveston (Galveston Wharves).

M. Harvey Weil for respondents, Nueces County Navigation District No. 1 (Port of Corpus Christi) and Brownsville Navigation District.

Tom Moore Featherston for respondent, Port of Port Arthur Navigation District of Jefferson County.

Malcolm M. Dorman for respondent, Orange County Navigation District and Port Administration.

Dan Rentfro for respondent, Port of Brownsville.

Doyle G. Owens for respondent, Port of Beaumont.

Burt Pines, Jack L. Wells and *Frank Wagner* for intervenor, California Association of Port Authorities.

Edward Schmeltzer, Edward J. Sheppard and *George Weiner* for intervenor, The Board of Commissioners of the Port of New Orleans.

J. Robert Bray and *Arthur W. Jacocks* for intervenor, Virginia Ports Authority.

Gary Koecheler for intervenor, Maryland Port Administration.

John Robert Ewers, Lizann Malleson Longstreet, and *Aaron W. Reese* as Hearing Counsel.

Sam H. Lloyd for Georgia Ports Authority, appearing specially.

Milton A. Mowat and *Robert L. Henry* for intervenors, Port of Portland and Northwest Marine Terminals Association, Inc.

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

This is a complaint proceeding, filed April 15, 1974, pursuant to the provisions of section 22 of the Shipping Act, 1916,[2] by West Gulf Maritime Association (WGMA), complainant, alleging violations of sections 15 and 17 of the Shipping Act, 1916,[3] by Port of Houston Authority (PHA), the City of Galveston (Galveston Wharves), Port of Beaumont, Texas (Beaumont), Port of Port Arthur, Texas (Port Arthur), Port of Corpus Christi (Nueces County Navigation District No. 1) (Corpus Christi), Brownsville Navigation District of Cameron County, Texas (Brownsville), and the Orange County Navigation and Port District, Texas (Orange), respondents, and requesting that specified tariff matter published by the respondents[4] be declared unjust, unreasonable, discriminatory and unlawful and further requesting that the tariff matter be ordered null and void and that the respondents be ordered to cease and desist from acting in accordance with and from seeking to enforce the tariff matter against complainant's members and requesting still further the issuance of such orders as may be necessary to secure compliance with the law by respondents. Reparation is not requested.

The answers of all respondents allege that the tariff matter appearing in each of their tariffs is just and reasonable and not discriminatory and not violative of any provisions of law.

WGMA is a trade association composed of (1) almost all the steamship agents representing operators of deep sea cargo vessels using the ports of the Gulf of Mexico from Lake Charles, Louisiana, to Brownsville, Texas, inclusive, (2) the owners of some of those vessels and (3) stevedoring firms whose employees load and unload those vessels.

All respondents operate port and terminal facilities in the State of Texas pursuant to provisions of the Constitution and other laws of the State. Each respondent, except Galveston Wharves, does so as a navigation district, which is a government agency, body politic and political subdivision of the State. Galveston Wharves derives its authority from the charter of the City of Galveston, a home rule city, which conducts the business of Galveston Wharves through a separate Board of Trustees.

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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).

[2] 46 U.S.C. §821.

[3] 46 U.S.C. §§814 and 816.

[4] After post hearing briefs were served and filed it became apparent that there was a need to clarify which of the tariff provisions placed in issue by the complainant by way of the complaint or by way of evidence introduced at the hearing remained in issue and under attack by the complainant at the close of the hearing. Therefore, at a post hearing conference on September 12, 1978, I distributed copies of a compilation, then entitled Appendix, containing the identification and text of those tariff provisions which, preliminarily, seemed to fall in that category. The parties were directed to advise me on the correctness of the Appendix. The complainant and all respondents, except Beaumont, responded. Generally, the respondents stated that the Appendix correctly reflected their understanding of the tariff provisions in issue at the close of the hearing, but several advised that some tariff changes occurring either prior to or during the hearing or subsequent to the close of the record should be noted. However, by latter dated September 12, 1978, the complainant adopted the Appendix as a correct statement of those tariff provisions which it contends violate the Shipping Act, 1916, advising, "The tariff provisions set forth in the Appendix presented at the conference on September 12 it is agreed by complainant are those at issue." WGMA's views of what is under attack will be accepted for the purposes of this decision.

The Appendix has been incorporated in the initial decision as Appendix A. Pertinent respondent comments appear as footnotes to the text of Appendix A.

Under appropriate provisions of Texas law—i.e., the Texas Water Code, special statutes creating some of the navigation districts or the City of Galveston's charter and applicable statutes—the respondents are authorized, among other things, to acquire and own land and purchase, construct, enlarge, extend, repair, maintain, operate and develop wharves, docks and other facilities or aids incidental to or useful in the operation or development of ports or waterways or in aid of navigation and commerce in the ports and waterways. In addition, the respondents are empowered to prescribe fees and charges to be collected for use of their land improvements and facilities. The fees and charges must be reasonable, equitable and sufficient to produce revenue adequate to pay expenses.[5]

Several persons intervened. They are the Port of New Orleans (New Orleans), an agency of the State of Louisiana created for the purpose of regulating and promoting the commerce and traffic at that port and administering and maintaining its public wharves and other terminal facilities; California Association of Port Authorities (California); Virginia Port Authority (Virginia); Maryland Port Administration (Maryland), and Hearing Counsel.[6] The Georgia Ports Authority appeared specially, but did not participate in the proceeding. All parties, except those who withdrew, participated in the proceeding and submitted briefs.[7]

There were 13 days of hearing in the proceeding. The record consists of 1962 pages of transcript and 65 numbered exhibits.

CONTENTIONS OF THE PARTIES

The text of the points of arguments made by WGMA and respondents appears as Appendix B of this decision. WGMA focuses on three distinct categories of provisions published in respondents' tariffs, together with the port practices which implement those provisions, as being violative of the Shipping Act, 1916.

The first category is comprised, usually, of a single tariff provision containing two components and providing: (a) that use of the port's facilities shall constitute consent to and agreement to comply with the regulations and provisions contained in the port's tariff;[8] (b) that vessel agents are users of the port's facilities.[9] Flowing from those provisions is the practice, of each of the respondents, of billing the vessel agent for certain tariff charges acknowledged by WGMA to be proper charges against the vessel (dockage, shed and pier use charges) and other tariff charges (wharfage and outbound cargo demurrage)

[5] See, e.g., Texas Water Code Ch. 60.101 ad 60.103 and Art. 1187f, V.T.C. S.

[6] Two intervenors, Port of Portland and Northwest Marine Terminals Association, Inc., withdrew before the conclusion of the hearing.

[7] In accordance with my request, a single joint brief was submitted on behalf of the seven respondents.

[8] The consent provisions are as follows: PHA—Item 2; Galveston Wharves—Item 30; Beaumont—Item 165; Port Arthur—Item 175; Corpus Christi—Item 1552; Brownsville—Item 105; Orange—Item 195.

[9] The user provisions are generally the same as those in n. 8, *supra*, except that there is a definition of "user" in PHA's tariff, which does not appear in Appendix A and there is no user provision in the portions of Brownsville's tariff appearing in Appendix A.

which WGMA claims are not proper charges against the vessel but are obligations of the cargo interests.

Also in this first category is a tariff provision published only by Galveston Wharves. It is Item 187 "Interference Due to Strikes." It deals with wharf demurrage and provides, in effect, that when cargo cannot be removed from piers or transit sheds because of strikes: (1) any cargo within the free time period will remain on free time i.e.: no demurrage charges will accrue during the strike, and (2) any cargo already in a compensatory or penalty demurrage status will remain in demurrage status, but at compensatory rates and not penalty demurrage rates. It is Galveston Wharves' practice to charge the using vessel interest (owner or agent, if the owner is not physically located at Galveston) for outbound demurrage of the second kind.

In the second category are tariff provisions published by six of the respondents[10] containing terms which, in substance, state that the port is the interpreter or sole interpreter of the meaning of the terms and conditions of the tariff.

The third category is concerned with tariff provisions, published by PHA, Galveston Wharves and Corpus Christi, involving the rental of cranes. The rental includes the services of a crane operator employed by the port and the rental charges include the crane operator's salary. In addition the tariffs provide that the stevedore renting the crane from the port assumes responsibility and liability for the negligent acts of the operator. The practice of transferring liability for employee negligence from the employer to the user of the equipment is known in the law as the "borrowed servant doctrine." See *Rorie v. The City of Galveston,* 471 S.W. 2d 789 (Tex. 1971), 8 SRR 20, 713.

Respondents, of course, urge that neither their tariffs nor their practices are violative of law.

Intervenor, New Orleans, argues that the tariff provisions at issue in this proceeding are necessary for efficient port operation and that they are not contrary to State or Federal Law, including the Shipping Act, 1916. Generally, the other intervenors, Hearing Counsel, California, Maryland and Virginia, take the same position as New Orleans.

THE POST HEARING CONFERENCE

Earlier, the post hearing conference of September 12, 1978, was mentioned.[11] Its primary purpose was to ascertain whether there was any desire to reopen the record for the taking of additional evidence or to submit supplemental briefs in the light of the Commission's Report and Order Adopting Initial Decision in Docket No. 75-21, *West Gulf Maritime Association v. Port of Houston Authority of the Port of Houston, Texas.*[12]

[10] WGMA has not cited any Galveston Wharves Tariff provision governing interpretation of its tariff.

[11] N. 4, *supra.*

[12] The Report and Order was served August 16, 1978. The Initial Decision was served April 12, 1978. Subsequent to the post hearing conference, WGMA sought judicial review of the Commission's decision. The case is now pending in the United States Court of Appeals for the District of Columbia Circuit under title of *West Gulf Maritime Association v. Federal Maritime Commission and United States of America,* No. 78-2021. The Initial Decision is published at 18 SRR 291. The Commission's decision is published at 18 SRR 783. Hereafter, that case will be identified as *WGMA v. PHA.*

A further purpose was to rectify certain deficiencies in the post hearing briefs.

Under the Commission's Rules of Practice and Procedure, post hearing briefs are required to have a separately captioned section containing proposed findings of fact in serially numbered paragraphs with reference to exhibit numbers and pages of transcript. Rule 221, 46 C.F.R. § 502.221.[13]

For the most part, initial briefs contained sections entitled proposed findings of fact. Yet, the proffered material was as much conclusionary as factual, but, even when factual, there was little or no reference to the portions of the record relied on. In view of the sizeable record and the breadth of the arguments these omissions presented palpable drawbacks to informed decision making and to the best interests of the litigants.

To remedy the problem a two round procedural schedule was developed. It was made applicable to the primary litigants but was optional for intervenors. The first round called for simultaneous submissions of proposed findings of fact, in accordance with Rule 221, by WGMA and by respondents jointly. In the second round, the parties were instructed to indicate whether and how they differed with the other side's proposed findings.[14]

In their first and second round submissions, the respondents complied with the directions given. In the second round they also observed, generally, that many of complainant's first round proposed findings were not cited to the record. The complainant did not file any second round comments.[15]

[13] Rule 221 provides in pertinent part:

Briefs; requests for findings.

The presiding officer shall fix the time and manner of filing briefs and any enlargement of time. The period of time allowed shall be the same for all parties unless the presiding officer, for good cause shown, directs otherwise. Briefs shall be served upon all parties pursuant to Subpart H of this part. . . . In investigations instituted on the Commission's own motions, the presiding officer may require Hearing Counsel to file a request for findings of fact and conclusions within a reasonable time prior to the filing of briefs. Service of the request shall be in accordance with the provisions of Subpart H of this part (Rule 8). Unless otherwise ordered by the presiding officer, opening or initial briefs shall contain the following matters in separately captioned sections: introductory section describing the nature and background of the case, proposed findings of fact in serially numbered paragraphs with reference to exhibit numbers and pages of the transcript, argument based upon principles of law with appropriate citations of the authorities relied upon, and conclusions. The Presiding Officer may limit the number of pages to be contained in a brief. All briefs shall contain a subject index or table of contents with page references and a list [of] authorities cited. . . .

[14] For a summary of the procedural schedule, see Notice of Order Fixing Time for Certain Filings, served September 14, 1978. Most intervenors stood on their opening briefs. New Orleans opted to file in the opening round. Hearing Counsel participated in both rounds, generally concurring with respondents in the first, but it added some other proposals. On the second, Hearing Counsel limited its response to taking issue with certain of complainants's proposals relating to the Port of Houston's wharfage practices on the grounds that those practices were found lawful in *WGMA v. PHA, supra.*

[15] By letter of December 18, 1978, complainant wrote:

The complainants do not feel it necessary to file a rejoinder to the Respondents' Reply to the Complainants' Requested Findings of Facts, because many of the separate replies where in disagreement with the complainants' requests are argumentative in character and no good purpose would be served in replying argumentatively.

Taken literally, this cryptic passage would appear to mean that complainant declined an opportunity for a third round submission. However, I understand it differently. I read it to mean that complainant would not be participating in the second round. I reach this conclusion because of a telephone conversation with complainant's counsel after the time to file the second round expired. I inquired if, perhaps, complainant's second round might have gone astray inasmuch as I could not locate it in the official docket. I was informed that complainant did not regard my ruling to mandatorily require a second round comment. I asked for written confirmation of that remark. The only writing which followed was the letter of December 18th.

FACTS

Preliminarily, it is noted that the burden of proof is on the "party proposing to halt existing tariff practices."[16] Here, then, the burden lies with WGMA. For convenience, the findings will generally follow the sequence suggested by WGMA's proposed findings of fact.

AGENT LIABILITY FOR DOCKAGE, SHED AND PIER (WHARF)[17] USE CHARGES

1. Certain things are undisputed by WGMA. Respondent's tariffs define "dockage," "shed hire" and "pier or wharf use hire" as charges against the vessel;[18] these are appropriate charges against the vessel or vessel interests insofar as vessel interests mean vessel owner or operator. In some tariffs, in addition to the "user" and "consent" provisions previously mentioned, some of those vessel interest charges are specifically, albeit redundantly, made the responsibility of the vessel agent.[19] The complaint, in part, concerns the practice of making steamship agents responsible for payment of these admittedly proper vessel charges.

Although the complaint alleges and WGMA argues in brief that the tariff provisions and port practices which make the vessel agent liable for these admittedly proper vessel charges are unjust, unreasonable and unfair, this view is not shared by all WGMA members. Of those WGMA members whose representatives testified, three, speaking as steamship agents, Lykes Bros. Steamship Company,[20] E. S. Binnings[21] and Kerr Steamship Company,[22] do not consider it to be unjust, unreasonable or unfair for agents to be held liable for these charges.

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[16] *WGMA v. PHA, supra,* 18 SRR at 787-788.

[17] Wharf use and wharfage charges are separate charges. Generally, as its name implies, the former is based on the use of the facility for loading or unloading and assembly or distribution of cargo. The latter is measured by the cargo passing or conveyed over the wharves.

[18] PHA Tariff No. 8 at 7, 9; Galveston Wharves Tariff No. 4-D at 4, 5; Beaumont Tariff No. 4-H at 5, 24; Port Arthur Tariff No. 11-A at 4, 31; Corpus Christi Tariff No. 1-J at 3A; Brownsville Tariff No. 2 at 503; Orange Tariff No. 1-J at 4, 22.

[19] See, e.g., Galveston Wharves Tariff, *supra,* at 4; Brownsville Tariff, *supra,* at 22. Respondents object to the tariff references relating to the definitions of dockage, shed and wharf use hire in WGMA's proposed findings of fact because those provisions were not included in Appendix A. Whatever technical merit may attach to the objection, it simply is not well taken because the complaint assails all vessel charges for which the agent is made liable.

[20] Lykes' position was stated by a senior vice-president, who distinguished between charges conceded to be those of the vessel (i.e., dockage) and what he considered to be "cargo" charges (i.e., wharfage). His view was emphatic and was reiterated and adhered to despite suggestions from WGMA's counsel that the witness was confused. All of this occurred before a lunch recess. Transcript, TR. 416, 457-461, 466-468. After the recess the witness recanted, indicating he was confused in his earlier responses, after all. Tr. 475-482. However, as noted in the record, I commented at the time on the witness' demeanor (Tr. 482) and based upon his testimony and my observations during the entire time the witness was on the stand, scant credence can be given to the disclaimer.

[21] Tr. 151.

[22] Tr. 356-357. Kerr, however, limits its position to those circumstances in which it has secured an advance or is otherwise put in funds by the vessel interests. Curiously, even though it is Kerr which decides whether or not to seek advances, Kerr believes the ports should share, with the agent, the risk of nonpayment.

2. Under their tariffs the respondent ports bill the agents and insist upon payment from the agent for the vessel's port charges.[23] This is a common practice throughout the ports of the United States.[24]

Agents play a vital role in water transportation. Vessel owners and operators must be represented at local ports for obviously they cannot accompany their vessels throughout each voyage. Among other things, owners and operators rely upon the agent's experience and expertise in dealing with local businessmen and ports to attend to the vessel's needs. Precisely because agents are local, the ports rely upon the agents and the agents' credit for payment of vessel charges. Under their tariffs and in accordance with custom ports deal with the agents as principals in assigning berths and cargo space and providing service for it is essential to good port operations that a well accepted local agent be present to assume financial responsibility for payment of port charges.[25]

Agents recognize their value to vessel owners and operators. Although agents solicit as much representation as they can handle or is prudent, they do so selectively. One of the criteria for choosing to represent a particular principal is that principal's creditworthiness. As put by one agent "A steamship company's creditworthiness fluctuates violently with the charter market and cargo market."[26] The principal's creditworthiness is important to agents not only because they are liable for port charges but because their agency fees are also dependent upon the principal's ability to pay.

Unless assured by the principal's financial strength, and often times even then, agents seek to be put in funds by their principals. This is accomplished by written or oral agreement, as circumstances warrant or permit, and most frequently takes the form of advances or authorization to make disbursements from freight revenues.[27]

An agent explained that for the most part it is not necessary to obtain advances from liners because of their frequent port calls, but some liners might have a bad reputation, in which cases advances are required; from tramps, advances are essential.[28] However, advances are not sought when the agent collects freight revenues on behalf of its principals (usually liners) and has authorization to deduct disbursements for vessel expenses before remitting the revenues to the principals.[29]

In particular, WGMA singles out PHA for the "pressures" it applies to collect vessel expenses from agents. PHA does not prefer that characterization but it does admit it has engaged in certain practices to insure the integrity of its tariff but it denies it has engaged in others. The details follow.

It is the general practice in all Texas ports for agents to make advance arrangements with the port for vessel facilities and services, e.g., berth space,

[23] It should be borne in mind that wharfage is treated as a vessel's port charge by ports whose tariff provisions make wharfage a liability of the vessel.

[24] Ex. 65; Tr. 1386, 1640, 1690.

[25] Exs. 50, 58, 62.

[26] Tr. 59.

[27] See, e.g., Tr. 65, 130, 317, 413-414, 606, 682, 770.

[28] Tr. 130.

[29] Tr. 318, 413-414.

shed hire, water and other port services.[30] From time to time, in accordance with its tariffs and practices, PHA refused to assign berths to some agents for inbound vessels until they (the agents) paid their delinquent accounts—accounts which were more than 30 days overdue; pursuant to Item 3(a) of PHA's tariff some agents have been threatened with berth denial until their accounts were paid, but no vessel was ever denied a berth;[31] occasionally, PHA placed or threatened to place some agents on a cash basis and required deposits against anticipated port charges from agents who failed and refused to timely pay port charges.

All agents active at Texas ports are aware of the tariffs, customs and practices which make them liable as principals for vessel expenses. They know that the ports rely on their credit and not that of the vessel when berthing arrangements are made and port services are furnished. Consequently, an agent may be subject to some or all of the foregoing admitted practices, even to the extent of possible denial of berth space (to the agent) for a particular vessel because the agent's PHA account is overdue for a different vessel.

But, as seen, no vessel was ever denied a berth for the reason that the agent's account was overdue for a different vessel. Moreover, WGMA has neither cited nor placed in issue any provision of PHA's tariff which conceivably would allow or result in allowing PHA to apply an agent's payment of the debt of one principal to the account of another. Rather, it has been established that PHA aggressively sought payment of delinquent accounts. In pursuing that program, pursuant to Item 3(a) of its tariff, PHA did require that a delinquent prospective user of a berth for a second vessel, in advance, to guarantee payment or make arrangements for a cash payment of the second vessel's port charges. There is here no evidence that PHA reserved the right, under a tariff provision, "to apply any payment received against the oldest bills rendered against vessels, their owners and/or agents, or other users of the facilities"—a type of tariff provision found to be in violation of section 17. *West Gulf Maritime Association v. The City of Galveston (Board of Trustees of the Galveston Wharves)*, 19 SRR 779, Report and Order of the Commission served September 14, 1979, at 13.

There is no reliable evidence to support WGMA's proposed finding that PHA ever rendered an unfavorable credit report concerning an agent.[32]

WGMA proposes a finding that "One agent, Fowler & McVitie, refused point-blank to acknowledge personal liability for vessel port charges, and it was forced out of business as an agent for cargo vessels by [PHA] for such refusal."

It is true that Fowler & McVitie refused to accept liability for port charges of vessels and continues in that refusal. It is not a fact that Fowler & McVitie was forced out of business or, as implied, that it no longer functions as an agent.

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[30] Tr. 618, 851, 973, 1088.

[31] *Id.* One agent, Fowler & McVitie, Inc., was denied berth space because it refused to pay vessel expenses for port charges incurred in 1966. This agent still refuses to be held responsible for a vessel's port charges. More on Fowler & McVitie will appear in the text, *infra*.

[32] On cross-examination by WGMA's counsel, a PHA witness was asked if he ever informed Dun & Bradstreet that some agents were "not trustworthy with respect to granting of credit." The witness responded in the negative. On further cross questioning the witness added that he did answer a specific question posed by D&B concerning ageing of accounts, but that no opinion concerning the agent was given. Tr. 1605-1606.

The record shows this unequivocally. This appears at Tr. 517 on WGMA's direct examination of its own Fowler & McVitie witness:

Q: So, *in substance*, the port's refusal has driven you out of the agency business for tramp vessels?
A: It hasn't driven me out because there are other ways of doing these things.

The "other ways" consist of arranging for berthing of vessels at PHA through another agent acting as Fowler & McVitie's sub-agent.[33] Because Fowler & McVitie is the only agent which persists in its refusal to accept liability, there is no dearth of sub-agents. These "other ways" are really a charade because Fowler & McVitie insists that the sub-agents and PHA recognize that the vessels are Fowler & McVitie's.

PHA is generally familiar with the identity of the owners or operators of liner vessels that call at that port, but PHA is not knowledgeable about ownership or operation of tramp vessels. There is no reliable evidence to show the extent to which other ports know the identity of liners frequenting their ports. Normally, agents do not inform the ports of the identity of the vessel interest when making berth arrangements.[34] As a result ports are generally unaware of such matters.[35] Moreover, agents sometimes act for undisclosed principles[36] or encounter difficulty in determining who the responsible vessel interest might be. Yet, at least at PHA, the port could readily ascertain ownership identity information by asking it of the agent arranging the berth, provided the agent had accurate information to impart. Thus, even though learning the vessel owner's or operator's identity is not without its problems, PHA's billing practices were not predicated on ignorance of ownership.[37] As found, the billing practices are based upon the tariff provisions which, in turn, have their foundation in the ports' need to rely upon the credit of a locally responsible entity to pay the fees for port facilities and services.

3. In addition, the foregoing findings demonstrate that agents have many means available to them, whether by agreement, advances, freight revenues or merely by determining creditworthiness of the vessel interest, to ensure that they have sufficient funds available timely to pay the port's tariff charges or to be reimbursed for such timely payments, without undue or unfair burden on them.[38] Nevertheless, they are often required to pay port charges out of their own funds when vessel operators delay in approval of accounts or delay in putting agents in funds.[39] Aside from some instances of vessel or principal default or disallowance of invoices for inadequate documentation,[40] there is little, if anything, to indicate that the agents failed to recoup those outlays.

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[33] Tr. 529, 553, 557.

[34] Tr. 163, 261.

[35] Tr. 260-270.

[36] Tr. 356-357. Cf. *WGMA v. PHA, supra*, 18 SRR at 308-309.

[37] Tr. 345-346.

[38] This should not be construed to mean that agents are never inconvenienced or never suffer losses. Agents are not always able to secure sufficient advances, Tr. 153, 323, 602, 605, 691-692, 769; sometimes there are losses of unspecified amounts because the vessel interest defaults, Tr. 974, 974A. For one agent there were losses of $16,000 due to a rash of 5 defaults from late 1972 through early 1974. But, this same agent had no defaults from 1962 through 1972. Tr. 108. Another agent lost $3,500 due to default in 1975, Tr. 1086.

[39] Ex. 14, 38; Tr. 23, 30, 576, 772.

[40] Tr. 573-577.

4. Corpus Christi agrees that its practice of holding agents accountable for the vessels' port charges is the same as that of PHA. In fact, to remove any doubt about its position in regard to agent liability to the port, Corpus Christi amended its tariff to provide that its port charges must be paid "regardless of when the . . . agents, are reimbursed."[41]

Certain events seem to have triggered that tariff amendment. Shortly before, Dix Shipping Company of Corpus Christi, an agent at that port, lost monies due to the default of several of its vessel accounts, even though Dix had obtained advances or other assurances (including a guarantee) of payment. Some advances were insufficient, another was paid by "hot check."[42] As a result Dix sent out letters to all its vendors and the port instructing them to make out their invoices to the vessel and not Dix and indicating that Dix would not be responsible for vessel expenses.

Dix's letter prompted action from Corpus Christi which both wrote and telephoned Dix, asking the agent to withdraw its letter insofar as it concerned the port. Initially, Dix did withdraw the first letter by a second letter, guaranteeing vessels' port charges. It later withdrew the second letter and sent a third, containing language provided by its counsel, which said, "Dix . . . agrees to be liable for debts incurred by the vessels under our agency to the extent of our liability under presently existing law." Consequently, Corpus Christi sent another letter advising Dix that unless it agreed to be responsible for facilities and services provided by the port to vessels represented by Dix, the port would expect someone else to make credit arrangements with the port prior to any vessel's use of the port's facilities or services.[43] The tariff amendment followed. Although it changed none of the existing tariff provisions or the practices thereunder, it made the port's position unmistakeable.

Agent Liability for Wharfage and Wharf Demurrage Charges

5. Essentially, wharfage is a charge which may be levied against the cargo or vessel interests. The charge is measured by the cargo crossing over a wharf.[44] Wharf demurrage is a charge imposed when cargo remains in or on terminal facilities after the expiration of free time. Free time for outbound cargo means that there is a period of time when cargo may remain on the wharf without incurring expense, the theory being that "The vessel is required, as part of the obligation of carriage, to provide terminal facilities for the receipt of outbound cargo and to afford a reasonable free time period for the shipper to assemble the cargo prior to loading aboard ship."[45]

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[41] Corpus Christi Tariff, *supra*, First Revised Page 4, Item 15, effective May 10, 1974.

[42] Under Texas law, a "hot check" is one not honored because of insufficient funds.

[43] Exs. 1, 2; Tr. 78-80. Item 15 of the Corpus Christi Tariff expressly provides for credit arrangements.

[44] The Commission's Regulations for Filing of Tariffs by Terminal Operators define Wharfage as follows, 46 C.F.R. §533.6(d)(2):

A charge assessed against the cargo or vessel on all cargo passing or conveyed over, on, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

[45] *WGMA v. PHA*, *supra*, 18 SRR at 304.

It is a common practice at ports in the United States to place responsibility for payment of wharfage and outbound wharf demurrage charges on the vessel interests and, thereby, the agent, under the user, consent or other tariff provisions designed to achieve that result.[46] Although the common practice generally prevails at respondents' ports, it does vary. Thus, on some cargoes or in some circumstances the responsibility for payment may be imposed on the cargo interest.[47]

In general and in particular, WGMA assails the practices and tariffs which make steamship agents responsible for wharfage and wharf demurrage charges. The attack is general in the sense that WGMA opposes any tariff provision or port practice which makes those charges the liability of the vessel interests. It is particular in that WGMA disputes the tariffs and practices which make the vessel interests liable for payment of those charges if there is present in tariffs terminology which WGMA opts to construe to mean that the cargo interest is liable for payment. Its specific complaint lies "against the respondents' practices and tariff provisions which impose upon steamship agents the responsibility for collecting and paying to the respondent ports charges which under their tariffs are liabilities of cargo interests—shippers, consignees and owners of cargo."[48]

First, WGMA turns its attention to the particular. The tariffs of Galveston Wharves, Corpus Christi and Orange define wharfage as "a charge assessed against the cargo or vessel."[49] However, it is other provisions of those tariffs which delineate responsibility for payment. WGMA asks for an overall finding as to these three ports that "but by other of their tariff provisions the wharfage charge is one imposed on cargo interests alone rather than on vessels (with the exception of Corpus Christi)." As to Orange, WGMA asks for an additional finding that "in the face of the tariff language making wharfage a charge against cargo, the tariffs of some of the respondents[50] impose responsibility for payment of this cargo charge on the vessel and its agent."

(a) Orange. It is correct to say that at this port wharfage charges are made the liability of the cargo owner or cargo agent.[51] However, I find no support for the statement that in the face of that kind of tariff provision, Orange imposes liability for this cargo charge on the vessel and its agent. Orange Tariff Item 120, cited by WGMA for support, does not convert liability from cargo interest to vessel interest. It deals with payment of charges by the person billed and does not attempt to change liability or responsibility for payment of wharfage charges.[52]

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[46] Ex. 65; Tr. 1386, 1640, 1690.

[47] Ex. 65; Tr. 1397, 179 1794.

[48] WGMA's proposed finding No. 5.

[49] Each of those ports utilizes the 46 C.F.R. §533.6(d)(2) definition of wharfage, *supra*, verbatim. The definition of wharfage in Galveston Wharves Tariff, *supra*, Item 5(t) at 5 and Corpus Christi Tariff, *supra*, paragraph 3 at 3A, appear in Appendix A, hereto. The definition in Orange Tariff, *supra*, Item 10 at 4, does not appear in Appendix A.

[50] WGMA includes Beaumont and Port Arthur in this statement.

[51] Orange Tariff, *supra*, Item 130 at 4.

[52] The proposed findings submitted by WGMA do not cite any portion of the record as proof that Orange does, in fact, seek payment of wharfage from vessel interests under Item 120. The same charge is made by WGMA in its opening brief, but here,

(b) Corpus Christi. At this port, although wharfage is "due" from the cargo interests, the vessel interests, including agents, "guarantee" and are "liable" to pay those charges whether or not collected by the vessel interests from the cargo interests. These tariff provisions reflect a long standing custom and practice by which steamship agents assure the port that they will be responsible for charges for port facilities and services furnished to vessels they represent.

(c) Galveston Wharves. The meaning to be attributed to WGMA's proposed finding that at this port the wharfage charge is one imposed "on cargo interests alone rather than on vessels" does not ring clear.[53] If the inference to be drawn is that all wharfage charges are made the liability of the cargo interest but that the port somehow converts the attachment of liability to the vessel interest, this is not a rational view of the evidence. Neither would it be a correct statement if it meant that some wharfage charges are made the liability of the cargo interest but are then converted into the liability of the vessel interests.

Briefly, with regard to wharfage at Galveston Wharves, these are the facts:

From at least 1911 until 1974, the payment of wharfage on all cargo was the responsibility of the vessel interests.[54]

Until 1969, the railroads serving the port absorbed wharfage charges. In accordance with its tariff, the port billed the steamship agents for wharfage. In turn, the agents collected the wharfage from the railroads and remitted to the port. This procedure proved satisfactory until the railroads cancelled wharfage absorption, "unlawfully," in 1969, the, "lawfully," effective May 1, 1971. Difficulties and delays in the collection of wharfage (by steamship agents from cargo interests and by the port from the agents) resulted from the termination of wharfage absorption by the railroads.[55]

A series of meetings were held in 1973 and 1974 between representatives of Galveston Wharves, steamship agents, freight forwarders and customhouse brokers. The purpose of these meetings was to develop a more workable system for the collection of wharfage.[56]

The meetings between the Galveston port interests resulted in the adoption of a new procedure for collection of wharfage which became effective on October 15, 1974, by an amendment to the Galveston Wharves' tariff.[57] The amendment reads:

> Vessel owners and their agents whose vessels receive or discharge cargo while moored to a pier, dock, or wharf, thereby contract to pay the applicable wharfage charges thereon, except as provided in Notes A, B, and C. [58]

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too, WGMA fails to cite the portion of the record it relies on. If, in fact, Orange does hold vessel agents liable for wharfage under Item 120 the evidence adduced by WGMA would seem insufficient to have warranted a defense which might have included such matters as custom and practice or other tariff provisions but which, under the circumstances of the proof proffered by WGMA, Orange chose not to offer.

[53] WGMA cites Ex. 62 and Tr. 1760 as support for the statement. Ex. 62 is the direct testimony of the Deputy Executive Director of Galveston Wharves. At Tr. 1760 that witness was being cross examined by WGMA counsel. Neither of those two references nor any other evidence of record supports the proposed finding in its entirety.

[54] Ex. 42, Tr. 1157-1158.

[55] Ex. 62.

[56] *Id.*

[57] Ex. 43: Local Tariff No. 27-E, Item 170(c) at Ninth Revised p. 12.

[58] Exs. 43 and 43a. Both Notes A and B relate to special situations not here involved. Note A dealt with Pier 38 cargo, only, and was later canceled. Note B deals with transshipped cargo, only.

Note C reads:

Outbound wharfage on cargo other than cotton and cargo in containers will be invoiced to shipper or owner of cargo or his agent and are due and payable by that party responsible for forwarding of cargo through this port.

The procedure adopted in 1974 took into consideration the fact that the port booked and unloaded the majority of outbound cargo, except cotton and containerized cargo. The longstanding practice of holding vessel interests, including agents, liable for outbound cotton and containerized cargo, as well as all inbound cargo, was continued.[59]

(d) Beaumont and Port Arthur. Earlier in n. 50, *supra*, I pointed out that WGMA charged Beaumont and Port Arthur, as well as Orange, as ports which make vessel agents liable for payment of wharfage "in the face of tariff language making wharfage a charge against cargo."

At Beaumont, "'Wharfage' is a charge on cargo passing over, under, or through a wharf; . . ."[60] The definition at Port Arthur is substantially the same—"'Wharfage' is a charge on cargo passing over a wharf or discharged into water over shipside while vessel occupies berth at wharf. . . ."[61]

Thus, WGMA is correct in saying that these tariffs, like so many of those previously examined, make wharfage a charge assessed on (or against) cargo. However, WGMA is definitely not on the right track in implying or saying that there is a conflict or contradiction in terminology or result, if a charge against cargo is made the economic responsibility of the vessel interests.[62] It is well settled law that no such conflict exists and that no ambiguity exists in a tariff which by one tariff provision defines a terminal facility or service charge as a charge assessed against cargo and which by another tariff provision makes that charge the liability of the vessel agent. In a case in which one of the issues was whether the steamship agent could be held liable under a consent provision in the tariff for pier demurrage which was defined as a charge assessed against the cargo but which charge was made the liability of the vessel interests under another tariff privision, the court held, *The City of Galveston v. Kerr Steamship Co., Inc.*, 362 F. Supp. 289, 293-294 (S.D. Tex. 1973), aff'd 503 F.2d 1401 (5th Cir. 1974), *cert. denied* 420 U.S. 975 (1975):

Defendants refer to the Item #5 definition of pier demurrage as "a charge assessed against cargo remaining in or on the terminal facilities after the expiration of free time unless arrangements have been made for storage." Defendants also point to other charges which are charged against the vessel. Defendants conclude that these definitions preclude plaintiff from charging vessels or vessel agents with pier demurrage.

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[59] Ex. 62. As users, steamship agents consent to the wharfage provisions of the tariffs and agree to pay all charges specified in the tariffs as vessel interest charges. See notes 8 and 9, *supra*. Similar or identical consent provisions are common at United States ports. Cf. tariffs of Brunswick, Georgia; Wilmington, North Carolina; Jacksonville, Miami, Palm Beach, Port Everglades, Tampa, Panama City and Pensacola, Florida; Mobile, Alabama; Pascagoula, Mississippi; New Orleans and Baton Rouge, Louisiana; Bay City and Port Lavaca, Texas; Boston, Massachusetts; Anchorage and Kodiak, Alaska; San Diego, Redwood City, and Sacramento, California; Astoria, Bandon and Portland, Oregon; Anacortes, Kalama, Longview, Olympia, Port Angeles, Seattle, Tacoma, Vancouver, Bellingham and Everett, Washington. Ex. 41.

[60] Beaumont Tariff, *supra*, Item 15-A at 5 (not shown in Appendix A).

[61] Port Arthur Tariff, *supra*, Item 15 at 4 (not shown in Appendix A).

[62] At Beaumont, wharfage charges are payable by the steamship agents under Item 115-c, at 7 of Beaumont's Tariff, *supra*. At Port Arthur, with certain exceptions, wharfage on inbound cargo is the liability of the steamship agents and on outbound cargo it is the liability of the cargo interests under Item 120 at 7-8 of Port Arthur's Tariff, *supra*.

The definitions only deal with the manner in which charges are accrued. They do not purport to establish which parties are liable for the charge. Liability for the various charges is fixed by Item #30 of the Tariff, quoted in Finding of Fact 1. Items #5 and #30 are neither conflicting nor ambiguous.

(e) Brownsville. The definition of wharfage at Brownsville is the same as the definition at Port Arthur. Therefore, it is a charge on cargo. However, the tariff provision defining wharfage does not appear in Appendix A. Consequently it is not considered as having been placed in issue by WGMA. Therefore, on the premise that Brownsville was not being called upon to defend its wharfage tariff provisions or practices no findings concerning liability for wharfage or wharfage payment practices at that port should be made.[63]

6. Next, WGMA singles out PHA for proposed findings concerning that port's wharfage practices. It asks that there be findings that at PHA wharfage is clearly the liability of the cargo interests and, that while PHA's billing practices varied over the years, prior to July 1, 1975, the port billed wharfage to cargo agents.[64] WGMA also asks for some specific findings concerning the degree of difficulty and delay encountered by PHA in billing the cargo interests.

WGMA's purpose in requesting those findings is not clear because it is by no means certain whether WGMA intends the specific findings to relate to circumstances before July 1, 1975, or afterwards. Also, neither is the request precise as to the time period envisioned by WGMA.

Nevertheless, it would be inappropriate to make any findings in this proceeding concerning wharfage at PHA, for two reasons. One, it was not placed in issue by the complaint.[65] Two, PHA Tariff Amendments effective July 1, 1975, which made collection and payment of wharfage charges the liability of vessel interests, including agents, were the subject of a separate complaint proceeding, brought by WGMA, alleging that the amendments violated sections 15 and 17 of the Shipping Act. It was decided in that case that the amendment did not violate sections 15, 16 First or 17. *WGMA v. PHA, supra.*

7. Conceding that the evidence of wharfage billing practices at the other ports is less detailed than the testimony about those practices at PHA, WGMA proposes no such findings for Beaumont, Brownsville or Orange, and only sketchy findings for Corpus Christi, Galveston Wharves and Port Arthur.

(a) Corpus Christi. Based upon testimony of the Dix witness,[66] WGMA proposes a finding that "the port bills agents for wharfage and seeks to hold them liable, Tr. 28, even though it knows the representative of cargo interests at the port know their principals and therefore have the ability to collect the cargo charges, whereas the steamship agents do not have such knowledge or

[63] All that WGMA says in its proposed findings on liability is that Item 110 at 100, of Brownsville's Tariff is ambiguous. WGMA then cites the language it believes to be ambiguous. The language cited, however, does not refer to vessel charges—only cargo interest charges. Moreover, neither in brief nor in proposed findings does WGMA cite any portion of the record to show whether Brownsville seeks payment for wharfage from the vessel agents.

[64] On outbound shipments the cargo representative is usually a freight forwarder, a person licensed by the Commission pursuant to section 44 of the Shipping Act, 1916, 46 U.S.C. §841b. On inbound shipments the representative is usually a customs broker, who is not subject to regulation by the Commission. Licensed freight forwarders may, under specified conditions, be compensated by vessel and cargo interests, both, for the same shipment. See unnumbered section preceding section 2 of the Shipping Act, 1916, 46 U.S.C. §801 and section 44(e).

[65] The PHA tariff provisions placed in issue appear at Appendix A at i-iii. Wharfage provisions are not included.

[66] The Dix witness was on the stand from Tr. 20 through Tr. 119.

access. Tr. 28–29." While the meaning and implication of that part of the sentence after "Tr. 28" is somewhat obscure, opinion testimony of the Dix witness suggests that it means that ports are in a "better position [than vessel agents] to know the forwarders and brokers."[67]

It is not disputed that Corpus Christi bills steamship agents and seeks to hold them liable for wharfage, but the port objects to the rest of the sentence in part because it is unsupported by the record and, in other part, for inaccuracy.

There is no reliable evidence to support a finding that the port knows what the cargo interests know, but even if it were assumed to be a fact, the presumption would not lead to a finding that ports are better positioned than steamship agents to know the cargo representative for a particular shipment at Corpus Christi.[68] On the other hand there is evidence that Dix books cargo for its vessels with the cargo representatives,[69] and, of course, Dix also collects freight revenues for a liner principal from cargo interests. However, the overriding fact according to WGMA's own witness, is that it is the contractual arrangement between the cargo and the ship which is the "determining factor in the assessment of [wharfage] charges" and there is no evidence that this contract, which even the agent must obtain from one of the two contracting parties,[70] is ever made available to the port.

(b) Galveston Wharves. After again noting that the practice of billing for wharfage at this port has varied, WGMA seeks a finding that "the port has on occasion sued steamship agents for wharfage, *as well as suing cargo interests (and railroads)*" (emphasis supplied), without further explanation of the time or circumstances involved.

It is difficult to understand the relevance or materiality of this proposed finding unless WGMA means that an inference be drawn that despite tariff provisions making the steamshjip agent liable for wharfage, Galveston Wharves indiscriminately sought to collect from the cargo interests as well. In any event, neither on its face nor by way of inference is the italicized portion a correct reflection of the record.

WGMA cites the following portions of the record to support the finding: Tr. 1762–1763, 1858; Exs. 36 and 62.

The matter of the suits was introduced first by Ex. 36, the prepared direct testimony of an officer of Strachan Shipping Company, a steamship agent and WGMA member. In the exhibit are references to two court actions brought by Galveston Wharves for unpaid outbound wharfage, which, at the time, were the responsibility of the vessel interests. The exhibit stresses that it was Strachan which was sued, as vessel agent, and that Strachan later impleaded others. Exhibit 62 confirms this fact. It is reconfirmed at Tr. 1762–1763, 1958, on cross examination by WGMA of the Galveston Wharves official who sponsored Exhibit 62. Thus, there is no validity to the statement that the port sued "cargo interests (and) railroads."

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[67] Tr. 92.

[68] Testimony by the Dix witness that Corpus Christi solicits the cargo was ordered stricken. Tr. 92.

[69] Tr. 52, 93.

[70] Tr. 67 69. Cf. *WGMA v. PHA, supra*, 18 SRR 304 n. 19.

(c) Port Arthur, This port has experienced no difficulty in collecting wharfage from cargo interests on outbound cargo. (It will be recalled that here the vessel interests are liable for inbound wharfage and the cargo interests are liable for outbound wharfage—see n. 62, *supra*).

8. In this and the next numbered paragraph of its proposed findings, WGMA moves on to the matter of wharf demurrage tariff provisions and billing practices. In this paragraph WGMA addresses the tariff provisions of all ports except Brownsville. In paragraph number 9, WGMA refers only to the ports of PHA, Galveston Wharves and Corpus Christi.

WGMA has no quarrel with the definitions of wharf demurrage in the respondents' tariffs. They are virtually identical and incorporate the authorized regulatory definition which provides, 46 C.F.R. § 533.6(d)(4):[71]

> Wharf demurrage: A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

As with the definition of wharfage, the definition of wharf demurrage deals only "with the manner in which charges are accrued." It does "not purport to establish which parties are liable for the charge." *The City of Galveston v. Kerr Steamship Co., Inc., supra*.

However, the proposed findings do not cite or quote from any of the tariff provisions of the respondents which place responsibility on the vessel interests for payment of wharf demurrage except to quote a part of a tariff provison published by PHA.[72] The provision quoted relates to outbound wharf demurrage.[73] As pertinent, it provides (portion in italics was omitted from WGMA's proposal):

> Outbound Cargo—Wharf Demurrage Charges, *will be assessed to the cargo owner or authorized agent, except on cargo cutback or* held on the wharves for convenience of vessel's owner or agent, the charges will be assessed to the vessel or its agent.

WGMA states it has no complaint against this type of tariff provision which holds vessel interests "liable for wharf demurrage accruing by reason of actions of the vessels, such as where cargoes could not be lifted when booked by reason of the failure of vessels to meet their schedules." Its complaint is limited to holding steamship agents liable (and here WGMA's combined position statement and proposed finding becomes somewhat obfuscated) "for collection and payment of these charges owed by cargo, which should be billed to and collected by the cargo representatives, i.e., freight forwarders and custom house brokers if not collected directly from shippers and cargo consignees themselves."

Taken literally, this means that WGMA is not pursuing a claim that the Shipping Act is violated by a port which holds vessel agents responsible for payment of wharf demurrage charges incurred by acts of their principals. Thus,

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[71] Only the Galveston Wharves Tariff provision, Item 5(k)(1) at 4, appears in Appendix A. In their respective tariffs, the other respondents' wharf demurrage definitions appear at: PHA at 4; Corpus Christi, No. 5 at 3A; Beaumont, Item 20 at 5; Port Arthur, Item 20 at 4; Orange, item 20 at 4.

[72] This provision does not appear in Appendix A. In its opening brief WGMA also cited Item 185(c) at 16-A of Galveston Wharves Tariff, *supra*.

[73] PHA's tariff provision dealing with inbound demurrage appears at Item 3(c)(4) at 14. It provides "Inbound Cargo-Wharf Demurrage Charges will be assessed to the owner of the cargo or his authorized agent, to whom the invoice will be sent."

the position statement appears to mean that WGMA is assailing wharf demurrage charges imposed by tariffs on the steamship agent where the tariff places liability for payment on the cargo interest. However, WGMA neither quotes nor cites any tariffs of the latter kind. In fact, the only wharf demurrage liability provision referred to in this praragraph and appearing in Appendix A, and therefore in issue, is that of Galveston Wharves in Item 185(c) at 16–A.

At Galveston Wharves, wharf demurrage on inbound cargo is the responsibility of the cargo interests. On outbound cargo it is the responsibility of the vessel interests (without regard to fault of vessel or cargo). The difference in responsibility between inbound and outbound cargo is based upon the respective legal responsibilities for removal of cargo from the terminal. On inbound cargo the responsibility for removal after the expiration of free time is on the cargo interests. On outbound, the responsibility for removal after expiration of free time is on the vessel, even though the fault may lie with the shipper interests. (The circumstances of delay are usually matters known only to the cargo and vessel interests and the ports are not privy to those facts).[74] These responsibilities are derived from the vessel's basic obligation to provide wharfage space for shippers to assemble outbound cargo and to pick up inbound cargo, an obligation acknowledged by a WGMA witness, Tr. 915.

Even if the combined position statement and proposed finding were not taken literally, WGMA's cause is not advanced. Should WGMA's position be considered an assault on tariff provisions which make wharf demurrage the liability of steamship agents, no findings can be made with respect to the ports of Port Arthur, Orange or Beaumont (Brownsville was specifically excepted by WGMA) because their wharf demurrage liability tariff provisions were neither quoted nor cited nor do they appear in Appendix A. To make findings as to those ports would deprive them of notice and opportunity to be heard.

Corpus Christi presents a somewhat different situation. Although WGMA does not refer to this port's tariff provision concerning wharf demurrage, directly, Item 15 of Corpus Christi's tariff does appear in Appendix A. It seems to make all wharf demurrage, including inbound, the responsibility of the vessel interests. If this were the fact, there would arise a question of the propriety of a tariff provision making vessel interests liable for what is undisputably not a vessel responsibility at law. However, there is nothing to indicate that WGMA made inbound wharf demurrage an issue in this proceeding and, of course Corpus Christi was neither placed on notice nor given an opportunity to defend against that kind of allegation. Consequently Corpus Christi must be treated as occupying the same position as Port Arthur, Orange and Beaumont insofar as inbound wharf demurrage is concerned.

9. Generally, the relevance, materiality or other significance of WGMA's proposed findings about wharf demurrage billing practices at PHA, Corpus

[74] Tr. 454A, 455, 949 952, 1203, 1205; Ex. 62. The fact that PHA's tariff made outbound wharf demurrage occasioned by fault of the shipper the liability of the cargo interests does not necessarily raise questions concerning the legal liability theory, for whether the port collects from vessel or cargo interests, "The charge will be borne by the ultimate beneficiary of the services." *Cargill, Inc. v. F.M.C.*, 530 F.2d 1062, 1068-1069 (D.C. Cir. 1976). Moreover, none of the ports were called upon to defend against charges *that there might be a violation of the Shipping Act* because they made outbound wharf demurrage the liability of the cargo interests. Therefore, it is not known whether other acceptable tariff considerations might have led to provisions such as those in the PHA tariff.

Christi and Galveston Wharves is obscure. Although the purpose in having these findings made is difficult to fathom, it might be conjectured that WGMA means to have it appear that it would be as convenient to hold agents for cargo interests liable for outbound wharf demurrage as it is to make agents for vessel interests liable for those charges. If this be so, it would seem to be an implicit, but contradictory, element of WGMA's theory that agents cannot be made liable for obligations of their principals, that somehow, agents for cargo are not as immune from liability under terminal tariffs as are agents for vessels. In addition to these general defects, the accuracy of some of the proposed findings is questionable.

(a) PHA. An additional problem with the proposed findings for this party is that WGMA does not make it clear whether it is seeking findings for the pre or post July 1, 1975, period.

These findings can be made. It is not disputed that before July 1, 1975, PHA billed freight forwarders and customs brokers for wharf demurrage.[75] PHA was able to do so because, in the case of freight forwarders, their names appeared on the copy of a document from which the port prepared another document permitting the cargo to be brought to the dock. It is undisputed, too, that on inbound cargoes, PHA obtained the information needed to issue wharf demurrage bills from ship's manifests and statements of cargo furnished by steamship agents or similar documents examined by PHA's clerks at vessel agents' offices. The reason for the office examination was the agent's tardiness in furnishing the necessary documents to PHA. PHA billed the vessel interests for wharf demurrage for cargo cutback by act of the vessel. It would bill the cargo interests if the cutback was for the convenience of the shipper, but, because it was rarely advised by the vessel interests why the cutback took place, PHA perceived it to have been caused by the vessel and billed accordingly. Ex. 55.

WGMA asks that it also be found that delays in receiving wharf demurrage billings (on cargo perceived to be in a demurrage status because of the act of the vessel interests) were often very great so that it was impossible for the wharf demurrage to be collected (presumably by the agents from vessel owners, operators or charterers). While the testimony is more or less evenly balanced concerning the cause of delayed demurrage billing by PHA (sometimes the fault of the agent and other times the fault of the port), there is no showing whatsoever, for a finding "that it was impossible for the wharf demurrage to be collected" by vessel agents.[76]

(b) Corpus Christi. WGMA proposes findings virtually the same as those discussed and rejected at finding number 7(a) relating to the practice of billing agents for wharfage. The reasons for rejecting those proposals here are even

[75] Freight forwarders on outbound and customs brokers on inbound.

[76] The evidence relied on by WGMA is Ex. 33; Tr. 912-914. Ex. 33 is the prepared direct testimony of an Hellenic Lines official; the transcript references are to additional direct testimony of this witness. At PHA, Hellenic Lines is an "operator" of vessels and not an agent. Tr. 914-915. Moreover, it is very difficult to accept this witness' view that delay in billing by PHA makes collection of wharf demurrage impossible, since it is Hellenic Lines' records, alone, which form the basis for wharf demurrage billing. In other words, Hellenic knew, before PHA could find out, that wharf demurrage had accrued, but apparently failed to act promptly, if at all, to collect the demurrage from the cargo interests. The blame for this carrier's administrative inefficiency can scarcely be laid on PHA.

stronger because the Dix witness, whose testimony is again relied upon by WGMA to support wharf demurrage findings, did not testify to wharf demurrage practices at all at the record references furnished by WGMA.

(c) Galveston Wharves. Essentially WGMA proposes findings that at this port the billing practices follow the tariff provisions. The findings made at paragraph 8 are sufficient and are incorporated herein by reference.

CRANE RENTAL/STEVEDORE'S LIABILITY FOR OPERATOR'S NEGLIGENCE

10. This paragraph concerns crane rental tariff provisions for port furnished cranes at PHA, Galveston Wharves and Corpus Christi[77] and the effect of those provisions on stevedore members of WGMA which use those cranes. The tariff provisions at the three ports are not identical but they do contain essentially similar terms and conditions. Not all of the terms and conditions are under attack—only those which make the suing stevedore liable for the negligence of the crane operator, a person furnished by the port and usually a port employee.

Generally, the tariffs[78] provide: that cranes rented from the ports will include a crane operator paid by the port although the port will charge the user for the operator's services; that, in engaging the operator and paying for his services, the port acts as agent for the user; that, when using the port's crane, the operator will be under the direction and control of the user; that the operator is considered the servant of the user; that the port makes no warranties regarding competency of the operator and that the user must satisfy himself in this respect; and, that if the crane is negligently operated under the control and direction of the user, the user assumes full responsibility for the negligent operation, including the operator's negligence.

The need to rent shore based cranes arises if the ship's gear is inadequate to load or unload the vessel and if the particular stevedoring entity does not itself own suitable equipment. Cranes may be rented from the ports or from private sources, subject only to a "first call" privilege which requires "stevedores to select a [port] crane *only* if that crane is 'suitable for the job in the judgment of the stevedore in terms of size and expense as any available crane'."[79] As a practical matter, however, at Galveston Wharves the port's cranes ordinarily are rented because local private rental cranes are too small and the cost of renting and transporting larger cranes from more distant locations is more expensive than renting from Galveston Wharves.

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[77] Portions of WGMA's proposed findings concerning crane rentals at Port Arthur, Brownsville, Beaumont and Orange will not be considered because those ports' tariff provisions treating with crane rentals were not mentioned in the complaint nor were they otherwise placed in issue on the question of the crane operator's negligence. Ex. 49 at 36 of Port Arthur's tariff was received in evidence. Item 605-A on that page refers to privately owned cranes used at that port but contains no references to port cranes.

[78] PHA tariff, *supra*, Item No. 15 at 22; Galveston, Wharves tariff, *supra*, Item No. 105 at 9; Corpus Christi tariff, *supra*, Item Nos. 125, 130, 135 at 11. Corpus Christi's tariff provisions do not appear in Appendix A, but no objection was raised because of their absence therefrom. These tariff provisions are contained in Ex. 51.

[79] There is evidence of record showing that PHA imposed limitations on rental of cranes from private sources stricter than the "first call" privilege when PHA's cranes were available. These preferential practices at PHA were the subject of a separate complaint proceeding and were there found unlawful under the "first call" test enunciated by the Commission in that proceeding. PHA was ordered to cease and desist from those practices and to file appropriate tariff amendments to reflect the Commission's decision. *Perry's Crane Service v. Port of Houston Authority, of Harris County, Texas*, 16 SRR 1459 (1976) Initial Decision, ____ SRR ____ (1977) (not published) Commission Decision, partially adopting Initial Decision.

WGMA proposes a finding that in contrast to the negligence provisions of the ports' tariffs, "where cranes with operators are rented from private concerns there is no agreement that the renting stevedore will be liable for the crane operator's negligence," citing the testimony of a WGMA member operating as a stevedore at PHA and Galveston Wharves.[80]

The WGMA witness related that his firm rents cranes from some private concerns as well as from the ports but that there is no agreement between his firm and particular private rental companies regarding operator negligence when an operator is furnished. This does not mean that the private rental companies have agreed to be liable for their employees' negligence—for the real point of the testimony is that there is no meeting of the minds on the subject of responsibility for negligence. In the witness' own words, "It's an unspoken agreement, I guess."[81]

There is other and more convincing evidence to show whether private concerns rent cranes with operators under the same terms and conditions as do the ports. They do. Exhibit 63 contains 19 sample crane rental and lease agreements obtained from private concerns listed in the Houston Yellow Pages. Specimen agreements of those firms which furnish operators with cranes contain provisions similar in effect to the language contained in the ports' tariffs relating to the transfer of liability for operator negligence.

Both WGMA and the respondents agree to many facts concerning crane rentals. They agree that it is a common practice for all crane equipment owners to lease them with operators because the equipment is very expensive, highly complex and technical and requires skilled operators for the protection of the equipment and safety to others and sometimes because of labor agreements.[82] They agree that if a crane were to be rented without an operator, it would be difficult for the crane owner to be certain that the operator, unknown to him, would be skilled and competent.[83] Significantly, they agree, too, that when a crane is rented the using stevedore has supervision and control of the crane and its operator and directs the operation of both because the crane operator cannot see into the hold of a ship and must rely upon directions given by a stevedore employee when operating the crane.[84] At least one WGMA witness acknowledges that even without a lease provision requiring it he would accept responsibility for damage caused because the "gangway" man, a stevedore employee, gave bad or erroneous signals to the operator.

Last, WGMA asks for findings that "stevedores have had to pay large sums when the crane operators furnished by the port have themselves been negligent . . . And liability for the crane operators actions increases the stevedore's insurance costs."

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[80] WGMA cites Tr. 1034–1035, 1063–1064, 1074–1075. The witness stated that all rentals from private concerns were reached orally and that a search of his records showed no written leases.

[81] Tr. 1035. It was suggested to the witness that perhaps there was a "custom and tradition of the trade" which might control. His answer was another guess. *Id.*

[82] Tr. 90, 733, 980 (WGMA); Tr. 1486, 1862 (Respondents).

[83] Tr. 227 (WGMA); Tr. 1487, Ex. 53 (Respondents).

[84] Tr. 96, 227–230, 1065 (WGMA); Tr. 1331, 1480, 1743, Ex. 53 (Respondents).

For the proposition that stevedores have had to pay large sums of money because of operator negligence, WGMA relies on the testimony of one stevedore witness who, on direct testimony, offered the opinion that on two occasions he paid for cargo damage because of the operator's negligence.[85] He thought that the two claims totaled in the neighborhood of $5,500.[86] On cross examination he stated that one of the two accidents occurred because the brakes failed but he also admitted he had no way of knowing what caused the accident. Another example of the payment of money was furnished by another stevedore who testified "An instance in which such a tariff provision has been highly detrimental to my company is *Rorie v. City of Galveston, (supra)*, in which the court held that where the Galveston Wharves' tariff provided that the hoist operator was to be under the direction of the lessee and was to be considered as agent or servant of the lessee, the hoist operator was the 'borrowed servant' of the stevedore at the time of the accident." The amount of damage paid by this witness' employee was not furnished.

For the proposed finding that the tariff provision increases the stevedore's insurance costs, WGMA relies solely upon the testimony of and evidence introduced through K. S. Trostmann,[87] Comptroller of Texas Transport and Terminal Company, an agent and stevedore.[88] The proposed finding is diametrically opposed to the evidence.

In prepared direct testimony, Mr. Trostmann said that his firm rented cranes with operators on numerous occasions from PHA. The lease was subject to the negligence provisions of the tariff. He concluded, "In my opinion such arrangement is both unfair and illegal in that it enables the Port to evade liability for its own employee's negligence and substantially adds to our cost of doing business."[89] The witness meant by this that his firm's liability insurance premium is greater when cranes are rented with operators than when rented without operators furnished by the port.

However, skillful cross examination of this witness demolished the conclusions expressed on direct examination and firmly established that the stevedore's overall insurance costs were reduced rather than increased by "such arrangement."[90]

Answers to questions on cross-examination demonstrated that even though the liability premium was higher for cranes with operators than for cranes without operators, there was an overall insurance savings to Texports because the stevedore incurred no expense for workmens' compensation insurance which has a much higher rate and total premium than the rate and premium for liability insurance for cranes with operators. Moreover, the stevedore is not liable for social security payments for operators who are furnished with cranes but who remain on the ports' payroll. Thus, on this record there is nothing to warrant

[85] Tr. 1025.

[86] Tr. 1028.

[87] WGMA cites Tr. 738 and Ex. 16 as authority for the proposed finding.

[88] Texports Stevedoring Company, an affiliate, is the stevedore.

[89] Ex. 14.

[90] Tr. 731-737; see also Appendix to Respondents' Joint Brief, Appendix D.

a finding that a stevedore's overall insurance costs or costs of doing business, for that matter, are increased because of the ports' crane rental tariff provision. On the other hand there is clear and convincing evidence that there are substantial savings to stevedores' cost of doing business in spite of (indeed, because of) the operator becoming the "borrowed servant" of the using stevedore.

One other factor should not be overlooked in this "arrangement." Because of the expense of crane rentals, stevedores do not like to keep the cranes idle during an operator's time off. Usually, then, an extra operator is provided at the request of the stevedore by the port thereby further increasing the stevedore's savings on insurance and social security.

INTERPRETATION OF TARIFF

11. For the next proposed finding of fact WGMA assails "provisions of respondents' tariffs which reserve to themselves or give to themselves, the right to interpret their tariffs and which state that use of the port facilities constitute consent to be bound by all of the tariff provisions, the two sets of provisions when taken together being allegedly oppressive, unfair, and unreasonable and therefore unlawful since by use of the facilities the agents (or their principals) would subject themselves to whatever interpretation of the tariffs the ports might make."

The language of the "use" or "consent" provisions may differ slightly from tariff to tariff, but, in effect, each respondent says the same thing—that use of the port facilities constitutes consent to all the terms and conditions of the tariff. The "consent" provisions were identified at n. 8, *supra*.[91]

The "interpretation" provisions of the respondents' tariffs are not all the same. Galveston Wharves does not have that kind of provision in the portion of its tariff appearing in Appendix A, nor was any such tariff provision referred to in the record.

Of the remaining ports, all, except PHA, have tariff provisions making the port the sole interpreter or judge of its own tariff.[92] PHA merely "reserves the right to interpret the provisions of this tariff."[93] The provisions of Beaumont's and Port Arthur's tariffs go even further than the others. They both provide that "The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations."

WGMA seeks no finding (and refers to no part of the record to establish) that any port has used the combination of the "consent" or "use" and "interpretation" provisions of its tariff unfairly against any agent or principal. However, this finding does not mean that any port's tariff which states, or is susceptible of being understood to mean, that the port is the arbiter of an unclear or ambiguous tariff provision is fair.

[91] WGMA's proposed finding fails to cite Corpus Christi's "consent" tariff provisions. Its all inclusive "consent" appears in Item 52. A more limited "consent," applicable, as here pertinent, to wharfage and wharf demurrage appears at Item 15.

[92] Beaumont tariff, *supra*, Item 100 at 7; Port Arthur tariff, *supra*, Item 105 at 6; Corpus Christi tariff, *supra*, Item 52; Brownsville tariff, *supra*, Item 115 at 100; Orange tariff, *supra*, Item 115 at 9.

[93] PHA tariff, *supra*, Item 2 at 12.

12. For its last finding against a respondent, WGMA repeats its contention concerning the Galveston Wharves "tariff provision assessing pier demurrage during strikes according to the free time status of cargo when strike interference commences, i.e., if cargo has free time remaining, the strike interference time will not count against free time; if cargo has used its free time and penalty demurrage time is running, penalty time will continue to run but at a different rate, the complainants contending that since all cargoes are in exactly the same status on the docks where handling is prevented by a strike they should be treated in the same fashion."

I find that WGMA has stated the substance of Galveston Wharves' strike demurrage tariff provision, Item 187 "Interference Due to Strikes," *supra,* and further find that WGMA has stated its contention concerning that tariff provision as a proposed finding of fact.

WGMA also asks for a finding that Maryland has a tariff provision which grants or extends free time to all cargo during a strike period.[94] The respondents seek to distinguish the Maryland tariff provision by stating that it merely extends free time because of strikes of its own labor. Maryland Port Administration did not respond to this proposed finding. No useful purpose is served by deciding which side is correct. It is sufficient to find that the two tariffs are different.[95]

13. WGMA also requests that certain findings be made in connection with intervenors, New Orleans, California and Maryland. Except to the extent that certain findings are made herein concerning those intervenors, the proposed findings are rejected because they serve no useful purpose in determining whether the respondents' tariff provisions and practices in issue in this proceeding are lawful.

DISCUSSION AND CONCLUSIONS

Category I—Vessel Agents' Liability for Payments of Vessel Charges

A: *General*

As explained before, a post hearing conference was held for the express purpose of determining whether any party wished the opportunity to have the record reopened for additional evidence or to submit supplemental briefs. This approach was appropriate because the Commission's decision in *WGMA v. PHA* had recently been served. *WGMA v. PHA* was perceived to have had a strong influence on some of the issues in this proceeding—particularly those in Category I—because the decision upheld the validity of tariff provisions making wharfage charges the liability of the vessel and tariff provisions making vessels agents, as users, liable for payment of vessel charges. No request to reopen or to submit additional briefs was made.

[94] Maryland Port Administration Terminal Services Tariff No. 2, FMC-T No. 3, Section IV. (4) at 10, Ex. 61.

[95] WGMA calls the Maryland tariff provision "noteworthy." It is merely different.

B: *Application of* WGMA v. PHA *to This Proceeding*

In *WGMA v. PHA,* as here, the complainant charged that particular port tariff provisions and practices implementing those provisions violated sections 15 and 17.[96] WGMA focused on the respondent's newly published tariff provisions which sought to hold vessels agents liable for wharfage charges. The new tariff provisions contained the following pertinent passage:

* * * Wharfage Charges * * * are liabilities of the owner of the cargo; however, the collection and payment of same to the Port Authority must be guaranteed by the vessel, her owners and agents, and the use of Port Authority facilities by the vessel, her owners and agents, shall be deemed an acceptance and acknowledgement of this guarantee.

In *WGMA v. PHA,* WGMA made essentially the same arguments concerning the liability of vessel interests for wharfage charges as those WGMA advances here concerning the liability of vessel interests for wharfage and wharf demurrage charges. Also, in the cited case, WGMA asserted the same contentions concerning the liability of vessel agents for payment of vessel charges as those made here with respect to wharfage, wharf demurrage and dockage charges.[97]

Among other things, the Commission rejected WGMA's theories, holding that terminal tariffs are not agreements within the meaning of section 15; that tariff provisions making the payment of wharfage charges the liability of the vessel interests were neither unjust nor unreasonable and, therefore, were not in violation of section 17 because the carrier's obligation to the shipper requires it to provide terminal (wharf) facilities; and that tariff provisions making vessel agents liable for payment of charges (deemed to be proper vessel charges) also were not unjust and unreasonable, because the vessel agents, as users of the port's facilities, had separately agreed to be liable for the wharfage charges.

The conclusions in *WGMA v. PHA* subsume: that the word "assessed," as used in definitions contained in the Commission's terminal tariff regulations, 46 C.F.R. §533, *et seq.,* deals only "with the manner in which charges are accrued"; that the word "assessed" does "not purport to establish which parties are liable for the charges"; and that whether charges are assessed against cargo or vessel, if the charge is a proper charge against the vessel it may properly be made the vessel agent's liability for payment.[98]

Patently the texts of the tariff provisions assailed in the proceeding differ in varying degrees from counterpart provisions held to be lawful in *WGMA v. PHA.* But there is no realistic substantive distinction between them.

For example, an examination of some tariffs' provisions relating to wharfage charges shows this:

a. Corpus Christi's tariff provisions placing liability for payment of wharfage charges on vessels agents (Item No. 15) are worded somewhat differently than,

[96] The complaint in *WGMA v. PHA* did not allege a violation of section 16 First, but WGMA's post hearing briefs did. On the issues in Category I—Vessel Agents Liability for Payments of Vessel Charges—the identical circumstances pertaining to section 16 First are present here.

[97] There is one major distinction. In *WGMA v. PHA* WGMA argued that making vessel agents liable for a particular vessel charge (wharfage) constituted duress under Texas law. WGMA does not make that argument here. In its place, WGMA raises a Texas Statute of Frauds issue which it did not do in *WGMA v. PHA.*

[98] See previous text references to these passages from *The City of Galveston v. Kerr Steamship Co., Inc.,* cited with approval in *WGMA v. PHA, supra,* 18 SRR at 315.

but are nearly the same as those encountered in *WGMA v. PHA,* even to the extent that they make vessels agents guarantors of payment of charges due from the cargo interests;

b. Galveston Wharves' tariff provisions make wharfage "a charge assessed against the cargo or vessel" (Item No. 5(1)t), but also specify that vessels agents using the wharf "thereby contract to pay the applicable wharfage charges" (Item No. 170(c); see n. 57, 58, *supra,* and related text);

c. Other respondents' tariffs use variations of the "user" and "consent" provisions[99] demonstrated in Galveston Wharves' tariff.

Thus, all the wharfage tariff provisions under attack here convey the same unequivocal message that wharfage charges are the liability of vessel interests and that vessels agents, as users of the ports' facilities, will be held accountable for payment of those charges. WGMA has failed to show by a preponderance of the evidence or by force of logic why wharfage charges in this proceeding should be regarded differently by the Commission in this proceeding than they were in *WGMA v. PHA.*

Insofar as dockage (shed hire or wharf use hire) charges are concerned, all of respondents' tariffs provide for assessment of dockage charges against the vessels and make the agents liable for payment. No one questions the propriety of treating dockage, etc., as a vessel charge. The argument made by WGMA is that dockage, etc., cannot be made the liability of the vessels agents. WGMA centers its argument on the definition of dockage in the Commission's terminal tariff regulations, which provide that dockage is "the charge assessed against a vessel for berthing at a wharf . . .," 46 C.F.R. §533.6(d)(1). Consequently, says WGMA, if dockage is defined as a charge "assessed" against the vessel, it cannot be made the liability of the agent. WGMA ignores the teaching of *WGMA v. PHA* and the many cases cited therein which uphold tariff provisions making agents liable, as users, for charges "assessed" against the interests they serve.[100]

Turning again to outbound wharf demurrage charges, as stated in the findings of fact, only the outbound wharf demurrage tariff provisions and practices at Galveston Wharves is squarely in issue, although WGMA more remotely raises questions concerning the tariff of Corpus Christi and practices of PHA.

WGMA's arguments are the same it made in respect to wharfage in *WGMA v. PHA* and those it makes concerning wharfage charges here. The only real issue to be determined, then, is whether outbound wharf demurrage is a proper vessel charge. As necessarily explained in the findings of facts (because of the way WGMA framed its proposed findings) outbound wharf demurrage is a proper charge against the vessel because of the vessel's undertaking to provide wharfage space to shippers for the assembly of outbound cargo and for removal

[99] "Consent" provisions are "probably superfluous," *State of Israel v. Metropolitan Dade County, Florida,* 431 F. 2d 925, 927 (5th Cir. 1970). See also *Chr. Salvesen & Company, Ltd. v. West Michigan Dock & Market Corporation,* 12 F.M.C. 135, 136, 141 (1968), upholding the principle that use of a port facility constitutes "acceptance of the terms of respondent's tariff." See, also, *WGMA v. PHA, passim,* to the same effect.

[100] True, WGMA's brief was submitted before *WGMA v. PHA* came down. However, as shown, WGMA declined the opportunity to submit supplemental briefs, when offered, after *WGMA v. PHA* was decided.

of cargo from the terminal. It is therefore a charge reasonably related to the vessel interests' use of the facility and it is a reasonable charge to be borne by the vessels agents. See *The City of Galveston v. Kerr Steamship Co., Inc., supra,* 362 F. Supp. at 293-294; *WGMA v. PHA, supra,* 18 SRR at 315.

Neither the tariffs of Galveston Wharves or Corpus Christi[101] nor the practices of those ports or PHA with respect to outbound wharf demurrage are significantly different than equivalent tariff provisions and practices with respect to wharfage insofar as the relevant issues are involved.

Thus, it can be seen that any differences between the tariff provisions and practices placing liability for payment of vessel charges on vessels agents in *WGMA v. PHA* and the tariff provisions and practices placing liability for payment of vessel charges on vessels agents in this proceeding are neither substantive nor substantial. Underlying the tariffs and practices one fact stands out in both *WGMA v. PHA* and here. The ports look to the agents for payment of the wharfage, dockage and outbound wharf demurrage charges and the ports rely upon the agents' credit not the credit of the absentee vessel interests.

In short, WGMA has failed to show that any of the tariff provisions and practices imposing liability for vessel charges on vessels agents are unlawful or are excessive or are not reasonably related, fit and appropriate to the ends in view. *WGMA v. PHA, supra,* 18 SRR at 790. On the other hand, respondents have affirmatively demonstrated that vessels agents are, in fact, the users of the services and facilities for which they are charged and that the tariffs and practices are just, fair and reasonable and not in violation of sections 16 First[102] or 17. "A just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the cost to the terminal of providing the service." *WGMA v. PHA, supra,* 18 SRR at 790.

C: *The Statute of Frauds*

The Statute of Frauds argument made by WGMA is simple. It invokes Texas law[103] which declares unenforceable promises of one person to answer for the debts of another unless the promise is in writing and signed by the person sought to be charged. The essential weakness of this argument is that the Statute of Frauds is never brought into play. These tariffs, which make agents liable for payment of vessel charges, impose that liability directly on the agents as users[104]—and—having used the facilities provided by the ports, the

[101] Although not referred to in WGMA's proposed findings on outbound wharf demurrage, Corpus Christi's tariff provisions in this regard (Item No. 15) are in issue.

[102] The comment made in *WGMA v. PHA, supra,* 18 SRR at 314 n. 34 is equally appropriate here:

As stated earlier, Section 16 First was not put in issue in the proceeding. Nevertheless WGMA argues that the tariff provisions are violative of its provisions, as an undue preference because the tariff shifts the burden of payment and collection of wharfage charges to vessel interests from cargo interest (payment) and PHA (collection). In essence, it is the same argument made by WGMA in regard to Section 17. Neither section has been violated.

[103] WGMA cites section 26.01 of the Texas Business and Commerce Code.

[104] The Commission's terminal tariff regulations require that the definitions of terminal services appearing in 46 C.F.R. § 533.6 be set forth in tariffs filed by the ports. Although the regulations allow for departures, it is not difficult to perceive the problems of the tariff writer in composing a definition different than prescribed. E.g.—how does one go about rephrasing a definition, such as the one for wharfage, which is set forth in the disjunctive ("cargo or vessel"), to make wharfage the liability of the vessels agents? Apparently, tariff writers have opted to achieve the result by retaining the definition and by adding other provisions, such as "consent," "user" or "guarantor" clauses to make the matter of liability clear.

agents accept the terms of the tariff. See n. 99, *supra.* Thus, none of the tariff provisions call for vessels agents to answer for the debt of another. The debt they pay is their own.

Moreover, the Commission has held that "while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations." *WGMA v. PHA, supra,* 18 SRR at 791. WGMA has made no such showing here.

D: *Galveston Wharves' Strike Demurrage*

Complainant has taken a rather curious stance in regard to the strike demurrage provision in Galveston Wharves' tariff (Item No. 187).[105] At the outset, in describing the contentions of the parties I expressed the view that this tariff provision and the practices thereunder were assailed because the vessels agents were held liable for and were being billed for strike demurrage chargeable to the vessel. This is the only reasonable conclusion which may be reached from a reading of the complaint which alleges that this particular provision violates sections 15 and 17 of the Shipping Act.

Nevertheless, in its post hearing opening brief: complainant seems to have abandoned the allegations of the complaint because it makes no reference to the practice of holding vessels agents liable for strike demurrage charges; instead, complainant directs its fire against those provisions of Item No. 187 which differentiate between cargo in free time and cargo in penalty time; complainant asserts sections 16 and 17 were violated because Item No. 187 discriminates between types of cargo.

In attempting to make its belated point, complainant relies upon events which occurred in 1968–1969—the identical events which led to the court action in *The City of Galveston v. Kerr Steamship Co., Inc., supra.* (The defendants in the *Kerr* case were vessel agents and members of WGMA, 362 F. Supp. at 290). Complainant states:

> As a concrete example, during the 1968–1969 180-day strike, *no* demurrage during the strike period was charged cargo on free time when the strike commenced. All cargo whose free time had at that time run out was charged demurrage for each day of the 180-day period. Yet both kinds of cargo were in exactly the same situation: Neither could be moved, all were occupying space on the wharves and whatever protective services were afforded by the port were afforded to both kinds of cargo.

Complainant may be correct in its appraisal of the "situation," but the factors it relies upon to describe the situation are not really relevant. What is important is that the cargoes did not have the same status when the strike began—one was in free time and the other in demurrage.

This was the distinction recognized by Judge Noel of the United States District Court for the Southern District of Texas and formed the basis for his Memorandum and Order awarding judgment to Galveston Wharves against

[105] At no point in this proceeding were the levels of rates in Item No. 187 placed in issue.

the defendants for strike demurrage charges for cotton shipments in a demurrage "situation" in *The City of Galveston v. Kerr Steamship Co., Inc.*

Apparently, Item No. 187 was written into Galveston Wharves' tariff as a direct consequence of the strike in 1968–1969 and the court proceedings which ensued. Before, during and after the strike many bales of cotton lay immobilized on the wharves. Under Item No. 185 of its then current tariff, Galveston Wharves allowed 15 days free time during which no charge would be made; afterwards there would be a demurrage charge at the rate of 2½ cents per bale per day for the first 5 days and 5 cents (penalty) per bale for each day thereafter until removed.

Unilaterally, Galveston Wharves took action to eliminate the penalty portion of the demurrage rate for the period of the strike and thereafter billed demurrage charges as follows:

1. Cargo on free time when the strike began remained at free time during the strike.
2. Cotton in demurrage status was charged 2½ cents during the strike.
3. Cotton in penalty demurrage status was billed at 2½ cents during the strike.

Judge Noel found the tariff provisions and practices and the action of Galveston Wharves rational, reasonable and nondiscriminatory. Item No. 187 generally reflects what Galveston Wharves did in 1968–1969. There is no evidence to show that any subsequent strike occurred since 1961 which would have caused Galveston Wharves to invoke the strike demurrage provisions of its tariff. But the passage of time has not made Galveston Wharves' actions and practices any less reasonable, rational or nondiscriminatory.

Moreover Galveston Wharves has conducted itself in a manner consistent with this Commission's policy. Since 1948, the Commission has not altered its view that, during a strike, penalty demurrage may not be charged but that compensatory demurrage shall be charged. *Free Time and Demurrage Charges—New York,* 3 U.S.M.C. 89 (1948). In that case the Commission emphasized, 2 U.S.M.C. at 107:

> The carrier is entitled, however, to fair compensation for sheltering and protecting a consignee's property during the period of involuntary bailment and after expiration of free time.

It would be unreasonable to hold that the port is entitled to less for doing the same thing for property in a demurrage status. In fact, WGMA does not urge that Galveston Wharves is not entitled to compensatory demurrage. Therefore, the only conclusion to be reached is that WGMA is urging that cargo that was in free time when the strike began should be charged at compensatory demurrage rates. But WGMA has failed to explain and, indeed, leaves it to the imagination why this should be done, except by implying that this would somehow avoid discrimination in the same "situation."

Last, for the same reasons that wharf demurrage charges may properly be made the liability of vessels agents, so too may strike demurrage charges, which are really just another variety of wharf demurrage, be considered the liability of vessels agents.

E: *Conclusion*

I find that WGMA has failed to prove that any of the ports' tariffs or practices thereunder involving the charging of vessels agents with liability for payment of vessel charges, including wharfage, wharf demurrage, dockage, etc., and strike demurrage is in violation of sections 15, 16 or 17 of the Shipping Act, 1916. I further find that Galveston Wharves' strike demurrage tariff provision, tariff Item No. 187, and the practices thereunder do not unduly or unreasonably prefer or discriminate against types of cargo, shippers, carriers, vessels or their agents in violation of sections 16 First or 17 of the Shipping Act, 1916.

Category II—Tariff Interpretation Provisions

The issue here is quite simple. Should tariffs be permitted to state explicitly or imply that only the port issuing the tariff may interpret its provisions?

The answer does not lie in the fact that there is no proof that any port has abused this provision or even that there is no evidence that any port has ever exercised the rights arrogated unto itself. Neither does the answer lie in the semantic argument made by respondents that "interpret" does not mean "construe" and that the ports were careful not to say that they reserved the right to "judicially construe" the tariffs to the exclusion of the courts or the Commission.

The answer does appear in the manifest infirmity of the provision itself. A need to interpret a tariff provision can exist only in the case of lack of clarity or ambiguity. But tariffs are required to be clear and unambiguous and if they do not meet that standard, the tariffs must be construed against the issuer—an event hardly likely to occur if the issuer is the interpreter. In his initial decision in *Matson Navigation Company v. Port Authority of Guam,* 18 SRR 45 (1978), adopted March 15, 1978, Chief Administrative Law Judge John E. Cograve explained, 18 SRR at 52:

> When dealing with the proper application of the definition of wharfage in a terminal tariff, the Commission in *Sacramento-Yolo Port Dist. v. Fred V. Noonan Co. Inc.,* 9 F.M.C. 551 (1966), laid down the following general principles:
>
> ". . . It is a basic principle in the law of tariff construction that tariffs must be clear and unambiguous to avoid possible discrimination among users of tariff services. When a tariff is clear on its face, no extrinsic evidence may be used to vary its "plain meaning." Tariffs are, moreover, drawn unilaterally and must therefore be construed in the case of ambiguity against the one making and issuing the tariff, and 'it is the meaning of express language employed in the tariff and not the unexpressed intention . . . which controls. . . . ' *Aleutian Homes, Inc. v. Coastwise Line,* 5. F.M.B. 602, 608. . . ." (9 F.M.C. at 558) [*]
>
> *Although I have not found a case which specifically states that the same principles of construction apply to terminal tariffs as well as carrier tariffs, the *Sacramento* case, *supra,* and others make it clear that they do.

Conclusion

I find that the respondent ports[106] which publish tariff provisions purporting to allow the port to interpret provisions of the ports' tariffs are engaging in

[106] As found, above, Galveston Wharves does not publish a tariff provision of the kind found to be offensive.

unjust and unreasonable practices relating to or connected with the receiving, handling, storing, or delivering of property in violation of section 17 of the Shipping Act. The violation may be cured and reasonable practices restored by deleting the offending provision from the tariffs.

Category III—Crane Rental/Liability of Stevedores for Operators' Negligence

The narrow issue presented is whether it is an unjust and unreasonable practice for ports[107] to rent cranes together with crane operators, in the employ of and paid by the port, to stevedores under tariff terms and conditions which require the stevedores to control and supervise the operators and to assume responsibility and liability for the negligent acts of the operators while the operators are under the stevedores' supervision. As explained previously, the practice of transferring liability for employee negligence from the employer to the user of the equipment is known in the law as the "borrowed servant doctrine." The doctrine has survived at least two tests in Texas, one in the State courts, *Rorie v. The City of Galveston, supra,* the other in the Federal courts, *Southern S.S. Co. v. Meyners,* 110 F. 2d 376 (5th Cir. 1940), *certiorari denied,* 311 U.S. 674 (1940). Both cases involved crane operators employed by ports and borrowed by a stevedore (*Rorie*) or equivalent (*Meyners*).[108]

WGMA argues that the tariff provisions are unconstitutional and void under State law and are invalid under Federal law.

In making its argument on State law, WGMA wholly ignores the *Rorie* case in its post hearing briefs.[109] One gets the impression that WGMA is using this forum to retry the principle of *Rorie* as if the *Rorie* case never existed.

There were two major issues in *Rorie.* The first involved section 15. The second concerned the borrowed servant doctrine. On the section 15 issue, the stevedore defended on the theory that the tariff was void as it had not been approved by this Commission pursuant to section 15. On this issue the Court accepted the opinion expressed in the Commission's "Memorandum Amicus Curiae" that terminal tariffs, as such, do not need section 15 approval to be valid and enforceable. Nothing has been offered by WGMA which would warrant disturbing the principle espoused by the Commission and adopted by the Court in *Rorie.*

With respect to the borrowed servant doctrine, the Court found that under the tariff provisions for crane rental there involved (the instant tariff provisions are substantially the same) there was an effective transfer of control of the crane operator from the port to the stevedore. The Court explained the rationale, 8 SRR at 20,715:

It is settled, of course, that a general employee of one person may become the special or borrowed employee of another employer. As we pointed out in *Producers Chemical Co. v. McKay,* Tex. Sup., 366 S.W. 2d 220:

> "Whether general employees of one employer have, in a given situation, become special or borrowed employees of another employer is often a difficult question, particularly when

[107] Only three ports ports' practices are involved—PHA, Galveston Wharves and Corpus Christi.

[108] Southern S.S. Co. used the dock facilities of PHA's predecessor, under the predecessor's tariff, to load and unload "its ships." 110 F.2d at 377.

[109] Strachan Shipping Company was the borrowing stevedore in the *Rorie* case.

> employees are furnished with machinery by their general employer to accomplish part of a project or contract undertaken by another. Solution of the question rests in right of control of the manner in which the employees perform the services necessary to the accomplishment of their ultimate obligation. If the general employees of one employer are placed under control of another employer in the manner of performing their services, they become his special or borrowed employees. If the employees remain under control of their general employer in the manner of performing their services, they remain employees of the general employer and he is liable for the consequences of their negligence.
>
> * * *
>
> "When a contract, written or oral, between two employers expressly provides that one or the other shall have right of control, solution of the question is relatively simple. . . ."

To the extent argued by the parties in *Rorie,* the court determined that the borrowed servant doctrine did not offend Texas law. This, then, is not the proper forum to re-try the issue of the validity of the borrowed servant doctrine under the Texas constitution or Texas law.

The question to be decided here is whether the tariff provisions embodying the borrowed servant doctrine are just and reasonable under Shipping Act provisions. In this respect, WGMA makes a more interesting argument, hinted at in its opening brief and fleshed out in its reply brief. It points to a general rule of law that common carriers or public service companies[110] cannot stipulate for immunity from their own or their agents' negligence. *United States v. Atlantic Mutual Insurance Company,* 343 U.S. 236, 239 (1952). WGMA invokes *Bisso v. Inland Waterways Corporation,* 349 U.S. 85, 90–91 (1955), for the rationale that:

> 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. The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. (Footnotes omitted.)

However, I do not find the rule in *Bisso* to be apposite to the facts of this case. Finding No. 10, *supra,* clearly shows no overreaching by those who have power to drive hard bargains.[111] The ports' practices are the same as those which exist in the crane rental industry, at least in the Houston-Galveston area. Under the pervasive regulatory scheme, see *Perry's Crane Service v. Port of Houston Authority of Harris County, Texas, supra,* stevedores are free to and do shop elsewhere than at the ports for cranes. Stevedores obtain direct financial benefits (among other things, lower insurance costs) from renting ports' cranes with operators which the stevedores could not get if they directly employed crane operators.

Moreover, the arrangement under the tariff is not illusory and is not imposed for the purpose of escaping liability for one's own negligence. The crane operators do, in fact, come under the supervision and control of the stevedore and they operate the cranes only under the directions of a supervisory stevedore

[110] "Because terminals are of vital importance to transportation, they may be deemed public utilities for purposes of regulation by this Commission." *WGMA v. PHA, supra,* 18 SRR at 309.

[111] See n. 79, *supra.*

employee. In this respect there is a vast difference between the facts in the case at bar and those in *Bisso, supra,* where the employment was a pure fiction. The Supreme Court explained the basis for its rationale in *Bisso* this way, 349 U.S. at 95:

> The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter "employment" is purely a fiction.

Moreover, it is well established law that the rule of *Bisso* is not automatically dispositive of all exculpatory clauses of common carriers. *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.,* 360 U.S. 411, 416 (1959). *Bisso* found an exculpatory provision in private contractual arrangements between tug and tow to offend public policy. Those considerations "are [not] 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 416–417.

Thus, the reasonableness of the tariff provision does not turn on respondents' mere status as public utilities. It does turn on the facts and circumstances peculiar to the terminal industry. " '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. Isbrandtsen Co.,* 356 U.S. 481, 498." 360 U.S. at 421.

Here, the ports hold themselves out to provide cranes to stevedores and to have a pool of crane operators available to operate those cranes under the direction, control and supervision of the stevedores. Stevedores need not accept the operator offered by the port, but are free to choose from any qualified operator in the pool. It is not part of the ports' undertaking to operate cranes for stevedores or to retain any operational control over the cranes during the rental period. The tariff provision comports with terms of crane rental agreements offered by competing private crane rental companies. The use of borrowed servants is demonstrably more advantageous, economically, to stevedores than carrying crane operators as employees on their own payroll.

In the final analysis, WGMA has failed to prove that the tariff provision exculpates the wrongdoer from its negligent acts or that the stevedores are at the mercy of the ports who are driving hard bargains from positions of power. Indeed, the tariff provisions place liability for negligence on the party exercising direction, control and supervision over the negligent employee and are accepted by the party who is now free to choose between the respondents' rental crane and a private rental crane. Even in those circumstances where the stevedore may be required to choose a port's crane, there is no evidence that the port retains any operational control over the crane operator.

Under the foregoing circumstances, I find the application of the borrowed servant doctrine to be a reasonable practice by the respondent ports.

Conclusion

Accordingly, I find that the tariff provisions and practices at PHA, Galveston Wharves and Corpus Christi which make crane operators the borrowed

servant of the crane user and make the crane user liable for the negligence of the crane operator while under the supervision, direction and control of the user are not unjust and unreasonable and do not violate section 17.[112] I further find that section 15 approval of the tariff provision is not required.

Order

It is ordered that within 30 days after this decision becomes administratively final that the respondents, Port of Houston Authority, Port of Beaumont, Texas, Port of Port Arthur, Texas, Port of Corpus Christi (Nueces County Navigation District No. 1), Brownsville Navigation District of Cameron County, Texas, and the Orange County Navigation and Port District, Texas, cease and desist and thereafter refrain from publishing tariff provisions which state or imply that those ports (or any one of them) may act as the interpretor or sole interpretor of the meaning of the terms and conditions of the tariffs published by those respondents (or any one of them).

It is further ordered that in all other respects, the complaint of West Gulf Maritime Association is denied.

It is further ordered that this proceeding be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

WASHINGTON, D.C.
September 21, 1979

[112] There is no showing that section 16 was violated.

APPENDIX A

The following are the texts of the tariff provisions which the complainant states were placed in issue. Unless otherwise noted, the concerned port respondent agrees with the complainant as to the text of the tariff provisions.

A: PHA

1. Portions of Item No. 2, *Application and Interpretation of Tariff,* reading as follows:

The use of the waterways and facilities under jurisdiction of the Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained.

The Port Authority reserves the right to interpret the provisions of this tariff.

2. Portions of Item No. 3, *Liability for Charges,* reading as follows:

(a) *Responsibility For Payment*

User or person desiring or proposing the use of any Port Authority property, facility or equipment may be required to deposit, in advance, an amount sufficient to satisfy anticipated cost or expense thereof; or in the alternative, may request extension of credit, in accordance with provisions of paragraph (b) of this Item No. 3.

In absence of an affidavit a User thereby warrants to the Port Authority that he is liable and responsible for payment of charges provided in this tariff and will pay the same as herein provided. If such user desires to relieve himself of such obligations, he shall (a) deposit in cash with the Port Authority the amount of charges estimated by the Port Authority to be due, and (b) in writing state the correct name and address of the owner or party warranted to be responsible for the charges.

(c) *Invoice Procedures and Liability*

1. All vessels, their owners, agents and stevedores or others, termed User in Tariff Section Three renting or using freight handling machinery or equipment will be liable for and invoiced in accordance with Item No. 15(a).

3. Portions of Item No. 15, *Provisions Applicable to Rent of Freight Handling Equipment:* [1]

(a) *General*

All steamships, their owners, agents and stevedores, or others hereinafter called User, renting or using freight handling machinery or equipment on Navigation District's property, shall be upon

[1] By letter of September 21, 1978, PHA advised that the portions of Item No. 15 quoted in the Appendix were not in effect at the time the record was closed. Instead, at that time, the following provisions of Item No. 15, paragraphs (a), (c) and (d) appeared in the tariff (See, also, Ex. 53):

(a) *General*

All renting or use of freight handling machinery or equipment on Port Authority property by User shall be upon and subject to the following conditions and charges, the renting or use of which shall constitute an agreement with the Port Authority to pay such charges and be bound by such conditions.

(c) *Responsibility for Damages*

Charge for operators of its freight handling machinery will be made by Port Authority; but it is expressly stipulated that Port Authority acts solely as agent of User in engaging operators and paying them for their services.

Port Authority freight handling machinery as well as the operator thereof is turned over to User, is under User's supervision, direction and control; and User assumes sole responsibility and liability for injury to or death of any person whomsoever, or damage to or destruction of property of any such person, including employees or property of Port Authority, incident to, arising out of, or connected with User's possession, use or operation of such machinery, and shall protect, indemnify and save harmless the Port Authority from and against any and all liability for or in respect of the same or any part thereof.

(d) *Use of Privately-Owned Machinery and Equipment*

The use of privately-owned freight handling machinery or equipment (other than tractors, dollies, lift trucks or the like of stevedores regularly operating on Port Authority property) on Port Authority property shall not be permitted except by special permission of the Executive Director who will regulate its use and establish the conditions and charges which shall be imposed by the Port Authority for the use of its tracks, wharves or property.

and subject to the following conditions and charges, the renting or use of which shall constitute an agreement with the Navigation District to pay such charges and be bound by such conditions.

(c) *Responsibility for Damages*

Charge for operators of its freight handling machinery will be made by Navigation District; but it is expressly stipulated that Navigation District acts solely as agent of User in engaging operators and paying them for their services.

Navigation District freight handling machinery as well as the operator thereof is turned over to User, is under User's supervision, direction and control; and User assumes sole responsibility and liability for injury to or death of any person whomsoever, or damage to or destruction of property of any such person, including employees or property of Navigation District, incident to, arising out of, or connected with User's possession, use or operation of such machinery, and shall protect, indemnify and save harmless the Navigation District from and against any and all liability for or in respect of the same or any part thereof.

(d) *Use of Privately-Owned Machinery and Equipment*

The use of privately-owned freight handling machinery or equipment (other than tractors, dollies, lift trucks or the like of stevedores regularly operating on Navigation District property) on Navigation District property shall not be permitted except by special permission of the General Manager who will regulate its use and establish the conditions and charges which shall be imposed by the Navigation District for the use of its tracks, wharves or property.

B: GALVESTON

1. Portions of Item No. 5, *Application,* Definitions:

(l) *PIER DEMURRAGE OR WHARF DEMURRAGE:* A charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.

(p) *USAGE:* The use of terminal facility by any rail carrier, lighter operator, trucker, shipper or consignee, their agents, servants and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

(t) *WHARFAGE:* A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

2. Portions of Item No. 30, *Application,* Responsibility for Charges, etc.:

The use of waterways and facilities under jurisdiction of the Board of Trustees of the Galveston Wharves shall constitute consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities, to pay all charges specified, including any and all damages to property as provided in Item 75, or reissues, and to be governed by all rules and regulations contained in this tariff.

3. Portions of Item No. 105, *Application,* Lessee Responsibility:[2]

When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control

[2] Effective April 7, 1975, before the close of the record, the following changes were made in Item 105 per Galveston Wharves letter of October 31, 1978. Some aspects of this tariff provision are the subject of another Commission proceeding in Docket No. 77-56, *West Gulf Maritime Association v. The City of Galveston (Board of Trustees of the Galveston Wharves),* 19 SRR 779 (1979).

When cranes, derricks, hoists, conveyors, lift trucks, tractors and other equipment used in the moving or lifting of cargoes are rented (hereinafter called "Leased Equipment") or leased to others, it is expressly understood that such Leased Equipment will be operated under the direction and control of the Lessee, and the Lessee shall be responsible for the operation thereof and assume all risks for injuries or damages which may arise from or grow out of the use or operation of said Leased Equipment.

of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.

It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters.

4. Portions of Item No. 185, Section 2, Pier Demurrage Rules and Charges:

(c) *PIER DEMURRAGE RULES:*

Inbound or outbound cargo remaining on the property of the Galveston Wharves after the expiration of free time will be subject to the following rules:

(1) Pier demurrage charges on outbound cargo will be considered as for the account and responsibility of the vessel, their owners or their agents, individually or collectively.
(2) Pier demurrage charges on inbound cargo will be considered as for the account and responsibility of the owner of the cargo, the shipper, the receiver or their agents, individually or collectively.

5. Portions of Item, 187, Section 2, Interference Due to Strikes:[3]

When it is impossible to remove cargo from Galveston Wharves' piers or transit sheds because of strike interference, cargo on piers or in transit sheds within the free time period will be allowed additional free time equal to period of such interference.

Cargo on piers or in transit sheds on which free time period has expired at beginning of such interference will be assessed pier demurrage during period of interference at rate of 5¢ per ton per day except cotton and cotton linters which will be assessed 2½¢ per bale per day.

The first and last day on which any strike interference occurred, such day will be included in the above special provisions.

C: BEAUMONT

1. Portions of Rules and Regulations as follows:

Item 100, Not Common Carrier:

The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations.

Item 105, Payment of Charges:

All bills rendered by the Port Authority for service, claims, or for any causes whatsoever, are due and payable upon presentation, and any agents, owners, persons, firms or corporations receiving such bills and failing to make full payment within ten days after presentation shall be placed upon a Delinquent List, conditions of which are hereinafter defined.

The Port Authority does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and

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Lessee, by acceptance of such Leased Equipment, agrees to fully protect, indemnify, reimburse and save harmless the Galveston Wharves against any and all loss or damage caused to or caused by said Leased Equipment; and should said Leased Equipment be damaged or destroyed while so leased, Lessee shall pay for all necessary repairs or replacement, and, if damaged, shall pay rental for such damaged Leased Equipment until same is returned to Galveston Wharves in the same condition as received.

It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the Lessee and the operator shall be considered as the agent or servant of the Lessee and Lessee shall be responsible for the acts of such operator during time of rental or lease. It is incumbent upon the Lessee to make a thorough inspection and satisfy himself to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation of warranties with reference to such matters.

[3] Effective October 23, 1978, after the close of the record, Item 187 was amended. Galveston Wharves letter of October 31, 1978.

consignees by the vessel, its owner and agent. Such bills are due when presented and must be paid regardless of when the vessel, its owner and agents are reimbursed.

Bills must be paid when presented and errors, if any, will be rectified by the Port Authority. Claims in excess of $10.00 will require specific approval of the Port Authority before refund is made.

The Port Authority reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port Authority, whose credit has not been properly established with the Port Authority or who are habitually on the Delinquent List. Use of such facilities may be denied until such advance payments or deposits are made.

The Port Authority reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of the facilities.

Item 115-c, Wharfage Rules:

(A) Wharfage charges earned on cargo placed on Port Facilities must be paid by vessel owners (operators) or their agents or owner or forwarder of the cargo and placing of such cargo on Port Facilities shall be deemed an acceptance and acknowledgment of this responsibility. Vessel owners (operators) or their agents shall furnish Port Authority manifests on inbound and outbound cargo, as the case may be, loaded to or from Port Facilities.

EXCEPTION—Where provisions are made with owner or agent of cargo, wharfage charges must be collected direct from owner or agent of the cargo.

Item 165, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of The Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents and other users of such facilities to all such charges specified in this tariff and be governed by all rules and regulations herein contained.

D: PORT ARTHUR[4]

1. Portions as follows:[5]

Item 105, Not Common Carrier:

The Port Authority is not a common carrier and is sole interpreter of its tariff rules and regulations.

Item 110-A, Payment of Charges:

All bills rendered by the Port Authority for service, claims or for any causes whatsoever, are due and payable upon presentation, and any Agents, Owners, person, firms or corporations receiving such bills and failing to make full payment within ten days after presentation shall be placed upon A Delinquent List, conditions of which are hereinafter defined.

The Port Authority does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its Owner and/or Agent. Such bills are due when presented and must be paid regardless of when the vessel, its Owner and/or Agents are reimbursed.

Bills must be paid when presented and errors, if any, will be rectified by the Port Authority. Claims in excess of $10.00 will require specific approval of the Port Authority before refund is made.

The Port Authority reserves the right to estimate and collect in advance all charges which may accrue against vessels, their Owners and/or Agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port Authority, whose credit has not been properly established with the Port Authority or who are habitually on the Delinquent List. Use of such facilities may be denied until such advance payments or deposits are made.

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[4] Complainant introduced Ex. 49, containing Item 605-A of Port Arthur's tariff dealing with use of privately owned cranes. See Port Arthur letter of November 16, 1978.

[5] The portions appeared in Tariff No. 1-A. Tariff No. 1-B is now in effect. Although the provisions have been renumbered, the language remains the same. See Port Arthur letter of October 13, 1978.

The Port Authority 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.

Item 120, Wharfage Rules:

(A) Wharfage charges earned on import cargo placed on Port Facilities must be paid by vessel owners (operators) or their Agents and placing of such cargoes on Port Facilities shall be deemed an acceptance and acknowledgment of this responsibility. Vessel Owners (Operators) or their Agents shall furnish Port Authority manifests on import and outbound cargo, as the case may be, loaded to or from Port Facilities. See Exception 1.

EXCEPTION 1.—Where specific arrangements are made with owner or agent of import cargo guaranteeing payment of import wharfage charges, such charges will be collected direct from said owner or agent of the cargo.

(B) Wharfage charges earned on export, Coastwise, Intracoastal, or local cargo must be paid by owner or agent of cargo and placing of such cargo on Port Facilities shall be deemed an acceptance and acknowledgment of these responsibilities. See Exception 2.

EXCEPTION 2.—Where specific arrangements are made with owners or agents of export, Coastwise, Intracoastal, or local cargo guaranteeing payment to Port Authority of wharfage charges earned on export, Coastwise, Intracoastal or local cargo by a railroad, truck line, or other party, such charges will be collected from such railroad, truck line, or other party as the case may be.

Item 175, Consent to Terms of Tariff:

The use of the facilities under the jurisdiction of the Port Authority shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their Owners and/or Agents and other users of such facilities to all such charges specified in this Tariff and to be governed by all rules and regulations herein contained.

E. Corpus Christi[6]

1. Portions of Tariff definitions, as follows:

3. Wharfage—A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.
9. Usage—The use of terminal facility by any rail carrier, lighter operator, trucker, shipper, or consignee, their agents, servants, and/or employees, when they perform their own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified.

2. Portions of Rules and Regulations, as follows:

Item 15, Payment of Charges and Responsibility Therefor; Extensions of Credit; and Liens:

Wharfage, wharf demurrage, car loading and unloading (when not absorbed by the ocean carriers) are due from the owner, shipper or consignee of the cargo, and shall be collected for and on behalf of the Navigation District by the vessel discharging or loading the cargo, or for which the cargo was received, through the vessel's owner, agent or other person duly authorized to do so, and such vessel and its owner and agent, jointly and severally, shall guarantee and be liable for the payment of such charges to the Navigation District whether or not collected by such vessel or its owner or agent. The use of the wharf or other terminal facility by the vessel or its owner or agent shall constitute acceptance and acknowledgment of this agency, guaranty and liability.

All bills rendered by the Navigation District for wharfage, dockage, wharf demurrage, shed and/or wharf use hire, charges for providing water and electricity, charges for equipment rental, charges for cleaning wharves and sheds, charges for terminal storage, special services, other services and claims or for any causes whatsoever, are due and payable in cash upon presentation,

[6] Complainant also introduced Exs. 47 and 51 containing provisions dealing with crane rental. See Corpus Christi letter of November 15, 1978.

unless arrangements for extension of credit are made. When credit arrangements have been made, any agents, owners, persons, firms or corporations receiving bills and failing to make full payment after presentation within the time permitted under the credit arrangements may be placed upon a cash basis.

The Navigation District does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting any port invoices or bills which may be passed on to shippers and consignees by the vessel, its owner and agent. Such bills must be paid regardless of when the vessel, its owner and agents, are reimbursed. Any errors in bills will be recitifed by the Navigation District.

The Navigation District reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Navigation District, whose credit has not been properly established with the Navigation District. Use of such facilities may be denied until such advance payments or deposits are made.

The Navigation District, at its option and subject to termination at its election, may at any time and from time to time extend credit to any user or other person conducting business with the Navigation District under the provisions of this tariff or amendments or reissues thereof by such user or other person establishing and maintaining financial responsibility acceptable to the Navigation District, or by posting and maintaining a single transaction or a period or an annual surety bond in form and content and with corporate surety acceptable to the Navigation District in amount equal to 125% of maximum liability on a single transaction or equal to an estimated period or estimated annual maximum liability. Further extension of credit may be suspended or terminated by the Navigation District subject to the establishment of added or extended credit acceptable to the Navigation District.

The Navigation District reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of the facilities.

Presentation of bills to owners and agents of vessels or to stevedores is done as a matter of accommodation and convenience and shall not constitute a waiver of the liens for charges furnished a vessel for which the maritime law gives the lien.

Item 35, Responsibility for Loss or Damage:

Users of its facilities agree to indemnify and save harmless the Navigation District from and against all losses, claims, demands, and suits for damages, including death and personal injury, and including court costs and attorneys' fees, incident to or resulting from their operations on the property of the Navigation District.

Item 52, Application and Interpretation of Tariff:

The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained.

The Navigation District shall be the sole judge as to the interpretation of this tariff.

F. BROWNSVILLE

1. Portions of Section One—General Rules and Regulations, as follows:

Item 105, Consent to Terms:

Use of the public wharves and related facilities shall constitute consent to the terms and conditions of this tariff, including the payment of all applicable charges specified herein.

Item 110, Collection of Charges:

The District may, at its discretion, extend customary trade credit or require the posting of bond or prepayment of charges. Vessel charges, as set out hereinafter, shall constitute a lien against the vessel and/or her agents. Cargo charges, as set out hereinafter, shall constitute a lien against the merchandise or commodity and/or the custodian at the port thereof. Service charges shall be payable by the party requesting such service.

Item 111, Service Charge on Past Due Accounts:

On all invoices except lease rentals: A service charge will be assessed on all accounts over 30 days old, at a monthly rate of 1½% on the first $500, and 1% on amounts over $500, with a minimum monthly charge of $0.50. *Exception:* Brownsville steamship agencies and stevedoring companies will be assessed on all accounts over 60 days old at the same rates as shown above.

Item 115, Interpretation of Tariff:

The District further reserves the right to be the sole judge in the interpretation of this tariff or any supplements thereto.

G: ORANGE

1. Portions of Application, as follows:

Item 85, Responsibility for Wharfage:

On shipments inward and outward bound, handled over the wharves or piers, or on shipments handled direct between barges or vessels, and vessels that are berthed at wharves or piers, the shipper will be held responsible for wharfage charges, and will not be permitted to load any property from the wharves or piers, or from barges or vessels onto a vessel without prepayment of the wharfage charges, or until satisfactory provisions have been made for the payment.

2. Portions of Rules and Regulations, as follows:

Item 115, Interpretation of Tariff:

The Port District shall be the sole judge as to the interpretation of its Tariff rules and regulations.

Item 120, Payment of Charges:

All bills rendered by the Port District for service, claims or for any causes whatsoever, are due and payable upon presentation, and any owners, agents, companies or persons receiving such bills and failing to make full payment within ten days after presentation shall be placed upon the delinquent list, conditions of which are hereinafter defined.

The Port District does not recognize the numerous shippers or consignees and cannot attempt to collect or assist in collecting storage and similar bills which may be passed on to shippers and consignees by the vessel, its owners and agents. Such bills are due when presented and must be paid regardless of when the vessel, its owners and agents, are reimbursed.

Bills must be paid when presented, and errors, if any, will be rectified by the Port District. Claims in excess of $10.00 will require specific approval of the Port District before refund is made.

The Port District reserves the right to estimate and collect in advance all charges which may accrue against vessels, their owners and agents, or against cargo loaded or discharged by such vessels, or from other users of the facilities of the Port District whose credit has not been properly established with the Port District or who are habitually on the delinquent list. Use of facilities may be denied until such advance payments or deposits are made.

The Port District reserves the right to apply any payment received against the oldest bills rendered against vessels, their owners and agents, or other users of facilities.

Item 130, Wharfage:

(A) Wharfage charges must be paid by owner or agent of cargo and placing of said cargo on Port facilities shall be deemed an acceptance and acknowledgment of this responsibility.

Item 195, Consent to terms of Tariff:

The use of the facilities under the jurisdiction of the Port District shall constitute a consent to the terms and conditions of this Tariff, and evidences and agreement on the part of all vessels, their owners and agents and other users of such facilities to pay all charges specified in this Tariff and be governed by all rules and regulations herein contained.

APPENDIX B

Contentions of Complainant and Respondents

1. *Points in WGMA's Opening Brief*

Point One—Each of the tariffs here complained of provides that use of the Port's facilities constitutes consent to be bound by all of the tariff provisions. Such language is a nullity, because lawful tariff provisions do not rest on consent but as a matter of law are binding upon all persons subject to them. Therefore use cannot lawfully be the equivalent of agreement. These provisions should therefore be ordered stricken and given no consideration in the determination of this complaint;

Point Two—Interpretation of a port's tariffs is a matter within the jurisdiction of the Federal Maritime Commission and the courts, and the statements in respondents' tariffs that they are to be interpreters of their tariffs are void as a matter of law as attempts to oust such jurisdiction;

Point Three—The ports tariff provisions, and billing practices, that make agents for vessels using port facilities personally liable for their principals' port charges are unlawful because the charges are obligations of third persons not agreed in writing to be borne by the agent and therefore unenforceable under the Texas Statute of Frauds, and contrary also to the Law of Principal and Agent, and violate sections 16 and 17 of the Shipping Act of 1916 (46 U.S.C.A. §§ 815, 816) in subjecting vessels' agents to an unreasonable disadvantage and to unjust and unreasonable regulations and practices;

Point Four—The ports' tariff provisions and billing practices which subject vessels' agents to responsibility for collecting, and personal liability for, wharfage and pier demurrage (which are liabilities of cargo) are unenforceable under the Texas Statute of Frauds, and they violate sections 16 and 17 of the Shipping Act of 1916 (46 U.S.C.A. §§815, 816) because they subject agents to unreasonable disadvantages and are unjust and unreasonable.

Point Five—Requiring renters of cranes and other heavy equipment from the ports *ipso facto* to become liable for the negligence of the operators of that equipment, who are employees of the Port, is violative of section 16 of the Shipping Act of 1916 (46 U.S.C.A. §815) in subjecting stevedores to undue and unreasonable disadvantages, and unjust and unreasonable and hence unlawful under section 17 of that Act; and

Point Six—The Galveston Wharves' tariff provision assessing strike penalty pier demurrage rates according to the status of cargo at the commencement of the strike is patently discrminatory and unlawful under sections 16 and 17 of the Shipping Act of 1916 (46 U.S.C.A. §§815, 816) because all of the strike-bound cargoes are in an identical position during a strike and assessing different charges on cargoes in an identical position is plainly unjust and unreasonable.

2. *Points in Respondents' Answering Brief*

Counterpoint One—Complainant has wholly failed to sustain its burden of proof by reliable, probative evidence that respondents' tariffs, or their practices

thereunder, make or give any undue or unreasonable preference or advantage (section 16) or that the complained of tariffs and practices thereunder are unjust and unreasonable (section 17).

Reply Point One (germane to WGMA's Point One)—Tariff provisions that the use of the port facilities constitutes consent to be bound by the tariffs are merely a statement of the law, clearly informing users of the applicability of the tariffs and their responsibilities thereunder. Complainant claims that such tariff provisions are unlawful, but fails to offer any evidence that such language or port practices thereunder constitute an unreasonable preference or advantage or that such provision is unjust and unreasonable.

Reply Point Two (germane to WGMA's Point Two)—Provision in some of respondents' tariffs that the issuer of the tariff shall be the interpreter of their tariffs does not, cannot and is not intended to oust jurisdiction of the Federal Maritime Commission and the courts. The interpretation provision does serve a useful purpose in non-litigious inquiries and situations, particularly involving complex and technical interpretation of language terms common to the trade and relating to customs of the port.

Reply Point Three (germane to WGMA's Points Three and Four)—Ports' tariff provisions and billing practices assessing responsibility for charges upon vessels, their owners and agents and other users of the facilities are not only lawful but essential to insure collection of port charges and the continued economic viability of public ports. Such tariff provisions, rather than resulting in agents being held responsible for debts of others, impose a direct obligation upon the agents for collection of port charges.

Reply Point Four (germane to WCMA's Point Five)—Ports' tariff provisions concerning the responsibility of lessees of cranes and other such heavy equipment providing that any leased operator of the port shall be under the direction of the lessee and shall be considered as lessee's employee are reasonable requirements, uniform in the port industry and non-discriminatory.

Reply Point Five (germane to WGMA's Point Six)—The Galveston Wharves' tariff provision eliminating penalty portion of demurrage rate and making additional free time allowance during strike period is most reasonable, makes or gives no undue or unreasonable preference or advantage and is consistent with Commission rulings.

3. *Points in WGMA's Reply Brief*

First Reply Point—The tariff provisions here stating that use of port facilities "constitutes a consent to the terms and conditions of this tariff" is not a statement of the law: Use of a public utility's facilities constitutes consent only to be bound by *lawful* tariff provisions. The tariff language is unjust and unreasonable and therefore violative of Section 17 of the Shipping Act of 1916 and lawfully should be disregarded;

Second Reply Point—The provision in the tariffs that the port is to be the "sole judge" or "sole interpreter" of the tariff's meaning is unlawful, and hence

Third Reply Point—As Texas municipal corporations respondents are subject to the laws of the State of Texas. As instruments of interstate and foreign commerce they are subject to applicable laws of the United States. Respondents' tariff provisions making vessels' agents responsible for vessels' and cargo owners' port charges are violative of both bodies of law and cannot lawfully be upheld as just and reasonable under Section 17 of the Shipping Act of 1916;

Fourth Reply Point—Respondents have reasonable alternatives for collection of their charges to holding steamship agents liable for collection and payment of port charges. It is unjust and unreasonable for respondents to impose such liability of steamship agents since it is done simply for respondents' convenience;

Fifth Reply Point—Respondents' monopolistic position with respect to use on their premises of their rented heavy lift equipment makes their tariff provisions exculpating themselves from liability for the negligence of their employees unlawful under well-established legal principles, and hence these tariff provisions should be found unjust and unreasonable and hence unlawful also under Section 17 of the Shipping Act of 1916;

Sixth Reply Point—The Galveston strike demurrage charge is plainly discriminatory, and not based on compensation for services rendered, and therefore unlawful under Sections 16 and 17 of the Shipping Act of 1916.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-86

JAPAN/KOREA—ATLANTIC AND GULF FREIGHT CONFERENCE RULES PERTAINING TO CHASSIS AVAILABILITY AND DEMURRAGE CHARGES THAT RESULT WHEN CHASSIS ARE NOT MADE AVAILABLE

Conference tariff rule allowing carrier members to provide chassis for containers to the extent available found permissive and consequently in violation of section 18(b)(1) of the Shipping Act, 1916.

Conference tariff rule permitting the assessment of demurrage on containers at amounts greater than compensatory during periods of general unavailability of chassis in port area found unjust and unreasonable in violation of section 17 of the Shipping Act, 1916.

Charles F. Warren and *George A. Quadrino* for Japan/Korea-Atlantic and Gulf Freight Conference and its member lines.
Joseph S. Fontana for John Sexton & Company.
Lawrence G. Cohen for Mitsubishi Corporation.
Arthur S. Schmauder for Sumitomo Corporation of America.
Gerald H. Ullman for National Customs Brokers & Forwarders Association of America, Inc.
Francis J. Gorman for Baltimore Customhouse Brokers and Forwarders Association.
William D. Weiswasser, C. Douglass Miller, and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

February 7, 1980

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

This proceeding was initiated on August 31, 1979 by an Order directing the Japan/Korea—Atlantic and Gulf Freight Conference (J/KAG) to show cause why the Commission should not find certain of its tariff rules concerning the availability of chassis equipment and the assessment of demurrage: (1) to result in the assessment of varying rates and charges which are unjustly discriminatory and constitute an unreasonable practice or regulation in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. §816); and (2) be permissive

in nature and indefinite in application in violation of section 18(b) of the Shipping Act, 1916 (46 U.S.C. §817(b)).[1]

J/KAG and its member lines were named Respondents. The National Customs Brokers & Forwarders Association of America, Inc., Baltimore Customhouse Brokers and Forwarders Association, Mitsubishi Corporation, Sumitomo Corporation of America, and John Sexton & Company subsequently intervened.

Affidavits and/or memoranda of law have been submitted by J/KAG, John Sexton, Baltimore Customhouse Brokers, and the Commission's Bureau of Hearing Counsel. In addition, both Baltimore Customhouse Brokers and Hearing Counsel have requested an evidentiary hearing, which is opposed by J/KAG. Also, J/KAG has moved: (1) to strike a notice of deposition which was filed by Baltimore Customhouse Brokers, and (2) for leave to file a rebuttal affidavit and memorandum, to which Hearing Counsel has filed in opposition. The National Customs Brokers have requested oral argument.[2]

BACKGROUND

J/KAG operates pursuant to agreement No. 3103 and serves the trades from Japan and Korea to United States Atlantic and Gulf Ports. It consists of 13 ocean carriers which during 1978 carried 378,772 TEU's[3] of container space in this trade. The Conference trade has become substantially containerized in the past five and a half years.

Though J/KAG members serve numerous discharge ports on the Atlantic and Gulf coasts, the Order to Show Cause and the responses of the parties have focused exclusively on the situation at the Port of Baltimore. Prior to 1978, there had been occasions when chassis were in short supply at Baltimore. However, during the early months of 1978 an extreme chassis shortage developed which was exacerbated by a dock strike and severe winter weather. Some J/KAG members were consequently unable to provide chassis within the five days' free time permitted by J/KAG tariff. In previous situations, individual J/KAG members had, on occasion, failed to assess demurrage after the expiration of this free time, although required to do so by tariff rules similar to those under review. Following an investigation by the Conference's independent neutral body, all J/KAG members began to assess demurrage after the expiration of the free time period regardless of whether the member had provided a chassis for the container. As a result, many consignees incurred demurrage charges when chassis were unavailable.

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[1] Though the Order fails to cite specific tariff rules, the parties agree that Rules 106 and 114 of Tariff No. 36 FMC 7 are the relevant rules.

Rule 106 provides that:

> [t]o the extent available, carriers are permitted to provide chassis at discharge ports at a rental charge of $6.00 for each twenty-four hours. . . .

Rule 114 states that all containers held with cargo at a carrier's discharge port container yard after the carrying vessel has completed discharge, whether the carrier has provided a chassis therefor pursuant to Rule 106 or not, will be subject to demurrage after 5 days' free time.

[2] The National Custom Brokers have offered no compelling reason for granting oral argument, and their request therefor will be denied.

[3] Twenty-foot equivalent unit, a unit of measure for cargo space suitable for containers on a liner vessel. Containers are generally twenty or forty feet in length.

Once unloaded at its discharge port, a container of cargo is virtually immobile. If the container is to proceed further inland by way of motor carrier it must first be placed upon a chassis compatible with its size. Generally, ocean carriers have provided such chassis to consignees on a rental basis to facilitate the removal of containers from their terminals and container yards. Carriers obtain chassis either from their own stock or from chassis leasing companies which are situated in port areas.

At least two major chassis leasing companies serve the Port of Baltimore—Uniflex and XTRA. They lease chassis to J/KAG members but do not restrict their services solely to ocean carriers. When consignees utilize chassis supplied by J/KAG members they are charged a *per diem* rate which covers the carriers' leasing costs.

Terminal and container storage space is in short supply at Baltimore. As a result, Conference members desire to clear cargo from their yards at the earliest possible time, particularly since Conference members provide a weekly service in the trade. Limiting the time within which to remove loaded containers to five days is intended to accommodate this service and minimize congestion at the port. However, the J/KAG tariff does allow the Conference to permit additional free time and/or waive demurrage during periods of "port tie-up" when a consignee is prevented by factors beyond its control from removing a container from the container yard.

POSITIONS OF THE PARTIES

Respondent

J/KAG states that the ocean common carrier's obligation is to transport cargo to the port of destination, discharge it from the vessel and tender it for delivery with notice to the consignee or its agent. It defines "chassis" as an integral part of a motor vehicle and argues that because the ocean carrier is not required to provide a motor vehicle for hauling away goods, neither is it required to provide any part of the vehicle—such as the chassis.

J/KAG claims that it has not established a historic practice of providing chassis to all consignees. The Conference maintains that it provides chassis, which it leases at Baltimore, only to the extent that such chassis are available. Under this arrangement, chassis are allocated on a first come-first served basis with no discrimination or favoritism.

Respondent explains that there are two reasons for assessing demurrage: (1) to recompense the ocean carrier for the extended use of its equipment and facilities, and (2) to minimize port congestion. It maintains that the latter purpose is especially compelling at Baltimore due to the lack of sufficient container storage areas. J/KAG concludes that any problem which may exist concerning chassis availability at Baltimore will be resolved by normal market forces and that any alteration of its existing tariff rules will impose obligations upon its members which, as common carriers, they are not required to assume.

Intervenors[4]

Intervenors agree that an ocean common carrier does not have an obligation to deliver goods to a consignee; rather, it must only tender them for delivery. They argue, however, that a proper tender occurs only when a container is mounted on a chassis, for it is only then that the cargo is reasonably accessible. They also contend that the fact that common carriers by water, including J/KAG members, have historically tendered containers mounted on chassis implicitly supports their view.

Intervenors argue that because demurrage charges are in effect penalties to induce the removal of containers from the carrier's container yard, the assessment of demurrage when chassis are not available at the port is unreasonable and therefore unlawful under section 17. They maintain that where both the carrier and the consignee are jointly affected by conditions beyond their control, neither should profit from the other's disability.

The National Customs Brokers claim that if a member line provides chassis to some consignees, it must do so for all consignees. It further suggests that J/KAG tariff rules should be amended to extend free time whenever chassis are unavailable.

Sumitomo contends that the subject tariff rules are ambiguous. It claims, for instance, that Rule 106 provides no guidance as to when chassis will be available, nor does it indicate the order in which chassis will be allocated during shortages. The danger perceived is that a variety of different interpretations may be given by various conference members. Sumitomo therefore concludes that these rules violate the principle of commercial certainty which tariffs are required to meet.

Hearing Counsel

Hearing Counsel generally agrees with the arguments raised by Intervenors. It does not allege, however, that J/KAG members have a common carrier obligation to provide chassis to consignees and concludes, therefore, that they could refuse to provide such service. Hearing Counsel adds, however, that once they elect to offer the service, they must meet certain requirements under the Shipping Act, 1916; *i.e.:* (1) the tariff must be certain and clearly identify the carrier's undertaking, and (2) shippers and consignees must be provided with actual notice of the service the carrier will provide. In addition, Hearing Counsel questions why, in situations of chassis shortage, consignees could be any more successful than ocean carriers in leasing chassis. Hearing Counsel also contends that in such situations, the provisions of Tariff Rule 114 which relate to the extension of free time or limiting demurrage would apply.

[4] The arguments raised by the Intervenors are similar and will, therefore, be discussed together unless reference to a specific Intervenor is warranted.

DISCUSSION

Procedural Matters

A. *Evidentiary Hearing*

The Baltimore Customhouse Brokers and Hearing Counsel have requested an evidentiary hearing. Hearing Counsel asserts that a significant question of fact exists concerning what notice consignees would need in order to acquire chassis for themselves on the "spot market," if such chassis are available. However, no effort is made by Hearing Counsel to explain why such information, if indeed relevant, could not be submitted through affidavit. In fact, Hearing Counsel fails to state how and by whom such evidence would be adduced.

The Baltimore Brokers claim that J/KAG's affidavit contains certain inaccuracies which are correctly described in their own affidavit. They then note several questions which are raised by J/KAG's affidavit and conclude that the Commission should explore in an evidentiary hearing whether: (1) J/KAG's historical and existing freight rates cover the cost of providing chassis; (2) truckers normally offer to provide chassis to shippers and consignees; and (3) it is impractical to expect importers and consignees to lease containers after being informed that the ocean carrier will not provide chassis. They contend that these matters "have not been adequately presented by affidavit," but, like Hearing Counsel, fail to explain why such proof cannot be submitted through affidavit or what evidence they would adduce.

In limiting this proceeding to the submission of affidavits of fact and memoranda of law, the Commission's Order to Show Cause provided that any party considering an evidentiary hearing necessary must accompany its request:

> [w]ith a statement setting forth in detail the facts to be proven, their relevance to the issues in this proceeding, a description of the evidence which would be adduced to prove these facts, and why such proof cannot be submitted through affidavit.

Neither Hearing Counsel nor Baltimore Brokers has strictly complied with this requirement. Moreover, neither party has indicated why the limited issues raised by the Order to Show Cause cannot be resolved on the present record. Consequently, the Commission will deny these requests for evidentiary hearing.

B. *Deposition*

J/KAG has moved to strike a notice of deposition served by the Baltimore Customhouse Brokers. The taking of the deposition, originally scheduled for January 8, 1980, has been postponed pending this decision. Because of the Commission's ruling above denying evidentiary hearing in this proceeding, J/KAG's motion will be granted. The proceeding was limited to the submission of affidavits of fact and memoranda of law, with no provision for discovery. In light of the nature and limited extent of the issues presented and the sufficiency of the affidavits submitted, there is no reason to deviate from this procedure.

C. *Rebuttal*

J/KAG has also moved for leave to file a rebuttal affidavit and memorandum, which it attached to its request. The Conference notes that the petitions to intervene were not granted until after it submitted its *prima facie* case and that it has not, therefore, been presented with an opportunity to respond to or rebut allegations contained in Intervenors' submissions. It argues that "administrative due process and fundamental fairness" require that it be given an opportunity to respond. Hearing Counsel opposes this motion primarily on the ground that J/KAG has failed to cite any support therefor, contrary to the express requirement of Rule 73 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.73). Hearing Counsel also submits that the rebuttal affidavit is "argumentative" and without cross-examination, would further confuse the proceeding.

The Order to Show Cause did not provide the Respondent with a right of rebuttal, nor was it required. Under the circumstances of this case, however, the Commission will grant Respondent's motion and accept the filing of the rebuttal affidavit and memorandum. In light of the ultimate decision in this proceeding, the Commission does not perceive that any party will be aggrieved by this ruling. To the extent that the affidavit of *fact* is argumentative or non-responsive to the issues, it will be ignored.

Substantive Matters

The Order raised the issue of whether the subject tariff rules are "permissive in nature and indefinite in application in violation of section 18(b)." A review of Tariff Rule 106 clearly indicates that, on its face, it is permissive in nature. The rule states that "[t]o the extent available, carriers are permitted to provide chassis at discharge ports at a rental charge of $6.00 for each twenty-four (24) hours. . . . " Carriers "are permitted" to provide chassis, to the extent available, but are clearly not holding themselves out as required to do so. Such a provision is contrary to established principles of tariff certainty. In one of the earliest reported cases, the United States Shipping Board stated:

> principle of tariff construction is that tariffs should be specific and plain. The board's tariff regulations throughout direct the carriers to this end, and provide that tariffs filed and kept open to public inspection in compliance with section 18 of the statute shall be explicit.
> *The Gelfand Manufacturing Co. v. Bull Steamship Line, Inc.*, 1 U.S.S.B. 169, 170 (1930).

A tariff should fully and clearly state the conditions under which a service will be accorded. *Puerto Rican Rates,* 2 U.S.M.C. 117, 129 (1939).

Section 18(b)(1) requires that shippers be fully apprised of the services carriers are providing and the rates which will be charged. The Commission's tariff rules also specifically require that tariffs contain "[a] clear statement of all the services provided to the shipper and included in the transportation rates set forth therein." 46 C.F.R. § 536.5(d)(2). Tariff Rule 106, however, does not inform the shipper at the time of shipment of the exact service the carrier will perform and is, therefore, violative of the Commission's rules and section

18(b)(1) of the Shipping Act, 1916 (46 U.S.C. §817(b)(1)). Rule 106 must consequently be modified.

The Order also raised as an issue whether the tariff rules "result in the assessment of varying rates and charges which are unjustly discriminatory and constitute an unreasonable practice or regulation in violation of section 17." There is no evidence in the record that the tariff rules under consideration are actually applied in an unjustly discriminatory manner. There have been no allegations of unequal treatment of shippers/consignees in the allocation of chassis during periods of shortages. The Commission concludes, therefore, that the J/KAG chassis allocation process does not constitute an unreasonable practice in violation of section 17. The Conference's demurrage practices are another matter, however.

Tariff Rule 114 states that all containers, whether the carrier has provided a chassis therefor pursuant to Rule 106 or not, are subject to stated free time and demurrage, *e.g.,* five days' free time, excluding Saturdays, Sundays and holidays. Thereafter, demurrage is assessed in three periodic and increasing increments. The Commission finds the assessment of such demurrage during periods of chassis unavailability throughout the port area to be an unjust and unreasonable regulation and practice relating to or connected with the delivery of property and violative of section 17.[5] The Commission recognizes the dual composition of demurrage charges: (1) compensation for the storage of property or use of equipment, and (2) a penalty to induce its removal and further the public interest of minimizing port congestion. *Free Time and Demurrage Charges at New York,* 3 U.S.M.C. 89, 107 (1948). However, in situations where there is a port-wide lack of chassis, the punitive element of demurrage is inappropriate. As was noted in *Free Time and Demurrage Charges at New York, supra:*

> [w]here carriers and consignees are jointly affected by conditions beyond their control, neither should be subjected to an avoidable penalty, and neither should be permitted to profit from the other's disability.
> 3 U.S.M.C. at 107

This does not mean that a carrier should be precluded from assessing any demurrage under such circumstances. Rather, that portion of the demurrage charges which is compensation for the carrier's storage and protection of the consignee's property during the period involved (after the expiration of free time) or for the use of the carrier's equipment or facilities is properly assessible. *See Midland Metals Corporation v. Mitsui O.S.K. Line, et al.,* 15 F.M.C. 193 (1972), and *Free Time and Demurrage Charges at New York, supra,* at 108. In this case, such compensation is obviously reflected by the first period demurrage charges. Anything more would appear to be an unwarranted and unjustified penalty.

There is no need for the Commission to prescribe a rule of general applicability at the Port of Baltimore. The problem concerning chassis unavailability and consequent demurrage charges has not been shown to affect other carriers

[5] To the extent that there is any ambiguity in the phrase "to the extent available" in Tariff Rule 106, the Commission interprets it to refer to "availability" from normal sources of chassis supply within the port area.

or conferences. The Commission will, therefore, order only J/KAG to modify its relevant tariff rules (106 and 114) to comport with this decision.

THEREFORE, IT IS ORDERED, That the Requests for Evidentiary Hearing submitted by the Baltimore Customhouse Brokers and Forwarders Association and the Bureau of Hearing Counsel are denied, and

IT IS FURTHER ORDERED, That the Motion to Strike Unauthorized Notice of Deposition and the Motion for Leave to File Rebuttal Affidavit and Memorandum submitted by the Japan/Korea-Atlantic & Gulf Freight Conference are granted, and

IT IS FURTHER ORDERED, That the request for oral argument of the National Customs Brokers & Forwarders Association of America, Inc. is denied, and

IT IS FURTHER ORDERED, That the Japan/Korea-Atlantic & Gulf Freight conference modify its Tariff No. 36, FMC-7 consistent with the above discussion, and file its amended tariff with the Commission within 30 days of the date of this Order, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-89

HANOVER BRANDS, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE

February 11, 1980

Notice is given that no appeal has been taken to the December 28, 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. 79-89

HANOVER BRANDS, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE ON COMPLAINANT'S REQUEST FOR DISMISSAL OF COMPLAINT

Finalized February 11, 1980

As requested in the Presiding Administrative Law Judge's December 6, 1979, notice, parties herein filed additional information. The parties each sent a letter. The Complainant's letter dated December 13, 1979 (received in the Commission December 18, 1979), stated:

Pursuant to your notification for parties to file additional information dated December 6, 1979, please be advised that our company will make payment in the amount of $5,840.47 within the specified time period delineated and approved by your office. Of course, payment will be made by Complainant assuming that this case will be considered closed.

The Respondent's letter dated December 19, 1979 (received in the Commission December 26, 1979), stated:

I have been advised by counsel for Hanover Brands, Inc. that Complainant acknowledges the propriety of the outstanding charges of $5,840.47 and will pay those charges to Sea-Land Service, Inc. as billed. Additionally, I received on December 16, 1979 a copy of a letter from counsel for Hanover Brands, Inc. to you specifying that the Complainant will, in fact, pay these outstanding charges.

At such time as Complainant, within the time period set, pays these outstanding charges, Sea-Land Service will provide you with appropriate verification of payment as ordered by your Notice issued December 6, 1979. If Sea-Land Service, Inc. may provide further assistance in this matter please advise the undersigned.

DISCUSSION

The Complainant on November 30, 1979, served (received December 3, 1979), its request for withdrawal and dismissal of its complaint in this proceeding. The Complainant indicates that the proper and correct rate applicable to shipment on September 23, 1978, of frozen vegetables weighing 35,950 lbs. and

measuring 1,395 cubic feet, from Baltimore, Maryland, to Santo Tomas de Castilla was $231.00 per 40 cubic feet under Sea-Land Service, Inc., Tariff No. 283, FMC No. 161, effective date August 28, 1978, Item No. 1250, for a charge of $8,566.46. Sea-Land Service, Inc. applied a rate of $73.00 per 40 cubic feet under its Tariff No. 283, FMC No. 161, effective date August 28, 1978, Item No. 1250, and on the basis of that rate assessed a charge to claimant of $2,725.59 which charge was duly paid on October 24, 1978. Claimant has refused to pay the difference between the $2,725.59 and the charge as per tariff of $8,566.46 or $5,840.47 because it believed such charge to be so unreasonably high as to be detrimental to the commerce of the United States. Claimant requested waiver of the $4,840.47.

In Complainant's request for withdrawal and dismissal of the complaint herein, and Sea-Land's submission of a copy of its 15th Revised Page 159 amending rate for frozen foods, Item No. 1250, to $130.00 W, effective November 30, 1979, no mention is made by either party of the disposition as to the $5,840.47 for which waiver was sought.

Ordinarily the request for withdrawal and dismissal of the complaint possibly would not entail such information, but having been brought to the Commission's attention, the Commission should and possibly must have in this record such information. Therefore, so the Presiding Administrative Law Judge and the Commission could act knowledgeably upon the Complainant's request to withdraw and dismiss the complaint in this proceeding, the parties were directed to file information and evidentiary proof as to the disposition as to the $5,840.47. The responses were the letters quoted above.

There were previous letters in the proceeding from the parties, each letter dated November 29, 1979, was received in the Commission on December 3, 1979. The Complainant's letter contained a copy of the instant request for dismissal of the complaint which letter stated:

1. That since the time of shipment by Respondent, Sea-Land Service, Inc., which is at issue, Petitioner has been informed and is of the belief that Sea-Land Tariff No. 483, FMC 161, dated August 28, 1978, has been changed by the 15th revised page 159, effective November 30, 1979. Said change would provide for imports from Guatemala to Baltimore for foods, frozen, N.O.S. in straight or mixed shipments—trailers; minimum 40,000 pounds at the rate of $130.00 W. As a result of said proposed change and a reliance thereon, Petitioner feels that it is not in its best interest to continue with this action and thereby respectfully requests that the Complaint in this matter be withdrawn and this case be dismissed, with both parties paying their own costs.

The Respondent's letter stated, *inter alia,* that it had been notified of Complainant's determination to withdraw the complaint or to request dismissal of the proceeding; that in conformance with request of Complainant, Respondent was supplying a copy of 15th Revised Page 159 of Sea-Land Service Tariff No. 283 (FMC No. 161).

From the above it can be seen that the additional information requested by the Presiding Administrative Law Judge and supplied by the parties indicates that there will be no ignoring of the Shipping Act, 1916.

Upon consideration of the above and the record herein the Presiding Administrative Law Judge *finds* and *concludes* the Complainant's request to withdraw the instant complaint and discontinue this proceeding should be granted.

Also that Sea-Land's offer to provide the Commission with appropriate verification of payment of the outstanding freight charges concerned in this proceeding be accepted.

Wherefore, it is ordered,

(A) Request of Complainant to withdraw the complaint herein be and hereby is granted.

(B) Sea-Land will provide the Commission with appropriate verification of the payment of the outstanding freight charges in this proceeding.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

December 28, 1979

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 704(I)

DOW CORNING CORPORATION

v.

UNITED STATES NAVIGATION, INC.

NOTICE

February 14, 1980

Upon consideration, the Commission has determined not to further review the decision of the Settlement Officer in this proceeding served October 29, 1979. Accordingly, the decision is administratively final.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 704(I)

DOW CORNING CORPORATION

v.

UNITED STATES NAVIGATION, INC.

DISMISSAL OF COMPLAINT

Finalized February 14, 1980

DECISION OF TONY P. KOMINOTH, SETTLEMENT OFFICER

Dow Corning Corporation (complainant), a company engaged in the manufacture and distribution of synthetic resin, silicon rubber compounds and various chemicals, filed a complaint through its agent, Traffic Service Bureau, Inc., against U.S. Navigation, Inc. (respondent), for an alleged overcharge on a shipment of Chemicals, NOS (Catalyst), from New York, New York, to Antwerp, Belgium. Complainant seeks $347.35 in reparation plus 6% interest.

U.S. Navigation, Inc., in its answer, noted that the complaint was "improperly served." U.S. Navigation acts as agent for a number of water carriers including Hapag Lloyd, A.G., the actual carrier of the shipment in question. The "improper service" was not raised as a defense to the complaint; in fact, U.S. Navigation, Inc., identified itself as agent for Hapag Lloyd A.G. on this shipment and has consented to the informal procedures under Subpart S.

The basic authority for the filing of complaints can be found in section 22 of the Shipping Act, 1916 which provides in part:

> That any person may file with the Commission a sworn complaint setting forth any violation of the Act by a *common carrier by water, or other person subjct to the Act,* and asking reparation for the injury, if any, caused thereby. (emphasis added)

In this instance, the complaint was filed against U.S. Navigation, Inc., which is not a common carrier by water or other person subject to the Shipping Act, 1916. Complainant's failure to identify a common carrier by water in the complaint is fatal to their cause of action and deprives the Commission of jurisdiction to determine the controversy. *Caterpillar Overseas, S.A. v. South African Marine Corp. (N.Y.),* 19 F.M.C. 316 (1976). Further, the naming of

an agent of such common carrier does not confer Commission jurisdiction over this matter. *Trane Company v. South African Marine Corp. (N.Y.),* 19 F.M.C. 374 (1976).

I realize that dismissal of the complaint at this date may preclude the filing of a new complaint in this matter since the two year statute of limitations has apparently run.* However, the latitude extended by the Commission in allowing an amendment to a complaint in order to preserve its viability within the two year limitation period does not extend to a situation where there has been a failure to name a jurisdictionally indispensable party. *Trane v. South African Marine, supra,* at 383-85; Cf. *Kam Koon Wan v. E. E. Black, Limited,* 75 F.Supp. 553 (D. Hawaii 1948) affirmed, 188 F.2d 558, *cert. den.* 342 U.S. 826 (1951).

Accordingly, the subject complaint is hereby dismissed.

(S) TONY P. KOMINOTH
Settlement Officer

October 29, 1979

*The bill of lading is dated September 30, 1977 and the shipment moved on a "Freight Prepaid" basis; however, there is no indication when the actual freight charges were paid. The complaint was filed with the Federal Maritime Commission on July 2, 1979.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 684

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF SOLTEX POLYMERS CORPORATION

ORDER ADOPTING INITIAL DECISION

February 19, 1980

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)), upon the application of Sea-Land Service, Inc., for permission to waive $10,675.74 of the applicable freight charges owed by Soltex Polymers Corporation on a shipment of Synthetic Resin, N.O.S., that was transported from Houston, Texas to Moss, Norway via Bremerhaven, Germany, and Gothenburg, Sweden.

Administrative Law Judge Stanley M. Levy issued an Initial Decision granting Sea-Land's application. No exceptions were filed, but the Commission on its own motion, determined to review the Initial Decision.

Although the findings and conclusions of the Initial Decision are well founded and correct, one further matter raised by the Commission's grant of the subject application must be addressed. Because of the Commission's decision here, the carrier is permitted to collect less in freight charges than the amount that would have been due under the rate on file and in effect at the time of the shipment in question. To the extent forwarder compensation may have been based upon the total amount from which a waiver has been granted, the parties are reminded that Sea-Land's tariff and section 18(b)(3) of the Shipping Act require that such forwarder compensation be adjusted to reflect the freight rate actually paid.

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

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

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 684, that effective January 1, 1979, for purposes of refund or waiver of freight charges on any shipments which have been shipped during the period from January 1, 1979 through May 10, 1979, the rate from Singapore on Synthetic Resin, N.O.S. is 101.50 W, subject to all rules, regulations, terms and conditions of said rate and this tariff.

IT IS FURTHER ORDERED, That this proceeding is discontinued.
By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 684

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF SOLTEX POLYMERS CORPORATION

Adopted February 19, 1980

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

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

This special docket application,[2] mailed to the Secretary of the Commission on October 19, 1979, seeks a waiver of freight charges of $10,675.74 arising out of a shipment of synthetic resin, NOS, sailing April 30, 1979, from Houston, Texas, to Moss, Norway, via Bremerhaven, Germany, and Gothenburg, Sweden, on Sea-Land vessel *Venture*, voyage 108E.[3]

The pertinent facts giving rise to the relief requested are as follows:

Prior to January 1, 1979, the applicable all-water rates via Sea-Land Service, Inc. (Sea-Land) from United States Gulf ports to Baltic ports were published in Sea-Land's Freight Tariff No. 162-A, FMC-137. This tariff contained an Item 4320 applying on Rosin or Resin, Viz: Synthetic NOS, packed with applicable rates applying on a weight basis. The item contained a circle reference 3 which indicated that the rate also applies in "Sea-Bulk" Liner Bags. "Sea-Bulk" is a registered name for a polyethylene liner that permits the conversion of a standard dry container for the contamination-free, moisture-free transportaion of dry bulk commodities.

During November 1978 the Gulf European Freight Association (GEFA), of which Sea-Land is a member, held meetings in order to establish a uniform FMC Agreement 10270 Tariff to apply via its member lines from the Gulf ports to ports in Scandinavia and the Baltic. At one of these meetings, Sea-Land's duly authorized Conference Manager, James Stevens, instructed the GEFA Chairman to overlay portions of Sea-Land's Tariff No. 162A for trans-

[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] Pursuant to section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. §817, as amended.

[3] One Hundred Seventy-Two days elapsed time from date of sailing until date of mailing of application.

fer into the new 10270 Agreement Tariff. The new tariff, GEFA Agreement No. 10270 Scandinavia/Baltic Tariff No. 1 (FMC-5) became effective January 1, 1979. On that same date Sea-Land Tariff No. 162-A, FMC-137 was cancelled.

The applicable rates of $101.50 W, minimum 15,241 kgs. on Rosin or Resin, viz: Synthetic N.O.S. were published in the new Tariff No. 1 on Page 176. However, as a result of a clerical error in the overlay of the Sea-Land Tariff No. 162-A no reference was made in the GEFA tariff to these rates applying on shipments in bulk in liner bags for the account of Sea-Land. When the omission was detected, Mr. Stevens notified the GEFA secretariat and the clause was added to 3rd Revised Page 176, effective May 10, 1979.

On April 30, 1979, one shipment consisting of three (3) containers of Synthetic Resin in bulk moved via Sea-Land from the port of Houston, Texas, destined to Moss, Norway. In the absence of specific tariff provision for bulk shipments, the bill of lading was rated on the basis of General Cargo, N.O.S. at the rate of $265.50 W/M. In addition to the ocean freight a Currency Adjustment Factor of 8% on the ocean freight, an Energy Surcharge of $3.50 per ton as freighted, and a Houston wharfage charge of $1.10 per ton of 2000 lbs. was assessed. Charges thus billed totalled $17,567.01. The shipper's agent, Stone Forwarding, has paid the ocean freight and Currency Adjustment on the basis of Synthetic Resin N.O.S. at the rate of $101.50W, minimum 15,241 kgs. plus the Energy Surcharge and Wharfage in full for a total of $6,891.27.

It was the intention of GEFA to publish a uniform tariff for its member carrier lines. The new publication was to include portions of the applicable Sea-Land publication, including the provisions for bulk shipments of Syntheitic Resin. However, through a clerical error in the transfer from one tariff to another, the bulk shipment provisions applying for the account of Sea-Land did not become effective until after the shipment had been made.

The applicants have certified that there are no other pending applications involving the same rate situation and that, to the best of their knowledge there are no other shipments of other shippers of the same or similar commodity which moved during the period of time beginning on the day the bill of lading was issued and ending on the day before the effective date of the conforming tariff and moved on the same voyage of the vessel carrying the shipment involved in this application.

Section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. §817 (as amended by Public Law 90-298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 C.F.R. §502.92(a), set forth the applicable law and regulation. The pertinent portion of section 18(b)(3) provides that:

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

be based. . . . (and) Application for refund or waiver must be filed with the Commission within (180) days from the date of shipment.

The error in filing the new tariff, as recited in the application, is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

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

(1) There was an error due to an inadvertent failure to file a new tariff transferring the rates from one tariff to another as intended.

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

(3) Prior to applying for authority to waive a portion of the freight charges, the conference filed a new tariff which set forth the rate upon which such waiver would be based.

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

Accordingly, permission is granted for Sea-Land to waive a portion of the freight charges in the amount of $10,675.74[4]

An appropriate notice will be published in the conference tariff.

(S) STANLEY M. LEVY
Administrative Law Judge

WASHINGTON, D. C.
November 16, 1979

[4] Charges originally billed—$17,567.01; charges paid—$6,891.27.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-55

MATSON NAVIGATION COMPANY—PROPOSED BUNKER SURCHARGE IN THE HAWAII TRADE

ORDER OF CLARIFICATION

February 19, 1980

The Commission's Bureau of Hearing Counsel has filed a petition requesting clarification of that portion of the Commission's Report and Order Adopting Initial Decision, served November 23, 1979, which addresses the remedy to be applied to the overrecoveries of fuel costs collected by Matson Navigation Company.

In its Report and Order the Commission found that the Presiding Officer relied on the mechanism provided in Domestic Circular Letter No. 1-79 to adjust the overrecovery of fuel costs, *i.e.*, Line 7 of Form FMC-274. In its Petition for Clarification, Hearing Counsel asserts that the Presiding Officer did not rely exclusively on the remedies incorporated in the Circular Letter but also held that claims for reparations under section 22 of the Shipping Act, 1916 (46 U.S.C. §821) may lie. In support of this contention, Hearing Counsel refers to the following language at page 46 of the Initial Decision:

> In the last analysis, therefore, apparently the Commission has decided that the best protection for shippers paying surcharges at any particular time is the guarantee that Matson has been required to follow reasonable forecasting techniques (*failing which Matson would be liable to reparation cases*) and that in the event of overrecovery there will be future reducing effects on subsequent surcharges. (emphasis added).

Hearing Counsel concludes from the above quoted language that Form FMC-274 was to be used to adjust only those overrecoveries that result from discrepancies between a carrier's reasonable forecasts of fuel costs and consumption and that which subsequently actually occurs, with any other overrecoveries resulting from either unreasonable forecasts or erroneous methodologies to be remedied by section 22 complaints.

Total reliance on the remedy allowed by the Domestic Circular Letter would allegedly result in carriers avoiding their responsibility to establish just and reasonable rates, open avenues to avoid repaying overrecoveries, render inconsequential the Commission's function in determining the reasonableness of

such surcharges, fail to compensate those who paid the excess charges, provide a windfall to carriers and possibly render carriers liable to double recoveries.

On the basis of the foregoing, Hearing Counsel specifically requests that the Commission clarify its November 23 Order to expressly permit the filing of section 22 reparation claims to lie for the recovery of excess revenues collected by Matson.

In its Reply to Hearing Counsel's Petition Matson takes the position that: (a) the Commission's Report and Order is not ambiguous; (b) its findings have already been incorporated into Matson's January 14, 1980 bunker surcharge; and (c) allowing an alternative remedy in this case would result in a needless multiplicity of litigation.

DISCUSSION

The portion of the Intitial Decision relied upon by Hearing Counsel, in and of itself, does not support the full extent of the relief requested. First, that language does not refer *specifically* to the overrecovery at issue in this case. Moreover, in other passages, the Initial Decision suggests that the remedy for overrecoveries is limited to the reduction of future surcharges through operation of the Domestic Circular Letter. I.D. at 35, 45, 46, 59, 60. For example, at page 35, the Presiding Officer advises:

> Again, although the Line 7 solution is not perfect, it is a substantial safeguard and given the practical difficulties of litigating the merits of constantly changing surcharges under strict time constraints, *perhaps there is no better solution*. (Emphasis added).

However, because the Initial Decision does not clearly address the appropriate remedy in this case, and because of the uncertainty expressed in Hearing Counsel's petition, the Commission is of the opinion that some clarification of the remedy issue is warranted.

The consideration that is perhaps most important with regard to remedies is whether a given approach will most effectively make whole the injured shippers without unduly penalizing the carrier. Docket No. 76-43—*Matson Navigation Company Proposed Rate Increases, etc.* Order on Reconsideration, 19 S.R.R. 263, 269 (1979). It was the Commission's intention that the Line 7 procedure provide the primary remedial device to be applied to the overrecoveries of fuel costs by carriers filing bunker surcharges.[1] This, however, is not intended to preclude the Commission from giving favorable consideration to shipper reparation claims under section 22 of the Act where the Line 7 remedy does not provide adequate relief.

Carriers should not realize a windfall from a proper application of Line 7 of Form FMC-274. Under a Line 7 theory any excess surcharge will have to be accounted for in future surcharges, and, it appears that bunker surcharges will continue to be filed. While a problem would be presented if no subsequent

[1] In fact, the application of the Line 7 procedure would, particularly in this case, appear to provide a more realistic remedy than reparations. The potential section 22 recovery here is a very small portion of the total freight an average rate payer remits. The theoretical maximum amount of money in question had the surcharge been in effect a full 120 days is $42,860, which represents only .07% of the $63,617,200 gross projected revenue during this period. I.D. at 19 n. 7. Under such circumstances it is highly unlikely that the recognition of a shipper's theoretical right of reparation in this case will result in the filing of any section 22 complaints and primary reliance upon such a remedial procedure would result in the carrier enjoying a windfall.

surcharges were imposed by a carrier, in this case Matson has, in fact, accounted for the excess recovery of fuel costs determined in this case in a subsequently filed surcharge.

Similarly, the application of current overrecoveries to future fuel cost needs does afford at least some of the overcharged ratepayers a benefit under such circumstances.[2] While not all of Matson's shippers remain the same due to the seasonal nature of some commodity movements, the majority of them should be the same from one four month period to the next. These should include the large volume shippers such as the intervenors in this case.

There was no ambiguity about the possibility of double recovery in the Commission's Report and Order in this case. Reparations are discretionary and if in any particular case the Commission is of the opinion that Line 7 has effectively returned any excess surcharge revenue to the complainant, then it would not appear to be an abuse of discretion to refuse to order reparation under section 22 to the extent a shipper was actually compensated by such a procedure. However, as indicated above, this should not be construed so as to prevent shippers from seeking reparations in those circumstances where the Line 7 remedy proves inadequate.

Finally, the Commission emphasizes the fact that the use of Line 7 of Form FMC–274 does not relieve carriers of their legal obligation to file reasonable rates. Regardless of the available statutory remedies, carriers still have a legal obligation to charge and establish reasonable rates. In this regard, the Commission will exert every effort to devise and utilize whatever meaningful and lawful remedial actions are warranted in any particular case.

THEREFORE, IT IS ORDERED, That the Petition for Clarification filed by Hearing Counsel is granted to the extent indicated above, and is denied in all other respects.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] As was noted in the Initial Decision, the subject 4.43% surcharge should have been set at 4.24%. (I.D. at 59). This computes to $.11 per barrel of bunker fuel allocable to general cargo and consumed in the four month test period in this case. See I.D. at 42. If it can be assumed that Matson's fuel consumption will remain reasonably constant in the near future the Line 7 accounting of the excess recovery should dampen the following four months' per barrel fuel cost by a figure of similar magnitude.

FEDERAL MARITIME COMMISSION

TITLE 46—SHIPPING

CHAPTER IV

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND ACTIVITIES

[GENERAL ORDER 13, AMDT. 2 AND GENERAL ORDER 43; DOCKET NO. 79-65]

PART 536—FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES.

PART 552—CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

Feburary 20, 1980

ACTION: Final Rule

SUMMARY: These final rules implement provisions of Public Law 96-25, 93 Stat. 71, which mandates that the Commission require the Chief Executive Officer of every vessel operating common carrier by water in the foreign commerce of the United States to file periodic certification attesting to company policies and efforts to combat rebating. Discretionary authority is given to the Commission to require similar certification from any shipper, consignor, consignee, forwarder, broker, other carrier or other person subject to the Shipping Act, 1916.

EFFECTIVE DATE: February 27, 1980

SUPPLEMENTAL INFORMATION:

The Commission previously gave notice (44 Fed. Reg. 39232-33) that it proposed to amend 46 C.F.R. § 536 and to add a new Part 552 to enable the Commission to implement the provisions of Public Law 96-25, 93 Stat. 71, which mandates that the Commission require the Chief Executive Officer of every vessel operating common carrier by water in the foreign commerce of the United States to file periodic certification attesting to company policies and

efforts to combat rebating. Further, Public Law 96-25 gives the Commission discretionary authority to require similar certification from a shipper, consignor, consignee, forwarder, broker, other carrier, or other person subject to the Shipping Act, 1916. Comments from the public were invited with respect to the proposed rules, and a total of 15 comments were filed on behalf of 29 representative commentators. Of the 15 separate comments, 8 comments represented the opinion of 21 conferences, 3 comments represented the views of U.S. flag carriers (Farrell Lines, Lykes Brothers Steamship Co. and Sea-Land Service), 2 comments were received from 2 shippers (City Products Corporation and NCR Corp.), 1 comment was submitted by the Council of European and Japanese National Shipowners' Associations (CENSA) and the Department of State forwarded an Aide Memoire from the Consultative Shipping Group (CSG).

POSITIONS OF THE COMMENTATORS

Many of the commentators viewed portions of the proposed rules as exceeding the authority prescribed by Public Law 96-25. One commentator was in total agreement with the rules as proposed, while another totally rejected the rules in the proposed form. The majority of comments, however, suggested specific changes in the proposed rules.

The CENSA group urged that the rules as proposed be rejected because the certification would (1) exceed the statutory mandate under section 4(b) of Public Law 96-25, and (2) do violence to established principles of international law and comity.

Three commentators urged that the certification requirements be binding upon nonvessel operating common carriers (NVO's) as well as vessel operating common carriers (VOC's) for the reasons that, (1) NVO's would not present the Commission with an identification problem since they are required to file tariffs with the Commission and, (2) that VOC's are sometimes in competition with NVO's, and NVO's would gain an unfair advantage by not being bound to the certification requirements. One of these commentators also urged that in addition to NVO's, freight forwarders and major shippers, consignees and consignors be bound by the certification requirements.

One commentator suggested that the Chief Executive Officer be defined as the most senior officer within the company as designated by the Board of Directors. This commentator also suggested that, if the Chief Executive Officer is domiciled in a country other than the United States, the top ranking official domiciled in the United States also be required to make such certification in order to avoid any legal impediments in the country where the Chief Executive Officer resides.

One commentator wanted to make the certification subject to national law and/or the express permission of its government.

One commentator urged clarification of section 552.2(a) in order to show that this section applies to the company generally as well as officers, employees or agents of that company. The same commentator also stated that the broad promulgation required under paragraph (b) of this section is neither feasible

nor reasonable for persons other than vessel operating common carriers, since such person, particularly shippers, have many employees and agents who are in no way connected or associated with the company's ocean shipping practices and to require promulgation to such persons is an unnecessary and undue burden.

One commentator states that the language of paragraph 552.2(c) could be interpreted as requiring the filing company to establish an intra-corporate program to prevent malpractices, while the statute only appears to call for disclosure of the measures, if any, which have been taken by the filing company to prevent or correct the illegal rebating. Two commentators urge the deletion of "and any subsidiaries, affiliated companies, or agents" from this paragraph, stating that compliance is impossible in the current world of interrelated companies and submitted that the Commission does not have jurisdiction to so extend the clear terms of the statute.

Nine commentators favored deletion of the last sentence of paragraph (d) of section 552.2 which states that full cooperation shall include disclosure of all relevant documents and information. Commentators felt that this requirement exceeded the statutory authority under section 4(b) of Public Law 96-25 because regardless of any privilege, statutory requirement or other ground for exception from such disclosure, the Commission has introduced a substantive change in the certification requirement that was neither considered nor contemplated by Congress. Another commentator suggests that at the very least, if not deleted, such affirmation for disclosure of relevant documents or information be required "only as otherwise required by law." Another commentator stated that the Commission has the authority to implement the certification requirements only with respect to the frequency, form and specific content of the certification.

Six commentators, all representing conferences/rate agreements, strongly opposed the tariff notification requirement of section 552.3, as applicable to conferences and rate agreements. These commentators argue that this requirement would serve no useful function, that the Commission offered no justification for this requirement in the Notice of Proposed Rulemaking, and that conferences and rate agreements have neither statutory responsibility nor any means of knowing whether member lines have implemented such policies. Their concern is that the carrier would be subject to additional sanction for the violation of the tariff notation required by the proposals and that such a requirement does not in any way enhance enforcement of the anti-rebating laws.

Two commentators urged that section 552.4—(Change of Chief Executive Officer) be deleted, since it is the commitment of the carrier, and not the Chief Executive Officer, that is the goal of the certification process and there is no reason to believe that a company would change its policy with a change of its executive officer.

Regarding the reporting requirement of section 552.5, one commentator suggested that a period of every three years would fully satisfy the statutory purpose and would significantly reduce the administrative burden of the certifications to the carrier. Another commentator suggested that all certifications be required to be filed within a specified period of time in each calendar year, so

as to avoid inadvertent default because the carrier failed to recall the date of its initial submission to the Commission.

Regarding paragraph (b) of the reporting requirement section, one commentator questioned whether annual certifications for persons other than carriers should be required unless the Commission has good cause.

All comments submitted with respect to the proposed rules were given due consideration. The following is a section-by-section analysis of the changes made as a result of the comments received.

552.1 *Scope*

Two conference commentators and one carrier suggested that NVO's be bound by the proposed rules. One of these commentators also recommended that major shippers, consignees, consignors and all freight forwarders be bound by the rules proposed.

It was pointed out that since NVO's are already required to file tariffs with the Commission, and freight forwarders are required to obtain licenses from the Commission, the identification problem would be manageable and not an administrative burden to the Commission. Further, commentators argue that VOC's are sometimes in competition with NVO's and to require NVO certification would tend to eliminate the opportunity for the NVO's to gain an unfair advantage through not being subject to the anti-rebating principles of the statute. In order to implement the certification requirement of Public Law 96-25 expeditiously, the final rule has not been changed to bind NVO's to the same certification requirement as vessel operators. However, the Commission will consider the issuance of a separate notice of proposed rulemaking proposing to amend this rule to bind NVO's and other entities to the annual certification requirement.

Freight forwarders, shippers, consignees and consignors do represent an enormous number of potential ocean carrier users for which a certification requirement cannot feasibly be administered by the Commission. The discretionary authority prescribed in the statue for such certifications on a case-by-case basis has, however, not been changed.

552.2 *Form of Certification*

The first paragraph of this section has been changed to include a definition of "Chief Executive Officer". Paragraph (a)(1) has been clarified to show that rebates *by the company*, as well as by any officer, employee or agent, are prohibited.

Paragraph (b) of the proposed rules which is now paragraph (a)(2), has been changed to require that the company policy be promulgated to each company owner, officer, employee and agent who is directly or indirectly connected with commercial ocean shipping, import or export sales or purchasing.

Proposed paragraph (c) which is now paragraph (b), has been changed to conform more closely with the statutory language. The reference to subsidiaries, affiliated companies or agents has been deleted in order to ascertain

the specific efforts made within the company or otherwise to prevent illegal rebating.

Proposed paragraph (d) which is now paragraph (c), has also been changed to conform more closely with the statutory language. The Commission deems it unnecessary to elaborate on the question of what constitutes full cooperation since this rule will not and cannot affect the obligation of carriers to produce documents and information in response to subpoenas or discovery in rebating investigations and the statutory sanctions for failure to produce such documents and information.

The changes in section 552.2 have been incorporated in the certification form.

With regard to the one comment suggesting that the Commission also require certification from the top ranking official of a foreign company who is domiciled in the United States, the Commission has determined that such a requirement is not necessary at this time.

552.3 *Tariff Notification*

The justification for this requirement evolves from the basic definition and purpose of a tariff, i.e. a publication containing the actual rates, charges, classifications, rules, regulations, and *practices* of a carrier or conference of carriers for transportation by water (46 C.F.R. §536.2(m)). The term "practice" refers to usages, customs, or modes of operation which in anyway affect, determine or change the transportation rates, charges, or services provided by a carrier. The unlawful practice of rebating, or charging any rate lower than those in published tariffs, has been singled out by Congress to be "eliminated from the U.S. ocean commerce".

To require that a practice (or policy) against illegal rebating be published in a carrier's tariff is consistent with the purpose of the tariff filing requirements and the purpose of Public Law 96-25. The Commission believes that such publication will inform the shipping public of the carrier's prohibition against rebates.

Although the Commission agrees with several conference commentators that conference/rate agreements have neither the responsibility nor the means of knowing whether such policies of the member lines have been implemented, it believes that conference/rate agreements do have the duty to publish the anti-rebating practices or policies of their members.

Therefore, section 552.3 has been revised to provide that, when the carrier's tariff is a conference/rate agreement tariff, the carrier shall ensure that the conference publish the carrier's tariff provision in the conference or rate agreement tariff.

552.4 *Change of Chief Executive Officer*

Two commentators urged that this section be deleted since it is the commitment of the carrier, and not its chief executive that is the objective of the certification process and that there is no reason to believe that a company policy in

favor of adhering to United States laws would change because of a change of the Chief Executive Officer.

While the Commission agrees that company policy may not change with a new Chief Executive Officer, the statute mandates that the Commission shall have such certification from the Chief Executive Officer and the proposed paragraph assures that such certification will be kept up-to-date, regardless of company personnel changes.

Therefore, no change in this requirement has been made.

552.5 *Reporting Requirements*

This section has been revised to require written certification from vessel operating common carriers on or before March 31 of each year. The provision referring to every person other than a vessel operating common carrier required to submit such certification has been changed to delete the annual certification requirement.

The Commission has considered all filed comments and arguments reasonably related to this rulemaking proceeding.

Accordingly, pursuant to the provisions of section 4 of the Administrative Procedure Act (5 U.S.C. § 553), sections 21 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 820 and 841(a)), the Federal Maritime Commission hereby amends 46 C.F.R. § 536 and enacts 46 C.F.R. § 552 as follows. The reporting requirements contained in 46 C.F.R. § 552 sections 2, 3, 4 and 5(a) have been approved by the U.S. General Accounting Office under number B-180233 (R0663).

PART 536

Section 536.5(c)(2) is amended to add the following language:

Every vessel operating common carrier shall publish a tariff provision to be effective upon filing which shall read substantially as follows:

(Name of Company) has a policy against the payment of any rebate, directly or indirectly, by the company or by any officer, employee, or agent, which payment would be unlawful under the United States Shipping Act, 1916. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act Amendments of 1979, Public Law 96-25, 93 Stat. 71, and the regulations of the Commission set forth in 46 CFR 552.

When the carrier's tariff is a conference/rate agreement tariff, the carrier shall ensure that the conference or rate agreement publish the carrier's tariff provision in the conference/rate agreement tariff.

PART 552

552.1 *Scope*

The requirements set forth in this part are binding upon every vessel operating common carrier by water in the foreign commerce of the United States and,

at the descretion of the Commission, will be applicable to any shipper, consignor, consignee, forwarder, broker, other carrier, or other person subject to the Shipping Act, 1916.

552.2 *Form of Certification*

The Chief Executive Officer (defined as the most senior officer within the company designated by the board of directors, owners, stockholders or controlling body as responsible for the direction and management of the company) of every vessel operating common carrier by water in the foreign commerce of the United States and, when required, at the discretion of the Commission, the Chief Executive Officer of any shipper, consignor, consignee, forwarder, broker, other carrier or other person subject to the Shipping Act, 1916, shall file a written certification, under oath, as set forth in the format in Appendix A attesting to the following:

(a)(1) That it is the stated policy of the filing company that the payment, solicitation or receipt of any rebate, directly or indirectly, by the company or by any officer, employee, or agent which is unlawful under the provisions of the Shipping Act, 1916, is prohibited; and

(2) That such company policy was promulgated (together with the date of such promulgation) to each company owner, officer, employee, and agent who is, directly or indirectly, connected with commercial ocean shipping, import or export sales or purchasing; and

(b) The details of measures instituted within the filing company or otherwise to eliminate or prevent the payment of illegal rebates in the foreign commerce of the United States; and

(c) That the filing company will fully cooperate with the Commission in any investigation of illegal rebating or refunds in United States foreign trades and with the Commission's efforts to end such illegal practices.

552.3 *Tariff Notification*

Within 90 days after the effective date of this Part, each vessel operating common carrier by water in the foreign commerce of the United States shall file a provision in each of its tariffs that shall read substantially as follows:

(Name of Company) has a policy against the payment of any rebate, directly or indirectly, by the company or by any officer, employee, or agent, which payment would be unlawful under the United States Shipping Act, 1916. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act Amendments of 1979, Public Law 96-25, 93 Stat. 71, and the regulations of the Commission set forth in 46 CFR 552.

When the carrier's tariff is a conference/rate agreement tariff, the carrier shall ensure that the conference or rate agreement publishes the carrier's tariff provision in the conference/rate agreement tariff. This provision shall be effective upon filing.

552.4 *Change of Chief Executive Officer*

Every vessel operating common carrier by water and any other person required by the Commission to file a certification in accordance with section 552.2 shall notify the Secretary, Federal Maritime Commission, of the identity of any new Chief Executive Officer within thirty (30) days of such appointment. Each new Chief Executive Officer shall file a certification as required by section 552.2 of this Part within thirty (30) days of appointment.

552.5 *Reporting Requirements*

(a) Every vessel operating common carrier by water in the foreign commerce of the United States required by this Part to submit a written certification to the Secretary, Federal Maritime Commission, shall submit such certification on or before March 31 of each year.
(b) Every person other than a vessel operating common carrier by water in the foreign commerce of the United States who is required by the Commission to submit a written certification under section 552.2 of this Part shall submit the initial certification to the Secretary, Federal Maritime Commission, on the date designated by the Commission and, thereafter, as the Commission may direct.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

APPENDIX A

(NAME OF FILING COMPANY)

Certification of Company Policies and Efforts to Combat Rebating in the Foreign Commerce of the United States

Pursuant to the requirements of section 21(b) of the Shipping Act, 1916, 46 U.S.C. §820, and Federal Maritime Commission regulations promulgated pursuant thereto, 46 C.F.R. §552, I, _____, Chief Executive Officer of (name of company), state under oath that:

1. It is the policy of (name of company) that the payment, solicitation, or receipt of any rebate, directly or indirectly, by the company or any officer, employee, or agent of such company which is unlawful under the provisions of the Shipping Act, 1916, is prohibited.
2. On or before _____, 19__, such company policy was promulgated to each owner, officer, employee and agent of (name of company) who is directly or indirectly connected with commercial ocean shipping, import or export sales or purchasing.
3. [Set forth the details of measures instituted by the filing company or otherwise to eliminate or prevent the payment of illegal rebates in the foreign commerce of the United States].
4. (name of company) affirms it will fully cooperate with the Federal Maritime Commisison in any investigation of illegal rebating or refunds in United States foreign trades and with the Commission's efforts to end such illegal practices.

_____

Signature

Subscribed and sworn before me this _____ day of _____ 19__.

_____

Notary Public

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-73

DRAYAGE SERVICE UNDER AGREEMENT NO. 2846

REPORT AND ORDER

February 21, 1980

A steamship conference with section 15 authority to perform "delivery" service relating to port-to-port shipments, may deliver cargo to inland points located within a reasonable distance from the ocean terminals used by conference vessels; provided, that such transportation is geographically limited to motor carrier "exempt zones" established under 49 U.S.C. § 10526(b) and is, in any event, exempt from ICC economic regulation.

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

The Commission has before it the "Petition for Declaratory Order" filed by the 17 ocean carriers which comprise the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference (WINAC), and the reply comments submitted by eight interested parties (Intervenors).[1]

WINAC serves the U.S. inbound trade pursuant to FMC Agreement No. 2846. Among their other activities, WINAC lines offer an "intermodal drayage service" between ocean terminals at various locations within the Port of New York and New Jersey and the Conrail "Portside" railroad terminal located in Port Elizabeth, New Jersey (Conrail Drayage) for containerized cargoes ultimately destined to interior points.[2] WINAC's petition does not state whether Conrail Drayage is furnished for cargo moving inland on *through* bills

[1] The other Intervenors are: Seatrain International, S.A., a member of WINAC; the Port Authority of New York and New Jersey; New York Terminal Conference; Virginia Port Authority; Maryland Port Administration; Delaware River Port Authority; Port of Philadelphia Marine Terminal Association; and the Commission's Bureau of Hearing Counsel.

[2] Conrail Drayage is performed by motor carriers. WINAC did not provide the exact location of the Conrail terminal or the ocean terminals used by its member lines, but the Commission has taken official notice of the locations specified in the 1978 "New York-New Jersey Port Directory." This directory indicates that about half the WINAC lines use terminals on the west side of the Hudson River (Port Elizabeth, Weehauken, Port Jersey, Newark) and half use terminals in Brooklyn, six miles due east of Port Elizabeth. WINAC Tariff No. FMC 3, 3rd Revised Page 58, Item 9 states that the charge for Conrail Drayage is "open" subject to a $55.00 minimum amount. Three member lines with terminals in Brooklyn publish $75.00 "open rates" under this provision. The terminal tariff of Sea-Land Service, Inc., FMC-T No. 3, 13th Revised Page 128, Item No. 5160, provides for Conrail Drayage at $21.00 per container except for WINAC shipments. WINAC shipments are assessed the $55.00 minimum specified in the WINAC tariff.

of lading or on *separate* bills of lading, but WINAC's tariffs do not include rates for intermodal transportation under through bills of lading *to* interior points within the United States. WINAC does publish through intermodal rates *from* interior points in Italy and Yugoslavia. WINAC member lines do not offer through intermodal service to interior U.S. points under separately published tariffs.

WINAC's organic conference agreement (Agreement No. 2846) has been approved by the Commission pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). The preamble to Agreement No. 2846 contains two paragraphs which provide, in pertinent part, as follows:

> The parties . . . hereby associate themselves . . . [to establish] reasonable rates, charges and practices for the transportation of merchandise . . . in the trade from Italian ports (including Islands), points in Italy (including Islands), Yugoslavia ports and points, to the extent such cargo moves through ports of Italy and Yugoslavia to North Atlantic ports of the United States (Hampton Roads/Portland Range), whether moving on a through Bill of Lading or otherwise.
>
> This Agreement shall also extend to . . . arrangements or agreements among the parties: (1) with other modes of transportation for the movement of cargo to and/or from inland points moving from loading to discharge ports covered by this Agreement, whether moving under through bills of lading or otherwise; (2) concerning intermodal shipments, inland rates, rules, changes, classifications, practices, liability, Bill of Lading conditions, per diem, free time, detention on Carrier-provided containers, chassis and related equipment, position of equipment, interchange with connecting carriers, terminal and shoreside loading operations, including wharfage, free time and demurrage, *receipt, handling, storage and delivery of cargo,* consolidation, container yards, depots and freight stations, insofar as the foregoing concern cargo moving from loading to discharging ports covered by this Agreement whether any of the foregoing related to through Bill of Lading movements or otherwise; and (3) such other matters as may be *ancillary to the transportation of said intermodal shipments, whether moving on a through Bill of Lading or otherwise,* it being the intention of the parties to include within the scope of this Agreement to the maximum extent as may from time to time be permitted by applicable law, rates, charges and practices relating to *movements from and/or to inland points of origin or destination whether or not moving under a through Bill of Lading*. . . . (Emphasis supplied).

WINAC requests a ruling that the preamble to Agreement No. 2846, and particularly the portions underscored above, permit it to concertedly:

> [e]stablish, maintain, modify, or eliminate charges, including drayage charges, for the transportation of intermodal shipments from the members' ocean terminals at U.S. North Atlantic ports to inland points of destination. (Petition at paragraph 5).

The term "intermodal shipment" was not defined and no particular attention was given to it by the petitioners. The context of WINAC's petition indicates, however, that the conference interprets the term broadly and would prefer to perform Conrail Drayage for through bill shipments from European origins to *U.S. inland points* as well as for shipments rated only to U.S. *ports.*

In addition to the preamble's expansive language pertaining to "intermodal shipments," WINAC states that Conrail Drayage should be considered an integral part of its port-to-port transportation service. It is contended that Conrail Drayage is simply a manifestation of an ocean carrier's traditional responsibility to deliver cargo to a safe and convenient "place of rest," and

WINAC finds support for this argument in an informal opinion from the Director of the Commission's Bureau of Compliance.[3]

Most of the Intervenors oppose a construction of Agreement No. 2846 which would permit WINAC to establish rates for inland drayage or delivery services for any type of cargo over distances as extensive as those involved in Conrail Drayage.[4] There are, however, significant differences in the viewpoints expressed by the eight Intervenors.

Seatrain International is only concerned that Agreement No. 2846 not be construed to include through intermodal transportation to U.S. points or services ancillary to such transportation. The New York port interests are only concerned with the possibility that WINAC's Conrail Drayage practices could discourage cargo movements through the Port of New York. The representatives of Philadelphia, Baltimore and Norfolk port interests are only concerned with the possibility that WINAC's Conrail Drayage practices could unduly favor the Port of New York at the expense of other WINAC ports. Hearing Counsel believes that Agreement No. 2846 encompasses drayage services ancillary to port-to-port (or point-to-port) shipments.

The specific arguments raised by the Intervenors are:

(1) The instant petition represents an attempt by WINAC to avoid ordinary section 15 procedures and the need to justify the application of anticompetitive practices (price-fixing) to inland drayage activities which have developed subsequent to the Commission's approval of Agreement No. 2846-26 on December 12, 1975.
(2) The "ancillary authority" language in Agreement No. 2846 is overly broad, highly ambiguous and should not be extended to Conrail Drayage unless further details are provided. Among the allegedly critical facts omitted from WINAC's petition are: the types of shipments to be handled (port-to-port or house-to-house); the persons who will actually perform the drayage and the arrangements under which they will operate; the level of WINAC's inland drayage charges at each U.S. port it serves; and whether authority to "eliminate" inland drayage charges would authorize WINAC to absorb such charges at any or all the ports it serves.
(3) Any WINAC tariff covering Conrail Drayage should allow the shipper the *option* of performing such services for itself.
(4) WINAC would apparently assess an inland drayage charge only at New York. The $55.00 minimum rate now employed is higher than the rate charged by some WINAC member lines for the same service (*e.g.*, Sea-Land) and could therefore cause cargo to be diverted from New York.

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[3] The July 27, 1978 staff opinion concerned the performance of Conrail Drayage by seven North Atlantic/Europe conferences with agreements similar to Agreement No. 2846. To the extent that opinion equated a carrier's duty to deliver cargo to a "place of rest" with a local delivery service covering several miles, it was erroneous. "Place of rest" is ordinarily a protected area adjacent to ship's tackle. The concept does not involve delivery to the shipper (or the shipper's agent) at locations beyond the ocean carrier's terminal.

[4] It is at least 15 highway miles from the New York Port Authority's Brooklyn piers to Port Elizabeth according to the 1979 *Rand McNally Road Atlas*. The highway distance between the various New Jersey ocean terminals and the Conrail Portside terminal may also be appreciable in any given case.

(5) If WINAC did not establish inland drayage charges at *all* its U.S. ports at rates which approximate the *prevalent rates* at each such port, there could be unlawful discrimination between shippers and ports. Unless New York bears the fair weight of the higher operating costs which prevail at its port—in particular the high cost of moving containers from Long Island piers to New Jersey rail yards—cargo will be diverted from Norfolk, Baltimore and Philadelphia.

(6) Any difference in WINAC's charges for inland drayage services performed at adjacent ports would violate section 205 of the Merchant Marine Act, 1936 (46 U.S.C. § 1115). *See Associated Latin American Freight Conference,* 15 F.M.C. 151 (1972), requiring uniform assessment of conference wharfage charges.

(7) Practices concerning the placement of loaded and unloaded containers at rail ramp locations—both within and without recognized "port areas"—should be uniform for (a) conferences with intermodal authority and (b) conferences without such authority.

DISCUSSION

The question posed by the instant petition is whether WINAC now possesses section 15 authority to establish rates and practices for Conrail Drayage, not whether such authority is or could be implemented in a fashion which violates the Shipping or Merchant Marine Acts. The conclusions reached concerning the section 15 issue do not preclude subsequent consideration of the lawfulness of specific WINAC rates and practices for inland drayage services in New York or other United States ports.

A conference may not lawfully set rates for ancillary services applicable to basic transportation movements which it lacks section 15 authority to provide. The first paragraph of the Agreement's preamble limits WINAC's activities to transportation terminating at *U.S. ports.*[5] Through intermodal transportation is only available from points in Italy and Yugoslavia, and may be extended to U.S. inland points only by an express amendment.[6] Language in the preamble's second paragraph referring to such matters as "through bills of lading," "inland points," "inland rates," and "agreement with other modes of transport," is limited to intermodal traffic originating at *European points* and cannot be viewed as authorizing a United States intermodal service inconsistent with the geographic scope provisions of the preamble's first paragraph.[7] Consequently, no delivery, drayage or other ancillary services applicable to *through intermodal carriage to U.S. points* may be established by WINAC pursuant to Agreement No. 2846. That Agreement can cover Conrail Drayage only if the drayage is performed for cargo moving under a *separate* U.S. inland bill of lading.

[5] This limitation does not, of course, prohibit WINAC from carrying cargo which moves inland from U.S. ports via non-WINAC means. It only limits WINAC's authority to itself undertake such inland transportation.

[6] WINAC's authority to serve inland points in other European countries via Italian and Yugoslavian ports, first approved on December 19, 1974 (Agreement No. 2846-24), expired on October 15, 1975.

[7] Ambiguous agreements are narrowly construed against their proponents. *American West African Freight Conference* (Agreement No. 7680-36), 18 S.R.R. 339, 342 (1978).

Shipments carried by more than one mode of transport under separate bills of lading are not considered "intermodal shipments" from a section 15 point of view.[8] Such shipments are treated like other types of port-to-port shipments, even if carried at special proportional rates. *See Investigation of Overland and OCP Rates,* 12 F.M.C. 184, 208 (1969), *aff'd sub nom. Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663 (5th Cir. 1970).

The performance of inland transportation beyond a carrier's immediate terminal area (pier, wharf and cargo storage facilities) is not a matter "ancillary" to a basic conference port-to-port service. Neither is the concerted provision of transportation as extensive as that involved in Conrail Drayage authorized by section 15 language pertaining only to "drayage" or "ancillary services." A more precise description is necessary. Such a description is found in Agreement No. 2846, however, which expressly permits the "delivery of cargo" as a service ancillary to WINAC's port-to-port shipments.

A conference with authority to perform "delivery" services for port-to-port shipments may haul cargo to facilities of the shipper/consignee (or its designated agent) which are situated a reasonable distance from the ocean terminals used by conference members. In the instant case, the inland carrier (Conrail) is the shipper's agent for purpose of the local delivery provision, and drayage to the Conrail terminal is equivalent to delivery at the shipper's own plant. Moreover, because the Conrail terminal is less than thirty highway miles from the furthest WINAC pier and is located within the New York/New Jersey "commercial zone" exempt from Interstate Commerce Commission motor carrier regulation under 49 U.S.C. § 10526(d),[9] it is concluded that Conrail Drayage does not exceed a reasonable distance when undertaken from either the New Jersey or the Brooklyn piers used by WINAC members.

The exact geographic scope of a local pick-up and delivery service and the details of its availability are matters within the discretion of the conference in the first instance. These details need only be described with particularity in the conference tariff. It is necessary, however, for conference agreements pertaining to the pick-up or delivery of port-to-port cargo to clearly state that agreement may be reached concerning cargo pick-up or delivery to *local* receiving facilities designated by the shipper/consignee and that any such services shall not include activities subject to economic regulation under the Interstate Commerce Act.[10]

The exclusion of ICC regulated delivery activities is required because the FMC and ICC are prohibited from regulating a service performed by the same

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[8] Conferences may not perform intermodal services absent approval of a specific section 15 agreement delineating the services involved; intermodal authority of any type will not be implied. *Lykes Bros. Steamship Company, Inc. v. Far East Conference,* 19 F.M.C. 589, 593 (1977). Because WINAC may not presently serve U.S. inland points, the use of the term "intermodal shipments" in Agreement No. 2846 is ambiguous and misleading. To remedy this situation, a clarifying amendment should be submitted by WINAC which indicates that ancillary services may be performed only with respect to shipments within the scope of the preamble's first paragraph. Such an amendment could simply delete the phrase "intermodal shipments" from item (2) of the second paragraph and replace it with the phrase "shipments within the scope of this agreement" in item (3) of that paragraph.

[9] Port Elizabeth is in Elizabeth, New Jersey, a "contiguous municipality" relative to the ocean terminals used by all of the WINAC member lines. *See* 49 C.F.R. §§ 1048.100 and 1048.101.

[10] Local pick-up and delivery service by motor carriers is exempt from Interstate Commerce Act regulation (other than safety standards) when performed within local "commercial zones" established under 49 U.S.C. § 10526(b). Although local delivery services need not be performed by motor carrier, any alternative method chosen by the ocean carrier must also allow full Shipping Act regulation of the service provided.

persons at the same time. 46 U.S.C. § 832. To avoid confusion and possible regulatory overlap, local cargo delivery which does involve ICC regulated transportation must take the form of joint through intermodal rates filed pursuant to section 536.8 of the Commission's Rules (46 C.F.R. § 536.8).[11] Such rates may be offered only by conferences with express "intermodal authority" under section 15 of the Shipping Act to serve appropriate interior points within the United States.

Because Agreement No. 2846 does not plainly state its applicability to the delivery of port-to-port cargoes to local facilities designated by the shipper/consignee, and does not restrict this ancillary activity to areas exempt from ICC motor carrier regulation, WINAC should submit an appropriate clarifying amendment at its earliest convenience.[12] In the future, agreements involving "pick-up and delivery services" will not be approved unless they describe the services upon which the proponents may agree in a manner consistent with this decision.

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference member lines is granted to the extent indicated above, and denied in all other respects.

By Order of the Commission.

(S) FRANCIS C. HURNEY
Secretary

[11] Section 536.8 is not restricted to *joint* through transportation. It also applies to the through route offerings of a single carrier which involve inland transportation extending beyond ocean terminal areas. An ocean carrier therefore has some flexibility in deciding whether to offer a through rate door-to-door service or a port-to-port service with separate pick-up and delivery. In all situations, inland transportation services must be separately identified and appropriately rated in an ocean carrier's tariff.

[12] An appropriate amendment to Agreement No. 2846 would authorize the conference to furnish:
local pick-up or delivery to or from shipper designated locations (including inland carrier terminals) within the Interstate Commerce Commission "commercial zone" set forth in 49 C.F.R. Part 1048 for each port served; *Provided*, that any pick-up or delivery service offered shall not be subject to economic regulation under the Interstate Commerce Act.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-84

MATSON NAVIGATION COMPANY PROPOSED 5.90 PERCENT BUNKER SURCHARGE INCREASE IN TARIFFS FMC-F NOS. 164, 165, 166 AND 167

ORDER ADOPTING INITIAL DECISION

February 21, 1980

This proceeding was instituted by Order of Investigation served August 24, 1979, to determine the lawfulness of a 5.9% bunker surcharge filed by Matson Navigation Company. The surcharge became effective August 25, 1979 and though scheduled to expire in 120 days was superceded by a 6.66% surcharge, which has also been made the subject of a Commission investigation.[1] As with prior bunker surcharges filed by Matson, all commodities except bulk sugar and molasses which move under specially negotiated rates that include fuel cost escalator clauses were made subject to the surcharge.[2] While this difference in treatment was the subject of the Commission decision in Docket No. 79-55,[3] it was also included as an issue in this investigation to allow application of whatever findings were made in that proceeding.

Three additional matters were put at issue in this proceeding, to wit:

a. Should an allocation be made between trade and non-trade cargo carried between the West Coast and Hawaii;

b. Should the fuel cost of the vessel *KOPAA* be excluded from the calculation of expense while tonnage carried aboard the *KOPAA* is included in the trade tonnage figure; and

c. Is it proper to allocate fuel costs for the months of April and May on a percentage which is based on a four month period that included February and March?

Matson was named Respondent in this proceeding and two of Matson's shippers, Oscar Mayer & Co., Inc. and George A. Hormel & Co., were named

[1] Docket No. 79-92—*Matson Navigation Company—Proposed 6.66% Bunker Surcharge* (Order of Investigation, served October 15, 1979).

[2] Matson's tariffs FMC-F Nos. 164, 165, 166 and 167 include the surcharge at issue while tariffs FMC-F Nos. 168 and 169, applicable to raw sugar and bulk molasses, include negotiated fuel adjustment clauses.

[3] Docket No. 79-55—*Matson Navigation Company Proposed Bunker Surcharge In the Hawaii Trade*—Report and Order Adopting Initial Decision—19 S.R.R. 1065 (1979).

Protestants, along with the State of Hawaii. The Commission's Bureau of Hearing Counsel also participated. Administrative Law Judge Joseph N. Ingolia held a prehearing conference, wherein it was determined that in light of the Commission's decision in Docket No. 79-55 and Matson's admission that its position as to Issues (b) and (c) above was in error, the only issue left to be resolved was the question of the treatment of non-trade cargo. It was agreed that no oral testimony was necessary and that the hearing would be limited to written submissions. An Initial Decision was issued by the Presiding Officer on December 21, 1979. Exceptions to this decision were filed by Respondent, Protestants and Hearing Counsel.

INITIAL DECISION AND POSITION OF THE PARTIES

The Initial Decision essentially rejects the methodology utilized by Matson in computing the instant surcharge and adopts that advanced by the Commission's staff as the most reasonable. The staff methodology relies on the finding of Docket No. 79-55 that the increased fuel costs must be allocated between general cargo subject to the surcharge and bulk sugar and molasses subject to fuel escalation clauses on a measurement ton basis. Matson did not so allocate in computing the instant surcharge, but merely subtracted the escalation clause recovery from the total increased fuel costs for the entire service. This difference in methodology, which was the only difference that was found to affect the level of the surcharge, resulted in a finding by the Presiding Officer that the amount of the surcharge should have been 5.73% rather than the 5.90% charged by Matson.

The Presiding Officer found that resolution of the remaining issues stated in the Order of Investigation (Issues (a), (b), and (c) above) would not affect the level of the surcharge, regardless of how they were resolved. Early in the proceeding the parties had agreed that the inclusion of February and March in the four month period used to allocate fuel costs for the months of April and May did not change the amount of the surcharge and, therefore, the percentage allocation used was proper.

The inclusion of the tonnage carried on the vessel *KOPAA* in the surcharge tonnage, while an admitted error on the part of Matson, was also determined to have no effect on the final level of the surcharge and supplemental submissions by Matson appear to bear this out.

While Oscar Mayer expressed concern that the revenue deficiency for the *KOPAA,* resulting from the fuel escalation clauses applicable to the bulk sugar carried on the vessel, might be borne by general cargo in calculating the carrier's overall rate of return, the Presiding Officer held that this was not a matter at issue in this proceeding.

Whether an allocation should be made between trade and non-trade cargo carried in Matson's Hawaiian service was characterized by the Presiding Officer as "the only real issue remaining in this proceeding." However, in the final analysis the exclusion of non-trade cargo was also found not to make any difference in the level of the surcharge. Although both Matson and Hearing Counsel nevertheless urged a ruling on the issue of whether as a general matter

a trade/non-trade allocation should be made, the Presiding Officer held that the record on this point was inadequate, and, as a result it would be unwise to decide the issue, particularly since it was unnecessary to resolve it in this particular proceeding. The matter was left to be resolved in an appropriate proceeding or by rulemaking.

Finally, although there is some discussion regarding the use of Line 7 of Form FMC-274 to adjust for any overrecovery of fuel costs and the relative merits of such a procedure, no finding is made with respect to the remedy issue in the Initial Decision.

Oscar Mayer excepts to the Initial Decision on three grounds. First, the *KOPAA* tonnage that was deducted from the surcharge tonnage allegedly must be recomputed and converted into measurement tons as the relevant exhibit allegedly stated it in terms of "tons" only and the Presiding Officer was incorrect in assuming this to mean measurement tons as opposed to weight tons. Second, it is argued that the methodology prescribed in Docket No. 79-55 must be retroactively applied to all prior Matson bunker surcharges and any resulting overrecoveries applied to revenue needs of Matson in this proceeding. Third, Oscar Mayer submits that the matter of what remedy is available to shippers that have been overcharged as a result of this and prior Matson bunker surcharges found excessive by the Commission must be resolved.

In its exceptions to the Initial Decision, Hormel seeks Commission advice as to how the alleged prejudicial allocation of fuel costs by Matson that resulted in a surcharge that averaged $5.50 per ton on general cargo and only $.29 per ton on bulk sugar and molasses will be remedied so as to compensate those shippers that have been paying the unreasonable surcharges. It argues that the Presiding Officer's suggestion that the Line 7 remedy may be inadequate does not resolve the matter.

Matson excepts to that portion of the Initial Decision which finds that the allocation of trade and non-trade cargo issue need not be resolved in this proceeding. It argues that although such a determination is not strictly necessary in this case, it will have an immediate impact on several pending surcharge investigations and therefore a resolution of the allocation issue serves a valid regulatory interest, especially in light of the strict decisional time limits imposed. On the merits of the issue, Matson submits that the considerations underlying the 5% non-trade cargo allocation exemption in Commission General Order No. 11 (G.O. 11) apply here with equal validity and that, accordingly, the Commission should adopt that standard.

Matson also takes the position that: (1) the evidentiary exhibit as to the tonnage carried on the *KOPAA* shows it to be in measurement tons; and (2) it has followed the requirements of Form FMC-274 in including past underrecoveries in its computation of the instant surcharge and has reduced the level of subsequent surcharges to provide for past overrecoveries as determined in Docket No. 79-55.

Hearing Counsel also excepts to the failure of the Presiding Officer to dispose of the trade/non-trade allocation issue, but disagrees with Matson as to the application of the G.O. 11 exemption to bunker surcharges. It is argued that unlike a G.O. 11 general revenue filing, a bunker surcharge is a purely cost

pass through filing, and therefore, *all* non-trade cargo must be allocated out of the surcharge tonnage regardless of the effect of such methodology in any particular case.

Hearing Counsel also asserts that: (1) because Oscar Mayer did not raise the issue of retroactive application of methodology during the proceeding and because this issue was not specified in the Commission's Order of Investigation, the Commission should defer consideration of that issue pending a decision in Docket No. 80–4, where that issue is expressly raised; and (2) Hormel's attack on the percentage-of-revenue assessment mechanism is beyond the scope of this proceeding.

Discussion and Conclusions

The foregoing arguments and contentions of the parties raise the following matters for consideration by the Commission: (1) whether non-trade cargo must in all cases be allocated out of the surcharge calculations or whether some level of exemption in this regard is appropriate; (2) whether the findings in Docket No. 79–55 must be retroactively applied to all prior Matson surcharges in order to compute the proper level of surcharge in this case; (3) what remedies are available to shippers in light of the finding that the Matson surcharge was excessive; (4) whether the Presiding Officer correctly computed the *KOPAA* tonnage; and (5) whether the per ton surcharge rate must be equalized among all types of cargo.

After a full consideration of the positions of the parties the Commission is of the opinion that the findings and conclusions of the Presiding Officer are substantially correct, and, accordingly, the Initial Decision served in this proceeding is adopted. The specific issues raised by the parties on exception and enumerated above are discussed seriatim below.

Allocation of Trade and Non-Trade Cargo

Whether the 5% non-trade cargo allocation exemption contained in G.O. 11 is applicable here is a question that, as the Presiding Officer accurately found, cannot be adequately and properly resolved on the basis of the existing record. The testimony in the case did not address the point at which non-trade cargo would significantly affect the level of bunker surcharges either as to Matson's particular operations or in the domestic offshore trades generally. While it does appear that there is justification for some level of exemption, there is sufficient difference bewteen G.O. 11 statistics and Form FMC–274 statistics to render a blind application of the G.O. 11 5% exemption to Form FMC–274 inadvisable.

In light of the foregoing, it appears that such methodology matters of general application are more properly addressed in a rulemaking proceeding where a comprehensive treatment of the subject can be undertaken with input from all affected interests. Until such time as a rule of general applicability is established, the matter of trade/non-trade allocation will be left to *ad hoc* determinations in particular cases. Accordingly, Matson's and Hearing Counsel's exceptions in this regard are denied.

Retroactive Application of Methodology

Because this issue was not included in the Order of Investigation and was not fully litigated the Commission is of the opinion that final disposition of this matter should be left for decision in Docket No. 80-4.

Remedies

The question of what is the appropriate shipper remedy for excessive bunker surcharges was recently addressed in the Commission's Order of Clarification in Docket No. 79-55, served February 19, 1980. It was determined there that the Line 7 procedure will be the *primary* remedy, except in those cases where it may prove inadequate.[4] This holding applies here and should serve to resolve any uncertainty that may have existed.

The KOPAA Tonnage Calculation

The Presiding Officer's finding that the tonnage figure of the *KOPAA* referred to in the submission of Matson is in *measurement* tons is proper and well founded. All other data in the relevant exhibit is expressed in terms of measurement tons[5] and Matson itself has indicated that the tonnage is indeed stated in terms of *measurement* tons. Accordingly, there appears to be no reason to disturb the Presiding Officer's findings in this regard and Oscar Mayer's exception to the contrary is denied.

The Per-Ton Surcharge Rate

The merits of the percentage of revenue method of surcharge assessment of Form FMC-274 were not made an issue in this proceeding, nor were they fully litigated. This matter will be left for resolution in a more appropriate proceeding. Accordingly, Hormel's suggestion that the Commission address that matter here is rejected.

THEREFORE, IT IS ORDERED, That the Exceptions of Matson Navigation Company, Oscar Mayer & Co., Inc., George A. Hormel & Co., and the Commission's Bureau of Hearing Counsel are denied, and,

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is adopted and made a part hereof, and,

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[4] Although not computed by the Presiding Officer the excess recovery in this case would appear to be $29,739.24. This amount is arrived at by multiplying the estimated revenue subject to the surcharge ($58,312,232) by the implemented surcharge, and from this product ($3,440,421.69) subtracting the product of the estimated revenue multiplied by the reasonable surcharge ($3,341,290.89), and multiplying the remainder ($99,130.80), which represents the total overrecovery had the surcharge remained in effect the full 120-day period, by the pro rata portion of the overcharge applicable to the 36 days the surcharge was in effect ($99,130.80 × 36/120 = $29,739.24). This calculation can be verified by multiplying the estimated revenue by the difference between the implemented and reasonable surcharges (.17%) and applying the effective period ratio to the product ($58,312,232 × .0017 × 36/120 = $29,739.237).

[5] Direct Testimony of Vladimir Hrabeta, Exhibit A, Line 4, Comments, Attachment 2.

FEDERAL MARITIME COMMISSION

NO. 79-84

MATSON NAVIGATION COMPANY PROPOSED 5.90 PERCENT BUNKER SURCHARGE INCREASE IN TARIFFS FMC-F NOS. 164, 165, 166 AND 167

Adopted February 21, 1980

It is held that:

(1) The correct amount of the allowable bunker surcharge is 5.73 percent.
(2) Where the inclusion or exclusion of non-trade cargo in computing the bunker surcharge does not affect the amount of the surcharge a decision as to the propriety of including or excluding it is unnecessary. Further, where the Commission has stated it intends to review and, perhaps, modify its treatment of bunker surcharge applications it would be inappropriate and unwise to limt its alternative by a holding based on the record of this proceeding.
(3) Using a specific recovery of added fuel costs per escalation clauses contained in sugar and molasses contracts to compute a bunker surcharge is improper and the allocation to sugar and molasses must be on the basis of measurement tons.
(4) Where the fuel cost of a vessel was excluded from the calculation of expense for purposes of computing a bunker surcharge, the tonnage carried by the vessel should also have been excluded. Here, its inclusion or exclusion did not affect the amount of the bunker surcharge and it was improper to consider other questions regarding general rate increases where the Commission's Order of Investigation specifically limited the justiciable issue to consideration of the bunker surcharge.

David F. Anderson and *Peter P. Wilson* for Matson Navigation Company.
Dale N. Gillings for Oscar Mayer & Co., Inc.
Harold M. Finch for George A. Hormel & Co.
Suzanne E. Barth and *R. Dennis Chong* for The State of Hawaii.
J. Robert Ewers, C. Douglass Miller and *Charles C. Hunter* as Hearing Counsel.

INITIAL DECISION[1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

FINDINGS OF FACT

1. On July 24, 1979, Matson Navigation Company (Matson) filed supplements to Matson Freight Tariff Nos. 1-T, 30-A, 15-C and 14-F (FMC-F

[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).

Nos. 164, 165, 166 and 167, respectively), which tariffs are the basic tariffs under which Matson provides service in the Pacific Coast-Hawaii trade.

2. The supplements provided for a bunker surcharge of 5.90 percent to become effective on August 25, 1979.

3. The 5.90 percent surcharge canceled a previously filed surcharge of 4.43 percent, so that the surcharge in issue here increased the surcharge in the Pacific Coast-Hawaii trade by 1.47 percent.

4. Subsequent to the 5.90 percent filing, effective October 1, 1979, another increase to 6.66 percent was filed. It is under investigation in another proceeding, *Matson Navigation Company—Proposed 6.66 Percent Bunker Surcharge Increase in Tariffs FMC–F Nos. 164, 165, 166 and 167*, Docket No. 79–92, Order of Investigation served October 15, 1979.

5. On June 6, 1979, the Federal Maritime Commission (Commission) published Domestic Circular Letter 1–79. It states in pertinent part:

> Vessel Operating Common Carriers (VOCC) and Non-Vessel Operating Common Carriers (NVOCC) in the Domestic Offshore Trades are hereby granted continuing outstanding special permission to establish and amend a bunker surcharge in their tariff publications on 30 days' notice to the Commission. The purpose of the special permission is (1) to allow the filing of bunker surcharges that fall within the definition of a general increase in rates contained in P.L. 95–475 on 30 days notice rather than 60 days notice; and (2) to suspend 46 C.F.R. Part 531 (G.O. 38) to the extent necessary to permit the filing of consecutively numbered supplements containing bunker increases for VOCC's and water transportation cost pass thru for NVOCC's when accompanied by specified financial justification. . . .
>
> Applicable provisions of Part 512, Part 531 and Section 502.67 (46 C.F.R. §§512, 531 and 502.67) of Commission regulations are hereby suspended to the extent necessary to carry out the specific purpose of this outstanding special permission. *This authority is expressly conditioned upon the simultaneous receipt of the information requested on FMC Form No. FMC–274 for VOCC's and FMC Form No. FMC–276 for NVOCC's in the Domestic Offshore Commerce of the United States*

6. The Commission issued Form FMC–274 (Fuel Surcharge Justification) with Domestic Circular Letter 1–79. In filing for the bunker surcharge increase to 5.90 percent, Matson submitted a completed Form FMC–274 as follows:

VESSEL OPERATING COMMON CARRIERS IN THE DOMESTIC OFFSHORE COMMERCE OF THE UNTIED STATES

Carrier: *Matson Navigation Company*
Date: July 25, 1979

Fuel Surcharge Justification
Tariff(s) FMC–F No. 164–165 & 166–167

1. Weighted average fuel cost per unit for units purchased between 12/25/78 and 1/5/79 or for the 10 days preceding the filing of the last general rate increase, whichever is later.	$10.59
2. Present per unit fuel cost:[2]	$17.51

[2] Documentation for the present fuel cost is required, such as copy of paid invoices, notice of price change(s) for the purveyor, etc. When the present fuel cost is supported by copy of paid invoices, the average for a consecutive ten day period, the end of which precedes the filing date of the surcharge by not more than ten days, shall be used. When fuel is purchased at more than one location, the weighted average shall be used. In those instances where the present fuel cost is supported by a notice of price change(s) from the purveyor, the weighted average for all locations where fuel is purchased shall be used. The carrier has the burden of demonstrating that this per unit fuel cost is truly representative of the fuel cost to be incurred while the surcharge is in effect.

3.	Difference (Line 1 subtracted from Line 2):		$6.92
4.	Estimated consumption for next 4 months commencing with effective date of surcharge:	470,816	
	a. Last year's consumption for the identical period:	480,365	
	b. Explain variations of 10% or more on attached sheets.		
5.	Fuel consumption and cost for the 4 months period ending no earlier than 30 days prior to the filing date:	(Fuel) 483,489	(Cost) $5,829,901
6.	Estimated 4 months consumption times difference in fuel cost (Line 3 times Line 4):	$ 3,116,927	
7.	(Under) or over recovery of increased fuel costs from surcharges in effect since 1/1/79 (Fuel Surcharge Recovery Line 17):	(460,602)	
8.	Estimated 4 months cost adjusted for over or (under) Recovery (Line 6 plus (under) Recovery of Line 6 minus over Recovery):		$3,577,529
9.	Revenue for the same period used in Item 5:	$58,766,000	
10.	Estimated revenue for the 4 month period utilized in Line 4 exclusive of proposed surcharge:	$60,656,669	
11.	Last year's revenue for identical period as shown in Line 10, explain difference:	$55,425,000	
12.	Percentage increase in revenue required to offset fuel costs as shown in Line 6 above (Line 8 divided by Line 10):	5.90%	
13.	Attach an Income Statement applicable to the subject Tariff(s) for the latest available 12 month period which ends not more than 60 days prior to the filing date of the increase.		
Fuel Surcharge Recoveries			
14.	Total fuel surcharge charges included in customer billings from effective date of first surcharge since 1/1/79 to ending date of Line 5 of this Fuel Surcharge Justification:		$ 439,310
15.	Total fuel costs for same period as Line 14: Barrels 254,919	$ 3,599,504	
16.	Total costs for barrels shown on Line 15 based on Line 1 cost of this fuel surcharge justification:		
	16a. Line 15 Barrels	254,919	
	16b. Line 1 Cost	$10.59	
	16c. −16a. × 16b.	$ 2,699,592	
17.	Over or (under) recovery of increased fuel costs from surcharge in effect since 1/1/79 (Subtract Line 16c. from Line 15; then subtract that figure from Line 14. Place that figure on Line 17 and carry back to Line 7):		$(460,602)

7. After Matson filed for the 5.90 percent bunker surcharge, protests were filed by Oscar Mayer & Co. (Oscar Mayer), George A. Hormel & Co. (Hormel), and the State of Hawaii (Hawaii).

8. On August 24, 1979, the Commission issued its Order of Investigation. It indicates that the Commission elected to accept Matson's financial justification despite the fact that Matson did not use the correct four-month period specified in Form FMC-274. Further, after reviewing the arguments advanced by the parties, the Commission found that "an investigation is not the proper forum for discussion of the merits of Circular Letter 1-79, Form FMC-274 and General Order 11." It ordered the instant proceeding to be limited to an investigation of the following areas:

1. Should fuel costs be allocated between general cargo and sugar/molasses on the basis of measurement tons carried;
2. Should an allocation be made between trade and non-trade cargo carried between the West Coast and Hawaii;
3. Should the fuel cost of the vessel *KOPAA* be excluded from the calculation of expense while tonnage carried aboard the *KOPAA* is included in the trade tonnage figure; and
4. Is it proper to allocate fuel costs for the months of April and May on a percentage which is based on a four-month period that included February and March?

The Commission provided that the hearing would be completed within sixty (60) days of the effective date of the tariff and that the initial decision would be submitted within one hundred and twenty days (120) of the effective date.

9. On September 20, 1979, a prehearing conference was held. The parties agreed that oral testimony need not be taken and that, to the extent the issues presented in this proceeding were the same as those presented in the prior filing for the bunker surcharge increase to 4.43 percent, (*Matson Navigation Company—Proposed Bunker Surcharge in the Hawaii Trade*, Docket No. 79-55, 19 SRR 793 (1979)), the Commission's decision in the prior case would be controlling. The parties also agreed that if Issues No. 3 and 4 (as set forth in the Commission's Order of Investigation) were technical in nature and did not change the ultimate amount of the bunker surcharge, they would not be considered as issues in this proceeding.[3]

10. On September 21, 1979, the Initial Decision in Docket No. 79-55 was served. As to the issue common to the instant case, the Administrative Law Judge[4] held that:

(1) Matson's allocation methodology using special sugar and molasses contracts is not shown to be reliable or valid. . . . I conclude therefore that Matson's use of the direct assignment of costs to sugar and molasses shippers under its peculiar fixed formula is unreasonable and unjustified because, by abandoning the G.O. 11 tonnage allocation methodology, Matson relies upon untested, unarticulated bases for direct assignment of costs and casts an additional cost burden on non-sugar and molasses shippers. . . .

11. By order served on November 23, 1979, the Commission adopted the Initial Decision.

12. The parties agree that in filing for the increased bunker surcharge, Matson excluded the fuel cost of the vessel *KOPAA* from the calculation of

[3] Oscar Mayer reserved the right to further argue this issue on other grounds.

[4] Administrative Law Judge Norman D. Kline.

expense but included the tonnage carried by the *KOPAA* in the trade tonnage figure utilized for allocating fuel consumption between the Hawaii and Marshall Islands Services. This was an error which has no effect on the amount of the bunker surcharge in this proceeding and which has been corrected in the filing for the subsequent 6.66 percent increase.

13. In filing for the increased bunker surcharge, Matson, in allocating fuel costs for the months of April and May, relied on a percentage based on a four-month period that included February and March as well. Whether or not February and March was used to allocate fuel costs in this proceeding, the amount of the bunker surcharge would be the same. Matson has used the four-month period specified by the Commission in the subsequent filing for the 6.66 percent increase.

14. The Hawaii Trade encompasses the carriage by Matson of cargo in the Domestic Offshore Trade between the United States Pacific Coast and Hawaii under the terms of tariffs applicable to that movement.

15. Matson transports cargo bound for the Marshall Islands in conjunction with trade cargo in vessels serving the Hawaii Trade. This cargo is transshipped in Honolulu to a Matson barge for carriage to its ultimate destination.

16. Cargo bound for the Marshall Islands does not move in the Domestic Offshore Trade of the United States. This cargo is transported from the United States to a foreign country.

17. Matson has admitted that in order to ascertain the amount of revenue that should be recovered by its proposed bunker surcharge, increased fuel cost must be allocated to foreign cargo carried in conjunction with trade cargo in vessels serving the Hawaii Trade.

18. Matson transports mail and cargo moving pursuant to tariffs on file with the Interstate Commerce Commission (ICC cargo) in conjunction with Trade cargo in vessels serving the Hawaii Trade.

19. The United States Pacific Coast/Hawaii Service (Hawaii Service) includes all voyages undertaken by Matson vessels between the United States Pacific Coast and Hawaii in which cargo moving in the Hawaii Trade is carried.

20. Included in the category of non-trade cargo moving in the Hawaii Service are foreign cargo, mail and ICC cargo.

21. Matson has allocated increased fuel cost to foreign cargo transported in the Hawaii Service, but has failed to make a like allocation to the other non-trade cargo moving in that Service.

22. Hearing Counsel and Matson have both submitted adjusted calculations wherein Matson amends its filing for bunker surcharge from 5.90 percent to 5.88. Hearing Counsel arrives at a bunker surcharge of 5.73 percent. They have stipulated that (1) they reached different conclusions based solely on their different treatment of sugar and molasses; and that (2) neither computation is affected by whether non-trade cargoes (mail and ICC cargo) are allocated out from the Service before the surcharge is calculated. A comparison of their calculations using the information required by Form FMC-274 is as follows:

MATSON NAVIGATION COMPANY

CALCULATION OF BUNKER FUEL SURCHARGE ON MEASUREMENT TON BASIS

	Hearing Counsel (A)	*Matson (B)*
1. Average fuel cost per barrel purchased between December 25, 1978, and January 5, 1979	$10.59	$10.59
2. Present per barrel fuel cost	17.51	17.51
3. Difference (line 2 less line 1)	$ 6.92	$ 6.92
4. Estimated consumption for next 4 months (September-December 1979)—barrels	475,044	475,044
5. Estimated increase in fuel cost (line 4 times line 3)	$ 3,287,304	$ 3,287,304
6. Estimated measurement tons for the service (September-December)[5]	2,944,372	2,944,372
7. Estimated measurement tons of cargo not subject to surcharge or specific recoveries:		
Marshall Islands	26,234	26,234
Sugar and molasses	183,340	—
Mail and ICC	101,462	101,462
	311,036	127,696
8. Estimated measurement tons subject to surcharge or its own recovery formula (line 6 less line 8)	2,633,336	2,816,676
9. Measurement ton relationship (line 8 divided by line 6)	.8944	.95663
10. Fuel cost to be recovered by surcharge or specific formulas (line 9 times line 5)	$ 2,940,165	$ 3,144,734
Special recovery under sugar and molasses agreements	—	141,120
Balance to be recovered by surcharge	$ 2,940,165	$ 3,003,614
11. Revenue collected under fuel surcharges in April and May	$ 442,004	$ 442,004
Revenue collected under specific tariff formulas	—	34,307
Total revenue collected to offset added fuel cost	$ 442,004	$ 476,311
12. Service fuel cost (April and May)	$ 3,672,000	$ 3,672,000

[5] Matson does not concede that Marshall Islands cargo is included in the Hawaii Service. Column B includes that cargo as service cargo so that Columns A and B can be stated on a comparable basis.

13. Service measurement tons (April and May)	1,530,087	1,530,087
14. Measurement tons not subject to surcharge or specific recoveries:		
Marshall Islands	15,050	15,050
Sugar and molasses	98,233	—
Mail and ICC	53,361	53,361
	166,644	68,411
15. Measurement tons subject to surcharge or specific recoveries (line 13 less line 14)	1,363,443	1,461,676
16. Measurement ton relationship (line 15 divided by line 13)	.8911	.95529
17. Fuel cost applicable to cargo subject to surcharge or its own recovery formulas (line 12 times line 16)	$ 3,272,119	$ 3,507,825
18. Fuel consumption for the Service (April and May)—barrels	257,598	257,598
19. Fuel consumption applicable to cargo subject to surcharge or specific recovery formula (line 18 times line 16)—barrels	229,546	246,081
20. Fuel cost applicable to cargo subject to surcharge or specific recoveries at base cost (line 19 times line 1)	$ 2,430,892	$ 2,605,998
21. Difference between base cost and cost incurred (line 17 less line 20)	$ 841,227	$ 901,827
22. Unrecovered fuel cost (line 21 less line 11)	$ 399,223	$ 425,516
23. Total fuel cost recoverable by surcharge (line 22 plus line 10)	$ 3,339,388	$ 3,429,130
24. Estimated revenue subject to surcharge (September-December)	$58,312,232	$58,312,232
25. Allowable surcharge (line 23 divided by line 24)	5.73%	5.88%

(A) Hearing Counsel's computation allocating added fuel cost to sugar and molasses and non-trade cargo on measurement ton relationship.

(B) Computation along the same lines as in (A), but using a specific recovery of added fuel cost per sugar and molasses tariffs as a credit.

ULTIMATE FINDINGS OF FACT

23. It is improper to compute the bunker surcharge by using a specific recovery of added fuel costs per escalation clauses in sugar and molasses

contracts. The allocation to sugar and molasses must be on the basis of measurement tons.

24. Allocation out of non-trade cargo in calculating the surcharge does not affect the amount of the surcharge in this case, and it is neither necessary nor desirable to decide the question as to whether or not it must be allocated out at this time.

25. Matson's exclusion of the fuel cost of the *KOPAA* from its calculation of expense while at the same time including the tonnage carried aboard the *KOPAA* when calculating the surcharge does not affect the amount of the surcharge.

26. Matson's allocation of fuel costs for the months of April and May was arrived at by relying on a percentage based on the four-month period which included February and March, as well as April and May. The use of February and March did not affect the amount of the surcharge, and the validity of the percentage used is no longer an issue in this case.

27. The correct amount of the allowable bunker surcharge is 5.73 percent.

DISCUSSION AND CONCLUSIONS

The issues presented in this case are basically factual in nature. To the extent that the Findings of Fact are not discussed in this portion of the decision, they are incorporated by reference.

In its Order of Investigation, the Commission listed four issues. They are treated separately in the following discussion.

Issue No. 1—Should fuel costs be allocated between general cargo and sugar/molasses on the basis of measurement tons carried?

We have already found as a fact that in deciding Docket No. 79-55, *supra,* Judge Norman D. Kline answered the above question in the affirmative, that the Commission has adopted Judge Kline's Initial Decision, and that the parties have all agreed to abide by the Commission's decision. Consequently, we will not undertake to repeat all that is contained in that decision except to say that it rejected Matson's methodology of using the escalation clauses in sugar and molasses contracts to arrive at increases in the bunker surcharge in the Hawaiian trade. However, it should be noted that in resolving the ultimate issue, the Initial Decision rejected the argument that Matson's application of the bunker surcharge was unfair because it falls disproportionately on westbound shippers and that therefore the allocation ought to be made on some basis other than round-voyage accounting. It held that any allocation which is based upon splitting legs of round voyages by assigning percentages of fuel costs to eastbound and westbound shippers using fuel consumed by leg or by applying measurement tons per leg is improper because it "marks a total departure from Commission case law and G.O. 11 methodology."[6] In adopting

[6] *Matson Navigation Company—Proposed Bunker Surcharge in the Hawaii Trade,* Docket No. 79-55, *supra,* page 50 of the Initial Decision, citing *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic Gulf Puerto Rico Trade,* 9 F.M.C. 220 (1966).

the holding, the Commission noted that there is a significant issue regarding Matson's overall rate structure which, in the Hawaii trade, appears to differentiate in favor of backhaul cargo based upon value-of-service principles at the expense of headhaul cargo. As in this proceeding, the Commission noted that such considerations were beyond the scope of the proceeding as defined in the Order of Investigation.

Issue No. 2—Should an allocation be made between trade and non-trade cargo carried between the West Coast and Hawaii?

This issue is the only real issue remaining in this proceeding. Matson's filing failed to make an allocation between trade and non-trade cargo carried between the West Coast and Hawaii. It argues that it need not do so because General Order 11 does not require such allocation when "other cargo" does not exceed 5 percent of the gross revenue derived from the "Service" (46 C.F.R. §512.6(c)). Further, it states that in recent years the Commission has made findings in general rate increase proceedings where Matson did not allocate between trade and non-trade cargo, citing *Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade,* Docket No. 75-57, served December 12, 1978, 18 SRR 1441 (1978), Order on Reconsideration served April 27, 1979, and *Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade,* Docket No. 76-43, served December 12, 1978, 18 SRR 1351 (1978), Order on Reconsideration served April 27, 1979. It points out that from September through December 1979, non-trade revenues will be 3.865 percent of "Service" revenues, well below 5 percent.[7]

Hearing Counsel argues that while Matson has admitted the necessity of allocating increased fuel costs between trade cargo and foreign cargo, Matson surprisingly takes the position that it is not required to allocate increased fuel cost between trade cargo and mail ICC cargo. Hearing Counsel states that given that mail, ICC cargo and foreign cargo are categorized by General Order 11 as non-trade or "other cargo," Matson's differing treatment of these cargoes in its calculation of the amount of revenue that should be recovered by its proposed bunker surcharge cannot be justified.

As to Matson's argument that it should not be required to allocate increased fuel costs to mail and ICC cargo because of the 5 percent of gross revenue exception contained in General Order 11,[8] Hearing Counsel asserts Matson "misunderstands" the Commission's rules and regulations. He points to pertinent portions of Domestic Circular Letter 1-79[9] as conflicting with General Order 11, which has to do with general rate increases and alleges they super-

[7] In its initial filing, Matson had misstated the percentage as 2.18 percent.

[8] "*Provided however,* That if gross revenue derived from the carriage of Other Cargo does not exceed 5 percent of the gross revenue derived from The Service, no segregation of revenue and expenses within The Service is required by this part." 46 C.F.R. §512.6(c) and (d).

[9] "The reporting requirements otherwise applicable to general increases in rates are suspended to the extent they apply to bunker surcharges and the reduced reporting requirements of the Circular Letter shall be filed in lieu thereof." 19 SRR at 407.

"The modified reporting requirements (set forth in the Circular Letter) are intended to ensure that bunker surcharges are set at levels which will recover only the increased costs of fuel and not result in windfall revenues to the carriers." 19 SRR at 407.

sede it. Hearing Counsel states that the intent of the Commission in sanctioning the use of bunker surcharges was to provide carriers with a means of passing through to shippers the increased fuel cost incurred in the carriage of their trade cargo.

Finally, Hearing Counsel avers that it is wrong for Matson to argue that this issue is moot because in this particular case, even if an allocation were made to non-trade cargo, it would not have any effect on the amount of the bunker surcharge. He states that the reason this proposed bunker surcharge is unaffected by the allocation of increased fuel cost to non-trade cargo is that Matson filed bunker surcharges with the Interstate Commerce Commission in similar amounts and at appropriate times and that there is no assurance that Matson or any other carrier would file such surcharges in every case.

Oscar Mayer agrees with Hearing Counsel that Matson should make an allocation between trade and non-trade cargo. It argues that unless this is done, Matson will be collecting twice for the increased cost of a portion of the same fuel. The State of Hawaii also agrees with Hearing Counsel.

Matson replies to the above arguments by taking issue with the fact that in six previous surcharge filings, Hearing Counsel never requested a trade/non-trade allocation. It expressed surprise that Hearing Counsel argues for the first time that Marshall Islands cargoes should be considered "Service" cargo, citing the holdings in Docket Nos. 75-57 and 76-43, *supra.* It argues that Hearing Counsel cannot now reasonably suggest that Matson's allocation out of Marshall Island cargoes should form a basis for concluding that Matson has agreed that non-trade cargoes should also be allocated out. It reiterates its view that a miniscule portion of the "Service" is non-trade cargo and that the intent of the Commission in publishing Domestic Circular Letter 1-79 was to permit carriers to quickly file rate adjustments imposing bunker surcharges in order to recover rapidly escalating fuel oil costs. It states that to require Matson to make the trade/non-trade allocations would delay such filings and serve no useful purpose.

It is clear that in promulgating Domestic Circular Letter 1-79, the Commission intended that increased fuel costs be "passed through" respecting cargo which is transported under those tariffs which are being amended to reflect the assessment of the surcharge. It is equally clear that if the non-trade cargo was meaningful in any particular situation as Hearing Counsel suggests, it would thwart the purpose of the Circular Letter if it was not allocated out.

The real question involved here is whether or not the Commission should adopt the 5 percent qualifying provision in General Order 11, in considering bunker surcharge applications. To do so would be to accept Matson's argument that the amount is "miniscule" and that it would "remove obstacles in the path of carriers recovering extreme increases in fuel cost," and to reject Hearing Counsel's argument that the issue transcends this particular case and might not be applied similarly by other carriers or even by Matson in other circumstances.

It has already been found as a fact that whether or not the non-trade cargo is allocated out in this particular case, the amount of the bunker surcharge increase will remain the same. While the question may not be moot as Hearing Counsel suggests, given the ambiguity of this record and the Commission's

Report and Order Adopting Initial Decision in Docket No. 79-55, *supra,* it is unnecessary and unwise to decide the matter or establish any precedent in this case. In its Report and Order, the Commission stated:

> The Domestic Circular Letter was promulgated on an emergency basis under crisis conditions. Under the circumstances the Commission could not reasonably anticipate all the potential operational difficulties that might arise with the application of the requirements of the Circular Letter. It is not surprising, therefore, that the application of the Circular Letter has shown a need for some revisions. Accordingly, while the Initial Decision in this case will be adopted, the Commission will undertake a review of the Domestic Circular Letter to determine what revisions may be necessary to bring the surcharge assessment procedures established in that Circular Letter in line with the principles enunciated in this decision.

In light of the above language and the posture of this proceeding, the Commission's alternatives should not be limited by an unnecessary holding in this case. It may wish to require an allocation between trade and non-trade cargo in every case; or it may wish to reconsider changes in the Domestic Circular Letter; or it may wish to rulemake. These alternatives, as well as any other the Commission wishes to consider, ought to be left open until the facts of a particular case demand otherwise. In this case they do not.

Issue No. 3—Should the fuel cost of the vessel KOPAA be excluded from the calculation of expense while tonnage carried aboard the KOPAA is included in the trade tonnage figure?

In its original submission, Matson included tonnage carried by the *KOPAA* in calculating the allocation percentage on a measurement ton basis, but excluded its fuel cost from the calculation of expense. Since the measurement tons carried on the *KOPAA* were originally unavailable, it was not possible to determine the exact allocation or surcharge percentage. Matson conceded that it had made the error in requesting the 5.90 bunker surcharge, but noted that when corrected on Form FMC-274, the reference figure on line 5 would be changed from 483,489 barrels to 483,245 barrels—an error of only 244 barrels.

All the parties have agreed that the error does not affect the amount of the bunker surcharge. In addition, in its revised computation in which it arrived at the 5.88 percent bunker surcharge, Matson exclude the *KOPAA* tonnage from the trade tonnage.

Matson's supplemental filing satisfied all other parties except that Oscar Mayer believes that even though the *KOPAA* has been completely excluded from the surcharge computation, the sugar contract escalator charge for the *KOPAA* will be short of projected increased cost by $46,700 for the period September through December 1979. It is concerned that the shortfall will become part of Matson's overall profit or loss figure and thereby a factor in determining their return on common equity or return on rate base. Matson answers by noting that the reasonableness of Matson's rate structure is not at issue in this proceeding and that the use of the *KOPAA* has no effect whatsoever on the computation of the bunker surcharge at issue here. It stresses that the scope of the Commission's order does not reach consideration of any future rate increase.

The arguments advanced by Matson are correct. Here, we are only concerned with the bunker surcharge and the Commission's order carefully frames an issue regarding the *KOPAA* which is limited to its effect on consideration of the surcharge itself. Having once determined that the *KOPAA* ought to be excluded entirely from the surcharge computation and that its exclusion does not alter the amount of the surcharge, nothing more remains for consideration in this proceeding.

Issue No. 4—Is it proper to allocate fuel costs for the months of April and May on a percentage which is based on a four-month period that included February and March?

It has already been stipulated by all parties that if the inclusion of February and March in calculating the percentage involved did not make any difference in the amount of the bunker surcharge, then this question would no longer be an issue in the proceeding. The evidence of record establishes and all parties have agreed that the use of February and March has no bearing on the amount of the surcharge and therefore it is held that the percentage used was proper.

CONCLUSION

After consideration of the issues set forth in the Commission's Order of Investigation, what remains is to determine the correct allowable bunker surcharge. As the Findings of Fact indicate, Matson revised its original 5.90 percent submission down to 5.88 and Hearing Counsel came to a figure of 5.73 percent. The only difference in their calculations was their treatment of the sugar and molasses cargo. Since they have made their computations, Docket No. 79-55, *supra,* which supports Hearing Counsel's position, has been promulgated. Therefore, it is held that in this proceeding the allowable bunker surcharge is 5.73 percent.

In so holding, note is taken of the computation submitted by Oscar Mayer in its reply brief where it arrives at a bunker surcharge of 4.86 percent. When one analyzes the computation and makes necessary corrections, it is identical with the 5.73 percent figure reached by Hearing Counsel and Matson. Oscar Mayer began by converting the tonnage carried by the *KOPAA* to measurement tons (94,000 × 95.24%). Actually, the 94,000 already represents the measurement tons carried by the *KOPAA.* Then the remaining measurement tons of sugar and molasses should total 183,340 not 187,814. As to adding back the 101,462 measurement tons of mail and ICC cargo, that is incorrect because the original figure of 3,012,138 already included it. After making these adjustments throughout Oscar Mayer's computation and allowing for underrecovery of $399,223, the total revenue on Hawaii Trade Cargo is $58,312,232, not $60,656,669, so the bunker surcharge is 5.73 percent ($2,947,539 ÷ $58,312,232), exactly the figure Hearing Counsel and Matson have computed.

Before concluding, there are some related matters which have been raised which should be addressed. In its initial protest and at various stages of the

proceeding, Oscar Mayer has taken the position that the Commission should institute a rulemaking proceeding even though the Commission's Order of Investigation states, "an investigation is not the proper forum for discussion of the merits of Circular Letter 1-79, Form-274 and General Order 11." Oscar Mayer "specifically request the Commission begin such a proceeding and hold in abeyance the determination of this investigation until the conclusion of such a proceeding."

It is clear that given the Commission's Order of Investigation and the narrow parameters of the issues described in it, this decision cannot consider Oscar Mayer's arguments respecting rulemaking. In adopting the Initial Decision in Docket No. 79-55, *supra,* however, the Commission noted that the Domestic Circular Letter was promulgated "on an emergency basis under crises conditions" and that "the Commission will undertake a review of the Domestic Circular Letter." In its reconsideration of the Letter the Commission may, if it so desires, initiate a rulemaking proceeding. In any event, Oscar Mayer, or any other person for that matter, may petition for the issuance of a rule under the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.51, et seq.

Finally, it should be noted that in the argument of this case as well as in Docket No. 79-55, *supra,* the parties have referred to the meaning and import of Form FMC-274, line 7, which provides for adjustment of underrecovery or overrecovery of the bunker surcharge. On the one hand, the view is expressed that if a mistake is made it can be "adjusted" in a subsequent filing. On the other, there is concern that the adjustment provision will be misunderstood and used improperly to foster bunker surcharge filings which contain information that is not the best information then available or which is ambiguous and incomplete.

It is clear that the Commission's intent in allowing for an adjustment in bunker surcharge filings was to provide a practical mechanism to make an adjustment where the best information available in the first instance proves to be incorrect or unsatisfactory. It thereby prevents the carrier from being unjustly enriched or under-compensated and recognizes that the ultimate purpose of the bunker surcharge procedure is to arrive at the increase in the cost of fuel and to allow it to be properly passed through to the shipper. It is not meant to be an exploratory filing which, if discovered to be incorrect, can be adjusted. Such an adjustment may ultimately provide the proper relief for the carrier, but it may ignore the rights of the shipper who cannot recover for the overcharge that was applicable to the period during which he shipped his goods. It also is unfair to the Commission in that it wastes staff resources, encourages litigation and delays the prompt disposition of the bunker surcharge application.

In view of the above, when the Commission reconsiders the Domestic Circular Letter, it may wish to clarify the import and use of the adjustment mechanism so that there will be no question regarding it in future bunker surcharge filings.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

WASHINGTON, D.C.
December 21, 1979

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-61

RENE LOPEZ AND DAVID ROMANO D/B/A
UNITED DISPATCH SERVICES—INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE NO. 1381

Independent ocean freight forwarder license suspended for six months for violations of section 510.24(e) of General Order 4 and section 44(e) of the Shipping Act, 1916.

Carlos Rodriquez for Rene Lopez and David Romano d/b/a/ United Dispatch Services.
John Robert Ewers, Joseph B. Slunt and *Martin F. McAlwee* for Bureau of Hearing Counsel.

REPORT AND ORDER

February 25, 1980

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

This proceeding was initiated by Order of Investigation and Hearing, served June 8, 1979, to determine whether Rene Lopez and David Romano, d/b/a United Dispatch Services (Respondent), violated General Order 4 and section 44(e) of the Shipping Act, 1916 and whether its independent ocean freight forwarder license should be revoked or suspended.[1] The Commission's Bureau of Hearing Counsel was made a party to the proceeding. In his Initial Decision, served October 19, 1979, Administrative Law Judge William Beasley Harris found the violations to have occurred and revoked Respondent's license. The

[1] Specifically, the Order alleged that Respondent received $2,360.47 in compensation for 85 shipments handled by an unlicensed forwarder, and set forth the following issues for determination:

1. Whether Rene Lopez and David Romano d/b/a United Dispatch Services has violated section 510.23(a) of General Order 4 by permitting its name and license number to be used by a person not employed by it for the performance of ocean freight forwarding services.

2. Whether Rene Lopez and David Romano d/b/a United Dispatch Services has violated section 44(e) of the Shipping Act, 1916, and section 510.24(e) of General Order 4 by falsely certifying to ocean carriers that it had performed forwarding services necessary to receive ocean carrier compensation and accepting ocean carrier compensation on such shipments for which it did not provide freight forwarding services; and

3. Whether Rene Lopez and David Romano d/b/a United Dispatch Services' independent ocean freight forwarder license should be revoked or suspended pursuant to section 44(d) of the Shipping Act, 1916, and section 510.9 of General Order 4 for failure to comply with any lawful rules, regulations or orders of the Commission and for conduct which renders the licensee unfit to carry on the business of forwarding.

proceeding is now before the Commission on Exceptions of Respondent, to which Hearing Counsel replied. For the reasons set forth below, the Commission has decided to suspend Respondent's license for six months.

BACKGROUND

Hearing Counsel alleges and Respondent admits that Respondent allowed Angel Romero and Foreign Freight Forwarders, Inc. (FFF) to use Respondent's name and license number in connection with FFF's forwarding activities pursuant to an oral agreement between Messrs. Lopez, Romano and Romero. Respondent admits collecting approximately $2,000 in freight compensation for 82 shipments handled by FFF under Respondent's name and license number.

Hearing Counsel argued for revocation of Respondent's license. Respondent, through David Romano, initially responded that it wished "to plead no contest on the charges brought against us," and argued by way of "mitigation of the sentence" that it was a first offense; that Respondent was ignorant of the law; that Respondent did not intend to violate the law; and that suspension or revocation would cause undue hardship on Respondent and its nine employees.

At a hearing held September 7, 1979, Respondent Lopez admitted all the violations and the factual bases for the allegations as set forth in the affidavit of Commission Investigator Miguel Tello. Mr. Lopez reiterated his request that Respondent's license not be revoked or suspended, citing the financial hardship severe sanctions would cause, and promised not to violate the law again. He also alleged that Respondent's violations were prompted by friendship with Mr. Romero, and not for monetary gain.

INITIAL DECISION AND POSITION OF THE PARTIES

In his Initial Decision, the Presiding Officer found that Respondent had committed each of the violations alleged in the Order of Investigation, and revoked Respondent's license.

In its Exceptions to Initial Decision, Respondent again admits its wrongdoing, although again offering mitigating facts to establish "the mental posture . . . as far as intent or willfulness is concerned."[2] Respondent argues that the Presiding Officer erred in imposing punitive rather than remedial sanctions; by failing to consider less severe sanctions which would nevertheless redress the violations; and by basing his decision to revoke Respondent's license on its "financial difficulties." Respondent also argues that the Presiding Officer acted arbitrarily and capriciously by departing excessively from previously applied, less severe sanctions.

Hearing Counsel's Reply to Exceptions emphasizes the seriousness of the violations, and makes the point that revocation was a proper remedy, not a punitive sanction. Hearing Counsel notes that Respondent has had eight years experience in the freight forwarder business, and is therefore appropriately

[2] Specifically, Respondent notes that its intent was only to help a friend; that the violations were based on ignorance; and that it will not do it again.

charged with knowledge of the law. Hearing Counsel also denies that the Presiding Officer's comments on the financial difficulties of Respondent were a basis for the determination to revoke its license. It argues that exact uniformity in the application of sanctions is unnecessary, and that mere unevenness in sanctions is not arbitrary and capricious unless excessive.

DISCUSSION

The Commission concludes, upon careful and thorough review of the record, that Respondent's violations can be redressed by a six-month suspension of its freight forwarder license. In view of Respondent's six-year violation-free history, the Commission is satisfied that a six-month suspension will serve a remedial public interest purpose,[3] and that a more severe sanction is unnecessary to achieve this end in this particular case. On the other hand, no lesser sanction would ensure that similar violations will not occur. Respondent's violations were willful and numerous, and its claims of ignorance of law and lack of intent are of little mitigating effect.[4]

Hearing Counsel has cited the Commission's revocation of a freight forwarder license in *John C. Grandon d/b/a/ Consulspeed Independent Ocean Freight Forwarder License No. 2011*, 19 SRR 1080 (1979), as support for its position that Respondent's license should be revoked. Although *Consulspeed* also involved unauthorized use of a license, the number of violations involved in that case and the fact that Consulspeed was, in effect, a sham operation prompted the Commission to revoke its license to ensure a remedy of the situation.

THEREFORE, IT IS ORDERED, That the Exceptions of Rene Lopez and David Romano d/b/a United Dispatch Services, are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Independent Ocean Freight Forwarder License No. 1381 of Rene Lopez and David Romano d/b/a United Dispatch Services, is suspended for six months effective February 27, 1980; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

[3] *See Independent Ocean Freight Forwarder License—E.L. Mobley, Inc.*, 19 SRR 39, 41 (1979).

[4] Although reducing the sanction imposed by the Presiding Officer, the Commission is not endorsing Respondent's suggestion that revocation of a license for this type of violation is necessarily improper, punitive, or unprecedented. Revocation is not warranted in this particular proceeding, however. Sanctions under section 44 must be tailored to the facts of each individual case.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-70

E.I. DU PONT DE NEMOURS AND COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE

February 26, 1980

Notice is given that no exceptions have been filed to the January 18, 1980 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. 79-70

E. I. Du Pont de Nemours and Company

v.

Sea-Land Service, Inc.

Finalized February 26, 1980

Du Pont, a shipper of chemical products, tendered four shipments of herbicidal and related products which were carried by respondent Sea-Land Service, Inc., from Houston, Texas, to Bangkok, Thailand, during July through September 1977. Du Pont claims that the rate charged for the bulk of these shipments ($134 WM) should be declared void and ineffective because of the fact that there had been a filing in May of 1977 which attempted to increase the previous rates on these items on less than the 30-days' notice period required by section 18(b)(2) of the Shipping Act, 1916. Du Pont seeks an award of $17,782.70, in reparation as the difference between the rate charged and two previous rates which had been in the tariff prior to the filing of May 1977, claiming an overcharge and a violation of section 18(b)(2). It is held that:

(1) There is no basis in law, fact, or equity in this case on which to find that the rate which was on file and charged by Sea-Land should now be declared void and ineffective;

(2) Principles of tariff law hold that a tariff must be given force and effect at the time of shipment and that filed rates do not become void until after rejection by the Commission under section 18(b)(4) of the Act;

(3) If a rate has been filed on short notice contrary to section 18(b)(2) of the Act and it is not rejected by the Commission, the better view is that the defective filing cures itself after the 30-day period established by that law runs out; however, in this case the rate under attack is not even the same rate which had allegedly been filed on inadequate notice;

(4) Declaring a rate on file void *ab initio* because of an old defect in tariff filing would render the validity of the filed rates uncertain and could open the door to multiple suits alleging overcharges even when shippers had suffered no real harm;

(5) Granting reparation in this case might indirectly contravene the special-docket law set forth in section 18(b)(3) since a special-docket application had been filed for Du Pont which had to be rejected because it did not meet the 180-day requirement of that law.

Don A. Boyd, William R. Rubbert, and *Raymond Michael Ripple,* for complainant.
John M. Ridlon, for respondent.

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

This proceeding commenced with the filing of a complaint by E. I. Du Pont de Nemours and Company, a company which manufactures and exports chemicals and related products. In its complaint, which was filed on July 13, 1979, Du Pont alleges that respondent, Sea-Land Service, Inc., a common carrier by water operating in the foreign commerce of the United States, transported four shipments of herbicidal preparations, insecticides, and fungicides during the period July through September 1977 under an intermodal tariff from Houston, Texas, to Bangkok, Thialand, and overcharged Du Pont by assessing improper tariff rates for the commodities in question. Du Pont further alleges that the reason for the overcharge was the fact that Sea-Land, as a member of the Pacific Westbound Conference and a party to that Conference's intermodal tariff, committed an error in May 1977 by publishing increased rates on these commodities without giving 30-days' notice as required by section 18(b)(2) of the Shipping Act, 1916. Therefore, as complainant later explained, it is alleging that Sea-Land violated both sections 18(b)(2) and section 18(b)(3) of the Shipping Act, 1916 (the Act), which require carriers to provide 30-days' notice of rate increases in their tariffs and to charge only the rates specified.

Du Pont claims that it was entitled to rates of $134 W and $145.50 W for the herbicides, fungicides, and insecticides for each of the four shipments which moved under bills of lading dated July 16, August 11, August 20, and September 9, 1977. These rates were the last effective rates which could be applied to the commodities prior to certain rate changes which took place in May 1977, when the rates increased to $146 W for Sea-Land initially and later to $134 WM on June 19, 1977. Sea-Land rated the commodities in question under the $134 WM rate because the shipments took place after June 19, 1977, when that rate went into effect. The essence of the dispute, therefore, is the question whether these items should have been rated at $134 W and $145.50 W or at $134 WM. Since the commodities produced more measurement tons than weight tons per shipment, the latter rate results in higher freight. A determination of which rate should have applied furthermore, depends upon an interesting and perhaps unprecedented question of tariff law, namely, if a carrier publishes a rate increase on less than statutory notice and also increases the rate on proper notice, can either the first increased rate or the second increased rate be applied lawfully to subsequent shipments? In other words, if a rate is filed with the Commission upon less than statutory notice, but the rate is not rejected under section 18(b)(4) of the Act, under what circumstances can the rate be charged and the shipper required to pay the full amount of freight with no right to future freight refunds?

In its answer Sea-Land admits the essential facts concerning the four shipments and concedes that in May of 1977 there had been a short-notice rate increase applicable to the commodities in question. Sea-Land denies that it assessed rates other than those lawfully in effect at the time of the shipments,

[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).

however. Nevertheless, Sea-Land states in its Reply to Complaint that it "acquiesces in a Federal Maritime Commission determination that, whether for reasons of tariff publication error alleged by Complainant, or because of effectuation of an increased cost to the shipper on less than the notice required by statute, Complainant has been overcharged, as claimed. . . ." Reply, last page, paragraph XX.

Notwithstanding Sea-Land's apparent willingness to acquiesce in a judgment against it, which would have required it to pay Du Pont over $17,000 as reparation, it was apparent that the record was insufficiently developed to enable me to determine whether there was any basis in fact or law for such action to be taken. As originally submitted, the complaint was supported by no evidence other than relevant bills of lading and packing lists which were attached. Despite the fact that the complaint relied upon several critical tariff changes and alleged tariff-filing errors, no tariff pages were furnished. Moreover, the complaint did not specify which provisions of section 18 of the Act were allegedly violated. It referred merely to "46 U.S.C. §817," as the law which allegedly had been violated, without specifying which of the many paragraphs of section 18 of the Act, which corresponds to 46 U.S.C. §817, were involved. Furthermore, the complaint referred to a rate increase to $141 W, supposedly effective on July 1, 1977, and sought reparation calculated on that rate as the base, although there was no evidence that such a rate increase ever took place affecting the trade route to Bangkok. Moreover, although seeking $17,330.38, in reparation, Du Pont furnished no exhibit with its complaint showing how that sum was calculated. The complaint also referred to several tariff item numbers without adequate explanation as to the commodity descriptions to which they applied, did not mention the date when the freight was paid, and referred to a misdescription in part of the bill of lading dated September 9, 1979, the significance of which was unclear. Finally, the complaint was rather confusing on the theory of the case, i.e., whether it relied upon short-notice tariff filing, a bill of lading misdescription and overcharge, or a reliance on a tariff rate which had been erroneously deleted from the tariff. Thus it could not be determined whether section 18(b)(2) or 18(b)(3) of the Act was allegedly violated or even whether this case should have been brought under the special-docket provisions of section 18(b)(3) on the grounds that there was an error in tariff filing which caused the shipper to suffer additional costs. The latter possibility could not be dismissed in view of the fact that the Commission's Secretary's files show that a special-docket application was indeed filed by the Conference on behalf of this shipper but had to be rejected because it was time barred. *See* letter dated March 29, 1978, from Mr. Hurney to Mr. Edmund P. Webber of the Pacific Westbound Conference. If the present complaint constituted an attempt to circumvent the 180-day provisions governing the special-docket law, the complaint would be subject to dismissal.

I called the parties' attention to the various problems described above and instructed them to furnish me with appropriate explanations. See my letter to Messrs. Boyd and Ridlon, dated September 6, 1979. In response to this letter, both Du Pont and Sea-Land furnished detailed affidavits and all pertinent tariff pages. *See* letter from Mr. Ripple representing Du Pont, dated October 5,

1979, and letter from Mr. Ridlon representing Sea-Land, dated October 5, 1979. These affidavits and attached tariff pages were ultimately admitted into evidence together with supplementary testimony and a further exhibit at a hearing held on November 14, 1979. The latter exhibit showed Du Pont's revised calculation of alleged overcharges.

The factual submissions made on October 5, 1979, explained many of the discrepancies and ambiguities in the complaint. However, a number of problems remained. Therefore, a prehearing conference and a hearing were held on November 14, 1979, in order to provide a full and clear factual record. *See* Notice of Prehearing Conference and Hearing, October 30, 1979; Notice of Rescheduling of Hearing, November 5, 1979. At the hearing the positions of the parties were clarified and Du Pont explained that it was basing its case upon the theory that a short-notice tariff filing had occurred in May of 1977, in violation of section 18(b)(2) of the Act, which means that Du Pont was consequently overcharged, a violation of section 18(b)(3) of the Act. Respondent Sea-Land understood the nature of these allegations and consequently did not contend that it had not been provided with sufficient notice and opportunity to defend itself.

As the evidentiary submissions, testimony, and argument made clear, the essential facts in this case are not disputed and the issue to be determined is one of law relating to the effect of an admittedly short-notice tariff filing which occurred in May of 1977. To determine that issue it is necessary to have a thorough understanding of the rather complicated facts surrounding the relevant tariff changes occurring prior to the time of the shipments. These facts are as follows.

FACTUAL BACKGROUND

At one time Sea-Land published its own intermodal tariff covering the ports involved in this proceeding, namely, Houston, Texas, and Bangkok, Thailand. In that tariff Sea-Land had published a special rate to Bangkok on "Weed Killer," amounting to $121.50 per 2,000 lbs., as Item 931. *See* Sea-Land Joint Container Freight Tariff 201-A. However, on or about February 1, 1977, Sea-Land joined the Pacific Westbound Conference's tariff and this weed killer rate was brought forward in the conference tariff as Item 599.2080.00 under the description "Herbicidal Preparations" in the amount of $139.50 per 1,000 kgs. This rate, however, had been incorrectly converted from the imperial to the metric system and was adjusted to the proper metric equivalent of $134 W (i.e., per 1,000 kgs.), effective April 1, 1977. *See* PWC tariff, 4th rev. page 518. The Conference tariff also published a rate on "fungicidal preparations" as Item 599.2075.20 to Bangkok in the amount of $145.50 per 1,000 kgs. *See* tariff, 5th rev. page 518. The Conference had still another rate on agricultural chemical preparations as Item 599.2090.00, in the amount of $160.50 per 1,000 kgs. *Id.* All of these rates had been published during April and for most of May 1977.

On May 17, 1977, the Conference issued two critical tariff notices in two different pages which changed the situation on these items. On one page the

Conference deleted the three items (599.2075.20, 599.20080.00, and 599.2090.00) described above and replaced them with a single item (599.2000.00) which had already been published elsewhere in the tariff. This change was to become effective on May 23, 1977, i.e., on six-days' notice. *See* tariff, 6th rev. page 518. Item 599.2000.00 was described in the tariff as "Insecticides, Fungicides, Disinfectants & Similar Products—N.O.S. . . ." *See* tariff, 8th rev. page 516. The effect of this first tariff notice, as far as Sea-Land's rates were concerned, was to increase the rates on the commodities covered by the previous items 599.2075.20 and 599.2080.00, from $145.50 W and $134 W, respectively, to $146 W on only six-days' notice.[2] The second notice issued by the Conference on May 17, 1977, announced further changes. By this notice, those shippers who had been informed that the three previous items were now lumped into Item 599.2000.00, effective May 23, 1977, were also informed on a separate tariff page on which that Item was published, that the special rate of $146 W, applicable to Sea-Land and certain other carriers was going to be deleted on June 19, 1977. *See* Tariff, 8th rev. page 516. This additional notice did provide at least 30-days' notice that the rates would increase from $146 W to $134 WM as of June 19, 1977, as far as Sea-Land was concerned because cancellation of the special rate of $146 W caused reversion to the general Conference rate of $134 WM. (As noted above, the change was an increase because the relevant cargo was a measurement-type cargo rather than weight, for rating purposes.) This last increase was confirmed by the Conference which published a subsequent tariff page on which the rate on Item 599.2000.00 was published showing only the $134 WM rate for all Conference members carrying the item to Group 6 destination ports (i.e., Bangkok, Thailand). *See* Tariff, 9th rev. page 516, issued June 23, 1977, effective June 24, 1977. The rate on Item 599.2000.00 ("Insecticides, Fungicides, Disinfectants & Similar Products—N.O.S. . . .") remained at $134 WM until it was reduced to $146 W on September 7, 1977. *See* Tariff, 10th rev. page 516.

To summarize, the picture was as follows. Any shipper such as Du Pont shipping "herbicidal preparations" and "fungicidal preparations" via Sea-Land under previous Items 599.2080.00 and 599.2075.20, respectively, were given notice on May 17, 1977, that in six days the rate for these products would increase from $134 W and $145.50 W to $146 W, and also that in 33 days the rate would be $134 WM. In other words, on May 17, 1977, shippers were notified that as of June 19, 1977, the rate would be $134 WM but they were also told that on May 23, 1977, there would be an interim rate increase to $146 W.

As of June 19, 1977, therefore, the applicable rate was $134 WM. Therefore, when the four shipments were tendered and carried by Sea-Land, between July and September, 1977, insofar as the fungicide and herbicide rates were applicable to the commodities shipped, Sea-Land rated them at $134 WM. The first shipment moved under a bill of lading dated July 16, 1977, and was shown on the bill of lading as "Herbicidal Preparations." The second shipment

[2] The tariff page in effect at the time of the May 17 notice shows that a number of lines also charged a special rate of $146 W but that the general Conference rate was $134 weight or measure. *See* Tariff, 8th rev. page 516.

moved under a bill of lading dated August 11, 1977, and was shown as "Fungicides N.O.S." and "Herbicides N.O.S." The third shipment moved under a bill of lading dated August 20, 1977, and was described as "Insecticide, Dry, N.O.S." with further indication that the product was a "poison." The fourth shipment moved under a bill of lading dated September 9, 1977, and was described as "Fungicides" and "Weed Killers." Du Pont furnished evidence showing that the weed killers were in fact herbicidal preparations.[3] However, that portion of the shipment described as "Fungicides" on the bill of lading, according to evidence furnished by Du Pont, consisted of a particular type of fungicide, a product known as "Tersan 75" which consists of "Dithiocarbamic acid fungicidal preparations, except household and industrial." This portion of the fourth shipment was rated by Sea-Land under Item 599.2065.00 of the tariff ("Dithiocarbamic Acid, Fungicidal Preparations, Except Household and Industrial") which published a rate of $145 WM. *See* Tariff, 11th rev. page 517. Du Pont does not contest the rating of this portion of the shipment. *See* Affidavit of Mr. Frank E. Baldwin, Supervisor, Liner Rates and Services, Ex. 1, at 4.

Except for that portion of the fourth shipment which consisted of "Tersan 75" (where there is no dispute between the parties) Sea-Land rated the herbicides, fungicides, and insecticides, which comprised the bulk of the shipments, under Item 599.2000.00 ("Insecticides, Fungicides, Infectants & Similar Products—N.O.S. . . .") at $134 WM and they were rated on the M (measurement) basis. In each instance, Du Pont claims that the correct rates should have been the rates applicable before the notices of increases were issued on May 17, 1977. These rates were $134 W for "herbicidal preparations" (Item 590.2080.00) and $145.50 W for "fungicidal preparations" (Item 599.2075.20) which items, as noted, were deleted and consolidated into Item 599.2000.00. In a special exhibit, Du Pont shows that it paid Sea-Land additional freight in the amount $17,782.70, under the $134 WM rate as compared to what it would have paid under the earlier rates. Ex. 3.[4]

Therefore, Du Pont seeks an award of reparation in that amount, and according to its original complaint, "interest and/or such other sums as, in view of the evidence, the Commission shall determine that Complainant is entitled to receive." Complaint, at 4.

Discussion and Conclusions

As noted earlier, the issue for determination concerns the effect of the two tariff notices of rate increases issued on May 17, 1977, on the application of rates for shipments occurring during July through September 9, 1977. In other

[3] See Exhibit 1 (Affidavit of Frank E. Baldwin, Du Pont's Supervisor, Liner Rates and Services, at 4, 5). Sea-Land does not dispute the fact that the commodity was a herbicidal preparation. Tr. 29-30.

[4] Exhibit 3 shows that Du Pont has revised its earlier claim for reparation, which was $17,330.38, as shown in the complaint, and now seeks $17,782.70. The reason for the revision relates to Du Pont's earlier failure to rate a portion of the second shipment under previous Item 599.2075.20 ("Fungicidal Preparations") whose rate was $145.50 W, rather than $134 W, which Du Pont is seeking to have applied for the remainder of the shipments except for that portion of the fourth shipment containing "Tersan 75," as discussed above. Moreover, Du Pont had to recalculate its original claim which had been based mainly upon a rate of $141 W, which Du Pont mistakenly believed would have been the applicable rate after a July 1, 1977, general rate increase. Tr. 10-18. No such increase affected these rates for the destination ports involved, however. Tr. 12.

words, does the fact that on May 17, 1977, the Conference (and Sea-Land) gave short notice (six days) of a rate increase when deleting Items 599.2080.00 and 599.2075.20 and incorporating them into Item 599.2000.00, and at the same time gave notice that the rate on Item 599.2000.00 would increase effective June 19, 1977, to $134 WM, make it unlawful for Sea-Land to assess that $134 WM rate on later shipments?

As clarified at the hearing, it appears that Du Pont is claiming that the proper rates that should be applied to the four shipments (except for that portion of the fourth shipment consisting of "Tersan 75") should be the rates applicable to Items 599.2080.00 ("Herbicidal preparations") and 599.2075.20 ("Fungicidal preparations") which had been deleted by the first tariff notice of May 17, effective May 23, 1977. Du Pont believes that the short-notice deletion of these items makes application of the $134 WM rate for Item 599.2000.00, which had gone into effect on June 19, 1977, unlawful. This is because, as Du Pont views the matter, the two items were deleted on only six-days' notice, not on 30 days, as required by section 18(b)(2) of the Act.[5] In making this argument Du Pont made clear at the hearing that it was relying solely upon a question of tariff law and was not claiming that it had relied on the earlier rates or any representations to Du Pont prior to shipment that the earlier rates would be charged on the shipments. In other words, Du Pont is not making a claim for equitable relief under the special-docket provisions of section 18(b)(3) and is not claiming that it had been quoted the earlier rates on which it had relied or that it had believed the earlier rates would apply before booking the shipment. Tr. 40. On the contrary, counsel for Du Pont stated that the alleged overcharge was uncovered through normal auditing procedures some time after the shipments took place and that no one at Du Pont who booked the shipment had a daily familiarity with the tariff rates. Tr. 39–40. Counsel for Du Pont made clear that Du Pont paid the rate filed at the time of the shipments ($134 WM), as it believes it was required to do, but believes that it now has the right to sue for recovery of the allegedly unlawful charges, under section 22 of the Act, as a matter of law. Tr. 40–41. In short, Du Pont is contending that it was overcharged unlawfully because of Sea-Land's deletion of the earlier rates on Items 599.2080.00 and 500.2075.20 on short notice on May 17, 1977, effective May 23, 1977, and that it is now entitled to recover the overcharge, in effect returning the rate to those rates in effect prior to May 23, 1977. Du Pont concedes that it has been unable to find much case law in support of its position (Tr. 35, 36) but does rely upon one case, namely, *Chicago, M., St. P. & P. R. Co. v. Alouette Peat Products,* 253 F.2d 449 (9th Cir. 1957), and another more recent I.C.C. case which cited *Alouette Peat,* namely, *Shobe, Inc. v. Bowman Transportation, Inc.,* 350 I.C.C. 664 (1975). Du Pont contends that in *Alouette Peat,* the Court allowed shippers to

[5] Although not clearly articulated by Du Pont at the hearing, one could conceivably argue that the charging of a rate other than $134 W, which Du Pont believes to be the only rate lawfully applicable to the four shipments, violated section 18(b)(3) of the Act because Sea-Land charged a rate other than that lawfully applicable. This argument is somewhat theoretical assuming as it does that the only rates properly specified in the tariff were the earlier rates of $134 W and $145.50 W, and that any departure from them (by charging $134 WM) was an act of charging a rate greater than that specified in the tariff. Since this contention, however, rests upon a determination of the effect of the short notice filing in May on the effectiveness of tariff rates in July through September, the critical issue remains whether the earlier short notice has any effect on the later rates, i.e., whether a violation of section 18(b)(2) which requires 30-days' notice of rate increases, requires that the later rate be held void.

recover overcharges because rail carriers had published increased rates on less than required statutory notice as well as exceeding permissible rate levels and that the recovery was allowed although the shipments took place some time after the short-notice increases had gone into effect. Tr. 33–38. In *Shobe,* Du Pont contends that the I.C.C. asserted that a statutory violation in filing tariffs would form the basis of relief for shippers. *See* letter from Raymond Michael Ripple, attorney for Du Pont, dated November 21, 1979, addressed to me. Although the rate on file might have been legal and therefore had to be paid by Du Pont, Du Pont claims that it was not lawful because of the defective filing in May, and therefore that Du Pont is now entitled to recovery. Tr. 45–46.

At the hearing, counsel for Sea-Land rebutted Du Pont's arguments on the law. Tr. 46–51. Counsel conceded that there was indeed a lack of case law on the particular point. However, he argued that *Alouette Peat* case did not merely involve a carrier's filing rate increases on short notice but rather filing rate increases at unlawfully high levels as well as on short notice, in violation of a specific order of the I.C.C. which had fixed a permissible level of rate increases as well as the particular notice period to be followed by the carriers. By violating the order of the I.C.C., according to counsel, the carriers had committed an act that was void and unlawful and the increased rates were, in effect, already rejected by the I.C.C. In the present case, however, the carrier rate filings were not rejected by the Commission under section 18(b)(4) of the Act (which authorizes rejection under certain circumstances). Therefore, according to Sea-Land's counsel, the filing was not void at the outset, although filed on short notice, and although the statutory violation cannot be excused, once the statutory notice period has run, the filed rates may become legal and lawful. Tr. 51.[6] Counsel stated furthermore that *States Steamship Company Far East/USA Household Goods Tariff No. 2FMC–9,* 19 F.M.C. 793 (1977), a case which I cited to both counsel and requested their views, is more pertinent than *Alouette Peat,* as establishing that an unrejected tariff is not void even if filed defectively.

After considering arguments of counsel and consulting case law, I find that Du Pont's contentions are not tenable either in fact or in law and that Sea-Land's views as to the correct legal conclusions to be drawn in this case are more reasonable. Although the Conference and Sea-Land did in fact file a defective tariff notice in May 1977, not only was this filing never rejected by the Commission but it had long since expired and receded into history by the time of the four shipments in question. To hold that a short-notice filing in May 1977 should render rates applicable to shipments in July through September ineffective would introduce a dangerous and unsound concept into tariff law, something akin to corruption of blood, i.e., a permanent taint running through the tariff many months after the 30-day notice period required by law had expired. Such a doctrine could expose a carrier to claims for many years after a short-notice filing had been made even if there were absolutely no

[6] In counsel's exact words: "In my view, conceivably passage of time alone and the expiration of the 30 day statutory requirements would be adequate to accomplish that purpose." Tr. 51.

equities on the side of the shipper, i.e., even if the shipper had no idea and did not care what the rate had been when it booked the shipment and consequently suffered no loss in profits because of payment of the applicable tariff rates. Moreover, to give shippers awards of money for short-notice tariff filings occurring months before their shipments would, in effect, be giving them even greater protection than the statute, which limited the notice period to 30 days, intended. Finally, this is not even a case in which the assailed rate which had been applied by the carrier to the shipments was the same rate which had been filed on short notice, since the rate filed on short-notice was $146 W, and the rate which was applied was $134 WM. Had Sea-Land attempted to charge the $146 W rate to shipments occurring within the first 30 days of the May 17 tariff filing, Du Pont might well claim the protection of the 30-day period established in section 18(b)(2) of the Act. In this case, however, I find no grounds for extending such protection well beyond the 30-day period and for voiding another rate which had been filed on statutory notice.

Principles of Tariff Law

Du Pont does not dispute the legal principle that a tariff rate which is filed and not rejected is legally applicable and must be paid by the shipper. This is a correct statement of applicable tariff law. Du Pont is also correct in asserting that a shipper, after paying the legal rate on file, may sue thereafter to seek recovery of damages where there is a violation of law. The Commission has acknowledged these principles. Thus, in *States Steamship Company Far East/USA Household Goods Tariff No. 2 FMC-9, supra,* the Commission was called upon to render a declaratory judgment regarding the effect of an allegedly defective tariff cancellation notice. In that case the carrier (States Steamship Co.) had at one time been a party to a mutual transhipment agreement with another carrier (Lykes Bros. Steamship Co., Inc.) by which the two carried military household goods from Far Eastern ports to U.S. West Coast and Gulf ports. The agreement was canceled on January 10, 1976, but the implementing tariff (FMC-9) was inadvertently not canceled by the parties. States finally noticed the failure to cancel the tariff and sent a telex to the Commission on May 21, 1976, announcing the cancellation of Tariff FMC-9. Under the Commission regulations then in effect (46 C.F.R. § 536.6(c)(5)), States was supposed to follow the telex with a permanent tariff page in 15 days. This was not done. The permanent page was not filed until July 29, 1976.

The shipper, Military Traffic Management Command of the Department of Defense (MTMC) argued, among other things, that the May 21 tariff filing was a "nullity" because it caused an increase in rates on less than 30-days' notice and because States violated the Commission's regulation requiring the followup permanent page. Alternatively, MTMC argued that the tariff was not legally canceled until August 29, 1976. The Commission, however, found that the May 21 filing effectively canceled the tariff notwithstanding the failure to file the permanent page within the time required by the regulation. Moreover, the Commission found that the May 21 notice did not result in an increase in cost to the shipper but rather a cancellation of a service. The Commission

rejected the "nullity" or "void *ab initio*" theory as to the May 21 filing. The Commission followed the general rule that once accepted for filing, a tariff rate becomes the legal rate which must be applied by the carrier notwithstanding defects in the filing and that this situation prevails until the Commission cancels the tariff after an appropriate proceeding, in which event the tariff is void thereafter. Relief for shippers injured by defective tariff filings are determined in section 22 proceedings after the tariff has been applied, not by declaring the tariff void retroactively. In pertinent part the Commission stated:

> A tariff has one major purpose—to prevent rebates and other types of unjust discrimination by publicly stating the rates to be charged all eligible shippers. Tariff filings are neither adjudicatory matters nor finally determinative of individual rights or privileges. Once accepted by the Commission, a tariff must be adhered to by publishing carrier and shipper alike. (Citation omitted.) Damage actions for illegal tariff provisions arise after the fact and are resolved by means of section 22 proceedings. (Footnote omitted.) To *retroactively* declare a duly accepted tariff *void* for noncompliance with section 536.6(c)(5) would contravene the regulatory scheme established by most Federal common carrier statutes, including the Shipping Act. Once accepted, a tariff may be canceled only after the Commission has, after appropriate proceedings, found it to be inconsistent with some other provision of the Shipping Act or the Commission's Rules. . . . Once the temporary filing was accepted by the Commission, (Footnote omitted) it became legally binding upon States Line, Lykes, and any shippers of military household goods employing the service described therein.
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> 19 F.M.C. at 797–798

To emphasize that the Commission did not accept MTMC's argument that a defective tariff filing is void *ab initio,* the Commission explained that some times the Commission is unable to reject a tariff as soon as it is filed because of lack of opportunity to take immediate action, for example, when the tariff telex is received after hours as happened in *States.* But when the Commission finally rejects the tariff, this does not mean that the tariff was void *ab initio.* Rather it means that the tariff was never accepted.[7]

The principle that filed rates are legally applicable and must be applied at the time of shipment notwithstanding defective filings or inherent unlawfulness of the rates, subject to possible claims for recovery of damages in appropriate proceedings, is well established in the law. See the discussion of the Court in *Alouette Peat,* 253 F.2d at 455 n. 5, citing *Louisville & N. R. Co. v Maxwell,* 237 U.S. 94, 97 (1915); and *Davis v. Portland Seed Co.,* 264 U.S. 403, 425 (1924). In short, the rate on file must be observed even if it does not conform to all requirements of substantive law, until the finding of unlawfulness is made because, whatever its defects, it is the only legal rate. See also *Valley Evaporating Co. v. Grace Line, Inc.,* 14 F.M.C. 16, 19, 20 (1970) ("a rate may be legal in the sense that it is the regularly published rate and yet be unlawful if it violates other provisions of the act."); Docket Nos. 73-17/74-40, *Sea-Land Service, Inc.—Rule on Containers,* 18 SRR 553, 556 (1978); *Cincinnati,*

[7] Thus, the Commission explained:

> It is generally assumed that a tariff which is not rejected by the close of business on its stated effective date has been accepted for filing. Difficulties arise in the case of after hours telex filings such as State Line's May 21, 1976 cancellation notice. In such situations, the Commission must have a reasonable opportunity to review the filing, and a "rule of reason" has been applied. If the tariff submission is in proper form it is *accepted retroactively.* If significant errors exist, then the tariff is *rejected* as expeditiously as possible on the theory that it was never accepted and not on the theory that it was "void *ab initio.*"
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> 19 f.M.C. at 798 n. 15.

NO.O. & T. P. Ry. Co. v. Chesapeake & O. Ry. Co., 441 F.2d 483, 488 (4th Cir. 1971) ("[e]ven if the Commission later determines that the tariff is not mandatory . . . the tariff, so long as it is in effect, must be treated as though it has the force of law"; 13 Corpus Juris Secundum, Carriers § 302, at 699–700.

The principle that a rate on file is the only legally applicable rate at time of shipment and that rejection of the tariff by the Commission renders use of the rate unlawful for the future but does not make it void *ab initio,* is supported by other authorities. Section 18(b)(4) of the Act, for example, which is similar to provisions in the Interstate Commerce Act, states:

> The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section. . . . *Upon rejection by the Commission, a tariff shall be void and its use unlawful.* (Emphasis added.)

It has been held, therefore, under similarly drafted statutes, that the filed tariff rates are applicable and do not become unlawful if not rejected. Thus, in *Phillips Petroleum Co. v. Akron, C. & Y. R. Co.*, 308 I.C.C. 257 (1959), the Interstate Commerce Commission dismissed a complaint filed by a shipper who alleged that railroads had increased rates on less than statutory notice and sought a refund of alleged overcharges in an amount approximating $75,000, plus interest. The rate filing had been done pursuant to a court order but nevertheless had the effect of increasing costs on short notice. The I.C.C. did not reject the filing even though the court's order did not require the railroads to file the increases on less than statutory notice. The I.C.C. noted that its rejection authority under former section 6(6) of the Interstate Commerce Act, which is similar to section 18(b)(4) of the Shipping Act, is not mandatory, i.e., that the Commission was not required to reject defective tariffs but if those tariffs were rejected, they become void prospectively, not retroactively. Interestingly, the I.C.C. refused to follow the decision in *Alouette Peat,* upon which Du Pont in this case relies and the shipper in that case had relied in attempting to return to the previously filed lower rates, finding that the carriers in *Alouette Peat* had not merely filed rates on less than statutory notice but had also violated the Commission's order imposing a maximum rate level so that the Court had refused to give effect to the rate increases which were not found to have been changed legally. 308 I.C.C. at 259. In commenting upon its discretionary rejection authority, the I.C.C. stated:

> Under section 6(6) the Commission is authorized to reject a schedule which does not comply with the provisions of section 6 or the regulations prescribed thereunder, and section 6(9) provides that the Commission "may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date. . . ." Both of these paragraphs provide that any schedule so rejected by the Commission "shall be void and its use shall be unlawful." It should be noted that the Commission is not required to reject any schedule, and that *a schedule becomes void and its use unlawful only upon its rejection by the Commission.* (Emphasis added.)
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> 308 I.C.C. at 260

The I.C.C. went on to say that since the tariff rates were not rejected by the Commission, they had to be applied and were "valid" even if they violated section 6 or regulations prescribed thereunder. 308 I.C.C. at 260. Then the Commission stated that "the assailed rates could not be found inapplicable, or

unjust and unreasonable, solely because they were filed on less than statutory notice without the prior consent of the Commission." *Id.* Finally, the Commission noted that there was no evidence that the assailed rates were "inherently unjust or unreasonable" or otherwise unlawful and dismissed the complaint. *Id.*

In *Shobe, Inc. v. Bowman Transportation, Inc.,* 350 I.C.C. 664 (1975), a case which Du Pont furnished and claims to support its position, the I.C.C. similarly dismissed a complaint in which a shipper had alleged that the carrier had improperly charged rates which had been increased without utilizing the proper tariff symbol required by pertinent regulations. The I.C.C. reversed the initial decision of the Administrative Law Judge who had recommended that the shipper be awarded reparation plus interest in reliance upon *Alouette Peat.* The I.C.C., however, reiterated that a tariff is not void automatically even if it was filed defectively but only void when rejected by the Commission under former section 217(a) of the Interstate Commerce Act (comparable to former section 6(6) of the Act). 350 I.C.C. at 670. Furthermore, the I.C.C again refused to follow *Alouette Peat* in deciding the complaint case before it in *Shobe.* It stated that the court in *Alouette Peat* had found that the rates filed in the tariff had to be collected by the carrier and "did not hold that the tariff was void but, rather that the rates were unlawful because not made effective in the proper manner." *Id.* The I.C.C. also distinguished *Alouette Peat* and the complaint case, which involved a violation of I.C.C. regulations rather than statutory notice provisions, by stating that there was no specific administrative remedy for the statutory violation in *Alouette Peat* whereas in *Shobe* there was an exclusive remedy for violation of the I.C.C.'s regulations, namely, rejection by the Commission and the voiding of the tariff. *Id.* Again, as in *Phillips Petroleum,* the I.C.C. found no reason for a reparation award and found that the assailed rates had not been shown to be unjust, unreasonable, or otherwise unlawful. *Id.*

In other cases the I.C.C. has dismissed complaints alleging tariff filing errors and adhered to the principle that the tariff rates, unless otherwise unreasonable or unlawful, should be charged and become void only after the Commission actually rejects the tariffs under the appropriate statutory provisions cited above. See, e.g., *Heavy and Spec. Carriers Tariff Bur. v. U.S.A.C. Transport,* 302 I.C.C. 487 (1957), and cases cited therein. Cf. also *Aaacon Auto Transport v. State Farm Mut. Auto Ins.,* 537 F.2d 648, 656 (2d Cir. 1976), *cert. den* 429 U.S. 1042 (1977) and *Aluminum Products Dist. v. Aaacon Auto Transport,* 549 F.2d 1381, 1385 (10th Cir. 1977), indicating the courts' views that tariffs are void after rejection by the I.C.C.

Notwithstanding this case law which demonstrates that reparation awards in cases involving old defects in tariff filing are virtually non-existent, Du Pont relies upon the aforementioned *Alouette Peat* case in support of its claim. As already mentioned, that case has consistently been distinguished by the I.C.C. itself and in this case, as counsel for Sea-Land has contended, the distinctions must be considered. In *Chicago, M. St. P. & P.R. Co. v. Alouette Peat Products, supra,* 253 F.2d 449, the Court of Appeals for the Ninth Circuit affirmed a lower court decision directing the I.C.C. to award recovery of overcharges which had been collected by railroads under rates which had been

increased by the railroads on short notice in violation of an I.C.C. order limiting the level of the rates. The court was impressed with the fact that the railroads had exceeded the maximum rate levels which the I.C.C. had twice found to be reasonable and had therefore "exacted a greater increase than the Commission had found they were entitled to. . . ." 253 F.2d at 457. It found that the case was one of overcharges because shippers had been required to pay "cash out of pocket that should not have been required of them," and the Court added that "it would be unthinkable if . . . they could not recover. . . ." 253 F.2d at 457. The Court, however, went beyond the fact that the rates had exceeded maximum permissible levels and agreed with the District Court that the recovery should be based on the last rate in effect prior to the rate increases which the Court felt had been instituted illegally and which therefore could be given no effect. 253 F.2d at 453, 456. As counsel for Sea-Land views this situation, the Court, in effect, rejected the tariff filing because of its violations of the I.C.C.'s orders regarding notice and the proper rate level, although the I.C.C. itself had not rejected the tariff. (Tr. 48). In other words, the Court believed the filing should have been rejected at the outset and took steps to ensure that shippers would be treated just as if the tariff had been rejected and therefore made void *ab initio.*

As far as the parties are aware, *Alouette Peat* is the only case which went so far as to invalidate filed rates from the moment of their filing when the agency did not reject such rates and to award recovery on the basis of the last rates which had been filed properly. As noted, the prevailing view is that filed rates are applicable until rejected and recovery under filed rates is limited to cases in which there is something unreasonable, discriminatory or otherwise inherently unlawful with the rates. Certainly, on the basis of the statements made by the Commission in *States, supra,* this Commission, as well as the I.C.C., does not hold to the view that a tariff filed with some defect that would justify rejection is void *ab initio* and that shippers are entitled to file claims against the filed rate seeking reparation awards during the time the rate was on file without showing that there was something unreasonable or unlawful about the rate itself. Analysis of the void *ab initio* theory which Du Pont, in effect, seems to advocate and which the Court in *Alouette Peat* seems to have followed reveals great dangers and potentials for abuse.[8]

The Problems With the Void Ab Initio *Theory*

The problem with the theory that a defective tariff filing can never be cured with passage of time and can never be given effect is that carriers' tariff rates become uncertain and the carriers may be exposed to liability and innumerable

[8] Occasionally courts will find a filed tariff to be ineffective or void even retroactively but in cases in which there is a fatal violation of law that cannot be cured by the mere passage of time. For example, a carrier's rates may be increased by a tariff filed by an association which failed to obtain the carrier's consent required by law, or a tariff provision may restrict liability of the carrier unlawfully, or the carrier may not have the requisite operating authority under law. See, e.g., *Axinn & Sons Lbr. Co., Inc. v. Long Island R. Co.,* 466 F. Supp. 993 (E.D.N.Y. 1978) (association filed tariff without carrier's consent); *Boston & Maine Railroad v. Piper,* 246 U.S. 439, 445 (1918) (unlawful limitation of liability provision in tariff); *W. J. Dillner Transfer Co. v. U.S.,* 214 F. Supp. 941 (W.D. Pa. 1962) (tariff filed outside scope of carrier's certificate of authority); *So. Pac. Co. v. U.S.,* 272 U.S. 445 (1962) (tariff filed contrary to statute granting Government special discounts). The present case, however, concerns a tariff filing on less than 30-days' notice rather than some type of defect that time can never cure.

claims for refunds of overcharges with no time limitation. For example, suppose a carrier in January 1960 inadvertently publishes a rate change on widgets which, no one notices, results in an increase and suppose the increase takes effect in one week but the tariff is not rejected. Ten years later the rate on widgets may have been increased ten or more times to keep pace with inflation and each rate increase may have been filed on proper 30-days' notice. Nevertheless, some enterprising shipper notices that there had been a short-notice filing ten years ago and argues that the tariff rate on widgets has been corrupted by the ancient defective filing. Therefore, the shipper seeks reparation measuring his damages as the difference between the 1970 rate, say $150 per ton, and the 1959 rate (before the short-notice increase) of, say, $50 per ton. Such a claim is obviously absurd. Or take another example. Let us suppose that the increased rate on widgets was filed on short-notice in January 1969 and never increased since that time. In late 1970 the enterprising shipper notices that almost two years ago there was a short-notice increase which was never rejected. Can he therefore argue that the defective filing was never cured by the passage of time? In other words, is it reasonable to permit him to claim an overcharge and seek to return to the 1968 rate level on the grounds that the rate was void *ab initio?* Should carriers be exposed to multiple suits and claims by shippers whenever they pay the freight because of an error occurring long before they booked the shipment and which caused them no loss of profits or other special financial harm? What doctrine of law holds that shippers are entitled to that much protection against tariff-filing errors? Section 18(b)(2), upon which Du Pont relies, limits protection to 30-days' notice only and furthermore states that rate increases "shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission." As counsel for Sea-Land argued, it is reasonable to conclude that a short-notice rate increase cannot be given effect within the first 30 days, but once that statutory period has expired, there is no reason to deny the validity of the rate.[9] After all, the 30-day period is all the notice that shippers are entitled to have by law. Hence, there is no compelling reason in law or logic to invalidate a rate which had been filed on short notice months or years ago and to award refunds of freight to shippers on the basis of a previous lower rate filed long ago. Such action would not only afford far greater protection to shippers than the law intended but would even award shippers refunds in cases such as this one where the shippers do not claim any special financial injury caused by a mistaken impression that an earlier, lower rate was still in effect. Such action by the Commission might also invite an industry of rate filing auditors who would search old tariff pages looking for defective filings so that they could recommend that shippers file complaints seeking recovery of alleged "overcharges" although shippers had felt no injury at the time of shipment.[10]

[9] The idea that a rate increase filed on less than 30-days' notice may become valid after the 30 days have expired but should not be given effect within the first 30 days, in other words, that the defect cures itself with the passage of time, finds support in *States, supra.* In that case the Commission held that a tariff cancellation notice filed on May 21, 1976, effective immediately, was valid. However, in its decision the Commission commented that had the tariff notice resulted in a rate increase, it could not have taken effect until June 20, 1976. See 19 F.M.C. at 797.

[10] Since payment of an alleged overcharge can constitute the beginning of a cause of action, a shipper could conceivably pay an alleged overcharge years after the defective filing of a rate increase and file a complaint within two years after payment under section 22. See *Aleutian Homes, Inc. v. Coastwise Line et al.,* 5 F.M.B. 602, 611 (1959). I do not mean to imply that Du Pont

In the Present Case the Rate Under Attack Was Not the Rate Filed on Short Notice

The previous discussion demonstrates that rates which had been increased at one time in the past by defective notice should nevertheless be held applicable to shipments occurring many months in the future and, as I have suggested, applicable to shipments occurring more than 30 days after the original defective filing. The discussion assumed that the rates which were applied to later shipments and which were attacked were the same rates which had been filed defectively in the past. In the present case, however, as the factual discussion showed, the rate which was applied to the shipment and which is under attack ($134 WM) is not the same rate which had been published on short notice ($146 W). Under Du Pont's theory, then, not only should the Commission hold a rate to be ineffective or void *ab initio,* which had been defectively filed months before, but it should also hold a subsequent rate invalid as well. Carried to its logical conclusion, this could mean that any present rate could be invalidated if it was part of a chain of increases in which the first rate increase had been filed on less than 30-days' notice.[11]

It will be remembered that prior to May 23, 1977, the rates for herbicidal and fungicidal preparations were $134 W and $145.50 W, respectively. However, on May 17, 1977, two tariff notices were published and filed by the Conference. One canceled the two previous rates and referred shippers to another commodity item. The other announced that Sea-Land's special rate on that item, which was $146 W, would expire on June 19, 1977, in favor of the Conference's general rate of $134 WM. This latter notice was published on more than 30-days' notice. The first notice, however, attempted to effectuate a rate increase on only six-days' notice. Clearly, under the doctrines discussed above, no effect could be given to the first notice as regards a rate increase to $146 W, and no one is attempting to apply such a rate in any event. But the second notice announced an increase on Item 599.2000.00 on full statutory notice, resulting in the rate of $134 WM which was applied to Du Pont's shipments from July through September. Nevertheless, Du Pont seeks to have this $134 WM rate declared void and ineffective for purposes of this case.

Since the $134 WM rate had been filed on full statutory notice but the $146 W rate had not been, it seems clear that it is the $146 W rate which should be declared ineffective and void, not the $134 WM rate. In other words, shippers like Du Pont had a right to consider the special $146 W rate to be defectively filed and subject to reparation action if Sea-Land had attempted to charge it. Moreover, since that special rate was announced as expiring on June 19, 1977, there is no way in which that rate could have been given effect 30 days after publication under the theory that a short-notice filing can correct itself with the passage of time. However, the second notice gave shippers more than 30-days' notice that on July 19, 1977, the rate on their commodities would

[11] In all fairness to Du Pont, I should mention that Du Pont does not seem to be urging such an extreme principle and is not supporting the idea of indefinite exposure of carriers to claims because of old tariff-filing errors. Counsel for Du Pont explained at the hearing, in response to my comments on such doctrines, that his contention was much narrower and rested upon the notice provisions of section 18(b)(2) and the doctrine enunciated in *Alouette Peat.* Moreover, he specifically asked that the case be limited to the facts involved herein so that Du Pont could be awarded reparation and he did not seek to establish open-ended carrier liability. See discussion at 51-54 of the hearing transcript.

increase to $134 WM, and there is no basis to hold that this rate should not be held applicable because of the other filing, especially since the shipments did not even commence until July 16, 1977. Whatever the merits of *Alouette Peat,* at least the rates which were assailed and held ineffective by the Court were the same rates which had been published on inadequate notice and which had violated a specific order of the I.C.C. In short, I find no basis in law by which I can find that the $134 WM rate under attack here should be held to be ineffective or void *ab initio.*

A Grant of Du Pont's Claim in This Case May Indirectly Contravene the Special-Docket Law

There is another reason why acceptance of Du Pont's contentions in this case may lead to possible abuse in addition to the problem of creating uncertainty about the validity of carriers' filed rates for an indefinite period of time whenever there had once been a defective tariff filing. This relates to the fact that there had been a special-docket application filed on behalf of Du Pont by the Conference which had to be rejected because it was filed beyond the 180-day period permitted by section 18(b)(3), as amended by P.L. 90–298. If, in fact, there was a tariff-filing error in May and Sea-Land would have preferred to assess a rate other than $134 WM to the commodities shipped during July through September had the error been detected prior to the time of the shipments, the law did provide a special equitable remedy. However, that special-docket application could not be considered because of its untimeliness and the Commission should be careful not to circumvent the jurisdictional requirements which the application failed to meet by granting the same claim under a strained theory of law. Such a result is also unwarranted when the shipper, such as Du Pont here, makes clear that it is not basing its claim on reliance on a lower quoted rate or carrier's misrepresentation but rather on a strict construction of tariff law.[12]

I conclude therefore that there is no basis in law for me to find that the rate which Du Pont paid for the four shipments during July through September, namely, $134 WM, should be declared ineffective, invalid, or void *ab initio* because of certain tariff filings in May of 1977. I also find that the subject rate was filed on full statutory notice and that the rate which was not applied and could not have been given effect was the special rate of $146 W, which expired on June 19, 1977. Moreover, I find that there is no basis in equity and no showing of unlawfulness or unreasonableness in connection with the $134 WM rate which could support a finding that Du Pont suffered financial injury for which it now deserves reparation under section 22 of the Act.

[12] As I mentioned above, a special-docket application was rejected by the Commission's Secretary because it was filed beyond the permissible time limit as prescribed by law. Counsel for Du Pont, at the hearing, expressed no knowledge of the facts contained in the application and deemed them to be irrelevant because his case was based upon principles of tariff-filing law, not upon equitable doctrines found in the special-docket cases. Tr. 38 41.

ULTIMATE CONCLUSIONS

Du Pont is seeking to have the Commission declare a rate on file during July through September 1977 to be ineffective and void as regards four shipments made during that period of time. It bases its claim on a theory of law that because there had been a short-notice filing of one rate ($146 W) the subsequent rate which was charged and which was filed on adequate statutory notice ($134 WM) was also ineffective and void. The overwhelming view of the authorities in tariff law is that a tariff rate on file is the only legal and effective rate that can be charged by the carrier and that it remains so until after rejection by the agency concerned under the rejection authority conferred by law. Furthermore, if any shipper has suffered harm because of the rate, the shipper cannot merely claim that the rate had once been filed on short notice and should now be declared ineffective or void *ab initio.* Rather the shipper must show that there is something inherently unreasonable or unlawful about the rate and that the shipper suffered injury as a consequence. Otherwise if refunds of freight are awarded in complaint cases merely because of old defective filings, carriers' tariff rates become uncertain and subject to attack for an indefinite period of time even when shippers have not suffered any special injury and had not been misled prior to shipment regarding the fact that the rate charged was filed and in effect. The only exception to this rule of tariff law is the special-docket procedure authorized by section 18(b)(3) of the Act in which shippers have been injured when relying on a tariff which contains an error. This is not that case.

Du Pont relies upon one court case, *Alouette Peat, supra,* in support of its claim. However, in that case the court invalidated a rate increase which had violated not only the notice provisions of law but also a specific order of the I.C.C. as to rate levels. Moreover, in that case the rates under attack by the shippers were the same rates which had been filed improperly. In this case the rate attacked by Du Pont is not the same rate which had been affected by a short-notice filing in violation of section 18(b)(2) of the Act. Even if the rates were the same, however, the more reasonable rule would seem to be that a short-notice filing corrects itself after 30 days, i.e., that the rate can be given no effect for the first thirty-day period but becomes effective thereafter. To declare filed rates void retroactive to the date of filing would not only create great uncertainty as to the validity of carriers' filed rates but might well invite an industry of rate-filing auditors seeking to locate old defects in tariffs which caused no harm to any shipper at the time of shipment but could now serve as the basis for complaints alleging "overcharges."

A final cautionary word is warranted in this case because of the fact that relief for Du Pont had once been sought in the form of a special-docket application which had been filed by the Conference but had to be rejected because it was filed beyond the 180-day period permitted by the special-docket provisions of section 18(b)(3) of the Act. Should Du Pont's arguments be accepted and it be granted the same relief that was sought in the special-docket application, the Commission may be circumventing the requirements of the

special-docket law on the basis of a strained theory of law in a case in which Du Pont does not even claim relief on equitable grounds.

I conclude therefore that there is no basis in law, fact, or equity for me to find that the rate which Du Pont paid for the four shipments should be declared ineffective, invalid, or void *ab initio* and no showing that Du Pont suffered financial injury for which it now deserves reparation under sections 18(b)(2) and 22 of the Act.

(S) NORMAN D. KLINE
Administrative Law Judge

WASHINGTON, D.C.
January 18, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-64

FIAT-ALLIS FRANCE MATERIELS
DE TRAVAUX PUBLICS S.A.

v.

ATLANTIC CONTAINER LINE

NOTICE

February 26, 1980

Notice is given that no exceptions have been filed to the January 21, 1980 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. 79-64

FIAT-ALLIS FRANCE MATERIELS
DE TRAVAUX PUBLICS S.A.

v.

ATLANTIC CONTAINER LINE

Finalized February 26, 1980

Complaint was not filed within the two-year period required by section 22 of the Shipping Act, 1916, and is therefore dismissed.

J. Ethan Jacobs for complainant.
John A. McFarlane for respondent.

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

Complainant Fiat-Allis France Materiels De Travaux Publics, S.A. (Fiat-France) charges Atlantic Container Line (ACL) with violations of section 18(b)(3) on a shipment of "wheelloaders" from New York to Le Havre, France. Generally, the complainant alleges that "on various dates in 1976, Fiat-Allis Construction Machinery Inc. (Fiat-Illinois), a manufacturer, shipped wheelloaders" via ACL from New York to Le Havre. "Through clerical error the shipper declared the full cube of each wheelloader as if shipped with tires and buckets at 2958 CU. FT. . . . Since tires and buckets were not shipped on the machines the correct cube of each wheelloader was 2547 CU. FT." Overcharges are claimed in the amount of $8,004.00.

In a letter dated July 11, 1979, ACL submitted a "sworn statement" as its answer to the complaint. In its statement ACL says that but for a conference tariff rule it "would have settled this claim when first presented based on the corrected dimensions as substantiated by documents from claimant."[2] Aside

[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] The tariff rule referred to provides: "claims for adjustment of freight charges, if based on alleged errors in weight or measurement will NOT be considered unless presented to the member line in writing before the shipment involved leaves the custody of the member line. . . . All other claims for adjustment of freight charges must be presented to the Member Line within six (6) months after the date of shipment." North Atlantic French Atlantic Freight Conference, Tariff No. (3) FMC 4.

from some mathematical errors which would reduce the amount of the claim to $7,999.00, ACL does not now dispute the claim. Further ACL expresses the hope that its response "is sufficient so that a hearing and oral testimony will not be required."

Initial consideration of the complaint and answer brought to the fore the need for the actual dates of payment of the freight charges, since the complaint stated that "All payments were made by claimant within two years of the original date of filing of these proceedings."

I telephoned counsel for complainant on July 31, 1979, and requested that he supply the dates of payment for each shipment. He said he would supply them as soon as possible. I received no response from counsel and on October 11, 1979, I wrote counsel a letter reminding him of the telephone call and giving him until October 30, 1979, to submit:

[t]he actual payment dates on the shipments in question. These should be supported by some documentary evidence.

On October 12, 1979, I received a letter from Fiat-Allis of Illinois [3] stating that the dates of payment were coming from France. On November 9, 1979, I received the dates of payment.[4]

After receipt of the payment date a complete analysis of the complaint revealed the very definite possibility that the complaint was barred by the 2-year statute of limitations set out in section 22 of the Act. The analysis showed that the complaint was first filed on February 26, 1979, and was "amended" on June 21, 1979; that the shipments were made on various dates in 1976; and that the complaint was intended to be a "continuation of proceedings originally filed as informal proceedings filed in February 3, 1979." Further, there was the statement already noted that "claimant" had paid the freight charges "within two years of the original date of filing of these proceedings."

By order of November 7, 1979, I required complainant to submit the following:

1. An explanation of the statement in paragraph I of the complaint that it "is a continuation of proceedings originally filed as informal proceedings on February 3, 1978." This explanation should be accompanied by copies of the "informal" filing and any other evidence supporting the assertion.
2. An explanation of the statement that "All payments were made by Claimant within two years of the original date of the filing of these proceeding," i.e., to what date does the statement refer?
3. A memorandum showing why the return of the complaint by the Assistant Secretary on June 4, 1979 and the refiling of the complaint on June 21, 1979, does not establish the latter as the filing date for the purpose of tolling the statute of limitations.

The submission of counsel for complainant in response to the order shows the following sequence of events.

[3] The letter was obviously in the mails when I wrote counsel for complainant.

[4] Contrary to my specific request no documentary evidence was submitted in support of the dates given in the letter.

On February 3, 1978, Inter-Maritime Forwarding Co. (IMF) wrote a letter to the Secretary of the Commission. IMF said that Fiat-Allis of Illinois had made a mistake in the cube of the wheelloaders and had asked IMF to obtain a refund on the ocean freight. The letter went on to set out IMF's inability to recover from ACL because of the tariff rule cited above and concluded:

> However, it is our understanding that you have the authority to review such a case on a special docket and within the time limit of two years. Consequently we hereby request of you a special docket in this matter and for which we will be presenting to you within a few days, complete documentation to these errors.
>
> Trusting this request will receive a favorable reply and that our claim will become effective as of today, we remain. . .

By letter dated February 7, 1978, IMF submitted (1) a letter from Fiat-Allis explaining "their error and outlining the exact cube," (2) the original manifest giving the incorrect measurements, (3) a corrected manifest showing measurements without bucket and tires and (4) ten sets of documents comprising freight bills, bills of lading, and shipping manifests. In the letter IMF said that documents from its file 07/22867 would be sent later because the file had been "temporarily misplaced." IMF concludes:

> We sincerely hope that we have supplied you with sufficient information to clearly indicate the error made by the shipper on his original manifest and we sincerely hope that you shall be able, very quickly to authorize Atlantic Container Line to amend their manifest to clearly assess the freight on 2,542 cubic feet per unit so that in turn they will advise their Le Havre office of this change and accomplish the necessary refund to:
>
> SETI INTERNATIONAL
> 79-81 Rue du. Fg. Poisenniere
> Paris 9 e France
>
> who paid the ocean freight for the consignee and for which they have not been reimbursed for the overpayment since the consignee has refused to pay same due to the wrong cube on which the freight was originally assessed.

Finally, by letter dated February 9, 1979, IMF, submitted the documents from its file 97/22867 and concluded:

> You now have the complete file and we look forward to your early reply and to settlement of this claim regarding wrong assessment of freight based on an incorrect cube.

Now in possession of the "complete file," the Secretary, on February 17, 1978, wrote IMF explaining that it was correct in its basic understanding that the Commission could review a claim for overcharges and order a carrier to make a refund. However, the Secretary pointed out that the Commission had established specific procedures for obtaining review none of which had been met by IMF. The Secretary went on to explain the various ways in which such a claim could be put before the Commission and cited the specific Commission rules governing them. The Secretary returned the letters and documents and sent copies of the pertinent rules to IMF.

Sometme between February 17, 1978 and November 8, 1978 ACL apparently filed some special docket applications. Counsel for Fiat-France alludes to them in his memorandum but does not attach them to it. They are evidenced by a letter dated November 8, 1979 from the Secretary to a "John A. McFarlane, Manager, Conferences & Ocean Pricing, Atlantic Container Line." In

the letter the Secretary returned "several recently submitted special docket application" because they were time-barred. The Secretary went on to point out that it appeared that what ACL was really seeking was authorization from the Commission to refund overcharges resulting from misdeclaration of measurement and if this was so the proper procedure was to file a complaint either formal or informal depending on the amount of the claim.

Finally on February 26, 1979, the original complaint was filed. As already noted that complaint contained no allegation of a violation of the Shipping Act, and on June 4, 1979, the Assistant Secretary wrote counsel for complainant the following letter:

> Returned herewith is a formal complaint which you filed in February of this year. Upon receipt of this complaint I telephonically advised you that it could not be processed because it failed to allege a violation of a specific section of the Shipping Act as required by 47 CFR 502.67. You indicated that you would submit a supplement to correct this defect. I subsequently called again to remind you that we had not received such a supplement.
>
> In view of the amount of time that has passed since our last conversation, I am now returning your complaint for whatever further action you choose to take in this matter. You are reminded, that a two-year statute of limitations applies to complaints seeking reparation.

On June 21, 1979, the Commission again received the original complaint only this time it had attached to it a cover page which stated:

> Section VII of the Complaint attached hereto which was submitted and received by the Federal Maritime Commission February 26, 1979 is amended to replace original Section VII as follows:
>
> VII. The section of the Shipping Act, 1916, as amended, alleged to be violated is 46 U.S.C. 817(b)(3) inasmuch as the carrier charged or received a greater compensation than the rates in its tariffs on file with the Commission.

DISCUSSION AND CONCLUSIONS

Before the merits of this claim can be considered, it must first be determined that the complaint is not time-barred. Section 22 provides in relevant part:

> The Commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment, . . . of full reparation to the complainant for the injury caused by such violation.

The crucial question is whether the "filing" of the "informal proceedings" on February 3, 1978, constitutes the filing of a complaint within the meaning of section 22. Complainant's entire argument on this issue consists of the following:

> [t]he filing with the Commission on February 3, 1978 of a request for a Special Docket in this matter . . . was the first application made to the Commission on behalf of Fiat-Allis and specifically requested at page 2 that the claim with the Commission would be effective as of that date thereby tolling the limitation period. The original claim was supplemented by letters of February 7, 1978 and February 9, 1978 . . . A response was received from the Secretary of the Commission . . . The continued contact between Fiat-Allis and the Commission ultimately resulted in the filing of the formal complaint with the Commission, which, as amended is the basis of the claim herein.

Counsel cites no authority and other than the suggestion that the letter of IMF and the formal complaint are all of a piece, no reasoning or argument is offered to support what is obviously counsel's theory, i.e. that the IMF letter

of February 3, 1978, constituted the filing of a "complaint" which tolled the statute of limitations and all the other pleadings filed in the proceeding are but amendments or supplements to that "complaint." Counsel is wrong on a number of counts which are fatal to his theory.

First it is claimed that the February 3rd letter of IMF "was the first application made to the Commission on behalf of Fiat-Allis. . . . ." This is simply not correct. The only mention of Fiat-Allis anywhere in the letter is to Fiat-Allis Construction Machinery Inc. and the only specific reference to it is as the perpetrator of the error which led to the alleged overcharge. However, Fiat-Allis Construction Machinery Inc. is not the complainant here. It is the letter of February 7, 1978, which clearly indicates on whose behalf the "application" was made. In that letter IMF expresses its sincere hope that:

> [the Commission] shall be able very quickly, to authorize Atlantic Container Line to amend their manifest to clearly assess the freight on 2,542 cubic feet per unit so that they in turn will advise their Le Havre office of this change and accomplish the necessary refund to:
>
> Seti International . . .
> Paris France
>
> who paid the ocean freight on behalf of the consignee since the consignee has refused to pay same due to the wrong cube on which the freight was assessed.

Thus, the application was not on behalf of Fiat-France the complainant here and indeed it could not have been. In order to seek reparation in an 18(b)(3) overcharge case, complainant must either show tht he has paid the freight charges or has a valid assignment of the claim from the person who did. *Trane Co. v. South African Marine Corp.,* 16 SRR 1497, 1501 (1976); *Ocean Freight Consultants Inc. v. Bank Line Ltd.,* 9 F.M.C. 211, 212–213 (1966). *Oakland Motor Car Co. v. Great Lakes Transit Corp.,* 1 U.S.S.B. 308, 311 (1934). Here not only was there not a valid assignment on behalf of Fiat-France, it could not have obtained one since Fiat-France had no claim to assign—it had refused to pay the freight charges. If the claim could be said to be on behalf of anyone it could only be on behalf of Seti-International, whoever they may be. However, it could, I suppose, be argued that the claim was not for an 18(b)(3) overcharge but for special docket relief. To do so would only reach the same result. In special docket cases refunds may be granted only to the person who has actually paid the freight charges. Additionally, even if the letter were considered an application for a special docket the application itself was time-barred under the provisions of section 18(b)(3) which requires that the application be filed within 180 days of the date of shipment. Thus, whether the IMF letter of February 3, 1978 was considered a complaint or an application for special docket relief it was fatally defective, and in neither case could the defect be cured by amendment. See *Carton-Print v. Austasia Container Express,* 20 F.M.C. 30, 39–41 (1977).[5]

The problem of the real party in interest, or the person who actually paid the freight charges raises yet another question—or rather puzzle—concerning the allegations of the formal complaint filed on February 26, 1979. It will be

[5] This says nothing about the other deficiencies if the letter were considered a "complaint." Aside from not naming the real party in interest, it was not sworn to; *Reliance Motor Car Co. v. Great Lakes Transit Corp.,* 1 U.S.M.C. 794 (1938); and it did not allege a violation of the Act as required by Rule 62 of the Commission's Rules of Practice and Procedure.

recalled that the complaint states that "All payments were made by the claimant within two years of the original date of filing of these proceedings." Although somewhat inscrutable, the sentence is meaningful only if it intends to assert that no payment of the freight charges was made earlier than two years prior to the February 3rd letter of IMF. This is borne out by the dates of payment submitted pursuant to my request. The earliest date was March 3, 1976, and the latest was said to be made December 21, 1977. Thus, all the payments would have been made within 2 years of what complainant calls "the original date of filing of these proceedings." It is asserted, however, that the payments were made by "claimant." By even the most charitable construction "claimant" can only be IMF or Fiat-France the complainant here.[6] Yet it is patently clear that neither IMF nor complainant made any payments to ACL for freight charges on the dates submitted. IMF's letter of February 7, 1978, clearly shows that it was Seti-International which had paid the freight charges on the shipments in question and that complainant had so far refused to pay the charges.[7] There is even now nothing in this record to show that complainant has as yet paid the freight on the shipments in question and even has the right to bring the action. However, since the action is time-barred there is no need to determine whether complainant has the legal right to bring this action for reparation.

Complainant points out that ACL has at no time raised the statute of limitations and states, "in fact, it is agreed among all concerned with this action that ACL has no defense to the claim and the refund is currently due to Fiat-Allis." It is a uniformly accepted principle, says complainant, "that it is essential to plead the statute of limitations in order to render it available for a defense." While it is true that there are some cases where it is necessary to plead the statute of limitations, it is not so in cases arising under the Shipping Act. Under that Act the statute of limitations is "jurisdictional." The failure to file a complaint within the two-year period of limitation extinguishes not only the right of a complainant—which could perhaps be revived by the acquiescence of respondent—but it also extinguishes the Commission's jurisdiction. *Reliance Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.M.C. 794 (1938); *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602 (1959). Respondent's failure to plead the statute of limitations in section 22 is irrelevant to the Commission's power to award reparations if the complaint is time-barred. Failure to comply with section 22 leaves the Commission without the power to order a respondent to pay reparations. However, complainant argues that the question of whether the action is time-barred cannot be settled on the present record.

Complainant's argument is that section 22 of the Act starts the limitations period running from the time at which "the cause of action accrues," but since "Fiat-Allis has not been requested to provide any information as to when the cause of action accrued . . . this is a factual question not yet considered." This is especially true, says complainant, "in the light of the fact that the mistake

[6] Claimant could possibly refer to IMF which filed "the first application to the Commission on behalf of Fiat-Allis."

[7] Either counsel for complainant is ill served by his client or his use of the word claimant is far too inexact.

which gives rise to this cause of action was not capable of discovery by Fiat-Allis until significant time had elapsed after shipment of the equipment."

Counsel for complainant is incorrect when he says that the evidentiary question of when the cause of action accrues cannot be resolved on this record. It can be. However, there seems to be some confusion as to just what transaction or element in the total act of transportation starts the two-year period running.

In *Sun Company v. Lykes Bros.*, 20 F.M.C. 67 (1977), it is said in footnote 7 at 69:

By judicial decision and Commission rulings, the two-year period starts either upon delivery of the cargo to the carrier or *upon payment* of the freight charges, whichever is later. *Southern Pacific v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918); *Commercial Solvents Corp. v. Moore-McCormack Lines, Inc.*, 16 SRR 1631, 1632, fn. 3 (Jan. 4, 1977).

In *Commercial Solvents, supra,* footnote 7 of the Commission's Order on Remand read:

It is well settled that a cause of action accrues at the time of shipment or upon payment of the freight charges whichever is later. *Aleutian Homes, Inc. v. Coastwise Line,* 5 F.M.B. 602, 611 (1959); *United States v. Hellenic Lines, Ltd.*, 14 F.M.C. 254, 260 (1971); *U.S. ex rel Louisville Cement Co. v. I.C.C.*, 246 U.S. 638 (1918).

In the 1971 *Hellenic* case, cited in the Order on Remand, the Commission adopted the initial decision of Judge Levy in which he said:

Whether the claim is barred by the statute of limitations is dependent upon whether the cause of action accrued at the time the shipment was received or delivered by the carrier . . . at the time of billing . . . or at the time when the freight charges were paid . . . If it accrued at the time the shipment was tendered or delivered or at the time of billing, the claim is barred by the 2-year period within which the statute requires claims to be filed. If it occurred at the time when the freight charges were paid, then the claim is not barred . . . The rule of law is that "the cause of action of the shipper . . . shall be held not to have ocrued (*sic*) until payment is made of the unreasonable charges" . . . *U. S. ex rel Louisville Cement Co. v. I.C.C.*, 246 U.S. 638, 644 (1918). See also *Aleutian Homes, Inc. v. Coastwise Line,* 5 F.M.B. 602, 611 (1959).

In *Aleutian Homes, supra,* and the Order of Remand, the Commission's predecessor, the Federal Maritime Board, said:

Coastwise's contention that the cause of action accrued at the time of delivery of the shipments is untenable. In *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 310, 311 (1934), our predecessor said:

> [Complainant] was injured the moment he *paid* the charges . . . *His claim accrued at once*. . . . (Emphasis supplied).[8]

From the foregoing it seems clear that originally a cause of action accrued under section 22 only upon the payment of the freight charges. See *Oakland, Aleutian* and *Hellenic, supra.* However, since at least the 1977 Order on Remand in *Commercial Solvents, supra,* the cause of action can accrue at the time of shipment or the time of payment of the freight charges whichever is later. And finally since *Sun Company v. Lykes Bros.*, 20 F.M.C. 67 (1979), the cause of action can accrue at the time of delivery of the cargo to the carrier,

[8] The full sentence quoted here read: "His claim acerued at once and the law administered by the Department does not inquire into later events. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co. et al.*, 245 U.S. 531."

the time of shipment or the time of payment of the freight charges whichever is later.

In suits brought under section 22 to recover reparation or damages for injury caused by a violation of the Act the rationale behind the time of payment of the freight charges is easily understood—the shipper has not been injured until he has paid the unlawful charges. See *U.S. ex rel Louisville Cement Co. v. I.C.C.*, 296 U.S. 638 (1917). In the admittedly limited research I have conducted, I have been unable to find the rationale behind the time of delivery to the carrier or the time of shipment. Fortunately, the selection of one of the three possible events would make no difference to the outcome of this case.

Even if the complaint filed on February 26, 1979, is taken as valid, all of the claims contained in it are barred by the statute of limitations. Paragraph V of the complaint states that the shipments in question were made on various dates in 1976. Thus even if the last shipment was made on December 31, 1976, it would be barred. That delivery to the carrier had to precede the time of shipment seems inescapable. However, even if complainant would define "time of shipment" as date of delivery to the carrier, this could have happened no later than December 31, 1976, by its own admission. Finally it is obvious from the record here that the last event in the total transaction was the payment of the freight charges. Since the last date of payment on a shipment included in the complaint was October 19, 1976, the complaint is clearly barred by section 22 of the Act.[9]

Finally, complainant would point out that for the Commission to hold that these claims are time-barred would be "to work a great injustice to the parties, all of whom recognize their obligations and merely await the authorization of the Commission to rectify the mistake which is the basis for the claim herein." It may be that a "great injustice" will be done to the parties,[10] however, the Commission is without the power and authority to authorize the refund sought here. *Reliance Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.M.C. 794 (1938); *Aleutian Homes Inc. v. Coastwise Line*, 5 F.M.B. 602 (1959); and *Carton Print v. Austasia Express*, 20 F.M.C. 30 (1977).

The complaint is time-barred and the case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

January 21, 1980

[9] Curiously, it would seem that originally a refund was sought on 14 shipments. See IMF letter of February 3, 1978. However, the complaint claims refunds on only 10. Finally, when the request for dates of payment was answered, the number was back up to 14. It is too late now of course for Fiat-France to file a complaint on the 4 omitted shipments.

[10] For an exhaustive discussion of statutes of limitations, their purpose and effect, see *Carton Print v. Austasia Container Express, supra*, at 39-41.