DECISIONS OF THE

# FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

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# FEDERAL MARITIME COMMISSION

## DOCKET NO. 78-14

## CELANESE CORPORATION, ETC.

*v.*

## THE PRUDENTIAL STEAMSHIP COMPANY

## NOTICE

*July 2, 1980*

Notice is given that no appeal has been taken to the May 30, 1980 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

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## DOCKET NO. 78-14

## CELANESE CORPORATION, ETC.

*v.*

## THE PRUDENTIAL STEAMSHIP COMPANY

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## SETTLEMENT APPROVED; COMPLAINT DISMISSED

*Finalized July 2, 1980*

By joint motion, the complainant, Celanese Corporation, a shipper,[1] and the respondent, Prudential Steamship Company, a common carrier by water between United States Atlantic Ports and West Coast Ports of South America, seek approval of their agreement to settle this proceeding and ask further, that, upon approval, the complaint be dismissed.

In my judgment, the settlement should be approved and the complaint be dismissed, with prejudice.

On April 28, 1978, Celanese filed a complaint against Prudential alleging that the respondent violated section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3),[2] in connection with nine shipments of a commodity described in the bills of lading for those shipments as "Kimpac filter material" transported from Charleston, South Carolina, to Buenaventura, Colombia, during the period from January 23, 1976 through September 7, 1976. The complainant asks for reparation in the amount of $21,765.80, with interest pursuant to the provisions of section 22 of the Shipping Act, 1916, 46 U.S.C. 821.[3]

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[1] The shipper shown on the bills of lading is Celanese Fibers Co., a division of the complainant.

[2] Section 18(b)(3) provides as pertinent:

> No common carrier by water in foreign commerce or conferences of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

[3] Section 22 provides, as pertinent:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, 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.

## BACKGROUND

To place the settlement agreement in perspective it will be helpful to summarize the matters which led up to the motion for approval as disclosed in the various pleadings, memoranda and other material furnished either orally or in writing.

During the period from January 23, 1976 through September 7, 1976, there were nine separate shipments of the filter material. Inadvertently, Celanese's freight forwarder described those shipments on the bills of lading by trade name—Kimpac filter material—rather than by the commodity's generic name "Cellulose Wadding." Relying on the descriptions shown on the bills of lading and the rules and regulations of its tariff, Prudential charged the Cargo, N.O.S. rate for the shipments, instead of the "Wadding, Cellulose" rate.[4]

The following table provides relevant data concerning each shipment:

| Shipment No. | Date of Bill of Lading | Measurement 14 cubic feet (CFT) | Cargo N.O.S.* Rate Per 40 CFT | Cellulose* Wadding Rate Per 40 CFT | Amount Paid** | Amount to be Paid at Cellulose Wadding Rate | Difference |
|---|---|---|---|---|---|---|---|
| 1. | 1/23/76 | 1344 | $ 93.00 | $59.75 | $ 3,124.80 | $2,007.60 | $1,117.20 |
| 2. | 2/26/76 | 1928 | 93.00 | 61.75 | 4,482.60 | 2,976.35 | 1,506.25 |
| 3. | 3/10/76 | 1874 | 96.00 | 61.75 | 4,497.60 | 2,892.98 | 1,604.62 |
| 4. | 4/29/76 | 1811 | 96.00 | 61.75 | 4,346.40 | 2,975.73 | 1,370.67 |
| 5. | 4/29/76 | 1811 | 96.00 | 61.75 | 4,346.40 | 2,975.73 | 1,370.67 |
| 6. | 6/25/76 | 1862 | 96.00 | 61.75 | 4,468.80 | 2,874.46 | 1,594.34 |
| 7 | 7/25/76 | 3168 | 101.75 | 61.75 | 8,058.60 | 4,890.60 | 3,168.00 |
| 8. | 8/25/76 | 3050 | 144.75 | 61.75 | 11,037.19 | 4,708.44 | 6,328.75 |
| 9. | 9/7/76 | 3050 | 144.75 | 61.75 | 11,037.19 | 4,708.44 | 6,328.75 |
| | Sub Total | | | | | | $24,389.25 |

The complaint, when filed, contained a request for reparation in the amount of $24,322.05. Subsequently, Celanese recognized that the causes of action concerning two of the nine shipments accrued more than two years before the complaint was filed and were time barred by section 22's jurisdictional statute of limitations. See *Carton-Print, Inc. v. Austasiа Container Express Steamship Co.*, 20 F.M.C. 31, 35-38 (1977) (The Commission determined not to review, July 7, 1977); *U. S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471-472 (1966); *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959). As a result, as set forth in the text, *infra*, Celanese withdrew its request for reparation for those two shipments.

The complaint does not explicitly ask for interest, but requests "such other sums as the Commission may determine to be proper as an award of reparation." The quoted language has been construed as a prayer for interest. See *Consolidated International Corporation v. Concordia Line, Boise Griffin Steamship Company, Inc. as Agents*, 18 F.M.C. 180, 181, n. 3 (1975).

[4] Prudential is a member of Atlantic & Gulf/West Coast of South America Conference. Rule 2(r) of the Conference's Tariff, F.M.C. No. 1, p. 10, provides: "Bills of lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name, to conform to merchandise description appearing herein. Bills of lading reflecting only trade names will be automatically subject to application of the rate specified for Cargo, N.O.S. as minimum."

| Shipment No. | Date of Bill of Lading | Measurement 14 cubic feet (CFT) | Cargo N.O.S.* Rate Per 40 CFT | Cellulose* Wadding Rate Per 40 CFT | Amount Paid** | Amount to be Paid at Cellulose Wadding Rate | Difference |
|---|---|---|---|---|---|---|---|
| | Less Shipments Nos. 1 & 2 | | | | | | 2,623.45 |
| | Total | | | | | | $21,765.80 |

*No separate computation has been made for Bunker, Port Congestion or Port Delivery Charges which would be the same whether the Cargo, N.O.S. rate or the Cellulose, Wadding rate were applied.

**Payment for Shipment Nos. 1 & 2 was made on or before April 1, 1976. Payment for the other shipments was made after May 1, 1976.

As the table and accompanying notes disclose, the shipments identified as Shipments Nos. 1 and 2 were delivered to the carrier and the freight charges thereon were paid by the shipper more than two years before the complaint was filed. Section 22 provides that reparation claims must be filed "within two years after the cause of action accrue[s]." It is well settled by Commission decisions that "A cause of action arises under section 18(b)(3) of the Act upon delivery of the cargo to the carrier or upon payment of the freight charges whichever is later." *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971); *Commercial Solvents Corporation International, Inc. v. Moore-McCormack Lines, Inc.*, 19 F.M.C. 424, n. 3 (1977); *Sun Company Incorporated v. Lykes Bros. Steamship Company, Incorporated*, 20 F.M.C. 67, 69 (1977). Cf. *U. S. ex rel Louisville Cement Company v. I.C.C.*, 246 U.S. 638, 644 (1918).

In recognition of the fact that the causes of action for Shipment Nos. 1 and 2 were time barred, Celanese later amended its request for reparation to the shipments identified as Shipment Nos. 3 through 9, inclusive, in the table. This effectively reduced the claim from $24,389.25 to $21,765.80.

Prior to the time the complaint was filed, Prudential rejected Celanese's claims because of the Conference's tariff rule barring consideration of claims requiring verification of cargo description before the cargo leaves the carrier's possession.[6] In apparent awareness that a tariff rule of this type, which, in effect, infringes on the rights granted by section 22 is invalid insofar as it governs filing of claims before the Commission, *Kraft Foods v. Federal Maritime Commission*, 538 F. 2d 445 (D.C. Cir. 1976), Prudential does not rely on this rule in its defense of the complaint.

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[6] Atlantic & Gulf/West Coast of South America Conference Tariff F.M.C. No. 1, p. 12, Rule 7(b).

Nevertheless, Prudential vigorously defended against the complaint. At first, it filed an answer denying any violation of section 18(b)(3) and a motion for partial summary judgment alleging that the shipments which were made between January 23, 1976 and April 29, 1976, were time barred.[6]

Afterwards, in a reply brief, Prudential made a three pronged defense against the seven remaining causes of action. It continued to assert that the shipments, identified in the table as Shipment Nos. 3, 4 and 5, were time barred.[7] Reinforcing its trade mark argument based upon Rule 2(r) of the Conference's Tariff, Prudential noted that affidavits filed by Celanese did not show that Kimpac filter material is, in fact, Cellulose Wadding, and, in effect, suggested that this issue could not properly be resolved without an evidentiary hearing to test the validity of the affidavits. Third, Prudential expanded its trade mark argument, urging that it was obligated to follow the Conference's tariff rules by applying the Cargo, N.O.S. rate, for if it did not do so it might be subject to sanctions imposed by this agency. In other words, Prudential is simply saying it should not be "faulted"[8] for relying on the bills of lading descriptions even if the commodity shipped is later shown to be Cellulose Wadding.

## THE SETTLEMENT AGREEMENT

Faced with the uncertainty and expense of further litigation, including a potential evidentiary hearing on the commodity description, the parties agreed to settle the proceeding. Following the conditions laid

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[6] Prudential subsequently opted to withdraw the motion for partial summary judgment in favor of addressing the issue in a reply brief.

[7] The argument made by Prudential is that there was a partial payment of freight charges more than two years before the complaint was filed. Insofar as Shipment Nos. 4 and 5 are concerned, payment was made well within two years prior to filing the complaint. With regard to Shipment No. 3, 5% of the freight charges were paid more than two years before the complaint was filed, but the remaining 95% was paid within the two year period. There is no evidence that Prudential considered payment of the 5% to be satisfaction of the indebtedness. The law is well settled that "'payment' means tender by the debtor with the intention to satisfy the debt coupled with its acceptance as satisfaction by the creditor [citations omitted]." *United States v. Isthmian S.S. Co.*, 359 U.S. 314, 318-319 (1959).

[8] The Commission has recognized this non-fault approach. In *Sun Company, Incorporated v. Lykes Bros. Steamship Compony, Incorporated, supra*, the Commission said, 20 F.M.C. at 10:

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

down by the Commission for settlement of section 18(b)(3) complaint proceedings in *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlanttrafik Express Service*, 18 S.R.R. 1536a (1979) (*Organic Chemicals*), the parties submitted a signed settlement agreement entitled Agreement of Settlement and Mutual Release[9] and a Joint Affidavit[10] setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

Under the terms of the settlement agreement, Prudential will refund to Celanese the difference between freight charges based on the Cargo, N.O.S. rate and the Cellulose Wadding rate for Shipment Nos. 3 through 9, inclusive. This amounts to $21,765.80. In addition Prudential agrees to pay Celanese the sum of $1,000 as liquidated interest charges.[11] In sum, Prudential agrees to pay $22,765.80, in full satisfaction of the claim, without admitting liability or admitting to any violation of law.

## DISCUSSION

In *Organic Chemicals*, the Commission reaffirmed the principle that the law encourages settlements and that every presumption is indulged in that favors their correctness, fairness and validity. However, in section 18(b)(3) cases the Commission insisted upon a balancing of the policy of settlement against the possibility of discriminatory rating practices which might result if settlements are conditionally approved in the absence of a finding of violation. Nevertheless the Commission enunciated a policy that parties should have the opportunity to settle disputes but emphasized that in order to prevent abuses, certain criteria had to be met. The Commission put it this way, *Organic Chemicals, supra*, 18 S.R.R. at 1539-1540:

> The Commission recognizes the well-established principle that the law encourages settlements [footnote omitted] and that "every presumption is indulged in that favors their correctness, fairness and validity." [footnote omitted.] But, in considering the settlement of claims arising under section 18(b)(3), the policy favoring the settlement of controversies must be balanced against the possibility of discriminatory rating practices which might result therefrom. For this reason, the Com-

[9] The Agreement of Settlement and Mutual Release is attached as Appendix I.

[10] The Joint Affidavit is attached as Appendix II.

[11] On May 8, 1980, the Commission announced its policy to grant interest on awards of reparation in cases arising under section 18(b)(3) of the Shipping Act, 1916, at the rate of 12%, accruing from the date of payment of freight charges. The Commission authorized exceptions from this general policy on a case by case basis. See 46 C.F.R. 530.12 Policy Statement - Interest on Awards of Reparation. The $1,000 in interest agreed to by the parties lies well within the 12% rate.

> mission has held in the past that approval of the settlement of claims under section 18(b)(3) could be made only upon a finding of a violation of that section. This policy appears to be unnecessarily restrictive. We believe that, even where section 18(b)(3) claims are involved, parties to the dispute should, under certain circumstances, have the opportunity to settle their disputes. To that end, and to insure that the Commission's processes are not used to circumvent the requirements of the statute [footnote omitted] and that settlements and compromises do not serve as a means for carriers to disregard their obligations under the tariff, [footnote omitted] we will permit the settlement of a claim arising under section 18(b)(3) of the Act if the following conditions are met:
>
> 1. A signed agreement is submitted to the Commission;
> 2. The parties file with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be;
> 3. The complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable.

The signed agreement and affidavit, of course, meet the technical standards of *Organic Chemicals, supra*. More importantly, I find that the agreement reflects a rational, valid and fair solution of the dispute and obviates the need for further extensive and expensive litigation. The complaint presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable without such further litigation. Moreover, it appears that the settlement is a bona fide attempt by the parties to terminate the controversy and not a device to obtain transportation at other than the applicable rates or charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

Accordingly, it is ordered that the settlement be approved and the complaint be dismissed with prejudice. It is further ordered that within ten (10) days after this order becomes final the parties file an affidavit of compliance with the terms of the settlement.

(S) SEYMOUR GLANZER
*Administrative Law Judge*

## APPENDIX I
## AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned, Celanese Corporation (Celanese), Complainant in Federal Maritime Commission Docket No. 78-14 and Prudential Steamship Company (Prudential), Respondent in said Docket that Docket No. 78-14 shall be terminated by mutual accord on the terms and conditions hereinafter set forth and for the reasons set forth in the accompanying Joint Motion for Approval of Agreement of Settlement and Mutual Release and for Dismissal of Proceeding and Joint Affidavit of the parties:

1. Prudential shall pay to Celanese the sum of Twenty-Two Thousand, Seven Hundred Sixty-Five and 80/100 ($22,765.80) Dollars.

2. Celanese shall, in consideration of the action of Prudential as provided in paragraph 1 above, withdraw its Complaint in Federal Maritime Commission Docket No. 78-14 and shall refrain from further pursuing its claim in this proceeding.

3. Neither Celanese nor Prudential, or any successor in interest of either such party, shall initiate any new claim against the other party arising in connection with the complaint of this proceeding except for enforcement of any provision of this Agreement.

4. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all disputed claims in the proceeding.

5. This Agreement shall be submitted for any necessary approval to the appropriate governmental authorities, and shall become effective and binding upon the parties when such approval is obtained.

6. It is further understood and agreed that this Agreement of Settlement and Mutual Release is in no sense to be understood as constituting any admission of liability of either party or of any admission of any violation of law by either party.

7. This Agreement of Settlement and Mutual Release, constitutes the entire Agreement between the parties.

Dated: New York, New York
October 30, 1979

CELANESE CORPORATION
(S) EDWARD L. KANTER
*Assistant Secretary*
PRUDENTIAL STEAMSHIP COMPANY
(S) JOHN F. MCHUGH
*Secretary*

## APPENDIX II

## BEFORE THE FEDERAL MARITIME COMMISSION

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CELANESE CORPORATION, ETC.,
Complainant

*v.* Docket No. 78-14

PRUDENTIAL STEAMSHIP COMPANY,
Respondent.

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## JOINT AFFIDAVIT

We, the undersigned Edward L. Kanter and John F. McHugh, being respectively the Assistant Secretary of Celanese Corporation and the Secretary of Prudential Steamship Company, and being each first severally sworn, depose and say for and on behalf of our respective corporations:

We believe the attached Settlement Agreement in FMC Docket No. 78-14 is a reasonable commercial settlement of this case which will avoid the substantial costs of further litigation.

Said Settlement Agreement is a bona fide attempt by the parties to terminate this controversy and is not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended.

Sworn to before me this
29th day of October 1979.

(S) John J. Purcell
Notary Public

(S) NAME: JOHN F. MCHUGH
*Title: Secretary*

Sworn to before me this
30th day of October, 1979.

(S) J. David McCalmont
Notary Public

(S) NAME: EDWARD L. KANTER
*Title: Assistant Secretary*

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 705(I)

3M

*v.*

TORM LINE

## REPORT AND ORDER

*July 2, 1980*

BY THE COMMISSION* (THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE KANUK AND PETER N. TEIGE, *Commissioners*)

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer Donald T. Pidgeon, served April 7, 1980, denying reparation.

Complainant 3M alleges that Torm Line applied an incorrect rate on a shipment of "Mixed Commodities"[1] in that the carrier placed the cargo on deck and applied the rate for "Dangerous or Hazardous Cargo NOS restricted to on deck stowage only." 3M argues that there was no reason for Torm Line to have placed the shipment on deck and applied the "on deck stowage" rate. Even though the shipment included Ethylene Oxide, which carries a "flammable liquid" label, 3M points out, this item can be stored either on or under deck. 3M argues that Ethylene Oxide is a surgical supply and should have been assessed the lower "Special Rate" of $55.25 W/M. Accordingly, 3M claims that it was overcharged $1,205.71, in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).

Torm Line did not respond to 3M's overcharge claim nor to the Settlement Officer's letter of July 16, 1979 inviting a response to the informal complaint.

Although the Settlement Officer concluded that $55.25 W/M rate sought by 3M applied to the shipment, he denied reparation on the ground that 3M "failed to establish that 'under deck' space was available."

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* Chairman Richard J. Daschbach did not participate.

[1] The bill of lading describes the shipment as "Mixed Commodities per Item Page 93-B of North Atlantic Portugal Freight Tariff #2." This tariff lists "Special Rates" of $55.25 W/M, any quantity, for certain "commodities in carrier's containers and breakbulk," including "Surgical Supplies."

## DISCUSSION AND CONCLUSION

The Commission is satisfied that the shipment in question should have been assessed the "Special Rate" rather than the rate for "Dangerous Cargo." Although placement of the cargo on deck may have been appropriate if there had been no room under deck, the availability of under deck stowage is a matter particularly within the realm of the carrier's knowledge. It is therefore inappropriate to require 3M to establish this element in meeting its burden of proof, especially where, as here, the carrier has declined to participate in the proceeding or to provide any information whatever.

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer is reversed; and

IT IS FURTHER ORDERED, That Torm Line pay reparations in the amount of $1,205.71 to 3M, with 12% interest accruing from date of payment of freight charges; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 766(I)
## DOW CORNING CORPORATION

*v.*

## ATLANTIC CONTAINER LINE

## PARTIAL ADOPTION OF DECISION OF SETTLEMENT OFFICER

*July 2, 1980*

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer Alan J. Jacobson awarding reparation without interest to Dow Corning Corporation for violation by Atlantic Container Line of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).

In cases involving the misrating of cargo and arising under section 18(b)(3), the Commission has determined to grant interest on awards of reparation, calculated at the rate of 12 percent, and accruing from the date of payment of freight charges. *Interpur, A Division of Dart Industries, Inc. v. Barber Blue Sea Line,* 22 F.M.C. 679 (1980). *See also,* Policy Statement - Interest on Awards of Reparation, 46 C.F.R. 530.12. This policy is applicable here.

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

IT IS FURTHER ORDERED, That Atlantic Container Line pay to Dow Corning Corporation 12 percent interest on the award of reparation, accruing from date of payment of freight charges; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

*Chairman Richard J. Daschbach did not participate.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 766(I)

DOW CORNING CORPORATION

*v.*

ATLANTIC CONTAINER LINE

## DECISION OF ALAN J. JACOBSON, SETTLEMENT OFFICER [1]

*Partially Adopted July 2, 1980*

## REPARATION GRANTED

Dow Corning Corporation (Dow), a company engaged in the manufacture and distribution of synthetic resin, silicon rubber compounds and various chemicals, filed a complaint against Atlantic Container Line (ACL) seeking reparation in the amount of $3,516.92 for alleged overcharges on two shipments of Polysiloxane. The complaint states that the tariff rate for "General Cargo, NES" was applied to the two shipments but that the cargo should have been rated as "Resin Synthetic" and assessed the corresponding lower rate. Complainant, Dow, seeks reparation in the amount of the difference between the assessed rate and the lower rate which it contends is applicable.

The two shipments moved from New York, New York to Southampton, England pursuant to ACL bills of lading nos. A63406 and A63404 dated December 16, 1977, aboard the vessel ATLANTIC CHAMPAGNE. The descriptions appearing on the bills of lading describe the cargo as "DRMS: Polysiloxane* Item 5811062 Flammable Liquid Flammable Label 65° F." Each shipment, according to the bills of lading, consisted of a house to house container containing 80 drums of Polysiloxane weighing 35,840 pounds and measuring 857 cubic feet.

Charges were prepaid by Dow in the amount of $3,652.96 on each shipment, or a total of $7,305.92. Charges were assessed under Item 931.0001, General Cargo, NES, value $1,000 to $2,000 per ton, under the North Atlantic United Kingdom Freight Conference Tariff No. 48 FMC 3, and rated at $170.50 per measurement ton.

Claimant contends that charges should have been assessed under Item 581.0001, Resin Synthetic, with minimum weight of 40,320 pounds at a

[1] Both parties having consented to the informal procedure of the Commission's Rules of Practice and Procedure (46 C.F.R. § § 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

rate of $105.25 per 2,240 pounds or $1,894.50 each shipment, making a total of $3,789.00. Thus, Dow requests reparations of $7,305,92 (assessed and paid charges) minus $3,789.00 (proper charges) or a total of $3,516.92.

ACL does not dispute that Polysiloxane is synthetic resin, but first disputed Dow's claim by citing tariff rule 4.J.2 dealing with dangerous and hazardous cargo. Under rule 4.J.2 such cargo shall be assessed the General Cargo rate, unless otherwise provided. Dow, however, correctly noted that Item 581.0001, Resin Synthetic, Note (A), allows labeled cargo to be included in that item, thus taking precedence over Rule 4.J.2.

ACL conceded that claimant's reasoning is sound, but rather than affirmatively respond to Dow's claim, it declined to honor the claim under its tariff Rule 20 which requires that all claims for adjustment of freight charges not presented to the carrier within six months after the date of shipment be denied.

Dow has submitted sufficient evidence to show that the goods transported in the two shipments were Polysiloxane which should have been rated under North Atlantic United Kingdom Freight Conference Tariff No. 48 (FMC-3), Item No. 581.0001. Dow submitted copies of the bills of lading, freight statements, packing lists and Intermodal Export Master Set.

Based on all the evidence submitted, Dow has sustained its burden of proof that the goods transported in the two shipments were Polysiloxane and should have been rated as "Resin, Synthetic." Dow is entitled to reparation from ACL in the amount of $3,516.92.[2] Upon evidence of payment of the amount awarded, this record will be complete.

(S) ALAN J. JACOBSON
*Settlement Officer*

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[2] ACL's reference to its tariff rule No. 20 (the six month rule) does not, of course, affect the Commission's ability to order reparations under section 22 of the Shipping Act, 1916. *Kraft Food v. Federal Maritime Commission*, 538 F.2d 445 (D.C. Cir. 1976). It is a shame that time and effort must be expended processing claims opposed only because of the six month rule.

# FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 26: DOCKET NO. 80-23]

PART 541 - FREE TIME AND DEMURRAGE CHARGES ON EXPORT CARGO

REVOCATION

*July 2, 1980*

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission revokes Part 541 of Title 46, Code of Federal Regulations, which provides for regulation of free time, consolidation time, and demurrage charges on export cargo at the Ports of New York and Philadelphia. Improved congestion conditions at those ports would appear to have eliminated the necessity for these regulations.

DATE: Effective July 9, 1980

SUPPLEMENTARY INFORMATION:

Part 541 of Title 46, Code of Federal Regulations, prescribes regulations governing free time, consolidation time, and demurrage charges at the Ports of New York and Philadelphia. The rules were established following hearings in Docket No. 68-9, *Free Time and Demurrage Charges on Export Cargo*, 13 F.M.C. 207 (1970). Evidence in that proceeding demonstrated that regulations were necessary because of the congested conditions of those ports.

The rules generally provide for a maximum free time period of ten days, with certain cargo being allowed up to 15 days upon request. Provision is also made for restrictions on the time allowed for consolidation of shipments and the assessment of demurrage charges.

The Port Authority of New York and New Jersey and the New York Terminal Conference have petitioned the Commission to rescind Part 541. Petitioners state that the congested conditions giving rise to the rules no longer exist. In the alternative, petitioners request that the coverage of the rules be extended to all Atlantic and Gulf Coast ports because the existence of the rules places them at a competitive disadvantage.

The Commission solicited comment on the proposal to revoke Part 541. We have reviewed these comments and found the majority of the commentators to be in favor of eliminating Part 541. The remaining comments expressed a neutral position. Two comments favored partial revocation only to eliminate the ten day maximum free time restriction. Of these two comments, one felt that the specific ten day prescription should be replaced by wording that would require free time at New York and Philadelphia to be compatible with the free time provisions maintained at other ports in the North Atlantic. The other is concerned that total revocation of Part 541 may result in free time of less than ten days and provide no guarantee that other protections to exporters will be retained. The majority of the comments expressed objection to Petitioners' alternative request that the coverage of the rules be extended to all Atlantic and Gulf Coast ports. The comments contain no strong objection to the revocation of Part 541. The rule is based on circumstance not in existence today. The modern technique of containerization which started in the late 1960's has replaced much of the traditional bulk-cargo method of delivering small lots of cargo that are assembled at the pier.

Only one comment expressed concern over the possibility of free time periods of less than ten days and the removal of other detailed restrictions, such as, granting an additional five days of free time on consolidated shipments, assessing demurrage against the vessel when it fails to meet its sailing date, assessing first-period demurrage against the vessel in the event of the vessel cancellation, granting of additional free time when loading of cargo is prevented by any factor immobilizing the pier and requiring the piers to issue dock receipts. We are not concerned that the revocation of Part 541 will lead to reinstitution of these practices or others that gave rise to the rule. Carriers and ports have a responsibility to operate in a non-discriminatory manner and specifically to promulgate reasonable regulations and practices for the receipt of cargo. The Commission will continue to monitor free time and demurrage practices to ensure that practices do not offend the requirements of section 16 and 17 of the Shipping Act, 46 U.S.C. § § 815, 816 (1916).

NOW, THEREFORE, IT IS ORDERED, That, effective upon publication in the *Federal Register*, Part 541 of Title 46, Code of Federal Regulations is rescinded.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 683

APPLICATION OF FLOMERCA LINE TO BENEFIT U.S. DEPARTMENT OF AGRICULTURE

## ORDER OF REMAND

*July 3, 1980*

The Commission has before it the February 7, 1980 Initial Decision of Administrative Law Judge Seymour Glanzer in the above-captioned matter. This decision denied the petition of Flomerca Line to waive collection of freight charges totalling $25,415.03 for the account of the United States Department of Agriculture (USDA). Notice of Determination to Review was served by the Commission on March 10, 1980.

### BACKGROUND INFORMATION

Flomerca Line is the trade name of Flota Merçante Gran Centroamericana, S.A., a common carrier controlled by the Government of Guatemala for purposes of section 18(c) of the Shipping Act, 1916. (46 U.S.C. 817(c)).[1] The freight charges in question were incurred on two USDA shipments of bagged corn carried between Galveston, Texas and Puerto Cortez, Honduras commencing July 2, 1979. A rate of $42.00 for "Corn (100 lb. bags)" was allegedly agreed to on May 25, 1979 when the cargo was booked, but Flomerca neglected to file the rate with the Commission. On July 10, 1979, Flomerca billed USDA at its then applicable tariff rate of $58.00 per short ton.[2] USDA questioned the higher rate and on October 19, 1979 a special docket application was timely filed pursuant to section 502.92 of the Commission's Rules. (46 C.F.R. 502.92). The application, as subsequently supplemented, shows that Flomerca amended its tariff to include a rate for bagged corn effective October 7, 1979. This tariff amendment left the previous $58.00 rate for "Corn" in effect and added a new $42.00 rate for "Corn in Bags, in Minimum Lots of 500 Tons."

Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3) permits the Commission to allow a waiver of freight charges when there has been a:

[1] By letter dated November 28, 1978 from William Jarrel Smith, Jr., the Commission advised Flomerca of its classification as a controlled carrier.

[2] The shipments weighed 1,165,039 and 2,012,837 pounds, respectively, for a total of 3,177,876 pounds. A bunker surcharge of $3.50 per short ton and lighthouse dues of $1.35 per metric ton were also applicable. Flomerca Tariff F.M.C. No. 17, at 4th Rev. 74, 1st Rev. 4-B and 4th Rev. 16.

> tariff error of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such waiver would not result in discrimination among shippers.

The error relied upon by Flomerca was the inadvertent failure to file the necessary tariff amendment prior to July 2, 1979 due to the confusion caused by its change in steamship agents from the Tilston Roberts agency to Kerr Steamship Company, Inc., on June 1, 1979.

USDA arranged for the transportation on May 25, 1979 by contacting Associated Shipping Agencies, a Washington, D.C. freight brokerage firm, and did not deal directly with Tilston Roberts. USDA booking confirmation forms were issued for both shipments May 31, 1979 and signed by Associated as Flomerca's agent. They quote a $42.00 rate for "Corn (100 lb. bags)," indicate that a tariff amendment was contemplated, and do not specify a 500-ton minimum. Both confirmation forms plainly show, however, that USDA reserved space for 525 metric tons for shipment on July 6, 1979 (Form No. 9896) and for 910 metric tons for shipment on June 22, 1979 (Form No. 9898) — sufficient cargo to cover the minimum in each instance.[3]

Associated also advised Tilston Roberts of the bookings by separate letters dated May 25, 1979, in which Associated requested a 2½% brokerage commission. Between June 1 and June 8, 1979, Associated wrote to Kerr Steamship concerning the bookings and sent duplicate copies of the USDA confirmation forms showing the need to amend Flomerca's tariff prior to shipment.[4] Neither Tilston Roberts nor Kerr arranged for the agreed upon $42.00 rate to be included in Flomerca's tariff.

The Presiding Officer denied Flomerca's application on two grounds:

(1) Flomerca's corrective tariff filing did not conform exactly to the originally negotiated arrangement with USDA because the tariff contained the 500 ton minimum lot requirement and the booking confirmation documents did not; the tariff amendment did not contain the requisite "intended rate." *United States Lines, Inc. to Benefit Merck & Co., Inc.*, 19 S.R.R. 788 (1979); *Sea-Land Service, Inc. to Benefit Munoz y Cabero*, 20 F.M.C. 152 (1977).

(2) Section 18(c) conflicts with section 18(b)(3) and bars state controlled carriers from obtaining special docket relief.[5] In order to prevent predatory price cutting by controlled carriers, section 18(c)(3) prohibits them from reducing their rates on less than 30

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[3] There was originally a period of 28 and 42 days, respectively, between the booking date and the intended shipment dates, but both shipments ultimately left Galveston on July 2, 1979.

[4] The record copy of this letter bears a stamp reading "Received June 8 A.M." which obliterates the date the letter was written.

[5] Section 18(c) took effect on November 17, 1978 pursuant to the "Ocean Shipping Act of 1978," P.L. 95-483, 92 Stat. 1607.

days' notice without special permission from the Commission. Congress intentionally imposed this 30 day delay to provide the Commission an opportunity to make an initial assessment of the reduced rate's reasonableness. In contrast, the relief afforded shippers by section 18(b)(3) is premised on the theory that, but for the unintended error, the carrier could have implemented the agreed upon rate reduction immediately. It would therefore defeat the purpose of section 18(c) if controlled carriers could retroactively implement rate reductions via the special docket process.

## DISCUSSION AND CONCLUSION

The Commission has reviewed the record and concluded that further evidence is required to evaluate aspects of Flomerca's application found deficient by the Presiding Officer. A limited remand is therefore ordered in accordance with the following discussion.

This is the second recent proceeding which raised questions concerning the relationship between the Ocean Shipping Act of 1978 (hereafter "Controlled Carrier Law") and section 18(b)(3).[6] Upon review of the legislative history of both provisions, the Commission concludes that mere classification as a controlled carrier should not negate the possibility that such a carrier can correct an inadvertent failure to implement a good faith undertaking to secure a timely rate reduction for the benefited shipper.

The present situation is analogous to that in *Compagnie Nationale Algerienne de Navagation to Benefit D. F. Young, Inc.*, 21 F.M.C. 730 (1979), where relief was granted when the carrier employed a conference tariff, but did not notify the conference of the desired tariff amendment prior to shipment.[7] Just as no reduction in a conference carrier's rates can occur unless the conference is aware of the desired change, under normal circumstances no reduction can occur in a controlled carrier's rates upon less than 30 days' notice without a grant of special permission. In both situations the carrier inadvertently neglected an action prerequisite to the implementation of the specially negotiated rate which would otherwise have taken effect exactly as the parties intended.[8]

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[6] In *Neptune Orient Line to Benefit Stauffer Chemical Company*, 19 S.R.R. 451 (1979), waiver of collection was denied on two legally distinct grounds, one of which was the Presiding Officer's finding that the controlled carrier did not actually intend to implement the rate reduction stated in the booking contract because of instructions it had given its agents concerning rate reduction filings.

[7] *See also, Waterman Steamship Corporation to Benefit Hermann Ludwig, Inc.*, 20 F.M.C 670 (1978).

[8] Because of the possibility that the Controlled Carrier Law's advance notice requirements may be shortened by a grant of special permission, there is no reason for distinguishing between cases where the negotiated rate was intended to take effect within 30 days and those where it was not. This does not mean, however, that the time between the date of the alleged agreement and the date of shipment may not be relevant in ascertaining whether the carrier actually intended to implement the rate reduction in question. *See Neptune Orient Line, supra.*

The critical question presented by Flomerca's application is whether Congress intended to preclude all opportunity for special docket relief by shippers using controlled carriers. The Presiding Officer believed this to be the case,[9] but review of the Controlled Carrier Law's legislative history leads the Commission to a different conclusion. Congress's awareness of the *Baltic Shipping Company* proceeding, *supra*, the authority given the Commission to shorten the 30-day advance notice period, and the failure to write an express prohibition against special docket applications by controlled carriers into the new law, are best interpreted as evidence of an intention to permit such applications in appropriate circumstances.[10]

This conclusion is further supported by the canon of statutory construction which disfavors repeals by implication. When different provisions of the same statute are construed together, each provision should be given effect whenever possible. *Rawls v. United States*, 331 F. 2d 21, 28 (8th Cir. 1964); *Malatico v. United States*, 302 F. 2d 880, 886 (D.C. Cir. 1962). *Cf., United States v. Borden Company*, 308 U.S. 188, 198-199 (1939). In the instant case, section 18(b)(3) was added to the Shipping Act in 1968 to provide equitable relief from the application of provisions requiring strict adherence to published tariffs which would otherwise penalize innocent shippers for a carrier's errors.[11] This objective can be reconciled with the basic purpose of the 1978 Controlled Carrier Law, which amended the Shipping Act in order to curtail predatory rate cutting practices of certain ocean carriers. The Controlled Carrier Law was directed at a particular type of unfair competition and was not intended to generally punish or discriminate against controlled carriers or their shippers.

The Controlled Carrier Law also empowers the Commission to require a controlled carrier to justify any of its proposed (filed, but not yet effective) or existing rates and authorizes the suspension of rates suspected of being unreasonable. These protective procedures fully apply to rates filed for special docket purposes and provide the Commission with sufficient tools to deal directly with the problems which

[9] See discussion of the Senate Commerce Committee's reference to Special Docket No. 589, *Baltic Shipping Company to Benefit AM General Corporation*, 19 S.R.R. 1091 (1979) — a proceeding involving a carrier controlled by the Soviet Union which was pending before the Commission during consideration of the Controlled Carrier Law — at pages 15-16 of the Initial Decision.

[10] *See* Sen. Rep. No. 95-1260 [to accompany H.R. 9998], 95th Cong., 2d Sess. 14, 18-19, 24 (1978). The pertinent Committee reports indicate that the Commission is expected to waive section 18(c)(3)'s 30-day notice requirement in at least those situations where the controlled carrier faces an immediate reduction by a competitor or a change in market conditions. H.R. Rep. No. 95-1381 [to accompany H.R. 9998], 95th Cong., 2d Sess. 9-10 (1978); Sen. Rep., *supra*, at 23-24.

[11] Section 18(b)(3) was enacted on April 29, 1968. P.L. 90-298, 82 Stat. 111. Its purpose is described in H.R. Rep. No. 920 [to accompany H.R. 9473], 90th Cong., 1st. Sess. (1967), and Sen. Rep. No. 1078 [to accompany H.R. 9473], 90th Cong., 2d Sess. (1968).

could result from retroactive rate implementation under section 18(b)(3).

Flomerca's $42.00 filed rate for bagged corn took effect on October 9, 1979, following the standard 30-day notice period. This rate was not protested at that time and the Commission has no information that a $42.00 rate is now unreasonable within the meaning of section 18(c).[12]

Because of section 18(b)(3)'s retroactive effect, however, there is a possibility that special docket procedures could be employed to implement rates which would have been unreasonably low *at the time of shipment*, but were considered unworthy of challenge when they were later added to the controlled carrier's tariff. Assuming the $42.00 rate for "Corn in Bags" was reasonable at the time it finally appeared in Flomerca's tariff, it was not necessarily reasonable on July 2, 1979. This possibility of unreasonableness during a prior period is an insufficient basis for a flat ban on special docket relief, but it does necessitate a showing by Flomerca that its application is not merely a device for evading the Controlled Carrier Law. Accordingly, the application will be remanded to provide Flomerca with an opportunity to demonstrate that conditions existed on or about July 2, 1979 which would have warranted the grant of a timely filed special permission request to implement a $42.00 rate.[13]

Remand is also warranted for another reason. Special docket relief is unavailable when the tariff amendment finally published does not reflect the rate intended by the negotiating parties.[14] It is unclear to the Commission whether Flomerca's October 9, 1979 tariff filing actually differed from the intended rate or, alternatively, whether any deviation between the originally negotiated contract and the tariff page finally filed was material in light of the fact that USDA would have paid $42.00 a ton under either arrangement. In order to resolve these questions, it is necessary to ascertain whether Flomerca handled any other shipments of bagged corn between July 2, 1979 and October 9, 1979, and, if so, whether the shipments were more or less than 500 tons.[15]

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[12] In March, 1980 Flomerca amended its tariff to place a $46.25 "Corn in Bags" rate in effect on April 2, 1980. Tariff FMC No. 17, 6th Rev. 74. This rate has also been unchallenged to date.

[13] The burden is upon Flomerca to establish these facts and it is assumed that such proof can be readily made in affidavit form. It is not the Commission's intention to turn this or any other special docket proceeding into an elaborate rate investigation. If *prima facie* evidence of reasonableness or extenuating circumstances is not submitted when a controlled carrier's special docket application is filed, the application will be denied. Such evidence could be — but is not limited to — a favorable comparison with the charges of other carriers in the trade, a showing that market conditions were changing significantly, or a showing that the reduced rate was necessary to move the cargo or to maintain acceptable service to the affected ports.

[14] The "intended rate" is the "rate on which [the] refund would be based," in the words of section 18(b)(3)'s second proviso clause.

[15] Flomerca's application stated that no other shippers were "affected by" the $42.00 rate. Because of the minimum tonnage condition, this does not establish that there were no other shippers of bagged corn during the period covered by the proposed retroactive rate decrease.

The possible existence of such shipments bears directly upon whether the 500 ton minimum was originally intended by the parties and whether retroactive implementation of the $42.00 rate would discriminate among shippers.

The Presiding Officer previously encountered difficulties in obtaining complete and verified information from Flomerca. If Flomerca fails to produce the information requested by this Order in a timely fashion, the Presiding Officer should issue a brief further decision describing the procedures followed and denying the application for inadequacy of proof. If additional evidence is provided, the Presiding Officer should prepare findings of fact on the issues specified in this Order and refer the matter to the Commission for final decision.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer to determine:

1) Whether there were conditions which existed on or about July 2, 1979 which would have warranted granting Flomerca special permission to file a $42.00 rate on less than 30 days' notice?
2) Whether any shipments of bagged corn other than the two USDA shipments were transported by Flomerca from U.S. points specified in its Tariff FMC No. 17 between July 2, 1979 and October 9, 1979, and, if so, the weight and other transportation characteristics of each such shipment?

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

* Chairman Richard J. Daschbach concurs only with the determination that a controlled carrier is not prohibited from obtaining relief under section 18 (b) (3) of the Shipping Act, 1916 (46 U.S.C. 817 (b) (3)).

Commissioner Leslie Kanuk concurs only in that portion of the Order which remands the application for purposes of determining the intended rate agreed upon by the carrier and the shipper.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 79-10

RATES OF FAR EASTERN SHIPPING COMPANY

ORDER ON RECONSIDERATION

*July 10, 1980*

On April 1, 1980, the Commission issued an Order in which it found certain rates of the Far Eastern Shipping Company (FESCO) to be unjust and unreasonable and, accordingly, disapproved them. FESCO has submitted a Petition for Reconsideration of that Order. American President Lines, Ltd. (APL), Sea-Land Service, Inc., and the Commission's Bureau of Hearing Counsel have filed replies to FESCO's Petition.

POSITIONS OF THE PARTIES

FESCO contends that the Commission's Order contains five substantive errors of material fact, in that the Commission disapproved five rates which were not subject to this proceeding. In addition, FESCO claims that changes in material fact which have occurred after the issuance of the Order *i.e.*, the lowering of rates by other carriers in the Philippines/U.S. trade - should result in the recision of the disapproval of a number of its rates. FESCO identifies several rates which are allegedly equal to or lower than 19 of the rates disapproved by the Commission. Finally, FESCO again raises its earlier argument that rate comparisons under section 18(c)(2)(ii) of the Shipping Act, 1916 should not be limited to rates in effect on the date of the institution of a suspension and show cause proceeding, but should employ the most current information available. FESCO thus lists a number of rates disapproved by the Commission in this proceeding which it claims are the same as or similar to rates of other carriers in the same trade which were effective subsequent to the initiation of this proceeding but prior to the issuance of the Commission's decision.

Hearing Counsel agrees with FESCO that three rates were erroneously disapproved, but maintains that one was properly disapproved and that another should have been disapproved. Hearing Counsel further argues that the rate changes referred to by FESCO have no bearing on the reasonableness of FESCO's disapproved rates - that the rates in existence at the initiation of a proceeding are those most appropriate for rate comparison purposes.

APL and Sea-Land raise similar arguments in opposition to FESCO's Petition. They both question the validity of FESCO's rate comparisons

on the ground that several of the non-controlled carriers with which FESCO compares its rates do not offer a service similar to FESCO's. APL and Sea-Land also note certain inaccuracies in FESCO's presentation which allegedly result in meaningless rate comparisons. Sea-Land in particular emphasizes the need for inclusion of actual tariff pages for any rate comparison so that total transportation charges can be accurately ascertained. In addition, these carriers contend that the Commission's ruling concerning the time period to be used for rate comparisons (*i.e.*, rates in effect on the date of the order instituting a proceeding) is supported by policy, practicality, and Congressional intent and should not, therefore, be reversed. Although APL views the Commission's Order as not forever forbidding FESCO from instituting a rate the same as or lower than a disapproved rate, it does contend that FESCO should not be afforded immediate relief from the Order. It believes that the lower rates of FESCO's competitors, which allegedly are in response to FESCO's rate cutting, are a temporary aberration and will return to normal (higher) levels under the force of market conditions.

## DISCUSSION

### A. Alleged Errors of Material Fact

The Commission's Order of Suspension and to Show Cause, served on March 2, 1979, listed 305 freight rates as subject to this proceeding and, in addition, included any changes or amendments to these rates which were *filed* during the 60 days' notice period (March 2, 1979 - May 7, 1979). FESCO correctly points out that three of the rates disapproved by the Commission's April 1, 1980 Order were not put at issue in this proceeding. The local $161.25 W rate for "nuts, almond shelled" (item 1838, FMC-20) and the $106.50 W/M rate for "toys and parts" (item 3150, FMC-20) were both filed prior to the 60 days' notice period, and only became effective during that time. In addition, the $229 W/M rate for "drugs and medicines, harmless" (item 2540, FMC-20) was deleted effective February 7, 1979. The Commission's disapproval of these rates will, therefore, be rescinded.

FESCO's assertions concerning the remaining two rates are incorrect. The $95 W/M rate on "glassware, machine made" (item 3100, FMC-28) was in effect on March 2, 1979 and was included in Appendix A to the Order of Suspension and Show Cause. Its disapproval, therefore, stands. FESCO's local, per container rate of $2500 for "books and pamphlets" (item 400, FMC-20) was filed during the notice period, contrary to FESCO's assertion. However, it was not included in Attachment A to the Commission's April 1, 1980 Order and was not thereby disapproved. Although filed within the notice period, this rate

was not clearly intended as a "replacement rate" for a suspended rate[1] and its disapproval will also be rescinded.

B. Alleged Changes in Material Fact

In its Order of April 1, 1980 the Commission concluded that ". . . the rates in existence at the time an Order institutes a proceeding are those most appropriate for any rate comparison."[2] Order at 13. Any rate changes occurring after the Order to Show Cause, or the Order of April 1, 1980, are not, therefore, "material" changes in fact for purposes of Rule 261(a)(1). 46 C.F.R. 502.261(a)(1). FESCO's arguments to the contrary are nothing more than elaborations on or repetitions of arguments which have already been fully considered and rejected by the Commission. Nothing presented here convinces us otherwise.

The Commission notes, moreover, that a continuation of its disapproval of most of FESCO's disapproved rates should not adversely affect FESCO's competitive position in these trades. FESCO is permitted to meet competition in the subject trades under the Commission's April Order. Indeed, the Commission recognized in that decision that in certain instances rates replacing disapproved rates may actually be *lower* than the rate disapproved. *See* Order at 17, n.16. Moreover, a rate replacing a disapproved rate may even be lower than the lowest rate of a national flag carrier in the trade for the same commodity, if it is ". . . necessary to assure the movement of the commodity or to effectively compete with some other carrier." Order at 17.

THEREFORE, IT IS ORDERED, That the Commission's April 1, 1980 disapproval of the following rates of the Far Eastern Shipping Company is hereby rescinded:

1. Item 1838, FMC-20, "nuts, almond shelled" - Local $161.25 W;
2. Item 3150, FMC-20, "toys and parts" - $106.50 W/M;
3. Item 2540, FMC-20, "drugs and medicines, harmless" - $229 W/M;
4. Item 400, FMC-20, "books and pamphlets" - per container $2500; and

[1] At the time of the Commission's Show Cause Order FESCO did not have a container rate for this commodity, but only a $143 W/M rate. Following the Order, FESCO did file the $2500 PC/20 rate, so it could arguably be considered a "replacement rate" for this commodity. It could also be considered a newly filed rate, however, especially because FESCO also filed a $163.50 replacement rate for the $143 rate and this replacement rate was subsequently disapproved.

[2] The Commission has indicated that it will not totally ignore rate changes occurring during the course of a proceeding. Rather, it has stated that such activity could be another "appropriate factor" for its consideration, but in so doing, it will closely scrutinize the reasons for any significant decreases in rates of comparative carriers. *See* Order at 14, n.11. The record in this proceeding, however, was not sufficiently developed to permit such a consideration.

IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by the Far Eastern Shipping Company is granted to the extent indicated above and denied in all other respects.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

* Commissioner Leslie L. Kanuk concurs only in that portion of the Order which rescinds the Commission's disapproval of the following rates in the Far Eastern Shipping Company's Tariff FMC-20: Items 1838, 3150, 2540, and 400.

Commissioner Peter N. Teige did not participate.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-24

FORTÉ INTERNATIONAL SALES CORPORATION

*v.*

AMERICAN PRESIDENT LINES, LTD.

NOTICE

*July 10, 1980*

Notice is given that no appeal has been taken to the June 4, 1980 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

DOCKET NO. 80-24

FORTÉ INTERNATIONAL SALES CORPORATION

*v.*

SEATRAIN INTERNATIONAL, S.A.

## (1) APPROVAL OF SETTLEMENT AND RELEASE

## (2) DISCONTINUANCE OF PROCEEDING

*Finalized July 10, 1980*

The complaint by Forté International Sales Corporation, a corporation organized under the laws of the State of Delaware, against Seatrain International, S.A., alleges the respondent failed to ship a container of complainant's goods on the vessel which respondent had advised was reserved for such containers and the respondent subsequently shut the container out of two other vessels, giving preference to other shippers in violation of section 14 of the Shipping Act, 1916. The complaint was served April 18, 1980.

On May 6, 1980, the parties advised the Presiding Administrative Law Judge that they had agreed to settle this matter, subject to the Commission's acceptance of such settlement. The parties asked and received an extension of time for the respondent to answer the complaint or for the parties to work out an appropriate settlement agreement. (See grant of request served May 14, 1980.)

On May 23, 1980, the parties submitted the following:

SETTLEMENT AND RELEASE

It is hereby agreed by and between Forté International Sales Corp. (Forté), Complainant in Federal Maritime Commission (FMC) Docket 80-24, and Seatrain International, S.A. ("Seatrain"), Respondent, that Docket No. 80-24 shall be terminated by mutual agreement subject to the following terms and conditions:

1. Seatrain shall pay Forté the sum of $16,000.00 (but without admission of liability therefor).

2. Forté and any successor or assign will be barred from initiating any new claim against Seatrain in connection with the shipment of mohair pursuant to Seatrain bill of lading number 09-05550-2, except for the enforcement of any of the provisions of this Agreement.

3. It is understood and agreed that this Settlement and Release is in full accord and satisfaction of Forté's complaint against Seatrain, and is not an admission of liability or violation of law by Seatrain.

4. This Agreement will become effective and binding on the parties only upon approval of the Federal Maritime Commission and the issuance of an order terminating Docket 80-24.

5. This Settlement and Release constitutes the entire Agreement between the parties hereto.

IN WITNESS WHEREOF, the undersigned have executed this Agreement this 20th day of May, 1980.

FORTÉ INTERNATIONAL SALES CORP.
BY s/s JOHN H. FORTÉ
*President*

SEATRAIN INTERNATIONAL, S.A.
BY s/s HARVEY M. FLETCHER

The parties also submitted the following:

## JOINT MEMORANDUM IN SUPPORT OF SETTLEMENT AND RELEASE

Forté International Sales Corp. (Forté) and Seatrain International, S.A. (Seatrain) have entered into a Settlement and Release Agreement in an effort to terminate the captioned proceeding. This Joint Memorandum is submitted by the parties to provide the necessary legal and factual support for such settlement. The statements set forth herein are made for purposes of the settlement only and are without prejudice to either party should the settlement be disallowed by the Commission. In addition, this Joint Memorandum is made expressly with the understanding that Seatrain does not admit any liability to Forté nor does it admit in anyway that it has violated any law.

## THE FACTS

Forté obtained from Seatrain a booking to ship a container laden with 119 bags of mohair to Genoa, Italy which were to be consigned to a Swiss company. On or about October 11, 1979, it was given Booking Number 957390 and was advised that the cargo would have to be received by the railroad in Houston on or before October 25, 1979, for movement by rail to Charleston, South Carolina and for carriage on the vessel SEATRAIN LONDON.

Forté obtained Seatrain container number 126021 and delivered the loaded container to the participating railroad on October 25, 1979 and was given Bill of Lading No. 09-05550-2.

As far as Seatrain can determine, a computer entry activating the container number against the booking was not made. Such computer entry is necessary to keep track of the container within the Seatrain system. Since the computer entry was not made, no notification of arrival of the container was given and it apparently remained at the rail yard unknown to Seatrain representatives in Charleston.

In the meanwhile, the scheduled vessel the SEATRAIN LONDON was redeployed by Seatrain management and the SEATRAIN PEGASIA was substituted therefore. The SEATRAIN PEGASIA sailed from Charleston on November 6, 1979 without the Forté mohair. At that time the container was apparently still at the rail yard in Charleston, unbeknownst to Seatrain.

Seatrain's next sailing was the SEATRAIN ITALY on November 25, 1979. Seatrain has been unable to ascertain the reason why the container did not move on that vessel but notes that as a result of the redeployment of the SEATRAIN LONDON and the substitution with the much smaller SEATRAIN PEGASIA, the available vessel slot capacity was substantially lessened, thereby creating a back-up of containers generally.

At some time after November 21, 1979 Seatrain became aware of the fact that the Forté container had been "lost" within the system, but by the time it so determined, it was apparently too late to load it on the SEATRAIN ITALY.

On November 29, 1979 the shipper, Forté, orally advised Seatrain to hold the container at Charleston because its customer in Italy had cancelled the order because of the delay in shipment. Subsequently, the container was returned to Houston and sold by the shipper to another buyer.

From available records it would appear that from at least October 25, 1979 to November 21, 1979 the shipper believed that the container had moved as scheduled and Seatrain having failed to make the computer entry, was unaware that the container was waiting movement.

Forté subsequently filed the complaint here involved charging Seatrain with discrimination under Section 14 Fourth.

## DISCUSSION

Seatrain does not believe that the failure to enter the container into its computer against the booking number constitutes discrimination under Section 14 Fourth of the Shipping Act, 1916. However, Seatrain recognizes that through no fault of the shipper the container was delayed in the system and missed two sailings, and that the shipper has suffered monetary damages.

Given the relative paucity of precedent under Section 14 Fourth, Seatrain and Forté both acknowledge that if this matter is not settled as proposed each could possibly be the loser in a full and complete adjudication. Both parties recognize that in the case of a full adjudication they will incur substantial costs in legal fees, travel expenses, transcript costs and the like. Both parties also recognize that an adjudication will take employees away from their day-to-day functions. Both parties further recognize that an adjudication will involve substantial efforts by the Administrative Law Judge whose efforts might be better employed on other matters. In view of all these factors the parties believe that the Settlement and Release is the most effective, efficient, cost-saving and time-saving resolution of this matter.

## THE APPLICABLE LAW

In FMC Docket No. 78-13, *Old Ben Coal Co. v. Sealand Service Inc.*, 21 F.M.C. 505 (1978) Administrative Law Judge Norman D. Kline extensively discussed the applicable law concerning settlements. The parties believe that the settlement here proposed fully meets the criteria set forth by Judge Kline.

First, it is well settled that the law and Commission policy favor settlements. *See, e.g. Merck, Sharp and Dohme v. Atlantic Lines,* 17 F.M.C. 244, 247 (1973).

Second, as long as the proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects, the settlement should be approved. As Judge Kline noted in *Old Ben,*

> "[A] judicial officer, in reviewing a proffered settlement, may look to see if the settlement is fair, reasonable and adequate and may weigh the likelihood of complainant's success...against the estimated cost and complexity of continued litigation". 8 S.R.R. at 1093.

Third, the issues here do not involve any departure from tariffs. Thus, unlike settlements which involve tariff departures which could have an impact on other shippers, (and upon

which the Commission still allows settlements), [1] this case involves, as far as can be determined a discrete occurrence which apparently affects no other shippers and requires no departure from the applicable tariffs.

CONCLUSION

In view of the foregoing facts, discussion and law, Forté and Seatrain believe that the Settlement and Release Agreement is a fair, reasonable and appropriate method of terminating this litigation and respectfully request the Administrative Law Judge and the Commission to approve the Agreement and to terminate the proceeding.

RESPECTFULLY SUBMITTED,
(S) DONALD FORTÉ, JR.
*Attorney for Forté International Sales Corp.*

(S) NEAL M. MAYER
*Attorney for Seatrain International, S.A.*

May 23, 1980

On May 29, 1980, the Presiding Administrative Law Judge telephoned counsel for the respondent who had submitted joint memorandum referred to above and who is in the D.C. area, the other counsel being in Massachusetts, anent substantiation by the complainant of the latter's claim for lost profits. Counsel promised to take the matter up with counsel for complainant. Counsel for complainant apparently was contacted the same date, because a letter dated May 29, 1980, was received June 2, 1980, from counsel for complainant, stating as follows:

> Mr. Mayer called to say that you had requested background on market conditions surrounding the sharp decline in mohair prices between October and December 1979 that contributed to the loss in the subject case.
>
> The mohair market historically has been a volatile one. Mohair is a luxury fiber used to impart luster and silky texture to fine fabrics and knitting yarns. Supply has been relatively stable in recent years, but demand, and thus prices, have fluctuated due to changes in fashions, consumer disposable income and exchange rates. Since February 1979 the price of adult Texas Mohair at the warehouse has fallen from $6.00 per pound to $2.90 per pound—52 percent. (See enclosed copies of *Market News* prepared by the Colorado Department of Agri-

[1] *See, e.g. Organic Chemicals v. Atlanttrafik Express Service,* 18 S.R.R. 1536 (1979).

culture in cooperation with the U.S. Department of Agriculture.) A decline from February 1979 prices was expected by some (see enclosed clipping from the 5/30/79 *San Angelo (Texas) Standard*: however, neither a dealer such as my client or its customers know how long or how far prices will fall.

My client's sale to Laines et Mohair on October 9, 1979 at $4.55 per pound was made in the midst of a declining market to a customer with an immediate need for mohair, hence the customer's stipulation that the mohair be shipped on October 28, 1979, the date for which my client had booked cargo space with Seatrain. At that time, it was paying $4.10 per pound at the warehouse for adult Texas mohair. By the end of November 1979, when my client's customer cancelled his purchase because of my client's failure to ship as prescribed, my client was paying $3.50 per pound for mohair and, anticipating further price declines, was attempting to reduce its inventory. Consequently, my client was happy to be able to sell the mohair originally sold to Laines et Mohair to another customer on December 14, 1979 for $3.75 per pound. (My client's current price for adult Texas mohair FOB Texas is $3.20 per pound.) Copies of the October 9 and December 14 sales contracts are enclosed.

Please let me know if you require further information.

The respondent's May 29, 1980, letter and attachments have been filed in this proceeding.

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The complainant alleged in its complaint a net loss of $26,804.95 as being the amount of complainant's damage. The amount of loss on sale of contents of container STLU 126021 is set out as Exhibit 2 to complaint as follows:

| | |
|---|---|
| difference in sales price 33,133 lbs. X ($4.55 - $3.75) = | $26,506.40 |
| *less*: 2% Commission to Italian agent | (530.13) |
| shipping from Mertzan to Houston, Texas 10/23/79 | 700.40 |
| shipping from Houston to San Antonio 12/28/79 | 414.34 |
| *less*: difference between shipping from Mertzan to Houston and from San Antonio to Houston | (286.06) |
| Net Lost Profits | $26,804.95 |

Because as to lost profits the complaining party is required to submit sufficient proof of them so that the trier of fact can find with reasonable certainty the fact and amount of lost profits, upon having review of the record herein and finding more information was needed, the Presiding Administrative Law Judge telephoned counsel on May 29, 1980, as referred to above. The information supplied by the complainant in its

letter dated May 29, 1980, is *found* and *concluded* under the circumstances herein to be sufficient proof of the lost profits. If the lost profits are due to failure of the carrier to perform its duty properly in delivery of the goods, the claimant is entitled to recover such profits as an element of his full actual loss, damage or injury. Here, however, settlement has been reached at $16,000. 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. *Pierpoint Management Co. and Retla Steamship Co. v. Holt Hauling and Warehouse System, Inc.*, Docket No. 78-44, 22 F.M.C. 324, 326 (1979).

In their joint memorandum set forth above, the parties discuss that given the relative paucity of precedent under section 14 Fourth of the Shipping Act, 1916, Seatrain and Forté both acknowledge that if this matter is not settled as proposed, each could possibly be the loser in a full and complete adjudication. Both parties recognize that in the case of a full adjudication, they will incur substantial costs in legal fees, travel expenses, transcript costs and the like. Both parties also recognize that an adjudication will take employees away from their day-to-day functions. The parties believe that the Settlement and Release is the most effective, efficient, cost-saving and time-saving resolution of this matter. The Presiding Administrative Law Judge shares this belief. There is sufficient justification offered for the $16,000 payment by Seatrain. See *Washington Electric Corp. v. Sea-Land Service, Inc.*, Docket No. 79-15, 22 F.M.C. 267, 417, (1979).

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

(1) Circumstances exist to warrant the grant of relief as indicated hereinabove, i.e., approval of the Settlement and Release;

(2) Such Settlement and Release is consistent with the Commission's support of the policy which favors the settlement of disputes.

Wherefore, it is *ordered*, subject to review by the Commission, as provided in the Commission's Rules of Practice and Procedure, that:

(A) The Settlement and Release jointly executed by Complainant and Respondent be and hereby is approved.

(B) The parties shall at the proper time advise the Commission as to how and when the Settlement and Release was executed, submitting copies of any pertinent documents.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-27

CONNELL BROS. COMPANY, LTD.

*v.*

LYKES BROS. STEAMSHIP CO., INC.

NOTICE

*July 10, 1980*

Notice is given that no exceptions have been filed to the June 6, 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

## DOCKET NO. 80-27

## CONNELL BROS. COMPANY, LTD.

*v.*

## LYKES BROS. STEAMSHIP CO., INC.

Complaint seeking reparations for freight charges based upon oral agreement with carrier representative which differs from charges assessed under existing tariff and time-barred under the special docket provisions of section 18(b)(3) cannot succeed when seeking remedy under section 18(b)(5) without Commission disapproval of involved rate and a showing of continued assessment after such finding. Complaint dismissed.

*Edward J. Martin* and *R. D. Vinick* for complainant.

*R. J. Finnan* for respondent.

## INITIAL DECISION[1] OF PAUL J. FITZPATRICK, ADMINISTRATIVE LAW JUDGE

*Finalized July 10, 1980*

Connell Bros. Company, Ltd., of San Francisco, California, by complaint served May 9, 1980, alleges that Lykes Bros. Steamship Co., Inc., assessed charges for ocean transportation which are so unreasonably high as to be detrimental to commerce in violation of section 18(b)(5) of the Shipping Act of 1916.[2]

The focus of the complaint involves a booking quotation of an all-inclusive rate of $78.50 per kilo ton and $5.00 per kilo ton as a bunker charge to be applied to a shipment of transformer oil for carriage during May 1979. Although complainant asserts that the respondent indicated two months earlier that it would take immediate steps to have the rate published (an allegation denied by the respondent), it was assessed freight charges at a higher rate. The shipment moved under respondent's Bill of Lading No. 019, dated May 13, 1979, aboard its NANCY LYKES at the tariff rates then in effect on lube oil at $90.00 per kilo ton, including a bunker surcharge plus a $6.50 per kilo ton C/Y receiving charge.[3] According to the bill of lading, the involved ship-

[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. section 817(b)(5).

[3] Although the tariff was not provided, complainant indicates that the rates are published in "Lykes' Tariff FMC-12, 5th Revised Page 145, 2nd Revised Page 33 and Original Page 51."

ment represents 32 containers which contained 2,400 drums of transformer oil having a gross weight of 485.523 KGS and resulting in freight charges of $46,852.97. According to complainant, these charges represent $6,311.79 in excess of the quotation agreed upon prior to the shipment.

Absent any other factual considerations, it would appear at this point that respondent's consideration of utilizing the remedy provided by Congress in P.L. 90-298[4] might be appropriate since it was designed to provide recourse where possible inequities may result when shippers rely upon a carrier's representation that an agreed-upon reduced freight rate would he assessed. Indeed, the statute was designed to cover situations where there is "an error due to an inadvertence in falling to file new tariff" -- assuming this to be the case here. However, the complainant states that its claim was denied and that the "exchange" between the parties extended beyond the 180 days to effectuate any timely request for refund under that statute. On the other hand, respondent denies receipt of the claim and points to Rule 20 of its tariff which restricts the time for filing claims to six months. In any event, an examination of the circumstance surrounding the failure to file under section 18(b)(3) is not a factor for consideration here. However, assuming that all the requirements of section 18(b)(3) were met, complainant could have received the refund sought here. The determination not to file for permission to refund a portion of the involved freight charges on a timely basis effectively foreclosed the remedy provided under the statute. Furthermore, the statute does not require a carrier to pursue such a remedy.

Recognizing that any requested relief fails under section 18(b)(3), complainant views as its only refuge the provisions of section 18(b)(5).[5] It seeks relief in three forms: (1) that the Commission disapprove the higher rates and charges; (2) that the rates be found unreasonably high and the Commission award reparation in the amount of $6,311.79 plus interest; and (3) that the relief sought be granted without a public hearing. Respondent "denies" the first and second but agrees that the complaint should be resolved without a public hearing. First, it is unnecessary to dwell at length about the statutory requirement of disapproval of any rate "after hearing" and what constitutes a "hearing," since the first and second requests for relief must be rejected. As to these requests, section 18(b)(5) is purely prospective in nature. *Westinghouse Electric Corp. v. Sea-Land Service, Inc.*, 22 F.M.C. 267, 268

[4] Section 18(b)(3) of the Shipping Act of 1916, 46 U.S.C. 817(b)(3).

[5] Section 18(b)(5) provides:

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.

(1979). If the rates here were shown to be so unreasonably high as to be detrimental to commerce, then the proper remedy would be for this Commission to disapprove those rates. But the considerations here involve an agreement to provide a reduced rate which ended with higher charges at the existing tariff rate, hardly the usual ground for a finding of a violation under this section. Furthermore, only after continued adherence to the rate which was found to be disapproved by the Commission could the respondent be considered in violation of section 18(b)(5) and penalties imposed, including the award of reparations. *Federal Maritime Commission v. Caragher*, 364 F.2d 709, 717-18 (1966); *Commodity Credit Corp. v. American Export Isbrandtsen*, 15 F.M.C. 173, 191 (1972). In this proceeding, none of these necessary elements are present, and complainant has failed to support its position and justify an award of reparations. Accordingly, the complaint is dismissed.

(S) PAUL J. FITZPATRICK
*Administrative Law Judge*

Washington, D.C.
June 6, 1980

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 775(I)

WILLIAM H. KOPKE, JR., INC.

*v.*

SEA-LAND SERVICE, INC.

## ORDER PARTIALLY ADOPTING SETTLEMENT OFFICER'S DECISION

*July 10, 1980*

The Commission has undertaken a discretionary review of the April 15, 1980 decision of Settlement Officer Robert M. Skall in the above-captioned proceeding in order to consider the propriety of awarding a shipper damages which include the cost of reweighing cargo which had been erroneously weighed by an ocean carrier.

In this instance, William H. Kopke, Jr., Inc., was the consignee of two freight prepaid containerloads of chestnuts transported from Naples, Italy, to New York, New York, by Sea-Land Service, Inc. Upon being notified by Sea-Land that insufficient freight charges had been received in Italy for one of the two containers, the consignee was required to pay an additional $894.11 to secure the release of its cargo. This amount was based upon Sea-Land's determination that the container in question weighed 812 kilos more than the weight stated on the bill of lading.[1]

Upon receiving the disputed container, the consignee made arrangements with the United States Department of Agriculture to weigh the contents of both containers and paid a total of $102.15 for this service. The reweighing indicated that the cargo in the disputed container weighed at least 50 kilos less than the 15,000 kilos at which it was originally rated. The consignee then filed a complaint with the Commission to collect $894.11 in excess tariff charges and $102.15 for reweighing. Sea-Land did not dispute the allegation that it had misrated the cargo or the amount requested in damages, and the Settlement Officer proceeded to award the consignee $894.11 plus $72.15 -- an

[1] The shipper was charged an additional freight rate of $281.47 plus penalty charges provided for under Rule 26 of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Conference Tariff No. FMC-15, in the amount of two times the additional freight ($562.74) plus the cost of weighing ($50.00). Sea-Land did not unpack the container and weigh its contents, but instead weighed the entire load and subtracted the "tare weight" of the empty container in accordance with figures from a container register.

amount found to be the cost of weighing the one container upon which excess tariff charges were collected. Interest was also awarded on these amounts, calculated from the date each payment was made.

Reparations were awarded for the consignee's reweighing expense because of the Settlement Officer's belief that, but for Sea-Land's Shipping Act violation, no reweighing would have been necessary. Although a chain of causation does exist between the violation and the reweighing, it is also clear that the consignee would not have incurred this expense if it had not pursued its legal claim against Sea-Land. Like attorneys' fees, reweighing expenses are considered to be a cost of litigation primarily within the independent control of the complainant rather than an economic loss flowing directly and without intervention from a misrating violation.

The Commission has determined that litigation costs are rarely proper subjects for an award of reparations, *Ace Machinery Company v. Hapag-Lloyd A.G.*, 16 S.R.R. 1531, 1534 (1976), and should not be considered by Settlement Officers in the context of nonprecedential informal docket proceedings. Accordingly, the Settlement Officer's decision shall be adopted except insofar as it permits the consignee to collect the costs of reweighing the cargo.

THEREFORE, IT IS ORDERED, That Sea-Land Service, Inc., pay to William H. Kopke, Jr., Inc., the sum of $894.11, plus interest at the rate of 12% from October 12, 1979, to the date full reparation is made.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

* Vice Chairman Thomas F. Moakley and Commissioner Leslie L. Kanuk dissent. In the circumstances of this case, they do not consider the consignee's reweighing expense as a cost of litigation, but rather as an expenditure necessarily incurred as a direct result of the carrier's failure to perform its duty to ascertain the proper weight of the cargo it transports.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 775(I)

WILLIAM H. KOPKE, JR., INC.

*v.*

SEA-LAND SERVICE, INC.

AND

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS, NORTH ATLANTIC RANGE CONFERENCE (W.I.N.A.C.)

Decision of Robert M. Skall, Settlement Officer[1]

*Partially Adopted July 10, 1980*

Reparation awarded in part

## PARTIES

William H. Kopke, Jr., Inc. (claimant) is a New York corporation ngaged in the business of importing and distributing fresh fruit and roduce, including chestnuts from Italy. It maintains offices at 676 Longfellow Avenue, Bronx, New York.

Sea-Land Service, Inc. (Sea-Land) is a common carrier engaging in ransportation by water and is a member of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Conference W.I.N.A.C.). As a member of that conference, Sea-Land participates in W.I.N.A.C.'s Freight Tariff No. 15 - FMC 3 (tariff) on file with the Commission.

## CLAIMANT'S CASE

By complaint filed January 14, 1980, claimant states that on September 30, 1979, its shipper, Ditta Vito Cioffi, delivered to Sea-Land two containers loaded with fresh chestnuts, in bags, for transportation from Naples, Italy to the port of New York (i.e., Port Elizabeth, New Jersey) under Sea-Land Bill of Lading No. 944-713135.[2] The two containers were temperature controlled containers whereby the chestnuts were to be maintained at a temperature of from 35 to 37 degrees.

[1] Claimant and carrier have consented to the informal procedure under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301-304). This decision, therefore, will be final unless the Commission elects to review it within 30 days from the date of service thereof.

[2] A review of a copy of this bill of lading, supplied by claimant, indicates that the actual number is 948 - 713135. This discrepancy is irrelevant to the decision herein in that the correct number appears on copies of other documents supplied by claimant, e.g., Sea-Land's corresponding freight bill.

On October 11, 1979, two days after it had paid Sea-Land's freight and accessorial charges, claimant intended to take delivery of the two containers of chestnuts at Sea-Land's Port Elizabeth, New Jersey, terminal. At the same time, however, pursuant to rule 26 of W.I.N.A.C.'s tariff, one of the two containers (container No. 22591) underwent a weight check by Atlantic Cargo Inspection Corporation (ACIC) on behalf of Sea-Land and W.I.N.A.C. Inadvertently, the second container (container No. 20781) was released by the terminal without a weight check by ACIC.

The weight of the chestnuts in container No. 22591 was found by ACIC to be 15,812 kilos -- 812 kilos over the weight of 15,000 kilos stated on the bill of lading. Since claimant's earlier payment of freight and accessorial charges had been based on the weight indicated on the bill of lading, ACIC notified claimant that container No. 22591 would be detained until payment of an additional sum in the amount of $894.11. This amount, computed pursuant to rule 26 of W.I.N.A.C.'s tariff, included (1) the alleged additional freight and accessorial charges due, (2) the cost of ACIC's weight check, and (3) an amount equal to double such additional freight and accessorial charges due.[3]

Claimant states that since chestnuts are a perishable cargo necessitating immediate delivery, it was forced to make prompt (i.e., October 12, 1979) payment of $894.11 to Sea-Land. Claimant made this payment under written protest wherein it invited representatives of Sea-Land and W.I.N.A.C. to attend the October 12 unloading of both containers at claimant's premises. This invitation was refused.

On October 12 the contents of each of the two containers was counted and weighed by a representative of the U.S. Department of Agriculture (USDA). As indicated on the two USDA inspection certificates, not only did the chestnuts in container No. 22591 not exceed the weight stated on the aforesaid bill of lading, the chestnuts in each container weighed slightly less than stated on the bill of lading.

Accordingly, claimant requests reimbursement from Sea-Land and W.I.N.A.C. of $894.11, plus $102.15 (i.e., the expenditure necessary to have the bags of chestnuts weighed and counted by the USDA), plus interest from October 12, 1979; a total of $996.26 plus interest. Claimant states that "the sum of $894.11 is an overcharge and, therefore, a violation of the...Conference's tariff and the Shipping Act of 1916, as amended." (Act).

In support of its claim, claimant has submitted copies of Sea-Land's short form bill of lading (prepared by the shipper), Sea-Land's corre-

[3] Although ACIC's inspection report indicates that the contents of container No. 22591 weighed 15,812 kilos, for some reason not clear to the Settlement Officer, the additional sum was computed by ACIC on the basis of 15,820 kilos. Again, however, this seeming discrepancy is irrelevant to the decision herein.

ponding freight bill, evidence of payment of the freight and accessorial harges, ACIC's bill for $894.11, ACIC's inspection reports, evidence f payment of ACIC's bill for $894.11, the USDA's inspection certifiates and evidence of payment of the USDA's inspection charges.

RESPONSE TO CLAIM

By response dated March 20, 1980, Sea-Land states that, while it ppears that the claimant has met its "heavy burden of proof" in stablishing the validity of its claim in connection with an overcharge, Sea-Land cannot unilaterally refund the charges, for to do so would epresent a violation of its Conference membership agreement."

By response dated March 25, 1980, counsel for the W.I.N.A.C. Conerence states that:

> In light of the pertinent regulations, it is unclear why WINAC was named as a respondent to the complaint. Nonetheless, we have reviewed the complaint and Sea-Land's response to it of March 20, 1980. The matter appears to be straightforward and WINAC has nothing to add to Sea-Land's response. [4]

DISCUSSION AND CONCLUSIONS

This matter involves a decision as to whether claimant has shown hat it should be awarded the whole or any part of its claim for $996.26 $894.11 plus $102.15) and, if so, whether interest also should be awardd. Although 46 C.F.R. 502.301-304 specifically provides for reparation f only "overcharges" and "damages", the Commission considers interst to be one form of "damages" as defined in 46 C.F.R. 502.303: 'damages'...means such violations of the Shipping Act, 1916,...other han overcharges[,] for which reparation may be granted."

As to its claim for the sum of $894.11 ($281.37 representing the lleged additional freight and accessorial charges due, plus $562.74 epresenting a penalty of twice such additional freight and charges, plus 50 representing ACIC's inspection expense), claimant states and the ettlement Officer agrees that that amount is an "overcharge." Section 8(b)(3) of the Act prohibits a common carrier by water in foreign ommerce or a conference of such carriers from charging a greater ompensation for the transportation of property than the rates and harges specified in the applicable tariff. Based upon ACIC's findings, he charge of $894.11 was not an overcharge and thus did not violate ection 18(b)(3), whereas, based on the USDA's findings, such charge vas an overcharge and a violation of section 18(b)(3) has occurred.

[4] Although the Commission's rules governing informal docket procedure do not apply to conferices specifically, for obvious reasons W.I.N.A.C. was named by claimant as a joint party to the comaint. Accordingly, when the Settlement Officer served a copy of the complaint on Sea-Land he also rved a copy on W.I.N.A.C. The question of whether or not W.I.N.A.C. was properly named as a spondent does not need resolution in this case; it is enough that Sea-Land is a respondent.

Should the USDA's findings be preferred over ACIC's findings? Without more, the answer is no. In this case, however, there is more. Specifically, a review of the respective inspection reports indicate that while ACIC neither weighed nor counted the contents of Sea-Land container No. 22591, the USDA did. ACIC merely weighed the sealed container and chassis and subtracted from that gross weight the "register" weight of the chassis and the "register" weight of the container. The remainder (i.e., 15,812 kilos, or 812 kilos more than the 15,000 kilos stated on the bill of lading) was presumed by ACIC to be the weight of the contents. The USDA, on the other hand, counted and weighed the contents of the container and found that the average weight of the bags of chestnuts was slightly under the stated per-bag-weight. Further, the USDA found that there were two bags less than indicated on the bill of lading for container No. 22591.[5]

In this case, therefore, it is concluded that the USDA's findings should be preferred over ACIC's findings and that claimant is entitled to a refund of overcharges in the amount of $894.11. Further, since as a direct result of that overcharge claimant was wrongfully deprived of the use of its money, it also is concluded that, in accordance with Commission policy, claimant is entitled to interest at 12 percent. Again in accordance with Commission policy, and as requested by claimant, since claimant paid the amount of $894.11 on October 12, 1979, interest will be awarded from that date until the date of the refund by Sea-Land.

As to the sum of $102.15, which represents claimant's expense in having the USDA verify the amount and weight of the cargo, claimant does not use the term "damages" as the basis for the requested reimbursement. The Settlement Officer believes, however, that reimbursement for at least a portion[6] of such expense can be awarded in the form of damages, if it can be concluded that (1) such damages were suffered as a direct result of the above-found violation of the Act, and that (2) "reparation may be granted" within the meaning of 46 C.F.R. 502.303.

Did the damages (i.e., the cost of the USDA's verification service) occur as a direct result of the overcharge violation? Obviously so. To conclude otherwise would be to conclude that no part of the expenditure was necessary to prove claimant's case, and despite the record herein, that claimant would have requested an impartial weight and count check in any case. No such conclusion can be reached here.

[5] The contents of container No. 22591 was said by the shipper to contain 600 bags weighing a total of 15,000 kilos, with each bag marked as weighing 25 kilos (600 x 25 = 15,000). The USDA, however, counted only 598 bags, with an average weight just under 25 kilos. Thus, the chestnuts in container No. 22591 could not have weighed 15,000 kilos, much less 15,812 kilos.

[6] The sum of $102.15 represents the USDA's service charge in connection with both containers -- not just container No. 22591, which is the only container directly involved in this case.

May reparation for damages be granted in this case? The Settlement )fficer is aware of no policy that would negate the literal meaning of he rules, and equity[7] certainly favors an affirmative answer. Further, ;ea-Land's response to the claim simply ignored the matter of damages.

Accordingly, it is concluded that 46 C.F.R. 502.303 entitles claimant o damages for that portion of the $102.15 applicable to container No. 2591.

As to the amount of damages to be awarded, a review of the JSDA's inspection certificate for container No. 22591 clearly indicates hat its charges, including overtime, amounted to $72.15. A telephonic iscussion with the USDA inspector who signed the certificate conirmed that $72.15 does in fact represent the inspection and overtime harges[8] related only to container No. 22591, and that no other charges or any other services are included in that amount. It is concluded, herefore, that the amount of $72.15 is the awardable amount of damges, exclusive of interest, to which claimant is entitled.

Although a viable argument can be made to the contrary, the Settleient Officer does not believe that he can consider the remaining mount of $30, which represents the USDA's inspection fee for the econd container, as damages *directly* related to the overcharge violaon. While it is true that the USDA's weight and count check of the ags of chestnuts in the second container supplied strong evidence to ipport the findings as to the weight of the bags of chestnuts in ontainer No. 22591, that supporting evidence was not necessary to rove claimant's contention that an overcharge occurred with respect container No. 22591.

As to the question of whether interest should be awarded on the mount of $72.15, it must be recalled that the underlying principal at ork here is to make the injured party whole -- within the limits of the ct, the rules and Commission policy.[9] The injury suffered by claimant s the result of its outlay to the USDA is not limited simply to the mount of the outlay. Rather, just as in the case of the overcharge, this ijury also involves the loss of the use of claimant's money. It is oncluded, therefore, that claimant is entitled to interest at 12 percent,

[7] This is not to imply that the rules enable the Settlement Officer to completely satisfy equity in this se. The claimant will still be out-of-pocket for expenses such as attorney's fees and will receive no paration for the aggravation suffered as a result of this incident.

[8] According to the USDA inspector, overtime begins at 4:30 p.m. The USDA's weight and count eck of container No. 22591, as stated on the inspection certificate, began at 4:35 p.m., October 12, 79. In that connection, the Settlement Officer notes that October 12, 1979 fell on a Friday. It was, er all, ACIC who had detained the container on October 11 and held it until claimant could pay the ditional charges on October 12. Only then could claimant arrange for delivery of the container to its arehouse in the Bronx. It is a distinct possibility, therefore, that the only way claimant could have oided overtime charges was to wait for at least two more days before allowing the USDA inspecn to begin.

[9] 46 C.F.R. 502.301-304 is based on section 22 of the Act. That section authorizes "*full* reparation to complainant for the injury caused by such violation"(emphasis supplied).

but not from the date of October 12, 1979, as requested. The USDA's invoice to claimant is stamped "Paid" on a date which, although blurred, appears to be October 24, 1979. Since telephone discussions with claimant and its attorney could not elicit a different date, interest on the amount of $72.15 will be awarded from the date of October 24, 1979.

Based on the foregoing, Sea-Land is hereby ordered to:

1) Refund to claimant the sum of $894.11, together with interest at 12 percent from October 12, 1979, to the date refund is made; and
2) Reimburse claimant in the additional amount of $72.15, together with interest at 12 percent from October 24, 1979, to the date such reparation is made.

Evidence of payment in accordance with this decision should be submitted by Sea-Land in order to complete this record.

(S) ROBERT M. SKALL
*Settlement Officer*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77-13

FIRST INTERNATIONAL DEVELOPMENT CORPORATION

*v.*

SHIP'S OVERSEAS SERVICES, INC.

reight charges collected by nonvessel operating carrier computed on the basis of the unfiled rate, found to be unlawful. Reparation awarded.

*Michael A. McManus, Jr.*, for First International Development Corporation.

*W. B. Ewers* for Ship's Overseas Services, Inc.

## REPORT

*July 17, 1980*

Y THE COMMISSION:* (THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, *Commissioner*; PETER N. TEIGE, *Commissioner*)

This proceeding is before the Commission on Exceptions filed by irst International Development Corporation (FIDCO) to the Initial ecision on Remand issued by Administrative Law Judge William easley Harris on October 30, 1979. Ship's Overseas Services, Inc. OS) filed a Reply to the Exceptions.

### BACKGROUND

The matter began with the filing of a complaint by FIDCO charging OS with violations of the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*) d seeking reparation from SOS in the amount of $553,484.71 for the jury caused by such violations. Specifically, the complaint alleged at whereas SOS had entered into an agreement with FIDCO to range for the transportation of a shipment of steel pipe from Houston, exas, to Benghazi, Libya, at the best rate available at the time of ipment, SOS collected from FIDCO freight charges at the rate of 27.50 per measurement ton (m.t.) while shipping the cargo on a ssel of the Jan C. Uiterwyk Company at the rate of $125.00 per m.t.[1] ne collection of charges at $227.50 per m.t., which rate was never ed with the Commission, FIDCO contends, was unduly or unreason- ly prejudicial and disadvantageous, unjustly prejudicial and unreason-

Chairman Daschbach concurs in part and dissents in part. Commissioner Kanuk dissents. Commis- ıer Teige did not participate in the previous Commission decisions served in this proceeding.

The rate of the Gulf-Mediterranean Ports Conference of which Uiterwyk was a member.

able in violation of sections 14 Fourth, 16, 17 and 18 of the Shipping Act, 1916.

In the Initial Decision served May 2, 1978,[2] the Presiding Officer determined that SOS was not a common carrier and dismissed the complaint for lack of jurisdiction. Because the Presiding Officer noted in his Initial Decision that Complainant's closing brief had not been received, the Commission on exceptions remanded the proceeding to the Presiding Officer for his consideration of the Complainant's brief.

On remand, the Presiding Officer reasserted the findings and conclusions of his earlier decision.

The Commission on review reversed the Presiding Officer's decision, finding that in arranging for the transportation of FIDCO's cargo SOS had acted as a non-vessel operating common carrier by water and that SOS's failure to file with the Commission a tariff covering such transportation violated section 18(b)(1) of the Shipping Act, 1916 (46 U.S.C. 817(b)(1)). The Commission, however, found the record insufficient for ruling on FIDCO's claim for reparation and again remanded the proceeding to the Presiding Officer for a determination of the amount of reparation, if any, to be awarded FIDCO.

## PRESIDING OFFICER'S DECISION AND POSITIONS OF THE PARTIES

In his Initial Decision on Remand now under consideration, the Presiding Officer dismissed the complaint and discontinued the proceeding on the ground that FIDCO had failed to introduce any new evidence on remand and had not proven that SOS's violation of section 18(b)(1) was the cause of any injury to it. Moreover, the Presiding Officer expressed some doubts as to whether the parties had come in with clean hands so that the matter could be equitably resolved.

In its Exceptions to the Initial Decision on Remand FIDCO contends that the Presiding Officer failed, either in that decision or in his earlier Initial Decision, to consider:

(1) FIDCO's arguments at law and equity on the question of the injury and of damages caused FIDCO by SOS's violation of the statute;

(2) whether a rate 75% in excess of the rate paid SOS to the underlying carrier was unreasonable;

(3) the purpose of section 18(b)(1) which is to prevent unreasonable charges and provide review of rates in order to protect "unknown members of the public from unscrupulous shippers [sic]";

(4) the Commission's decision in *J. G. Boswell v. American Hawaiian S.S. Co.*, 2 U.S.M.C. 95 (1939), which requires an

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[2] *First International Overseas Corp. v. Ship's Overseas Services, Inc.*, 18 S.R.R. 415 (1978).

analysis of the reasonableness of the charge where there was a failure to file a tariff.

FIDCO also excepts to the doubt expressed in the Initial Decision on Remand on the parties' "clean hands" and contends that equity, in this instance, weighs heavily in FIDCO's favor. Finally, it is argued that if the Initial Decision is allowed to stand, carriers will be encouraged to violate the statute and avoid the filing requirements of section 18(b)(1).

SOS, in reply, maintains that damages are not presumed but must be proven. It submits that because the further hearings to determine the amount of damages were held at FIDCO's request, its failure to introduce any evidence on remand on that question amounts to a fraud on the Commission and to an abuse of the "judicial" process.

SOS insists that FIDCO has not shown that the rate charged was unjust or unreasonable or that it was in fact damaged. Citing *Carton-Print v. The Austasia Container Express*, 20 F.M.C. 31 (1977), SOS contends that the Commission has rejected claims for damages resulting from loss of business[3] and maintains that Complainant should have, but has not, shown that SOS's failure to file a tariff was the proximate cause of a specific injury to it, which it allegedly has not done. Finally, SOS again reasserts its position that it is not a common carrier subject to FMC regulation.

## DISCUSSION

The Commission has previously found that SOS utilized the services of Charles Ragan to procure business and that it shipped FIDCO's cargo under its own name and assumed liability for the safe water transportation and delivery of the cargo at the port of destination.[4] On that basis it was determined that in arranging for the movement of FIDCO's cargo to Benghazi, SOS had acted as a non-vessel operating common carrier and that its failure to file a tariff covering the transportation was violative of section 18(b)(1).

On exceptions, SOS again denies that it is a common carrier subject to regulation and refers to arguments made in earlier pleadings. However, the matter of SOS's status has already been fully considered in an earlier opinion and will not be discussed further. SOS's exception to the contrary is therefore rejected. Accordingly, the only remaining issue before the Commission is FIDCO's claim for reparation and damages.

Section 22(a) of the Shipping Act, 1916, provides, in relevant part:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by

[3] That decision turned on the question of the standing of the shipper to claim reparation for freight overcharges paid by the consignee.

[4] The essential facts are as set forth in the Commission's decision served March 23, 1979, which is incorporated herein.

> water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board, 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. (Emphasis added) 46 U.S.C. 821(a).

As mentioned, the Initial Decision on Remand held that FIDCO had not proven any injury caused by the violation of the statute. FIDCO, however, claims that it was indeed injured and seeks reparation in the amount of $553,484.71, $500,000 of which is claimed for the loss of business and profits and as punitive damages, while $53,484.71 represents the 75 percent difference in the amount SOS collected from FIDCO over the charges SOS paid the underlying ocean carrier.

With regard to the claim of lost business and profits, the Presiding Officer correctly found that FIDCO has failed to establish that SOS's violation is the proximate cause of any such losses by FIDCO. The Presiding Officer's decision is therefore adopted in that respect.

With respect to FIDCO's claim of injury resulting from the excess in freight charges paid by FIDCO over the amount SOS paid the underlying ocean carrier, SOS does not deny that it received payment on the basis of the unfiled rate, but insists that FIDCO was not injured thereby because it had agreed to the payment of that rate. Upon close examination, this argument proves itself to be without merit.

The primary purpose of section 18(b) is to prevent discrimination among shippers and to make the use of an unfiled rate unlawful. The courts, this Commission, and the Interstate Commerce Commission (under similar provisions of the Interstate Commerce Act) have long recognized that although carriers subject to regulation may establish rates under private contracts with shippers, the rates so agreed upon may be collected only when set forth in a tariff duly on file and in effect at the time of the shipment. As the Supreme Court explained in *Armour Packing Co. v. United States*, 209 U.S. 56 (1908), in referring to section 6 of the Interstate Commerce Act:[5]

> There is no provision excepting special contracts from the operation of the law . . . . There is no provision for the filing of contracts with shippers and no method of making them public . . . If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to

[5] P.L. 95-473 recodified the Interstate Commerce Act without substantive change. The pertinent portions of section 6 now appear at 49 U.S.C. 10761 and 10762. These provisions closely parallel section 18(b) of the Shipping Act, 1916, which, among other things: (1) requires that water carriers engaged in foreign commerce file with the Commission tariffs containing all their rates and charges; (2) sets forth the conditions upon which tariffs of such rates and charges will become effective; (3) prohibits carriers from receiving a different compensation than provided in their tariffs; and (4) makes unlawful the use of a rate whose filing was rejected by the Commission.

establish a rate duly published, known to all and from which neither shipper nor carrier may depart. 209 U.S. at 81.[6]

'he Shipping Act similarly prohibits special arrangements between iippers and carriers unless their terms are fully disclosed in the tariff. *'ariff Filing Practices, Etc. of Containerships, Inc.*, 9 F.M.C. 56 (1965); *ıvestigation of Tariff Filing Practice*, 7 F.M.C. 305 (1962); *Intercoastal ıvestigation*, 1 U.S.S.B.B. 400, 416 (1935). Indeed, the tariff adherence equirements of the federal common carrier statutes are so strict[7] that, 'hen properly filed, tariffs have the force of law and strict liability is nposed upon shippers and carriers alike.[8]

The question presented by the instant case therefore reduces itself to 'hat reparation may a shipper receive when a carrier has unlawfully ollected charges for untariffed services. SOS's argument that FIDCO ıay receive nothing is based upon the assumption that a carrier withıt a tariff may not be penalized for "misrating" freight (or for giving ebates or refunds) despite being in plain violation of section 18(b), ecause there is no "lawful" rate against which the unlawful charges ın be measured.[9]

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[6] *See also Atchison T. & S.F. Ry. Co. v. Robinson*, 233 U.S. 173 (1913); *Chicago & Alton R.R. Co. v. rby*, 225 U.S. 155 (1912); *Texas & Pac. Ry. v. Mugg*, 202 U.S. 242 (1906); *New York, N.H. & H. R.R. . v. ICC*, 200 U.S. 361 (1906); *Bernstein Bros. Pipe & Machinery Co. v. Denver & R. G. W. R.R. Co.*, 3 F. 2d 441 (10th Cir. 1951); *Northern Valley Transfer, Inc. v. ICC and USA*, 192 F. Supp. 600, 604 .N.J. 1961); *S. L. Sheppard & Co. v. Agwilines, Inc.*, 39 F. Supp. 528, 531 (D.S.C. 1941); *American oadcasting Companies, Inc. v. F.C.C.*, No. 78-1968 (D.C. Cir., April 28, 1980).

[7] Principles of equity which might prevail in other contractual situations are inapplicable to freight e disputes. Thus, when carriers rate shipments in good faith reliance on cargo descriptions furnished the shipper, they may nonetheless be held in violation of section 18(b)(3) and ordered to pay repaion if the shipper submits evidence showing that the commodity transported was something other an that described in the shipping documents. *E.g., Durite Corp. v. Sea-Land Service, Inc.*, 20 F.M.C. 4 (1978), *aff'd without opinion Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F.2d 1000 .C. Cir. 1979); *Sun Co., Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. 67 (1977); *Abbott Laboratos v. Alcoa Steamship Co.*, 18 F.M.C. 376 (1975); *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 R.R. 16 (1972).

[8] *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94 (1915); *Pennsylvania R.R. Co. v. International Coal ining Co.*, 230 U.S. 184 (1913); *Chicago, B. & O. R. Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263 h Cir. 1973); *U.S. v. Pan American Mail Line, Inc.*, 359 F. Supp. 728 (S.D.N.Y. 1972). The recent ıendment to section 22 of the Shipping Act, 1916 strengthening the Commission's authority to prosute rebating underscores the Congressional intent that tariff adherence requirements be rigidly enrced. P.L. 96-25, 93 Stat. 71, effective June 19, 1979. The need for a tariff on file as a condition ecedent to the collection of freight charges is further illustrated by the requirement under the special cket procedure established pursuant to section 18(b)(3) that, when the failure to timely file a new e is inadvertent, or due to error, before applying to the Commission for relief, the carrier must file a iff setting forth the rate sought to be charged. *See e.g., Airlex Shipping A/C v. Lykes Bros. S.S. Co., :.*, 19 F.M.C. 16 (1975); *Oppenheimer International Corp. v. Moore-McCormack Lines, Inc.*, 15 F.M.C. (1971).

[9] FIDCO relies heavily upon domestic commerce decisions. In *J. G. Boswell v. American-Hawaiian S. Co.*, 2 U.S.M.C. 95 (1939), the Commission held that although certain carriers had collected arges without tariff authority, complainants were not entitled to reparation "unless the sum paid by mplainants amounted to an unjust and unreasonable exaction for the service performed." *Id.* at 105. e Interstate Commerce Commission has held that when transportation services are rendered witht a tariff on file, the ICC may find reasonable charges therefor and award reparation where the arges collected were excessive. *Manufacturers Shippers Cooperative Ass'n v. Erie R. Co.*, 311 I.C.C.

Although the Commission has no authority to prescribe just and reasonable rates in foreign commerce,[10] if section 18(b) is to be reasonably construed to fulfill its legislative intent, an ocean carrier should not be allowed to collect and retain the fruits of its unlawful act.[11] Tariff filing requirements benefit and protect shippers by subjecting rates to public scrutiny and the pressures of competing market forces, thereby ensuring not only equal treatment, but also equal opportunity for all shippers, especially those less experienced in transportation matters. The collection of untariffed rates in violation of the statute deprives the shipper of those benefits and this deprivation causes injury for which reparation may be granted under the terms of section 22 of the Shipping Act, 1916.

Because an unfiled rate is unlawful *per se*, the shipper suffers a legally cognizable injury at the time it pays the unlawful charges.[12] The premise that damages must be proven rather than presumed does not prevent an award of reparation in circumstances where, as here, the disputed charges were unlawful in their entirety. Similar arguments were rejected by the Supreme Court 65 years ago when it held that proof of particular pecuniary loss to the shipper was unnecessary in overcharge cases and that damages could be awarded upon mere proof that a higher rate was paid. *Lehigh Valley R. Co. v. Meeker*, 236 U.S. 412 (1915).[13]

Even though a carrier may not collect charges based on an untariffed rate, the Commission may, in the exercise of the discretion granted by section 22 and as determined by the circumstances of each particular

637, 641 (1960); *Southwestern Petroleum Co., Inc. v. S. W. R. Co.*, 310 I.C.C. 431 (1960); Hackney Bros. Body Co. v. N.Y. Central R. Co., 266 I.C.C. 795, 798 (1946); *Cities Service Oil Co. v. Erie R. Co.*, 237 I.C.C. 387 (1940); *International Paper Sales Co. v. Georgia R. & B. Co.*, 213 I.C.C. 67, 68 (1935); *Bannon v. Southern Express Co.*, 13 I.C.C. 516 (1908).

[10] Section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a)) and sections 3 and 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845 and 845(a)) provide for ratemaking authority in domestic offshore trades only. The unfiled rate is not being challenged under section 18(b)(5) which forbids rates which are so unreasonably high or low as to be detrimental to United States foreign commerce.

[11] The duty to file rates and charges and to strictly adhere to tariffs is the same for both foreign and domestic commerce carriers. If carriers which file no tariffs were permitted to benefit from the retention of revenues from negotiated rates, the result would be that carriers which do obey the law would be held to more stringent standards than those which do not.

[12] *Adams v. Mills*, 286 U.S. 397, 407 (1932); *News Syndicate Co. v. N.Y. Central R. Co.*, 275 U.S. 179 (1927); *Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925). *See also Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918), where the Court noted that:

> The tendency of the law, in regard to damages, is not to go beyond the first step. It holds the carrier liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered a loss to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law.
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> * * *
>
> The carrier ought not to be allowed to retain his illegal profits and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. 245 U.S. at 533-534.

[13] *See also* cases cited in n. 12, *supra*.

case, consider whether to permit the carrier to retain out of pocket expenditures made for the benefit of the shipper.[14] In this instance, the record shows that of the $123,101.38 it collected from FIDCO, SOS paid $69,616.67 in freight charges for the water movement of the cargo, which is the amount FIDCO would have paid for the ocean transportation had it dealt directly with the ocean carrier.[15] FIDCO claims as reparation only the balance of $53,484.71, which amount reflects the difference between the amount collected by SOS and the cost of the transportation service which FIDCO received and from which FIDCO benefitted. In view of the Commission's authority to make equitable adjustments in the amount of reparation awarded, *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), FIDCO will only be granted reparation for the balance of $53,484.71, with interest calculated from the date of payment.

Other contentions and arguments not specifically discussed have nevertheless been considered and found to be without merit.

THEREFORE, IT IS ORDERED, That the Presiding Officer's Initial Decision on Remand is adopted to the extent it denies FIDCO's claim for damages for loss of business or profits and is vacated in all other respects; and

IT IS FURTHER ORDERED, That FIDCO is hereby awarded reparation in the amount of $53,484.71 with interest of 12 percent per annum from the date of payment of the freight charges found unlawful herein; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

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[14] *See United States v. Columbia Steamship Company*, 17 F.M.C. 8 (1973).

[15] It is apparent from the record that FIDCO lacked experience in matters concerning ocean transportation.

*Chairman Richard J. Daschbach, concurring in part, dissenting in part.*

I do not agree with the majority in its conclusion as to the amount of reparation to be granted to the shipper.

Ship's Overseas Services, Inc. (SOS), has acted as a regulated non-vessel operating common carrier with respect to the subject cargo shipment and failed to file a tariff covering that shipment in violation of section 18(b). The majority correctly notes that rates established under private contracts between shippers and carriers "*may be collected only when set forth in a tariff duly on file and in effect at the time of shipment.*"(p.50) (emphasis added) The majority also recognizes that an unfiled rate is unlawful *per se*, and that legally cognizable injury immediately arises upon the payment of such a rate. It further states that:

> The premise that damages must be proven rather than presumed does not prevent an award of reparation in circumstances where, as here, the disputed charges were unlawful in their entirety. (p.52)

Despite this analysis, the majority invokes the aegis of the Commission's discretionary power to establish reparations awards under section 22 of the Act, and denies the shipper the return of its *full* payment, thereby partially sanctioning SOS' violation of the law.

The foundation of regulated liner shipping is the filed tariff. The Shipping Act, 1916, requires strict adherence to these tariffs in order to maintain stability and regularity in the U.S. liner trades and to protect shippers from discriminatory, capricious or unscrupulous deviations from published rates. Any effort by the Commission to substitute 'discretionary' ratemaking for enforcement of strict tariff adherence erodes the foundation of the tariff filing system. Consequently, I would require the return to the shipper of all monies collected by SOS for the shipment of the cargo involved in this proceeding.

*Commissioner Leslie Kanuk, dissenting.*

The majority's opinion is based on the best of intentions and my sympathies are with them. Unfortunately, the law is not. Section 22 permits the award of reparations for injuries resulting from violations of the Shipping Act. The only violation here is a failure to file a tariff for the negotiated rate. This violates section 18(b)(1) of the Shipping Act. Had SOS properly filed the rate resulting in the $123,101.38 charge, there would be absolutely no cognizable action which this agency could entertain. However, the section 18(b)(1) violation by SOS has not in my opinion, been properly linked to an injury suffered by FIDCO. Even if injury is presumed, I can find no rationale for awarding reparations in the amount of $53,484.71 as a direct result of failure to file a tariff.

It is unfortunate that the law sometimes does not permit us to act in complete accordance with our good intentions. However, I view FIDCO's situation to be one best remedied in a forum with equity powers.

This regulatory agency cannot properly honor FIDCO's request for reparations.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 79-101

LORESCO INTERNATIONAL, INCORPORATED

*v.*

YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LIMITED

## NOTICE

*July 17, 1980*

Notice is given that no exceptions have been filed to the June 16, 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

## DOCKET NO. 79-101

## LORESCO INTERNATIONAL, INCORPORATED

*v.*

## YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LIMITED

Complainant, an exporter of a backfill product known as "Loresco Type DW2," made ten shipments of this product via respondent carrier during December 1977 through February 1978. Complainant contends that the product should have been rated as "calcined petroleum coke" instead of "artificial graphite." Respondent rated the shipments under the latter tariff item, as a result, deriving an aggregate amount of $15,634.67, in additional freight. It is held that:

(1) The preponderance of the evidence shows with reasonable certainty and definiteness that the product was in fact "calcined petroleum coke" since the raw petroleum coke from which it was made was never heated to the level necessary to convert "calcined petroleum coke" to "artificial graphite." Moreover, respondent has in effect acknowledged this fact by paying a later claim on the same product, after being informed of the true nature of the product.

(2) Complainant is entitled to show what actually moved notwithstanding erroneous descriptions inserted into bills of lading, or export declarations, especially in such a case as this in which the shipper was apparently inexperienced in exporting its product and unfamiliar with respondent's tariff structure.

(3) Reparation in the aggregate amount of $15,634.67 is awarded plus interest on each individual overcharge from date of payment at the rate of 12 percent, as prescribed by current Commission policy.

*Joseph F. Tatum, Jr.*, for complainant Loresco International, Inc.

*Thomas E. Kimball* and *Charles L. Coleman*, for respondent Yamashita-Shinnihon Steamship Co., Ltd.

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

*Finalized July 17, 1980*

This case commenced with the filing of a complaint on December 13, 1979. Complainant, Loresco International, Incorporated, is in the business of selling carbon products overseas. Complainant alleges that respondent, Yamashita-Shinnihon Steamship Company, Limited, a common carrier by water engaged in the foreign commerce of the United States, overcharged it on 10 shipments of a product known as

[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).

"Loresco Type DW2 Backfill" which respondent carried during the period December 1977 through February 1978 from New Orleans to Japan under services and rates published in respondent's intermodal tariff (the Pacific Westbound Conference Westbound Intermodal Tariff No. 8). Loresco alleges that respondent misclassified the products in question as "artificial graphite" whereas, according to Loresco, the products are actually "calcinated" or "calcined petroleum coke." Loresco claims that this misclassification constitutes a violation of section 18(b)(3) of the Shipping Act, 1916, and that, as a result, Loresco paid additional freight in the amount of $15,634.67, which it now seeks as reparation.

Following the filing and serving of the complaint, respondent, through its general agent, requested additional time to file its answer so that it could retain Conference counsel under the Conference's rules. A further reason for this request was to enable respondent to file a full and complete answer which would deal more thoroughly with the issues than would a perfunctory general-denial answer. In granting permission to respondent, I also advised complainant, who was not represented by an attorney or by a registered Commission practitioner, that it was incumbent upon complainant to furnish adequate evidence showing the nature of its product known as "Loresco Type DW2 Backfill" since complainant had submitted nothing but bills of lading, tariff pages, copies of Commission regulations, a corrected invoice, case citations relating to the two-year statute of limitations, and a one-page chemical analysis, none of which appeared to show that the product was in fact "calcinated" or "calcined petroleum coke" rather than "artificial graphite." Thereafter, on January 25, 1980, and April 30, 1980, complainant supplemented its evidentiary submissions with sales literature, export shipping instructions, packing lists, a chemical analysis, and a letter and affidavits from Loresco's president explaining that the product was "calcined petroleum coke." Finally, in response to my further instructions, complainant, on May 12 and 20, 1980, through its freight forwarder, W.R. Zanes & Co. of La., Inc., furnished canceled checks and other evidence relating to the date of payment on two shipments for which the bills of lading appeared to be dated more than two years prior to the filing of the complaint. Since the Commission has held that date of payment may be used to calculate the two-year period of limitation under section 22 of the Act, the furnishing of this evidence was essential to enable me to consider claims of overcharges on these two shipments on the merits. See *Sun Co. v. Lykes Bros.*, 20 F.M.C. 67, 69 (1977); *TDK Electronics Co., Ltd. v. Japan Lines, Ltd.*, F.M.C. Docket No. 79-87, May 20, 1980, p. 3. Complainant also furnished a legible copy of one bill of lading which had originally been furnished in an illegible form.

## DISCUSSION AND CONCLUSIONS

### THE EVIDENTIARY SUBMISSIONS OF THE PARTIES

The issue for determination in this case is simply whether the product shipped by respondent known as "Loresco Type DW2 Backfill" is "calcinated" or "calcined petroleum coke" rather than "artificial graphite." If it is the former, then respondent has overcharged Loresco in violation of section 18(b)(3) of the Act because respondent applied the higher rate for "artificial graphite" published in its tariff at the time of the shipments in question.[2] In determining this issue, I must also determine the subsidiary issue of whether the evidence submitted by Loresco is sufficient to sustain its contention that the product was in fact "calcined petroleum coke."

As mentioned above, Loresco submitted its evidence at several different times and in different forms. At the time of filing the complaint (December 13, 1979), complainant submitted various documents consisting of the pertinent bills of lading, tariff pages, Commission regulations, a corrected invoice, chemical analysis, and case citations. These documents, while useful in providing background information, did not demonstrate whether the product "Loresco Type DW2 Backfill" was "calcined petroleum coke" or "artificial graphite." For example, the various bills of lading for the ten shipments involved merely showed that the commodity had been described as "Loresco Type DW2 Backfill." After I advised complainant that its evidence required supplementation if complainant wished to pursue its claims, Loresco furnished additional evidence in the form of sales literature, export shipping instructions, packing lists, chemical analyses, affidavits of Loresco's president, Mr. Joseph F. Tatum, Jr., excerpts from a chemical reference book, and evidence showing dates of payment for all ten shipments.

Respondent replied several times in response to the various allegations and to the evidence submitted by Loresco. Initially, on January 28, 1980, respondent filed its answer and brief in support thereof. Respondent denied that it had misrated the shipments in question, although generally acknowledging the veracity of the bills of lading and the fact that respondent had denied the claims when they had been submitted under the Conference's rules because they had not been submitted within the time period required by Conference Rule 20. (See

[2] Complainant is claiming that a rate of $94 per kt should have been applied. This was the rate published in respondent's tariff for "Petroleum Coke N.O.S. packed" with an Item No., at that time, of 332 9000 40. .(See tariff, 9th rev. page 403, attached to complaint.) According to the rated bills of lading for the ten shipments and the table of calculations attached to the complaint, respondent rated nine of the shipments at $117 per cubic meter and one shipment at $117 per kt. Respondent admitted that it assessed the $117 per cubic meter rate on the nine shipments but couldn't read the rated bill of lading showing $117 per kt. Complainant later furnished a legible copy of that bill of lading, dated 12/17/77, showing the rate as $117 per kt. The $117 WM rate which respondent charged was that for "artificial or colloidal graphite" with an Item No., at the time of the shipments, of 599 7200 00. (See the two tariff pages 524 attached to respondent's Brief in Support of Answer to Complaint.)

letter from respondent's agent, Lilly, dated September 19, 1979, attached to the complaint.) Respondent also acknowledged that it had rated the shipments as "artificial graphite." However, respondent argued that the shipments had moved in sealed containers, leaving respondent with minimal opportunity to verify the contents of the container, that Loresco submitted evidence which was insufficient to carry complainant's "heavy burden of proof," and that the evidence submitted was consistent with respondent's rating the shipments as "artificial graphite." Respondent also commented on the fact that some of the evidence submitted was illegible and that at least two of the shipments moved on bills of lading which were stamped "freight prepaid" and were dated December 8, 1977, a date beyond the two-year period of limitation prescribed by section 22 of the Act since the complaint was filed on December 13, 1979. Finally, respondent contended that the export declarations which it located and furnished for the record relating to six of the shipments in question show that the commodity classification number selected for export purposes (the "Schedule B" number)[3] was the number for "artificial graphite." Therefore, argued respondent, both the bills of lading and the export declarations indicate that the product shipped was "artificial graphite" rather than "calcined petroleum coke." Respondent also furnished additional evidentiary materials for the record, including tariff pages showing how its tariff had been conformed to the "Schedule B" numbers, and excerpts from a chemical dictionary explaining the physical differences between "calcined petroleum coke" and "artificial graphite."

Because respondent had not had an opportunity to analyze and comment upon some of the evidence which was submitted by Loresco on January 25, 1980, consisting of sales literature, packing lists, a letter from Loresco's president, and a chemical analysis, I granted respondent permission to file additional responses. (See Notice of Instructions to Supplement the Record, March 31, 1980.) Respondent did so and argued that the additional evidence still did not show that the product in question was "calcinated petroleum coke." Respondent contended furthermore that the chemical analysis was not shown to be that for "calcinated petroleum coke," that the packing lists continued to show "Loresco Type DW2 Backfill" as did the sales literature, and that the literature suggested that some of the component parts of this product might have been graphite. In short, respondent again argued that Loresco had not carried its burden of proof and that respondent had relied upon the information presented to it in the bills of lading and

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[3] This so-called "Schedule B" number entered on export declarations refers to a list of numbers printed in the Schedule B Statistical Classification of Documents and Foreign Commodities Exported from the United States, published by the U.S. Department of Commerce.

export declarations which indicated that the product shipped was "artificial graphite."

After the filing of respondent's supplemental arguments described above, complainant filed its last evidence and arguments as permitted under my ruling of March 31, 1980, cited above.[4] In this last submission, dated April 30 and May 1, 1980, Loresco furnished product literature, excerpts from a book entitled *Carbon and Graphite Handbook*, and affidavits explaining how the product was manufactured so that it became "calcined petroleum coke" rather than "artificial graphite." Except for a few later documents relating to dates of payment and one illeglble bill of lading, the above materials completed Loresco's evidentiary case. Because the record seemed sufficient for me to issue an initial decision without the need for oral hearing and cross-examination, I instructed the parties to advise me if they consented to my following such procedure. (See Final Instructions to Furnish Additional Evidence and Advise Regarding Desired Procedure, May 6, 1980.) In the interest of avoiding unnecessary expense and delay which a trial-type hearing would have caused, both parties consented. To its credit, respondent not only agreed that a trial-type hearing was unnecessary but acknowledged that such formal hearing "would be wasteful of the resources of all parties and the Commission."[5]

## ANALYSIS OF THE EVIDENCE AND ARGUMENTS

Analysis of the evidence and arguments submitted by both parties reveals that there is essentially only one factual issue to be resolved in this case, namely, whether the product known as "Loresco Type DW2 Backfill" was heated to the level necessary to convert "calcined petroleum coke" into "artificial graphite." The evidence, especially the product literature, shows that the product in question is a "backfill," i.e., a substance intended to be used to fill in a trench or excavation surrounding a foundation.[6] Furthermore, there appears to be no dispute regarding the fact that the backfill is a carbon product and that it originated as raw petroleum coke, i.e., a residue of petroleum distillation.[7] There-

[4] In that ruling I noted that in cases of this type it is customary for complainant, who has the burden of proof to file the last pleading. For example, under the Commission s shortened procedures (Rules 181 through 187, 46 C.F.R. 502.181-187), when both parties wish the case to be decided upon written pleadings and evidence, complainant has the right to file its memorandum in reply to respondent within 15 days after respondent's answering memorandum. (See Rule 184, 46 C.F.R. 502.184.) As I note later, both parties in this case have consented to the use of the shortened procedure.

[5] Although respondent consented to my issuing a decision without needless oral hearings and cross-examination, respondent did prepare and file cogent pleadings together with useful evidence which served to narrow the issues in this case considerably, thereby helping to move the case along to prompt disposition.

[6] According to Webster's Third New International Dictionary (p. 158), a "backfill" is "the material used in backfilling" or "the refilling of a trench or other excavation or of the space around a foundation."

[7] "Petroleum coke" is defined as a residue "obtained as the final still product in the distillation of crude petroleum." Webster's Third New International Dictionary (p. 1691).

fore, the only question is whether this raw petroleum coke was heated to the level necessary to convert it into artificial graphite.

Respondent itself argued and furnished evidence showing that although "raw petroleum coke," "calcined petroleum coke," and "artificial graphite" are related products of carbon, the critical distinction between the latter two is the degree to which the raw coke was heated in the manufacturing process. Thus, as respondent states:

> Raw coke becomes "calcined" after being heated to 1200-1800 degrees C. Coke changes into artificial graphite when it is heated above 2400 degrees C. (Brief in Support of Answer to Complaint, p. 4 n. 7.)

The excerpts which respondent has furnished from a reference book entitled *Kirk-Othmer Encyclopedia of Chemical Terminology* (1968 and 1978 editions) fully support the above quotation and describe the process of "calcination" and manufacture of artificial graphite in some detail. Another reference work furnished by complainant, entitled *Carbon and Graphite Handbook*, written by Charles L. Mantell (Library of Congress No. 67-29457) appears to agree substantially with respondent's authority. This author states that "graphitization can be described in a series of steps which occur as the temperature is raised to 2500-3000 degrees Centigrade." (See book cited, p. 9, quoted in complainant's pleading received May 3, 1980, and attached to letter from complainant, dated May 1, 1980.)

Both complainant's and respondent's textbook authorities appear to agree substantially as well as to the nature of the "calcination process." Thus, complainant's authority (*Carbon and Graphite Handbook*) indicates that "calcination" is merely a heating process and that incipient graphitization does not commence until the heating or "calcining" exceeds 1300 degrees Centigrade. (See book cited, p. 9.) Full graphitization does not occur, according to complainant's authority, until the temperature is raised to 2500-3000 degrees Centigrade, as I mentioned above. As noted, respondent's authority stated that raw coke became "calcined" after being heated to temperatures of 1200-1800 degrees Centigrade and further stated that "artificial graphite" is not created until the carbon product is heated above 2400 degrees Centigrade.

Accordingly, it is obvious that Loresco's backfill could not have been converted into "artificial graphite" unless it had been heated to a temperature of at least 2400 or 2500 degrees Centigrade depending upon which authority one relies. Furthermore, it is obvious that the raw petroleum coke should be considered to have become "calcined" petroleum coke if it has been heated either between 1200 to 1800 degrees Centigrade according to the respondent's authority or between 1000 to 1300 degrees Centigrade according to complainant's authority. (See *Carbon and Graphite Handbook*, p. 9, cited above.)

The determination of the nature of "Loresco Type DW2 Backfill," therefore, in large measure boils down to the manufacturing process, i.e., to what temperature was the raw petroleum coke heated. Respondent contends that complainant is in a much better position to provide evidence regarding the composition of its product. (See respondent's supplemental reply, received April 14, 1980, p. 1.) But complainant has furnished the evidence. According to the unrefuted affidavit of Loresco's president, Mr. Joseph F. Tatum, Jr., the product in question could not possibly have become "artificial graphite" because the temperature to which it was raised in the kiln never exceeded 1315 degrees Centigrade. Indeed, the average temperature in the center of the kiln is only in the range of 1200 degrees Centigrade and the product is heated to about 1300 degrees Centigrade only for a short period of time. Because this affidavit is so critical to my finding that the product in question is in fact "calcined petroleum coke," I quote the affidavit in full as follows:

> The calcination of "Loresco Type DW2 Backfill" is performed in a rotary kiln lined with fire brick. The kiln is approximately 11′ in diameter, and approximately 80′ long. As the calcined fluid petroleum coke enters the kiln, in what we call the front of the kiln, it has a temperature of about 871 degrees Centigrade. As it reaches the center of the kiln, and only for a short period of time, it reaches a momentary temperature in the range of about 1300 degrees Centigrade. The maximum which has ever been recorded was 1315 degrees Centigrade, and the average temperature of the center burned of the kiln is in the range of 1200 degrees Centigrade. When the kiln is running in the range of 1300 degrees Centigrade, we experience brick problems and hence do not often approach the temperature of 1300 degrees Centigrade. At the tail of the kiln, the temperature has decreased and the average outfall of the material is approximately 870 degrees Centigrade. To the best of my knowledge, the above is true and factual.

Although the above evidence is sufficient to show that the product in question is in fact "calcined petroleum coke" as complainant has alleged, this evidence does not stand alone. Complainant alleges and respondent admits that several months after the ten shipments in question, Loresco filed a claim with respondent on another shipment of its product, which claim respondent honored. This later shipment, which sailed from Oakland on August 14, 1978, moved under a bill of lading which, unlike the bills of lading relating to the shipments in question, showed a "Schedule B" number (517.5120) for "petroleum coke, calcined." (See Brief in Support of Answer to Complaint, p. 5.) The bill of lading for this claim which respondent paid is attached to the complaint. It is dated August 5, 1978, and describes the product as "Backfill DW2." Respondent, as noted, admits that it honored this claim. The

only distinction which respondent offers between this honored claim and the claims for the 10 shipments in question which it contests is that the bill of lading on the honored claim listed the correct "Schedule B" number. Therefore, respondent did not deny that the "Type DW2 Backfill" shipped by Loresco was "calcined petroleum coke" apparently because it relied upon the fact that the correct "Schedule B" number was shown on the bill of lading. However, respondent is denying the present claims on the grounds that the bills of lading and export declarations showed the wrong "Schedule B" numbers and that none of the documents shown to respondent at least prior to the final affidavit which I have quoted showed that the product was "calcined petroleum coke" rather than "artificial graphite." Furthermore, since the bills of lading and export declarations showed the "Schedule B" number for "artificial graphite," respondent feels it was justified in rating the product as "artificial graphite."

## GOVERNING PRINCIPLES OF LAW

The Commission has held for some time that a shipper is entitled to reparation for overcharges if the shipper can show what actually moved notwithstanding an incorrect description which the shipper or its forwarder may have placed on the bill of lading. The leading case is recognized to be *Western Publishing Co. v. Hapag-Lloyd A.G.*, 13 S.R.R. 16 (1972), but this was the Commission's view even before that case. See, e.g., *Union Carbide Inter-America v. Norton Line*, 14 F.M.C. 262, 264 (1971), and the case cited therein.[8] Although the basic doctrine holding that the shipper can recover for an overcharge if it can show what actually moved is still the law, the Commission has refined it in various ways. Thus the Commission has adopted language explaining the *Western Publishing* doctrine to mean that the shipper "must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim." See *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 245 (1973), and the cases cited therein; *Sun Co. v. Lykes Bros.*, 20 F.M.C. 68, 70 (1977). A decision to award reparation is issued, furthermore, after consideration of "all the evidence of record with no single document or piece of evidence necessarily being controlling." *Kraft Foods v. Moore McCormack Lines, Inc.*, 19 F.M.C. 407, 410 (1976).

Although some Commission decisions reiterate the statement that a shipper has a "heavy burden of proof" when the goods have left the

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[8] It is also established law in numerous Commission decisions that the shipper may recover for overcharges even if the shipper inserted a trade name on the bill of lading in violation of a carrier's tariff rule or failed to comply with some other tariff rule regarding cargo description. See, e.g., *Pan American Health Organization v. Prudential Lines, Inc.*, 19 F.M.C. 412 (1976); *Durite Corporation, Ltd. v. Sea-Land Service, Inc.*, 20 F.M.C. 674, 675 (1978), Order on Reconsideration, November 8, 1978 (unreported), affirmed without opinion, *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F.2d 1000 (D.C. Cir. 1979); see also cases collected In *Sanrio Company, Ltd. v. Maersk Line*, 19 S.R.R. 1627, 1652 (I.D. April 21, 1980).

custody of the carrier, these words have been explained by the Commission to mean that the shipper will have "difficulty in obtaining the necessary evidence rather than to the weight to be given to such evidence." Informal Docket No. 387(I), *Pan American Health Organization v. Moore McCormack Lines, Inc.*, Report on Remand, September 12, 1979, p. 5 n. 9. The Commission reaffirmed this explanation of the so-called "heavy burden of proof" in *Pacific Freight Audit, Inc. v. American President Lines et al.*, 22 F.M.C. 207, 209 (1979). The Commission has furthermore confirmed that the standard of proof in overcharge cases is the normal standard observed in administrative proceedings, i.e., a "preponderance of the evidence." Thus, in replying to a court's inquiries regarding what standard of proof the Commission was following in overcharge cases, the Commission replied:

> . . . a complainant seeking reparation under section 22 of the Shipping Act, 1916 for freight overcharges caused by such error, must set forth sufficient facts to prove with reasonable certainty and definiteness the validity of its claim by a preponderance of the evidence. *Pan American Health Organization v. Moore McCormack Lines, Inc.*, Report on Remand, cited above, pp. 4, 5.

As discussed above, complainant's evidence showing that the product shipped was in fact "calcined petroleum coke" which was entitled to a lower rate than that for "artificial graphite," which latter rate had been charged, consists of a variety of shipping documents and excerpts from chemical dictionaries, chemical analyses, and affidavits, as well as the fact that respondent had honored a claim for the product in question at a later date. The critical evidence, however, appears to be the affidavit of complainant's president describing how the backfill product was manufactured so that raw petroleum coke was heated to become "calcined petroleum coke" rather than "artificial graphite." This evidence considered together with the chemical authorities cited shows with reasonable definiteness and certainty that Loresco's claim is valid. Added to this evidence is the fact that respondent itself paid a claim for a later shipment of the backfill product without contesting that it was in fact "calcined petroleum coke," apparently only because the bill of lading showed the "Schedule B" number applicable to "calcined petroleum coke." Had the bills of lading for the 10 shipments at issue in this proceeding shown the correct "Schedule B" number for "calcined petroleum coke" or had respondent not been required to reject the claim under Rule 20 of its tariff because the claim was filed after the goods left the carrier's custody, perhaps this present case might not have been brought before the Commission. [9]

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[9] Rules in tariffs which do not allow carriers to consider claims for overcharges filed more than six months after date of shipment are not illegal. See *Proposed Rule Covering Time Limits on the Filing of*

## MISCELLANEOUS ARGUMENTS OF RESPONDENT

To rebut the evidence presented by complainant, respondent has furnished its own evidence and arguments. Mainly respondent argues that complainant has not sustained its "heavy burden of proof," that the shipping documents and chemical analyses submitted by complainant do not show that the product was "calcined petroleum coke," and that respondent relied upon the bill of lading and export declaration descriptions and "Schedule B" numbers which, if anything, indicated that the product was "artificial graphite." Moreover, some of the sales literature, according to respondent, indicates that some graphite may have been included in the backfill.[10] None of respondent's arguments or evidence, in my opinion, is sufficient to outweigh the evidence showing that the product was heated only to the level necessary to convert raw petroleum coke to "calcined petroleum coke"or to the fact that respondent itself paid a later claim on the Loresco backfill without contesting the fact that the product was "calcined petroleum coke."

As I have explained, the so-called "heavy burden of proof," which respondent recites, refers merely to the shipper's difficulty in obtaining evidence. The normal standard of "preponderance of the evidence" is the standard that governs. In this case, Loresco's affidavit showing that its product was not heated above the level necessary to convert the coke to "artificial graphite" coupled with respondent's own payment of a similar claim on this product at a later date when the claim was apparently not barred by the Conference's claims rule, in my opinion, outweigh the fact that Loresco's forwarder used a "Schedule B" number for "artificial graphite" when completing the export declaration or that some particles of graphite are found in the product. Although the Commission has held that export declarations are entitled to great weight, in the very case cited by respondent the Commission indicated that it considered export declarations only as one part of the entire body of evidence since it was the Commission's "well established policy

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*Overcharge Claims,* 10 F.M.C. 1 (1966). However, they and other tariff time limitation rules such as Rule 20 here have been held to be no bar against the filing of complaints with the Commission within the two-year period prescribed by Section 22 of the Act. See *Kraft Foods v. Federal Maritime Commission,* 538 F.2d 445 (D.C. Cir. 1976); *Union Carbide Inter-America, Inc. v. Venezuelan Line,* 19 F.M.C. 97, 99 (1976). The Commission's regulations require carriers to advise shippers of their rights to file complaints with the Commission within two years. See Docket No. 78-30, *Filing of Rates and Charges,* 21 F.M.C. 984 (1979). Respondent did so advise complainant of its rights. (See letter dated September 19, 1979, from respondent's general agent to complainant's forwarder, Mr. Corcoran of the Zanes Co., attached to the complaint.) Nevertheless, but for this tariff rule, respondent would have been able to consider the claims on their merits and it is possible that Loresco would have been spared the trouble of filing a formal complaint with the Commission.

[10] In all fairness to respondent, I should mention the fact that these arguments and comments were directed to the evidence which had been submitted by Loresco prior to April 30 when Loresco submitted its final affidavit explaining that the backfill was heated only to the level necessary to create "calcined petroleum coke." However, after this later evidence was submitted, respondent, as noted, consented to issuance of an initial decision without undergoing the expense and delay of oral hearings and cross-examination. (See Consent to Shortened Procedure, *May 15, 1980.*)

of considering any type of evidence by which a shipper may show the true nature of his cargo." *Chevron Chemical Co. v. Mitsui O.S.K.*, 20 F.M.C. 216, 218 (1977), affirming the Commission's earlier decision reported in 17 S.R.R. 1269, 1270 (1977). Furthermore, an export declaration, like the corresponding inbound document, the consumption entry, is generally prepared by someone other than the shipper, i.e., the forwarder or the customhouse broker, for purposes other than ocean carrier tariff classification or rating. Therefore, as the Commission has observed, these documents may not be based upon knowledge of the actual contents of the shipments and in the case of the consumption entry, the Commission has determined what the commodity shipped was notwithstanding a contrary description in the entry. See *Equality Plastics, Inc. et al.*, 17 F.M.C. 217, 227-228 (1973).

Similarly, respondent argues that Loresco's product literature suggests that some of the particles in the product may consist of graphite which was added as a lubricant because it is well known that graphite is used as a lubricant. Loresco's product literature submitted with its letter of January 25, 1980, does indeed show that "carbon lubricants" have been added to the backfill. Even more, as part of the chemical analysis of the product, Loresco states that "conductive and lubricating graphite particles have been added in the range of three percent to one percent by weight per unit of calcine (sic) fluid petroleum coke." The adding of such a minuscule portion of graphite, (which, incidentally is apparently natural, not artificial graphite), does not change the essential nature of the product, which is 99 or more percent calcined petroleum coke.[11] The ultimate question remains what is the essential nature of the product and whether complainant has shown that the product "may reasonably be included in the tariff item" for "calcined petroleum coke." See *United States of America v. Farrell Lines, Inc.*, 16 F.M.C. 41, 46 (1972); *Crestline Supply Corp. v. Concordia Line*, 19 F.M.C. 207, 211 (1976) (. . . "applicable freight rate should depend upon the intrinsic nature and market value of the goods themselves, rather than a shipper's representation as to the intended use of the goods . . ."); *European Trade Specialists v. Prudential-Grace Lines*, 21 F.M.C. 888, 890 (1979) ("true nature of the commodity").

Ultimately, respondent claims that it relied upon both the bills of lading and export declarations which used "Schedule B" numbers for artificial graphite and contends that neither these documents nor the

[11] In his last pleading dated April 30, 1980, Loresco's president, Mr. Tatum, states that the minuscule portion of graphite added to the backfill is a "naturally mined natural graphite," and that, accordingly, "Loresco Type DW2 Backfill" is "over 99 percent pure calcined fluid petroleum coke."(See pleading cited, pp. 3, 4.) Mr. Tatum also states that graphite, as even respondent's dictionary definition states, is a "soft" substance whereas Loresco's backfill "has long been known for its rigidity and hardness . . ." (*Id.*, p. 4.) Also, he states that due to its excessively high cost per pound, graphite is not commonly used as a backfill. *Id.*

fact that respondent later honored a claim on this product (which was not time-barred under the Conference's claims rule) permit the inference to be drawn that the product was "calcined petroleum coke." However, as I have discussed, Loresco has provided the critical evidence showing how the product was heated and respondent nowhere explains how it could pay a later claim on the product, apparently acknowledging that it was in fact "calcined petroleum coke" in August 1978, while contesting similar claims on the same product in this case. Respondent merely states that the bills of lading for the later claim showed the proper "Schedule B" number for "calcined petroleum coke."[12] As has been made clear by the Commission, however, in many cases, an erroneous description in a bill of lading does not determine the nature of the commodity. It is the total evidence which the shipper now presents which is considered in determining what actually moved. The preponderance of this evidence shows, in my opinion, that the product could not possibly have been "artificial graphite" and that it was indeed "calcined petroleum coke."

Accordingly, I find that complainant has shown the validity of its claim for reparation for overcharges on 10 shipments carried under bills of lading dated at various times between December 8, 1977, and February 28, 1978. I find furthermore that the aggregate amount of reparation for the financial injury incurred as a result of the overcharges is $15,634.67, as shown in the table of computations on page 2 of the complaint.[13]

The Commission has a policy of awarding interest in overcharge cases calculated at the rate of 12 percent, accruing from the date of payment of freight charges. See Policy Statement, dated May 8, 1980,

[12] Furthermore, in his last pleading, Mr. Tatum, president of Loresco, states that the product shipped in August 1978, as to which respondent paid the claim, was the same product as that shipped in the present case, yet respondent contests the present claims. Moreover, Mr. Tatum states that Loresco was inexperienced in exporting and that the "Schedule B" number for "artificial graphite" and rate was selected by respondent, not by Loresco, which did not understand how respondent's tariff was constructed. Mr. Tatum states that when Loresco became familiar with exporting, they advised respondent of the true nature of the product and respondent agreed with Loresco, assigning the lower rate and "Schedule B" number for "calcined petroleum coke." (See Loresco's pleading, April 30, 1980, p. 5.)

[13] Respondent did not dispute this table of computations generally but raised some specific problems which have been corrected. For example, the table contained typographical errors for three of the bills of lading in areas not pertinent to the calculation of the overcharges. One bill of lading, dated 12/17/77, furnished with the table, was not legible. A legible copy of that bill of lading has been furnished confirming complainant's calculation in the table, as noted earlier. The only substantive objection raised by respondent related to the fact that two of the bills of lading were dated December 8, 1977, more than two years prior to the filing of the complaint. However, in response to my instructions, complainant, through its forwarder, submitted checks and other evidence showing date of payment of the freight, indicating that payment for the shipments shown on the two bills of lading occurred by check dated January 5, 1978, within the two-year period prescribed by section 22 of the Act. The Commission has held that date of payment of freight may be used to calculate the two-year period. See *Sun Co. v. Lykes Bros.*, 20 F.M.C. 67, 69 (1977); *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971).

46 C.F.R. 530.12; *Interpur, A Division of Dart Industries, Inc. v. Barber Blue Sea Line*, 22 F.M.C. 679 (1980). Accordingly, interest is awarded at the rate of 12 percent for each of the 10 overcharges accruing from date of payment of each shipment, in addition to the aggregate award of $15,634.67.[14]

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

Washington, D.C.
June 16, 1980

[14] Although it is current Commission policy to award interest at the rate of 12 percent dating from date of payment of freight, the Commission stated in its policy statement that it would consider whether to depart from its policy on a case-by-case basis. In the present case, complainant did not ask for interest but merely for the aggregate overcharge in the amount of $15,634.67. Furthermore, applying interest at 12 percent dating back more than two years or so on the individual shipments means that a 12 percent rate is applied although at the time of the overcharge payments the rate of interest was probably substantially lower, and total interest to time of judgment may approximate $4,000. (Cf. the different rate of interest established for payments of refunds under section 4 of the Intercoastal Shipping Act, 1933 (average prime rate during the applicable time period).) Of course, but for respondent's tariff Rule 20, it might have been possible for the parties to settle this case when Loresco first submitted its claim to respondent. The Commission may wish to consider these factors in determining whether to follow its current policy in this particular case.

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 80-30

## IN THE MATTER OF EXEMPTION OF KUGKAKTLIK, LIMITED FROM TARIFF FILING REQUIREMENTS

## REPORT AND ORDER

*July 30, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE KANUK AND PETER N. TEIGE, *Commissioners*)

Kugkaktlik, Limited (Petitioner), an Alaskan corporation organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*), has petitioned the Commission for an order declaring that a tug and barge operation to be established during 1980 is exempt from the tariff filing requirements of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) by virtue of the small vessel exemption contained in 46 C.F.R. 531.1(c).[1] Alternatively, Petitioner seeks an exemption of its operations pursuant to section 35 of the Shipping Act, 1916 (46 U.S.C. 833).

Petitioner is a village corporation based in the village of Kipnuk, Alaska, population approximately 400. Its shareholders consist solely of the Alaskan native population of the village. According to its latest financial statement, the total assets of Kugkaktlik, Limited are $2,273,917.

In 1979, Petitioner purchased two vessels for purposes of establishing a common carrier service between Bethel, Alaska and eight smaller villages, including Kipnuk. The primary cargo would be liquid fuels of Grade (B) and below, the majority of which would be fuel oil; however, general commodities would also be transported.

Petitioner's vessels consist of a sixty-foot all steel tugboat with tonnage 73 gross and 49 net and two 500 horsepower diesel engines; and a steel combination deck cargo and oil barge with dimensions of 120′ x 30′ x 7′ and a cargo fuel capacity of approximately 3,000 barrels.

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[1] 46 C.F.R. 531.1(c) provides an exemption for:

(c) Transportation by vessels with a cargo carrying capacity of 100 tons or less, or with an indicated horsepower of 100 or less; *Provided*, That such vessels: (1) are not employed by or under the common control or management of a domestic offshore carrier which operates vessels in excess of these limits; (2) are not operated as part of a through route with another domestic offshore carrier; and (3) are not performing lighterage services in connection with or on behalf of another domestic offshore carrier; . . .

The tug and barge service will transport liquid fuels and general commodities from the vicinity of Bethel, Alaska, on the Kuskokwim River, downstream to the village of Tuntutuliak, also on the Kuskokwim River, thence out to the western coastal waters of Alaska, to the villages of Kongiganak, Kwigillingok, Kipnuk, Chefornak, Tooksook Bay, Nightmute, and Tununak.[2] The freight service will be conducted only six months of the year, commencing in May and terminating in October. The primary customers of this service will be the village corporations of the villages served, each of which owns large liquid fuel storage tanks. These corporations act essentially as wholesalers, retailing liquid fuels to individuals and companies. Furthermore, many of the general commodities will also be ordered by these corporations, most of which conduct retail businesses within their respective villages.

Other than serving the three villages listed in note 2, *supra*, Petitioner has no current plans for expansion of the tug and barge service described above, either in terms of number of vessels or geographical scope of operation.

Petitioner alleges that each of its vessels qualifies for a section 531.1(c) exemption since the tug has less than 100 tons cargo carrying capacity and the barge has less than 100 horsepower. The Commission disagrees. Petitioner's proposed service contemplates tandem use of the tug and barge at all times. The barge clearly could not operate without benefit of the tug and vessels which are operated as a unit must be considered to be a single vessel for purposes of determining whether the exemption applies. As such, the exemption does not apply to Petitioner's two vessels because the tug and barge combined have a cargo carrying capacity in excess of 100 tons and an indicated horsepower in excess of 100.

Petitioner alternatively requests that it be exempted from the tariff filing requirements pursuant to section 35 of the Shipping Act because imposition of such requirements would serve no regulatory purpose.[3]

The Commission has determined to grant the requested section 35 exemption. Petitioner has shown that its activities are both small and geographically remote and that the support of its customers for the

[2] Petitioner may also extend service to Quinhagak, Eek, and Goodnews Bay, all south of the mouth of the Kuskokwim River.

[3] Section 35 provides:

> The Federal Maritime Commission, upon application or on its own motion, may order or rule *exempt* for the future any class of agreements between persons subject to this chapter or *any specified activity of such persons* from any requirements of this chapter, or the Intercoastal Shipping Act, 1933, *where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.*
>
> The Commission may attach conditions to any such exemptions and may, by order, revoke any such exemption.
>
> No order or rule of exemption or revocation of exemption shall be issued unless opportunity for a hearing has been afforded interested persons. (Emphasis added).

proposed operation has been uniformly enthusiastic. The expense of complying with the Commission's tariff regulations would be relatively large for a business of Petitioner's size. Moreover, the unique relationship between the customers and the operators of Petitioner's proposed water carrier service indicates that the commercial impact of the service may be small. In this region of Alaska ongoing communications between operator and customers are more likely to effectively establish and maintain fair and equitable rates than would Federal regulation based upon technical tariff filing requirements. For these reasons the exemption granted here should not substantially impair effective regulation.

Neither does it appear that the exemption would be unjustly discriminatory or detrimental to commerce. The instant petition was served on the only known competitor of the proposed service, United Transportation, Inc. (United), and noticed in the *Federal Register* on May 21, 1980 (45 F.R. 34065). No response to the petition has been received. Petitioner has demonstrated that the scope of United's service is much larger and includes more and larger vessels than does Petitioner's service. It has also been suggested that United has been unable to serve some of the villages adequately. Considering that no objection has been lodged to the requested exemption, the operations of Petitioner's only known competitor are not comparable, and Petitioner would fill a need not served by the existing carrier in this trade, the Commission concludes that grant of the exemption will neither be unjustly discriminatory nor detrimental to commerce.

The exemption is from tariff filing requirements only and will be limited to those service points north of the Kuskokwim River which Petitioner proposes to serve this year. At such time as Petitioner is ready to expand its operation it may petition the Commission for an extension of this exemption.

Therefore, pursuant to section 35 of the Shipping Act, 1916 (46 U.S.C. 833(a)) the following exemption is adopted.

Transportation by Kugkaktlik, Limited, a village corporation organized under the Alaskan Native Claim Settlement Act, limited to the following description, is exempt from the tariff filing requirements of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933 and Part 531 of Title 46 C.F.R.

(1) Transportation on vessels consisting of a sixty-foot all steel tugboat with tonnage 73 gross and 49 net and two 500 horsepower diesel engines; and a steel combination deck cargo and oil barge with dimensions of 120′ x 30′ x 7′ and a cargo fuel capacity of approximately 3,000 barrels.

(2) Transportation between Bethel, Alaska and the villages of Tuntutuliak, Kongiganak, Kwigillingok, Kipnuk, Chefornak, Tooksook Bay, Nightmute, and Tununak.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 746(I)

GIRTON MANUFACTURING COMPANY

*v.*

PRUDENTIAL LINES, INC.

## ORDER ADOPTING DECISION

*July 30, 1980*

The Commission has determined to review the March 14, 1980 decision of Settlement Officer Donald F. Norris in the above-captioned matter. This decision awarded Girton Manufacturing Company reparations based upon a finding that Prudential Lines, Inc., collected $525.78 in excess ocean freight charges, but denied any recovery for interest expenses because Girton (or the independent ocean freight forwarder retained by Girton) was found to have exercised insufficient care in preparing the bill of lading upon which the ocean carrier relied.[1] The Settlement Officer also stated that the Commission's Rules prevented him from reducing the amount awarded to the shipper so as to compensate the carrier for the brokerage and freight forwarder compensation paid on the $525.78 in excess freight.[2]

The Settlement Officer's calculation of the excess freight charges was carefully and accurately accomplished. Review was warranted only because of the need to articulate a standard approach to interest awards and the deduction of offsetting carrier expenses in informal docket cases.

On May 8, 1980, the Commission announced its intention to apply a uniform policy in awarding interest in overcharge situations. 46 C.F.R.

[1] Girton shipped milk storage equipment from Philadelphia, Pennsylvania to Valparaiso, Chile on October 30, 1977 under a single bill of lading. This bill listed three items: (1) "milk cooling tanks," (2) "accessories," and (3) "condensing units," and noted that freight and ancillary charges totaling $8,907 were prepaid. The controlling tariff was Atlantic & Gulf/West Coast of South America Conference Tariff No. FMC-1. The instant dispute concerns only the "condensing units" which were designed for attachment to the cooling tanks. These units were rated by Prudential as "steam condensers," but were entitled to the lower rate for "milk coolers" shown on 11th Rev. Page 137 because they were in fact parts for such coolers. The Settlement Officer also discovered and corrected an arithmetic error in the calculation of the shipment's cubic footage which favored the carrier.

[2] The Settlement Officer apparently perceived a significant distinction between the terms "overcharges" and "damages" as used in the Commission's informal docket regulations (46 C.F.R. 502.301 - 502.303). The Shipping Act, 1916, permits the award of "reparations" for "any injury" suffered as a result of statutory violations (46 U.S.C. 821). Overcharges are simply a particular type of injury. In adjudicating an informal claim, a Settlement Officer may properly consider a counterclaim against the complainant which arises from the same incident and is also under $5,000 in amount.

530.12, 45 *Fed Reg.* 31722.[3] An ocean carrier's duty to rate cargo in strict accordance with its tariff is a nondelegable one. Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), is violated regardless of whether the carrier relies upon documentation furnished by the shipper. Although exceptional cases of shipper deception or misconduct could result in a refusal to allow full recovery of overcharge expenses, such determinations should be made in a procedural context other than that of a *pro forma*, nonprecedential informal docket dispute. Settlement officers shall therefore consistently award interest from the date the excess freight charges were paid.

Similar considerations of administrative efficiency and uniform statutory compliance apply to Prudential's claim for reimbursement of the excess freight broker and freight forwarding expenses it paid on Girton's shipment. Items of carrier expense are not ordinarily deducted from an overcharge claim,[4] and this is particularly so in the case of payments to freight forwarders subject to the FMC regulation under the Shipping Act, 1916. Such persons are required to adjust their brokerage receipts when a carrier submits appropriate documentation of an overpayment, and in recent special docket proceedings the Commission has specifically ordered carriers to collect excess payments from licensed forwarders. *Sea-Land Service, Inc. to Benefit New Era Shipping*, 22 F.M.C. 270 (1979); *Sea-Land Service, Inc. to Benefit BDP International, Inc.*, 22 F.M.C. 226 (1979). To the extent freight brokerage payments are made to persons not subject to the Shipping Act, carriers can readily modify their contractual arrangements with such persons to account for overcharge possibilities.[5]

A final matter which concerns the Commission is the presence of evidence which indicates that Girton's sale was made "C.I.F., Valparaiso" and that Girton has probably been reimbursed for the entire amount it paid Prudential, including the $525.78 overcharge. This fact does not defeat Girton's standing to file a Shipping Act complaint and receive full reparations.[6] In the interest of fairness, however, a copy of the Commission's decision will also be mailed to the consignee.

THEREFORE, IT IS ORDERED, That, except to the extent indicated above, the decision of the Settlement Officer is affirmed; and

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[3] *See also Interpur v. Barber Blue Sea Line*, 22 F.M.C. 679 (1980).

[4] Although the Commission possesses authority to adjust reparations awards based upon equitable considerations, *see Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), it is highly unlikely that a situation would arise wherein a shipper would be awarded overcharge damages less a deduction for carrier expenses. When the shipper's conduct is particularly culpable, the more appropriate remedy would be to deny relief entirely.

[5] Carriers could commit themselves to pay no more than a percentage of the lawful rate specified in their tariff, subject to adjustments in the event of error.

[6] *See Adams v. Mills*, 286 U.S. 397, 407 (1932).

IT IS FURTHER ORDERED, That Prudential Lines, Inc., pay to Girton Manufacturing Company, Inc., the amount of $525.78, plus interest at the rate of 12%, accruing from the date freight charges were paid; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

*Commissioner Leslie Kanuk dissenting. Chairman Richard J. Daschbach not participating.

*Commissioner Leslie Kanuk, dissenting.* The award of interest in informal dockets is a matter which involves an exercise of discretion on the part of the Commission. As a general rule, I support the award of interest as a means of compensating shippers for the deprivation of the use of their money during the period in which overcharge claims are litigated. However, I would not award interest in situations where the misrating was caused by or contributed to by documentary errors made by the shipper. This appears to have been the case in this proceeding.

*Chairman Richard J. Daschbach, not participating.* I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 746(I)
## GIRTON MANUFACTURING COMPANY

*v.*

## PRUDENTIAL LINES, INC.

Decision of Donald F. Norris, Settlement Officer[1]

*Adopted July 30, 1980*

*Reparation awarded; claim for interest denied; off-setting claim denied.*

By its complaint filed with the Commission on October 22, 1979, the Girton Manufacturing Company (Girton), through its agent, claims $224.76 plus 6% interest of the Prudential Lines, Inc. (Prudential), this amount representing an alleged overcharge arising out of a Girton shipment transported by Prudential in one of its vessels from Philadelphia, Pa. to Valparaiso, Chile pursuant to a bill of lading dated October 30, 1977. The shipment comprised the following: (a) 17 crates of "milk cooling tanks" measuring 2,153 cubic feet (hereafter feet); (b) one crate of "accessories" measuring 22 feet; and (c) 17 crates of "condensing units" measuring 379 feet. Girton prepaid freight and ancillary charges amounting to $8,907.60 assessed it by Prudential pursuant to the latter's interpretation of the controlling tariff, i.e., the United States Atlantic and Gulf /West Coast of South America Conference's Tariff No. S.B. SA-12, FMC-1 (the Tariff). While no violation of section 18(b)(3) of the Shipping Act, 1916 is alleged such is presumed in that the *res* of the complaint is that Prudential did not assess and collect rates of freight in accordance with the commodity descriptions and classifications then applicable.

By way of reply, Prudential has submitted a general denial along with three "complete affirmative" defenses which are quoted in their entirety:

(First defense):

> V. Carrier relied upon the description of the articles carried provided by the shipper and acted in reliance upon those representations in stowing and securing the cargo and in paying commissions to brokers and charges of freight forwarders.

[1] Both parties having consented to the informal procedure under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

VI. Carrier having acted in reliance upon shippers description, and having made payments which cannot be recovered based thereon, claimants complaint should be dismissed.

(Second defense):

VII. Claimant supports this claim only with shippers records and advertising materials.

VIII Claimant asserts that shippers records previously resulted in a misdescription of the freight, resulting in a higher freight charge.

IX. Claimant having impeached the shippers records cannot rely solely on those records to support this claim.

X. The freight shipped having been delivered and not being available to either party the claimant has not met its heavy burden of proof in this case as no creditable evidence has been provided to support its allegation that the freight was other than that previously described by the shipper in documents of equal weight to those now relied upon by claimant.

(Third defense):

XI. The higher assessment of freight charges alleged was done by shipper and/or shippers agent and not by the carrier.

XII. Any award of refund here should be without interest and should be reduced by the amount of brokers and freight forwarders fees paid by carrier.

Each defense will be dealt with in turn. As to the first, the Settlement Officer (S.O.) considers it irrelevant to the issue. As the S.O. views it, the issue here is how should the shipment, any of its components, and all else accompanying the shipment have been classified and rated.[2] The issue established, it seems to the S.O. that the holding in *Union Carbide Inter-America v. Norton Line,* 14 F.M.C. 263 (1971) applies. Briefly summarized, that case stands for the proposition that it is what was actually shipped in any instance, not necessarily what appears upon the bill of lading as shipped, as controlling for classification and rating purposes.

The second defense runs to what the S.O. conceives to be Prudential's evaluation of the "evidence" submitted in support of Girton's claim, and the "weight" which should be accorded it. Prudential is correct in its assertion, that the cargo having left its possession, that the burden of proof lies upon Girton.[3] A corollary flowing from *Union*

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[2] To be distinguished from claims for damages to cargo where reliance upon shippers' assertions as to the nature or description of cargoes may well be relevant.

[3] Often described as "heavy." However, the adjectival "heavy" ". . . relates to the shipper's difficulty in obtaining the necessary evidence rather than the weight to be given such evidence." Informal Docket No. 387(I), *Pan American Health Organization v. Moore-McCormack Lines, Inc.*, 22 F.M.C. 98 (1979).

*Carbide, supra,* however, is that any claimant is entitled to submit any materials of reasonably probative value seeking to establish the true identity of any merchandise shipped, his knowledge of the cargo being considered intimate if not unique.[4] Advertising matter or sales literature are acceptable. *European Trade Specialists, Inc. and Kunzle & Tasin v. Prudential-Grace Lines, Inc., and the Hipago Co., Inc.*, 19 F.M.C. 148, 183 (1976).

The relevant materials submitted here consist of (a) a copy of the original bill of lading; (b) a Girton invoice addressed to the "notify" party appearing upon the bill of lading; (c) a certificate of insurance involving the notified party appearing upon (a) and (b); and (d) sales literature. All, except (d), make reference to the same "import permit" or "license" number. Exhibits (a) and (c) describe the cargo in identical terms. In particular, (a), the bill of lading, was sufficiently clear so as to enable a part of the shipment to have been rated correctly in any event. The invoice, (b), describes the cargo in more detail and, by referral to the sales literature, (d), assists in determining what the S.O. conceives to be the crucial issue here -- whether the 17 crates of "condensing units"are to be considered "parts" of the milk cooling tanks as contemplated by the Tariff's Rule No. 2(g).

As to the third defense, no determination can be made from the bill of lading as to who "rated" it -- Girton, Girton's forwarder, or Prudential's staff. Whoever did made something of a hash of things. Whatever, this is really not material to the statutory obligation imposed upon Prudential by the terms of section 18(b)(3) of the Shipping Act, 1916 (46 USC 817), i.e., and to wit: that Prudential is to ensure that it *shall not* ". . . charge or demand or collect or receive a greater or less or different compensation [for services] than the rates and charges which are specified in its tariffs. . . ." The claim for offsets, set forth in XII., is dealt with below.

As stated previously, the critical issue here is to determine whether the condensing units are "parts" of the milk cooling tanks so as to fall within the Tariff's Rule No. 2(g). That Rule provides:

> Whenever rates or ratings are provided for on articles named herein, the same basis will also be applicable on named parts of such articles, when so described on the ocean bills of lading, except where specific rates or ratings are provided for such parts.[5]

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[4] To be distinguished from shippers' arguments as to the proper interpretation of tariffs' rates, terms, and conditions.

[5] The phrase "same basis" appearing in the second line can create confusion if not read in the context of the entire rule. In the Tariff proper, the basis of rating is whether any rate assessed is to be based upon a "weight" ton of 2,000 pounds or a "measurement" ton of 40 cubic feet. Read in the context of the entire rule, however, the S.O. is convinced that "same basis" refers to the "rates or ratings" as appear in the fourth and fifth lines. Even if this were not so, any alternative construction would result in tariff's ambiguities which require resolution in any shipper's favor.

Despite the fact that they were shipped and transported in separate crates, Girton's invoice describes the cargo shipped as being "bulk milk cooler(s)" of various models *with* (emphasis added) "condensing unit(s)" of varying horsepowers. A diagram in the sales literature indicates that the condensers are in someway attached, or connected, to each coolers' divided "cold plates" although each condenser lies outside of the cooler proper. However, each seems to be critical to the coolers' milk cooling function. This conception is reinforced by the standard order form incorporated in the sales literature. In essence, the standard order form calls for the purchase of a milk cooling unit of a recommended capability *with* (again, emphasis added) a condenser or condensers of various makes or varying power. The sales literature makes clear the point that no condensers need be ordered if any serviceable condensers are in the purchasers' possession still. Further, condensers are distinguished from various, listed, "milkhouse accessories" -e.g., stainless steel wash sinks, sani spray, valve brushes, brush racks, etc. -- whose purchase is optional with the buyer but which -- as with the one crate of "accessories" -- someone thought clearly fell within the application of Rule No. 2(g). Upon the evidence submitted, the S.O. considers the condensers to be "parts" of the milk cooling tanks, if not vital components. Accordingly, Girton is entitled to a reparation.

In structuring the claim, Girton's agent, the Traffic Service Bureau, Inc., seems to have overlooked several things. First, and in apparent reliance upon, although without mention of, Rule No. 2(g), it claims that the entire shipment should have been rated as per Tariff Item 735, Refrigerators, NOS. at a rate of $130.50 per 40 cubic feet. On October 17, 1977, the Conference amended its Tariff to reflect that shipments of "milk storage tanks," also "coolers, milk" to Group 3 Chilean ports (including Valparaiso) were to be assessed a Class 17 rate, and as applies here, of $126.20 per measurement ton of 40 cubic feet.[6] Secondly, Girton was "overcubed" by some 20 cubic feet through an erroneous addition as it appears in the rating box in the lower left hand corner of the bill of lading copy, and as mirrored in much of the Service Bureau's correspondence concerning the matter. Thirdly, the Service Bureau did not make compensating adjustments in the various ancillary charges assessed.

According to the S.O.'s calculations, based upon the bill of lading figures as recited in the first paragraph of this decision, the shipment amounted to 2,554 feet (rather than 2,574 feet) working out to 63.85 measurement tons of 40 feet each. The applicable rate of freight was $126.20 per 40 feet for the tanks and its parts, including the condensers

[6] Eleventh revised page 137, effective October 17, 1977. This rate was actually applied to the milk cooling tanks and their accessories. The condensing units were rated as "steam condensers" at a rate of $173. per 40 feet.

as per Rule No. 2(g). The proper freight amounted to $8,057.88. In addition, the Tariff required the assessment of a terminal surcharge of $1.25 per measurement ton, ($79.81), and a Chilean governmental importation tax of 3% of the "total transportation charges" ($244.13). The total due and payable to Prudential then amounted to $8,381.82. As recited in the first paragraph, and as reflected in the submitted documents, Girton paid a total of $8,907.60. Accordingly, Girton is entitled to a reparation to the amount of $525.78. So ordered.[7]

Girton claims interest. The award of interest is left to the Commission's discretion. *Flota Mercante Grancolombiana v. Federal Maritime Commission*, 373 F. 2d 674 (D.C. Circuit, 1967.) The claim arose from Girton's lack of care in adequately describing the condensers upon the bill of lading. A description reading "milk cooling tanks' condensing units" would have brought the item involved squarely within the ambit of Rule No. 2(g). Further, a claim was lodged with Prudential only about a month before the complaint here was filed with the Commission. In the circumstances, the S.O. can see no reason why interest should be awarded. The claim for interest is denied. So ordered.

Prudential contends that any reparation be reduced by the amount of brokers' and freight forwarders' fees paid by Prudential. There are several reasons for denying this. The most important, however, is that the S.O. does not believe that he has the authority to do so. Subpart S - Informal Procedure for Adjudication of Small Claims (46 C.F.R. 502.301 et seq.) of the Commission's Rules of Practice and Procedure is directed to "Claims against *common carriers* subject to the Shipping Act, 1916 . . . for the recovery of damages (not including claims for loss or damage to property), or for the recovery of overcharges. . . ." Section 502.303 defines "overcharges" as "charges in excess of those applicable under tariffs lawfully on file with the Commission. . . ." Damages ". . . means such *violations* (by common carriers) of the Shipping Act, 1916, as amended . . . other than overcharges for which reparation may be granted." As the S.O. views it, under section 22 of the Act Prudential must demonstrate (a) that Girton is an "other person subject" to the Shipping Act, 1916 (e.g. section 16 initial paragraph, and as no "tariff" is involved, (b) demonstrate that it has in someway violated the Act for it to have a chance of prevailing. This is clearly beyond the scope of the authority delegated to the S.O. Lastly, the claim is really directed to a party not present here given the peculiar relationships of freight forwarders to common carriers whereby the latter, and not the forwarders' principals, are the primary source of

[7] The result here is in accord with that reached in Informal Docket No. 568(I), *Girton Manufacturing Company v. Prudential Lines, Inc.*, served February 29, 1979. The same commodities were involved, as well as the application of the same Tariff Rule. Only the defenses differed. There, Prudential relied upon the Conference's so called "six months rule" as precluding its consideration of the matter.

forwarders' compensation for services rendered. The S.O. suggests that Prudential's proper recourse is to re-bill the forwarder involved using this decision as the basis of adjustment. Accordingly, the claim for offset is denied. So ordered.

(S) DONALD F. NORRIS
*Settlement Officer*

March 14, 1980

# FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 704

## APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF UNITED FORWARDERS SERVICE, INC., AS AGENT FOR MIRRO ALUMINUM CO.

Application for permission to refund a portion of freight charges in the amount of $2,992.50 granted.

Errors made by applicant in filing the $47.00M rate found to be of a clerical or administrative nature within the purview of the remedial provisions of section 18(b)(3) of the Shipping Act, 1916.

## REPORT AND ORDER

*July 31, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE KANUK AND PETER N. TEIGE, *Commissioners*)

The proceeding is before the Commission on Exceptions filed by Sea-Land Service, Inc., to the Initial Decision of Administrative Law Judge Joseph N. Ingolia denying Sea-Land permission to refund a portion of the freight charges collected from United Forwarders Service, Inc., as agents for the shipper, the Mirro Aluminum Company, on a shipment of aluminum kitchen utensils carried from Elizabeth, New Jersey, to Puerto Limon, Costa Rica. Sea-Land asks permission to refund $2,992.50 of the $5,363.50 collected.

Pursuant to negotiations with the shipper's agent and the consignee, Sea-Land had agreed to publish a rate of $47.00M trailerload (TL) minimum 1800 cu. ft. for Mirro's shipment. Due admittedly to a clerical error, the revision to the tariff filed prior to the sailing of the vessel did not reflect the rate agreed upon and, as a result, freight charges were collected at the rate of $113.50M per 40 cu. ft., the rate in effect at the time of shipment. Because of further errors made in filing the $47.00 rate, Sea-Land revised its tariff several more times before applying for a refund.

The Presiding Officer denied the application on the ground that Sea-Land's many revisions failed to properly set forth the proposed rate but rather rendered the tariff ambiguous.

Sea-Land on exceptions maintains that as ultimately filed the tariff properly reflects the intended rate.[1]

## DISCUSSION

The Presiding Officer correctly found that the application was timely filed and that the errors made in the tariff were of the type contemplated by the statute.[2] Therefore, the only question before the Commission is whether, prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff setting forth the rate on which the refund can be based.

As mentioned, the Presiding Officer held that Sea-Land had not filed such a tariff. The Initial Decision, however, is somewhat ambivalent on that point. The conclusion that the record does not justify a finding that a new, corrected tariff was filed prior to the application, appears to rest not so much on the failure to file the $47.00 rate, but rather on a finding of ambiguity in the tariff.

After a sequence of revisions and corrections, the tariff which was to serve as the basis for the refund provided at the same time both a class and a commodity item number as well as two different rates for the same commodity, and, on its face, at least, could appear to be ambiguous. Tariff ambiguity alone, however, is not a ground for denying relief.

Here, notwithstanding Sea-Land's careless filing practices, the $47.00M rate upon which the refund would be based appears in the tariff. Following the principle of long standing that any ambiguity in the tariff must be construed against the carrier, the Commission finds that the filing satisfies the requirements of section 18(b)(3).

The cases cited in the Initial Decision as precedents are not controlling here. In *Munoz y Cabrera v. Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977), permission to waive collection of a portion of freight charges was denied because the tariff Sea-Land filed before the application set forth a rate other than the negotiated rate agreed upon before the date of the shipment; and in *Louis Furth, Inc. v. Sea-Land Service, Inc.*, 20

[1] Sea-Land addresses the various ways available for amending a tariff and submits that the technical aspects of how to revise a tariff are best left to the carrier's discretion.

[2] Section 18(b)(3) of the Shipping Act, 1916, provides in part:

> That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce . . . has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based, . . . . *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. 46 U.S.C. 817(b)(3).

F.M.C. 186 (1978), and in *A. G. Staley Mfg. Co. v. Mamenic Lines, Inc.*, 20 F.M.C. 385, 642 (1978), the carriers had failed altogether to file a new tariff prior to their applications.

Accordingly, the Initial Decision of the Administrative Law Judge issued in this proceeding is hereby reversed and Sea-Land is granted permission to refund the amount of $2,992.50 of the $5,363.50 collected from Mirro for freight charges.

THEREFORE, IT IS ORDERED, That applicant is granted permission to refund $2,992.50 of the charges collected from Mirro Aluminum Company; 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 No. 704, that effective August 18, 1979, and continuing through January 23, 1980, inclusive, the rate on file on aluminum utensils, cooking, kitchen, hospital or toilet, N.0.S electric or non-electric (not forks, knives or spoons), TL minimum 1800 cu.ft. is $47.00M subject to all applicable rules, regulations, terms and conditions in this tariff.

and

IT IS FURTHER ORDERED, That refund of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 79-104
## SPECIFIC COMMODITY RATES OF FAR EASTERN SHIPPING COMPANY IN THE PHILIPPINES/U.S. PACIFIC COAST TRADE

Controlled carrier's rates on "Buri Furniture" and "Woven Articles" found to be unjust and unreasonable and are, therefore, disapproved.

*Steven B. Chameides* and *John F. Dorsey* for Far Eastern Shipping Company.

*Edward M. Shea* and *Francis W. Fraser* for Sea-Land Service, Inc.

*Charles F. Warren* and *George A. Quadrino* for Philippines North America Conference.

*Polly Haight Frawley, Alan J. Jacobson,* and *Paul J. Kaller* for Bureau of Hearing Counsel.

## REPORT AND ORDER

*August 5, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman,* THOMAS F. MOAKLEY, *Vice Chairman,* JAMES V. DAY, PETER N. TEIGE, *Commissioners*) *

This proceeding was initiated on December 28, 1979, by Order of Suspension and to Show Cause directed to the Far Eastern Shipping Company (FESCO).[1] In that Order, the Commission: (1) found that eight FESCO rates on five commodities in the Philippines/U.S. trade may be unjust and unreasonable,[2] and ordered FESCO to show cause why they should not be disapproved; and (2) suspended those rates for 180 days pursuant to section 18(c)(4) of the Shipping Act, 1916 (46 U.S.C. 817(c)(4)), pending the Commission's determination in this proceeding. Sea-Land Service, Inc., and the Philippines North America Conference (PNAC) intervened.

The proceeding was assigned to Administrative Law Judge Norman D. Kline for the expedited development of an evidentiary record, with the record to be certified to the Commission for decision. On April 18,

* Commissioner Leslie Kanuk dissents in part. A separate opinion will follow.

[1] FESCO is a "controlled carrier" subject to regulation under the Ocean Shipping Act of 1978, P.L. 95-483, 92 Stat. 1607, which amended sections 1 and 18 of the Shipping Act, 1916 (46 U.S.C. 801, 817). FESCO is directly or indirectly owned and controlled by the government of the U.S.S.R. under whose flag its vessels operate.

[2] *See* Attachment A.

1980, the Presiding Officer certified a record consisting of 20 documents admitted as Exhibits 1 through 19 (including Exhibits 16A and 16B). Three late-filed exhibits were subsequently received (20, 21, and 22) and made part of the record. FESCO, Sea-Land, PNAC, and the Commission's Bureau of Hearing Counsel filed simultaneous opening briefs. Reply briefs were filed by all parties except PNAC. FESCO's request for oral argument was denied by the Commission.

## POSITIONS OF THE PARTIES

FESCO contends that the eight rates at issue are similar to rates of other carriers in the same trade. It compares its suspended rates both with other carriers' rates in existence at the time this proceeding began and at the time the record closed. Its rates for four out of five of the commodities are allegedly the same as or similar to other carrier rates as of the commencement of the proceeding, while at the close of the record, every rate is allegedly the same or higher. FESCO maintains that the Commission's earlier determination that rate comparisons employ rates in existence at the time of the issuance of an investigative order was incorrect, that the effect of a finding of unreasonableness is prospective only, and that the Commission's decision should be based on the most current information available.

FESCO also states that its service is different than that of the Conference carriers, *i.e.*, less frequent and slower, and that this results in greater costs to shippers (primarily the buyer's cost of financing the goods as part of its inventory and insurance costs). FESCO contends, therefore, that its rates should be lower than the Conference carriers' rates by the amount of these added costs. Finally, in an attempt to show that its rates are required to assure the movement of particular cargo, FESCO offers affidavits from one Philippine exporter and one U.S. importer endorsing FESCO's rate levels on furniture and woven articles.

PNAC and Sea-Land offer similar arguments in response to FESCO. They initially note that the Commission previously concluded that Military Sealift Command (MSC) rates of competing carriers are inappropriate for rate comparison purposes. They also contend that a comparison of suspended rates with current rates is inappropriate. Sea-Land claims that the Ocean Shipping Act of 1978 was not intended to be prospective only and that by the time the Commission commences a proceeding by suspending controlled carrier rates, the damage which the Act was designed to prevent may already have occurred -- *i.e.*, a controlled carrier may already have gained an unjust and unreasonable market penetration. If rates in effect at the time of the Commission's Order to Show Cause are used, PNAC and Sea-Land conclude that FESCO's rate for each of the subject commodities is the lowest in the trade and should, therefore, be disapproved.

PNAC also points out that one independent carrier used by FESCO for comparison purposes, Scindia Steam Navigation Co., Ltd., has not offered service in the eastbound Philippines/U.S. trade since 1976. In addition, PNAC notes that for "Woven Articles," FESCO has converted its individual measurement rate to a per container rate and then compared this rate with per container rates of other carriers, even though some carriers provide a measurement rate for this commodity. Sea-Land further maintains that certain FESCO comparisons contain inaccuracies and that the only way to ensure meaningful rate comparisons is by reference to actual tariff pages, something FESCO has failed to provide.

PNAC and Sea-Land contend that nothing in the record supports FESCO's argument that its rates are necessary to assure the movement of particular cargo, especially since one of FESCO's shipper witnesses remains a PNAC dual rate contract signatory and the Conference members and Sea-Land continue to carry the particular commodities. They further maintain that FESCO's argument that its "inferior service" requires lower rates: (1) is based on unsupported inventory and insurance costs; (2) understates FESCO's sailing frequencies; and (3) ignores the majority of Conference carriers with service frequencies less than its own. Moreover, Sea-Land points out that differences in total transportation times and vessel itineraries are transient in nature and are, therefore, of questionable value. In fact, Sea-Land asserts that it offers a slower service in the trade than does FESCO.

Hearing Counsel also agrees that the Commission should use rates of non-controlled carriers on file at the time of a suspension in assessing rate similarity. It argues that a Commission determination of unlawfulness is based on certain conditions in the trade and that such a determination would not necessarily apply if conditions changed. Hearing Counsel further states that consideration of rate changes after a suspension would be procedurally unworkable and could restrict a controlled carrier's competitors from responding to its rates or other competitive pressures in the trade during the pendency of a proceeding.

Hearing Counsel maintains that FESCO's rates on "Buri Furniture" and "Woven Articles" are not similar to those of its competitors and should, therefore, be disapproved. Hearing Counsel explains that while FESCO's total transportation charges for all five commodities are lower than comparable competitors' charges, it does not believe there is sufficient evidence from which to conclude that other carriers suffered "injury" from the rates on the remaining three commodities, particularly where, in 1979, FESCO did not carry any commodities under these tariff descriptions -- "Glass Manufactures, N.O.S."; "Reefer Cargo, other" and "Fruit Juice Concentrates."

## DISCUSSION

For the purposes of determining whether rates of a controlled carrier are just and reasonable, the Commission is permitted to take into account appropriate factors, four of which are set forth in section 18(c)(2).[3] In an attempt to meet its statutory burden, FESCO has presented evidence relating to the second and third factors. Other parties take issue with this presentation. The Commission has reviewed the entire record, and has found that rates on two of the commodities at issue are unjust and unreasonable.

FESCO's attempt to justify some of its rates as necessary to assure the movement of particular cargo relies on affidavits of one exporter and one importer. These affidavits relate, at best, to only two of the five commodities at issue -- "Buri Furniture" and "Woven Articles." One of the affiants is a dual rate contract signatory with PNAC and ships some of its goods via PNAC member carriers. (Exhibit 6, at 14). In addition, the record reveals that even though FESCO's share of these commodities is growing, the Conference still carries substantial amounts of these items. (Exhibit 6, at 9). It appears, therefore, that consistent with recently established principles, FESCO's rates on these two commodities are not *necessary* to assure their movement. *See Rates of Far Eastern Shipping Company*, 22 F.M.C. 651, 656 (1980).

In *Rates of FESCO, supra*, the Commission determined that rate comparisons made pursuant to section 18(c)(2)(ii) should generally employ rates of other carriers in effect on the date of the order instituting the proceeding. The Commission reaffirms this position. In proceedings under the Ocean Shipping Act of 1978, the Commission is not empowered to set rate levels for a controlled carrier to adhere to in the future. The Commission is simply determining the justness and reasonableness of a rate based upon circumstances existing at a particular point in time -- when the rate is initially questioned. Such an approach is the only rational way of administering our regulatory duties under this Act. If a later date certain (*e.g.*, the close of the record) or a sliding reference point were employed, it would become very difficult to resolve controlled carrier rate cases within the 180-day

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[3] Section 18(c)(2) states in part:

> . . . the Commission may take into account appropriate factors, including, but not limited to, whether:
>
> (i) the rates . . . which have been filed . . . are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a *similar trade*;
>
> (ii) the rates . . . are the same as or similar to those filed or assessed by other carriers in the same trade;
>
> (iii) the rates . . . are required to assure movement of particular cargo in the trade; or
>
> (iv) the *rates*. . . are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

suspension period, and potentially unjust or unreasonable rates could be reinstituted pending resolution of the proceeding. Moreover, without a predetermined reference point for rate comparison purposes, the parties could find it extremely difficult to marshall their facts, conduct discovery, and prepare their briefs. In addition, the impacts of subsequent rate changes on a trade or their duration, could not be ascertained for some time following their effective dates. The Commission will, therefore, rely upon rate comparisons using rates of other carriers in effect on December 28, 1979.

Section 18(c)(2) provides the Commission with the option of considering other "appropriate factors" when determining the justness or reasonableness of a controlled carrier's rates. 46 U.S.C. 817(c)(2). The Commission is not, therefore, relegated to merely reviewing naked rates presented to it for comparison purposes. The Commission can and will look behind these rates to the service characteristics of the carriers themselves, when appropriate to do so. In this case for instance, some carriers whose rates are compared with FESCO's offer only feeder service rather than direct service (Zim Israel Navigation Company and Evergreen Line). Others operate much larger vessels than FESCO (Zim) or different types of vessels (Knutsen Line -semicontainer). In addition, at least one compared carrier is a non-exempt, state-owned or controlled carrier (Neptune Orient Line).[4] Absent any proof that these differences have no relevance to the level of rates set by these carriers, the Commission will give greatest weight to comparisons between FESCO and those carriers most operationally similar to it. At the very least, the rates of any carrier not presently operating in the trade will be disregarded.[5]

FESCO has claimed that because the frequency and speed of its service are less than those of Sea-Land and American President Lines (APL), its rates must necessarily be lower to remain competitive. This theory is based upon the assumption that slower service results in increased inventory and insurance costs to shippers. Certain parties have questioned FESCO's exclusive reliance on the sailing frequencies of Sea-Land and APL. The itineraries presented by FESCO have also been disputed. Sea-Land, for instance, provides a service from Cebu

[4] Listing of Controlled Carriers, (45 *Fed. Reg.* 5397, January 23, 1980). Zim Israel Navigation Company is also state-owned or controlled. It is exempt from the requirements of the Ocean Shipping Act of 1978 by virtue of its status as a carrier of a state whose vessels are entitled by treaty to receive most-favored-nation treatment. *See* 46 U.S.C. 817(c)(6)(i).

[5] Scindia Steam Navigation Co., Ltd., has had rates on file for this trade since 1976, but has never amended these rates or apparently offered any service in the trade during that time. (*See* Exhibit 6, at 3, 4). This is supported by a recent advertisement in the *Pacific Shipper* which indicates that Scindia does not presently offer inbound service from the Philippines (Exhibit 20). Although not a matter at issue here, Scindia's failure to serve the trade could result in the cancellation of its inbound Philippine tariff under the principles developed in Docket No. 77-35, *Publication of Inactive Tariffs by Carriers in Foreign Commerce*, 20 F.M.C. 433 (1978).

(the port from which 86% of FESCO's Philippine cargo originates) which is actually slower than FESCO's (31 days vs. 29 days). In any event, FESCO's contentions concerning the level of insurance and inventory costs are unsupported by any evidence.

FESCO has converted its measurement rates on "Woven Articles" to per container rates and then compared these rates with per container rates of other carriers. However, many carriers in this trade offer measurement rates for this commodity, including some of the carriers with which FESCO has compared per container rates. Measurement rates are intended to apply to shipments which are not eligible for full container rates because of their volume. If other carriers also publish measurement rates, such rates are the best basis for comparison.[6] For comparison purposes, the Commission will, therefore, give greatest consideration to measurement rates which have been filed for woven articles.

The Commission has established certain principles for deciding controlled carrier rate cases. Rate comparisons should include any differences which affect the total transportation charge to a shipper.[7] *Rates of FESCO*, 19 S.R.R. at 1541. However, rate similarity between a controlled carrier and another carrier in a trade is not conclusive proof that a controlled carrier's rate is just and reasonable. If there is evidence that differences in rates, no matter how slight, have caused trade disruption, such rates could be found unlawful. *Rates of FESCO*, 19 S.R.R. at 1543. We will now examine the particular rates at issue in light of these principles.

FESCO's suspended rate for "Glass Manufactures, N.O.S." is the only 20 foot container rate offered in the trade. As a result, it is necessary to convert this rate to a weight basis. (*See* Exhibit 9, at 3). Once converted, a comparison of FESCO's rate with that of the Conference indicates that FESCO's total charges on a weight basis are actually higher than PNAC's.[8] Even though this rate was deleted subsequent to its suspension, it will not be disapproved.[9]

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[6] Conversions of measurement or weight rates to per container rates, or vice versa, introduce a variable which lessens their value as indicators -- the stowage factor for the particular commodity.

[7] The Commission has previously indicated that a controlled carrier relying upon a rate comparison should provide:

> (1) applicable tariff pages, (2) an explanation of any adjustments made to effect a comparison, (3) all relevant charges which affect the total transportation charge, and (4) if converting a per container rate to a weight/measure rate or *vice versa*, representative bills of lading. *Rates of FESCO*, 19 S.R.R. at 1541, fn. 9.

Though FESCO has failed to comply with this requirement, there does appear to be general agreement as to all applicable rates and charges.

[8] The various rate comparisons in the record employ contract rates offered by PNAC and other carriers. These rates are generally 15 percent below the ordinary rates for any given commodity and are available to any shipper which signs a contract giving all, or a fixed portion, of its business to the Conference or carrier. *See* 46 U.S.C. 813a.

[9] The impact of this rate or its predecessors appears minimal given the fact that FESCO carried none of the commodity covered by the rate in 1979. Exhibit 15.

FESCO has attempted to justify its reefer rates -- "Reefer Cargo, other" and "Fruit Juice Concentrates" -- solely by reference to rates filed by Scindia. Such a comparison is of no value because Scindia has not and does not operate in the trade. However, Hearing Counsel has also provided comparisons for these items, using carriers which do operate in the trade (Attachments G and H). These comparisons indicate that FESCO's charges are significantly less than those of PNAC and Seatrain. However, these rates have also had a minimal impact on the trade because of FESCO's failure to carry any cargo under them in 1979 (*See* Exhibit 15). They will not, therefore, be found unjust and unreasonable.

FESCO's total charges for "Buri Furniture" and "Woven Articles" are significantly lower than the Conference's charges for these commodities. They are also lower than the charges assessed by the relevant independent carriers in the trade. *See* Attachments B and C. Furniture[10] and woven articles are two of the seven major moving commodities in the trade. (Exhibit 6, at 9). Exports of these commodities have increased steadily from 1977 to 1979. (Exhibit 14, at 4, 5). However, during this period, the Conference and Sea-Land experienced a decrease in their carriage of these commodities. *See* Attachment D.

Furniture and woven articles were the principal commodities FESCO carried from the Philippines in 1979, accounting for 80 percent of its total carriage. (Exhibit 15).[11] From 1978 to 1979, FESCO increased its share of furniture and woven articles by 75 percent. (Exhibit 16A, at 2). By the end of 1979, FESCO was carrying over one-third of this cargo.[12] This increasing market penetration has been accompanied by the consistent maintenance of significant differentials in total charges between FESCO and PNAC and Seatrain. *See* Attachments E and F. These facts indicate that, for "Buri Furniture" and "Woven Articles," FESCO's rates have had a significant impact on the trade. Because FESCO has failed to meet its burden of proving that these rates are just and reasonable, they will be disapproved.

THEREFORE, IT IS ORDERED, That the rates of Far Eastern Shipping Company for "Buri Furniture" and "Woven Articles," as

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[10] The record data does not distinguish between furniture and "Buri Furniture," though the latter is obviously subsumed in the former. The commodity description of the rate under consideration is "Buri Furniture Only, From All Ports Except Cebu." Though its extent cannot be precisely determined, it is clear that the subject rate contributes to FESCO's overall penetration of the market for the carriage of furniture.

[11] FESCO is the only independent carrier to carry a significant amount of furniture and woven articles. (Exhibit 11).

[12] FESCO carried 79 percent as much furniture as the entire 17 carrier conference, and 49 percent as much woven articles. (*See* Attachment D).

listed in Attachment A, are hereby disapproved as unjust and unreasonable; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

## ATTACHMENT A

Far Eastern Shipping Company Freight Tariff - FMC-23
From: Ports in the Philippines
To: U.S. Pacific ports and Overland Common points

| DESCRIPTION | TARIFF ITEM | RATE SUSPENDED | EFFECTIVE DATE |
|---|---|---|---|
| Glass Manufactures, N.O.S. | 510 | Local $1,200.00 P/C 20 | 12/30/79 |
| Furniture made of: Buri Furniture Only | 480 | Local $40.50M<br>O.C.P. $36.00M | 1/05/80 |
| Woven Articles, Viz: Bags-Marketing/Shopping of Woven Fiber; Baskets, Bamboo/Buri Rib; Braids; Buri; Brooms; Cloth, Abaca/Burlap/Raffia/Saguran; Mats-Mattings, Bamboo/Bankman/Buri/Grass/Hemp/Door/Woven Fiber; Nipa Strips; Petutes Rakes; Bamboo; Rugs, Balangot/Hemp; Sawali and Screen; Woven Fiber, N.O.S. | 1070 | Local $54.00M<br>O.C.P. $54.50M | 1/06/80 |
| Reefer Cargo<br>Other | 890 | Local $52.00W or $46.50M | 1/15/80 |
| Fruit Juice Concentrates | 890 | Local $113.40M | 1/15/80 |

# ATTACHMENT B

## BURI FURNITURE

| CARRIER | RATE | BUNKER SURCHARGE | TOTAL CHARGE | PERCENT BY WHICH FESCO'S TOTAL CHARGE DIFFERS FROM COMPETITOR'S TOTAL CHARGE |
|---|---|---|---|---|
| FESCO | LOC 40.50M | 4.00 | LOC 44.50M | |
| | OCP 36.00M | 4.00 | OCP 40.00M | |
| PNAC | LOC 45.00M | 9.50 | LOC 54.50M | 18.35 |
| | OCP 39.00M | 9.50 | OCP 48.50M | 17.52 |
| SEATRAIN | LOC 41.00M | 8.00 | LOC 49.00M | 9.18 |
| | OCP 35.00M | 8.00 | OCP 43.00M | 6.98 |
| EVER-GREEN | LOC 43.00M | 8.00 | LOC 51.00M | 12.74 |
| | OCP 39.00M | 8.00 | OCP 47.00M | 14.89 |

## ATTACHMENT C

### WOVEN ARTICLES*

| CARRIER | RATE | BUNKER SURCHARGE | TOTAL CHARGE | PERCENT BY WHICH FESCO'S TOTAL CHARGE DIFFERS FROM COMPETITOR'S TOTAL CHARGE |
|---|---|---|---|---|
| FESCO | LOC 54.00M | 4.00 | LOC 58.00M | |
| | OCP 54.50M | 4.00 | OCP 58.50M | |
| PNAC | LOC 60.00M | 9.50 | LOC 69.50M | 16.55 |
| | OCP 58.50M | 9.50 | OCP 68.00M | 13.97 |
| SEATRAIN | LOC 54.00M | 8.00 | LOC 62.00M | 6.45 |
| | OCP 52.50M | 8.00 | OCP 60.50M | 3.30 |

* Per container rates of Zim and Knutsen which were converted to measurement rates have been disregarded because the conference and Seatrain offer rates on a measurement basis.

## ATTACHMENT D

### CARGO MOVEMENTS (REVENUE TONS) IN THE PHILIPPINES-U.S. PACIFIC COAST TRADE

| | Commodity | PNAC[1] | Sea-Land | FESCO[3] |
|---|---|---|---|---|
| 1979 | Furniture | 64,486 | 6,288[2] | 50,847 (1994 TEU's x 25.5 cm stow) |
| | Woven Articles | 40,239 | 9,821 | 19,660 (771 TEU's x 25.5 mwt stow) |
| 1978 | Furniture | 66,782 | 7,530[2] | ———[4] |
| | Woven Articles | 41,173 | 11,489[2] | |
| 1977 | Furniture | 66,939 | 12,183[2] | ———[4] |
| | Woven Articles | 41,627 | 15,204[2] | |

1 Exhibit 6, at 9.
2 Exhibit 7, Attachment D, and Exhibit 16B, at 3.
3 Exhibit 15 provides data in TEU's. Stowage factors are available from Exhibit 2, at 2. No data was provided for other years.
4 No data available.

# ATTACHMENT E

## BURI FURNITURE - LOCAL*

(TOTAL CHARGES)

| | FESCO | PNAC | SEATRAIN |
|---|---|---|---|
| 5/6/79 | | 59.50 | |
| 5/7/79 | 47.00 | | |
| 6/11/79 | | 63.00 | |
| 8/15/79 | | 61.25 | |
| 8/28/79 | | | 59.50 |
| 9/27/79 | | | 63.50 |
| 10/1/79 | 51.00 | 62.75 | |
| 10/15/79 | | | 58.50 |
| 10/24/79 | | 60.75 | |
| 11/18/79 | | 54.50 | |
| 11/27/79 | | | 56.00 |
| 11/29/79 | | | 49.00 |
| 1/1/80 | | | 50.50 |
| 1/5/80 | **44.50 | | |

*(Exhibit 5, Schedule 3)
**(Suspended)

## BURI FURNITURE-OCP*

(TOTAL CHARGES)

| | FESCO | PNAC | SEATRAIN |
|---|---|---|---|
| 6/20/76 | 37.75 | | |
| 2/15/77 | | 43.25 | |
| 4/1/78 | | 51.25 | |
| 5/31/78 | | 49.00 | |
| 3/1/79 | 39.00 | | |
| 5/6/79 | | 53.00 | |
| 5/7/79 | 41.00 | | |
| 6/11/79 | | 57.00 | |
| 8/15/79 | | 56.75 | |
| 8/28/79 | | | 53.00 |
| 9/27/79 | | | 57.00 |
| 10/1/79 | 45.00 | 58.25 | |
| 10/15/79 | | | 54.00 |
| 10/24/79 | | 56.25 | |
| 11/18/79 | | 48.50 | |
| 11/27/79 | | | 52.00 |
| 11/29/79 | | | 43.00 |
| 1/1/80 | | | 44.50 |
| 1/5/80 | **40.00 | | |

*(Exhibit 5, Schedule 4)
**(Suspended)

# ATTACHMENT F

## WOVEN ARTICLES -- LOCAL*

(TOTAL CHARGES)

| | FESCO | PNAC | SEATRAIN |
|---|---|---|---|
| 6/20/76 | 46.75 | | |
| 2/15/77 | | 55.00 | |
| 11/19/77 | | 60.00 | |
| 4/1/78 | | 66.75 | |
| 3/1/79 | 59.00 | | |
| 3/15/79 | 53.50 | | |
| 5/6/79 | | 70.75 | |
| 5/7/79 | 59.25 | | |
| 5/25/79 | | 64.00 | |
| 6/11/79 | | 68.00 | |
| 8/28/79 | | | 64.00 |
| 9/27/79 | | | 68.00 |
| 10/1/79 | 63.25 | 69.50 | |
| 10/15/79 | | | 62.00 |
| 11/1/79 | 63.50 | | |
| 1/1/80 | | | 63.50 |
| 1/6/80 | **58.00 | | |

*(Exhibit 5, Schedule 1) **(Suspended)

## WOVEN ARTICLES -- OCP*

(TOTAL CHARGES)

| | FESCO | PNAC | SEATRAIN |
|---|---|---|---|
| 6/20/76 | 42.25 | | |
| 2/15/77 | | 49.75 | |
| 11/19/77 | | 54.75 | |
| 6/14/78 | | 61.50 | |
| 3/1/79 | 54.00 | | |
| 3/15/79 | 49.50 | | |
| 5/6/79 | | 65.50 | |
| 5/7/79 | 54.25 | | |
| 5/25/79 | | 62.50 | |
| 6/11/79 | | 66.50 | |
| 8/28/79 | | | 62.50 |
| 9/27/79 | | | 66.50 |
| 10/1/79 | 58.25 | 68.00 | |
| 10/15/79 | | | 60.50 |
| 11/1/79 | 58.50 | | |
| 1/1/80 | | | 62.00 |
| 1/6/80 | **58.00 | | |

*(Exhibit 5, Schedule 2) **(Suspended)

# ATTACHMENT G

## REEFER CARGO OTHER

| CARRIER | RATE | BUNKER SUR-CHARGE | TOTAL CHARGE | PERCENT BY WHICH FESCO'S TOTAL CHARGE DIFFERS FROM COMPETITOR'S TOTAL CHARGE |
|---|---|---|---|---|
| FESCO | LOC 52.00W | 4.00 | LOC 56.00W | |
| | LOC 46.50M | 4.00 | LOC 50.50M | |
| PNAC* | LOC 58.00W | 9.50 | LOC 67.50W | 17.04 |
| | LOC 51.75M | 9.50 | LOC 61.25M | 17.55 |
| SEATRAIN* | LOC 52.00W | 8.00 | LOC 60.00W | 6.66 |
| | LOC 47.00M | 8.00 | LOC 55.00M | 8.18 |

* Exhibit 5.

## ATTACHMENT H

### REEFER CARGO - FRUIT JUICE CONCENTRATES

| CARRIER | RATE | BUNKER SUR-CHARGE | TOTAL CHARGE | PERCENT BY WHICH FESCO'S TOTAL CHARGE DIFFERS FROM COMPETITOR'S TOTAL CHARGE |
|---|---|---|---|---|
| FESCO | LOC 113.40M* | 4.00 | LOC 117.40M | |
| PNAC | LOC 142.00W | 9.50 | LOC 151.50W | 22.5 |
| SEATRAIN** | LOC 128.00W | 8.00 | LOC 136.00W | 13.68 |

* FESCO filed a measurement rate. The appropriate conversion rate is one metric ton per measurement ton of cargo. (Exhibit 1 at 6).

** Exhibit 5.

*Commissioner Leslie Kanuk, concurring and dissenting in part.* With this decision, the Commission has made some progress towards achieving a rational approach to cases arising under section 18(c) of the Shipping Act, 1916. I concur in the disapproval of FESCO rates on Buri Furniture. However, I do have difficulties with the majority's approach to other issues in this proceeding.

The majority states that "[i]f there is evidence that differences in rates, no matter how slight, have caused trade disruption, such rates could be found unlawful." (Slip Opinion at p. 11). This statement begs the question of what constitutes trade disruption. In the context of this particular proceeding, the majority seems to supply a working definition of trade disruption when it observes that:

> [FESCO's] increasing market penetration has been accompanied by the consistent maintenance of significant differentials in total charges between FESCO and PNAC and Seatrain. Slip Opinion at p. 13.

If disruption is defined as increasing market share, I fear the Commission has foreclosed the possibility of a controlled carrier exerting beneficial competitive influences on a trade. This fear is accentuated by the Commission's requirement in an earlier proceeding that a controlled carrier's replacement rates must meet the level of the national-flag carriers serving the trade.* This requirement presumes that the national-flag rates are set at a level which is, indeed, just and reasonable. For the sake of the shippers in any affected trades, I earnestly hope this is true.

In other proceedings involving section 18(c) of the Shipping Act, I have expressed my reservations about the rigidity which the Commission has imposed on proceedings involving controlled carriers. (See FMC Docket No. 79-10, *Rates of Far Eastern Shipping Company*, separate opinions of November 28, 1979, and June 9, 1980). Though I will not treat those issues in detail in this particular opinion, they are incorporated herein. However, I reiterate my general concern that in its zeal to disapprove rates filed by Soviet-flag carriers, the Commission has created a precedential monster which will make it nearly impossible for any non-conference controlled carrier to have a pro-competitive impact in the United States ocean trades. I continue to consider the dangers of predatory rate practices of controlled carriers to be a serious threat. Nonetheless, I consider it unwise for the Commission to create case law which will make it virtually impossible for a non-predatory, non-conference controlled carrier to offer an alternative service to the shipping public at competitive rates.

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* FMC Docket No. 79-10, *Rates of Far Eastern Shipping Company*, Report and Order of April 1, 1980, Slip Opinion at p. 17.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-35

PACIFIC COAST EUROPEAN CONFERENCE
(AGREEMENT NO. 5200 DR-4--EXTENSION OF
DUAL RATE CONTRACT TO INTERMODAL SERVICE)

## NOTICE

*August 7, 1980*

Notice is given that no exceptions were filed to the July 3, 1980 order discontinuing this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-35

PACIFIC COAST EUROPEAN CONFERENCE

(AGREEMENT NO. 5200 DR-4--EXTENSION OF DUAL RATE CONTRACT TO INTERMODAL SERVICE)

## ORDER DISCONTINUING PROCEEDING

*Finalized August 7, 1980*

Proponents of Agreement No. 5200 DR-4, who are the member lines of the Pacific Coast European Conference, have moved to dismiss this proceeding on the basis of "mootness" since the Agreement has been formally withdrawn by its letter of June 17, 1980.[1]

The Agreement, which is a modification to the Conference's existing Dual Rate Contract, was filed in mid-1976 and had been held in abeyance at the request of the Conference until the institution of this proceeding by Order of Investigation and Hearing served May 28, 1980. Basically the modification includes cargo of contract shippers described as moving "overland from a Pacific Coast area port via connecting water movements from U. S. Atlantic, Great Lakes and Gulf ports, to a destination port" within the scope of the conference agreement. According to the order, the apparent purpose of the modification is to include under the contract "mini-bridge" traffic which may be moved under the authority of the conference agreement.

The stated basis for withdrawing the application is that the issue of this Commission's jurisdiction to approve an extension of an exclusive patronage agreement to "mini-bridge" traffic moved by members of a conference under their approved conference agreement is presently before the United States Court of Appeals for the District of Columbia Circuit.[2] The proponents indicate that depending on the outcome of the litigation or, perhaps, clarifying legislation in the interim, the Conference may wish to file a similar application at some future time.

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[1] The undersigned did not receive either a copy of the Motion to Dismiss on Grounds of Mootness served June 17, 1980, or a copy of the letter in support thereof. Apparently Hearing Counsel were not served as well since those documents, which were eventually received in this office, were made available to Hearing Counsel for duplication and appropriate response. Since the motion included a certificate of service, I trust that all other parties were more fortunate and actually were served.

[2] See *U.S.A. v. F.M.C.*, No. 79-1299; *Seatrain Pacific Services, S.A. v. F.M.C.*, No. 80-1248 and *U.S.A. v. F.M.C.*, No. 80-1251.

Hearing Counsel by their reply to the motion served June 26, 1980, indicate they have no objection to the motion, and the designated protestants have not objected.

The above actions dispose of the issues to be decided herein. Accordingly, this proceeding is discontinued.

(S) PAUL J. FITZPATRICK
*Administrative Law Judge*

July 3, 1980

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 724(I)

COTTON IMPORT AND EXPORT CO.

*v.*

SEA-LAND SERVICE, INC.

## REPORT AND ORDER

*August 11, 1980*

BY THE COMMISSION:* (THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE KANUK AND PETER N. TEIGE, *Commissioners*)

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer Donald F. Norris, served March 14, 1980, awarding reparation. The Settlement Officer found that Sea-Land Service, Inc. violated section 17 of the Shipping Act, 1916 (46 U.S.C. 816) in billing Cotton Import and Export Co. (Complainant) for deficit weight charges resulting from Sea-Land's substitution of 40-foot containers for 35-foot containers without notifying Complainant.

Complainant alleges that it had ordered 35-foot containers on shipments of cotton, and that Sea-Land substituted for its own convenience 40-foot containers, without the knowledge or consent of Complainant. Consequently, the shipments did not meet the minimum weight requirements for 40-foot containers. Complainant alleges that it was billed for and paid deficit weight charges as a result of Sea-Land's action, and requests reparation in the amount of $2,327.87.[1]

Sea-Land, by letter to the Settlement Officer dated October 17, 1979, admitted error in its action, stating in part:

> It is our understanding that Sea-Land did not notify the shipper that larger equipment would be substituted for the ordered equipment. Had the shipper been made aware of the substitution of equipment, the shipper's loading pattern could have been changed to accommodate the larger box, thereby precluding the billing of deficit charges.

* Chairman Daschbach filed a separate opinion.

[1] This figure is allegedly the sum of $683.93, $415.35, and $1,273.59, supposedly the deficit weight charges on each of three trailers. The figures add up to $2,372.87, however.

> The issue, therefore, is a carrier (Sea-Land) substituting equipment for its own convenience and the shipper being penalized for the carrier's actions.
>
> Sea-Land urges the Settlement Officer to award reparation in the amount of $2,327.87 as claimed.[2]

By letter dated September 18, 1979, the Settlement Officer requested additional information from Complainant, including, *inter alia*:

> . . . evidence that your Company was billed and subsequently paid the additional charges "for deficit weights" in the amount claimed, $2,327.87.

Complainant's response, dated November 20, 1979, addressed this query merely by stating:

> We enclose photo-copy of our check in the amount of $2,338.87, which is the amount under claim.

Attached was a copy of the front of a check dated April 18, 1979, made out to Sea-Land Service, Inc. Complainant did not respond to the Settlement Officer's request for proof of billing. Nor was the new figure of $2,338.87 explained. The Settlement Officer, however, awarded reparation in that amount.

Upon its review of the Initial Decision, the Commission was troubled by several aspects of Complainant's case: there remained, despite the Settlement Officer's request, no evidence that Sea-Land sent a bill for the deficit weight; the copy of the check did not indicate endorsement; and the variance in amounts claimed was unexplained. Pursuant to the Commission's instructions, a letter from the Commission's Secretary was sent to Complainant on May 19, 1980, requesting clarification on these matters by June 15, 1980.[3]

Complainant's response was received July 8, 1980. Despite the tardiness of the submission, the Commission accepts the submission for consideration. Complainant enclosed three copies of billings from Sea-Land for the three trailers in question, but again failed to produce a bill for deficit weight charges. Complainant resubmitted the copy of the front of its check to Sea-Land, but the July 8, 1980 submission contains calculations not on the copy of the check submitted on November 20, 1979. On the check is written:

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[2] Sea-Land's letter also makes use of the erroneously-added $2,327.87 figure.

[3] The Secretary's letter requested the following information:

(1) Evidence of Sea-Land's billing to you for the freight charges involved; (2) Evidence of your payment of the charges (if by check, show face *and* back of check); and (3) An explanation of the discrepancy between the alleged billing of Sea-Land of $2,338.87 and the amount claimed of $2,327.87.

| | | |
|---|---|---|
| 971-869525 | - | 1284.59 |
| 961-869516 | - | 638.93 |
| 961-869503 | - | 415.35 |
| | | 2338.87[4] |

Complainant also submitted a copy of a back of a check endorsed by Sea-Land and dated by the bank May 20, 1980. The discrepancy in amounts was explained:

> The correct difference is $2,327.87 and due to an error in addition, we paid $2,338.87.

## DISCUSSION AND CONCLUSION

Because the Commission is not satisfied that Complainant has met its burden of proof, the reparation award is denied and the decision of the Settlement Officer is reversed.

Complainant's responses to the Settlement Officer's and the Commission's inquiries have raised more questions than they answered. There remains not the slightest indication of where the various numbers adding up to $2338.87, $2327.87, or $2372.87 came from, nor is it clear whether the $1,284.59 and $638.93 figures written on the copy of the check or the $1,273.59 and $683.93 figures listed in the complaint and concurred with by Sea-Land are the basis of the amount claimed. The exact amount of the deficit weight charges would be expected to appear on the bill which Complainant asserts it received from Sea-Land, but despite two requests, Complainant has failed to produce any documentation verifying its claim that it in fact was billed for deficit weight.

Moreover, the validity of the copies of the check has not been established to the satisfaction of this Commission. If Complainant indeed submitted copies of the front and back of the same check, the question arises as to why a check dated April 18, 1979[5] was not endorsed until May 20, 1980. Complainant's submissions indicate that Sea-Land held the check for over a year, and endorsed it twelve days after the Commission expressed its concern about the check's validity at its open May 8, 1980 meeting. Thus, the parties' original contention that the "bill" for deficit weight had been "paid" appears to have been misleading. Complainant's inability or unwillingness to establish the basic premises of its complaint -- *i.e.*, that it was billed for and paid deficit weight charges in an identifiable amount -- precludes a finding that it has met its burden of proof.[6]

---

[4] Compare with calculations in complaint. See n.1, *supra*.

[5] Even this date is questionable. The copy submitted by Complainant shows that the line on which the date is typed is broken in several places, suggesting that the date of the check was, at some point, altered.

[6] It is therefore unnecessary to address the issue of whether the facts, if established, amounted to a violation of section 17 of the Shipping Act.

THEREFORE, IT IS ORDERED, That the Initial Decision of the Settlement Officer is reversed; and

IT IS FURTHER ORDERED, That Cotton Import and Export Co.'s request for reparation is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

CHAIRMAN DASCHBACH'S SEPARATE OPINION.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, therefore Commission review imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-17

WESCOT INTERNATIONAL, INC.

*v.*

SEA-LAND SERVICE, INC.

## ORDER ADOPTING INITIAL DECISION

*August 13, 1980*

This proceeding was initiated as a result of a complaint filed by Wescot International, Inc. seeking a refund of freight charges from Sea-Land Service, Inc. Its claim was based on an alleged error in the measurement of bundles of iron pipe. Sea-Land admitted all allegations in the complaint.

Administrative Law Judge Paul J. Fitzpatrick issued an Initial Decision in which he awarded reparation in the full amount claimed by Wescot, and in addition, awarded interest at 12 percent from the date of payment of the freight charges. Sea-Land filed Exceptions only as to the award of interest.

Though Sea-Land recognizes that an award of interest could be proper in a case such as this one, it argues that the Commission should exercise its discretion and vacate the award of interest. Sea-Land alleges: (1) it was not responsible for the erroneous mismeasurement of the cargo; (2) the error was not known to it, nor did it have the ability to ascertain it; and (3) Wescot did not seek an award of interest.

The Commission is not persuaded by Sea-Land's arguments. Sea-Land had a non-delegable duty to assess its freight charges on the basis of the actual measurement of the commodity being shipped. In this case particularly it is difficult to understand how Sea-Land lacked the ability to assess this cargo. The iron pipes in question were presented to the carrier in slings and were not hidden away in containers. Their correct measurement could have been easily ascertained.

Sea-Land should further understand that an award of interest in this proceeding is not meant as a penalty for some perceived malefaction on its part. Rather, the award of interest simply serves to make this shipper whole. Sea-Land after all has had the benefit of this shipper's overpayment from the date the freight charges were paid.

The Presiding Officer's decision to award interest was clearly consistent with our policy statement of May 8, 1980, concerning interest on

awards of reparation. The circumstances of this case do not warrant an exception to this general policy.

THEREFORE, IT IS ORDERED, That the Exceptions filed by Sea-Land Service, Inc. are denied and the Initial Decision in this proceeding is hereby adopted; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
*Assistant Secretary*

*Commissioner Leslie Kanuk would not award interest in situations where a strong showing is made that the error in measurement was due to erroneous entries made by shippers in the documentation which follows the shipment.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-17

WESCOT INTERNATIONAL, INC.

*v.*

SEA-LAND SERVICE, INC.

Through a combination of error in supplier's preparation of a packing list and carrier's corresponding billing in reliance thereof, complainant was overcharged for shipment of ductile iron pipe. Reparation awarded.

*Everett S. Layman, Jr.* and *Edward Winslow* for complainant.

*John M. Ridlon* for respondent.

## INITIAL DECISION OF PAUL J. FITZPATRICK, ADMINISTRATIVE LAW JUDGE [1]

*Adopted August 13, 1980*

By complaint served March 26, 1980, Wescot International, Inc., of San Francisco, California (Wescot or complainant), seeks a refund of freight charges resulting from an alleged error in the calculation of weight applied to a shipment of ductile iron pipe. Wescot requested that the proceeding be handled under the Shortened Procedure provided by the Commission's Rules of Practice and Procedure (46 C.F.R. 502.181-187). Sea-Land Service, Inc. (Sea-Land), consents to handling of the matter under the shortened procedure and in essence admits to all of the allegations and contentions included in the numbered paragraphs of the complaint.

Wescot, an exporter of goods manufactured in the United States, entered into a contract with Misato Kogyo & Co., Ltd., of Naha City, Okinawa, to provide, among other commodities, certain ductile iron pipe. It also entered into a contract with P. E. O'Hair and Company of Pittsburg, CA, a supplier, to purchase the iron pipe to be delivered F.O.B. Dock San Francisco. The shipment moved under Sea-Land bill of lading dated May 15, 1979, on *SS LEADER*, Voyage 14 W on May 20, 1979.

The gravamen giving rise to the requested refund concerns the cubic measurement reflected in the bill of lading. Item .004 of the bill of lading specifies 26 Slings-Cast Iron Pipe-72.395 KG (Gross Weight) and

[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).

a measurement of 223 CBM.[2] According to the complainant a refund for the freight charges incurred is due for 98.598 CBM which is the difference between the measurement of 223 CBM and 124.402 CBM or the actual cube size of the involved slings. Apparently the error was spotted after management examined the file and after the cargo had already been unloaded at destination. The error itself is attributed to the supplier's preparation of the packing list. Evidently the supplier's typist in not referring to the underlying work copies showed all slings as 19 feet high, 48 inches long and 48 inches wide. In using this standard, the involved slings yields an equal distribution of 304 cubic feet per sling or a total of 7,794 cubic feet. And because of the error it is claimed that the actual cubic feet represents a difference of 3,526 cubic feet from that reflected on the packing list used by Sea-Land.[3] In order to substantiate the difference in measurement the Pacific Cargo Inspection Bureau, located in San Francisco, was requested to inspect and measure "As Shipped" samples at the supplier's yard. The Bureau measured the bundles of pipe which were said to be identical to the slings shipped under the bill of lading. The results of these measurements were shown to be as follows: 9 slings at 5.256162 = 47.305 CBM; 12 slings at 4.798752 = 57.585 CBM; and 4 slings at 3.828348 = 15.313 CBM or a total of 120.203 CBM for 25 slings. Although the remaining sling (composed of 4" and 6" pipe) was not available for measurement it was calculated by the complainant to be 4.199 CBM and apparently Sea-Land agrees with that measurement. As a result of its explanation of the error and the Bureau's measurements, complainant seeks a refund of $20,774.59.[4]

[2] In addition to the slings, Item .004 included 1 Bundle Cast Iron Pipe-1,451 KG with a measurement of 2.747 CBM. The measurement and freight charges assessed here are not in controversy.

[3] The supplier claims the actual measurements to be as follows:

*Units 1 to 9*

8" Ductile Iron Pipe (12 Pcs 4 Pcs Wide by 3 Rows High) Length 19 Feet Width 40 Inches Height 29 inches = 184.7 Cubic Feet Per Unit

*Units 10 to 21*

6" Ductile Iron Pipe (18 Pcs 6 Pcs Wide by 3 Rows High) Length 19 Feet Width 44 Inches Height 29 inches = 168.4 Cubic Feet Per Unit

*Units 22 to 25*

4" Ductile Iron Pipe (27 Pcs 9 Pcs Wide by 3 Rows High) Length 19 Feet Width 45 Inches Height 23 Inches = 136.6 Cubic Feet Per Unit

*Unit 26*

4" and 6" Ductile Iron Pipe Mixed Unit (9 Pcs Wide by 3 Rows High) Length 19 Feet Width 45 Inches Height 25 Inches = 148.4 Cubic Feet Per Unit

[4] The calculation is based upon the following:

| | | |
|---|---|---|
| Actual charge | | 223.000 CBM |
| Pipe as remeasured | | 124.402 CBM |
| | | 98.598 CBM |
| 98.598 CBM | x $155.00 | $15,282.69 |
| AB | 10.00 | 985.98 |
| Subtotal | | $16,268.67 |
| BS | 5.00 | 492.99 |

Under the circumstances presented here, it is found that the complainant is entitled to reparation in the full amount. Initially, a complainant is not bound where the misdescription of cargo results from a shipper's (complainant's) unintended mistake or inadvertence[5] and even a showing of a lack of equitable justification on the part of a shipper (complainant) has not precluded an award where it is considered that an overcharge would operate as a windfall to that carrier.[6] Here the error leading to the misdescription by the supplier has been well-documented and confirmed by an independent measurement. In addition, the complainant has supplied other appropriate documentation to support the relief requested.[7]

One final matter requires consideration. Although complainant does not request an award of interest in addition to the overcharges on the shipment of its goods, the Commission in a recent policy statement declared an intention to grant interest on awards of reparation in cases involving the misrating of cargo and arising under section 18(b)(3) of the Act.[8] And while exceptions from this general policy will be considered on a "case-by-case basis" and this proceeding involves a misdescription rather than a misrating of cargo, it would seem that the current policy would apply here as well.

## ULTIMATE CONCLUSION

Complainant is awarded reparation in the sum of $20,774.59, with interest, computed at a rate of 12 percent, from the date of payment of the freight charges.

(S) PAUL J. FITZPATRICK
*Administrative Law Judge*

Washington, D. C.
May 16, 1980

| | | |
|---|---|---|
| HDL | 11.00 | 1,084.57 |
| CU | 18.90 | 2,928.36 |
| | | $20,774.59 |

[5] *Western Publishing Company v. Hapag-Lloyd A.G.*, Docket No. 283(I), 13 S.R.R. 16, 17 (1972).

[6] *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181, 182 (1973), *Cf. United States v. Columbia S.S. Company*, 17 F.M.C. 8, 10 (1973).

[7] For example, among other material, it submitted the commercial invoice, the bill of lading, its packing list and its supplier's packing list.

[8] *Interpretations and Statements of Policy - Interest on Awards of Reparations*, dated May 8, 1980.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-18

PORT OF NEW YORK OCEAN FREIGHT FORWARDERS' CONFERENCE (AGREEMENT NO. 8370)

## REPORT AND ORDER

*August 13, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE KANUK AND PETER N. TEIGE, *Commissioners*)

On March 27, 1980, the Commission ordered the 22 independent ocean freight forwarders participating in FMC Agreement No. 8370 to show cause why the Agreement should not be cancelled. The Commission's Order explained that no business had been conducted under the Agreement since 1958 and that if activities were resumed it would be necessary for the parties to justify the Agreement's price-fixing provisions under the *Svenska* doctrine.[1]

The Respondents were given until April 30, 1980 to respond to the Commission's Order, but have yet to do so. Instead, a request for 30 days additional time was filed on April 28, 1980. This request was found to be unjustified under section 502.102 of the Commission's Rules (46 C.F.R. 502.102) and was denied.[2] On May 22, 1980, a second extension request was submitted asking for 120 additional days. This request incorporated an intervening letter dated May 9, 1980 which stated that only 5 of the original 22 parties remained interested in the Agreement, but that 34 additional parties wished to further consider joining a New York area freight forwarder "conference." No attempt was made to dispute or explain Respondents' 26 years of inactivity or to justify the Agreement in terms of present transportation benefits. Under these circumstances, Agreement No. 8370 will be disapproved.[3]

THEREFORE, IT IS ORDERED, That Agreement No. 8370 between the 22 independent ocean freight forwarders listed in the Commission's March 27, 1980 Show Cause Order is disapproved; and

---

[1] *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), affirmed the need for proponents of anticompetitive section 15 agreements to demonstrate the existence of offsetting transportation benefits.

[2] Order of May 12, 1980.

[3] Interested ocean forwarders may submit a new agreement (and justification statement) for Commission consideration at any time.

IT IS FURTHER ORDERED, That this proceeding is terminated.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 798(I)

KOBRAND CORPORATION

*v.*

SEA-LAND SERVICE, INC.

## ORDER PARTIALLY ADOPTING DECISION OF SETTLEMENT OFFICER

*August 15, 1980*

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer Donald F. Norris awarding reparation without interest to Kobrand Corporation for violation by Sea-Land Service, Inc. of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).

In cases involving the misrating of cargo and arising under section 18(b)(3), the Commission has determined to grant interest on awards of reparation, calculated at the rate of 12 percent, and accruing from date of payment of freight charges. *Interpur, A Division of Dart Industries, Inc. v. Barber Blue Sea Line*, 22 F.M.C. 679 (1980). *See also*, Policy Statement - Interest on Awards of Reparation, 46 C.F.R. 530.12. The circumstances in this proceeding do not warrant an exception to this general policy. The award of reparation in this proceeding will therefore be with interest at 12 percent.

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

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. pay to Kobrand Corporation 12 percent interest on the award of reparation, accruing from the date of payment of freight charges; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
*Assistant Secretary*

* Commissioner Leslie L. Kanuk would not award interest. The separate opinion of Chairman Richard J. Daschbach is attached.

*Chairman Daschbach's separate opinion.*

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 CFR 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, therefore Commission review imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 798(I)

KOBRAND CORPORATION

*v.*

SEA-LAND SERVICE, INC.

## DECISION OF DONALD F. NORRIS, SETTLEMENT OFFICER[1]

*Partially Adopted August 15, 1980*

*Reparation Awarded*

By its complaint filed with the Commission on February 28, 1980, the Kobrand Corporation (Kobrand) claims $409.22 of Sea-Land Service, Inc. (Sea-Land), this amount representing an alleged overcharge arising out of Kobrand shipment transported by Sea-Land from Fos-sur-mer, France to Miami, Florida, pursuant to a bill of lading (No. 967-707359) dated either in October or November, 1978. This shipment comprised cases of "still wines" whose total weight amounted to 16960 kilograms (kgs) according to the bill of lading. Kobrand claims that this is in error, that the actual weight amounted to only 13585 kgs, and that the resulting disparity of 3.375 kilo tons entitles it to the sum claimed.

By way of reply, Sea-Land states correctly that Kobrand has the burden of proving its case inasmuch as the cargo in question has long since left Sea-Land's possession. If, however, reparation is in order Sea-Land submits that the amount of that should be $431.16, Kobrand having used an incorrect rate in structuring its claim.[2]

At the outset, Kobrand's standing to press the claim probably ought to be discussed. Kobrand appears on the bill of lading as the consignee with another firm, Miami Crown Distributors (Crown), as the notify party. Freight and charges were payable at destination. Crown in fact paid the freight which amounted to $2,166.64. Subsequently, Crown notified Kobrand of the overcharge, and the latter credited $415 to Crown's account in the form of a credit memo (#4097) dated June 29, 1979. Has Kobrand acquired standing by right of subrogation? The Settlement Officer (S.O.) will hold that it has despite the fact that any

[1] Both parties having consented to the informal procedure of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

[2] Kobrand calculated its claim on the basis of a rate of $121.25 per 1,000 kgs rather than the rate applicable at the time of shipment, $127.75 per kilo ton as per the terms and conditions of the controlling tariff, that of the Med-Gulf Freight Conference, Freight Tariff No. 3 - FMC 3, 26th revised page 136.

small, lingering doubt would be dispelled had Kobrand remitted the overcharge by check or in cash so that Crown could have enjoyed full discretion in disbursing the sum received.

The principle controlling in resolving this matter, as the S.O. views it, is that laid down in *Union Carbide Inter-America v. Norton Line*, 14 F.M.C. 263 (1971). Briefly summarized, that case stands for the proposition that what is actually shipped in any instance, not necessarily what appears upon the bill of lading as shipped, as controlling for classification and rating purposes. By analogy, this principle should extend to quantities as well.

According to the bill of lading, the shipment consisted of 675 cases of "12 x 24 oz still wines" claimed by Kobrand to have weighed 18 kgs each, and another 70 cases of "24 x 12 oz still wines" each of which is alleged to have weighed 20.5 kgs, the total amounting to 13.585 kilo tons. In support of its contentions, Kobrand has submitted as evidence (a) a supplier's invoice which is easily associable with the bill of lading; and (b) copies of twenty other bills of lading involving similar shipments of wines transported by Sea-Land and six of Sea-Land's competitors. The former serves to substantiate expressly Kobrand's assertion; and at least nine of the twenty bills, all involving the same shipper as here, either expressly or by eduction, clearly corroborate. Accordingly, reparation in the amount of $431.16 representing the discrepancy in weights (3.375 kilo tons x $127.75) is in order.[3] However, by this decision, Kobrand is directed to credit an additional $16.16 to Crown's account. So ordered.

Kobrand did not request interest. However, it is now the Commission's "intention" to "... grant interest on awards of reparations in cases involving misclassification of cargo and arising under section 18(b)(3). Exceptions from this general policy will be considered on an ad hoc basis. Moreover, interest shall ... be calculated at the rate of 12%, accruing from the date of payment of freight charges." *Interpur, A Division of Dart Industries v. Barber Blue Sea Line*, 22 F.M.C. 679, April 8, 1980.[4] The S.O. assumes that this policy is intended to extend to misdeclarations of weights as well, inasmuch as the controlling tariff here reflects the universal commercial practice of assessing rates on the basis of actual quantities of cargoes shipped. Assessments of freight on any other basis, unless clearly sanctioned by appropriate tariff, are violative of section 18(b)(3) of the Shipping Act, 1916.

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[3] No surcharges of any sort were being assessed at the time of the shipment.

[4] The language here indicates to the S.O. that it is the Commission's intention to award interest on an annual, either pro-rated or compounded as appropriate, rather than a simple basis. Recent decisions by other S.O.'s raise a question. Whatever, until advised accordingly, this S.O. will proceed on that principle, that all interest is on an annual basis which should be compounded, or pro-rated, as circumstances require.

The problem here, however, is that the person preparing the bill of lading is the cause of the error resulting in the weight discrepancy which is the foundation of the claim. Kobrand contends that Sea-Land prepared the bill of lading whereas Sea-Land asserts: "We have been advised by our office in Europe that: 1. Sea-Land provides blank bill of ladings forms 2. B/L 967-707359 (that involved here) was prepared by Kobrand 3. The B/L was issued by our agent Agena on S/L's behalf." In order to determine the commercial practice in the trade involved, the S.O. contacted employees of four of those lines whose names appeared on copies of the twenty bills of lading submitted by Kobrand. Three declared flatly that shippers prepare bills of lading issued in France. The fourth stated that this was the case "90%" of the time. From this it is reasonable to conclude that Kobrand is mistaken, and that the bill of lading was prepared by the shipper, S.T.R. Aubrey, of Chalon-sur-Saone, or its agent.

Without question, Sea-Land can be conceived of as having had the "use" of the sum awarded here since that day when Crown paid the freight. By the same token, an award of interest here, estimated to amount to some $75, if interest is compounded on an annual basis, in effect penalizes Sea-Land for a mistake for which it is innocent.

The bill of lading here, and all copies of the twenty bills submitted by Kobrand, indicate that all shipments were "house-to-house" movements in containers. This means that the shipper is responsible for "stuffing" or loading the container, and the consignee for "stripping" or discharging it. The carriers involved saw nothing else but the containers and paper purporting to state what was in them. Further, the Sea-Land bill of lading and some of the twenty submitted by Kobrand are claused "shippers load and count" and in Sea-Land's case, "stow".

There are equities involved here, or so it seems to the S.O. Sea-Land is not at fault for the discrepancy, and probably neither is Kobrand given the fact that S.T.R. Aubrey was the shipper. Whatever, in the circumstances, the S.O. cannot see any reason why interest should be awarded. So ordered.

(S) DONALD F. NORRIS
*Settlement Officer*

May 30, 1980

# FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[DOCKET NO. 80-36; GENERAL ORDER 46]

PART 520 - EXEMPTION OF HUSBANDING AGREEMENTS

*August 15, 1980*

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission hereby exempts certain husbanding agreements from the filing and approval requirements of section 15 of the Shipping Act, 1916.

DATE: Effective August 21, 1980

SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission solicited comment on a proposed rulemaking by notice filed in the *Federal Register* on June 4, 1980 (45 F.R. 37703) to exempt certain husbanding agreements between persons subject to the Shipping Act, 1916, from the filing and approval requirements of section 15 of the Shipping Act, 1916, (46 U.S.C. 814). Husbanding agreements generally fall into two categories. The first consists of those agreements that deal with routine vessel operating activities in port such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operators; arranging bunkers, stores, repairs, water, garbage disposal; assisting with passengers and crew matters; and related services. The second consists of those agreements which in addition to the foregoing, also cover agency matters involving the solicitation and booking of cargoes and signing of contracts of affreightment and bills of lading.

Section 35 of the Shipping Act, 1916, (46 U.S.C. 833a) provides that the Commission, upon application or on its own motion, may by order or rule exempt any class of agreement between persons subject to the Act, or any specified activity of such persons from any requirement of the Act, where it finds that such exemption will not impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce.

The first category of husbanding agreements has such minimal competitive impact that continued regulation of these agreements through

the section 15 review process serves no substantive purpose. The delay involved in the regulatory process is not offset by any corresponding regulatory benefit under the Act, provided that such agreements do not preclude the agents from servicing other carriers. These agreements are rarely protested, nor are they frequently made the subject of formal Commission proceedings to determine their approvability under the standards of the Shipping Act. Exemption from the filing and approval requirements of section 15 is warranted for this category of agreements as it will present no impairment to the Commission's effective regulation of the parties' activities, nor will it be unjustly discriminatory or detrimental to commerce. The exemption will not confer antitrust immunity; however section 15 approval consideration will remain available to parties requesting it.

The second category of husbanding agreements has a potential for competitive impact which requires a thorough analysis of the relationships between the parties involved. This category is presently under review for consideration for possible exemption in a separate proceeding.

The comments support the exemption of husbanding agreements from the filing and approval requirements of section 15 of the Shipping Act.

The Commission has adopted one suggested change in the requirement that exempted husbanding agreements be available for public inspection at the agent's office. After considering what is fair to the parties affected by the rule, no reason was found to now require the agreement, including rate schedules, to be made public. Thus, exempted agreements shall be kept by the parties and shall be available for the purpose of inspection by the Commission only.

The same comment also suggested that all agency agreements be exempted from the filing and approval requirements of section 15 with certain exceptions. The Commission is limited in affording relief to the scope of its published proposed rule. Therefore, we will treat this comment as a suggestion for further study.

NOW, THEREFORE, pursuant to sections 15, 35, and 43 of the Shipping Act, 1916, (46 U.S.C. 814, 833a, and 841a), and section 4 of the Administrative Procedure Act, (5 U.S.C. 553), IT IS ORDERED, That, effective upon publication in the *Federal Register*, Title 46 C.F.R. is hereby amended by the addition of Part 520 as follows:

## PART 520 - EXEMPTION OF HUSBANDING AGREEMENTS

Sec.

520.1 Purpose
520.2 Definition
520.3 Exemption
520.4 Termination of Approved Husbanding Agreements

520.5 Compliance with the Filing and Approval Requirements of Section 15

AUTHORITY: Section 15, 35, 43; 46 U.S.C. 814, 833a, and 841a

520.1 *Purpose*

(a) Section 15 of the Shipping Act, 1916, requires that certain agreements between common carriers by water and other persons subject to the Act be filed with and approved by the Commission prior to implementation. Section 35 of the Act, as pertinent in this context, provides that the Commission may by order or rule exempt any class of agreements between persons subject to the Act where it finds that such exemption will not impair effective regulation by the Commission, be unjustly discriminatory, or detrimental to commerce.

(b) In the interest of minimizing unnecessary delay in the implementation of routine husbanding agreements between persons subject to the Act and to avoid the cost of unnecessary regulation, the Commission is exempting certain husbanding agreements from the filing and approval requirements of section 15.

520.2 *Definition*

As used in this part, husbanding agreements are agreements between a common carrier by water and another person subject to the Shipping Act, 1916, through which the carrier contracts with an agent to handle routine vessel operating activities in port, such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, and linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operators; dealing with passenger and crew matters; and providing similar services related to the above activities. The term does *not* include agreements which provide for the solicitation or booking of cargoes, signing contracts or bills of lading and other related matters, nor does it include agreements that prohibit the agent from entering into similar agreements with other carriers.

520.3 *Exemptions*

Husbanding agreements between persons subject to the Act are hereby exempted from the filing and approval requirements of section 15. Exempted agreements shall be kept by the parties and shall be available for inspection by the Commission during the term of the agreement and two years thereafter.

520.4 *Termination of Approved Husbanding Agreements*

Husbanding agreements which have received section 15 approval shall continue to be approved for the duration of their term or until terminated by the parties.

520.5 *Compliance with the Filing and Approval Requirements of Section 15*

Notwithstanding the provisions of this part, persons who desire approval of husbanding agreements may continue to submit such agreements to the Commission for section 15 consideration in accordance with ordinary filing procedures.

By the Commission.

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-7

THE MENNEN CO.

*v.*

MITSUI O.S.K. LINES

## PARTIAL ADOPTION OF INITIAL DECISION

*August 21, 1980*

This proceeding is before the Commission upon Mitsui O.S.K. Lines' Exceptions to the Initial Decision of Chief Administrative Law Judge John E. Cograve. The Presiding Officer found that Mitsui had violated section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817), and awarded the Mennen Co. reparations "in the amount of $3,005.12 with interest at the rate of 12% from the date of shipment."

Mitsui excepts only to the award of interest insofar as it is calculated to accrue from date of shipment. Mitsui cites the Commission's policy that interest shall accrue from date of payment of freight charges, and requests that the award of interest in this proceeding reflect that policy. *See Interpur, A Division of Dart Industries, Inc. v. Barber Blue Sea Line,* 22 F.M.C. 679 (1980); *see also,* Policy Statement - Interest on Awards of Reparation, 46 C.F.R. 530.12. Mennen did not respond to Mitsui's Exceptions.

The Commission agrees that its policy on accrual of interest should be applied here. The award of interest on the reparation will be amended to accrue from date of payment of freight charges.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted except as indicated; and

IT IS FURTHER ORDERED, That Mitsui O.S.K. Lines pay the Mennen Co. 12 percent interest on the award of reparation, accruing from date of payment of freight charges; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-7

THE MENNEN CO.

*v.*

MITSUI. O.S.K. LINES

Respondent Mitsui found to have violated section 18(b)(3) of the Shipping Act, 1916. Reparation awarded.

*M. Robert Livesey* for complainant.

*George E. Dalton* for respondent.

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

*Partially Adopted August 21, 1980*

The Mennen Company alleges that Mitsui has violated section 18(b)(3) of the Shipping Act, 1916, on two shipments of Mennen's products. Mennen requested that the case be tried under the shortened procedure provided in Rules 181 to 187 of the Commission's Rules of Practice and Procedure and Mitsui acquiesced.

The first shipment which complainant says consisted of 2,069 cases of Shaving Cream, Hair Tonic and Baby Lotion was described on the bill of lading as:

> Consumer Commodities ORM-D (Toilet Preparations) Toilet Preparations

The second shipment alleged to consist of 1,960 cases of Hair Tonic and Baby Bath was described on the bill of lading as:

> 687 Cases Consumer Commodities ORM-D (Hair Tonic); 1263 Cases Toilet Preparation

On this shipment the 687 cases of Hair Tonic were as complainant admits correctly rated as Hair Tonic. With the exception of the 687 cases of hair Tonic, all the commodities were classified by Mitsui as "Toilet Preparations N.O.S." and rated at $167.00 per cubic meter plus an 8% currency adjustment factor. Under this rate complainant paid a total of $9,875.26 in freight charges.

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

At the time of the shipments Mitsui's tariff contained the following classifications.[2]

Item No. 553.0010.40 Shaving Cream: $94.00 W/M
Item No. 553.0020.60 Hair Tonic: $102.00 W/M
Item No. 553.0035.48 Baby Lotion: $121.00 W/M
Item No. 554.1000.00 Soap N.O.S.: $120.00 W/M

In support of the complaint, Mennen has submitted the packing lists for the two shipments to show that the commodities rated as Toilet Preparations N.O.S. were actually:

1584 cases Hair Tonic--31.403 cu. m., 3564 lbs.
203 cases Baby Lotion--2.937 cu. m., 2760 lbs.
75 cases Shaving Cream--1.076 cu. m., 1106 lbs.
180 cases Shaving Cream--1.019 cu. m., 900 lbs.
1273 cases Baby Bath--10.817 cu. m., 11457 lbs.

Mennen argues that the commodities in the two shipments should have been rated as follows:

> 255 cases of Shaving Cream (180 cases of brushless shave and 75 cases of sof. stroke regular): 2.095 cu. m. at $94.00 per cu. m. plus 8% CAF = 212.68 under Item No. 553.0010.40 (Tariff No. 27 p. 367)
>
> 1584 cases Hair Tonic, 31.403 cu. m. at $102.00 per cu. m. plus 8% CAF = 3459.36 under Item No. 553.0020.60 (Tariff 27, p. 367)[3]
>
> 230 cases Baby Lotion, FAS value over $300/2000 lbs. 2.937 cu.m. at $121.00 per cu. m. plus 8% CAF = $383.81 under Item No. 553.0038.48 (Tariff 27 p. 368)

Mennen claims that the correct total for the above is $6,852.14 and claims reparation in the amount of $3,005.12.

Mitsui moves to dismiss[4] Mennen's complaint on two grounds. First, Mitsui contends that the use of the classification Toilet Preparations N.O.S. was proper because it was based upon Mennen's own description of the commodities shipped. Second Mitsui urges that Mennen has not met the heavy burden of proof required by the Commission in cases such as this.

The first argument made by Mitsui was disposed of in the very case cited by Mitsui in support of its second argument. In *Western Publishing Co. v. Hapag-Lloyd A.G.*, 13 S.R.R. 16 (1972), the Commission expressly held that a shipper is entitled to reparation for overcharges if he can show what actually moved notwithstanding an incorrect description which the shipper or forwarder may have placed on the bill of lading.

[2] The applicable tariff is the Far East Conference Tariff No. 27 (FMC No. 10).

[3] The 687 cases of Hair Tonic which moved in the second shipment were correctly rated under Item No. 553.0020.60.

[4] Although entitled "Motion to Dismiss," Mitsui asks that the pleading be considered its memorandum of law under Rule 183.

The "heavy burden of proof" referred to by Mitsui and imposed by the Commission has subsequently been explained by the Commission as referring "to the shipper's difficulty in obtaining the necessary evidence rather than the weight to be given to such evidence." *Pan American Health Organization v. Moore McCormack Lines Inc.*, Docket No. 387(I) FMC Report on Remand, September 12, 1979.

In support of its charge that Mennen has failed to sustain its burden of proof, Mitsui refers only to the bills of lading and the export declarations covering the two shipments and which were attached to the complaint. As already noted except for 687 cases of Hair Tonic, all the articles were described as "Toilet Preparations." The export declarations variously describe the articles shipped as "Shaving Preparation, Hair Preparation Cosmetic creams, lotions and Bath Preparations." Mitsui claims that this only confuses matters and that on the export declarations the articles "are not accurately described."

Mitsui makes no mention on the "packing lists" and "sales literature" which were also attached to the complaint. The packing lists describe the articles as "Mennen Brushless Shave," "Mennen Soft Stroke Reg.," "Mennen Hair Tonic," "Mennen Baby Lotion," "Mennen Hair Groom," and "Mennen Baby Bath." The sales literature demonstrates that these descriptions coincide with the items Shaving Cream, Hair Tonic, Baby Lotion and Soap N.O.S. cited above and appearing in Mitsui's tariff at the time of shipment. In a great many previous cases the Commission has accepted just such evidence as sustaining the required burden of proof. See *e.g., Western Publishing Company v. Hapag Lloyd A.G., supra; Abbott Laboratories v. Alcoa S.S. Company*, 18 F.M.C. 376 (1975); *Union Carbide v. Venezuelan Line*, 17 F.M.C. 185 (1974).

On the basis of the foregoing I conclude the complainant has proved that respondent Mitsui has violated section 18(b)(3) of the Shipping Act, 1916, by improperly classifying the shipments under consideration here. Complainant Mennen is awarded reparation in the amount of $3,005.12 with interest at the rate of 12% from the date of shipment.

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

Washington, D. C.
May 27, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 79-94

ALL-FREIGHT PACKERS & FORWARDERS, INC.

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE APPLICATION

## ORDER ADOPTING INITIAL DECISION

*August 26, 1980*

This proceeding was initiated by Order of Investigation and Hearing served October 29, 1979, to determine:

1. Whether All-Freight Packers and Forwarders, Inc. violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;
2. Whether civil penalties should be assessed against All-Freight Packers & Forwarders, Inc., pursuant to 46 U.S.C. 831(e), for violations of the Shipping Act, 1916, and, if so, the amount of any such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty;
3. Whether All-Freight Packers & Forwarders, Inc. is fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder.

On May 16, 1980, Administrative Law Judge Joseph N. Ingolia issued an Initial Decision finding that All-Freight Packers and Forwarders engaged in forwarding without a license, but that the applicant was nevertheless fit, willing and able to carry on the business of forwarding. Exceptions to the Initial Decision were filed by All-Freight, to which the Commission's Bureau of Hearing Counsel, replied.

### THE INITIAL DECISION

The Initial Decision first makes certain findings of fact concerning the three issues raised in the Order, and then concludes that: (1) All-Freight engaged in six instances of forwarding without a license; (2) a civil penalty of $5,000 be assessed for these violations; (3) All-Freight is nevertheless fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder; and (4) within 90 days of the Commission's adoption of the Initial Decision, All-Freight must file a statement with the Commission,

affirming that it established reasonable accounting procedures for recording its ocean freight forwarding transactions.

With respect to the penalty issue, the Presiding Officer advises that the $5,000 amount reflects the fact that the violations were unintentional in nature, few in number, that All-Freight received no compensation for its unlawful forwarding, that All-Freight cooperated fully during the investigation and took steps to correct the situation once it learned it was acting improperly. The Presiding Officer further points out that this penalty is sufficient to remind freight forwarders that they act in a fiduciary capacity and must maintain a high standard of conduct which requires knowledge of and adherence to Commission rules and policies.*

When considering the fitness issue, the Presiding Officer takes into account numerous mitigating factors, to wit, that: the applicant has an untarnished business reputation and an unblemished past; there were few violations; there was no attempt to conspire with others to deceive or mislead the Commission; the violations did not involve acts of moral turpitude or false statements or result in unjust enrichment. In short, the Presiding Officer concludes that there is nothing to indicate that All-Freight would be deficient in the operation of freight forwarding or should be deprived of an opportunity to engage in such business.

## POSITION OF THE PARTIES

All-Freight restricts its Exceptions to a challenge of the amount of penalty assessed in the Initial Decision. It urges the Commission to reject the finding that a $5,000 penalty be assessed and, instead, "refer the matters of penalties to the Commission's Office of General Counsel for assessment of civil penalties consistent with mitigating factors relevant to this proceeding. . . ." Besides recapitulating the mitigating factors cited by the Presiding Officer, All-Freight submits that its financial condition and losses already suffered by the delay in processing its license application also be considered.

In its Reply to All-Freight's Exceptions, Hearing Counsel points out that the Commission's rules and regulations provide that "assessment of civil penalties may be made only in a formal [section 22] proceeding . . . [and that] . . . Hearing Counsel shall participate as attorney for the Commission . . . entering into stipulations and settlements." (46 C.F.R. 505.3). Hearing Counsel also notes that *formal assessment proceedings* against All-Freight were instituted by the Commission pursuant to sections 22 and 32 of the Shipping Act, 1916, and that All-Freight's

* *Harry D. Kaufman D/B/A International Shipping Co. of N.Y., Independent Ocean Freight Forwarder License*, 16 F.M.C. 256, 271 (1973); *Dixie Forwarding Co., Inc., Application for License*, 8 F.M.C. 109 (1964).

request to refer this matter to General Counsel for negotiations is therefore inappropriate.

Moreover, Hearing Counsel asserts that the mitigating factors cited by All-Freight in its Exceptions were considered by the Presiding Officer in determining the $5,000 penalty amount. Hence, Hearing Counsel urges the Commission to reject the Exceptions and to adopt the Initial Decision.

## DISCUSSION AND CONCLUSION

The Commission, after a thorough review of the record in this proceeding, finds that the conclusions reached in the Initial Decision are proper and well founded. The contentions advanced by All-Freight regarding the reasonableness of a $5,000 civil penalty merely reargue matters already considered and correctly disposed of by the Presiding Officer. Accordingly, payment of the recommended amount will be required.

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

IT IS FURTHER ORDERED, That the Exceptions of All-Freight Packers & Forwarders, Inc. are denied; and

IT IS FURTHER ORDERED, That within thirty (30) days of the date of this Order All-Freight Packers & Forwarders, Inc., contact the General Counsel of the Federal Maritime Commission to arrange for payment of the assessed penalty; and

IT IS FURTHER ORDERED, That within ninety (90) days of the Commission's adoption of the Initial Decision, All-Freight Packers & Forwarders, Inc., file a statement with the Commission, affirming that it has established reasonable accounting procedures for recording its ocean freight forwarding transactions and describing in sufficient detail the nature and operation of those procedures, including but not limited to the nature of original books of entry, retrieval capability, and the availability of financial statements.

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

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 79-94
## ALL-FREIGHT PACKERS & FORWARDERS, INC.
## INDEPENDENT OCEAN FREIGHT FORWARDER
## LICENSE APPLICATION

Held:

1. All-Freight violated section 44(a) of the Shipping Act by engaging in the business of ocean freight forwarding without a license, in at least six separate instances.
2. Where All-Freight's principal officer believed one could forward ocean freight without a license if no "compensation" were received; and where it stopped forwarding ocean freight after being advised it was illegal to do so, except in one or two inadvertent instances; and where, after being advised it was illegal to forward ocean freight without a license it instructed its employees not to do so, and referred its customers to other licensed ocean freight forwarders, it is held that a penalty of $5,000 shall be assessed against All-Freight under section 32(e) of the Shipping Act.
3. Where the applicant applied for an ocean freight forwarder's license and cooperated fully with the Commission's investigation into its activities, and in light of the facts set forth in paragraph 2 above, it is held that All-Freight is fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder; it is further held that within 90 days of Commission adoption of this decision, All-Freight file a statement with the Commission describing its accounting procedures regarding its ocean freight forwarding activities.

*Carlos Rodriguez* for respondent, All-Freight Packers & Forwarders, Inc.

*John Robert Ewers* and *Joseph B. Slunt* as Hearing Counsel.

## INITIAL DECISION[1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

*Adopted August 26, 1980*

This proceeding was instituted by a Commission Order of Investigation and Hearing issued October 29, 1979. The issues set forth in the Commission's Order and under consideration in this proceeding are:

1. Whether All-Freight Packers & Forwarders, Inc. violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;
2. Whether civil penalties should be assessed against All-Freight Packers & Forwarders, Inc., pursuant to 46 U.S.C. 831(e), for violations of the Shipping Act, 1916, and, if so, the amount of

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

any such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty;

3. Whether All-Freight Packers & Forwarders, Inc. is fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder.

In accordance with the Commission's Order, the parties submitted original and reply memorandums of law, together with several affidavits. They later agreed that no oral testimony or cross-examination was necessary and that the case should stand submitted on the basis of the written material already in the record. The various documents in the record and the respective exhibit number assigned to each are as follows:

| Document | Exhibit No. |
|---|---|
| Affidavit of Carlos D. Niemeyer | 1 |
| Affidavit of Robert-James Klapouchy | 2 |
| Affidavit of Eleanor V. Navickas (12/4/79) | 3 |
| Affidavit of William M. Adams | 4 |
| Affidavit of Eleanor V. Navickas (1/29/80) | 5 |

## FINDINGS OF FACT

1. On June 14, 1978, Mr. William M. Adams, President of All-Freight Packers & Forwarders, Inc. (All-Freight) voluntarily telephoned the Commission's San Francisco office. He asked for information about how he might acquire an independent ocean freight forwarder license. Mr. Adams stated he had forwarded some ocean shipments and wanted a license so he could collect compensation on future shipments. (Ex. 1, par.'s 2 & 3; Ex. 4, par. 3.)

2. At the time Mr. Adams telephoned the Commission's San Francisco office, he and All-Freight believed it was not improper to forward without a license as long as compensation was not collected. (Ex. 4, par. 3.)

3. Mr. Adams was informed that section 44, Shipping Act, 1916, and General Order 4 require a license before forwarding any ocean shipment, and he was advised not to forward any more shipments by water until such time as he was licensed. (Ex. 1, par. 4.)

4. By letter dated June 14, 1978, Mr. Adams was sent a Form FMC-18 (Application for a License as an Independent Ocean Freight Forwarder), copies of General Order 4, and sections 1 and 44 of the Shipping Act, 1916. The letter specially directed Mr. Adams to the

need to obtain a license before engaging in the business of forwarding. (Ex. 1, par. 5.)

5. On June 21, 1978, Mr. Adams was interviewed by an investigator in the Commission's Los Angeles Office, Pacific District. At that time all records were made available to the investigator and Mr. Adams fully cooperated. Mr. Adams stated All-Freight had only recently applied for a freight forwarder's license in order to accommodate a few requests from customers for ocean freight shipments and that All-Freight forwarded two ocean freight shipments, but did not collect forwarding compensation from the ocean carriers. (Ex. 3, par.'s 2, 4; Ex. 4, par. 6.)

6. The Commission's investigator verified what had transpired with respect to the two shipments by contacting third parties and learned that All-Freight has not received any brokerage fees from the two shipments. (Ex. 3, par.'s 5 & 6.)

7. Sometime between July 1, 1978, and October 1978, All-Freight filed its application for an independent ocean freight forwarder license.[2] By letter dated November 22, 1978, the Commission's Office of Freight Forwarders acknowledged receipt of the application and advised All-Freight that if it engaged in freight forwarding before receiving its license, it would be subject to penalties provided by law and might prejudice the issuance of its license. (Ex. 2, par. 4; Ex. 4, par. 21.)

8. In July of 1978, All-Freight advised its employees that they should not offer ocean freight forwarding services until the company received its license from the Commission. (Ex. 4, par. 10.)

9. Beginning in the summer of 1978, All-Freight advised some of its customers that it was not licensed to engage in ocean freight forwarding and referred them to licensed ocean freight forwarders such as API Maritime Services, Inc. (API); Senderex Cargo, Inc. (Senderex); and Amerford International Corporation (Amerford). (Ex. 4, par.'s 9 & 10; Ex. 5, par. 6.)

10. During the period from July 14, 1978, until October 29, 1979, All-Freight has handled packing for at least twenty ocean export shipments, all of which were referred to licensed forwarders. (Ex. 4, par. 17.)

11. On January 4, 1979, the Commission investigator again interviewed Mr. Adams in All-Freight's offices. Files dating back to the company's inception were provided. It was found that no ocean shipping journals were maintained by All-Freight. A review of its sales invoices indicated that in addition to the two ocean shipments described

[2] Mr. Adams affirms that the application was filed on July 1, 1978, at Washington, D.C. (Ex. 4, par. 21.) The affidavit of the Commission's investigator states the application was received in the Pacific District's San Francisco office on October 10, 1978. (Ex. 5, par. 13.) Since letters of recommendation were sent to the San Francisco office in September, it would appear the application was filed before October of 1978. Mr. Adams also affirmed that the Pacific District Office told him the application had been "sitting on someone's desk."

in paragraph 6, there were seven other ocean shipments as set forth below:

| All-Freight Invoice Date | Shipper | Carrier, Vessel and Bill of Lading |
|---|---|---|
| 1. 01/10/79 | Kaynar Mfg. Co. | Johnson Scanstar, "Antonio Johnson," V-40E, B/L No. 530176 |
| 2. 11/15/78 | Globe Union | APL, "President Fillmore," V-73, B/L No. 053347 |
| 3. 07/14/78 | Plasticos Modernos | Delta Line, "Delta Africa," B/L No. 7 |
| 4. 06/09/78 | Abdul Al Alami | Maersk Line (B/L unavailable) |
| 5. 04/24/78 | North Supply Co. | Matson Line, "Transoneida," V-35, B/L No. T-42880 |
| 6. 02/23/78 | Sun Marketing | Hoegh Line, "Hoegh Elite," V-31, B/L No. LA-16 |
| 7. 10/24/77 | Kaynar Mfg. Co. | Johnson Scanstar, "San Francisco," V-40E, B/L No. 430172 |

(Ex. 3, par. 9.)

12. All-Freight did not receive any forwarding compensation with respect to any of the above shipments, nor did it receive any brokerage fees. (Ex. 3, par. 16; Ex. 4, par. 20.)

13. The bill of lading relating to the 1979 Kaynar Mfg. Co. shipment does not list anyone as the forwarding agent, although the Commission's investigator affirms that the Department of Commerce Shipper's Export Declaration lists All-Freight as "agent of exporters (Forwarding Agent)." The signature "J. S. JETTE" appears as the "Duly authorized officer or employee of exporter or named forwarding agent for All-Freight Packers and Forwarders, Inc." Mr. Adams indicates he does not recall All-Freight performing any freight forwarding services and that since the time of the shipment Kaynar had been using Amerford for over a year, and he believed "the only services besides packing provided by us had to do with the labeling and documentation relating to the shipping of hazardous cargo . . ." (Ex. 4, par.'s 13 & 15; Ex. 5, par. 11.)

14. The bill of lading relating to the Globe Union shipment indicates that All-Freight was the forwarding agent. All-Freight does not dispute this fact, but avers the shipment was unintentional, isolated and inadvertent. (Ex. 3, par. 10; Ex. 4, par.'s 13, 15 & 16.)

15. The bill of lading relating to the Plasticos Modernos shipment lists Amerford as the forwarding agent. (Ex. 3, par. 10.)

16. The bill of lading relating to the 1977 shipment of Kaynar Mfg. Co. lists Amerford as the forwarding agent. (Ex. 3, par. 10.)

17. All-Freight is a California corporation, formed on October 15, 1976, with principal offices at Anaheim, California. It is a packer for firms and individuals who are involved in the transportation of goods in export and domestic trades. (Ex. 4, par. 1.)

18. All-Freight has been an air freight forwarder (IATA) since May 22, 1978. (Ex. 4, par. 2.)

19. IATA agents are required to secure a license if they collect compensation for their services. A person may forward air freight without a license if no compensation is collected. (Ex. 4, par.'s 2 & 3.)

20. All-Freight employs twelve persons and nets less than $500 per month. (Ex. 4, par. 23.)

21. William M. Adams, the qualifying officer, after graduating from Brigham Young University, worked in the transportation industry as follows:

> 1971 - Began working for Airborne Freight Corporation.
>
> 1971-1972 - Sales Representative for International Department.
>
> 1972-1974 - Salesman for Air-Sea Forwarders. Promoted to Assistant General Manager working closely with both air and ocean department coordinating shipments and preparing documents for customers.
>
> 1974-1976 - Vice-President of Marketing for Airport Packers & Forwarders. Supervised air and ocean sales and operations. Reviewed special project documentation, consular work.
>
> 1976 to Present - President of All-Freight Packers & Forwarders. Directed all operations and sales activities for the company. Works closely with operations manager in reviewing documents and coordinating shipments for various customers.

22. From early 1979 through June 6, 1979, Mr. Adams had several conversations with Commission employees in the Office of Freight Forwarders. On May 14, 1979, he was told there were "no serious" problems with the application. However, on June 5, 1979, he was told the application would be recommended for denial. (Ex. 4, par. 21(4).)

23. By letter dated July 12, 1979, Mr. Adams was informed that the Commission intended to deny the application, whereupon he timely requested a hearing on behalf of All-Freight.

## ULTIMATE FINDINGS OF FACT

24. All-Freight violated section 44(a) of the Shipping Act, 1916, by forwarding ocean freight without a license, albeit without compensation.

25. Prior to being informed that one could not forward ocean freight without a license from the Commission, All-Freight's qualifying officer believed that, as in the case of air freight, one could forward ocean freight without a license if he did not receive compensation for it.

26. After being advised by the Commission that it was unlawful to forward ocean freight without a license, All-Freight advised its employees not to do so and, after informing some of its customers that it (All-Freight) could not forward ocean freight, referred them to other licensed freight forwarders in at least twenty instances. In one or two instances, All-Freight did list itself as freight forwarder or perform an

isolated freight forwarder activity after being advised not to do so, but these instances were inadvertent, unintentional oversights, not willful acts meant to bypass the Commission, the law or the regulations promulgated under it.

27. A civil penalty of $5,000 assessed under sections 32(a) and (e) of the Shipping Act is proper and adequate as it recognizes the lack of willfulness or intentional disregard of the law and regulations, and at the same time is deterrent enough to indicate that freight forwarders act in a fiduciary capacity and must maintain high standard of conduct which requires knowledge of and adherence to the Commission's regulations and policies.

28. All-Freight is fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder.

## DISCUSSION

### ISSUE NO. 1 - VIOLATION OF SECTION 44(A)

Section 44(a) of the Shipping Act, 1916, provides:

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

This issue is basically a factual one and there is no dispute in the record regarding the fact that All-Freight did carry on the business of forwarding without having obtained a license to do so from the Commission. While the parties disagree as to the exact number of times the unlicensed forwarding occurred, even if All-Freight were given the benefit of the doubt in each of the disputed instances, it still would have violated section 44(a) in the following six instances:

Schedule of Shipments

| | Date | Shipper | Carrier, Vessel and Bill of Lading |
|---|---|---|---|
| 1. | 11/15/77 | Sun Marketing | Hoegh Line, "Roech Orchid," V-22, B/L No. LA-7 |
| 2. | 12/05/77 | Sun Marketing | Hoegh Line, "Not Legible," V-17, B/L No. LA-12 |
| 3. | 11/15/78 | Globe Union | APL, "President Fillmore," V-73, B/L No. 053347 |
| 4. | 06/09/78 | Abdul Al Alami | Maersk Line (B/L unavailable) |
| 5. | 04/24/78 | North Supply Co. | Matson Line, "Transoneida," V-35, B/L No. T-42880 |
| 6. | 02/23/78 | Sun Marketing | Hoegh Line, "Hoegh Elite," V-31, B/L No. LA-16 |

It is held that All-Freight violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

ISSUE NO. 2 - CIVIL PENALTIES

Section 32(a) of the Shipping Act provides in pertinent part that:

> . . . whoever violates . . . section 44 of this Act . . . shall be subject to a civil penalty not to exceed $5,000 for each such violation.

Further, section 32(e) of the Shipping Act states:

> . . . the Commission shall have authority to assess or compromise all civil penalties provided in this Act.

Since it has already been determined that All-Freight has violated section 44(a) of the Shipping Act by engaging in the business of freight forwarding without a license, what remains to be determined is the amount of civil penalty to be assessed under the above sections. Hearing Counsel takes the view that:

> A penalty of $40,000, $5,000 for each of the eight violations of section 44(a) could be assessed against All-Freight. In consideration of the limited amount of fees collected by All-Freight and the fact that it nets less than $500 per month (Respondent's Memorandum at 13), we submit that . . . a $5,000 penalty is appropriate.

In answer, the respondent asserts that a lesser penalty, or none at all should be assessed because it was unaware it was unlawful to forward ocean freight without a license if one did not collect compensation, and because it has already been sufficiently punished because of "the inordinate delay" in processing its application. Hearing Counsel replies:

> . . . the delay in the processing of respondent's application has been a direct result of the applicant's own activities. If All-Freight had not engaged in carrying on the business of forwarding without a license, its application would have been processed in the normal time. Any delay which resulted from the respondent's activities should not be a factor in reducing the amount of a civil penalty.

And further:

> Likewise, respondent's claim that it did not realize that its activities were unlawful . . . should not serve to reduce the proposed penalty as Mr. Adams has several years of experience in the forwarding industry, and All-Freight continued to carry on the business of forwarding after it was warned not to do so.

It is clear that given a statute providing for a civil penalty of $5,000 for *each violation*, and given the fact that the word "each" refers to individual transactions (here, it is each shipment), there is a wide area of discretion as to the amount of the penalty which might be assessed

and as to the factors which one should consider. In essence, it is an area one might traverse ranging from a purely unintentional, technical violation which damages or unjustly enriches no one, to a willful and flagrant illegal act, intended to unjustly enrich the person perpetrating it to the detriment of others. Here, the record will not support a holding that the violations which occurred were willful or deliberate. Rather, they support a holding that All-Freight (Mr. Adams) forwarded ocean freight without compensation and believed the lack of compensation obviated the need for a license.[3] Further, he voluntarily applied for a license and, once he was advised by the Commission that he was in error in forwarding freight without a license, he took steps to correct the error.[4] Also, the record is devoid of any unjust enrichment from any service, directly or indirectly related to the unlicensed ocean forwarding and there is no falsification or duplication of records.

As to Hearing Counsel's averment that the delay in this case resulted from the fact the respondent forwarded without a license, there is no doubt that a portion of the period June 1, 1978, to July 12, 1979, was taken up in the investigation of that wrongdoing. However, one must read the record myopically to conclude that the delay was due entirely to the respondent.

On the other hand, the respondent avers that it has been sufficiently punished because of the "inordinate" delay in processing its application. A portion of that delay was attributable to its own actions, and in any event the record contains no evidence of how any delay would or should monetarily affect the amount of the penalty.[5] For example, it would seem appropriate to show the exact period of delay which was "inordinate" and what financial damage was suffered during that period of time. In short, the mere fact that there was some delay, inordinate or not, should not of itself serve to reduce what otherwise would be a proper civil penalty.

The respondent argues further that the civil penalty should be less than $5,000 because "Hearing Counsel's proposed sanction represents All-Freight's net profit for a whole year of operation." However true and unfortunate that fact may be, standing alone it cannot be allowed to govern the amount of civil penalty to be assessed. The record contains no evidence as to why All-Freight's net profit is low in the

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[3] This argument was advanced in *Concordia International Forwarding Corporation - Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, Docket No. 78-34, served December 18, 1978, (21 F.M.C. 587) and rejected by the Commission which bottomed its decision on differentiating the word "compensation" from the word "consideration."

[4] Findings of Fact 8, 9, 10, where the respondent advised his employees not to offer ocean freight services until licensing was obtained and where he referred clients to other licensed freight forwarders pending his own receipt of a license.

[5] The citation of *Fabio A. Ruiz D/B/A Far Express Company*, 15 F.M.C. 242, 247, relying on *Independent Ocean Freight Forwarder License Application - Guy G. Sorrentino*, 15 F.M.C. 127, is not helpful since it lacks specificity and refers to the general question of fitness.

year in question. Even if it did, the correlation between net profit and the amount of penalty is vague. If there is a true inability to pay as opposed to a low net profit, that aspect could more properly have been addressed initially with Hearing Counsel in settlement negotiations, and even now may still be raised if it has any validity. So here the mere assertion that yearly net profit is less than the penalty to be assessed does not by virtue of the assertion itself warrant any real consideration.

In his brief, Hearing Counsel, in support of his argument, states that, "The shipments were forwarded in order to hold on to clients that the respondent had no right to serve." The record does not support such a far-reaching conclusion. It is based on assumption rather than fact and is elaborated upon in a later portion of this opinion. Also, Hearing Counsel's argument that the respondent's claim that it did not realize its activities were unlawful should not serve to reduce the proposed penalty is not valid. Certainly, a knowing violation is more abhorrent than one which is unintentional, and although both are nonetheless violations, the equal application of a penalty to both would be erroneous. Further, the fact that Mr. Adams had some experience as an ocean freight forwarder does not serve to establish that he *knew* he had to be licensed before forwarding ocean freight without compensation. That he should have known is indisputable, that he did know is debatable. Finally, as to carrying on the business of forwarding after being warned not to do so, there appears to be one inadvertent instance (Globe Union) where a shipment was made after the warning was given, two others where some incidental freight forwarding *may* have occurred after the warning was given, and over 20 others where shipments were referred to licensed forwarders. Mr. Adams says the one incident was inadvertent, and since there is nothing in the record to refute that statement, it has been so held as a fact. The other instances where some freight forwarding services may have been performed were also inadvertent.

So here, while we do not agree with all of his reasoning, we do agree with Hearing Counsel that a civil penalty should be assessed against All-Freight and that the amount of that penalty, taking into consideration the factors in mitigation, should be $5,000. That figure gives adequate consideration to the unintentional nature of the violation, the fact that there was no deviousness or unjust enrichment, that the number of violations was not great and that All-Freight did cooperate fully during the investigation and took steps to correct the situation once it learned it was acting improperly. On the other hand, it is a deterrent enough to signal that freight forwarders act in a fiduciary capacity and that they must maintain a high standard of conduct which

requires knowledge of and adherence to Commission rules and policies.[6]

ISSUE NO. 3 - APPLICANT'S FITNESS

Section 44(b) of the Shipping Act provides in pertinent part:

> A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied.

Hearing Counsel in making his argument concludes that:

> . . . in view of the clear prohibition of section 44(a) not to forward ocean shipments without a license and the applicant's disregard of warnings from the Commission not to do so, All-Freight does not qualify for licensing.

The conclusion is erroneous. It is based on the applicant's "disregard of warnings" from the Commission, a fact which has no real support in the record. To the contrary, as has been noted, the record shows and we have found as fact that once the Commission "warned" the applicant, he advised his employees not to offer clients ocean freight forwarding services and referred his customers to other licensed forwarders. The record contains documentary evidence from the employees, forwarders and shippers to this effect. Again, while there are three instances where All-Freight was involved in ocean shipments after the Commission "warning," only in one instance was it listed as the ocean freight forwarder. We have found as fact that incident, as well as any other incidental act of forwarding, was unintentional, and they hardly justify the leap to a holding that All-Freight disregarded Commission "warnings" not to forward without a license.

As to the cases cited by Hearing Counsel, we do not disagree with the import of the cases or the quoted language setting forth general tenets to be followed. However, the issue here is basically factual and when one looks behind the broad language and compares the specific facts, the cases cited are clearly distinguishable from what is involved in this proceeding or have no specific application to the issue to be decided. In *Harry Kaufman, supra,* the facts clearly show an involved scheme whereby the holder of an ocean freight forwarding license sold

[6] *Independent Ocean Freight Forwarder License Application, Guy G. Sorrentino, supra*; *Harry D. Kaufman D/B/A International Shipping Co. of N.Y., Independent Ocean Freight Forwarder License,* 16 F.M.C. 256, 271 (1973); *Dixie Forwarding Co., Inc., Application for License,* 8 F.M.C. 109 (1964).

his business to another party whose freight forwarder's license had already been revoked by the Commission, and allowed his own license to be used by the other party -- all without any notice to the Commission. The situation in *Kaufman* is so aggravated that when compared with the facts involved in the instant case, one is hard pressed to find any correlation between the two cases except to note the basic difference as to how the violation occurred. As to the citation of *Independent Ocean Freight Forwarder License Application, Guy G. Sorrentino*, 15 F.M.C. 127, 128 (1972), there the Commission ultimately approved issuance of the license and Hearing Counsel does not make any relevant factual comparisons to the instant case. The general language is pertinent, but its application is what is at issue. As to *Independent Ocean Freight Forwarder Application, Lesco Packing Co., Inc.*, 19 F.M.C. 132, 136-137 (1976), once again the general statement cannot be disputed, but the denial of the freight forwarder license involved the same party who was involved in *Kaufman, supra*, who had been convicted of criminal fraud, willfully and knowingly made false statements in applying for a prior ocean freight forwarding license, and who had previously violated the export control laws. These kinds of facts are not involved in this proceeding, so that the case cited is clearly distinguishable.

Hearing Counsel cites *Concordia International Forwarding Corporation - Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, Docket No. 78-34, served December 18, 1978 (21 F.M.C. 587), to support the argument that:

> Mr. Adams, the qualifying officer of the applicant, had four years of experience in the forwarding industry. In addition, the applicant received at least two oral and two written warnings that to carry on the business of forwarding without a license . . . The applicant's disregard of the Shipping Act and these warnings demonstrates that it is not fit and cannot be found to be willing to conform to the provisions of the Shipping Act and the Commission's regulations. Therefore, All-Freight's application for an independent ocean freight forwarder license should be denied.

The only similarity between *Concordia* and the instant case is that both respondents averred that they believed they could engage in ocean freight forwarding if they did so without charge, but that lone similarity is hardly material here. When one compares the other facts in these cases, he is apt to conclude that *Concordia*, inferentially at least, supports All-Freight more than it does Hearing Counsel. In *Concordia* the applicant was initially an individual and principal employee of Concordia. He had many years of experience in freight forwarding, including 12 years in ocean freight forwarding, where he had supervised over 46 people in the ocean freight division of a corporation. In the instant

case, Mr. Adams has experience as a forwarder since 1972. While the record indicates some experience in ocean freight forwarding, it is apparent that Mr. Adams did not ever engage in the business on a full-time basis. His activities have been conducted on a small-scale basis.

Even more compelling is the fact that in *Concordia* the individual involved worked for another company as an ocean freight forwarder and, immediately after he left the old company to go to Concordia (the new company), Concordia forwarded ocean freight for his customers without a fee. Six other employees had already moved from the old company to Concordia. The Commission saw through these machinations holding that while Concordia did not receive "compensation" it certainly did not perform the services without "consideration." In this proceeding, there are no similar facts, although Hearing Counsel contends that Mr. Adams continued to forward ocean freight after being warned not to do so because he wanted to "hold onto clients which respondent had no right to serve." The evidence underlying such a conclusion is woefully weak. The Commission investigator affirmed (Ex. 3, par. 11) that:

> Mr. Adams stated that he continued to forward ocean freight shipments after he had been warned he was in violation of General Order 4 because he feared losing his air cargo customers who occasionally made ocean shipments.

Mr. Adams states that while he may have told the investigator "one always fears losing its clients by referring them," the fact was that once informed of the unlawfulness of forwarding without a license, all of All-Freight's shipments, with one concrete inadvertent exception, were referred to licensed forwarders. The customer involved in the exception was not an Air-Freight customer. The record is replete with documents verifying these facts. Further, as to Mr. Adams' contentions regarding the original statement made by the investigator, the investigator's responding affidavit avoids dealing with whether or not Mr. Adams ever made the specific statement attributed to him, but rather says:

> I relied solely on what Mr. Adams told me about his fear of losing air cargo customers. . . . I have made no attempts to verify whether All-Freight's clients were or were not air cargo customers.

Based on the above, it has been found as a fact that All-Freight *did not* intentionally continue to forward ocean shipments after being warned not to do so. To find that it did so is not supportable on the facts, and to find that it did so to retain air freight customers is the kind of judicial "bootstrapping" one should avoid. For example, here such a fact would have to be based on the sworn statement of one person (the Commission investigator) as to what another person (Mr. Adams) told him, where the other person (Mr. Adams) denied making the statement, where the documentary evidence of record refutes the statement, and

where, given the opportunity to amplify on the statement, the person originally advocating it (the investigator) desists. So here, we believe Hearing Counsel's argument and its use of *Concordia* is misplaced.

In essence, we think this case presents a situation where the applicant, while experienced, was not so experienced as to be all-knowing. Consequently, it made a mistake, a mistake which was brought to light by its own voluntary act. Once aware of the mistake, it took measures to avoid making it again. The record shows that the applicant, and its principal officer have an untarnished business reputation. There is no record of prior wrongdoing of any nature either in maritime or in other matters, and statements from established financial institutions and business associates attest to their business reputation and acumen. As to the initial act of forwarding without a license, All-Freight's activities were much less serious than in the cases that usually come before the Commission. There was not a large number of violations; there was no attempt to conspire with others to deceive or mislead the Commission; no act of moral turpitude; no false statement; no unjust enrichment.[7] In short, there was nothing to indicate that if granted an ocean freight forwarder's license, All-Freight would be deficient in the operation of such a business or should be deprived of an opportunity to engage in that business. *Application for Freight Forwarder License, Carlos H. Cabezas*, 8 F.M.C. 130 (1964).

Therefore, it is held that All-Freight is fit, willing and able properly to carry out the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder. In so holding, there is one further point which needs to be addressed. The record indicates that throughout the investigation of this application, All-Freight kept a poor set of books, or none at all, regarding its ocean freight forwarding activities. From time to time it either had no record of a transaction or was "at a loss" to explain what it did on a particular shipment. It seems clear that the import of the law and regulations require anyone engaged in the business of freight forwarding to keep books and records accurately recording those transactions occurring on a day-to-day basis. Accordingly, within 90 days of the date the Commission adopts this decision, in whole or in part, All-Freight is directed to file a statement with the Commission affirming that it has established reasonable accounting procedures for recording its ocean freight forwarding transactions and describing in sufficient detail the nature and operation of

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[7] Cf. *Application for Freight Forwarding License, Dixie Forwarding Co., Inc.*, 8 F.M.C. 109 (1964); *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders*, 6 F.M.B. 327 (1961); *Independent Ocean Freight Forwarder License, E. L. Mobley, Inc.*, Docket No. 77-26, Report and Partial Adoption of Initial Decision served March 12, 1979; *Independent Ocean Freight Forwarder License Application, L.T.C. Air Cargo, Inc.*, 13 F.M.C. 267 (1970); *York Forwarding Corp., J.B. Wood Shipping Co., Inc. & Edwards Fay Corp.*, 15 F.M.C. 114 (1972).

those procedures, including but not limited to the nature of original books of entry, retrieval capability, and the availability of financial statements.

(S) JOSEPH N. INGOLIA
*Administrative Law Judge*

Washington, D.C.
May 16, 1980

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 566(I)

EXCAM, INC.

*v.*

LYKES LINES AGENCY, INC.
AND COSTA LINES

## ORDER

*August 28, 1980*

By Complaint filed August 16, 1978, Excam, Inc. seeks reparation in the amount of $1,594.10 for freight overcharges assessed by Lykes Bros. Steamship Co., Inc., on two shipments described on the bills of lading as "Firearms". Excam further seeks reparation for overcharges assessed by Costa Line in the amount of $778.38 on one shipment that was also rated as "Firearms".

Settlement Officer Donald T. Pidgeon issued a decision on December 27, 1979 awarding $1,594.10 and $743.17 in reparation to Excam on the basis that the merchandise shipped was in fact "Replica Arms" and not "Firearms." The Commission determined to review the Settlement Officer's decision on its own motion.

The Commission, after reviewing the record, found that Complainant had failed to sustain its burden of proof, and, by Order on Remand served April 17, 1980, directed the Settlement Officer to offer Excam a further opportunity to demonstrate that the commodity shipped was in fact "Replica Arms," and to issue another decision setting forth his supplemental findings. On June 4, 1980, the Settlement Officer issued a Supplemental Decision reaffirming his Initial Decision, citing additional findings in support of his earlier ruling.[1] Unexplainably, the Settlement Officer did not, as directed by the Commission, offer Excam a further opportunity to present evidence in support of its claim.

The Commission remains unconvinced that the shipments at issue were indeed "Replica Arms," as alleged, and not "Firearms." The four additional "findings" that are offered in support of the Presiding Officer's Supplemental Decision, have little probative value in the resolu-

[1] These include: (1) the fact that Complainant has been trying since June 17, 1976 to petition the Med-Gulf Conference for a reduced rate on "Replica Arms;" (2) that there was no doubt on the part of the carriers that the cargo shipped was "Replica Arms;" (3) that on May 3, 1977, a special freight tariff and commodity classification was created for Replica Arms Muzzle-Loading, finished or kits, accessories and parts; and (4) that the shipments in question were made after the new rate was created.

tion of this controversy. The Settlement Officer's particular reliance upon the admission of the carriers that the cargo shipped was "Replica Arms" is misplaced in a misrating proceeding.

Rather than remanding this proceeding for a second time, the Commission will directly offer Complainant a further opportunity to produce convincing evidence (*e.g.*, invoices, bills of lading, manifests) which would serve to corroborate the assertion that the commodity shipped was different than the description stated on the bill of lading. [2]

THEREFORE, IT IS ORDERED, That Excam, Inc. submit to the Commission by September 26, 1980 evidence to support its contention that the commodity shipped was "Replica Arms" and not "Firearms;" and

IT IS FURTHER ORDERED, That if this information is not submitted within the time prescribed above, the Settlement Officer's Supplemental Decision will be reversed and the reparation prayed for will be denied.

*Chairman Daschbach, not participating.*

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value, Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

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[2] This principle was enunciated in *E.I. DuPont v. Seatrain International*, 18 S.R.R. 879 (1978), where it was held that:

> . . . a determination of the applicable rate must be based not on a mere admission by the carrier that it misrated the cargo but on *evidence in the record* showing the true nature of the commodity shipped. 18 S.R.R. at 880.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 681(F)

SANRIO COMPANY, LTD.

*v.*

MAERSK LINE

## ORDER ADOPTING INITIAL DECISION

*September 5, 1980*

The Commission has before it the Exceptions of the Trans-Pacific Freight Conference of Japan/Korea (TPFC)[1] to the April 21, 1980 Initial Decision of Administrative Law Judge Norman D. Kline in the above-captioned matter. Replies to Exceptions were filed by the Complainant, Sanrio Company, Ltd.

This is a complaint proceeding in which an importer of goods manufactured in Japan alleges it was overcharged for 42 different commodities shipped on Maersk Line vessels from Tokyo to Oakland, California in November and December, 1977, under the provisions of TPFC's Tariff FMC No. 6. If proven, each such overcharge would represent a violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)) for which reparations may be awarded. The Presiding Officer ultimately concluded that 38 of the 42 products were incorrectly rated by Maersk,[2] but withheld his decision on the amount of reparation due Sanrio until a reparation statement is filed pursuant to Section 502.252 of the Commission's Rules. (46 C.F.R. 502.252). TPFC now argues that the Initial Decision is erroneous for giving undue weight to Sanrio's evidence and for failing to consider the policy ramifications of awarding reparations when a shipper is responsible for the carrier's misrating of the commodities shipped. Sanrio supports the Initial Decision in all respects.

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[1] TPFC is an association of steamship lines operating under an agreement approved by the Commission (FMC No. 150). Maersk Line, the Respondent in this proceeding, is a member of TPFC and is governed by its tariff. The Conference was granted leave to intervene on March 4, 1980 in order to present Maersk's viewpoint from a broader prospective.

[2] Commodity rates for "Stationery," "Bags, Baskets and Luggage," "Artist's Materials," "Travel Kits," "Paper Manufactures," "Toys," "Personal Ornaments," "Ceramicware," "Plastic Manufactures," "Brushes (under $1,000)," "Hari Clip," "Tape," "Cart," "Printed Matter," "Towel Bar" and "Novelty Pencil" were found to apply instead of the "Cargo, N.O.S." rate.

## POSITION OF THE PARTIES

### *Respondent/Intervenor*

TPFC's primary contention is that the Commission is following an unwise policy by adjudicating section 18(b)(3) claims exclusively upon the evidence presented as to what was actually shipped.[3] TPFC states that this policy is not legally mandated and that a more flexible approach could be taken both in determining whether violations have occurred and whether reparations should be awarded under section 22 of the Shipping Act, 1916 (46 U.S.C. 821). This proposition is supported by citations to *State of Israel v. Metropolitan Dade County,* 431 F.2d 925 (5th Cir. 1970) and *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 621-622 (1966).

TPFC believes the Commission should adopt a policy of considering the respective "culpability" of the parties and the purposes of the Shipping Act, 1916, before awarding damages for misratings. The Conference further alleges that it is experiencing increased difficulties with cargo rating disputes which arise after the goods leave the carrier's custody and believes shippers deliberately furnish vague commodity descriptions with the intention of subsequently recovering overcharges if a section 18(b)(3) violation occurs. TPFC advises that Sanrio itself has eight overcharge claims pending against Conference lines.

In the instant case, TPFC claims that Maersk Line was blameless because the containerized goods were loaded by the shipper before they reached the carrier and the ocean bills of lading were prepared by a freight forwarder retained by the shipper.[4] Sanrio therefore should not be awarded reparations.

TPFC alternatively argues that Sanrio's evidence is insufficient under existing Commission standards which recognize the carrier's difficulty in rebutting after the fact allegations concerning the nature of the goods shipped.[5] Sanrio is a subsidiary of Sanrio, Ltd., from whom the goods were purchased in Japan and the shipping documents were prepared by representatives of one or the other of these companies. TPFC would have Sanrio explain why it initially described its goods as "General Merchandise" (which receives a clearly higher "Cargo, N.O.S." rate); waited over a year to file its claim; provided no inventory records covering the goods in question; and entered descriptions on U.S. Cus-

[3] *See Durite v. Sea-Land Service, Inc.*, 20 F.M.C. 674, *aff'd without opinion*, 610 F.2d 1000 (D.C. Cir. 1979); *Pan American Health Organization v. Moore-McCormick Line, Inc.*, Order on Remand, 22 F.M.C. 98 (1979); *Western Publishing Company v. Hapag-Lloyd,* 13 S.R.R. 16 (1972); *Mueller v. Peralta* 8 F.M.C. 361 (1965).

[4] TPFC alleges that the preparation of rated bills of lading by freight forwarders is a firmly established practice in Japan.

[5] The Commission requires that shippers provide corroborating evidence to supplement their unilateral assertion that the bill of lading incorrectly described the goods. *E.g., Pacific Freight Audit v. American President Lines,* 22 F.M.C. 207 (1979).

toms documents different from those on the Bill of Lading and the Sales Invoice.

*Complainant*

Sanrio claims that any policy change made for reasons extending beyond the immediate facts of this case would violate its procedural rights and further asserts that TPFC's proposal is inappropriate in light of the Shipping Act's clear intention that the ocean carrier be responsible for accurately rating the cargo it transports.[6] Once the carrier breaches this duty, section 18(b)(3), and analogous provisions of the Interstate Commerce Act, require the imposition of liability without fault. *See Penn Facing Mills Co. v. Ann Arbor Ry.*, 182 I.C.C. 614 (1932). No other approach is consistent with the overriding statutory purpose of eliminating unjust discrimination between shippers. *See generally, Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *United States v. Pan American Mail, Inc.*, 359 F.Supp. 728, 733-735 (S.D.N.Y. 1972); *Tyson & Jones Buggy Company v. Aberdeen & Asheboro Ry.*, 17 I.C.C. 330 (1909).

Finally, Sanrio argues that it did adequately prove its assertion that the bill of lading was incorrect by introducing catalogs and samples which corroborated the entries on its packing lists and invoices.

DISCUSSION

The record in this proceeding presents the Commission with no reason for altering its position concerning the proper rating of cargo. This function is and must remain a nondelegable duty of the ocean carrier. It is true that this task becomes more difficult when containerized cargo moves on a "House-to-House" basis, but the very difficulty of the process makes it even more important that carriers take the steps necessary to ascertain what is being shipped *before* freight charges are assessed or collected. The Shipping Act would be virtually unenforceable if carriers were entitled to rely upon cargo descriptions provided by shippers, and the halfway measure of denying reparations to shippers otherwise in compliance with the law would also discourage the type of industry conduct necessary to effectuate the present statutory scheme of strict tariff adherence.[7]

The Commission fully recognizes that reparation awards are discretionary under section 22, *see First International Development Corp. v.*

[6] It follows, Sanrio argues, that any cargo rating functions performed by an ocean forwarder are performed as an agent of the carrier and it is the carrier that must be held accountable for any errors made in this regard.

[7] Section 16 Initial Paragraph (46 U.S.C. 815) imposes civil penalties upon shippers which knowingly or willfully, by means of any unfair device or method, obtain or attempt to obtain transportation at rates *less* than those otherwise applicable. The unintentional furnishing of inaccurate information to a carrier would not ordinarily violate this section.

*Ship's Overseas Services, Inc.*, 20 S.R.R. 209 (1980), but continues to believe that its discretion is best exercised by awarding reparations for overcharges in situations where the shipper was merely negligent in preparing shipping documents.

The *State of Israel* decision, requires no contrary result. There, a terminal tariff provision was construed as *conditioning* a favorable "standby" berthing rate for cruise ships upon the receipt of notice that a vessel was in a nonloading status.[8] The Maersk Line rates involved in this proceeding were not subject to a condition precedent, but even if they had been expressly dependent upon the shipper's furnishing some specific and reliable type of cargo description, they might not have been lawful in light of the holding in *Kraft Foods, Inc. v. Federal Maritime Commission*, 538 F.2d 445 (D.C. Cir. 1976).[9] *See also Union Carbide Corporation v. American and Australian Steamship Line*, 17 F.M.C. 177 (1973); *The Carborundum Company v. Royal Netherlands Steamship Company*, 19 F.M.C. 431 (1977); *Cone Mills Corp. v. Trailer Marine Transport Corp.*, 20 F.M.C. 143 (1977), regarding the need for any such condition to be reasonably related to transportation circumstances.

The Commission has reviewed the evidence presented by Sanrio and believes it sufficiently demonstrates that the two shipments in question consisted of the articles alleged by Sanrio to have been present and that the Presiding Officer properly determined which tariff rates should have been applied to each item.

THEREFORE, IT IS ORDERED, That the Exceptions of the Trans-Pacific Freight Conference of Japan-Korea are denied and the Initial Decision served on April 21, 1980 is adopted as the final decision of the Commission; and

IT IS FURTHER ORDERED, That Sanrio, Inc., submit a reparations statement to the Presiding Officer pursuant to section 502.252 of the Rules within 30 days from the service date of this order (with copies to all parties of record).

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

[8] After failing to give notice, a vessel operator later attempted to obtain the lower rate by demonstrating that the ship had actually been in a nonloading status. The Court denied relief on the grounds that the notice requirement was reasonably implied by the tariff because knowledge of operating status was a matter particularly within the knowledge of the vessel operator.

[9] The *Kraft* decision overturned a Commission order denying reparation because a shipper failed to comply with a tariff rule requiring freight adjustment claims based upon alleged errors in cargo description, weight or measurement to be brought to the carrier's attention before the cargo left the carrier's custody. The Court held that a rule of this nature could not be used to deny the shipper's right to seek reparations under section 22 of the Shipping Act, 1916, even if it limited the carrier's obligation to voluntarily correct rating errors.

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 681(F)

## SANRIO COMPANY, LTD.

*v.*

## MAERSK LINE

Complainant. an exporter of small products designed mainly for children, filed claims for overcharges with respondent Maersk Line claiming that Maersk had misrated 42 products which the shipper or its forwarder had described as "General Merchandise" on the bills of lading. the carrier allegedly violating section 18(b)(3) of the Shipping Act. 1916. After Maersk declined to consider the merits of the claims because of a tariff rule, complainant filed a complaint with the Commission, furnishing evidence of the nature of the products, such as packing lists, invoices, catalogs, actual samples, sales literature and employee's sworn statements. Maersk and intervenor Conference argue that complainant's evidence is unreliable, that complainant has not met its "heavy burden of proof," and that present Commission law and policy in overcharge cases are harmful and ought to be changed. It is held that:

(1) Complainant has submitted the type of evidence customarily relied upon in cases of this type, which evidence has enabled complainant and sometimes respondent to show the correct rate that should have applied to 38 of the 42 products shipped.

(2) The Commission's policy is to permit shippers to show what actually moved on the basis of a preponderance of the evidence, notwithstanding incorrect bill of lading descriptions originally presented to carriers. The shipper must however set forth sufficient facts to prove with reasonable certainty and definiteness the validity of its claim. Its "heavy burden of proof" refers to the difficulty the shipper will have in obtaining evidence long after the shipment. The "preponderance of the evidence" standard is the traditional standard employed in administrative and most civil cases.

(3) The principles of law governing cases of this type are derived from tariff, not contract law. Tariff law is much stricter than contract law, ordinarily not allowing for mistakes or even misrepresentations, because of an overriding purpose of preventing discrimination. However, the Conference's and respondent's argument that the Commission ought to reverse its present views on the law because of alleged harm to carriers and departure from contract law is a policy matter for the Commission to decide.

(4) Complainant must submit a reparation statement under Rule 252, if this decision is adopted by the Commission, so that the total amount of reparation to be awarded can be determined.

*Daniel L. Goldberg*, for complainant Sanrio Company, Ltd.

*R. Frederic Fisher*, for respondent Maersk Line.

*Charles F. Warren and George A. Quadrino*, for intervenor Trans-Pacific Freight Conference of Japan/Korea.

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

*Adopted September 5, 1980*

This is a complaint proceeding which began with the filing of a complaint by a claimant known as Sanrio, Inc. which, on April 20, 1979, had filed with the Commission's Secretary a complaint under the Commission's informal settlement procedures contained in Subpart S, 46 C.F.R. 502.301 to 304. In this complaint, Sanrio, Inc., an importer located in Foster City, California, had alleged that respondent Maersk Line, a member of the Trans-Pacific Freight Conference of Japan/Korea, had overcharged Sanrio on some 42 different articles imported from Japan moving under three separate bills of lading, two of which bore dates inserted as November 3, 1977, and the final one, December 29, 1977. All of the bills of lading were stamped "Freight Prepaid." Most of the allegedly overcharged commodities moved under the first two bills of lading on the vessel ANDERS MAERSK on Voyage 7710 out of Tokyo. The last shipment moved on the vessel ALBERT MAERSK on Voyage 7802 out of the same port.

Before filing the complaint, three claims for the alleged overcharges were presented to Maersk by an entity known as "Traffic Associates" on behalf of Sanrio, Inc., the Importer. These claims were broken down to correspond to the shipments on each of the three bills of lading and were designated as "Claim SA-81," "Claim SA-82," and "Claim SA-83." They were submitted to Maersk by letter dated December 5, 1978. Together with the claim letter, Traffic Associates furnished Maersk with ocean bills of lading, invoices, packing slips, and worksheets. Maersk had also been furnished with the Sanrio, Inc., catalog and specific information on the packing slips showing the tariff items which Sanrio believed should have been applied instead of the rate actually assessed. Traffic Associates did indicate in their transmittal letter that although they believed that some of the products should have been rated under the tariff's toy rate rather than the stationery rate, they had been conservative and requested the carrier's opinion as to the correct rate. (See Exhibit A-3.)

On January 5, 1979, Maersk Line declined the claims on the ground that Rule 59 of the Conference tariff required claimants to submit claims seeking adjustment of freight charges because of alleged errors in description, weight and/or measurement in writing before the shipment involved had left the custody of the carrier. (Ex. A-4.) Thereafter, in April, as noted above, the claims were filed with the Commission under the Commission's informal procedures. As provided by the Com-

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 318, Rules of Practice and Procedure, 46 C.F.R. 502.318).

mission's regulations, the claims were assigned to a Settlement Officer, were docketed as Informal Docket No. 681(I), and were served on Maersk. (See service letter of July 9, 1979.) On July 23, 1979, Maersk requested that the case be handled under the formal procedure set forth in Subpart T, 46 C.F.R. 502.311 to 321 and stated that it would need additional time to locate a number of documents in Tokyo and that claimant had not submitted readable copies of complete bills of lading so that the carrier's task could be accomplished. Thereafter, in September 1979, the case was transferred to the formal procedures and began to be processed accordingly.

Upon assignment to me, I examined the file and determined that there were basic jurisdictional problems which required immediate attention. The main problem concerned the question of Sanrio's standing to seek reparation. Since the shipping documents indicated that it was the Japanese shipper, Sanrio Company, Ltd., and not the importer, Sanrio, Inc., which had paid the freight, it appeared, according to pertinent case law, that the nominal complainant, Sanrio, Inc., had no standing to seek recovery of the alleged overcharges unless it obtained an assignment of the various claims. I therefore instructed Sanrio, Inc., to clarify its status. (See Order to Complainant to Show Standing to Seek Reparation, September 28, 1979.) I also instructed respondent to file its answer, which had not been done, although the complaint had been served on July 9, 1979, within 10 days after service of my ruling concerning the question of standing. (See Order to Respondent to File Answer, September 28, 1979.)

In response to the above rulings, Mr. Daniel L. Goldberg of Traffic Associates, a registered F.M.C. practitioner representing Sanrio, Inc., advised me that he would substitute the Japanese shipper, Sanrio Company, Ltd., for the importer, Sanrio, Inc., and that he would furnish evidence that he was authorized to represent the Japanese shipper in this matter. An amended complaint substituting Sanrio Company, Ltd., for Sanrio, Inc., was filed on October 19, 1979, and thereafter served on Maersk.[2] Maersk retained counsel for the first time, who requested additional time to file a comprehensive and informative answer to the complaint. The request was granted and the answer together with detailed accompanying materials dealing with each of the 42 products was filed (mailed) on November 16, 1979. Thereafter, on December 4, 1979, complainant Sanrio Company, Ltd., through Mr. Goldberg, mailed its Reply Memorandum in Answer to Respondent, as permitted

[2] I had cautioned complainant to consider that the two-year statute of limitation in section 22 of the Shipping Act might bar an assignment or amended complaint unless such complaint were filed promptly. (See Order to Complainant, cited above, page 6, note 2.) Since the amended complaint was filed on October 19, 1979, it fell within the two-year period which had begun on or about November and December 1977.

under Rule 313, 46 C.F.R. 502.313. These pleadings are quite detailed and deal with each of the 42 items in question.

## THE NATURE OF THE ISSUES

As noted above, the claims in this case have been classified into three shipments according to the three separate bills of lading. In each of the three claims, designated as "SA-81," "SA-82," and "SA-83," complainant has identified the product by the Sanrio catalog number and has furnished various materials, including invoices, packing lists, the Sanrio catalog, actual specimens of some of the products, pictures from the sales manual, a statement in a letter from a distribution manager employed by Sanrio, Inc., consumption entries, and arrival notices. A general survey of the Sanrio catalog as well as the accompanying materials indicates that Sanrio Company, Ltd., appears to manufacture or sell a variety of relatively small, inexpensive products designed primarily for children, and according to the complainant, for children aged 7 to 12. (See Reply Memorandum by Complainant in Answer to Respondent, p. 3.) Thus, Sanrio's present catalog (Ex. A-28) shows a variety of products classified under the following headings: "Kitchen and Dining Ware, Toiletries and Grooming Aids, Beauty Items, Personal Accessories, Items for Room Decor, Mascots and Miniatures, Dolls, Bags, School Supplies and Stationery, Origami Gift Books, and The Strawberry." The invoices for the three shipments show that the products consisted of a number of different items such as "Paper Clips, Box Eraser, Pencil Sharpener, Dear Diary, Mini Seal, Pack Memo, Petite Elegance, Mini Stamp Set, Vanity Set, Bath Kit, Tiny Clip Board, Phone Pal, Doll Pencil, Friendly Message, Coin Purse, Mini Sketching Set, Hankie Set, Towel Hanger, Strawberry Newspaper, Adhesive Tape, Barrette, Scissors, Key Chain Phone Book, Happy Tooth Brush, Little Mascot, Charming Holder, and Ponytail Holder." (See list of these descriptions shown in the complaint, page 3, line 22 to page 5, line 3.)

On the first two shipments, (Claims "SA-81" and "SA-82") Maersk rated the items as "General Merchandise" which was the description on the bills of lading for each shipment. The rate for this description was the Cargo N.O.S. rate (Item 9999-00) of the Conference's tariff. The last shipment (Claim "SA-83") was rated under various tariff items for "toys," "scissors," "stationery," "general merchandise," and "brush." (See Ex. A-22.) It is not quite correct to allege, as complainant does, that the "entire shipment was rated under Item 9999-00, 'Cargo's NOS,' of the tariff" unless only the first two shipments are meant. Complainant alleges that its products should have been rated under the Conference's Tariff Items for Travel Kits, Stationery, Toys, Plastic Mfgs. and not as Cargo NOS, and it disputes Maersk's use of tariff items which were assessed against the third shipment.

Maersk has checked each of the items which Sanrio now identifies specifically from its catalog as products other than general merchandise shown on the first two bills of lading or than the items listed in the third bill of lading. In the majority of instances, Maersk appears to agree with Sanrio, assuming the evidence to be determinative, on the rate that should have been applied. (See Answer to Complaint, pp. 3-8.)[3] However, on 18 of the products identified by Sanrio, Maersk disagrees with Sanrio's contentions that they were incorrectly rated even if the evidence shows the items to be what Sanrio claims them to be. In almost all of these disputes (15), Sanrio claims the products are "toys" and should be rated as such while Maersk claims they were not "toys" and should be rated as "stationery," "Cargo NOS." "Bags, Baskets, & Luggage." or "Artist's Materials."[4] In the other three instances, Sanrio claims the products to be "Stationery," "Travel Kit," and "Paper Mfg. (Mixed Shipment)." On these last three products, Maersk claims the proper tariff rate to he "Cargo NOS." Obviously the definition of a "toy" for tariff rating purposes is critical to this case since it will decide 15 of the 18 outstanding disputes. However, before resolving these disputes, it is necessary to clear away a number of ancillary issues dividing the parties.

Complainant asserts that respondent was provided with invoices and packing lists so that it could rate the products properly. Respondent denies that this is so except for the last shipment where respondent rated the products as items other than general merchandise (i.e., Cargo NOS) in its tariff. Respondent also asserts that it rated the products on the basis of what the shipper had represented to it according to "shipper's load and count" and that it had minimal opportunity to confirm the shipper's representations without breaking into the sealed containers, the shipments having all moved "house to house," i.e., between containeryards in sealed containers. Respondent also calls upon complainant to furnish "import declarations" prepared for the U.S. Custom's Service and denies the probative value of documents passing between one Sanrio affiliate and another, i.e., between Sanrio in Japan and its affiliate in the United States because they were not subject to "outside verification." Respondent contends that the Commission is being asked to accept complainant's "revised" representations as to

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[3] Maersk does not admit that it improperly rated any of the products and states in its answer that it denies that any of the products were something other than what was indicated on the bills of lading. However, in agreeing that if the products were in fact what Sanrio now claims them to be, the majority of the products would take the tariff classifications which Sanrio seeks, Maersk seems to be saying that Sanrio would be entitled to reparation if the evidence supported Sanrio. In each instance of this halfway agreement by Maersk, Sanrio has presented evidence showing what the product specifically was, usually tracing it to the catalog.

[4] For ready reference, these 15 commodities which Sanrio claims to be "toys" while Maersk claims them mostly to be "stationery" but sometimes other things for tariff rating purposes, are listed in Brief of Respondent Maersk Line in Support of Answer to Complaint, page 5, note 5.

what it in fact shipped nearly two years ago. Respondent summarizes its position by stating:

> As matters presently stand, complainant has failed to meet its heavy burden of proof in establishing that the nature of the goods shipped was different than indicated on the bills of lading. This is so because: (1) the bills of lading were based upon complainant's representations; (2) complainant did not contradict these representations when the bills of lading were issued or at any time when the goods were in respondent's custody; (3) complaint's supporting documentation is entirely internal in nature, not subject to verification by outside parties; and (4) complainant has omitted information of great evidentiary weight, in the form of customs declarations, from its complaint. (Brief of Respondent Maersk Line in Support of Answer to Complaint, pp. 4, 5.)

DISCUSSION AND CONCLUSIONS

The basic principle of law which has governed overcharge cases arising under section 18(b)(3) remains essentially what the Commission held in the leading case of *Western Publishing Company v. Hapag-Lloyd A.G.* , Docket No. 283(I), May 4, 1972, 13 S.R.R. 16. In that case, interestingly also involving a claim that part of the shipment should have been rated as "toys," the Commission dealt with the contention that the shipper should have been held to what he had described on the bill of lading, that the carrier had relied on the shipper's description in the bill of lading, that the carrier might have special problems in defending itself once the goods had left its custody, and that the evidence relied upon by complainant consisted essentially of commercial invoices and packing lists. In dealing with all of these problems the Commission stated:

> Furthermore, we have recently taken the approach that the description on the bill of lading should not be the single controlling factor in cases of this nature. Rather, the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's misdescription appearing on the bill of lading. Likewise, claimant is not bound at least where the misdescription results from shipper's unintentional mistake or inadvertence. 13 S.R.R. at 16-17.

Having freed the shipper from his own misdescription of the goods which he or his forwarder had placed on the bill of lading and having allowed the shipper to show what actually moved notwithstanding bill of lading descriptions, the Commission appeared to soften the blow on the carriers who no longer had custody of the goods and could not verify the shipper's claims by actual examination of the goods by

establishing a "heavy" burden of proof on the shipper. In this regard the Commission stated:

> But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim. 13 S.R.R. at 17.

The statements quoted have remained essentially unchanged since that time and continue to govern cases of this nature. However, the Commission has, in later decisions, clarified the meaning of the *Western Publishing* decision in certain significant respects. Thus, while repeating the doctrine that the shipper is entitled to prove what actually moved based upon all the evidence notwithstanding descriptions in bills of lading, the Commission has adopted language showing that this means that the shipper "must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim." See *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 245 (1973) and the cases cited therein; *Sun Co. v. Lykes Bros.*, 20 F.M.C. 68, 70 (1977); Informal Docket No. 387(I), *Pan American Health Organization v. Moore-McCormick Lines, Inc.*, 22 F.M.C. 98, 99-100 (1979). The decision is issued furthermore after consideration of "all the evidence of record with no single document or piece of evidence necessarily being controlling." *Kraft Foods v. Moore McCormick Lines, Inc.*, 19 F.M.C. 407, 410 (1976).

The fact that the Commission has frequently stated that the complainant has a "heavy burden of proof" in these cases has required some clarification. In an earlier case in which the presiding officer had believed the standard of proof to be "beyond a reasonable doubt," the Commission expressly disavowed such a test. See *Johnson & Johnson International v. Venezuelan Lines*, 16 F.M.C. 84, 85 (1973). Such a test, of course, applies in criminal proceedings. In traditional proceedings before courts there have been recognized three different degrees of the burden of proof. These are, in ascending order of difficulty: preponderance of the evidence, clear and convincing, and beyond a reasonable doubt. See McCormick, *Evidence* (2d Ed. 1972) § 339 p. 793. The normal burden of proof in most civil cases is "preponderance of the evidence." *Id.* Similarly, in administrative proceedings, the usual standard is that of "preponderance of the evidence." *Sea Island Broadcasting Corporation of S.C. v. F.C.C.*, 627 F.2d 240 (D.C. Cir. 1980); McCormick, *op. cit.*, § 355, p. 853; *Ollin Construction Co. v. OSHRC*, 525 F.2d 464 (2d Cir. 1975). As the court stated in the *Sea Island* case:

> The use of the "preponderance of evidence standard" is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. 556(d). (Footnote citation omitted) 627 F.2d at 243.

Whenever an agency has been told to use a stricter standard of proof, i.e., "clear and convincing" evidence, this has been done because of a particularly valuable or vital interest involved such as deportation of a person or revocation of a valuable license upon which a person may depend for his living. See *Sea Island Broadcasting Corporation v. F.C.C.*, 627 F.2d at 243; *Collins Security Corp. v. SEC*, 562 F.2d 823 (D.C. Cir. 1977). Likewise, the higher standard of proof has been held to be applicable in certain types of extraordinary civil cases involving such things as fraud, establishment of the terms of a lost will, proceedings to set aside written transactions, etc. McCormick, *op. cit.*, § 355; § 340, pp. 796-797.

In recent cases the Commission has explained its use of the term "heavy burden of proof." That term, which has no counterpart in the courts or administrative law, as far as I am aware, has been explained by the Commission to refer to the fact that the claimant will have difficulty in proving its case after much time has elapsed after the shipment because of the difficulty of obtaining evidence. Furthermore, the Commission has also indicated that the usual standard of preponderance of the evidence is to be followed in cases of this kind notwithstanding the continual reiteration of the phrase "heavy burden of proof." Thus in Informal Docket No. 387(I), *Pan American Health Organization v. Moore McCormick Lines, Inc.*, the Commission was asked by a reviewing Court of Appeals to explain what standard of proof it required of complainants in this type of case. The Commission responded as follows:

> With respect to the burden of proof, although the shipper is conclusively presumed to have knowledge of the carrier's tariff (citation omitted) the Commission has recognized that bona fide errors may occur in the preparation of shipping documents and a complainant seeking reparation under section 22 of the Shipping Act, 1916 for freight overcharges caused by such error, *must set forth sufficient facts to prove with reasonable certainty and definiteness the validity of its claim by a preponderance of the evidence.* (Citation omitted.) 22 F.M.C. at 99-100. (Emphasis added.)

The Commission furthermore explained the term "heavy burden" of proof as follows:

> The Commission held that once the shipment has left the custody of the carrier, and is no longer available for inspection, the shipper has a "heavy burden" of proving that the shipment is other than described on the bill of lading. (Citing *Western Publishing.*) *This "heavy burden" however, relates to the shipper's difficulty in obtaining the necessary evidence rather than*

> *to the weight to be given to such evidence.* 22 F.M.C. at 100, n. 9. (Emphasis added.)[5]

The Commission repeated its holding that these cases are to be decided on a preponderance of the evidence and that the term "heavy burden of proof" merely referred to the difficulty in obtaining evidence shortly after the report in *Pan American Health Organization,* quoted above. In Docket Nos. 78-24 and 78-25, *Pacific Freight Audit, Inc. v. American President Lines, Sea-Land Service, Inc. and American President Lines' Ltd.*, 22 F.M.C. 207, 209 (1979), the Commission stated:

> One final matter needs to be addressed. In his Initial Decision, the Presiding Officer advised that the Complainant in these cases bore a "heavy burden of proof." While this statement is not necessarily inaccurate, it does require some clarification, particularly in light of the Commission's recent decision in *Pan American Health Organization* . . . . There the Commission explained that references in carrier decisions to an overcharge claimant's "heavy burden" related "to the difficulty in obtaining the necessary evidence rather than to the weight to be given such evidence." The applicable standard here is that the validity of the claims be established by a "preponderance of the evidence."

The Commission has indicated in other cases that such decisions are based upon a weighing of the evidence in such a way as to suggest that it has been using a preponderance of the evidence test even when it has not specifically said so. See, e.g., *European Trade Specialists v. Prudential-Grace Lines,* 21 F.M.C. 888, 891 (1979) ("official notice . . . contravenes the weight of the record evidence."); Docket No. 78-27, *Merck Sharp & Dohme International v. "K" Line,* 22 F.M.C. 396, 399 (1979) ("We conclude that these findings [of the Presiding Officer] are contrary to the weight of the record evidence.").

The Commission has also established that it is of no consequence whether the shipper should have been more careful in filling out the commodity descriptions in the bill of lading, although acknowledging that a carrier has a right to expect the shipper to fill in the bills of lading correctly.[6] Furthermore, even if the carrier relies on the erroneous information prepared by the carrier and is not expected to check export declarations or other shipping documents when rating the shipment, as it has not been required to do,[7] the Commission has found

[5] The Court of Appeals has recently affirmed the Commission's Report on Remand. See P.A.H.O. v. F.M.C., No. 78-1690, "Judgment," February 22, 1980.

[6] United States of America v. Farrell Lines, Inc., 16 F.M.C. 42, 48 (1972); Ocean Freight Consultants, Inc. v. Italpacific Line, 15 F.M.C. 314, 319 (1972); Sun Co. v. Lykes Bros., 20 F.M.C. 67, 70 (1977); Carborundum Co. v. Royal Netherlands Steamship Co., 19 F.M.C. 431, 435 (1977).

[7] Royal Netherlands Steamship Co. v. FMB, 304 F.2d 938, 4 S.R.R. 20,276, 20,281 (D.C. Cir. 1962).

violations of section 18(b)(3) and has awarded reparation. In other words, the lack of equities on the part of the shipper has not prevented the shipper from receiving a reparation award and the carrier is held to a standard of absolute liability, i.e., liability without fault, under section 18(b)(3).[8] Thus, in *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181 (1973), *Abbott Laboratories v. Alcoa Steamship Company*, 18 F.M.C. 376 (1975), and *Carborundum Co. v. Royal Netherlands Steamship Co.*, 19 F.M.C. 431 (1977), the Commission held that equities were irrelevant in cases of this kind. In *Union Carbide Inter-America v. Venezuelan Line*, the Presiding Examiner had denied a claim because of the lack of equities on the part of the shipper and because of failure to meet the standard of proof which he believed to be "beyond a reasonable doubt." 17 F.M.C. at 185. He found that it would have been inequitable to award reparation to the shipper, "a large corporation, engaged in marketing products as to which the exact technical description is known to it," who "furnished the carrier with a description which was applicable to an item set forth in the tariff." Furthermore, the Examiner found the carrier to have acted without fault, stating that "[i]nsofar as may be determined, the carrier had no reason to doubt the veracity of that description. That carrier was without fault. Complainant was solely responsible for the error, if an error was made . . . ." *Id.* The Commission, however, totally rejected the Examiner's equity theory although stating that "we are not without sympathy for the carrier . . 17 F.M.C. at 181. The Commission felt that the carrier was not entitled to retain an overcharge because it was required to adhere to the rate specified in its tariff. Hence, in the Commission's view, "[t]o permit the carrier to retain the overcharge would in fact provide the carrier a windfall." 17 F.M.C. at 182. The Commission reiterated its position that "what is actually shipped determines the rate to be applied" but stated that the equities would be considered in determining whether enforcement penalties should be sought against the carrier. *Id.*

In *Abbott Laboratories v. Alcoa Steamship Company*, the Commission found itself again unhappy with the shipper's careless practice in describing goods shipped on the bill of lading and in sympathy with the carrier who relied on the inaccurate descriptions. Nevertheless the Commission awarded reparation to the shipper expressing its belief that it had no equitable powers which, if it had, would have resulted in

[8] Rates, Hong Kong-United States Trade, 11 F.M.C. 168, 178-179 (1967); Union Carbide Inter-America v. Venezuelan Line, 17 F.M.C. 181 (1973); European Trade Specialists v. Prudential-Grace Lines, 21 F.M.C. 888, 891 (1979); Carborundum Co. v. Royal Netherlands Steamship Co., 19 F.M.C. 431, 435-436 (1977); United States v. Pan American Mall Line, Inc., 359 F. Supp. 728. 734-735 (S.D.N.Y. 1972).

denial of the claim. 18 F.M.C. at 379.[9] A similar result occurred in *Carborundum Co. v. Royal Netherlands Steamship Co.*.

To recapitulate, the present status of the case law governing overcharge claims filed under section 18(b)(3) is that the complainant is entitled to show what was actually shipped notwithstanding descriptions which the shipper or its agent may have entered on a bill of lading and notwithstanding the fact that the shipper or his agent may have acted carelessly when filling in the bill of lading and that the shipper may not have relied upon a lower rate before shipping the goods. Where the shipment has left the custody of the carrier, the shipper may have problems in obtaining evidence but the shipper must nevertheless set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. The Commission will decide the case on the basis of a preponderance of the evidence after consideration of all the evidence of record with no single document or piece of evidence necessarily controlling. This statement disposes of respondent's first two contentions set forth in its Brief regarding complainant's erroneously described bills of lading and alleged misrepresentations relating thereto. There remain questions concerning the type of evidence which complainant has submitted and which respondent disputes as lacking credibility.

## THE TYPE OF EVIDENCE CUSTOMARILY UTILIZED

A survey of overcharge cases reveals that the Commission has relied upon various types of evidence in determining the nature of the commodity involved. Such things as commercial invoices, packing lists, export declarations, sales literature, dictionary definitions, letters, actual samples, as well as oral expert testimony have all played a role in one case or another. See Rules 304(a); 311 to 313 (46 C.F.R. 502.304(a); 502.311 to 502.313). In the case which first enunciated the doctrine allowing the shipper to prove what actually moved notwithstanding bill of lading descriptions, *Western Publishing Company v. Hapag-Lloyd A.G.*, the evidence of record consisted only of commercial invoices and packing slips. (See 13 S.R.R. at 17.) In *Abbott Laboratories v. Alcoa*

[9] Notwithstanding this belief that the Commission must grant reparation to shippers whenever a violation of section 18(b)(3) is found regardless of equities, the Commission has in one case denied reparation precisely because its sense of equity had been offended even though a violation of section 18(b)(3) had occurred. In *United States of America v. Columbia Steamship Company, Inc.*, 17 F.M.C. 8 (1973), the shipper, who was the United States Government, sought to recover an overcharge on a shipment of unboxed trucks. The carrier had charged a rate above that published in its tariff and had therefore violated section 18(b)(3). However, because the Government had negotiated that higher rate with the carrier prior to shipment and had expected to pay it, the Commission refused to allow the shipper to renege on its agreement although the carrier had failed to file the agreed-upon rate. The Commission held that relief under section 22 "is discretionary and permissive, and the mere fact that a violation of the Act has been found 'does not in itself compel a grant of reparation.'" 17 F.M.C. at 9, 10. To award the shipper reparation in that case, according to the Commission, would be to grant it a "windfall which it neither anticipated nor bargained for." 17 F.M.C. at 10.

*Steamship Company*, the evidence was limited to the same two documents plus an export declaration. (See 18 F.M.C. at 377.) In *Union Carbide v. Venezuelan Line*, 17 F.M.C. 181, the only evidence of record was an invoice and a letter. (17 F.M.C. at 185.) Moreover, in reversing the Examiner and awarding the claim, the Commission relied upon the invoice alone. (17 F.M.C. at 182.)

In *European Trade Specialists v. Prudential-Grace Lines*, the record included oral testimony, actual samples, and dictionary definitions, although the latter were characterized as being useful for purposes of aiding memory and understanding rather than as evidence in the strict sense. 21 F.M.C. at 891.[10] In Docket No. 78-27, *Merck Sharp & Dohme International v. Kawasaki Kisen Kaisha, Ltd.*, the critical evidence on which the case turned was complainant's sales literature which showed the purpose of the commodities in question which were found to be pharmaceuticals rather than animal feed. 22 F.M.C at 399. In *Kraft Foods v. Moore McCormick Lines*, cited above, 19 F.M.C. 407, a case in which the issue concerned measurement of the commodity shipped, the evidence included a sales invoice, bill of lading, dock receipt, and a sales brochure price list. 19 F.M.C. at 410.

In Docket No. 78-2, *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlanttrafik Express Service*, 21 F.M.C. 1082 (1979), the evidence used to prove the measurement of drums which had been shipped but which were no longer available was entirely indirect, consisting of evidence of standard drum measurements of the type involved in the shipment and affidavits based on random sampling indicating that the drums that were shipped conformed to the standard. Thus, indirect evidence consisting of hearsay has been used to determine what was actually shipped and the Commission has utilized such evidence to draw reasonable inferences although the product shipped was incapable of being retrieved for remeasurement.

In accepting documents, affidavits, sales literature, letters, etc., in cases of this kind, the Commission has obviously not followed the strict rules of evidence observed by the courts. This approach is entirely consistent with administrative law in which it has long been held that the strict rules pertaining to courts should not apply to the more informal administrative process. As early as 1934, this Commission's predecessor recognized "that a regulatory body . . . ought not to be hampered in its proceedings by the hard and fast rules as to pleading and practice which govern courts of law" and "that even when acting in a quasi-judicial capacity the strict rules which prevail in suits between private parties do not apply, and that inquiries should not be too

[10] But in Informal Docket No. 653(I), *J. T. Baker Chemical Company v. Yamashita-Shinnihon Line*, 22 F.M.C. 553 (1980), the Commission relied heavily on dictionary definitions without limiting their evidentiary value.

narrowly constrained by technicalities . . . ." *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934). This Commission has continued to follow the principle established in the Administrative Procedure Act and by case law that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." APA, 5 U.S.C. 556(d); Rule 156, 46 C.F.R. 502.156 ("In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative shall be admissible."). In keeping with current views of administrative law, furthermore, the Commission has decided cases involving serious matters such as rebating and approval of pooling agreements under section 15 of the Act in reliance upon hearsay even if that hearsay has been uncorroborated by direct evidence. *See, e.g., Malpractices-Brazil/United States Trade*, 15 F.M.C. 55 (1971), relying upon *Richardson v. Perales*, 402 U.S. 389 (1971); Docket No. 77-43, *Agreement No. 10286*, 21 F.M.C. 676, 679 (1979). *See also, Unapproved Sect. 15 Agreements-S.African Trade*, 7 F.M.C. 159, 167-170; 178-184 (1962). In the last case cited, the Commission found that internal correspondence culled from the files of the parties was admissible and reliable. Furthermore, contrary to respondent's contentions in this case, the fact that the documents were intra-company correspondence did not detract from their probative value. The Commission specifically found that "in our view this enhanced rather than detracted from their evidentiary value because the communications contained completely candid utterances bearing directly on the subject of the inquiry." 7 F.M.C. at 183. In that case, furthermore, the Commission emphasized the principle that its proceedings were not governed by strict technical rules of evidence observed in the courts (7 F.M.C. at 167-168) citing the Administrative Procedure Act and numerous cases. One reason for this principle "is that administrative agencies, unlike the lay juries for whom the exclusionary rules were meant, are presumed competent to judge the weight that should be given evidence." 7 F.M.C. at 167. For that reason, too, Maersk's comments that certain affidavits submitted by Sanrio's Distribution Manager are "self-serving post hoc affidavits of complainant's employees (such as Exhibit A-31) . . . of no value" (Brief of Maersk, page 9, n. 9) are not quite correct. As the Commission stated in *Unapproved Sect. 15 Agt.-Coal to Japan, Korea*, 7 F.M.C. 295, 302 (1962):

> Testimony does not become sacrosanct when uncontradicted nor is self-serving testimony automatically to be discredited. These are but factors to be considered in determining the validity and probative value of the testimony and the inferences that may properly be drawn therefrom in light of all the evidence.

As a final matter, respondent has contended that Sanrio should have furnished verification of its claims in the form of "import declarations made to United States Customs in connection with these shipments." (Brief of Respondent Maersk Line in Support of Answer to Complaint, p. 4). Maersk states that these declarations are entitled to great evidentiary weight according to the Commission's decision in *Chevron Chemical Co. v. Mitsui O.S.K. Lines, Ltd.*, 20 F.M.C. 216, 217 (1977). In *Chevron*, the document in question was an export declaration since the shipment moved in the export not import trade, unlike the present case. In the case of imports, the pertinent document is a "consumption entry" which is prepared by a customhouse broker for the purpose of paying the proper customs tariff duty. See *Equality Plastics, Inc. et al.*, 17 F.M.C. 217, 227-228 (1973). In its reply pleading in this case, Sanrio did furnish the consumption entry prepared by the broker, W.J. Brynes & Co. (See Reply Memorandum by Complainant in Answer to Respondent.) As the Commission noted in *Equality Plastics*, however, these entries are prepared for purposes other than conformance to ocean carriers' tariffs and do not necessarily show the contents of shipments for tariff-rating purposes. 17 F.M.C. at 227. The Commission stated that "ocean carrier tariffs have no real relationship to the TSUS [the Tariff Schedule of the U.S.]" and that "consumption entries are not prepared based on knowledge of the actual contents of the shipments." *Id.* Indeed, although the broker had not used the TSUS entry for "toys" in connection with the products shipped in that case but had used another customs item under "electrical machinery and equipment," the Commission nevertheless found that one of the products, a battery-operated drink mixer, was a "toy" for ocean tariff rating purposes. *Id.* Even in the *Chevron* case, cited by Maersk, the Commission indicated in a later ruling that it considered export declarations only as part of the entire body of evidence since it was the Commission's "well established policy of considering any type of evidence by which a shipper may show the true nature of his cargo." *Chevron Chemical Co. v. Mitsui O.S.K.*, 20 F.M.C. 216, 218 (1977).

## THE PRODUCTS WHICH WERE SHIPPED

An analysis of the complaint and answer reveals that there were 42 separate products which were involved in the three claims ("SA-81," "SA-82," and "SA-83") which constitute the substance of the complaint. Of the 42 products, it appears that 24 concern products as to which Maersk agrees with Sanrio regarding the proper tariff classification provided Sanrio's evidence identifying the products is reliable and probative. Of the remaining 18 products, Maersk disagrees with Sanrio as to the proper tariff classification even if Sanrio's evidence identifying them is to be believed. Of these 18, 15 products are claimed by Sanrio to be ratable as "toys" whereas Maersk claims they should be rated as

"stationery" for the most part. Finally, there are three products remaining which Sanrio claims to be ratable as "stationery," "travel kit," and "paper manufactures" but which Maersk claims to be ratable under different tariff items, again assuming the evidence identifying them is to be believed.

The first category of 24 products is shown in the following table identified by catalog numbers and by the tariff commodity description which both Sanrio and Maersk agree would apply if Sanrio's evidence is considered to be sufficiently reliable and probative.

24 Commodities as to Which Parties Agree as to Proper Tariff Classification if the Evidence is Sufficient

| *Old Catalog No.* | *Commodity* | *New Catalog No.* | *Agreed Tariff Item* |
|---|---|---|---|
| C/No. 3024/14-19 | Box Eraser | | Stationery (Item 5820-10) |
| C/No. 3040/1-20 | Pencil Sharpener | | Stationery (Item 5820-10) |
| C/No. 3041/1-10 | Pencil Sharpener | | Stationery (Item 5820-10) |
| C/No. 2010/1-14 | Mini Seal | | Toy (Item 6020-00) |
| C/No. 2011/1-20 | Mini Seal | | Toy (Item 6020-00) |
| C/No. 2012/1-20 | Mini Seal | | Toy (Item 6020-00) |
| C/No. 2013/1-20 | Mini Seal | | Toy (Item 6020-00) |
| C/No. 2018/1-17 | Petite Elegance | | Personal Ornament (Item 6260-15) |
| C/No. 2019/1-17 | Petite Elegance | | Personal Ornament (Item 6260-15) |
| C/No. 1010/1-88 | Vanity Set | A-211-1 | Plastic Manufactures (Item 9460-00) |
| C/No. 1011/1-2 | Vanity Set | A-211-2 | Plastic Manufactures (Item 9460-00) |
| C/No. 3020/1-50 | Doll Pencil | | Novelty Pencil (Item 6020-00) |
| C/No. 1029/35-75 | Towel Hanger | A-109-1 | Towel Bar (Item 4360-00) |
| C/No. 1-2 | Cart | | Cart (Item 5420-00) |
| C/No. 1-25 | Strawberry Newspaper | | Printed Matter under $1200 (Item 5760-05) |
| C/No. 6-8 | Adhesive Tape | | Tape (Item 6560-00) |
| C/No. 1014/1-10 | Barrette | A-213-1 | Hair Clip (Item 6400-00) |

24 Commodities as to Which Parties Agree as to Proper Tariff Classification if the Evidence is Sufficient—Continued

| *Old Catalog No.* | *Commodity* | *New Catalog No.* | *Agreed Tariff Item* |
|---|---|---|---|
| C/No. 1016/1-20 | Scissors | A-310-1 | Stationery (Item 5820-10) |
| C/No. 1010/1-65 | Vanity Set | A-211-1 | Plastic Manufactures (Item 9640-00) |
| C/No. 1011/1-85 | Vanity Set | A-211-2 | Plastic Manufactures (Item 9640-00) |
| C/No. 1018/1-30 | Happy Tooth Brush | A-106-1 | Brushes under $1000 (Item 5940-05) |
| C/No. 1019/1-50 | Happy Tooth Brush | A-106-2 | Brushes under $1000 (Item 5940-05) |
| No. 2001/1-20 | Little Mascot | | Ceramicware (Item 1320-00) |
| C/No. 1003/1-26 | Ponytail Holder | | Plastic Manufactures (Item 9640-00) |

There appears to be little reason to linger over these 24 products. Sanrio has submitted evidence consisting of pictures, specimens, packing lists, and invoices which identify these products. Most of these products were rated as "Cargo N.O.S." because of the fact that the shipper or the forwarder provided no specific descriptions in the first two bills of lading by which the Maersk's rating clerk could have selected the proper tariff item. Maersk apparently now recognizes that specific tariff items would have been applicable had the specific descriptions been entered although Maersk does not concede that Sanrio's evidence is adequate to carry its "heavy burden of proof." I have already discussed the fact that the Commission has invariably relied upon just the type of evidence which Sanrio has produced to determine whether the commodity can be reasonably found to be included in the tariff commodity description, e.g., sales literature, invoices, packing lists, actual samples, pictures.

Most of the products in the above table are identifiable by their names alone. For example, the box eraser, pencil sharpener, mini seal, doll pencil, towel hanger, cart, Strawberry Newspaper, adhesive tape, barrette, happy tooth brush, and ponytail holder are erasers, pencil sharpeners, seals, pencils, hangers, carts, newspapers, tape, etc. The invoice, packing list, and catalog give additional description to these items. For example, the box eraser which Maersk agrees would be rated as "stationery" is shown on the invoice (Ex. A-8) and the packing list (Ex. A-11) which state that 720 of them were shipped. In the new catalog, box erasers are shown under "School Supplies and Stationery." (See Ex. A-28, p. 42.) The other products are also listed on the invoice

and packing list, in most instances, and pictures or samples are provided. In some instances the name of the product is not self-explanatory but the packing list, invoice, catalog, pictures, or actual samples are provided which show what these products really are. For example, the "Petite Elegance" is a "pendant" made of glass and metal according to the invoice (Ex. A-9). Pictures of this product are shown on Exhibit A-40. It appears indeed to be a "personal ornament" as both Sanrio and Maersk seem to agree it should be rated. The "Vanity Set" is also not self-descriptive. However, the invoice describes it as a "(Book Shaped Mirror & Comb Set) Plastic 80%, Mirror 20%." (Ex. A-9 Sanrio's later catalog shows a picture of a "Vanity Set K/T" which corroborates the invoice description of the earlier catalog set. (See Ex. A-28, p. 14.) Both Sanrio and Maersk agree that the set would be rated as "plastic manufactures." Both the packing list and invoice show several thousand pieces of "Mini Seal." (See Exs. A-8, A-9, A-11, A-12.) A picture of the "Mini Seal" is shown on Exhibit A-40. They appear to be tiny images of children, bicycles, pistols, buckets, of no great value with no serious function or use. Both parties would rate them as "toys." The pencil sharpener is listed on the packing list and invoice (Exs. A-11 and A-8) and a picture of a Sanrio pencil sharpener is shown in the later catalog (Ex. A-28, p. 45) under "School Supplies and Stationery." Both Sanrio and Maersk would rate this product as "stationery." The doll pencil is identified on both packing list and invoice and a picture and actual sample are provided. (See Exs. A13, A-10, A-36, A-40 The evidence shows it to be a type of pencil with a kitty's head on the top and bright writing on the side. Both Sanrio and Maersk would rate it as a "novelty pencil." Similarly, the towel hanger, Strawberry Newspaper, adhesive tape, barrette, scissors, happy tooth brush, and ponytail holder are identified on the pertinent packing list and invoice, and in most instances the same or similar products can be seen in the catalogs (Exs. A-28, A-40). In other instances, e.g., the Cart, the product is described only on the packing list and invoice but the parties agree on the proper rate ("Cart") rather than "Cargo N.O.S" if the invoice and packing list are to be believed. Finally, the "little mascot" appears on the invoice for the third claim (SA-83) which identifies the product as "Ceramic 100%." (See Ex. A-24.) A picture of these little objects is shown on Exhibit A-40. Both Sanrio and Maersk would rate them as "ceramic-ware."

In summary, as regards the above 24 products, Sanrio has furnished evidence which is sufficient to indicate with reasonable definiteness that the products were not "Cargo N.O.S.," as most of them were rated, but were in fact specific commodities for which Maersk would in all probability have rated them under specific tariff commodity items had they been properly identified on the bills of lading. Although a picture of these products is not provided in every instance and sometimes only

a picture of the later Sanrio catalog item bearing the same or similar name is shown, the packing lists and invoice show what the products were with sufficient detail to permit rating them by a specific tariff commodity item. Indeed, now that Sanrio has provided the packing list and invoice and other evidence, Maersk has gone down the list of products and has rated them in agreement with Sanrio, insofar as these 24 products are concerned, although not conceding that the evidence is adequate. Even the product which is described by the least amount of evidence (the Cart, which is listed on the packing list and bill of invoice. Exs. A-15, A-16, and described as consisting of a cart body and iron handle with a price of $46) is shown with reasonable definiteness to qualify for the tariff rate for "Carts." It will be recalled that in the very case which established the doctrine that the shipper could show what actually moved notwithstanding bill of lading descriptions, *Western Publishing Co. v. Hapag-Lloyd*, the only evidence describing the commodity consisted of the packing list, invoice, and the bill of lading.[11]

Since the evidence establishes what each of the above products was and both Sanrio and Maersk have agreed on the proper tariff rate which was not assessed because of inadequate bill of lading descriptions at the time of the shipments, the only reason to deny the claims on each of the above products would be on the basis that the evidence is not sufficient to establish the true nature of the commodity for rating purposes. However, as discussed above, this type of evidence has traditionally been relied upon by the Commission in deciding overcharge cases and the shipper is not held to a standard of proof requiring that his evidence show what the commodity was by "clear and convincing" evidence or "beyond a reasonable doubt." The requirement is only that the shipper prove the validity of the claim with reasonable certainty and definiteness by a preponderance of the evidence. As to the above 24 products, although I do not applaud Sanrio's careless habit of providing uninformative descriptions on bills of lading, I find that Sanrio has made the requisite showing and met the pertinent standard of proof. The more difficult issues in this case relate to the next two categories of products in which Maersk does not agree with Sanrio on the tariff commodity item that should apply. The first of these two categories concerns 15 products which Sanrio alleges to be ratable as "toys" and is now discussed.

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[11] Later cases, as discussed earlier, have established that the shipper may show what actually moved regardless of bill of lading description and have cited the *Western Publishing* case as the basis for this doctrine. It is interesting, however, to note that in *Western Publishing* the bill of lading did show the commodity shipped to be "pre-school puzzles" as well as "crayons" and the Commission accordingly found that the carrier should have rated that portion of the mixed shipment which consisted of puzzles as "toys" rather than "crayons." In *Western Publishing*, therefore, the shipper had provided an adequate description on the bill of lading.

## THE DISPUTES CONCERNING "TOYS"

The bulk of the really viable disputes involve Sanrio's contention that 15 commodities should have been rated as "toys" whereas Maersk claims that they should be rated under various tariff items. namely "stationery," "Bags, Baskets, & Luggage," or "Artist's Materials." A list of these 15 commodities is set forth below together with Sanrio's old and new catalog numbers where available, and Maersk's contentions:

*15 Commodities Which Sanrio Claims to be "Toys"*

| *Old Catalog Number* | *Commodity* | *New Catalog Number* | *Maersk Claims They Are* |
|---|---|---|---|
| C/No. 3005/1-14 | Paper Clips (Plastic) | B12-1 | "stationery" |
| C/No. 3049/36-100 | Dear Diary | D31-1 | "stationery" |
| C/No. 3050/26-100 | Dear Diary | D31-2 | "stationery" |
| C/No. 3054/1-25 | Pack Memo | | "stationery" |
| C/No. 3055/1-25 | Pack Memo | | "stationery" |
| C/No. 3001/1-10 | Tiny Clip Board | D52-1 | "stationery" |
| C/No. 3002/1-3 | Tiny Clip Board | | "stationery" |
| C/No. 3011/1-17 | Phone Pal | | "stationery" |
| C/No. 4006/1-63 | Friendly Message | | "stationery" |
| C/No. 1004/1-8 | Coin Purse | A311-1 | "bags, baskets, & luggage" |
| C/No. 3009/18-84 | Mini Sketching Set | | "artist's materials" |
| C/No. 3010/14-84 | Mini Sketching Set | D4-2 | "artist's materials" |
| C/No. 4013 | Key Chain Phone Book | | * |
| C/No. 2015/1-7 | Charming Holder (Key Holder) | | * |
| C/No. 2017-18 | Charming Holder (Key Holder) | | * |

*Maersk does not state in its answer what it believes the proper rate to be.

Sanrio claims that all of the above products should be rated as "toys." It states that the Commission has ruled that in determining the essential character of an article, the starting point should be the shipper's catalog, sales efforts, common understanding of what is for sale, and samples of the commodities themselves, and believes that it has furnished evidence in these respects. Sanrio contends that its evidence shows that the articles are designed to appeal to children age 7 to 12 and that they are advertised in its magazine known as "The Strawberry" which is heavily oriented toward children and contains slogans such as "Kitty delivers your letters personally on her little tricycle" and "Little writing sets for hand deliveries." Sanrio asserts that it is unusual for children of the ages stated to keep diaries, write letters, or record phone numbers as a matter of habit and that the products are of such small size as to preclude any practical use for adults. (See Reply

Memorandum of Complainant.) Although Sanrio concedes that it does manufacture some articles included in its catalog as "School Supplies and Stationery" which may not be "toys" (Complaint, paragraph 3 L), nevertheless the bulk of its articles and those listed above, albeit in some instances educational, Sanrio contends are not intended or suitable for practical use, i.e., that they are not "fit and appropriate for the end in view." (*U.S. v. American & Paterson*, 9 Ct. Cust. App. 244, 245) (Complaint, paragraph 3 I). Sanrio states furthermore that "it is an unreasonable practice to make the shipper determine whether each toy might have some minuscule ulterior purpose outside its normal intended use." *Id.* To summarize, Sanrio contends that the products in question were manufactured and marketed for children as playthings and are not really suitable or intended for practical use. Furthermore, Sanrio believes that it has furnished the type of evidence which the Commission has relied upon in the past in determining validity of claims for overcharges. As to the reliability of invoices and packing lists sent from one Sanrio affiliate to another, which Maersk disputes because of lack of outside verification, Sanrio claims that these documents are entitled to belief because they are kept in the regular course of business and fall within Federal Rule of Evidence 803(6), 28 U.S.C.A., the court rule which permits admission into evidence of records kept by a business on a regular basis notwithstanding the fact that they are hearsay.

Maersk claims that Sanrio has failed to meet its "extremely heavy burden of proof" established under the *Western Publishing* case. Maersk contends that Sanrio has changed its story regarding the nature of the commodities from what Sanrio had described at the time of shipment and that it is relying upon in-house documents which are not subject to outside verification by evidence such as customs documentation. As to the nature of the products in question, Maersk contends that they are mainly stationery designed for use by children but that they have practical uses and are "clearly suitable for, and intended for, use" as stationery. (Brief of Maersk, at 7.) Maersk cites its tariff definition of "toys" and numerous cases in the field of customs law which hold that smaller articles which are really junior editions of articles used by adults, such as boxing gloves, baseball gloves, cheap musical instruments, cheap phonographs, and table croquet sets, have been held not properly classifiable as "toys" for customs purposes. Maersk states that Sanrio's own literature never uses the word "toys" but appears to be marketing junior editions of adult articles. Finally, Maersk seems to rely upon two things: (1) its belief that the articles in question can be actually used to perform a function which is more than serving as a mere prop in a child's fantasy; and (2) upon its tariff definition of a "toy" (Item 6020-00) which it believes to rule out these articles because they can, in Maersk's opinion, be used for practical purposes or are suitable for such purposes.

Most of Maersk's contentions regarding Sanrio's evidence have been discussed in my treatment of applicable principles of law. It has long been established that the shipper is permitted to depart from the description first entered on the bill of lading and show what actually moved by various types of evidence including the types of evidence furnished by Sanrio in this case. Furthermore, as I have noted, the "heavy burden of proof" does not change the usual standard requiring a preponderance of evidence demonstrating the validity of the claim with reasonable certainty and definiteness but merely refers to the shipper's problems in obtaining evidence, according to recent decisions of the Commission. As to Maersk's contention that certain evidentiary documents such as the packing lists and invoices are not entitled to much weight because they were sent from one Sanrio affiliate to another, I agree with Sanrio that they are documents kept in the regular course of business and are therefore recognized in law as being trustworthy not only under Federal Rule of Evidence 803(6) but under well established principles of the law of evidence. See notes to Rule 803(6), 28 U.S.C.A., at 586-587. Even if Sanrio, the importer, is affiliated with Sanrio, the shipper, it is hard to believe that a company actively engaged in manufacturing and selling its products would keep inaccurate inventory records and invoices in the daily conduct of its business or that it would be sloppy when dealing with an affiliate in the conduct of its affairs.

Although I do not agree with Maersk's various contentions on questions of law regarding the propriety of using the type of evidence which Sanrio has furnished nor with Maersk's contentions that Sanrio has a "heavy burden of proof" if that is supposed to mean that Sanrio must meet a "clear and convincing" or "beyond a reasonable doubt" standard of proof, I find that Sanrio's evidence that the 15 products listed above are toys does not establish with reasonable certainty and definiteness the validity of its claims. In other words, the preponderance of credible evidence, in my opinion, does not establish that the small articles such as Paper Clips, Dear Diary, Pack Memo, Clip Board, Phone Pal, Friendly Message, and the like, are toys within the common meaning of that word, under various dictionary and court definitions, under the Commission's definitions, and finally, and perhaps most importantly, under the tariff definition of "toys." In the last analysis the evidence submitted shows that these products can perform useful functions and are not merely child's playthings having no practical use whatsoever. The fact that the products are aimed at children and are designed for small fingers does not establish that they are useless playthings any more than children's aspirins, diapers, articles of clothing, small forks, spoons, etc., are toys because they are designed for small people rather than for adults.

## GENERAL PRINCIPLES OF LAW AND DEFINITIONS OF TOYS

Before discussing the specific evidence which Sanrio has furnished in support of its claims that the 15 products are all entitled to the tariff rate for "toys," a discussion of the various principles of tariff law and the meaning of the word "toy" is warranted.

Generally, Sanrio claims the 15 products to be toys because, according to Sanrio, they are small, cheap, designed for children's play, and are not suitable or intended for practical use. Maersk, on the other hand, contends that although they may have been designed for children they do have practical uses, i.e., that they are not merely playthings and that their construction, value, and transportation characteristics show them to be more like stationery for children than toys, and that Sanrio's own catalog and sales literature identify most of them as "School Supplies and Stationery" having practical uses. Maersk cites cases arising under customs law in which courts have followed the principle that an article of small size which resembles a practical object is in reality only a junior edition of the adult product and should be classified like the adult product rather than as a "toy." Essentially Maersk contends that the products have practical uses and are really junior editions of adult products.

As my discussion regarding the specific evidence will show, I agree with Maersk that the products have practical uses and are mainly stationery for children. Furthermore, as I also discuss, Sanrio's own sales literature and catalog never refer to the products as "toys," they describe them as having many uses and show them under "School Supplies and Stationery" or "Personal Accessories."

Ultimately, for Sanrio to prevail, it must show that its products qualify for the tariff item which describes "toys." As the Commission states in *United States of America v. Farrell Lines, Inc.*, 16 F.M.C. 41, 46 (1972):

> The burden is on complainant to establish that the [article] shipped may reasonably be included in the tariff item.

It is also basic tariff law that terms in a tariff must be used in the sense in which they are generally understood and accepted commercially and that neither carriers nor shippers are permitted to urge a strained and unnatural construction for their own purposes. *Matson Navigation Company v. Port Authority of Guam*, 20 F.M.C. 506, 512 (1978); *European Trade Specialists v. Prudential-Grace Lines*, 21 F.M.C. 888, 890 (1979); *National Cable and Metal Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 470, 473 (1941); *Corn Products Co. v. Hamburg-Amerika Lines*, 10 F.M.C. 388, 393 (1967); *National Van Lines, Inc. v. United States*, 355 F.2d 326, 332 (7th Cir. 1966). If there is no specific commercial meaning to a term, that term must be given its ordinary meaning and one can turn to the dictionary definitions as an aid. *European Trade Specialists v. Prudential-Grace Lines, Inc.*, 21 F.M.C. 890-891.

The tariff definition used by Maersk, the dictionary definitions, court definitions, and Commission decisions all appear to be very similar in their definitions of a "toy." Essentially they define toys as playthings usually designed for children chiefly for purposes of amusement or diversion and having no practical use. Thus, Maersk's tariff defines a "toy" as follows:

> A toy is defined as a play thing for children or pets which is neither suitable nor intended for other use.

There are several dictionary definitions of a "toy." In *Equality Plastics, Inc. et al.*, 17 F.M.C. at 228 n. 13, the Commission quoted the following definition from "Webster's Third New Dictionary (1966)":

> "toys" are defined as ". . . something designed for amusement or diversion rather than practical use . . . ."

The more complete definition contained in Webster's Third International Dictionary 2419 (Rev. Ed. 1971) is as follows:

> Something designed for amusement or diversion rather than practical use; an article for the playtime use of a child either representational . . . and intended esp. to stimulate imagination, mimetic activity, or manipulative skill or nonrepresentational . . . and intended esp. to encourage manual and muscular dexterity and group integration; something diminutive esp. in comparison with others of the same general class (the tug was a toy beside the ship that it guided).

The Random House College Dictionary 1390 (Rev. Ed. 1975) defines a "toy" as follows:

> 1. an object, often a small representation of something familiar, as an animal, object, person etc. for children to play with; plaything; 2. something of little or no value or importance; trifle; 3. something diminutive, especially in comparison with like objects.

Webster's New World Dictionary 1505 (2d College Edition 1974) defines toys as follows:

> 2. a thing of little value or importance; trifle 3. a little ornament; bauble; trinket 4. any article to play with, esp. a plaything for children 5. any small thing, person, or animal; specif., a dog of a small breed.

The Tariff Schedule of the United States (TSUS) defines "toy" as follows:

> Any article chiefly used for the amusement of children or adults. 19 U.S.C.A. 1202, Schedule 7, Part 5, at 613.

The above TSUS definition was quoted by the Commission in *Ross Products and Taub, Hummel & Schnall, Inc.*, 16 F.M.C. 333, 341 (1973). Furthermore, in *Equality Plastics, Inc.*, the Commission had occasion to determine whether a battery-operated vacuum cleaner, an immersion

heater, and a battery-operated drink mixer were "toys" for ocean tariff rating purposes. The Commission noted both the dictionary and TSUS definition of "toys" and determined that only the drink mixer could be rated as a toy under the carrier's tariff on the ground that the mixer did not have "a more practical use than one chiefly for amusement." 17 F.M.C. at 228. Although the drink mixer consisted of a jar with cocktail recipes printed thereon and a plastic cover with batteries which operated a stirring rod, the Commission nevertheless believed the mixer to be a toy because it did not work very well even with new batteries. 17 F.M.C. at 221. It would appear that the Commission agrees with Maersk that the "touchstone is whether the item can be used to perform a function." (Brief of Respondent Maersk, p. 8.)

The idea that something is a toy because it has no practical function and is suitable only for amusement, diversion, or play seems to be found not only in the preceding definitions but in various decisions of the courts under customs law cited by Maersk. In such cases as *Mego Corp. v. United States*, 405 F. Supp. 1088, (Cust. Ct. 1975); *New York Merchandise Co. v. United States*, 294 F. Supp. 971 (Cust. Ct. 1969) and other cases cited by Maersk in its Brief (page 8 n. 7), the Customs Court has held that little articles such as boxing gloves, baseball gloves, croquet sets, musical instruments, cheap music boxes, etc., are not toys but are really junior editions of adult articles which do perform practical functions, albeit on a reduced scale. In other cases arising under the TSUS, the courts have found articles to be toys when such articles had no practical functions but were used primarily for amusement or diversion. See, e.g., *U.S. v. Topps Chewing Gum, Inc.*, 440 F.2d 1384 (C.C.P.A. 1971) (metallic buttons with humorous sayings printed on them worn by children); *Henry A. Wess, Inc. v. U.S.*, 434 F. Supp. 650 (Cust. Ct. 1977) (battery-operated practical joke known as "Frisky Whiskey Bottle").

As will appear in my discussion below, the 15 products which Sanrio claims to be toys are not shown by the evidence to have no practical purpose. On the contrary, they appear to be usable for clipping paper, writing, holding keys, holding coins, drawing, sketching, etc., and nowhere does Sanrio's catalog indicate that they cannot or should not be used for those purposes. The fact that children may play with them, moreover, does not change their essential nature. It is the controlling or primary use, not possible use that should be considered if necessary to determine the nature of an article for tariff rating purposes. *Royal Netherlands Steamship Co. v. Federal Maritime Board*, 304 F.2d 938, 941 (D.C. Cir. 1962); *Continental Can Co. v. United States*, 272 F.2d 312, 315 (2d Cir. 1959); *Merck Sharp & Dohme International v. "K" Line*, 22 F.M.C. 396, 399 (1979). Indeed, possible use rather than controlling or primary use does not constitute a lawful basis for establishing different tariff charges. *Royal Netherlands Steamship Co. v. Federal Maritime*

*Board*, 304 F.2d at 941; *United States v. Baltimore & O. R. Co.*, 225 U.S. 326, 342 (1912); *Misclassification and Misbilling of Glass Articles*, 6 F.M.B. 155, 159 (1960); *Raymond International Inc. v. Venezuelan Line*, 6 F.M.B. 189, 191 (1961).

In finding that the 15 products are not toys as Sanrio contends but mainly stationery for children or other things, I recognize the fact that in cases of this nature it is not always easy to classify different articles under their proper tariff descriptions. Frequently reasonable persons may differ as to the proper classification and the answer is very close. As the court observed in *Continental Can Company v. United States*, "there is no justification for holding that one classification is so clearly right and the other wrong . . . " 272 F.2d at 316. In that case, as the court noted further, the Board's Examiner had reached one conclusion, the Board reached another with one member dissenting, and the court reversed the Board with three separate opinions. 272 F.2d at 316. My analysis of the evidence, however, convinces me that Sanrio has not carried its burden and has not shown that the 15 products qualify for Maersk's tariff definition of a toy as merely a child's plaything which is neither suitable nor intended for other use with reasonable certainty and definiteness by a preponderance of the evidence.

## ANALYSIS OF THE EVIDENCE SHOWING THE NATURE OF THE 15 PRODUCTS ALLEGED TO BE "TOYS"

As with the 24 products discussed earlier where Sanrio and Maersk were able to agree upon the applicable tariff commodity item, Sanrio has furnished catalog pictures, sales literature, invoices, packing lists, actual samples, and statements of its distribution manager, Mr. Cameron, describing the purposes and uses of the products. This evidence certainly identifies the products so that they can be rated mostly as something other than General Cargo N.O.S. In most instances, furthermore, the description given in the above table is self-explanatory. The Paper Clips are described as "paper clips" on the invoice (Ex. A-8) and described to be "100% Plastic" with 15 pieces in a plastic case. Samples of them are attached as Exhibit A-36. They are about one and one-half inches in length and can clip paper together, as the sample provided shows. However, Sanrio claims that they are really toys because they "break easily" and would not hold up well as attachments, being more decorative than practical," (Reply Memorandum by Complainant, at 4). I grant that the paper clips are colorful and have little animal heads on the top so that they appeal to children. But they do perform a practical function and Maersk's tariff commodity item lists paper clips specifically under stationery (Item 5820-10, Tariff 8th rev. page 306).

Similarly, the Dear Diary, Pack Memo, Tiny Clip Board, Phone Pal, Friendly Message, Coin Purse, Mini Sketching Set, Key Chain Phone Book, as far as can be seen from the pictures and samples provided, can

perform practical functions, although aimed at children and designed for little fingers. Furthermore, many of these products are marketed and shown under Sanrio's later catalog (Ex. A-28) under the caption "School Supplies and Stationery." For example, the "Dear Diary" is shown in the catalog on p. 38 as an actual booklet of paper and is marketed in the catalog as "School Supplies and Stationery." It is shown together with a number of other products such as ballpoint pens, mechanical pencils, staplers, and other products which are shown lying on a desk (Ex. A-28, at 41). It is difficult to argue from this evidence that the products do not work, have no practical functions, and are mere playthings, especially when Sanrio itself does not list them as "toys" and advertises that the products have many uses. For example, in discussing many of these products, Sanrio's own sales literature states:

> Other items in this line are miniature stationery items like the My Pockette memo book and the mini letter set. Mini color pencils delight the eye with their bright colors and compact shape, and the variety of charming holders available indicates their customer appeal. Petite push pins and *paper clips have many uses*, and the mascot stapler and refills are an attractive way for customers to get it all together. Also available are key charms and key chain phone book . . . . Children always enjoy *using things designed on a smaller scale with their fingers in mind*. As inexpensive and unusual gifts, these miniatures are unbeatable . . . . Ex. A-32. (Emphasis added.)
>
> Sanrio's business now encompasses a wide range of fields, centering on the design, manufacture and wholesaling and retailing of merchandise for young people *and for those adults who have preserved youthful enthusiasm and joy*. (Ex. A-29.) (Emphasis added.)

Contrary to Sanrio's contentions that the Pack Memo, Tiny Clip Board, Phone Pal, Friendly Message, Coin Purse, Key Chain Phone Book, Charming Holder (key holder), are really tiny items having no practical use, they are in reality constructed and marketed as stationery or as items having many uses, albeit appealing to children aged 7 to 12. Where pictures are provided, usually in the later catalog (Ex. A-28), moreover, it is obvious that the products are constructed of paper and for purposes of writing, not for useless diversion or for turning into missiles or spitballs. As Maersk remarks, many of these products are really stationery for use by children and bear far more physical resemblance in terms of value and carriage to stationery than to toys which for the most part are less compact, not constructed of paper, and do not have the high value per cubic foot that stationery does. (Brief of Respondent Maersk, at 9.)

Most of the 15 products listed in the above table, or their close analogues, are shown in Sanrio's catalog (Ex. A-28) as "School Supplies

and Stationery" and are advertised as having uses, not as being wholly impractical. Having placed them together with stationery items and marketing them in its catalog under such nomenclature, Sanrio is not very convincing when it argues that they are really toys having no practical use. Such a contention contradicts its own marketing and advertising efforts. Evidence of the manner in which a company markets its goods has been considered probative in determining the nature of the product. *See, New York Merchandise Co. v. U.S.*, 294 F. Supp. 971, 976 (Cust. Ct. 1969); *Davis Products, Inc. v. U.S.*, 59 Cust. Ct. 226 (1967).

To recapitulate, of the above 15 products, the first nine, "Paper Clips" through the "Friendly Message," are all in fact children's stationery items made of paper and plastic materials capable of practical uses, according to Sanrio's own sales literature and visual inspection of the actual samples and catalog pictures provided. In no instance is there any marketing or advertising in which the products are described as "toys" and in most instances they are listed under "School Supplies and Stationery" in Sanrio's own catalog. I agree furthermore with Maersk which has re-rated these items without conceding that the evidence is reliable and sufficient, and contends that the products are ratable under the tariff item for "Stationery" (Item 5820). Not only do the products fit the generic description of stationery for children far better than toys but in most instances they or their analogues are specified in the tariff item cited.[12] Maersk has persuaded me that the nine products "may reasonably be included in the tariff item." *United States of America v. Farrell Lines, Inc.*, 16 F.M.C. at 46.

Similarly, as to the next three products (Coin Purse and the two Mini Sketching Sets), Sanrio has failed to show by a preponderance of reliable and probative evidence that they are toys, i.e., that they are mere playthings having no practical functions whatsoever. The Coin Purse is shown on Exhibit A-36 where an actual sample is provided. It is several inches in size and comes with a little pencil and paper entitled "Shopping Memo." The invoice (Ex. A-10) describes it as "Coin Purse w/One Pencil, Cotton 90%, Pencil 10%." Sanrio's later catalog carries it under "Personal Accessories, Useful and Handy." (Ex. A-28, pp. 18, 19.) The product appears capable of carrying coins and enables children to write lists of things on the memo with the pencil. The other products shown in the catalog under the same heading "Personal Accessories" appear equally capable of performing useful functions and are more than mere playthings having no practical purpose. For example, under this heading in the catalog Sanrio also sells scissors, wallets, nail

[12] For example, listed under the Stationery Item in the tariff are such things as: Clipboard, Diaries, Loose Leaf Books, Note Books and Blocks, Address Books, Letter Paper, Paper Clips, Paper Clamps. (See Tariff, 8th rev. page 306.)

clippers, sewing sets, etc., which could hardly be called useless "toys." Indeed, as noted earlier, even Sanrio agreed that scissors should not be rated as toys but as "stationery." I agree with Maersk and with Sanrio's catalog that the Coin Purse is "useful and handy" and is therefore not a "toy." I also agree with Maersk, assuming the evidence is acceptable and sufficient, as I so find, that the proper rate for the product is the tariff item for "Bags, Baskets, and Luggage" (Item 3440). That item not only includes bags but also lists such things as "Purses and Wallets." (See Conference Tariff, 17th Rev. Page 258.)

The Mini Sketching Sets are shown in Sanrio's catalog under "School Supplies and Stationery." (Ex. A-28, pp. 32-33.) The invoice (Ex. A-10) describes them as containing 14 color pencils in a plastic case with a sketch book in a vinyl case. The catalog further describes Sanrio's "School Supplies and Stationery" as "Aiding Study and Creativity." (Ex. A-28, p. 32.) Sanrio contends that the toy rate should apply but again I find that the product has an obvious practical function for drawing and sketching and Sanrio's own catalog indicates that the product as well as the other products shown on the same page and heading have practical purposes. I agree with Maersk's contentions, assuming the evidence to be sufficient, as I so find, that the proper tariff rate is for "artist's materials." In the tariff, "artist's materials" are specifically listed under the item for "stationery" (Item 5820, 8th rev. page 306).

The Key Chain Phone Book and two Charming Holders are the last products in the list. Again, Sanrio has failed to show that these products are toys having no practical uses. The Phone Book is shown on Ex. A-40, the previous Sanrio catalog. Other products on that exhibit have already been discussed and appear to be products made of paper for writing purposes (i.e., Phone Pal, Friendly Message) which I have already found to be functional. The invoice describes the Key Chain Phone book to be "Metal 40%, Paper 60%. (Ex. A-24.) Sanrio's sales manual discusses the Phone Book in the context of products having "many uses" and of children "using things designed on a smaller scale with their fingers in mind." (Ex. A-32.)[13] Sanrio has simply failed to provide a preponderance of evidence to sustain its burden of proof that the Phone Book is really a useless toy. On the contrary, the evidence suggests that the product cannot only hold keys but that names can be written into the little book. However, Maersk has not argued nor shown what the rate for this product should be other than Cargo N.O.S. It is not shown by Maersk that the little phone book which is smaller than the "Phone Pal" but is 60% paper qualifies for the "stationery" rate or any specific commodity rate other than Cargo N.O.S.

[13] I have quoted the pertinent language from the sales manual above which discussed such products as petite push pins, paper clips, mascot staplers, as well as key charms and the key chain phone book.

Finally, we come to the two Charming Holders. Pictures of these products from the previous Sanrio catalog are shown on Ex. A-40. They appear to be key holders with little images of little people attached to one end of a chain. The invoice (Ex. A-24) shows that the Charming Holder consists of "Plastic 70%, Mirror 10%, Metal 20%." From all that can be determined from the evidence relating to this product, the little key holder can do the job it appears designed to do, namely, hold keys. It was Sanrio's burden to prove that the key holder had no practical purpose and was a child's plaything useful for nothing else so as to qualify for the tariff rate for "toys." As in the case of the Key Chain Phone Book, Maersk has not re-rated this product and has not contended that it should be rated under a specific tariff item. I am cited to no evidence or specific commodity tariff item except by Sanrio which incorrectly claims they are ratable as "toys." For all that the record shows, therefore, they should be rated as Cargo N.O.S.

To conclude, I agree with Maersk on the re-rating of 12 of the above 15 products as being "stationery," "bags, baskets and luggage," or "artist's materials" within the meaning of the cited tariff items, and find that the evidence and Maersk's contentions regarding the proper tariff item are persuasive. As to the last three, there is neither persuasive evidence nor argument from either side showing that the products qualified for a specific commodity tariff item rather than for Cargo N.O.S. In no event do I find that any of the 15 products have no useful function so that they could qualify for the "toy" rate. On the contrary, in each instance the product appears to be useful for children and designed for their little fingers and Sanrio's own sales literature and catalog appear to belie its contentions that the products have no practical use.

## THREE OTHER COMMODITIES WHICH SANRIO CLAIMS WERE OVERCHARGED

There are three remaining products which Sanrio claims were overcharged but which Sanrio does not claim to qualify for the "toy" rate. These are its "Mini Stamp Set," "Bath Kit," and "Hankie Set," which Sanrio claims should have been rated as "Stationery," "Travel Kit," and "Paper Manufactures," respectively. The following table shows the products:

| *Old Catalog No.* | *Commodity* | *Sanrio Claims* | *Maersk Claims* |
|---|---|---|---|
| C/No. 4022/72 | Mini Stamp Set | Stationery | Cargo NOS |
| C/No. 1031/1-126 | Bath Kit | Travel Kit | Cargo NOS |
| C/No. 1006/18-116 | Hankie Set | Paper Manufactures (Mixed Shipment) | Cargo NOS |

I find that Sanrio has shown with reasonable certainty and definiteness that the Bath Kit and Hankie Set were misrated. In the other instance there is a failure of proof.

The Mini Stamp Set, according to Sanrio, consists of four character stamps, two stamp pads, and name cards. Sanrio refers to the picture of this set in the later catalog (Ex. A-28, p. 25). (Reply Memorandum, p. 4.) Sanrio claims that the set is really a plaything for children and would have qualified for the "toy" rate but for the fact that rubber stamp sets over $9.00 per gross were excluded from the "toy" rate. (Reply Memorandum, p. 4.) The invoice shows the stamp set to be "4 stamps, 2 color ink with message card in plastic case, Plastic 80%, Paper 10%, Ink 10%." (Ex. A9.) The later catalog (Ex. A-28) shows this set under "Mascots and Miniatures" and it appears to function for children to affix stamped images onto little cards. As Sanrio itself admits, the set could not qualify for the "toy" rate in the tariff because rubber stamp sets of its value were excluded from the "toy" rate. (Reply Memorandum, p. 4.) However, it cannot qualify for the "stationery" rate which Sanrio has selected in the alternative because, as Maersk points out, the "stationery" rate covers only "Rubber Stamps and Stamp Pads" but this set includes more than the pads and stamps, i.e., it includes ink and message cards. (Answer to Complaint, p. 5.) Since the burden is on Sanrio to show that the article shipped "may reasonably be included in the tariff item" (*United States v. Farrell Lines, Inc.*, 16 F.M.C. at 46), and since Sanrio has not shown that the set can qualify for either the "toy" rate or the "stationery" rate for the reasons discussed, it appears that Maersk's only alternative was to rate the set as Cargo N.O.S. I therefore cannot find that Sanrio has proven this particular claim.

The Bath Kit is identified in Sanrio's sales literature as a travel kit intended for that specific use. (See Ex. A-38.) A verified statement of Mr. Bruce Cameron, Sanrio's Distribution Manager, confirms that this item is intended for use as a travel kit which allows parents to wash and bathe children on trips, each kit containing a sponge, brush, towel, soap, and soap case. (Ex. A-39.)[14] Sanrio's later catalog (Ex. A-28, p. 10) shows a "Bath Kit" under two item numbers (1031 and 1050). They appear to contain the things that Mr. Cameron states they do. They are listed in the catalog under "Toiletries and Grooming Aids" together with such articles as a wash up kit, a towel hanger, hair brush, hand mirror, bath towel, face towel, etc. Sanrio therefore believes that the

[14] As I discussed earlier, Maersk has argued that the verified statements of Mr. Cameron should not be given much weight because they are self-serving. However, as I noted, the Commission, in *Unapproved Sect. 15 Agt.-Coal to Japan, Korea*, 7 F.M.C. at 302, has held that self-serving testimony is not automatically discredited but is considered together with all the evidence. For a similar holding *see, Builders Steel Co. v. Commissioner of Internal Rev.*, 179 F. 2d 377, 380 (8th Cir. 1950).

product qualifies for the Maersk tariff rate published for "Travel Kits (with or without toiletries)" (Item 3440-10). Maersk concedes that the Sanrio catalog mentions some items in relation to travel but argues that the plastic bag in which the toilet articles are held may be for storage purposes rather than travel, as far as the evidence shows. (Answer to Complaint, p. 5.) Maersk therefore urges a Cargo N.O.S. rate. I find that the evidence shows with reasonable certainty and definiteness that the Bath Kit is essentially made for travel purposes and that it is reasonably included in the Maersk tariff item for "Travel Kits . . ." As discussed earlier, the standard of proof is not "clear and convincing" evidence or evidence "beyond a reasonable doubt" but simply a preponderance of the evidence. Furthermore, Maersk's speculation that the travel bag may be used for storage purposes is not convincing or probative evidence. As discussed earlier, the primary purpose of the product is what determines its essential nature, not speculation as to possible uses. Maersk's tariff publishes a commodity item which reads:

> Bags, Baskets and Luggage, includes: Travel Bags, Travel Cases and Travel Kits, with or without Toilet Articles. (Item 3440-00, 17th rev. page 258.)

The evidence shows with reasonable certainty that the Bath Kit is a travel kit with various articles included for use on trips. Maersk's argument that the Bath Kit cannot fit into the tariff item seems strained and unnatural. I would therefore grant this particular claim.

The final product is a Hankie Set which Sanrio claims should have been charged under the tariff rate for "Paper Manufactures." The relevant invoice (Ex. A-8) shows the set to consist of "Handkerchief and Tissue Paper in Vinyl Case." The packing list contains notations in pen stating that the set consists of "Plastic, Tissue, Cotton Cloth." (Ex. A-14.) Sanrio claims that the hankie set qualifies for the "Paper Manufactures" rate under the Conference's mixed shipment rule (44) which requires that a shipment of mixed goods be rated under the rate for the highest rated commodity included in the mixed set. (See Rule 44, attached as appendix 6 to Affidavit of Robert D. Grey, Conference Chairman.)

Maersk claims that the hankie sets were properly rated as Cargo N.O.S. because the shipper did not show Maersk separate valuations for the component parts of the shipment so that Maersk could apply Rule 44. The Conference agrees that Maersk was unable to apply Rule 44 because the commercial invoice was not furnished so that Maersk was forced to apply the Cargo N.O.S. rate.

Notwithstanding the failure of Sanrio to explain the nature of the hankie set at the time of shipment, Sanrio has now shown that it does consist of three different materials: paper, cloth, and vinyl. Furthermore, Sanrio has furnished an exhibit (Ex. A-51) attached to its Reply to the Conference which explains the application of Rule 44 and Rule

11 in the tariff, which latter rule pertains to valuation of the elements of the mixed shipment. The exhibit shows that if Rule 44 is applied, the hankie set should be rated under the rate for "Paper Manufactures" ($118 WM) which is the highest of the rates, higher than the rates for plastic goods or cotton. Sanrio has now shown with reasonable certainty and definiteness the validity of its claim that the hankie sets are entitled to the "Paper Manufactures" rate of $118 WM rather than the rate for Cargo N.O.S. As shown earlier, the failure of a shipper to provide full information on the bill of lading does not preclude the shipper from later showing the true nature of the cargo. I would therefore grant this particular claim.

## PROCEDURE TO DETERMINE TOTAL AMOUNT OF REPARATION

As discussed above, there are 42 different products as to which Sanrio has filed claims alleging overcharges. This total can be divided into three groups. The first group consists of 24 products which both Sanrio and Maersk have agreed as to the proper tariff rate, although Maersk does not concede that Sanrio's evidence was adequate to prove the true nature of the products. The second group consists of 15 products which Sanrio claimed to be "toys" but which Maersk contends to be something else, mainly stationery products for children. Of this group, Maersk has shown persuasively that 12 of the products, while not toys, should be rated as "stationery," "bags, baskets and luggage," or "artist's materials." The third group consists of three products which Sanrio claims should have been rated under specific tariff items rather than Cargo N.O.S. I have found that Sanrio has proven that two of these three products (Bath Kit and Hankie Set) were misrated.

To summarize, I have found that the evidence and arguments presented by both Sanrio and Maersk show what the proper rate should have been on 38 products out of the 42 (24 from the first group, 12 from the second group, and two from the third group). Since Sanrio based its calculations of total overcharges on favorable findings for all 42 of its claims, it calculated total overcharges to be $4,360.76. Maersk re-rated some of the products, without conceding that Sanrio's evidence was sufficient, and arrived at a figure of $2,288.06. The record, therefore, does not contain an exhibit showing overcharge calculations based upon my findings that the proper rate has been shown for 38 products out of the 42.

Under these circumstances, the Commission's rules provide an appropriate procedure. Both Rules 251 and 252 (46 C.F.R. 502.251-252) permit parties to furnish exhibits showing reparation calculations when the record has not been fully developed on the question of reparation. Rule 251 provides that "[i]f complainant is found entitled to reparation,

the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation." Rule 252 provides that when "the amount cannot be ascertained upon the record . . . , the complainant shall immediately prepare a statement . . . . Complainant shall forward the statement . . . to the carrier . . . for checking and certification as to accuracy. Statements so prepared and certified shall be filed with the Commission for consideration in determining the amount of reparation due. Disputes concerning the accuracy of amounts may be assigned for conference by the Commission, or in its discretion referred for further hearing."

It is obviously necessary to follow the procedures set forth in the above rules. Furthermore, because the record shows the correct rate for 38 of the 42 products, I believe that the amount of overcharge on these 38 should be calculated rather than the overcharge on merely those 26 products as to which only Sanrio and Maersk or Sanrio alone have shown what commodity rate should have applied. Otherwise, if nothing is done to correct the rating on the 12 products which, although not toys, have been shown by Maersk to be ratable under specific tariff items, Maersk will retain freight even when Maersk itself has made a persuasive showing of the rate that should have been supplied. Had this simply been a case in which Sanrio had failed to prove the validity of its claims, the prevailing decisions of the Commission hold that the claims should be denied. *See, e.g., Pacific Freight Audit, Inc. v. Sea-Land Service, Inc.*, 22 F.M.C. 207 (1979); *Poirette Corsets, Inc. v. Consolidated Express, Inc.*, 22 F.M.C. 376 (1979); *Abbott Laboratories v. United States Lines, Inc.*, 18 F.M.C. at 264-265. But since Maersk has, admittedly without conceding that Sanrio's evidence is sufficient, shown what the correct specific commodity tariff rate should have been in 12 instances even when it disagreed with Sanrio's claims in those instances, the record permits those products to be re-rated so that Maersk will ultimately retain the correct freight. Under such circumstances, claims can be granted even when the claimant has not made the showing. *See, e.g., European Trade Specialists, Inc. and Kunzle & Tasin v. Prudential-Grace Lines, Inc.*, 19 F.M.C. 148, 163-164 (1976); Informal Docket No. 607(I), *Ideal Toy Corporation v. Atlantic Container Line*, Order Remanding Proceeding, October 31, 1979. *Cf. Union Carbide InterAmerica v. Venezuelan Line*, 17 F.M.C. at 182.[15]

[15] On the other hand, where neither Sanrio nor Maersk has made a persuasive showing that the product should have been rated under a specific tariff commodity item, as is the case with four of the products in question, it would conceivably be a violation of due process to make *sua sponte* findings if neither side had had an opportunity to argue and litigate the matter. In other words, a new finding or new theory should not be utilized in a decision detrimental to a party when no party had notice that such findings would be made nor opportunity to present their arguments and evidence on the particular matter. *See N.L.R.B. v. Temple-Estex, Inc.*, 579 F 2d 932, 936 (5th Cir. 1978). Incidentally, in the present case, Sanrio had the last opportunity to reply to Maersk's re-rating of the 15 allegedly toy products and in that final reply continued to argue that the products were ratable as "toys."

Since findings concerning the proper re-rating of 38 products have been made, if these findings are affirmed by the Commission, the case can be closed quickly by submission of the relevant arithmetic calculations which both sides ought to be able to agree upon. Final determination of the proper rating for these products as well as the amount of reparation should also serve a useful purpose of curtailing the scope of the three other informal dockets involving similar claims now pending before Settlement Officers as well as future claims which Sanrio appears to be preparing, all leading toward quicker termination of formal dockets.

Accordingly, if this decision is adopted by the Commission, the complainant shall prepare an exhibit showing calculations of overcharges by re-rating the 38 products in accordance with the findings made in this decision, shall submit its calculations to Maersk for verification, and shall thereafter submit them to the Commission as provided by Rule 252 under such schedule as the Commission may devise. Unless disputed by Maersk, such exhibit will form the basis for determining the amount of reparation to be awarded.

## THE CONTENTIONS OF THE TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA

On February 12, 1980, the Trans-Pacific Freight Conference of Japan/Korea petitioned for leave to intervene. The Conference stated that this case is only one of at least four similar cases involving the same shipper and members of the Conference and that critical issues concerning its tariff were involved which justified its participation. Respondent Maersk supported the petition while complainant Sanrio opposed. I granted intervention so that the Conference could make known its views on matters concerning its tariff and on the evidentiary materials submitted by Sanrio and further instructed the Conference to file tariff pages and furnish explanations on certain matters which the original parties had failed to do. (See Intervention Granted, March 4, 1980.) The Conference complied fully with my ruling and furnished its arguments and an affidavit of the Conference Chairman, Mr. Robert D. Grey, within 16 days of the date of service of the ruling.[16]

The arguments of the Conference are directed to two problems: (1) the present state of Commission law which permits shippers to obtain reparation awards if they show what was actually shipped notwithstanding contrary or obscure bill of lading descriptions; and (2) the type

[16] I accepted the filings of the Conference one day late because, as Conference counsel explained in a cover letter, unexpected absence of counsel overseas coupled with a heavy work load, made it impossible to file everything in 15 days. (See letter from George A. Quadrino to me, dated March 20, 1980.) Despite the short period of time granted the Conference to file all of the requested materials, counsel was able to furnish the record with explanatory evidence and critical missing tariff pages which proved to be of great benefit to me in understanding the opposing contentions.

of evidence submitted by Sanrio in this case which the Conference believes to be unreliable and contradictory. The affidavit submitted by the Conference Chairman, Mr. Grey, states that the present Commission law in this type of case encourages careless and negligent practices on the part of shippers and forwarders, interferes with the Conference's rate policing efforts, and encourages the growth of outside traffic consultants working for percentages of refunds. Mr. Grey asks the Commission to reconsider its decisions and recognize that the shippers they are protecting are "multimillion dollar, international corporations, well schooled in international transportation and well able to enter into binding contracts with carriers." (Affidavit, at 5.)

SANRIO'S REPLY TO THE CONFERENCE'S CONTENTIONS

Sanrio has replied to the Conference. Sanrio contends that the Conference, rather than help in determining how to interpret its tariff, their ostensible reason for intervening, has used this case "as a platform to air its criticism of prior Commission decisions and the profession of freight auditing in particular." (Reply by Complainant to Conference, at 2.) Sanrio contends that the Conference's idea that the bill of lading is a contract and that shippers are held to their cargo descriptions placed in the bills of lading contravenes principles of tariff law which hold that tariffs have the same status as statutes and take precedence over private contracts, citing a case that the Conference also cites, *State of Israel v. Metropolitan Dade County, Florida*, 431 F. 2d 925, 926 (5th Cir. 1970). Sanrio defends the reliability and authenticity of the evidence it has submitted, stating that the invoices and packing lists are dated at the time of the shipments and signed by a Mr. Z. Takahashi of the International Division, that the invoice is a record of transfer of merchandise by sale from Sanrio the shipper in Japan to Sanrio, Inc., the purchaser in California, and that the reference numbers on the invoices, packing lists, and bills of lading all correspond. Moreover, the invoice comprises a more detailed statement whereas the bill of lading constitutes only a summary, according to Sanrio's argument. Sanrio rebuts the Conference's assertion that customs declarations should be relied upon to show that the products alleged to be toys are not toys, stating that those declarations show only the opinion of the customhouse broker who prepared them for purposes of customs clearance, not for purposes related to carrier tariff classifications.

Sanrio strongly objects to certain statements of Conference Chairman Grey and Conference counsel that criticize shippers' use of outside freight consultants, considering some of the remarks "scandalous." Sanrio asserts that many shippers do not employ rate experts and rely upon outside professionals as needed and that the Conference is attempting to discredit a profession which serves the shipping public. Furthermore, Sanrio asserts that these cases were made necessary be-

cause of the Conference's own practices and rules under which Maersk had to deny the claims when first presented, although Sanrio filed the claims only a few months after the alleged classification errors were discovered. Sanrio contends, moreover, that it is the Conference which is unfair in its treatment of claims and that if, as alleged by Mr. Grey, some forwarders may be intentionally misdescribing goods on bills of lading, the Conference ought to begin verifying documents presented to them relating to the bills of lading. Furthermore, Sanrio contends that it is absurd to expect that shippers or forwarders would deliberately err in filling out bills of lading so that the shipments would be charged higher rates with the intent of recovering something later.

DISCUSSION OF ISSUES RAISED BY THE CONFERENCE

The Conference is asking the Commission to reverse its policy of awarding reparation on the basis of evidence showing what actually moved regardless of previous bill of lading descriptions. The Conference contends that this policy is contrary to contract law which holds that a contractor may not avoid its agreed-upon obligations by relying upon its own mistakes, is contrary to the decision of the Court in *State of Israel v. Metropolitan Dade County, Florida*, 431 F. 2d 925 (5th Cir. 1970), places carriers in extremely difficult and unfair positions in trying to defend against overcharge claims filed many months after the shipment when the goods have long since disappeared into the stream of commerce, and encourages purposeful inaccuracies by forwarders and shippers who may misdescribe commodities on bills of lading but nevertheless seek reparation later notwithstanding their own misdescriptions. Most of these arguments have been made in past cases. However, almost all of them have been rejected by the Commission which has invariably reversed any Administrative Law Judge or Settlement Officer who has denied reparation because of them.

The Commission has long held that a shipper is entitled to reparation for overcharges if he can show what actually moved notwithstanding an incorrect description which the shipper or its forwarder may have placed on the bill of lading. As discussed earlier, the leading case is *Western Publishing Co. v. Hapag-Lloyd A.G.*, but this was the Commission's view even before that case. *See, e.g., Union Carbide Inter-America v. Norton Line*, 14 F.M.C. 262, 264 (1971), and case cited therein. Moreover, the shipper has been granted reparation even when the shipper has failed to comply with tariff provisions regarding use of trade names in bills of lading or requiring the shipper to designate on the bill of lading that the cargo was proprietary in nature and therefore entitled to special, lower rates. *See, e.g., Pan American Health Organization v. Prudential Lines, Inc.*, 19 F.M.C. 412 (1976) (shipper awarded reparation despite its noncompliance with tariff trademark rule); *Abbott Laboratories v. Venezuelan Line*, 19 F.M.C. 426 (1977) (shipper's use of

trademark description no bar to recovery); *Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V.*, 19 F.M.C. 431 (1977) (same); *Cities Service International, Inc. v. The Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976) (shipper awarded reparation although not complying with tariff rule requiring shipper to indicate on bill of lading that cargo was proprietary); *Durite Corporation, Ltd. v. Sea-Land Service, Inc.*, 20 F.M.C. 674 (1978), Order on Reconsideration, November 8, 1978 21 F.M.C. 458;[17] affirmed without opinion, *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F. 2d 1000 (D.C. Cir. 1979) (reparation awarded despite shipper's noncompliance with tariff provisions requiring specification of proprietary cargo on bills of lading); *Sun Co., Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. 67 (1977) (reparation awarded despite shipper's failure to comply with tariff requirements governing specification of value of cargo, proprietary nature of cargo, and use of trade-name descriptions).

The Commission summed up its policy in this area of law by stating in the Durite case, 20 F.M.C. at 675:

> The Commission has consistently held with respect to overcharge claims that what actually was shipped determines the proper rate and has permitted shippers, who had failed to comply with some tariff provision, to cure the defect by later introduced evidence. *Cities Service* followed this policy.

The Conference's arguments that the Commission's policy in these cases encourages careless or even deliberate misdescriptions on bills of lading and fosters the development of an industry of outside rate auditors, protects huge companies experienced in exporting and importing, etc., have also been heard, considered, and consistently rejected by the Commission. *Pan American Health Organization v. Prudential Lines, Inc.*, provides a good example of the present state of the law with respect to the Conference's arguments. In that case, as mentioned, the shipper was awarded reparation although the shipper had provided an inadequate description of the goods shipped on the bill of lading which not only ignored the tariff's commodity index but violated the tariff rule against using trade names. The Initial Decision discussed the fact that the carrier had little choice but to rely upon the shipper's poor description when initially rating the goods since it was not expert in identifying the shipper's merchandise and had a tariff rule specifically governing the situation. The decision emphasized the importance of shippers' describing goods correctly in bills of lading and the right of carriers to expect that a shipper will properly identify the shipment just as the shipper has

[17] In the Order on Reconsideration, the Commission corrected a technical error in its decision by substituting reference to section 2 of the Intercoastal Shipping Act, 1933, for section 18(b)(3) of the Shipping Act, 1916, which had been inadvertently discussed by the Commission in this domestic offshore case.

the right to expect the carrier to charge the proper rate for the type of goods actually carried. The decision stated that shippers were playing a "rating game" with the help of outside rate auditors by misdescribing goods on bills of lading and later claiming overcharges and believed that these practices should be discouraged. Finally, the decision suggested a more equitable policy by which carriers would be found in violation of law only in cases in which it was shown that the carrier made a mistake in classifying the commodity shipped to be determined merely by looking at the face of the description entered on the bill of lading. In other words, the carrier should be able to rely upon the shipper's description in the bill of lading and to rate the shipment accordingly and not to be held to a latent description made known to the carrier many months after the shipment. The precise words of this decision (19 F.M.C. at 414-415) give the full flavor of its sentiments and I quote them here:

> It is usually the case, as it is here, that the carrier, in classifying and rating a shipment, must look to the information supplied him by the shipper. To require the . . . carrier to inquire of a shipper as to whether the supplied description of cargo is correct would place an undue burden on the carrier. We cannot expect the carrier to be a "mind-reader" (n.b. sealed drums) or a chemical analyst . . . .
>
> The importance of declaring in bills of lading the correct description of the cargo shipped cannot be overemphasized. The carrier has the right to expect that a shipper will properly identify his shipment, just as the shipper has the right to expect the carrier to charge the proper rate for the type of goods actually carried . . . . The now-prevalent practice of some shippers to provide trade name descriptions for their cargoes, or vague descriptions that do not comport with anything listed on filed tariff commodity index lists, and a year or more later, to play the "rating game" by newly arguing (with documentation never before presented to the carrier) that some other tariff rate (lower, of course) should have been used, should be discouraged. The fact that there are firms that offer to "audit" shippers' records in the hopes of finding just such potential conflicts, with regard to long-completed shipments, does not make the practice any more palatable. (Footnote reference omitted.) A more equitable rule would seem to limit reparations to those cases where the actual language used on the face of the bill of lading indicates an improper misclassification or obvious disregard, by the carrier, of the descriptive language used by the shipper.

Notwithstanding all of the above, the Initial Decision granted reparation to the shipper, stating that:

> Having said this, however, we must return to what the law is under present Commission policy and case interpretation, and

> this requires a finding for the complainant. (Case citations omitted.) . . . Past Commission policy and precedent have unquestionably declared shipper's misdescriptions of cargo to be legitimate bases to award relief, even without fault on the part of the carrier. In cases involving alleged overcharges under section 18(b)(3) of the Act, the Commission has determined that the controlling test is what the complainant (shipper) can prove was actually shipped. (Case citations omitted
> 19 F.M.C. at 415.

The Commission adopted the Initial Decision with respect to these ultimate conclusions but not with respect to the sentiments expressed by the Administrative Law Judge regarding his belief that the present situation under Commission policy was unfair. See Notice of Adoption, 19 F.M.C. 412. In other cases the Commission has followed this same policy, reversing various Administrative Law Judges or Settlement Officers who have shared the sentiments of the Judge in the *Pan American Health Organization* case. Furthermore, the Commission has found no basis to deny reparation to shippers who have misdescribed goods on bills of lading merely because the shippers are large and well experienced in exporting and importing the goods they manufacture or even because the shipper has been inexcusably careless in describing the goods shipped on the bill of lading. For example, in *Abbott Laboratories v. Alcoa Steamship Company*, 18 F.M.C. 376 (1975), the Commission severely criticized the shipper for its "slipshod procedures" and its "will-nilly description of such items as corn oil and detergents as 'raw drugs' on a bill of lading," a practice which the Commission found to be "inexcusable." 18 F.M.C. at 379. The Commission stated that "we sympathize with a carrier who relies upon a drug-producing firm's own description of packaged goods as 'raw drugs' and assesses a raw drugs tariff rate based thereon." *Id.* The Commission also expressed "disfavor" towards Abbott's practice. *Id.* Nevertheless, the Commission awarded reparation to the shipper, stating that although such a decision might not be equitable, the Commission was unable to judge the case on the basis of equities, being without "equitable powers in cases such as this." Id.

Similarly, in *Johnson & Johnson v. Prudential-Grace Lines*, 18 F.M.C. 244 (1975), the Commission affirmed an Initial Decision which had awarded reparation to the shipper although the shipper had violated the tariff's trademark rule governing use of trademark descriptions. The carrier had argued on exceptions that such a decision was unfair because "it imposes no responsibility upon the shipper to describe his goods accurately while leaving the carrier open to later claims against which he may be unable to defend." 18 F.M.C. at 246.

In *Abbott Laboratories v. Venezuelan Lines*, the Commission, reversing the Initial Decision, granted reparation notwithstanding the contentions

of the respondent carrier that it had relied upon "information supplied by the party most informed about the nature of the commodity" who was a "knowledgeable" shipper. 19 F.M.C. at 429. The Commission held that it does not matter whether the carrier misrated the commodity knowingly or inadvertently. In either event, it is liable under section 18(b)(3) of the Act. However, as I have noted earlier, since the statute imposes liability without fault, the Commission refrains from seeking penalties although awarding reparation. *Id.*

In *The Carborundum Company v. Royal Netherlands Steamship Company (Antilles) N.V.*, and *Union Carbide Interamerica v. Venezuelan Line*, the Commission reversed two Initial Decisions which had denied reparation on equitable grounds, namely, that the shippers were large and knowledgeable exporters who should have described the goods properly on the bill of lading. In *The Carborundum* case the Commission again dismissed this type of carrier argument, stating:

> [T]he Administrative Law Judge's conclusion is based on a discussion of equities regarding size and experience of shipper and frequency of shipments made. These considerations have nothing to do with proof of the nature of the commodity shipped, and in any event the Commission has previously disavowed equity theories regarding overcharge claims. (Footnote citation omitted (Emphasis added.) 19 F.M.C. at 435-436.

In the face of this overwhelming precedent, it is obvious that I cannot dismiss the complaint on the various grounds advanced by the Conference concerning the carrier's reliance on a large, knowledgeable shipper's descriptions placed by the shipper or its forwarder on bills of lading nor on the basis that this complaint had been prepared by an outside rate auditor some time after the shipment. Nor, since the Commission believes that allowing a carrier to retain freight based upon a higher N.O.S. or other rate later shown to be mistakenly applied in reliance on the shipper's description of the goods placed in the bill of lading would permit the carrier to enjoy "windfalls," can I follow the Conference's arguments that the continual sloppy practice of shippers in misdescribing their goods must be terminated by denying their claims because the practice interferes with the Conference's policing efforts. Moreover, in cases of this type the shipper is not attempting to misclassify the goods in order to obtain a lower rate in violation of section 16 first paragraph of the Act, such as occurred in *Equality Plastics, Inc., et al.*, and similar cases. Rather the shipper, through negligence, pays higher freight at the time of shipment than necessary and, as always, the extra money is passed on to the consignee. One might argue that such a practice is costly, inefficient, and bad business, but the Commission has not held it to be unlawful and, as so clearly seen by Commission decisions, has not precluded shippers from recovery of the overcharges. A change in the policy of the Commission, which the Confer-

ence is strenuously urging, is a matter obviously for the Commission, not for an Administrative Law Judge.

What is perhaps a new argument, however, is the Conference's contention that the Commission's policy contravenes contract law. The Conference argues that under contract law a contractor (i.e., the shipper) cannot renege on its promise to pay the applicable freight based upon the description of the goods which the shipper itself has placed on the bill of lading. This is so, argues the Conference, because the bill of lading on which the shipper placed its own description of the goods is a contract and if the contractor finds that it has made a mistake, it cannot later disavow its obligations under contract law. This argument provides further rationale for the old arguments of carriers in cases of this type that the shipper is bound to the description which the shipper or its agent placed in the bill of lading and upon which the carrier had a right to rely when rating the shipment. As we have seen, however, the Commission has consistently refused to bind the shipper to the bill of lading description when the shipper later shows what actually moved, notwithstanding the carrier's so-called "right" to rely upon the shipper's description of the goods and the shipper's so-called "duty" to describe the goods properly.[18] Obviously the Commission has not followed general principles of contract law when it permits shippers to disavow the earlier bill of lading descriptions. This does not mean, however, that the Commission must reverse its policy because such principles exist.

A bill of lading is, indeed, a contract between shipper and carrier as well as other things, such as a receipt and sometimes evidence of title to the goods. *See, e.g., Bills of Lading - Incorporation of Freight Charges*, 3 U.S.M.C. 111, 114 (1949) and cases cited therein. However, a bill of lading is subject to relevant provisions of the Shipping Act, 1916, and the bill of lading does not take precedence over the tariff with which it must be filed and to which it must conform under section 18(b)(1) of the Act and the Commission's regulation (General Order 13, 46 C.F.R. 536.5(d)(8). Furthermore, the bill of lading is merely a contract whereas the tariff has long been held to have the same standing of a statute, i.e., as having the force and effect of law. In short, it is not contract law which governs but rather tariff law.

In *Compagnie Generale Transatlantique v. American Tobacco Co.*, 31 F. 2d 663 (2d Cir. 1929), cert. denied 280 U.S. 555, the consignee sued to enforce an award of reparation granted by the United States Shipping

[18] I have referred to these "rights" and "duties" in this fashion because usually the violation of a right or duty leads to some consequences adverse to the party violating the right or duty. However, in cases of this type, if a shipper does not comply with its "duty" to describe the goods properly on the bill of lading, the shipper recovers reparation anyway. Similarly, the carrier, in exercising its "right" to rely upon the bill of lading description, is later found to be a violator of section 18(b)(3).

Board (one of this Commission's predecessors) which had found that the carrier had violated sections 16 and 17 of the Shipping Act, injuring the consignee. The court found no merit to arguments that application of the Shipping Act was improper because it would disturb rights under a contract which the parties had executed in France. The court held that "a lawful statute in force at the time the contract was made is read into the contract and becomes part of it . . . [a]nd the power of Congress to regulate also extends to and embraces the right to control the contract power of the carrier, in so far as the public interest requires such limitation. It is often manifested in bills of lading and tariffs . . . . Parties are free to contract with the carrier, but are subject to the rule which prohibits discrimination . . . . Such a contract must be and is deemed to be modified to conform to the statute . . . ." 31 F. 2d at 666.

At the time of the decision in the *Compagnie Generale* case (1929), there was no section 18(b)(3) and no requirement that carriers operating in the foreign commerce of the United States file tariffs to which they must rigidly adhere. Since 1961, of course, such carriers must file their tariffs and adhere strictly to them. Unlike the bill of lading, furthermore, the tariffs are considered to have the same force and effect as a statute and no contract will be enforced which departs from the tariff. *See, e.g., Penna. R.R. Co. v. International Coal Co.*, 213 U.S. 184, 197 (1913); *Farr Co. v. Seatrain*, 20 F.M.C. 411, 414 (1978), and the cases cited therein. In *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 98 (1915), the Supreme Court emphasized the binding nature of tariffs and their supremacy over other contracts between shipper and carrier, stating:

> When a tariff has become legally promulgated, it is binding upon both the carrier and any shipper taking advantage of it, and its terms (in essence) become, in such respects the only contract between the two allowed by law.

In a similar vein, the Court in *State of Israel v. Metropolitan Dade County, Florida*, stated:

> As with taxes, we start with the proposition that morality, equity or the invidious reflex of each has no part in tariff application. A tariff required by the appropriate regulatory statute, (footnote citation omitted) like the law of the Medes and Persians which altereth not is more than a consensual contract. It has the force of law with the analogous dignity of a statute. (Citations omitted.) 431 F. 2d at 928.

*See also Kansas Southern Ry. v. Carl*, 227 U.S. 639, 653 (1913) and *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155, 165 (1912), holding that a common carrier and shipper cannot even contract for a special service or rate unless the carrier publishes the special service or rate in its tariff making it open to all equally; and *see S. L. Shepard & Co. v.*

*Aguilines, Inc.*, 39 F. Supp. 528, 531 (E. D. S. C. 1941) refusing to enforce a contract for special services absent tariff authority. (Note that at the time of this case, however, section 18(b)(3) was not enacted.) For more cases holding that the tariff has the force and effect of a statute and overrides contracts between parties, *see 13 Corpus Juris Secundum*, Carriers § 302, at 700-702.

The short answer to the Conference's arguments, therefore, is that contract law has been supplanted by section 18(b)(3), an overriding regulatory statute. This tariff law and similar tariff laws, moreover, have long developed their own peculiar principles based upon strict congressional policies designed to prevent discrimination among shippers. Moreover, it has long been recognized that these peculiar tariff laws and policies take precedence over ordinary principles of contract law. As seen by the quotation, cited above, from the decision in *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. at 98, the tariff becomes in effect the supreme contract. Furthermore, whereas mistake, fraud, misrepresentation, or contrary intention of the parties may have some relevance under principles of contract law, they are irrelevant under tariff law. As the Commission stated in *Sun Co. v. Lykes Bros.*, 20 F.M.C. at 70 n. 8:

> Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit deviation from the rates, rules and regulations in the carrier's filed tariff. (Case citations omitted.)

The Commission has several times[19] quoted the following language from *Louisville & Nashville R.R. v. Maxwell*, cited above, 237 U.S. at 97:

> Under the Interstate Commerce Act [similar to section 18(b)(3)] the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

To cite a few examples of cases in which tariff law has superseded contract law, consider that a carrier may actually intentionally misrepresent rates to a shipper who relies upon the erroneous quotation in booking the shipment. Under contract law, the contract would prob-

[19] *See Farr Co. v. Seatrain Lines*, cited above, 20 F.M.C. at 417 n. 8; *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *Ocean Freight Consultants, Inc. v. Bank Line Ltd.*, 9 F.M.C. 211, 214-215 (1966).

ably be voidable because of fraudulent inducement. But under tariff law, the carrier may recover the full amount of the tariff rate if the carrier performs the service. See the cases discussed in 88 American Law Reports 2d 1375, 1377, 1387-1388 (1963). Or the shipper may have booked the shipment with the carrier only because the carrier had promised to file a lower rate in its tariff prior to the time of shipment. If the carrier fails to file the lower rate and the higher rate remains in the tariff, the carrier can recover the full amount of freight under tariff law notwithstanding the shipper's defense that the carrier breached its agreement. *See Chicago, B & Q. R. Co. v. Ready Mixed Concrete Co.*, 487 F. 2d 1263 (8th Cir. 1973) in which this state of events actually occurred.[20] Or, to give a final example, even if the shipper fails to comply with some provision in the tariff itself, i.e., in contract law terms, it breaches the contract, such as when the shipper fails to insert the notation in the bill of lading that the cargo is proprietary or fails to provide a specific commodity description but rather provides a trade-name description in the bill of lading, as discussed earlier, the Commission does not bar the shipper's recovery of an overcharge regardless of any doctrine in contract law.

But the Conference has another string to its bow, namely, the case of *State of Israel v. Metropolitan Dade County, Florida*. In that case the Court permitted a Port to assess and retain a higher tariff dockage charge even when the shipowner showed after the fact that its vessel was in the status required to qualify for a lower rate. The Court found that because the shipowner had failed to provide written notice that its ship was in a non-loading status as required by the Port's tariff, the ship was required to pay full dockage rather than half dockage but that when the shipowner notified the Port of this fact, the ship was entitled to half dockage thereafter. The Court simply read the tariff provision as requiring advance notice of the vessel's status and applied the provision literally, finding that the shipowner's failure to comply with the notice requirement would result in assessment of the full dockage rate and that the shipowner could not gain retroactive relief merely by giving notice later. The Court relied upon the principle that a tariff has the force of law and that it was unreasonable to shift the burden of determining the status of the vessel on the Port when the shipowner had better knowledge. 431 F. 2d at 928-929.

The Conference argues that the shipper in the instant case, Sanrio, is trying to do what the shipowner in *State of Israel* tried to do, namely, seek a lower rate by showing the actual facts which would have

[20] Of course, the only relief for the shipper is the special-docket provision of section 18(b)(3) of the Act by which a carrier may file an application seeking to refund or waive additional freight when the carrier forgot to file the tariff rate promised to the shipper. This is an exceptional provision in tariff law and gives the carrier the option of filing the application, not the shipper.

justified a lower rate after the event. If we assume that there is no difference in the law applicable to terminal tariffs filed under Commission regulation (General Order 15, 46 C.F.R. 533) rather than under a statute (section 18(b)(3) of the Act) which governs common carriers' tariffs,[21] there are still some factors that should be noted when dealing with the case.

First, the Court treated the issues in *State of Israel* as merely requiring a literal reading of the tariff without feeling the need for any expert assistance. 431 F. 2d at 928. The Court interpreted a provision in the tariff (Item 215) which required shipowners to give advance written applications to the Port regarding the status of its vessels as being a notice provision and treated that provision as an essential condition to the determination of the correct rate. The tariff provision itself did not specify that failure to comply with the provision would result in assessment of higher dockage. However, the Court believed that there was good reason to construe the provision as a binding condition determining the dockage rate. But, as discussed, the Commission in many cases does not construe tariff provisions regarding designation of proprietary cargo or use of nontrade names in cargo descriptions on bills of lading as being essential conditions. As the Commission stated in one of the many cases following this policy, *Durite Corporation Ltd. v. Sea-Land Service, Inc.*, 20 F.M.C. at 675:

> The Commission has consistently held with respect to overcharge claims that what actually was shipped determines the proper rate and has permitted shippers, who had failed to comply with some tariff provision, to cure the defect by later introduced evidence.

This decision of the Commission was, as mentioned, affirmed by the Court of Appeals without opinion in *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F. 2d 1000 (D.C. Cir. 1979). In its brief to the Court, the Commission had pointed out the many cases in which it had permitted shippers to recover overcharges notwithstanding the shippers' failure to comply with tariff provisions requiring various types of specification so long as the shippers could prove what actually moved. The Commission explained that it did not view the tariff provisions as unyielding conditions precedent but merely as something used for initial rating purposes. In other words, although the carrier may have had to rate the cargo under higher rate categories because of a particular tariff provision at the time of shipment, this initial rating was subject to change if the shipper later presented evidence showing the

[21] The Court made no distinction between terminal tariffs and common-carrier tariffs although noting that the Port's tariff was filed under 46 C.F.R. 533. (431 F. 2d at 928 n. 6.) The Court discussed the Port's tariff, assuming that it was "required by the appropriate regulatory statute . . . " 431 F. 2d at 928.

actual commodity. (See Brief for Federal Maritime Commission, *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F.2d 1000 (D.C. Cir. 1979) (No. 78-2271)).[22]

Second, it appears that the Commission had not intervened in *State of Israel.* Consequently the Court did not have the benefit of the Commission's views. This does not mean that the Court would necessarily have agreed with the Commission's policy of permitting complainants to show after the fact what actually moved or what was the true state of events notwithstanding tariff provisions. However, the Commission obviously does not treat these tariff cases as merely involving simple interpretations of tariff language but has established and followed a policy of which the Court was not aware.[23]

Third, since the Commission was not a party to *State of Israel,* that decision, while entitled to respect, is not binding on the Commission. If the Commission finds the reasoning in *State of Israel* persuasive and agrees that granting shippers recovery causes carriers to bear unreasonable burdens under present policy, the Commission can change its policy. However, present Commission law and policy do not seem to agree with the Court. Moreover, Chief Judge Brown, who wrote the opinion in *State of Israel,* and who had remarked that the case did not require the assistance of "a supposedly expert body" (431 F. 2d at 928), in a later opinion recommended that courts have the assistance of expert agencies in cases having industry-wide consequences and policy considerations and cited the inadequacy of trial courts' reliance on limited evidentiary records presented by private adversary parties when the courts attempted to make far-reaching decisions. *See Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 239-246 (5th Cir. 1976). Apropos of these later remarks of Judge Brown, in the instant case the Conference and Sanrio are making pointed comments about the role of outside rate consultants, whether they serve the public, whether shippers or forwarders who place inadequate descriptions of goods on bills of lading should be given relief or whether it is the Conference and carriers who have a duty to establish verification practices, etc. There is no evidence that the Court in *State of Israel* was aware of all of these issues nor how widespread the problem of overcharges has become in the shipping industry. The Commission, however, can consider all of these factors in fashioning policy in cases of this type.[24]

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[22] The Commission also explained to the Court that the carrier had not gone to any extra expense in handling the cargo because of the shipper's failure to follow the tariff rule requiring specification of proprietary cargo on the bill of lading. (Brief, pp. 8, 23 n. 26.)

[23] Of course, the present Commission policy was developed primarily by decisions issued after the date of *State of Israel* (1970). Apparently no one has cited that case to the Commission in these later decisions.

[24] Moreover, the Commission is in a better position to consider whether freight forwarders are contributing to the overcharge problem by carelessly describing goods on bills of lading and, if so, how

## THE CONFERENCE'S ARGUMENTS CONCERNING THE EVIDENCE SUBMITTED BY SANRIO

To some extent the Conference repeats the arguments made by Maersk that the evidence submitted by Sanrio is unreliable and insufficient because the invoices and packing lists were sent between affiliated companies and were not subject to "outside verification." The Conference makes clear that it is not opposing the admission into evidence of the Sanrio documents (i.e., packing lists, invoices, etc.) but it is arguing that they are not to be given much weight. The Conference also argues that the documents were not verified, that they are inconsistent and contradictory, may not be authentic, and that Sanrio has presented four different versions of its claims in the past, a fact, if true, the Conference believes to undermine Sanrio's case. The Conference also questions whether the poor descriptions on the bills of lading ("General Merchandise") were truly inadvertent. As I mentioned earlier, Sanrio contends that its evidence is reliable and authentic and asserts that it is absurd to argue that any shipper would deliberately misdescribe its goods with the result that the shipper would have to pay more freight. Sanrio also explains the alleged discrepancies in the earlier claims submitted and points to the invoices which it believes to show constitute the best evidence of what actually moved rather than the bill of lading descriptions which a forwarder may have filled out "for the sake of expediency." (Reply by Complainant to Conference, p. 3.)

I have discussed earlier in this decision the various types of evidence which the Commission has customarily accepted and relied upon in deciding cases of this type. I have also discussed the doctrine that holds that court rules of evidence are not followed by administrative agencies operating under the Administrative Procedure Act, 5 U.S.C. 556 (d). Sanrio has submitted exactly the type of evidence consistently utilized in cases of this type (e.g., packing lists, invoices, sales literature, actual samples) and even the Conference does not question their admissibility into evidence. As to the Conference's contention that the packing lists and invoices may not really relate to the shipments in question, I agree with Sanrio that the signature of Mr. Z. Takahashi, the contemporaneous dates on the documents, and the mutually corresponding reference numbers serve to authenticate the evidence. I note furthermore that even the Conference does not argue that Sanrio lacks integrity in submitting those documents. (Reply of Intervenor Conference, pp. 8-9.) Furthermore, there is additional evidence in the case, such as catalogs

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this practice can be curbed. Also the Commission can consider the Complainant's argument that the Conference should institute a verification of documents practice instead of relying upon bill of lading descriptions. However, the Commission once tried to impose a duty on carriers to verify documents but was rebuffed by a court. *See Ocean Freight Consultants v. Royal Netherlands Steamship Company,* 17 F.M.C. 143, 145 (1973).

and actual samples, which corroborate the packing lists and invoices. In the last analysis, it should be remembered that the essential question in this case, as in the three other cases pending before Settlement Officers, is to determine what products Sanrio Company Ltd. is actually manufacturing and shipping to the United States. That is, are they toys, stationery for children, or other things? The catalogs and samples as well as the invoices and packing lists provide answers and even if one believes that because the shipper and consignee are affiliated companies, their invoices are not to be trusted, one can turn to the catalogs and samples for corroboration.

The Conference also argues that Sanrio's evidence is contradictory. The Conference argues that the first version of what was shipped was presented by the bill of lading, the second version relating to claim "SA-81," by a document prepared by Traffic Associates on December 5, 1978; the third version was shown on the complaint filed with the Commission on April 11, 1979; and finally, a fourth version was shown by the Customs consumption entry. In each of these versions there are certain changes concerning the description of the shipment and the volume of alleged toys. Sanrio has explained these discrepancies, however, and I have discussed the status of bill of lading descriptions and consumption entries earlier in this decision.

The first description of the shipment involved in claim "SA-81" was that shown as "General Merchandise" on the bill of lading. But shippers are not bound to bill of lading descriptions as the cases so amply demonstrate since it is what can now be shown to have moved that counts in cases of this kind. The second document questioned by the Conference is the claim letter which Traffic Associates sent to respondent Maersk which showed fewer cubic meters of alleged toys than the third document cited, which is the complaint. But Sanrio replies that the original claim letter (Ex. A-2) dated December 5, 1978, asked Maersk to verify the claim but Maersk did not do so. Therefore, when the third document was filed (the complaint), Sanrio revised the earlier claim and resolved doubts in its favor. Sanrio also criticizes Maersk because the claim was not considered on its merits but was rejected under the so-called six-months' rule in the Conference tariff but for which this complaint might not have had to be filed.[25] (Reply by Complainant to Conference, p. 7.) The final document, the Customs consumption entry, does not show toys as a description although Sanrio

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[25] Maersk rejected the claim by letter dated January 5, 1979 (Ex. A-4) citing Conference Tariff Rule 59 which does not permit Conference carriers to consider claims for freight adjustments unless the claims are presented within six months of the date of shipment. The rule therefore left Sanrio with no choice but to file its complaint with the Commission. It is well settled that the so-called six months' rule and other time rules in tariffs cannot bar a shipper from seeking reparation for overcharges under section 22 of the Shipping Act, 1916. *See, e.g., Kraft Foods v. Moore-McCormack Lines, Inc.*, 19 F.M.C. 407 (1976); *Union Carbide Inter-America, Inc. v. Venezuelan Line*, 19 F.M.C. 97, 99 (1976).

claims most of its products shipped to be toys. However, Sanrio asserts that the consumption entry represents the opinion of the customhouse broker as to how the goods should be classified for customs purposes and is not necessarily the best evidence of what the goods were. The Commission, as I have discussed earlier in this opinion, agrees with Sanrio. *See Equality Plastics, Inc. et al.*, 17 F.M.C. at 227. In that case, as noted, the Commission found a battery-operated drink mixer to be ratable as a "toy" under the carrier's tariff although the consumption entry showed it as something else. To illustrate further the point that ocean carrier tariffs and the U.S. Customs Tariff Schedule of the United States may not correspond, Sanrio asserts that the Conference's tariff Item 6020 for "toys" includes a number of specific articles which would not be classified as "toys" in the TSUS.

I conclude, therefore, that the Conference is seeking to persuade the Commission to reverse its now well established policy that the shipper can recover reparation for overcharges on the basis of a preponderance of evidence showing what actually moved notwithstanding careless descriptions on bills of lading prepared by the shipper or forwarder or the shipper's failure to comply with tariff rules requiring particular designations. But in so doing, the Conference is relying almost entirely on rejected arguments or on theories of contract law which are held not applicable to tariffs. The Conference does, however, cite one court decision which seems contrary to the Commission's policy but that case, decided in 1970, preceded the bulk of Commission law on the subject, nor did the Commission participate in that case and another United States Court of Appeals (for the District of Columbia) does not appear to be disturbed by the Commission's policy. The Conference's arguments that Sanrio's evidence is not entitled to much weight, although admissible into the record, mainly repeats the arguments of Maersk. New arguments made by the Conference have been rebutted by Sanrio which has explained apparent discrepancies and inconsistencies which occurred over a period of time during which the claims were being prepared and filed.

## ULTIMATE CONCLUSIONS

Complainant, Sanrio Company Ltd., a shipper in Japan which manufactures and exports a variety of small products designed mainly for children, shipped 42 different products to the United States via respondent Maersk Line in late 1977, which were described on three bills of lading mainly as "General Merchandise." A traffic consultant firm audited the freight records of these shipments for the importer and submitted claims to Maersk stating that the products in question were specific commodities entitled to specific commodity rates under Maersk's tariff, which Maersk had not given them. Maersk refused to consider the merits of these claims because of its tariff rule (and that of

the Conference to which Maersk belongs) barring consideration of the merits of claims submitted more than six months after date of shipment. Thereafter Sanrio filed its complaint with the Commission after correcting a jurisdictional problem relating to the fact that the complaint was originally filed in the name of the importer who had not paid the freight.

Sanrio has submitted evidence which it claims shows the true nature of the products for carrier tariff rating purposes. In 24 instances both Sanrio and Maersk agree on what tariff rate should apply, although Maersk does not concede that the evidence submitted is reliable and sufficient. In 15 other instances in which Sanrio claims that the products were ratable as toys, Maersk disagrees and shows the proper rate for 12, mainly stationery products, although not conceding the sufficiency of the evidence submitted by Sanrio. In three other instances Sanrio has shown what rate should apply for two of the products. The record thus shows the proper commodity rate for 38 of the 42 products shipped. There is a failure of proof and inconclusive evidence as to the remaining four products. Since this is a bellwether case, being the forerunner of at least seven more claims[26] in which Sanrio products are involved, conclusive findings on the 38 products are desirable and should help curtail future litigation, Sanrio being an active, continual shipper.

Since the record does not contain an exhibit calculating the total amount of overcharge and consequently, the amount of reparation to be awarded, Sanrio shall comply with the Commission's procedures under Rule 252 which are designed to deal with such situations, namely, by preparing a reparation statement based upon the findings in this decision, checking it with Maersk for accuracy, and then submitting it to the Commission, which should be able to issue an appropriate reparation order without further litigation, if the findings in this decision are adopted.

Both respondent Maersk and intervenor Trans-Pacific Freight Conference of Japan/Korea, whose tariff is involved, argue that Sanrio's claims should be denied for a variety of reasons, although Maersk suggests alternatively that partial reparation on 24 of the products may be acceptable. Maersk and the Conference argue that Sanrio has not borne its "heavy burden of proof" applicable in cases of this type, that its evidence is unreliable and insufficient, and that respondent relied upon Sanrio's representations on the bill of lading when first rating the products. The Conference amplifies the arguments of Maersk, urging that present Commission law and policy be reversed because of its

[26] Since I began writing this decision. I notice officially that four more complaints have recently been filed by Sanrio, Inc., the importer, besides the three earlier complaints mentioned earlier in my decision.

belief that such policy encourages carelessness in preparing bills of lading, is unfair to carriers subject to belated claims, is contrary to principles of contract law, and fosters continual litigation frequently brought by outside rate consultants. Sanrio rebuts all of these arguments, defending and explaining its evidence, relying upon Commission decisions, and explaining the need for shippers to have the assistance of freight consultants if carriers do not verify shipping documents and rate shipments correctly at the time of shipment.

On the basis of well settled Commission precedent and policy, Sanrio must prevail in its arguments concerning applicable principles of law in overcharge cases. The Commission has countless times affirmed the principle that the shipper may recover overcharges if the shipper can show what actually moved on the basis of all the evidence, notwithstanding the shipper's failure to describe the goods on the bill of lading properly or the shipper's failure to comply with some tariff provision requiring particular types of descriptions or designations on bills of lading. Furthermore, although frequently stating that the shipper has a "heavy burden of proof" in cases of this type, the Commission has explained that this merely means that the shipper will have difficulty in obtaining evidence after the shipment. The Commission has clarified the matter further by stating that the shipper must show with reasonable certainty and definiteness the validity of its claim on the basis of a preponderance of the evidence.

In the present case Sanrio has presented evidence which has frequently and customarily been utilized by the Commission, such as invoices, packing lists, sales literature, and actual samples. Although Sanrio has not shown that its products in dispute are mainly toys, because the evidence reveals that they have practical uses, as Maersk shows, Sanrio and Maersk, either alone or together, have shown the correct nature and rate for 38 of the 42 products. The fact that some of the evidence may be self-serving on Sanrio's part, that the invoices and packing lists were sent between affiliated companies, that the Customs consumption entry has different descriptions, and that there are other criticisms of Sanrio's evidence does not alter the fact that on balance the basic documents, the catalogs, and actual samples show with reasonable certainty and definiteness the nature of the products shipped for carrier tariff rating purposes.

In the last analysis this is another of the many cases in which a shipper, with or without the help of outside rate consultants, has presented claims to a carrier for alleged overcharges months after the shipment and which the carrier's tariff requires to be rejected without consideration of the merits. Thereafter the shipper filed a formal complaint with the Commission and presented evidence showing that the bill of lading description on which the carrier relied at the time of shipment was inaccurate. Maersk and the Conference are urging me to

ignore an overwhelming body of Commission case law which has firmly established the policy of permitting shippers to show what actually moved notwithstanding erroneous bill of lading descriptions, alleging various adverse consequences flowing from this policy and asserting contrary principles of contract law. I could not adopt the Conference's arguments even if I believe them to have merit since a change in Commission policy is a matter for the Commission, not an administrative law judge.

Under prevailing Commission law and precedent, therefore, I have considered all of the evidence, determined what rates should have applied when the record enabled me to do so, and recommended that the proceeding be concluded under the procedures established by Commission Rule 252 governing determination of total amount of reparation to be awarded.

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

Washington, D.C.
April 15, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 79-27

EASTERN FORWARDING INTERNATIONAL, INC.

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

POSSIBLE VIOLATIONS, SECTION 44, SHIPPING ACT, 1916

## NOTICE

*September 8, 1980*

Notice is given that no exceptions have been filed to the July 31, 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

## DOCKET NO. 79-27

## EASTERN FORWARDING INTERNATIONAL, INC.

## INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

## POSSIBLE VIOLATIONS, SECTION 44, SHIPPING ACT, 1916

Settlement of a proceeding seeking to determine whether respondent engaged in forwarding activities in violation of section 44(a) and 44(e), Shipping Act, 1916, approved. Respondent ordered to pay $7,500 as a civil penalty pursuant to the terms of the settlement agreement.

*John H. Dougherty* for respondent.

*Paul J. Kaller and Joseph B. Slunt* as Hearing Counsel.

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

*Finalized September 8, 1980*

This proceeding was instituted by Order of Investigation and Hearing, served April 2, 1979, to determine whether Eastern Forwarding International, Inc., the respondent, had violated section 44 of the Shipping Act, 1916, 46 U.S.C. 841b, by engaging in forwarding activities without a license and receiving compensation therefor and whether its application for a license should be granted or denied. In particular, said Order required the determination of the following issues:

1. Whether Eastern Forwarding International, Inc., has violated section 44(a) and section 44(e), Shipping Act, 1916, by engaging in forwarding activities subsequent to revocation of its license on May 13, 1977, and by receiving payment of compensation from oceangoing common carriers in violation of section 44(e), Shipping Act, 1916, and section 510.24(e), Commission General Order 4.
2. Whether Eastern Forwarding International, Inc. continues to engage unlawful forwarding activities under the guise of "port agent" on behalf of non-vessel operating common carriers by water, and possibly others, in violation of section 44, Shipping Act, 1916.
3. Whether, in light of the evidence adduced pursuant to the foregoing issues, together with any other evidence adduced, Eastern

[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).

Forwarding International, Inc. and its corporate officers, posses the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, properly to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder.

By letter dated October 23, 1979,[2] the respondent notified the Commission that it wished to withdraw its application and to enter into negotiations for settlement of any civil penalty claims arising from the activities at issue in the proceeding.[3]

The Commission responded to respondent's letter request on December 5, 1979, by issuing an Amended Order of Investigation providing for the assessment or settlement of civil penalties under section 32 of the Shipping Act, 46 U.S.C. 831. The amendment added a fourth issue to the proceeding, as follows:

4. Whether civil penalties should be assessed against Eastern Forwarding International, Inc., pursuant to 46 U.S.C. 831(e), for violations of Shipping Act, 1916, and if so, the amount of such penalties;

In addition, the Commission gave the parties until March 3, 1980, to conclude any settlement negotiations.

Upon the retirement of Judge Levy, the proceeding was assigned to me. On February 28, 1980, I was advised by Hearing Counsel that there was no likelihood that settlement negotiations would be concluded by March 3, 1980. By Notice of Hearing, served February 28, 1980, I ordered that this matter proceed to hearing on April 1, 1980. At the hearing the parties informed me that they had come to agreement on the terms of settlement but would require some additional time to reduce their understanding to writing. Under the circumstances I ordered that the settlement be submitted not later than April 25, 1980. That time was later enlarged to May 12, 1980.

On May 12, 1980, the parties filed, jointly, a Proposed Settlement of Civil Penalties[4] and a Stipulation to which were attached a Promissory Note Containing Agreement for Judgment executed by respondent and various other attachments, including a receipt issued in the name of the Commission for a certified check in the amount of $1,071.42, representing payment of the first installment of monies due under the terms of

[2] The Order of Investigation directed that the hearing be held not later than October 2, 1979. Accordingly, Administrative Law Judge Stanley M. Levy, the Judge to whom this proceeding was initially assigned, established a timetable to comply with that directive. However, the respondent's chief executive officer later became ill and the schedule was necessarily interrupted.

[3] The withdrawal of the application makes it unnecessary to decide issue Number 3.

[4] Should this decision become the decision of the Commission, see n. 1, *supra*, pursuant to 46 C.F.R. 505.3, the Proposed Settlement of Civil Penalties is attached as Appendix I and made a part of this decision.

the settlement agreement. Separately, the parties also filed a Memorandum of Respondent Eastern Forwarding International, Inc. in Connection With Proposed Settlement of Penalties and Hearing Counsel's Memorandum in Support of the Proposed Settlement Negotiated With Respondent.

## THE STIPULATED FACTS

The Stipulation contains the following recitation of the facts:[5]

1. Eastern Forwarding International, Inc. (Eastern) was licensed as an Independent Ocean Freight Forwarder, license No. 1353, on August 11, 1971. Eastern's license was revoked as of May 13, 1976, in accordance with section 44(c) of the Shipping Act, 1916, because of Eastern's inability, at that time, to deposit cash collateral required by the Surety on Eastern's freight forwarder bond. This resulted in the surety cancelling the bond.

2. On two occasions in the summer of 1977, Commission Investigators from the New York District Office visited Eastern's place of business. The first occasion followed a report from a vessel operating common carrier to the Commission that Eastern was continuing to show its name and license number, 1353, in the forwarder identification box on vessel operating ocean carrier bills of lading prepared by Eastern. The second occasion followed Eastern's second application in May 1977, and was an investigation of Eastern's activities.

3. The FMC staff members ascertained that Eastern was continuing to send to ocean carriers a line copy of the bill of lading for non-Government movements of household goods. It would do so with a hand-stamped certification in the form prescribed by section 44(e) of the Shipping Act. This authorizes a common carrier to compensate a forwarder for soliciting the cargo covered by the bill of lading or for booking space for the cargo. This results in the carrier payment of the ocean freight compensation. Non-Government movements of household goods then constituted about 10 percent of Eastern's business, with military (Government) movements of household goods constituting the balance. No compensation is paid on Government movements of household goods. The Commission's staff members informed Jay Goldberg, Eastern's president, that Eastern could not collect compensation from ocean carriers. They ascertained that Eastern, while handling approximately 440 ocean freight shipments during the period from revocation of its forwarder license until July 8, 1977, collected some $2,944 in ocean freight compensation from 23 ocean carriers on about 50 commercial shipments of household goods.

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[5] The Stipulated Facts which appear in that text are unedited except for bracketed inserts representing additions or deletions.

4. Goldberg discussed these practices with FMC staff members on the occasions of their two visits to Eastern's place of business and with the Chief of the Office of Freight Forwarders following each of these visits. Following the second visit, he stopped listing the former license number on ocean bills of lading upon learning that the Commission's staff considered that the use of the license number violated section 44 of the Act. Eastern refunded all these payments to the carriers, and had done so by Fall 1977. Some vessel operating ocean carriers continued to send payments of ocean freight compensation to Eastern on shipments handled by Eastern without the solicitation, billing or certification on the part of Eastern. Eastern has retained these compensation checks, uncashed, and has made all of them available to Hearing Counsel for inspection and copying.

5. Since discontinuing its collection of ocean freight compensation, Eastern has not increased its charges to its NVOCC [non vessel operating common carrier] principals. Those charges have remained unchanged from the levels at which they have stood since 1963.

6. By letter of February 15, 1978, the Commission's Managing Director advised Eastern that the Commission intended to deny Eastern's May, 1977 application. As Eastern did not request a hearing on the intent to deny the application, by letter dated April 18, 1978, Eastern's application was denied.

7. In dealing with ocean carriers Eastern has usually acted and identified itself as a port agent. The documentation Eastern sends to the ocean carrier on such a shipment customarily consists of a set containing the ocean carrier bill of lading, a letter of transmittal of the bill of lading addressed by Eastern to the ocean carrier, and, where necessary, an export declaration. Eastern's letter of transmittal has been in the same form since Eastern commenced operation. [Attachment and reference thereto omitted.]

8. The Military Traffic Management Command (MTMC) receives quotations from household goods carriers for household-goods movements in response to invitations for bids which MTMC issues semiannually. Such invitations take note of the existence and role of port agents, [Attachment and reference thereto omitted]. From time to time MTMC issues special instructions concerning actions to be taken by port agents, functions to be performed, or reports to be submitted by them. [Attachment and reference thereto omitted.]

9. The August 1979 issue of the magazine *Containerization International* (Vol. 13, No. 8) contains (pp. 54-55) an article entitled "Facts of life for US forwarders," which is a discussion of the business of ocean freight forwarding in the United States. [Attachment and further reference thereto omitted.]

10. By letter dated November 24, 1978, the FMC Managing Director notified Eastern that the FMC intended to deny Eastern's third applica-

tion unless Eastern asked for a hearing. [Attachment and reference thereto omitted.]

11. Before requesting a hearing, Goldberg asked for and received the letter attached hereto as [Appendix II].

12. Eastern asked for a hearing by letter dated January 10, 1979. Thereafter, on April 2, 1979, the Commission issued the Order of Investigation and Hearing in this proceeding.

13. Since the visits of the Commission staff members in 1977 and Goldberg's conversations then and subsequently with the Chief of the Office of Freight Forwarders, Eastern has described itself on bills of lading and other shipping documents relating to shipments it handles as port agent for its NVOCC principal whom it identified as the shipper and no longer collects compensation from ocean carriers (retaining, uncashed and, for this proceeding only, such brokerage checks as are still being sent to it by carriers).

14. As a port agent, Eastern performs the following services, although not all of them on every shipment or for every NVOCC principal:

a. Books export shipments with the ocean carrier.
b. Prepares ocean bills of lading.
c. Sends the ocean bills of lading to the NVOCC principal and the overseas agent of the NVOCC.
d. Advises the NVOCC's of the expected arrival time of shipments at the port of discharge.
e. Prepares the export declarations on shipments bound for foreign destinations.
f. Arranges for the packing of the ocean carrier container and the delivery of the container to the pier through an affiliated company.

15. Eastern does not maintain written agency agreements with its NVOCC clients. In one instance the NVOCC has provided Eastern with a manual of written instructions which sets forth the working details of the arrangement between the NVOCC and its port agents. [Attachment and reference thereto omitted.]

THE SETTLEMENT

Briefly, the Settlement[6] requires the respondent to pay $7,500 to the Commission[7] in consideration for the barring of any civil action or

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[6] See n. 4, *supra*, and Appendix I.

[7] Under the terms of the promissory note, respondent shall make 7 equal payments of $1,071.43. The last payment is due June 30, 1983. The note bears interest at the rate of twelve percent (12%) per year. The method of payment and the instruments executed meet the requirements of the applicable Commission Regulation appearing at 46 C.F.R. 505.7.

claim for recovery of civil penalties against the respondent arising from the alleged violations set forth in the Order of Investigation and Hearing and occurring during the period from May 13, 1976 through December 31, 1978. The Settlement expressly states that the "Agreement is not to be construed as an admission of guilt by Respondent, its officers, directors or employees to the alleged violation." The Settlement is, of course, conditional in that it is expressly made subject to the approval of the Commission.

## DISCUSSION AND CONCLUSION

Both Hearing Counsel and the respondent submit that the amount of $7,500 is a fitting and appropriate settlement. Separately, each points out that the respondent made restitution of the $2,944 which the respondent received from the ocean carrier; that the respondent has terminated the practices related to the use of its former freight forwarder license and collection of compensation from ocean carriers; and that the respondent has agreed to refrain from such practices and to observe the procedures specified by the Commission's staff in its port agent activities in the future.[8] Under the circumstances they concur that the settlement is likely to prove a sufficient deterrent in the future.

In addition, the respondent asserts that at the outset of its allegedly unlawful activities it labored under some misunderstanding of the law applicable to port agents of NVOCC principals in that it was not then aware that the Commission's staff considered such port agents to be "'a related person' to its NVOCC principal for purposes of Section 510.22(c)[9] of the Commission's General Order 4," and, therefore ineligible to collect compensation "from oceangoing common carriers for forwarding services performed on behalf of NVOCC principles."[10]

In this connection, respondent contends that because there has as yet been no administrative or judicial testing of the Commission's staff's construction, there is some doubt about the outcome of any litigation

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[8] See The Stipulated Facts, No. 9; Appendix II.

[9] Section 510.22(c) of the Commission's Freight Forwarder Regulations, 46 C.F.R. 510.22(c), provides as follows:

> (c) A nonvessel operating common carrier by water or person related thereto, otherwise qualified, may be licensed as an independent ocean freight forwarder to dispatch export shipments moving on other than its through export bill of lading. Such carrier or person related thereto may collect compensation under section 44(e) when, and only when, the following certification is made on the "line copy" of the ocean carrier's bill of lading, in addition to all other certifications required by section 44 of the Shipping Act, 1916, and this part:
>
> "The undersigned certifies that neither it, nor any related person, has issued a bill of lading covering ocean transportation or otherwise undertaken common carrier responsibility for the ocean transportation of the shipment covered by this bill of lading." Whenever a person acts in the capacity of a nonvessel operating common carrier by water as to any shipment he shall not be entitled to collect compensation under section 44(e) nor shall a common carrier by water pay such compensation to a non-vessel operating common carrier for such shipment.

[10] See Appendix II.

that might be undertaken.[11] It supports this argument by references to what it considers to be contrary positions taken by the Commission's staff in November and December 1978[12] and an article which appeared in a publication in August 1979 which it perceives to reflect its own prior understanding of permissible conduct under regulation. Nevertheless the respondent does not wish to pursue the litigation alternative because it cannot be assured of a favorable result and because of the expense involved in a lawsuit.

Most important respondent states that other than these activities, which were short lived, and which were terminated following the staff's visits in the summer of 1977,[13] it has had no history of violations of the Shipping Act. It stresses that the activities which are called into account in this proceeding do not involve fraud, deceit or other conduct involving moral turpitude. Indeed, respondent states that it cooperated with the Commission's staff and Hearing Counsel through all stages of this investigation.

Following enactment of Public Law 96-25[14] the Commission promulgated rules and regulations governing the compromise, assessment, settlement and collection of civil penalties,[15] indicating that the criteria for compromise, assessment or settlement included the standards set forth in 4 C.F.R. Parts 101-105.[16]

The standards enunciated in 4 C.F.R. Parts 101-105, particularly those appearing in Part 103, have long been a part of this agency's program in the mitigation of civil penalties prior to the passage of P.L. 96-25.[17] They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings. *Angel Alfredo Romero--Independent Ocean Freight Forwarder Application and Foreign Freight Forwarders, Inc.--Possible Violations of Section 44, Shipping Act. 1916*, 22 F.M.C. 788 (1980). *H. K. International Forwarding, Inc. Independent Ocean Freight Forwarder License Application,* 22 F.M.C. 622 (1980).

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[11] Respondent candidly states that the doubt about the outcome is not shared by Hearing Counsel.

[12] The Stipulated Facts, paragraph Nos. 10 and 11.

[13] *Id.*, paragraph Nos. 2, 3, 4.

[14] 46 U.S.C. 831.

[15] General Order No. 30, 46 C.F.R. Part 505, entitled *Compromise, Assessment, Settlement and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933* (Awarded).

[16] Federal Claims Collection Standards, issued jointly by the Comptroller General of the United States and the Attorney General of the United States under section 3 of the Federal Claims Collection Act of 1966, 31 U.S.C. 952.

[17] See enclosure to letter dated July 12, 1978, from the Commission's Deputy General Counsel, Edward G. Gruis, to the Chairman, Administrative Conference of the United States, Robert A. Anthony, at pp. 5, 8.

Those standards recognize the value of settling claims on the basis of litigative probabilities,[18] i.e.--the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts. A pragmatic approach is warranted in utilizing this criteria.

Those standards also recognize that settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and security compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon."[19] In this connection, the Comptroller General and Attorney General advise that "These accidental or technical violations may be dealt with less severely than willful and substantial violations."[20]

It should also be observed that those standards recognize that penalties may be settled "for one or for more than one of the reasons authorized in this part."[21]

On the record before me I am satisfied that the proposed settlement of penalties should be approved as it comports with established criteria.

Although the activities of the respondent might not be classified as merely a technical or accidental violation they certainly cannot be considered as deliberate attempts to defeat regulation. Moreover, there was no effort to conceal those activities or to defraud anyone. This is manifest from the fact that respondent cooperated with the staff and attorneys for the Commission and made full restitution. Compliance with regulation was obtained almost immediately after the matters were brought to the respondent's attention. There has been no resumption in the allegedly illegal activities. Under the circumstances it is manifest that the Commission's enforcement program will be served by the payment of the amount agreed upon pursuant to and in addition to the other terms and conditions of the settlement agreement.

[18] 46 C.F.R. 103.3.

[19] 46 C.F.R. 103.5.

[20] *Id.*

[21] 46 C.F.R. 103.7.

Accordingly, it is ordered that the settlement agreement entitled "Proposed Settlement of Civil Penalties" be approved and, in accordance with the terms of that agreement, respondent is ordered to pay the sum of $7,500 in settlement of civil penalty claims.

(S) SEYMOUR GLANZER
*Administrative Law Judge*

Washington, D. C.
July 31, 1980

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(Editor's Note: Appendices I and II are included in the official docket files for this proceeding.)

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-28

IN THE MATTER OF FURNISHING CONTAINER CHASSIS

## ORDER

*September 8, 1980*

The Maryland Port Administration and the Delaware River, Massachusetts, and Virginia Port Authorities have filed a Petition for Declaratory Order seeking a ruling from the Commission that "common carriers by water must tender cargo containers mounted on chassis for removal of the cargo from the pier to the ultimate consignee at an interior point." On May 13, 1980, the Commission served notice of the filing of this petition. Subsequently, sixteen replies were submitted on behalf of a large number of interested parties.*

Section 502.68 of the Commission's Rules (46 C.F.R. 502.68) provides for the discretionary issuance of a declaratory order to terminate a controversy or remove uncertainty. Petitions seeking such relief must:

1. state clearly and concisely the controversy or uncertainty;
2. name the persons and cite the statutory authority involved;
3. include a complete statement of the facts and grounds prompting the petition;

*(1) ABC Containerline NV; (2) Gulf/Mediterranean Ports Conference; (3) Board of Trustees of the Galveston Wharves; (4) National Maritime Council; (5) Japan/Korea-Atlantic and Gulf Freight Conference, Japan-Puerto Rico & Virgin Islands Freight Conference, New York Freight Bureau, Philippines North America Conference, Straits/New York Conference, Thailand/Pacific Freight Conference, Thailand/U.S. Atlantic & Gulf Conference, TransPacific Freight Conference (Hong Kong), Trans-Pacific Freight Conference of Japan/Korea, Agreement No. 10107, and Agreement No. 10108; (6) Latin America/Pacific Coast Steamship Conference and North Europe - U.S. Pacific Coast Freight Conference; (7) Australia-Eastern U.S.A. Shipping Conference, the "8900" Lines Rate Agreement, Greece/United States Atlantic Rate Agreement, Iberian U.S. North Atlantic Westbound Freight Conference, Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, Mediterranean-North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. North Atlantic Spain Rate Agreement, U.S. South Atlantic/Spanish Portuguese Moroccan and Mediterranean Rate Agreement, and West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference; (8) Counsel of American-Flag Ship Operators; (9) Port of Houston Authority of Harris County, Texas; (10) Delta Steamship Lines, Inc.; (11) National Customs Brokers & Forwarders Association of America, Inc.; (12) American President Lines, Ltd.; (13) Steamship Operators Intermodal Committee; (14) West Gulf Maritime Association; (15) the Commission's Bureau of Hearing Counsel; and (16) North Atlantic United Kingdom Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic Baltic Freight Conference, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, Continental North Atlantic Westbound Freight Conference, North Atlantic Westbound Freight Association, South Atlantic North Europe Rate Agreement, Gulf-United Kingdom Conference, Gulf-European Freight Association, United Kingdom & U.S.A. Gulf Westbound Rate Agreement, Continental-U.S. Gulf Freight Association, and FMC Agreement 10140.

4. fully disclose petitioner's interest; and
5. be served upon all parties named therein.

Moreover, section 502.68(b) expressly limits the availability of declaratory rulings to situations where a Commission order would allow persons to act without peril upon their own view. Because the instant petition fails to satisfy several of these requirements it will be denied.

Petitioners have failed to clearly articulate the controversy which they wish the Commission to resolve. At best, the petition indicates some dissatisfaction with the Commission's decision in another proceeding, Docket No. 79-86, *Japan/Korea-Atlantic and Gulf Freight Conference Rules Pertaining to Chassis Availability and Demurrage Charges,* 22 F.M.C. 466 (1980). The Petitioners have also failed to adequately disclose their interests in any controversy which might exist. Most importantly, however, they have not provided a complete statement of the facts and grounds for relief. Without a detailed statement of the factual situation prompting the petition, the Commission cannot reasonably be expected to pass judgment on containerized carrier operations throughout the United States.

Finally, the petition fails to reveal how the requested relief would materially affect the conduct of the Petitioners themselves. It appears that only particular terminal operators and ocean common carriers would be directly affected by the Commission's resolution of the petition.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order filed by Delaware River Port Authority, Maryland Port Administration, Massachusetts Port Authority, and Virginia Port Authority is hereby denied, without prejudice, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 69-57

## AGREEMENT NO. T-2336 - NEW YORK SHIPPING ASSOCIATION COOPERATIVE WORKING ARRANGEMENT

## ORDER REOPENING PROCEEDING FOR LIMITED PURPOSE OF SATISFYING CLAIM OF ZIM-AMERICAN ISRAELI SHIPPING CO., INC. AND DIRECTING NEW YORK SHIPPING ASSOCIATION TO SATISFY REMAINING CLAIMS OR TO SHOW CAUSE WHY SUCH CLAIMS SHOULD NOT BE SATISFIED

*September 9, 1980*

On July 30, 1980, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in actions brought to review various aspects of our orders in this proceeding issued on April 3, 1978 and July 5, 1978. In *No. 78-1479 - New York Shipping Association, Inc. v. FMC & USA*, the Court affirmed our order directing New York Shipping Association, Inc. (NYSA) to satisfy all of the remaining claims for assessment adjustments which the Commission had found to have been viable and timely-filed. In No. *78-1871 - Zim-American Israeli Shipping Co., Inc.*, the Court reversed the Commission's denial of Zim's claim on the grounds that a similarly situated claimant, Korea Shipping Corporation, had been granted an assessment adjustment.

The Commission had denied Zim's claim on the basis that it had been filed in an untimely fashion and had also been waived. The Court found that Zim's claim was still viable since Zim's negative response to a poll requesting its opinion as to whether it wished an assessment refund did not constitute a waiver of its claim because of the "unofficial" and "nonbinding" nature of the poll. It also found that the Commission's grant of an extension of time to Korea Shipping Corporation to file its claim when such extension was requested after the filing deadline, but failure to grant a similar extension to Zim, was arbitrary and capricious. The Court went on to say that the fact that Zim was treated in the same way as other late-filing claimants requesting an extension out of time ". . . suggests that Zim was not the only firm treated arbitrarily." (Slip opinion at 16).[1]

[1] The Court was not persuaded by the Commission's argument that Korea Shipping was in a different position from all other late-filing claimants because it alone had sought assessment adjustments earlier by a positive response to the above discussed poll.

The consideration by the Commission of Korea Shipping's claim out of time appears in law to have constituted a waiver of the Commission-imposed limitation for the filing of claims and required the Commission to consider all claims which were filed during the additional filing period granted to Korea Shipping. See *Montship Lines, Limited v. FMB*, 111 U.S. App. D.C. 160, 164, 295 F.2d 147, 151 (1961). All of the late-filed claims were in fact filed during such additional period. Korea Shipping filed its claim on January 13, 1977, having been given until January 31, 1977 to file, and the last claim, that of Moore-McCormack Lines (Moore-McCormack), was filed on January 17, 1977. The only distinction which could be made among the various late-filing claimants is that some requested an extension of time to file and some did not.[2] Since, however, the requests for extension were themselves out of time, the distinction would indeed appear to be one without a difference.

NYSA, although served with notice of the extension for filing granted to Korea Shipping, never objected to that extension. Moreover, NYSA, while formerly contending that it was not liable for claims adjustments and that claims granted by the Commission were barred by waiver and estoppel, contentions which have been rejected by both the Commission and the Court of Appeals, has at all times recognized the need to insure that assessment adjustments are made in a fair and non-discriminatory manner. (*See, e.g.*, NYSA's Objection to Claims, received December 9, 1976 at 9, NYSA's Petition for Reconsideration or Stay filed October 18, 1976 at 3, 10-11).

Zim and the other late-filing claimants have of course computed the amount which they feel is due them. One slight adjustment is necessary in these computations. As the Commission held in its orders of August 22, 1977 and April 3, 1978, the claims of all successful claimants must be reduced by the amount of the assessment adjustments due and granted to those in whose favor adjustments were made because of overassessments on automobile carriage since to the extent automobiles were overassessed, all other claimants were underassessed. All successful claimants have borne their share of the automobile assessment adjustments, and it is only fair that Zim and the other late-filing claims for

[2] Another possible distinction, that based on a negative response to the informal poll, which would have applied to Moore-McCormack, has been removed by the Court's holding that a negative response to the poll did not constitute a waiver of an assessment adjustment claim.

which adjustments are to be made also bear their share.[3] There would thus seem to be no dispute as to the dollar amount of the claims.[4]

The late-filed claims previously denied by the Commission, computed in exactly the same manner as were those of all of the successful claimants in the earlier orders herein affirmed by the Court of Appeals, are as follows:

Zim-American Israeli Shipping Co., Inc.

> $5,004,344 (Puerto Rican carrier underpayment) less $801,214 (total automobile credits) or $4,203,130 multiplied by 1.75% (% of Zim's assessments vis-a-vis total tonnage assessment) = $73,555

## Additional Late-Filed Claims

| | |
|---|---|
| Total Adjustments Required if Claims Granted: $291,697 | $5,004,344 (Puerto Rican carrier under payment) less $801,214 (total automobile credits) or $4,203,130 multiplied by 6.94% (% of claimaints' assessments vis-a-vis total tonnage assessment) |

| | |
|---|---|
| Adjustments for each individual late-filing claimant if claims granted: | |
| North American Maritime Agencies (on behalf of Maritime Co. of the Philippines) | $6,725 (0.16% of total tonnage) |
| Crossocean Shipping Company, Inc. (as general agents for Jugolinija, Rijeka) | $53,380 (1.27% of total tonnage) |
| Crossocean Shipping Company, Inc. (as general agents for Muhammadi Steamship Co., Ltd., Karachi) | $1,681 (0.04% of total tonnage) |
| Venezuelan Line | $23,958 (0.57% of total tonnage) |
| J. H. Winchester & Co., Inc. | $24,378 (0.58% of total tonnage) |
| Norton Lilly & Co. Inc., as agent for: | $52,119 (1.24% of total tonnage) |
| Fassio Line | $21,016 (0.50% of total tonnage) |
| The Shipping Corporation of India, Ltd. | $13,450 (0.32% of total tonnage) |
| Norton Line | $3,783 (0.09% of total tonnage) |
| American & Australian Line | $5,464 (0.13% of total tonnage) |
| Ellerman & Bucknall Steamship Co., Ltd. | $4,623 (0.11% of total tonnage) |
| Port Line | $3,783 (0.09% of total tonnage) |
| Moore-McCormack Lines, Incorporated | $129,456 (3.08% of total tonnage) |

[3] The orders establishing the liability of claimants to bear their share of the automobile assessment adjustments were those of December 27, 1976, which granted NYSA's petition for reconsideration on the question of the effect automobile assessment adjustments should have on other claims (see especially page 10), the order of February 23, 1977, which held that claims should be reduced to take account of all non-automobile claimants' underpayments occasioned by the overassessment of automobiles (see especially pages 2, 4, 7 and 14), and the order of August 22, 1977, which determined the exact amount of the automobile assessment adjustments, and thus the amount by which all other claims would be reduced (see pages 2-3, 6-7). These orders were served on all claimants, have never been challenged, and the time for court review of them has long passed.

[4] NYSA itself admits that the "Commission now has available the basic information needed for an accurate computation of all of the additional claims." (Response of NYSA, October 24, 1977 at 6).

In accordance with the Court's direction that Zim be permitted to file its claim, and no reason appearing why the claim should not be satisfied, we shall direct that NYSA satisfy such claim in one of the three ways which we have recognized as proper herein in proceedings which have twice been upheld by the Court of Appeals, namely, cash refunds, credits against present and future assessments, or partial assessments.[5]

We perceive no reason why NYSA should not satisfy all of the late-filed claims in the amount set forth in the foregoing chart and in the manner we have directed for all other claims. Since, however, NYSA has not as yet had an opportunity specifically to address itself to the problem of apparent discrimination in making assessment adjustments for Zim but not other late-filing claimants in the light of the Court's July 30th order, we shall allow NYSA such opportunity. NYSA will thus be directed to satisfy the remaining late-filed claims or, in the alternative, to show cause as to why the remaining late-filed claims should not be satisfied. The claim of Zim must of course be satisfied promptly.[6]

THEREFORE, IT IS ORDERED, That this proceeding be reopened;

IT IS FURTHER ORDERED, That NYSA shall, within 30 days of the date of service of this order, satisfy the claim of Zim-American Israeli Shipping Co., Inc. in the amount of $73,555 by means of cash payments or a system of credits or partial credits against present and future assessments as outlined herein and in our orders of April 3, 1978, December 27, 1976 and our report and order in 19 F.M.C. 248, and notify the Commission in writing that such claim has been satisfied and describe the method of satisfaction employed;

IT IS FURTHER ORDERED, That NYSA shall, within 30 days of the date of service of this order, satisfy the remaining late-filed claims by means of cash payments or a system of credits or partial credits against present and future assessments, or, in the alternative, show cause why, in light of the Court's holding regarding Zim, the other claimants should not be accorded the same treatment as Korea Shipping

[5] As we have earlier explained, should a successful claimant cease to serve the port of New York, credits or partial credits will no longer be a satisfactory means of assessment adjustments, and cash refunds will be required to satisfy the remaining liability. See e.g., *Agreement No. T-2336*, 19 F.M.C. 248, 262-265 (1976), *affd. sub nom. New York Shipping Ass'n v. FMC*, 187 U.S. App. D.C. 282, 292, 571 F.2d 1231, 1241 (1978); Orders of December 27, 1976 at 5, 9-10, and April 3, 1978 at 21; and notice of July 5, 1978 at 3-4.

[6] Although we have utilized 60 days in the past as the time during which adjustments which we have ordered are to be made, 30 days seems more appropriate here. All problems relating to Zim's claim have been fully resolved, and that claim should be satisfied expeditiously. Thirty days also seems sufficient for the satisfaction of the additional late-filed claims in light of the small number of such claims and NYSA's experience in making the necessary adjustments in compliance with our other orders herein. Moreover, if NYSA chooses to show cause why the remaining late-filed claims should not be satisfied, in light of the narrow questions presented, 30 days should also be sufficient.

Company. If NYSA elects to show cause in lieu of satisfying all of the remaining claimants, it shall make proper service upon all persons whose claims it contests.

IT IS FURTHER ORDERED, That if NYSA submits arguments that some or all of the remaining claimants should not be satisfied, those claimants may file replies to NYSA within 15 days of the date of service of NYSA's submission.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-98

AIR/COMPAK INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

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NOTICE

*September 10, 1980*

Notice is given that no exceptions have been filed to the August 5, 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

## DOCKET NO. 79-98

## AIR/COMPAK INC.

## INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

Held:

1. The applicant, Air/Compak Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed freight forwarding activities in at least seven instances.
2. Where the applicant was notified not to engage in freight forwarding activities without a license by the Federal Maritime Commission, both orally and in writing, and where the applicant did engage in such activities after being so notified, a civil penalty of $5,000 is warranted and will be assessed pursuant to 46 U.S.C. 831(e). The penalty gives adequate consideration to any mitigating circumstances involved on the one hand, and constitutes a sufficient deterrent to future like conduct on the other.

*Clarence Morse* for respondent.

*Joseph B. Slunt* and *Alan J. Jacobson* as Hearing Counsel.

## INITIAL DECISION[1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

*Finalized September 10, 1980*

This is a proceeding begun pursuant to sections 22 and 44 (46 U.S.C. 821 and 841(b), respectively) of the Shipping Act, 1916, and section 510.8 of the Commission's General Order 4 (46 C.F.R. 510.8). The issues to be determined are:

1. Whether Air/Compak Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities; and
2. Whether civil penalties should be assessed against Air/Compak Inc., pursuant to 46 U.S.C. 831(e), for violations of Shipping Act, 1916, and, if so, the amount of such penalty which should be imposed taking into consideration factors in mitigation of such a penalty.

### BACKGROUND INFORMATION

This proceeding was begun by the Commission's Order of Investigation and Hearing, dated December 7, 1979. The Order noted that Air/Compak had apparently engaged in freight forwarding without a li-

[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).

cense and, in addition to the two issues set forth above, directed that the following issue related to the applicant's fitness be determined:

3. Whether Air/Compak is fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder.

The Order further provided for seriatim filings of memorandums of law, etc., from the parties,[2] and directed that any additional procedure adopted by the Administrative Law Judge:

> shall include oral testimony and cross-examination in the discretion of the Presiding Officer only upon a showing that there are issues of fact which cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

Respondent filed a motion on February 21, 1980, to extend the time for its opening memorandum, which motion was granted. Then, by letter dated February 29, 1980, it notified the Commission that it was withdrawing its application for a freight forwarder's license, without prejudice, and filed a motion to dismiss the proceeding in part[3] as well as for an extension of time so that it might "negotiate with Hearing Counsel and/or to reach settlement or otherwise plead." The motion was granted as was a subsequent motion for an extension of time to submit the opening memorandum. Finally, after the parties failed to reach agreement on settlement, both filed opening memorandums of law accompanied by affidavits and other evidence and Hearing Counsel filed its reply. In addition, both parties have agreed that the case should stand submitted on the written filings without the taking of direct oral testimony and without cross-examination.

## FINDINGS OF FACT

For purposes of this decision the following documents are accepted as evidence and identified as follows:

[2] January 21, 1980 - Opening Filing of Hearing Counsel.
February 22. 1980 - Opening Filing of Respondent.
March 14, 1980 - Reply Filing of Hearing Counsel.

[3] The issue sought to be dismissed was the issue of fitness (Issue No. 3) set forth in the Commission's Order of Investigation, dated December 7, 1979.

| Document | Exhibit No. |
|---|---|
| Affidavit of Robert James Klapouchy | 1 |
| Letter of Charles W. Clow dated 6/7/78 | 2 |
| Affidavit of District Investigator Miguel G. Tello | 3 |
| Affidavit of District Investigator David. M. Johnson | 4 |
| Affidavit of Thomas N. Davis | 5 |

1. Air/Compak is a corporation with its principal office in Melbourne, Florida. Mr. Thomas Davis is its president. (Exs. 1, 5.)

2. Thomas Davis' work history is as follows:

1961-1973 -Employed in family owned and operated business (trucking) as a driver of daily runs, as claims investigator and as a rate clerk. In 1968 became Dispatch Supervisor and Traffic Manager and in 1972, Director of Operations.

1973-1974 -Employed by Birdsall, Inc., agents for Tropical Shipping, Ltd. as Equipment Control Manager. In October of 1973 was given responsibility of Port Operations which entailed direct supervision of stevedoring and all port and marine related functions.

1974-1978 -Employed by Harris Corporation as Transportation Manager who was responsible for all domestic and international traffic by ocean, land and air. His duties included booking ocean freight space and supervising the procurement of accurate and proper bills of lading, shipper's export declarations and other pertinent shipping documents. While at Harris he performed many if not all of the various activities engaged in by freight forwarders.

3. On June 1, 1978, Robert James Klapouchy, of the FMC's Office of Freight Forwarders, discussed Air/Compak's application for an ocean freight forwarder license with Mr. Davis. Mr. Klapouchy informed Mr. Davis that Air/Compak was not permitted to engage in ocean freight forwarding without a license. (Ex. 1.)

4. On June 7, 1978, the FMC sent the following letter to Air/Compak over the signature of Charles L. Clow, Chief, Office of Freight Forwarders:

> Receipt is acknowledged of your application for an independent ocean freight forwarder license. The application is being processed, and further information regarding it will be sent to you in the future. The application has been assigned number *B-183*. Correspondence concerning the application should refer to the application number and be submitted *in triplicate.*
>
> Your attention is specifically directed to Section 44, Shipping Act, 1916, which prohibits any person from engaging in carrying on the business of forwarding unless such person holds a license issued by the Federal Maritime Commission to engage in such business. "Carrying on the business of forwarding" is

> defined under Section 510.2 of the enclosed General Order 4 and Section 1, Shipping Act, 1916.
>
> If you should engage in the business of forwarding before receiving your license, you will be subject to penalties provided by law and may prejudice the issuance of your license.
>
> Any changes in facts contained in your application, including addresses, telephone numbers, additional corporate officers, etc., should immediately be reported to the Commission in *triplicate.* Delay in reporting such changes may delay the processing of your application.

(Ex. 2.)

5. On December 18, 1978, after asking Mr. Davis to have Air/Compak's records available for inspection, FMC District Investigator Miguel G. Tello interviewed Mr. Davis and reviewed Air/Compak's records at its Melbourne office. Mr. Davis supplied M. Tello with "the forwarding paperwork" performed in Melbourne and told Mr. Tello the bookkeeping records were maintained in the Houston, Texas, office. He stated it would have been inconvenient to bring those records to Melbourne. (Ex. 3.)

6. Mr. Tello found five instances where Air/Compak engaged in freight forwarding between August 4, 1978, and October 3, 1978, after being told it would violate the law if it did so. He prepared a schedule setting forth the violations which schedule has been made a part of the record. (Ex. 3, paras, 8, 9, Attachments A, B-1 through F-3.)

7. Air/Compak invoiced its ocean freight clients $60 for "Bill of Lading," which charge was for preparing the bills of lading and handling the shipments which included contacting the ocean carrier, arranging for booking the shipments and preparing the export documentations. (Ex. 3 para. 11.)

8. At the December 18, 1978, meeting, Mr. Tello asked Mr. Davis if he had engaged in ocean freight forwarding. Mr. Davis stated he had on a limited number of occasions for clients for whom he also had performed air freight forwarding services. He also stated he had experience in handling ocean shipments to the relevant foreign destinations due to his prior employment. (Ex. 3, para. 5).

9. Mr. Davis informed Mr. Tello that he had received a letter from the Commission, which enclosed a copy of the Commission's rules regarding ocean freight forwarding and stated he was familiar with the Commission's rules. He also stated that he did not know his activity was improper since he did not receive compensation from ocean carriers which receipt he thought would have been improper. (Ex. 3, paras. 6, 7.)

10. At the end of the December 18, 1980, meeting Mr. Tello informed Mr. Davis not to perform any more ocean freight forwarding

without a license and to turn such work over to a licensed freight forwarder (Ex. 3, para. 12.)

11. On January 30, 1979, Commission District Investigator David M. Johnson, reviewed Air/Compak's records at its Houston office. The records reflected two other instances of ocean freight forwarding engaged in after the Commission had advised Air/Compak not to engage in such activity without a license. One occurred on December 28, 1979, and the other on January 5, 1980. (Ex. 4, paras. 3, 4, 5, Attachments A-1 through A-3, B-1 through B-3 and E-1 through E-4.)

## ULTIMATE FINDINGS OF FACT

12. Air/Compak, through its principal officer Thomas N. Davis carried on the business of ocean freight forwarding within the meaning of sections 1 and 44 of the Shipping Act, 1916, and 46 C.F.R. 510, et seq., without a license.

13. Air/Compak carried on the business of ocean freight forwarding after being notified by the Commission that it was illegal to do so without a license.

14. Under section 32(a) of the Shipping Act, 1916 (46 U.S.C. 831(a)), the Commission may assess a civil penalty not to exceed $5,000 for each violation of section 44 of the Shipping Act.

## DISCUSSION

*Issue No. 1* - Whether Air/Compak Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

Section 44(a), Shipping Act, 1916, provides:

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

The record in this case clearly establishes that Air/Compak violated section 44(a) in at least seven different instances and it has been so found as fact. Indeed, the respondent does not contest such a finding and has admitted in its own proposed findings of fact that the violations occurred (Respondent's Opening Memorandum of Law and Affidavit of Facts, Proposed Findings of Fact, paras. 5, 6). Consequently, no further discussion of this issue is necessary to this decision.

*Issue No. 2* - Whether civil penalties should be assessed against Air/Compak Inc., pursuant to 46 U.S.C. 831(e), for violations of the Shipping Act, 1916, and, if so, the amount of such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty.

Section 32(a) of the Shipping Act, 1916, provides that:

> . . . whoever violates . . . section 44 of the Act . . . shall be subject to a civil penalty not to exceed $5,000 for each such violation.

Further, section 32(e) provides that:

> . . . the Commission shall have authority to assess or compromise all civil penalties provided in this Act.

The real question to be decided here is the amount of the penalty to be assessed. On the one hand, the respondent urges a penalty not to exceed $1,000. On the other, Hearing Counsel argues for a penalty of $5,000. The respondent bases his argument on the assertions that neither Air/Compak nor Mr. Davis has engaged in any prior violations of law, that Mr. Davis did not believe he was "doing business" as an ocean freight forwarder, that he thought, as in the case of air forwarding, that he could forward ocean freight before a forwarding license was issued, that Mr. Davis was ignorant of the Commission's freight forwarder statute and the regulations applicable to ocean freight forwarders, that he did not intend to violate Commission rules and regulations, that he did not çollect brokerage fees from the carriers, that "he recognizes he gave little attention to the FMC application," that he has already suffered damage because of delay and the fact that he had to withdraw his application.

Hearing Counsel notes that while the minimum penalty is $5,000, the relative severity of the violations and the cooperation of the respondent did not warrant such a penalty and that $5,000 is the "minimum realistic penalty." He suggests that the $1,000 penalty espoused by the respondent neither recognizes the significance of the violations nor serves as a meaningful deterrent against future misconduct.

As to the case law cited by the parties, respondent cites several cases most of which were decided before the Commission had authority to assess civil penalties. He cites *E. L. Mobley Inc.*, Docket No. 77-26, Report and Partial Adoption of Initial Decision served March 12, 1979, for the general proposition that the sanctions imposed by the law and regulations must be in the public interest and not punitive in nature. He then cites a series of cases which are concerned with the granting or denial of a license rather than with the penalty to be assessed.[4] Respondent does cite *Concordia International Forwarding Corporation-Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, Docket No. 78-34, 21 F.M.C. 587 (1978), and *Angel Alfredo Romero--Independent Ocean Freight Forwarder Application and Foreign Freight Forwarders, Inc.--Possible Violations of Section*

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[4] *Independent Ocean Freight Forwarder License Application - Guy G. Sorrentino*, 15 F.M.C. 127 (1972); *Fabio A. Ruiz d/b/a Far Express Company*, 15 F.M.C. 242, 247 (1972); *Independent Ocean Freight Forwarder License Application--Key Air Freight, Inc.*, 14 F.M.C. 290 (1971); *Independent Ocean Freight Forwarder License Application, L.T.C. Air Cargo, Inc.*, 13 F.M.C. 267 (1970).

*44, Shipping Act, 1916*, Docket No. 79-29, 22 F.M.C. 788 (1980) which are concerned with the penalty provisions. He analogizes the facts in those cases with those involved here and notes that the severity and number of violations involved in those cases exceeds what is involved in this proceeding.

As to the cases involving licensing Hearing Counsel responds that "equally irrelevant to the pending question of assessment for violations are the Commission's actions cited by Respondent regarding the licensing or revocation of licenses of forwarders." Hearing Counsel then proceeds to distinguish *Concordia* from the instant case, pointing out that *Concordia* involved a *settlement* agreement between the parties and not an assessment. Likewise, he distinguishes *Romero* from this case, noting that in *Romero* the facts indicated that the respondent was unable to pay any more than the $2,500 penalty assessed, while here there is no inability to pay.

After reviewing the entire record in this case, it is held that a penalty of $5,000 is appropriate. While in mitigation one can agree with the respondent that the number of violations was not great, that the amounts received for services rendered were small and that Mr. Davis' moral character and business reputation are good, these facts do not outweigh what is clearly reflected in the record, namely, that even after he was told not to forward ocean freight without a license Mr. Davis did so. It is not enough to dismiss his actions by calling them technical violations, by pointing to a lack of willfullness or by asserting that he was ignorant of the law and regulations. Given Mr. Davis' background and experience and the fact that in July of 1978 he was told it would be wrong to forward ocean freight without a license and was referred to the law and regulations, one is hard pressed to look upon his latter actions as inadvertent or forgetful. Any reasonable man being so put on notice would have inquired of the Commission as to what he might or might not do, and Mr. Davis' failure to make such inquiry evidences, at the very least, the kind of negligence, the kind of brinksmanship and the kind of conscious inaction the penalty provision was meant to deter. While the severest of penalties is not warranted certainly some penalty having a deterrent effect is called for. The $5,000 figure is appropriate.

In its brief the respondent properly notes that it is difficult to set a minimum settlement figure for all cases and cites the many factual variations present in the cases such as the presence or absence of willfullness, "lawful intent and state of mind, etc." and experience as a freight forwarder. He then proceeds to argue that a $5,000 penalty here would be unreasonable in light of *Concordia* and *Romero, supra*, where there were many more violations and where the violations were willful. Respondent also makes a penalty per violation computation which he uses to demonstrate how severe the $5,000 penalty would be here. We

agree with Hearing Counsel that *Concordia* and *Romero* should not be compared to this case and are distinguishable from it because *Concordia* was the result of a settlement and not a hearing on the merits as here and because, in *Romero*, the assessment was clearly predicated on an inability to pay which is not present in the instant case.

As to the factual variances in each case it is obvious and we would agree with the respondent that each case must stand on its own. However, that is not to say that given the embryonic posture of the Commission's assessment authority it cannot or should not proceed to establish certain criteria so as to achieve some predictable degree of uniformity. The holding in this case stands for the proposition that once Commission warnings not to engage in ocean freight forwarding have been clearly disseminated to a respondent so that a reasonable man would either understand them, or lacking such understanding, would undertake to inquire as to matters he does not understand, the subsequent act of engaging in freight forwarding without a license is not a "technical" violation and will not be excused because of alleged lack of willfullness, ignorance, lack of harm or other similar factors. Further, a civil penalty of at least $5,000 is warranted in such cases, where there are no *material* distinguishing facts. Here, a decision assessing such a penalty gives adequate consideration to the mitigating circumstances involved in that it recognizes that the respondent's actions did not result in unjust enrichment or an inordinate number of violations, and at the same time recognizes the need for the Commission to assess a penalty which will deter illegal ocean freight forwarding in the future either by the respondent or others who may find themselves similarly situated, facing similar alternatives.

In light of the above facts and discussion, as well as the entire record, it is held that the respondent, Air/Compak Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed freight forwarding activities, and that civil penalties in the amount of $5,000 are hereby assessed against Air/Compak Inc., pursuant to section 831(e) (46 U.S.C. 831(e)) of the Shipping Act, 1916.

(S) JOSEPH N. INGOLIA
*Administrative Law Judge*

Washington, D. C.
August 5, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-2

AVION FORWARDING, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

## NOTICE

*September 10, 1980*

Notice is given that no exceptions have been filed to the August 4, 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

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DOCKET NO. 80-2

AVION FORWARDING, INC.

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

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Respondent found to have carried on the business of ocean freight forwarding without a license; also found that a civil penalty should be assessed against respondent, and that mitigating factors are insignificant and unimpressive; and that respondent is not fit to be licensed. Application denied.

*John L. Alfano* and *Roy A. Jacobs* for respondent.

*John Robert Ewers, Joseph B. Slunt* and *William D. Weiswasser* as Hearing Counsel.

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

*Finalized September 10, 1980*

Avion Forwarding, Inc. (Avion), the respondent, filed an application for a license as an independent ocean freight forwarder. During the course of the Federal Maritime Commission's investigation of Avion, it appeared that Avion had engaged in unlicensed forwarding activities although previously warned not to engage in such activities.

Avion was advised of the Commission's intent to deny its application for a license, and Avion requested a hearing. By order of investigation and hearing served January 11, 1980, this proceeding was instituted to determine: (1) whether Avion violated section 44(a) of the Shipping Act, 1916 (the Act), by engaging in unlicensed forwarding activities; (2) whether civil penalties should be assessed against Avion pursuant to section 32(e) of the Act, 46 U.S.C. 831(e), for violations of the Act and the Commission's General Order 4 (46 C.F.R. 510) and, if so, the amount of such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty; and (3) whether Avion and its corporate officers possess the requisite fitness within the meaning of section 44(b) of the Act to be licensed as an independent ocean freight forwarder.

In accordance with the order of investigation Hearing Counsel filed their opening memorandum of law, their request for a penalty of $25,000, and affidavits of facts; respondent subsequently filed its memo-

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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).

randum of law and affidavit of facts; and later Hearing Counsel filed their reply memorandum of law.

The order of investigation further provided within two weeks following the reply memorandum of Hearing Counsel, that the parties submit written statements identifying any unresolved issues of fact and specifying the type of procedure to resolve them, any such procedure to include oral testimony and cross-examination at the discretion of the Presiding Officer only upon a showing of necessity to develop an adequate record.

In response to the above directive, neither the respondent nor Hearing Counsel requested opportunity for oral testimony. But, Hearing Counsel on May 19, 1980, petitioned that the record be reopened to receive new evidence of continuing violations by the respondent, to which petition the respondent did not reply. For good cause, the said petition was granted, and the record was reopened to receive the affidavit and supporting documentation offered by Hearing Counsel. The parties then were given two weeks following the ruling reopening the record (ruling served June 11, 1980) to submit written statements identifying unresolved issues of fact and specifying the type of procedure suited to resolve them. No response was received from the respondent, and Hearing Counsel submitted that the record was sufficient, stating that as of June 17, 1980, they had submitted for the record evidence of at least 137 violations of section 44(a) of the Act. Hearing Counsel reiterated their earlier recommendations that respondent's license application be denied and that a civil penalty of $25,000 be assessed.

The following findings of facts are based upon the written record submitted by the parties.

Respondent is a New York Corporation established in November 1978 for the purpose of serving shippers of freight in both air and surface modes of transportation. Its principal office is in Jamaica, New York. Respondent is approved as an air forwarder by the Civil Aeronautics Board and possesses a license from the International Air Transport Association. Respondent also handles consolidations and domestic shipments throughout the United States.

An affiliate of respondent, Lorme International, Inc., holds a custom house brokers license and arranges customs clearance for all types of cargo. Another affiliate, Avion Air & Sea Trucking, Inc., provides motor carrier support to respondent's other companies while conducting local cartage operations in the New York, New York, area.

Neither respondent, nor its two affiliates, are connected with, in control of, or associated with any shipper or consignee of shipments to or from foreign countries.

Respondent has operated at a small loss for the seven months ending January 31, 1980. Respondent attributes this loss to the provision by it

of certain services without compensation, and anticipates a profit when and if it receives a license as an independent ocean freight forwarder.

Over the year ending March 19, 1980, respondent admits that it has provided its customers ocean freight forwarding service, including examining instructions and documents received from shippers, ordering cargo to port, preparing or processing delivery orders and dock receipts, and preparing and processing ocean bills of lading.

Respondent has not received brokerage from ocean common carriers, and believed that as long as it did not receive such brokerage, that it could continue to furnish ocean freight forwarding services.

Respondent states that it had the impression that so long as a licensed forwarder was shown on the bill of lading, the law was being complied with.

Respondent further states that its conception of the term, "carrying on the business of forwarding" implies that compensation is being paid. Inasmuch as respondent was compensated by its shippers for its forwarding services, apparently respondent's definition of compensation is limited to brokerage from ocean common carriers.

Respondent states that even if it violated the Shipping Act technically, that it should not be penalized when it has not benefited (received brokerage from ocean common carriers); that it is willing to accept a license as an independent ocean freight forwarder on a limited term basis, providing for a review of its fitness prior to the expiration of the term; and that if at a later date it has demonstrated that it can comply with the Shipping Act that it should be granted a permanent license.

On January 10, 1979, Avion received a form letter from the Commission in Washington, D. C., transmitting the application form for license as a freight forwarder which had been requested by Avion. The form letter received by Avion explicitly refers to section 44 of the Act and to the requirement of a license to carry on the business of forwarding. The form letter further warned that forwarding without a license subjected an applicant to possible penalties and prejudice to the issuance of a license.

On March 5, 1979, Avion's president, Mr. Charles Lorme, was told by a transportation industry analyst employed by the Commission in Washington, D. C., in a telephone conversation that Avion was not permitted to conduct ocean freight forwarding work before being issued a license by the Commission. This analyst gives the same warning to all applicants for licenses as freight forwarders.

On March 9, 1979, the Office of Freight Forwarders of the Commission in Washington, D. C., sent Avion a letter, which the analyst had referred to in the March 5th telephone conversation with Avion. This letter, as shown by the postal receipt, was delivered to Avion on March 14, 1979. The letter acknowledged receipt of Avion's application and directed its attention to the fact that:

> section 44 of the Shipping Act, 1916, prohibits any person from engaging in carrying on the business of forwarding unless such person holds a license issued by the Commission to engage in such business.

The letter also warned Avion that if it should engage in the business of forwarding before receiving a license, it would be subject to penalties and such activities might prejudice the issuance of its license.

On March 28, 1979, an investigator employed by the Commission at its Atlantic District Office in New York City, spoke by telephone with Avion's president, Charles Lorme, and Mr. Lorme then was warned not to forward any more ocean shipments.

On April 4, 1979, the District Investigator of the Commission referred to above met with Mr. Lorme, and with Rosemarie Bacchi, Vice President/Operations Manager of Avion, and with Angelo M. Durso, Secretary of Avion. On May 30, 1979, Ms. Bacchi acknowledged in a written statement, witnessed by District Investigator Wilfred P. Calkins, that:

> On April 4, 1979, Atlantic District Investigator Wilfred P. Calkins advised us that we were not permitted to handle ocean freight forwarding without being licensed by the Federal Maritime Commission. (Calkins affidavit, paragraph 17, and Exhibit F.)

On May 30, 1979, the district investigator once more warned Mr. Lorme and Ms. Bacchi that forwarding without a license was a violation of section 44(a) of the Act, and that a significant fine would be assessed and that their application for a license would be prejudiced thereby.

On November 6, 1979, the Managing Director of the Commission wrote to the president of Avion that information had been brought to the attention of the Commission that Avion had engaged in ocean freight forwarding activity on at least 31 occasions in violation of section 44(a) of the Shipping Act, 1916, and further advising, in part, that the Act requires that no person shall engage in carrying on the business of forwarding unless such a person holds a license issued by the Commission to engage in such business.

Mr. Lorme states in his affidavit, "We then immediately sought the assistance of counsel because of the apparent seriousness of the situation *and our crucial need for a forwarder license* in order to offer our customers a complete service." (Emphasis supplied).

As seen, at least as of November 6, 1979, respondent's president acknowledged its crucial need for a forwarding license.

Charles Lorme, respondent's president, has worked 10 years as a manager of import and export air freight for an air forwarder which also held an independent ocean freight forwarder's license. Among

other employment, he worked as assistant manager, import department, for another combined ocean and air forwarder and customhouse broker.

Ms. Bacchi, respondent's vice president, worked three years for an air freight forwarder. She worked a year as air freight manager for a forwarder which also held an independent ocean freight forwarder's license.

Between January 10, 1979 (when Avion received its first warning, notifying it of the requirement of a license to carry on the business of ocean freight forwarding) and March 5, 1979 (when Avion got its second warning), Avion admitted having forwarded 14 ocean shipments.

Between March 6, 1979, and March 28, 1979, Avion admitted having forwarded seven ocean shipments.

Between March 28, 1979, and April 4, 1979, Avion admitted having forwarded six ocean shipments.

Between April 5, 1979, and May 30, 1979, Avion admitted having forwarded five ocean shipments. Avion during that period also forwarded at least 10 other ocean shipments. (Exhibit C-2.)

Since May 30, 1979, until some few days before the time of the affidavit of Mr. Calkins, dated February 20, 1980, attached to the opening memorandum of Hearing Counsel, Avion had forwarded at least 53 ocean shipments.

Since January 26, 1979, and prior to February 25, 1980, Avion forwarded a total of at least 95 ocean shipments, without holding a license from the Federal Maritime Commission.

When the record was reopened, the new evidence showed that Avion had forwarded 33 more ocean shipments, with bills of lading dated as early as February 15, 1980, and as late as April 18, 1980. (Appendices A and B to the Affidavit of Edwin Hartin, International Traffic Manager of Mallinckrodt, Inc., the respondent's major ocean client.) Of these 33 invoices, 20 were billed under the invoices of Home Pack Transport, Inc., and 13 were billed under the invoices of Avion. Avion had an agency agreement dated March 1, 1977, with Home Pack Transport, Inc., in the sale of international air freight transportation.

Avion has invoiced its shippers for a wide variety of services including an "ocean freight forwarding fee." Exhibit A shows that on the 31 shipments listed, Avion collected a forwarding fee of $35 in 29 instances, and a forwarding fee of $40 in 2 instances, or a total of $1,095.

Generally the facts show that even after numerous warnings Avion continued to carry on the business of ocean freight forwarding without a license from the Commission.

## DISCUSSION AND CONCLUSIONS

The respondent in general contends that its violations of the Shipping Act were technical in nature, not flagrant nor deceitful, whereas Hear-

ing Counsel contend that respondent's violations of the Act were knowing and flagrant, and in fact that the evidence shows that the respondent is unwilling to conform to the rules and regulations of the Commission.

The evidence clearly supports the view of Hearing Counsel. From time to time respondent has offered different explanations of its conduct.

Respondent asserted that the district investigator did bring to respondent's attention the second paragraph of the letter dated March 9, 1979, concerning the prohibition against carrying on the business of forwarding, but that he did not fully explain how broadly the Commission defines forwarding, and that respondent understood the paragraph merely to mean that it could not cut shipping documents under its own name.

On May 30, 1979, respondent's Vice President, Ms. Bacchi, acknowledged the district investigator's warning given on April 4, 1979, and stated that respondent had not accepted any more shipments from that day on. (Exhibit F.)

Charles Lorme, the president of respondent, stated that when respondent received the Managing Director's letter dated November 6, 1979, respondent was aware of the seriousness of the situation and of its crucial need for a forwarding license.

Yet, respondent continued to forward ocean shipments including 33 such shipments as late as February, March, and April 1980, including at least 13 where respondent billed the shipper under its own name for forwarding services.

It is concluded that the respondent knowingly and flagrantly violated the Shipping Act after repeated written, telephonic, and oral in person, warnings.

The respondent on brief argues that in the absence of brokerage payments by ocean common carriers, unlicensed forwarding does not violate the statute. In *Concordia International Forwarding Corporation--Independent Ocean Freight Fowarder Application and Possible Violations of Section 44, Shipping Act, 1916* 21 F.M.C. 587, the Commission considered the same argument as now made by Avion and ruled against Concordia. The Commission pointed out that the plain meaning of section 44(a) of the Act is a flat proscription against dispatching shipments of others without a license.

On brief, respondent also contends that if Avion technically violated the statute by performing forwarding services without a license even though no brokerage was received from ocean common carriers, that such violations were not so severe or so flagrant as to warrant the assessment of civil penalties. Respondent's contention that it was uncertain as to the law, and that in good faith that respondent had adjusted its operations to meet the legal requirements, certainly does not hold

water. Maybe at the outset of its operations, respondent was uncertain, but after repeated warnings, and acknowledgments by its vice president and by its president that it could not forward ocean shipments and that a license was crucial, respondent could not have been uncertain of the law.

Respondent contends also that by not accepting brokerage from ocean common carriers, it has avoided the one evil against which the law sought to protect, and if this factor does not excuse the alleged violations of the Act, it certainly should mitigate in Avion's favor in determining whether civil penalties should be assessed. While Avion did not receive brokerage it did receive consideration in the form of money from its shippers for its unlicensed forwarding services. Respondent did benefit from the services it rendered.

Respondent points out that it did not obtain legal counsel until November, 1979. However, even afterwards, well into February, March, and April 1980, respondent continued to forward without a license.

Respondent also asserts that it does not seek condonation of its activities, but nevertheless that no regulatory purpose is served by denial of its application for an ocean freight forwarder's license, because respondent is otherwise fit, willing and able to carry on its business for which there is a public need, and that no one has been damaged by respondent's misconduct.

Respondent, as seen, suggests that it be given a limited term license, so that the Commission may monitor Avion's activities and obtain assurance that the Commission's regulations are being complied with. Needless to say, Avion's activities in 1980 have been monitored and it has continued to violate the law after repeated warnings and acknowledgments of the law. No further monitoring is justified by the circumstances herein.

It is concluded and found, that on numerous and continuing occasions the respondent Avion violated section 44(a) of the Act by carrying on the business of ocean freight forwarding without holding a license from the Federal Maritime Commission; that a civil penalty of $25,000, as recommended by Hearing Counsel, should be assessed against Avion pursuant to section 32(3) of the Act, and that the factors in possible mitigation of such a penalty are insignificant and unimpressive in view of the continued and flagrant nature of the violation of the Act by Avion; and that Avion and its corporate officers, as shown by their past disregard of the Act, do not possess the requisite fitness within the meaning of section 44(b) of the Act to be licensed as an

independent ocean freight forwarder. The said application hereby is denied.

(S) CHARLES E. MORGAN
*Administrative Law Judge*

Washington, D. C.
August 4, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-41
THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY

*v.*

THE WEST COAST OF ITALY
SICILIAN AND ADRIATIC PORTS
NORTH ATLANTIC RANGE CONFERENCE
AND ITS INDIVIDUAL MEMBERS

## NOTICE

*September 10, 1980*

Notice is given that no appeal has been taken to the August 6, 1980 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

DOCKET NO. 80-41
THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY

*v.*

THE WEST COAST OF ITALY
SICILIAN AND ADRIATIC PORTS
NORTH ATLANTIC RANGE CONFERENCE
AND ITS INDIVIDUAL MEMBERS

## MOTION TO DISMISS COMPLAINT AND DISCONTINUE PROCEEDING GRANTED

*Finalized September 10, 1980*

On July 21, 1980, Respondents served and filed the instant motion that the complaint be dismissed and that this proceeding be discontinued as moot. In support of this motion, respondents attached a copy of their tariff filing by which the subject drayage charge tariff provision, Rule 20-9 of the Conference Tariff, has been cancelled effective September 1, 1980. Respondents say that cancellation of the subject tariff rule is exactly the relief sought in the complaint. Therefore, the proceeding is moot and should be discontinued.

On August 5, 1980, the Complainant served and filed the following Reply to Respondents' Motion to Dismiss: "Inasmuch as respondents, the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference and the individual members of that conference, have cancelled the tariff item which is the subject of the Complaint, the Port Authority of New York and New Jersey has no objections to Respondents' Motion to Dismiss."

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* the motion should be granted.

Wherefore, it is *ordered*:

(A) The motion is granted. The complaint is dismissed.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

August 6, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 76-11

AGREEMENT NOS. 150 DR-7 AND 3103 DR-7

## MOTION TO DISAPPROVE DENIED

*September 11, 1980*

The Commission has before it the "Motion to Disapprove Agreement No. 150 DR-7" filed July 25, 1980 by Seatrain Pacific Services, S.A., and the August 4, 1980 Reply of the Trans-Pacific Freight Conference of Japan/Korea (TPFC).

Seatrain contends that the amended version of Agreement No. 150 DR-7 does not meet the conditions specified in the Commission's December 31, 1979 Report and Order conditionally approving that Agreement.[1] Seatrain's position is based upon the fact that TPFC was ordered to modify its dual rate contract to:

> . . . clearly allow shippers the choice of binding only their port-to-port shipments or only their joint through intermodal shipments to the Conference. 22 F.M.C. 378, 392.

This requirement arose out of the "two contracts rather than one contract" issue which was argued throughout this proceeding, and Seatrain interprets the Commission's language as mandating the use of separate documents to describe the intermodal and the port-to-port contract obligations of merchant signatories. TPFC, however, filed a single document with two different signature lines marked "Port-to-Port Trade" and "Joint Through Intermodal Trade," respectively. The other modifications in TPFC's contract, except for those in Article 2(a), were in the form prescribed by the December 31, 1979 Order.

The Commission finds merit in Seatrain's argument that the Agreement would be clearer and less confusing to shippers if the two contracts were physically as well as legally separated. The use of at least two different signature pages and the addition of clarifying language to Articles 1 and 2(a) would have reduced the possibility of confusion on the part of contract shippers. Nonetheless, the amended Agreement is sufficiently clear when read in conjunction with the Commission's Report and Order and the Conference should not be seriously faulted for concentrating its attention on the specific modifications set forth

[1] The Commission ruled that Agreement No. DR-7 would be disapproved unless certain shipper protection amendments were submitted on or before February 29, 1980. An amended version was timely filed and approved, but the approval was subsequently vacated when the Commission discovered that TPFC had not served other parties to the proceeding (Order of July 14, 1980).

therein. The amended version of Agreement No. 150 DR-7 submitted on February 29, 1980 will be approved. Seatrain's objections to the TPFC amendments are in actuality a petition for reconsideration of the December 31, 1980 Report and Order and, as such, are inconsistent with section 502.261 of the Commission's Rules (46 C.F.R. 502.261).

TPFC will also be directed, however, to make modifications in Agreement No. 150 DR-7 which assure that *each* contract has a combined cover and signature page that plainly identifies it as either a "Port-to-Port" contract or a "Through Intermodal" contract.[2] Amendments to Articles 1 and 2(a) are also necessary to better describe the determinative effect of the two different cover/signature pages. Alternatively, the Conference may remove all references to its intermodal service from its present contract so as to create two completely separate six-page documents, but the Commission does not wish to require any greater duplication of material and effort than is reasonably necessary to notify shippers of their right to choose between the two TPFC contract services.[3]

The further amendments should be submitted within 60 days of the service date of this Order and captioned "Agreement No. 150 DR-7 (revised)." This Agreement need not be served on the parties to this proceeding. Instead, it will be published in the *Federal Register* and otherwise processed as a separate and distinct section 15 matter.[4] If the requested amendments are not filed within 60 days, an order will be entered disapproving Agreement No. 150 DR-7 pursuant to section 25 of the Shipping Act, 1916 (46 U.S.C. 824).

THEREFORE, IT IS ORDERED, That the "Motion to Disapprove" of Seatrain Pacific Services, S.A., is denied and Agreement No. 150 DR-7 is approved: and

IT IS FURTHER ORDERED, That this proceeding is terminated: and

IT IS FURTHER ORDERED, That, on or before the sixtieth (60th) day following service of this Order, the member lines of the Trans-Pacific Freight Conference of Japan/Korea shall cause to be delivered to the Commission's offices in Washington, D.C., a complete copy of the dual rate contract approved today captioned as "Agreement No. 150 DR-7 (Revised)," signed by all the proponent lines, and modified in the following respects:

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[2] *I.e.*, a shipper wishing to sign both contracts would be required to sign two separate pieces of paper, but not two separate six-page contracts.

[3] TPFC has several thousand contract signatories, many of which may wish to sign both the port-to-port and intermodal contracts.

[4] The legal and factual issues litigated before the Commission and now on review in the United States Court of Appeals in *Seatrain Pacific Services, S.A. v. Federal Maritime Commission*, D.C. Cir. No. 80-1248, would not be reexamined in the consideration of Agreement No. 150 DR-7 (revised), however.

1. Article 1 is amended to read, in pertinent part:

   . . . in the trade from ports in Japan and Korea to United States Pacific Coast ports in California, Oregon, Washington, Hawaii and Alaska (hereafter "Port-to-Port Trade"); or the trade from ports or points in Japan and Korea to inland points in the United States via ports in California, Oregon, Washington, Hawaii and Alaska (hereafter called the Through Intermodal Trade); . . .

2. Article 2(a) is amended to read:

   Except as otherwise provided in this Agreement, the Merchant shall ship or cause to be shipped all of its ocean shipments moving in the Port-to-Port Trade, the Through Intermodal Trade, or both, on Conference vessels -- depending upon which contract the Merchant has executed. A Merchant signing only the Port-to-Port Contract need only commit its Port-to-Port shipments to the Conference and a Merchant signing only the Through Intermodal Contract is obligated to commit only its Through Intermodal shipments to the Conference. A Merchant may, but is not required to, sign both the Port-to-Port and the Through Intermodal contracts, in which case both types of shipments would be reserved for Conference vessels.

3. Separate cover/signature pages are attached to the Agreement, one plainly designated as controlling TPFC's "Port-to-Port Trade" and the other as controlling its "Through Intermodal Trade," so that shippers desiring to commit themselves to both contracts are required to sign two separate pieces of paper.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

*Commissioner Teige did not participate.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77-23

AGREEMENT NO. 10294

## ORDER OF DISCONTINUANCE

*September 17, 1980*

This proceeding was initiated by Order of Investigation and Hearing on June 9, 1977, to determine: (1) whether Agreement No. 10294 is a true and complete copy of the understandings or arrangements between the parties; (2) whether the parties entered into and implemented any agreement or agreements, understandings, and/or arrangements without prior Commission approval; and (3) whether Agreement No. 10294 should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814).

Agreement No. 10294 prohibits any signatory from paying consolidation allowances to off-pier non-vessel operating consolidators for their services in consolidating less than containerload cargoes, notwithstanding anything to the contrary in any tariff or other agreement. However, the Agreement permits the payment of any authorized consolidation allowance for consolidation which occurs on the pier, at a deepsea waterfront facility. By its terms, the Agreement applies to shipments from, to, or via all Atlantic and Gulf Coasts ports and is open to any common carrier by water. Moreover, upon approval, it would void or cancel any provisions in existing Commission approved agreements which conflict with it.

Agreement No. 10294 was initially executed by seven ocean carriers,[1] and was later signed by six other carriers.[2] Eight carriers subsequently withdrew from the Agreement, leaving only Sea-Land, USL, Seatrain, Dart and ACL as parties. The Order of Investigation also designated Boston Consolidation Service, Inc., the International Association of NVOCCs, the United States Department of Justice (DOJ), and twelve non-vessel operating common carriers as Protestants. However, because several Protestants withdrew, only DOJ, C.S. Greene and Company, Inc., Emery Ocean Freight, Yellow Freight International,

[1] American Export Lines, Inc., Atlantic Container Line (ACL), Dart Containerline Co., Ltd., Hapag-Lloyd AG, Sea-Land Service, Inc., Seatrain International, S.A., and United States Lines, Inc. (USL).

[2] Zim American Israel Shipping Co., Inc., Japan Line, Ltd., Mistui O.S.K. Lines, Ltd., Nippon Yisen Kaisha, Kawasaki Kisen Kaisha, Ltd., and Yamashita-Shinnihon Steamship Co., Ltd.

Lyons Transport, Inc., and the Wilson Group remain as Protestants. The Commission's Bureau of Hearing Counsel also participated.

On December 13, 1979, Administrative Law Judge Norman D. Kline served an Initial Decision in which he concluded that Agreement No. 10294 should be disapproved. Exceptions to this decision were filed by three of the remaining Proponents.[3] Hearing Counsel, DOJ, and protestant NVO-consolidators filed replies to exceptions.

The Commission presently has before it Proponents' Motion to Discontinue Proceeding. This motion is based upon Proponents' withdrawal of Agreement No. 10294 on July 14, 1980, which allegedly renders this proceeding moot. Protestant NVO's have replied in opposition to this motion claiming that Proponents withdrawal of the Agreement is an attempt to avoid an adverse decision of the Commission. Protestants contend that it was apparent at the Commission's open meeting of July 9, 1980 that the Commission had unanimously decided to uphold the Initial Decision and disapprove the Agreement, even though the Commission postponed the adoption of its report and order until its next scheduled meeting.

## DISCUSSION

A Commission decision is not final until the order effecting it is issued. Until that time, Commissioners' votes are always subject to change. Likewise, the Commission's report or order following a determination made at either an open or closed meeting can also be modified considerably prior to its ultimate publication.

In this particular case the only issue which is before the Commission is whether the Agreement should be approved, disapproved, or modified.[4] Since the Agreement was withdrawn by Proponents prior to the Commission's final decision, the Commission has nothing before it upon which it is required to act.

THEREFORE, IT IS ORDERED, That the "Motion to Discontinue Proceeding" filed by the parties to Agreement No. 10294 is granted; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
*Assistant Secretary*

[3] Seatrain and ACL did not join in these exceptions.

[4] The other two issues raised by the Order of Investigation and Hearing have been disposed of and are not before the Commission on Exceptions.

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 80-10

## BORDEN WORLD TRADE, INC. PETITION FOR DECLARATORY ORDER

A combination of tariff ambiguity, carrier complacency and circumstantial evidence of the correct cargo measurements is sufficient to establish misrating by ocean carrier in violation of section 18(b)(3).

*Jayson S. Rice,* for Borden World Trade, Inc.

*David W. Gunther,* for Lykes Bros. Steamship Co., Inc.

## REPORT AND ORDER

*September 23, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, LESLIE KANUK, AND PETER N. TEIGE, *Commissioners*)

The Commission has before it the "Petition for Declaratory Order" of Borden World Trade, Inc., and responsive materials submitted by Lykes Bros. Steamship Co., Inc.[1] Borden seeks a ruling that Lykes Bros. would violate section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)) by collecting an amount for the transportation of certain food processing equipment from New Orleans to Balboa, Canal Zone which exceeded the charges specified in its published FMC tariff. Lykes Bros. denies the allegation.

### BACKGROUND INFORMATION

The shipment in question sailed on December 3, 1977. It was packed in three 40-foot containers, one 20-foot container, and two "Low Boy" storage devices, all of which were owned by Lykes. A freight rate of $142.00 per weight ton was assessed in accordance with Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference Tariff FMC No. 1.[2] The parties agree as to the nature of the commodity

[1] On May 16, 1980 the Commission ruled that Lykes Bros.' Tariff Rule No. 8 did not bar consideration of Borden's claim in a proceeding under section 22 of the Shipping Act, 1916. At that time, both Borden and Lykes Bros. were ordered to provide further information regarding the disputed shipment. Responses were received from these parties on June 16, and June 6, 1980, respectively. Lykes replied to Borden's Response on July 3, 1980.

[2] Lykes Bros. was and is a member of this steamship conference. Borden was a signatory to the Conference's dual rate contract at the time of shipment. The Conference's tariff FMC No. 1 was cancelled by Tariff FMC No. 3 effective May 1, 1979.

shipped and the basic $142.00 rate. Their dispute relates only to additional charges claimed by Lykes for unused space in the four carrier-owned containers.[3] The shipping documents were prepared by Cobal International, Inc., an independent ocean freight forwarder selected by Borden, but the rating was performed by Lykes Bros. The bill of lading issued in New Orleans shows an entry for "Freight Prepaid" totaling $19,899.14. Only part of this amount was paid at the time of shipment. Lykes did not measure the contents of the containers before or after shipment.

On June 5, 1978, Lykes billed Borden for a remaining balance of $8,537.76 derived entirely from charges contained in Tariff Rule 24. The remaining balance includes $8,191.63 under Rule 24(n)(2) based on the "unused portion" of the containers and a "container use charge" of $346.13 under Rule 24(t) based on the total assessed tonnage. Unless Borden prevails in the present proceeding, Lykes would be expected to collect the unpaid balance of $8,537.76.

The critical provisions of Lykes' tariff are subsections 24(n)(2) and (n)(3) which provide that containers rated on a weight basis will be charged as though they weigh out at 85% of the container's capacity, *unless* the container is 85% full by volume. Lykes assessed a rate based upon 188,105 pounds (85% of the containers' weight capacity) rather than the 72,730 pounds actually placed in the containers by Borden. However, if the containers were 85% full by volume, the minimum weight charge would not apply.

## POSITION OF THE PARTIES

I. Borden

A. Borden states that each of the four containers was filled to 85% of its capacity by volume and supports this contention with the following evidence:

(1) An Export Shipping Order (also referred to as an Invoice Packing List) dated October 18, 1977 and showing cubic measurements totalling about 87% of container capacity for the contents of each container (Exhibit "E").

(2) A statement that Lykes based its June 5, 1978 invoice (Exhibit "B") on an earlier copy of the Export Shipping Order which showed about 79% utilization. This figure was reached only because Borden inadvertently omitted hundreds of small, flexible items such as filters, washers, scaffolding and piping. The Lykes invoice was immediately challenged by Borden.

[3] Tariff Rule 24 governed container use charges. No such minimum charges are alleged to be applicable to "Low Boy" devices.

(3) A statement that Borden was guided in selecting the amount of container space required by Mr. Paul Brown, a Lykes cargo planning specialist who actually visited the loading site and recommended the use of four 40-foot containers in addition to the "Low Boys."

(4) The June 13, 1980 affidavit of James E. Thompson, the Arthur Morgan Co. employee who supervised the packing of the containers, stating that after three of the four 40-foot containers were packed, the fourth was returned to Lykes in exchange for a 20-foot container, and that all of these containers were filled to "full visual capacity," and that 15% of usable space did not remain. This explanation is verified by the affidavit of Borden's Director of Distribution, Jayson S. Rice, who was also present at loading.

(5) A statement that Borden first questioned the applicable rate while the containers were still in Lykes' possession, but that Lykes failed to measure or even visually inspect the cargo.

B. Borden alternatively argues that Rule 24(n) is inapplicable to its shipments, because the first heading under that rule states that it governs arrangements for the "exclusive use of containers" (Exhibit "C," 3rd Revised Page 18) and the December 3, 1977 bill of lading (Exhibit "A") contains no exclusive use specification.

II. Lykes Bros.

A. Lykes contends that Borden twice supplied it with sets of measurement figures showing less than 85% utilization -- once at the date of shipment (50%) and again on March 22, 1978 (79%). The second version was in the form of a Borden Export Shipping Order dated October 18, 1977 (Exhibit "1") and bearing the statement that it was "certified true and correct." The third and final measurement figures were submitted on August 7, 1978 (Exhibit "2"). The third version was an identical copy of the second except for the volume figures and the signature of A. J. Amore, a person unidentified by position or function. There were no additional items listed on the Export Shipping Order which might explain the difference in volume and no such explanation has been provided by Borden or Cobal International, Inc.

B. Lykes states that Borden did not bring the measurement problem to its attention until the cargo left its custody and failed to provide timely written notice of its disagreement with the assessed freight as required by Tariff Rule No. 8.

C. Lykes further asserts that Rule 24(n) is not limited to exclusive container use. It describes the "exclusive use" phrase referred to by Borden as only a "subheading" pertaining to a previous

set of rates and not a "heading" affecting the entire section. Moreover, Rule 24(a) permits containers to be filled with the cargoes of more than one shipper only if all of the cargo is consigned to the same person, so that unless multiple cargoes were placed in the containers used by Borden before they reached Lykes Bros.' facilities in New Orleans, the carrier would have been unable to place additional cargo inside them at that time.[4] It would allegedly have been "legally and practically impossible" for Lykes Bros. to have put another shipper's cargo in "House-to-House" containers such as those involved in the Borden shipment.

## FINDINGS OF FACT

The shipment was of a complex and unusual nature. Special rate negotiations were conducted between Borden and the Conference and Lykes sent Mr. Paul Brown to Borden's plant in Milstadt, Illinois, to review the shipment and make loading recommendations. Mr. Brown was not present at a time when the cargo was in the containers, however. Upon Mr. Brown's recommendation, Borden requested and Lykes initially provided four 40-foot containers from its marshalling station in St. Louis. These were trucked by Borden's agent, the Arthur Morgan Co., to Borden's plant for packing.[5]

Borden never requested exclusive use of the containers and Lykes never advised Borden that it would be enjoying exclusive use or that the applicable rate was based on an exclusive use theory.

After loading three of the 40-foot containers, Borden exchanged the fourth for a 20-foot container. All four containers were loaded by the Arthur Morgan Co. and delivered to Lykes' terminal in New Orleans via the Illinois Central Gulf Railroad at Borden's expense. Upon arrival

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[4] Rule 24 bears a heading which reads as follows:

> These rules and regulations govern the carriage of cargo in ocean Carrier's (hereinafter called the Carrier) containers which the shipper or consolidator or inland common carrier(s) subject to prior booking arrangement with the Carrier, may fill and ship the cargo therein pursuant to the following terms and conditions, and will apply, unless otherwise indicated, only when the container has been filled by shipper, consolidator or inland common carrier as agent for the shipper(s) at his expense off the premises of the Carrier. The Carrier, as defined herein, may not itself be, or act as consolidator.
>
> The term of "shipper(s) or consignee(s)" referred to herein, include his/their agent(s) or authorized representative(s) acting on behalf of the shipper(s) at port of loading or on behalf of the consignee(s) at port of discharge, whichever the case may be.
>
> All rules and regulations published elsewhere in this Tariff and not conflicting with these rules, will apply.

Rule 24(a) states that:

> Cargo from one or more shippers at one loading port only to one consignee at one port of discharge only, unless otherwise provided, may be placed in one container. Containerized cargo will be delivered at port of discharge, either to Customs or to consignee, in accordance with Customs regulations and at Carrier's option.

[5] The Arthur Morgan Co. of St. Louis is an industrial contractor which performs professional hauling, rigging, assembly, disassembly and packing functions for its clients.

in Panama, the containers were delivered directly to agents of the consignee, taken to the plant site, unpacked and assembled.

Lykes initially charged Borden for the shipment on December 5, 1977. The rates shown on the bill of lading were based upon Lykes' determination at the point of loading that the containers did not weigh out at 85% of their capacity, but Lykes did not open the containers to determine whether they were 85% full by volume. It gathered the facts necessary for cargo rating simply by telephoning the ocean freight forwarder on December 3, 1977 and requesting the cubic measurements of each container. At that time, Cobal International quoted measurements which equalled about 50% of the containers' stowage capacity. Because Lykes did not receive payment for all the charges listed on the bill of lading at the time of shipment and had to make arrangements to extend Borden credit, Lykes had adequate notice of the need to verify the cargo's measurements before it relinquished possession of the container.[6]

Lykes subsequently agreed to remeasure the set up food processing equipment at the consignee's plant in Panama in the context of participating in a FMC adjudicatory proceeding with Borden. When Borden decided not to file a formal complaint, Lykes withdrew its offer because the remeasuring would be very difficult and because its Tariff Rule No. 8 prohibited voluntary refunds for mismeasurement after cargo has left the carrier's custody.

Certain "exclusive use" rates were deleted from Lykes' Tariff Rule 24(n) on January 28, 1975, but at the time of shipment that rule continued to bear the following heading:

> Freight rates to be applied will be specified in this tariff, subject to the following conditions:
>
> Exclusive use of containers 20′ and over:[7]

Minimum charges for "exclusive use" containers appear only in subsection (7) of Rule 24(n). Rule 24(a) restricts the situations in which the cargo of more than one shipper can be tendered in a single container, but there are no Rule 24 rates for "nonexclusive" container use and no other tariff provisions governing nonexclusive use.

Tariff Rule 24 does not expressly state whether or when the ocean carrier may add cargo to shipper loaded containers, but Borden has not rebutted Lykes' assertion that carriers in the trade customarily refrain from placing additional cargo in containers moving in a House-to-

[6] Lykes offers no explanation for its issuance of a "Freight Prepaid" bill of lading or why it waited over six months to send Borden an invoice for the balance due. Credit transactions of this nature are not provided for in Lykes' tariff. *See* 46 C.F.R. 536.5(d)(7) regarding tariff rules governing credit terms.

[7] The Conference's current tariff still bears this heading.

House configuration.[8] Carriers receiving less-than-trailerload cargo on a Pier-to-Pier basis will commonly combine several shippers' cargo in a single container, however.

DISCUSSION

Lykes Bros.' tariff is vague and incomplete regarding the rates and practices applicable to shipper use of carrier-owned containers. There are no provisions instructing shippers how to obtain a particular type of container use and Rule 24 as a whole does not indicate with reasonable clarity that *all* House-to-House shipments will be afforded exclusive container use and rated on an exclusive use basis. Lykes dismisses the misleading heading appearing under Rule 24(n) as an obvious typographical error, but it is difficult to understand why such an error was allowed to remain in place for over five years without correction. The Conference should take prompt action to clarify these aspects of its tariff.

Although the incomplete condition of Lykes Bros.' tariff alone might not persuade the Commission that the additional charges were improper, that fact plus Borden's evidence that the containers were 85% full warrants a finding that the lawful rate in this instance was $8,537.76 less than the amount assessed by Lykes on December 3, 1977. The affidavit of the Arthur Morgan Co. supervisor, the recommendation of a Lykes employee that four 40-foot containers were necessary, and the fact that one of these large containers was subsequently exchanged for a 20-foot container all lend substantial credence to Borden's unilateral declaration that its initial paper work was incorrect because it inadvertently failed to measure the great number of small parts which were included in the shipment. The alternative explanation offered by Lykes implies that Borden deliberately falsified at least the final (August 7, 1978) version of its Export Statement in order to save some $8,500 -- conduct which would subject it to civil penalties of up to $5,000 under section 16 Initial Paragraph of the Shipping Act, 1916, as that statute then read. The sounder conclusion is that Borden twice made an honest mistake.

Finally, the Commission notes that Lykes made no independent effort to ascertain the volume of the cargo it carried, despite the fact that the Shipping Act places the duty for accurately rating cargo upon the ocean carrier and not the shipper. It is no defense to a misrating claim for a carrier to rely upon information provided by the shipper or a freight forwarder selected by the shipper. If Lykes had made contemporaneous cargo measurements of its own which totalled less than 85%, Borden's circumstantial evidence would probably not have prevailed.

[8] *I.e*, loaded and unloaded away from the ocean carriers' premises by agents of the shipper. Pier-to-Pier cargo is loaded at the carrier's facilities.

In this instance, however, the combination of tariff ambiguity, Lykes' issuance of a "Freight Prepaid" bill of lading when the freight was not paid in full, Lykes' failure to inspect the containers before rating them, and Lykes' insistence upon a written request before attempting to verify the rate applicable to cargo in its possession, provides a sufficient basis for the Commission to find that the four containers were loaded to at least 85% of their capacity by volume. Accordingly, it is concluded that collection of the "unused portion" charge and the challenged percentage of the "container use" charge stated on Lykes Bros.' bill of lading and subsequent invoice would violate section 18(b)(3) of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of Borden World Trade, Inc., is granted to the extent indicated above.

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 724

## APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF STAR-KIST FOODS, INC.

## ORDER ADOPTING INITIAL DECISION

*September 24, 1980*

Pursuant to Rule 92(b) of the Commission's Rules (46 C.F.R. 502.92(b)), Sea-Land Service, Inc., filed an application for permission to waive collection of a portion of the freight charges due from Star-Kist Foods, Inc., for six shipments of frozen eggs from Houston, Texas to San Juan, Puerto Rico.

Sea-Land and Star-Kist had negotiated a reduced rate for the shipment of eggs. However, because of an alleged administrative error, the negotiated rate was not published in Sea-Land's tariff at the time of shipment. Sea-Land admitted that the freight charge billed, which was based upon the rate legally in effect at the time of shipment, was unjust and unreasonable in violation of section 18(a) of the Shipping Act, 1916. 46 U.S.C. 817(a). Sea-Land further contended that the negotiated rate was the just and reasonable one.

Administrative Law Judge William Beasley Harris issued an Initial Decision in which he denied the application to waive the uncollected freight charges. This decision was based upon his legal conclusion that, in the domestic offshore commerce, a waiver could only be granted upon a finding that the legally applicable rate was unreasonable and a finding that the rate actually charged was reasonable. Initial Decision at 7. The Presiding Officer ultimately concluded that Sea-Land had failed to prove either fact, and that the record would not permit such a determination.

Sea-Land has filed Exceptions to the Initial Decision, stating: (1) that its application met the "standards" of Rule 92(b), or (2) that its tariff publication error was the establishment of an "unjust practice" in violation of section 18(a), for which reparations should be awarded to Star-Kist.

### DISCUSSION

Rule 92(b) of the Commission's Rules (46 C.F.R. 502.92(b)) sets forth the procedures which must be followed by carriers in domestic offshore commerce seeking to refund or waive collection of a portion of freight charges. The remedy to which this special docket procedure applies arises under section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817(a))

and section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845a). Although an application is procedurally "considered the equivalent of a complaint and answer admitting the facts complained of," the Commission is not bound by any such admission. The carrier must still establish the essential elements of the relief as set forth in the relevant statutes.

Sea-Land has also alleged that its tariff publication error results in the establishment of an "unjust practice" in violation of section 18(a) of the Shipping Act. This theory was not raised in Sea-Land's application; nor was it discussed in the Initial Decision. Sea-Land cannot now raise it for the first time in its Exceptions. In any event, this single incident between Sea-Land and Star-Kist cannot be said to have risen to the level of a "practice."

The primary issue before the Commission is whether Sea-Land has met its burden of establishing a violation of section 18(a). The Commission's position concerning waivers or refunds based upon errors or inadvertence in failing to file or incorrectly filing an intended rate has evolved considerably since 1961. Prior to 1965, the Commission freely granted such requests in both the foreign and domestic trades. However, in 1965, a divided Commission decided that special docket relief would not apply in foreign commerce because of the then existing language of section 18(b)(3). *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965). The Commission noted that special docket relief applied only in domestic offshore commerce because, in those cases, it was empowered to direct the enforcement of a reasonable rate pursuant to section 18(a). *Ludwig Mueller, supra.* 8 F.M.C. at 366. In such cases, the Commission would approve refunds of "the difference between a rate that the carrier admits and the Commission finds to be unreasonable (and therefore unlawful), and a rate which the Commission adjudges to be reasonable." *Ludwig Mueller, supra.* The Commission subsequently stated that questions of equity or justice were irrelevant in special docket proceedings and that only the factual questions of reasonableness or unreasonableness of a rate were relevant. *The East Asiatic Co., Inc.*, 9 F.M.C. 169, 172 (1965).

In 1968, Congress amended section 18(b)(3), P.L. 90-298, 82 Stat. 111, to empower the Commission to authorize common carriers by water in the foreign commerce to make voluntary refunds to shippers and to waive collection of freight charges where there was a clerical error in a tariff or, through inadvertence, there had been a failure to file an intended rate. *See* 46 U.S.C. 817(b)(3).

The Commission continued, however, to take a narrow view of its powers to grant refunds and waivers in the domestic commerce. *See, e.g., Davies, Turner & Co. v. Atlantic Lines, Ltd.*, 13 F.M.C. 279 (1970); *Real Fresh, Inc. v. Matson Navigation Co.*, 16 S.R.R. 553 (1975). In fact, the Commission specifically stated that section 18(a), unlike section 18(b)(3), does not contemplate refunds and waivers for errors in tariff

filings. *Real Fresh,* 16 S.R.R. at 554. Moreover, in a case quite similar to the instant proceeding, the Commission held that a carrier's "*admission,*" standing alone, is not sufficient to support a finding that the applicable rate was unreasonable for purposes of section 18(a). *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, 21 F.M.C. 747 (1979).

Because Sea-Land has not affirmatively demonstrated that the rate in effect at the time of the shipments was unjust or unreasonable or that its negotiated rate with Star-Kist was reasonable, the Commission agrees with the Presiding Officer that Sea-Land's application must be denied. The Commission will, therefore, adopt the Initial Decision.

THEREFORE, IT IS ORDERED, That the Exceptions filed by Sea-Land Service, Inc., are hereby denied; and

IT IS FURTHER ORDERED, That the Initial Decision in this proceeding is adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
*Secretary*

*Commissioner Teige dissents.

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 724

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF STAR-KIST FOODS, INC.

## DISSENTING OPINION

Dissenting Opinion of Commissioner Peter N. Teige

In affirming the Administrative Law Judge's denial of this Special Docket application, the majority perpetuates an inequity which has gradually developed in the Commission's Special Docket proceedings, whereby the benefits of these procedures are made readily available to shippers in foreign commerce, while they are effectively denied to shippers in domestic offshore commerce. Because I believe that there is no good reason in law or policy why this inequity should exist, I respectfully dissent.

As the majority itself states, prior to 1965 the Commission and its predecessors had no difficulty in granting Special Docket applications in the domestic trades. Applications in both domestic and foreign commerce were processed under former Commission Rule 6(b) of practice and procedure, which read in relevant part as follows:

> (b) *Voluntary payment of reparation.* Carriers or other persons subject to the shipping acts may file applications for the voluntary payment of reparation or for permission to waive collection of undercharges, even though no complaint has been filed pursuant to rule 5(b). All such applications shall be made in accordance with the form prescribed in appendix II(5) herein, shall describe in detail the transaction out of which the claim for reparation arose, and shall be filed within the 2-year statutory period referred to in rule 5(c). . . . *Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of.* If allowed, an order for payment will be issued by the Board.
>
> *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp.*, 8 F.M.C. 361, 362 (1965) [Emphasis supplied.]

However, as the majority notes, in 1965 the Commission held by a 3-2 vote in the *Ludwig Mueller* case, *supra*, that Special Docket relief did not apply in foreign commerce because of the then existing language in Section 18(b)(3) of the Shipping Act. Later that same year, by an identical 3-2 vote, the Commission held for the first time that, based on the language of Section 18(a) of the Shipping Act, 1916, and Section 4 of the Intercoastal Shipping Act, 1933, "the application of a rate other

than the one legally on file [because of] a misunderstanding or a misconception of the carrier does not provide sufficient basis upon which to rest the granting of relief in a [domestic commerce] special docket application." *The East Asiatic Company, Inc.*, 9 F.M.C. 169, 172 (1965). The majority went on to state that (*id.*):

> . . . it is evident that our special docket technique requires that all considerations of intention, error, misunderstandings, and the like, be discounted as irrelevant. The question is not one of inequity or injustice but rather one of fact, namely the "reasonableness" or "unreasonableness" of the rates in question. [1]

Because the Commission had held in *Ludwig Mueller* that the Special Docket procedure was unavailable to shippers in foreign commerce, Congress amended Section 18(b)(3) of the Shipping Act in 1968, P.L. 90-298, to empower the Commission to authorize common carriers by water in foreign commerce to make voluntary refunds to shippers and to waive collection of freight charges where there was a clerical error in a tariff or, through inadvertence, there had been a failure to file an intended rate. Although the legislative history of P.L. 90-298 contains few references to the question of Special Docket relief in domestic commerce, it does indicate that Congress thought it was providing shippers in foreign commerce the same relief from tariff filing errors which it assumed was already enjoyed by shippers in domestic commerce. *See* H.R. Rep. No. 920, 90th Cong., lst Sess. 2 (1967). Certainly, it is most unlikely that Congress intended to grant shippers in foreign commerce greater relief than shippers in domestic commerce. Nevertheless, the Commission's decisions since 1968 have followed *East Asiatic* and have generally denied Special Docket relief to shippers in domestic commerce on the ground that the carrier applicant had failed to prove that the rate it had mistakenly applied was "unreasonable." *Real Fresh, Inc. v Matson Navigation Co.*, 19 F.M.C. 215 (1976); *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, 21 F.M.C. 747 (1979).[2]

I believe that the decisions commencing with *East Asiatic* were wrong and should be overturned. The statutes permit the Commission to find that a rate charged by a carrier in domestic commerce is "unjust or unreasonable." 46 U.S.C. 817, 845a. I see no reason why, when a carrier and a shipper negotiate a rate which, through mistake or oversight, is never filed or is incorrectly filed, and the shipper, relying on

[1] It should be noted that the opinion in East Asiatic gives no guidance to carriers or shippers as to what quality or quantity of evidence must be adduced in order to permit the Commission to find that a particular rate, applied to a particular shipment or group of shipments, was "unreasonable."

[2] The case law, however, is not as uniform as the majority opinion indicates. In two recent cases, refunds to shippers in domestic commerce have been authorized on the basis of errors in tariff filings. *Fleetwood Aluminum Products v. Sea-Land Service, Inc.*, 19 S.R.R. 96 (1979); *Williams, Clarke Co., Inc. v. Sea-Land Service, Inc.*, 20 F.M.C. 461 (1978). Both of these cases are unreviewed decisions of Administrative Law Judges which became decisions of the Commission pursuant to 46 C.F.R. 502.227.

the new rate, makes the shipment, the Commission cannot permit carriers to admit facts showing that, *under the special circumstances attendant in these cases*, the tariffed rate is "unjust and unreasonable" and the intended rate is "just and reasonable." These words are, in normal human usage, flexible terms of equity and fairness. Where they arise in isolated instances heavily charged with individual acts of inequity, and not in the context of ratemaking in the normal economic regulatory sense, the words should be given the broader, equitable meaning they have in everyday parlance.

This approach would also give real meaning to Commission Rule of Practice 92(b), 46 C.F.R. 502.92(b), which governs Special Docket applications in domestic commerce. Rule 92(b) has been in effect without change since 1968, when it was promulgated in a rulemaking instituted after the passage of P.L. 90-298. *See* 33 *Federal Register* 14412 (September 25, 1968). It makes no reference to any requirement that a carrier allege or prove that a rate is "unreasonable," but instead states, in language identical to the old rule 6(b) which governed all applications before the *Ludwig Mueller* decision, *supra*, that Special Docket applications by carriers in domestic commerce "will be considered the equivalent of a complaint and answer thereto admitting the facts complained of." Under the procedure I propose, a carrier would simply "admit" facts showing that its tariffed rate was "unjust and unreasonable" and ask the Commission for permission to apply instead the intended rate. The Commission would then verify the *bona fides* of the alleged transaction to be certain that the tariff requirements of the Shipping Act were properly observed by the carrier. By instead reaffirming the holding in *Pan American Industries, supra*, that a carrier's admission under these special circumstances is nevertheless not sufficient proof that the substituted rate is "just and reasonable" in the ratemaking sense, the majority renders Rule 92(b) meaningless.

Although the Commission has never corrected the failure of the *East Asiatic* opinion to state how the question of "reasonableness" should be addressed in a Special Docket case, and does not do so in this case, it must be assumed that the majority would require a showing similar to that necessary in general ratemaking investigations under Section 18(a) and Section 4, i.e., evidence showing that the tariffed rate resulted in an excessive rate of return on rate base, and that the application of the intended rate would render an appropriate rate of return. *See, e.g., Matson Navigation Company Proposed Rate Increases in the U.S. Pacific Coast/Hawaii Domestic Offshore Trade*, 21 F.M.C. 532, 987 (1978). Obviously, that is not feasible in these types of cases. However, if the term "just and reasonable" is interpreted more flexibly so that it has a less technical meaning in these Special Docket cases than in general rate

investigations, there would be no need for requiring such a formidable presentation.[3]

In the present case, Sea-Land has admitted that Star-Kist Foods was mistakenly charged a higher, tariffed rate for six shipments of frozen eggs, even though Sea-Land and Star-Kist had previously negotiated a lower rate for those shipments. In reliance on that agreement, Star-Kist made a substantial change in its economic position and completed the shipment with Sea-Land. Not to protect the shipper in these circumstances would be highly inequitable. These facts are more than sufficient for the Commission to find that the tariffed rate was "unjust and unreasonable," and that the intended rate was "just and reasonable" under Section 18(a) of the Shipping Act, 1916.[4]

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[3] In view of the narrow fact situations typically presented in Special Docket applications, I cannot conceive how adoption of this approach would damage the integrity of the Commission's general rate-making powers in domestic offshore commerce. Of course, if an application were filed which did present such a threat, the Commission could always reject the application on that basis. Ordinarily, the rate change involved in these cases does not possess the magnitude or economic significance that triggers a rate investigation by the Commission.

[4] If reparation were to be granted as proposed herein, the procedure customarily followed by the Commission in reparation cases to prevent discrimination against other shippers would, of course, have to be utilized.

# FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 724

## APPLICATION [1] OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF STAR-KIST FOODS, INC.

Charges of $23,161.86 (which included $5,106.23[2] for wharfage, arrimo, transfer and documentation) on six shipments of frozen eggs from Houston, Texas, to San Juan, Puerto Rico, were paid and borne as such by Star-Kist Foods. The carrier, Sea-Land admits the freight charge originally billed by it, based on its rate legally in effect at the time of shipment, was unjust and unreasonable and therefore unlawful in violation of section 18(a) of the Shipping Act, 1916. Sea-Land believes that the rate upon which this application is based is just and reasonable in all respects. Sea-Land seeks permission to waive collection of a $1,885.51 portion of aggregate ocean charges of $19,941.14 so that aggregate ocean charges total $18,055.63, under ocean charges sought to be applied and the shipper freed of the obligation to pay.

Permission requested for the waiver must be and is denied. The applicant under section 18(a) of the Act has to prove that the rate charged was in fact unreasonable or that the rate sought to be applied is in fact reasonable, in the same manner as if the carrier were opposing the payment. This the applicant-carrier has failed to do.

## INITIAL DECISION[3] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

*Adopted September 24, 1980*

This proceeding involves transportation in the so-called noncontiguous domestic trades of six shipments of frozen eggs from Houston, Texas, to San Juan, Puerto Rico.

This special docket application was received in the Commission on June 6, 1980. That is the filing date. Violation of section 18(a)[4] of the

[1] Filed as *Star-Kist Foods, Inc. v. Sea-Land Service. Inc.* by the latter.

[2] These additional charges are not in issue and they were paid in full by the shipper. See Exhibit No. 10 at 1, attached to application.

[3] 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).

[4] Section 18(a) of the Shipping Act, 1916, 46 U.S.C. 817(a), provides, *inter alia*:

> That every common carrier by water in interstate commerce shall establish. observe, and enforce just and reasonable rates, fares, charges, classifications and tariffs . . . [and that] no such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the [Commission].

The section further provides that:

> Whenever the [Commission] finds that any rate, fare, charge, classification, tariff, regulation or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff regulations, or practice.

Shipping Act, 1916, is admitted by the carrier-applicant. Sailing dates for the shipments are given (corroborated by applicable copies of Sea-Land's vessel portion bulletin - Exhibit No. 8) as June 18 and 24, 1978, July 7, 14 and 30, 1978, and August 11, 1978. The application filed within two years after the cause of action accrued as to each of the six shipments is timely as to all.

The tariff applicable is that of Sea-Land Service, Inc., Tariff No. 273, FMC-F No. 40, from United States Gulf Ports to Ports in Puerto Rico. Prior to January 15, 1978, the applicable rate on shipment of Eggs, frozen, was $3.98 per 100 lbs., TL minimum 36,000 lbs. as published in Item 10080, Original Page 280, effective November 12, 1977. Effective January 15, 1978, the rates in Tariff 273 were increased by 10.4% as provided for by Supplement No. 1 (Exhibit No. 2 attached to application). The $3.98 per 100 lbs. rate became $4.39 per 100 lbs.

Star-Kist Foods was developing movements of frozen eggs from the port of Houston, Texas, to Puerto Rico to be used in the manufacture of pet food. In consideration of the value and load factor of the cargo, Star-Kist deemed the current rate of $4.39 per 100 lbs. too high to effect such movements. As a result of negotiations between Star-Kist and Sea-Land, it was agreed to publish a rate of $3.96 per 100 lbs., minimum weight 40,000 lbs., confirmed by letter dated March 22, 1978, showing tariff effective date of March 28, 1978 (Exhibit No. 3).

Publication of the new $3.96 per 100 lbs., minimum weight 40,000 lbs., was made in Item 10080, 1st Revised Page 280, effective date March 28, 1978. The new rate was properly symbolized as a reduction, but failed to state the rate was not subject to Supplement No. 1 (Exhibit No. 2) as was the intent.

First Revised Page 280 was canceled by 2nd Revised Page 280, effective August 10, 1978. Item No. 10080, Eggs, frozen TL minimum 40,000 lbs., shows rate of $4.37 per 100 lbs. to incorporate the 10.4% increase. A new Item No. 10115 Fish, Tuna, raw, frozen, whole, loose was added, with a rate of $1,869.90 per trailer.

During the period from June 18 to August 11, 1978, a total of six truckload shipments of frozen eggs were made by Star-Kist from Houston, Texas, To Mayaquez, Puerto Rico, via the Port of San Juan. The shipments were rated at the applicable rate of $4.37 per 100 lbs. ($3.96 plus 10.4%). In addition to the ocean charge, assessorial charges for Wharfage (Rule 520), Arrimo (Rule 540), Transfer (Rule 310), and Documentation (Rule 440) were made. This resulted in substantially higher charges than would have been the case had Sea-Land published the rate that had been agreed upon.

When paying the freight charges, Star-Kist reduced the ocean freight to the basis of the $3.96 agreed-to rate and complained about the incorrect rate which was being assessed. Upon investigating the complaint, Sea-Land's America's Pricing Department discovered that an

obvious administrative error had occurred in the preparation of the proposal for the reduced rate and in not checking the published page for correctness as required by Pricing Policy. The error was corrected with the issuance of 3rd Revised Page 280, effective August 17, 1978, Item No. 10080, Eggs, frozen TL minimum 40,000 lbs., rate $3.96 per 100 lbs.

The applicant submitted the following statement of the ocean charges for each shipment showing the charge as originally billed; as paid by the complainant; and the amount to waive based on the agreed-to rate which has now been published and become effective. Presented in support are copies of bills of lading or freight bills, together with applicable pages to support the assessorial charges (copies omitted here).

| Freight Bill No. | Ocean Charge Originally Billed | Ocean Charge Paid by Shipper [g] | Ocean Charge Sought to Be Applied [h] | Ocean Charge Sought to be Waived |
|---|---|---|---|---|
| 961-842667[a] | 40,000 lbs. at $4.37/cwt $1,748.00 | 40,000 lbs. at $3.96/cwt $1,584.00 | 40,000 lbs. at $3.96/cwt $1,584.00 | $ 164.00 |
| 961-843974[b] | 40,330 lbs. at $4.37/cwt $1,762.42 | 40,330 lbs. at $3.96/cwt $1,597.07 | 40,330 lbs. at $3.96/cwt $1,597.07 | 165.35 |
| 961-845661[c] | 80,360 lbs. at $4.37/cwt $3,511.73 | 80,360 lbs. at $3.96/cwt $3,182.26 | 80,360 lbs. at $3.96/cwt $3,182.26 | 329.47 |
| 961-846607[d] | 44,430 lbs. at $4.37/cwt $1,941.59 | 44,430 lbs. at $3.96/cwt $1,759.43 | 44,430 lbs. at $3.96/cwt $1,759.43 | 182.16 |
| 961-848623[e] | 170,210 lbs. at $4.37/cwt $7,438.18 | 170,210 lbs. at $3.96/cwt $6,740.32 | 170,210 lbs. at $3.96/cwt $6,740.32 | 697.86 |
| 961-838884[f] | 80,620 lbs. at $4.39/cwt $3,539.22 | 80,620 lbs. at $3.96/cwt $3,192.55 | 80,620 lbs. at $3.96/cwt $3,192.55 | 346.67 |
| Totals | $19,941.14 | $18,055.63 | $18,055.63 | $1,885.51 |

Reference Marks
Cwt = per 100 lbs.

[a] Additional charges (not at issue) assessed in the amount of $320.00 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

[b] Additional charges (not at issue) assessed in the amount of $1,840.55 for ocean freight on Cheese Pellets (Item 10040) plus wharfage, Arrimo & Transfer - paid in full by shipper.

[c] Additional charges (not at issue) assessed in the amount of $631.79 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

[d] Additional charges (not at issue) assessed in the amount of $354.22 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

[e] Additional charges (not at issue) assessed in the amount of $1,325.87 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

[f] Error in rate in original billing - applicable rate was $4.37/cwt. Additional charges (not at issue) assessed in the amount of $633.80 for wharfage, Arrimo, Transfer & Documentation - paid in full by shipper.

[g] Payment based on rate agreed upon to be published.

[h] Based on *EXHIBIT NO. 9*.

In support of this application, only the following is submitted by the carrier-applicant:

> Sea-Land's failure to properly publish the reduced rate of $3.96 per hundred lbs., TL minimum of 40,000 lbs. resulted in an unintentional increase to the shipper which Sea-Land does not attempt to justify.
>
> The undersigned carrier hereby admits that the freight charge originally billed, based on its rate legally in effect at the time of shipment was unjust and unreasonable and therefore, unlawful in violation of Section 18(a) of the Shipping Act, 1916.
>
> It is Sea-Land's belief that the rate as published and in effect August 17, 1978, and upon which this application is based, is just and reasonable in all respects. Permission to waive collection of $1,885.51, the amount in excess of that basis, is requested.

## DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

During the period from June 18 to August 9, 1978, the applicable rate for the shipment of frozen eggs as to five shipments (those of June 18 and 24, July 7, 14 and 30) was $3.96 per 100 lbs. minimum weight 40,000 lbs., as per Item 10080, lst Revised Page 280, effective date March 28, 1978. The applicable rate for the sixth shipment (August 11, 1978) was $4.37 per 100 lbs., as per Item 10080, 2nd Revised Page 280, effective August 10, 1978. Applicant admits its failure to properly publish the reduced rate of $3.96 per 100 lbs., TL minimum of 40,000 lbs., resulted in an unintentional increase to the shipper.

Section 2 of the Intercoastal Shipping Act, 1933, prohibits a carrier by water in intercoastal commerce from charging a greater or less or different compensation from that contained in the tariff on file with the Commission.

To find here that the application of a rate other than the one legally on file was the result of a failure of Sea-Land to properly publish the negotiated reduced rate, resulting in an unintentional increase to the shipper, does not provide sufficient basis upon which to rest the granting of relief in this special docket application. See Special Docket No.

382, *The East Asiatic Co., Inc. - Application for Permission to Waive Collection of Undercharges,* 9 F.M.C. 169, 172 (1965).

The Commission said it is empowered to direct the enforcement of a reasonable rate under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, both of which relate solely to the Commission's jurisdiction over common carriers in the non-contiguous domestic trades. (*Ibid.*)

Section 18(a) has been set forth in the footnote above. The Intercoastal Act, section 4, authorizes the Commission whenever it finds a particular rate unjust or unreasonable to prescribe and order enforced a just and reasonable maximum or minimum rate.

According to the Commission (*Ibid.*), from the foregoing it is evident that our special docket technique requires that all considerations of intention, error, misunderstandings, and the like, be discounted as irrelevant. The question is not one of inequity or injustice, but rather one of fact, namely the "reasonableness" or "unreasonableness"' of the rates in question.

In 1965 the Commission chose Special Docket No. 377, *Ludwig Mueller Co., Inc. v. Peralta Shipping Corporation, Agents of Torm Lines,* and Special Docket No. 378, *Lykes Bros. Steamship Co., Inc., Application to Refund Part Freight Charges Collected on Shipment Via SS "Nancy Lykes" From Le Havre, France, to Galveston, Texas,* 8 F.M.C. 361 (January 13, 1965), for careful review in an effort to spell out clearly Commission policy with respect to special docket proceedings. (*Ibid.*, at 362.) No. 377 Involved transportation of paprika from New York to Algiers. No. 378 involved transportation of household thermometers from Le Havre to Galveston. The Commission, after a painstaking review, was of the opinion. with respect to special docket proceedings in our *foreign* commerce, that the dissent in the *Swedish American Line* case, Special Docket No. 371, 8 F.M.C. 142, 143 (1964), reached the correct result. The Commission adopted the position that strict adherence to filed tariffs is mandatory (p. 364). The Commission asked what is the function of our special docket procedure and when may it be used. (p. 366)

> It is a procedure whereby there is approved a refund from a carrier to a shipper of the difference between a rate that the carrier admits and the Commission finds to be unreasonable (and therefore unlawful) and a *rate which the Commission adjudges to be reasonable.*

The Commission continued.

> It becomes immediately apparent, therefore, that only in those cases where the Commission is empowered to direct the enforcement of a reasonable rate is our special docket technique applicable, i.e., those cases within the purview of section 18(a) of the Act and the provisions of Intercoastal Shipping Act,

1933. Such cases, of course, relate solely to the Commission's jurisdiction over common carriers in the so-called non-contiguous domestic trades.

On August 12, 1965, the Commission in Special Docket No. 396, *Sea-Land Service, Inc. - Application to Waive Undercharges*, 8 F.M.C. 641, stated, *inter alia* the purpose of the special docket proceeding "is designed to reduce, insofar as possible, the time and expense of the parties, the Commission and its staff." (p. 643.)

The applicant herein has disposed of which rate was unjust and unreasonable, as well as which rate was just and reasonable, merely by alleging same. The only proper way that authorization can be granted for deviation from the duly filed tariff and grant the waiver requested in the present application is to grant that waiver upon a finding that the tariff or legally applicable rate was unreasonable, and a concomitant finding that the rate actually charged is a reasonable rate. *See East Asiatic* case, *supra*. The rate charged was the rate on file. There is no showing that the rate charged was unreasonable and unjust. See Special Docket No. 422, *Davies, Turner & Co., as Agents for Robert S. Schlesinger, Owner v. Atlantic Lines, Ltd.*, Special Docket No. 422, 13 F.M.C. 279 (1970); *Real Fresh, Inc. v. Matson Navigation Company*, Special Docket No. 468, 19 F.M.C. 216 (1976); *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, Special Docket No. 556, 21 F.M.C. 747 (1979). Compare *Williams, Clarke Company, Inc. v. Sea-Land Service, Inc.*, Special Docket No. 489, 20 F.M.C. 461 (1978); *Fleetwood Aluminum Products v. Sea-Land Service, Inc.*, Special Docket No. 609, 19 S.R.R. 96 (1979).

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that the applicant has failed to prove which rates are unreasonable and unjust or which are just and reasonable. Also that the record is not such as to which in the final analysis such determinations can be made. The application must be denied.

Wherefore, *it is ordered:*

(A) The application is denied.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

Washington, D.C.
June 30, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 77-13

FIRST INTERNATIONAL DEVELOPMENT CORPORATION

*v.*

SHIP'S OVERSEAS SERVICE, INC.

## ORDER DENYING RECONSIDERATION

*September 25, 1980*

By Petition filed July 30, 1980, Ship's Overseas Service, Inc. (SOS), asks the Commission to reconsider its decision served July 17, 1980, in *First International Development Corporation v. Ship's Overseas Service, Inc.*, 20 S.R.R. 209 (1980), ordering SOS to pay reparation in the amount of $53,484.71 to First International Development Corporation (FIDCO). SOS also asks for a stay of the Commission's order and for oral argument. There were no replies to the petition for reconsideration.

SOS maintains on reconsideration that the Commission failed to consider the arguments raised in SOS's brief of February 20, 1978,[1] especially the question of FIDCO's "standing." SOS contends that "FIDCO was reimbursed for the transportation by OASIS and is not the person who bore the freight." SOS maintains that the situation in this case is identical to the that in *Carton Print, Inc. v. Austasia Container Express S.S. Co.*, 20 F.M.C. 30 (1977), where the shipper was found to lack standing to claim reparation for overcharges the carrier had collected from the consignee.[2]

SOS's reliance on the holding in *Carton Print, Inc., supra*, is misplaced. In that case the carrier collected directly from the consignee overcharges sought to be recovered by the shipper, whereas in this instance FIDCO paid the freight charges.[3] Applying the criteria estab-

[1] The brief was received at the Commission on February 21, 1978.

[2] The shipper in that case admitted that it had suffered no losses and that in filing the complaint it had acted as an "intermediary" for the consignee in Australia. Here, neither Gulf Consolidated International, Inc., which sold the pipe to FIDCO, nor SOS had any dealings with OASIS, the consignee.

[3] Clearly FIDCO could not be "reimbursed" had it not paid the charges in the first place. However, in its February 21, 1978 brief, SOS simultaneously argues that OASIS reimbursed FIDCO and thus bore the transportation charges and that no proof was offered as to what portion of the charges OASIS actually paid. In fact, SOS collected from FIDCO $23,115.14 in freight charges at a time cargo space had not yet been booked and the balance from the sales price payable to FIDCO under an escrow agreement apparently arranged by Charles Ragan under which FIDCO also paid an additional $6,378.75 in insurance costs.

lished by the Supreme Court,[4] the Commission concluded that FIDCO suffered cognizable injury when it paid freight charges found to be unlawful.[5] Thus, the question of FIDCO's standing to claim reparation under section 22 of the Shipping Act, 1916 was fully considered by the Commission.

In any event, under Rule 261 of the Commission's Rules of Practice and Procedure,[6] none of SOS's arguments presents a basis for reconsideration of the Commission's decision in this proceeding. The petition for reconsideration and stay will therefore be denied.

It is so ordered.

By the Commission.*

(S) JOSEPH C. POLKING
*Assistant Secretary*

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[4] *Adams v. Mills*, 286 U.S. 397, 407 (1932); *News Syndicate Co. v. N.Y. Central R. Co.*, 275 U.S. 179 (1927); *Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Southern Pacific Co. v. Darnell- Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918); and *Lehigh Valley R. Co. v. Meeker*, 236 U.S. 415 (1915).

[5] *First International Development Corp. v. Ship's Overseas Services, Inc.*, 20 S.R.R., *supra*, at 213.

[6] Rule 261 provides that:

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. 46 C.F.R. 502.261.

*Commissioner Leslie L. Kanuk dissents.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-8

SCHENKERS INTERNATIONAL FORWARDERS, INC.

*v.*

SEA-LAND SERVICE, INC.

## NOTICE

*September 25, 1980*

Notice is given that no exceptions have been filed to the August 12, 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) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 80-8
## SCHENKERS INTERNATIONAL FORWARDERS, INC.

*v.*

## SEA-LAND SERVICE, INC.

Complainant has failed to meet its burden of proving, under the circumstances herein, the violations of the Shipping Act, 1916, alleged. Complaint dismissed. Proceeding discontinued.

*Gerald H. Ullman* for Complainant.

*John M. Ridlon* for Respondent.

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

*Finalized September 25, 1980*

"The issue in this case," according to the complainant, "is whether the shipment of adhesive cement should have moved as refrigerated cargo at a rate of $515.75 or as glue or adhesives at a rate of $209.50." (May 30, 1980 Complainant Brief, at 5). "The identity or characteristics of the shipment, adhesive cement, is not in question, the sole issue being whether respondent was justified in moving the cargo under a controlled temperature rate. That issue does not evolve around the question of the actual character of the cargo, there being no dispute concerning same, but rather the application (or misapplication) of Tariff Rule 30 by Sea-Land." (June 20, 1980 Complainant's Reply Brief, at 9).

The respondent in its June 12, 1980 Answer (at 8) contends the "Complainant's entire evidentiary record with respect to section 18(b)(3) relates to the alleged instructions with respect to carriage rather than the actual character of the cargo transported and its requirements with respect to temperature control. Complainant in its memorandum simply concludes without evidentiary basis that 'there being no basis for Respondent's assessment of the higher rate, the shipment was mis-rated' . . . far from being 'no basis' for assessment of the rate charged, Respondent had no alternative under the circumstances of this proceeding..."

The applicable tariff herein is the North Atlantic Mediterranean Freight Conference Freight Tariff No. 12 - FMC-7, French Section

[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).

From: North Atlantic Ports of the United States on the Hampton Roads/ Eastport, Maine, range to Marseilles, including Caronte, Fos, Port De Bouc and Port St. Louis de Rhone, France, only.

The freight charges for transportation of the commodity the carrier charged pursuant to the applicable Tariff, page 241, Item No. 931.0002.109 Refrigerator Cargo/Cargo, N.O.S., Requiring Minimum/ Maximum Controlled Temperature Stowage (NOT applicable to shipments in bulk in Deep Tanks) at $515.75 W/M. The complaint alleges in Paragraph 3 that Sea-Land charged and Standard Transport of France paid $14,475.30 based thereon—stating the rate as $555.75 W/ M. The respondent's reply admits as to the $14,475.30 (there is no documentary proof submitted on any statement by Standard of its having paid), saying, "3. With respect to paragraph 3 of the complaint, except to the extent that the rate applicable is cited as $555.75 W/M, admitted. It is avered, however, that at the date of shipment, as shown by the attached Exhibit 'A,' the applicable rate was, in fact, $515.75 W/ M." The complainant contends the correct charge was for glue or adhesives at $209.50 (May 30, 1980 brief at 2, 8). (Respondent's June 12, 1980 Answer, Exhibit 13) pursuant to 11th Rev. page 166 of tariff effective January 4, 1979, Item No. 569.5901.210.

The complaint alleges the respondent has assessed ocean freight charges in violation of sections 16 First, 17, 18(b)(3) and 18(b)(5) of the Shipping Act, 1916. The complaint seeks, *inter alia*, an order for the respondent to cease and desist from the aforesaid violations and to pay to the complainant by way of reparation the sum of $10,352 with interest.

The complainant in its May 30, 1980 Brief and Memorandum of Facts, as part of an introductory statement, states that, "this proceeding was initiated by the filing with the Commission of a complaint, dated December 31st, 1979, against Sea-Land Service, Inc., respondent, for reparations in the sum of $10,352.97."

## BACKGROUND

The complaint in this proceeding signed by the Vice-President of Schenkers International Forwarders, Inc., was sworn to and subscribed to before a notary public, State of New York, December 31, 1979. The complaint, with a covering letter dated January 31, 1980, was received in the Office of the Secretary of this Commission February 4, 1980. Under date of February 5, 1980, the Secretary sent the following letter:

> Reference is made to your complaint filed on behalf of Schenkers International Forwarders, Inc. against Sea-Land Service, Inc.
>
> Before your complaint can be processed, it will be necessary for you to furnish the assignment of the claim to Schenkers

from Standard Transport of France. I will hold the complaint pending receipt of the assignment.

The complainant in a letter dated February 8, 1980 (received February 12, 1980) to the Secretary of the Commission wrote:

> In reply to your February 5, 1980 letter concerning the complaint I filed in the above matter, I am enclosing herewith an Assignment of Claim[2] executed by Standard Transport of France.

The complaint in this proceeding was served February 20, 1980. Notice of the filing of the complaint served February 21, 1980, was published in the *Federal Register*, Vol. 45, No. 39, February 26, 1980, page 12489.

Respondent's reply to the complaint, dated March 11, 1980, was received in the Commission March 13, 1980.

A prehearing conference was held herein on March 25, 1980, pursuant to notice served March 14, 1980. The parties revealed they had begun discussions toward a possible settlement; the talks and investigations were to continue; the parties to submit a status report on or before Tuesday, May 6, 1980.

The status reports were filed indicating the parties were amenable to this proceeding being conducted under the Shortened Procedure pursuant to Rule 181 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.181. Use of the Shortened Procedure was approved and a procedural schedule presented by notice served May 15, 1980.

The transcript and exhibits, together with all papers and requests filed in this proceeding, constitute the exclusive record for decision. The requests of parties for findings of fact have been considered fully and carefully; such requests were granted, granted in substance or denied as indicated by the following findings of fact.

## FACTS

Standard Transport of France, whose name does not appear on any transportation documents in this proceeding, is an ocean freight for-

[2] "Assignment of Claim. Know all men that Standard Transport of France, with its principal place of business at 4, Rue de Castiglione, Paris, France in consideration of One ($1.00) Dollar paid to it by Schenkers International Forwarders, Inc., with its principal place of business at One World Trade Center New York, N.Y. (herein called the "assignee") hereby assigns to the said assignee all of its right, title and interest in a claim against Sea-Land Service, Inc. of Iselin, New Jersey for overcharges arising under a Sea-Land Service, Inc. bill of lading dated April 1, 1979, with respect to a shipment of adhesive cement in container number 263403.

In witness whereof, we have hereunto set our hands and seal in the City of Paris, France on this 31st day of December 1979

Standard Transport of France

by Francis Arne - Pres. Directeur General

and by Jean Bazes - Directeur General

Notarized January 11, 1980"

warder, doing business at Paris, France. In the latter part of January 1979, Schenkers International Forwarders, Inc., a corporation engaged in ocean freight forwarding, with its principal place of business in New York, N.Y., under FMC No. 911, received instructions from Standard Transport of France to arrange for the exportation, in a refrigerated container, of one container of "ciment golle," an adhesive cement, for discharge at the port of Nice for ultimate delivery to the purchaser, Sa Rhone Aquitaine-Chemie.

On March 12, 1979, the assistant traffic manager of Schenkers International Forwarders, Inc., booked with Sea-Land Service, Inc., a common carrier by water in the foreign commerce of the United States, on a house to house[3] basis, carriage for approximately 30,000 lbs of adhesive paste, temperature control 40°, on behalf of Miracle Adhesive Sales Corporation of New Philadelphia, Ohio, USA, for export to Nice, France (Respondent's June 12, 1980 Answering Memo, Exh. 2).

On March 13, 1979, Sea-Land Service Refrigerated Container No. 263403 was dispatched to Miracle Adhesive Sales Corporation in New Philadelphia, Ohio, via the trucking company Motor Freight Express, Inc. (*Ibid.*, Exhs. 3-4).

Container No. 263403, under Sea-Land Service, Inc. B/L No. 749640 dated 3/31/79[4] was "said to contain 18 Palleys (792 Pails) Ciment Golle as per pro forma invoice[5] dated 17th January 1979; Gross Weight 41,983 lbs., measurement 1069 cu. ft., Temp. control maintain 40°." Stamped correction approved. The port of loading is Baltimore on the vessel *Sea-Land Market* for discharge at Nice. The shipper is Miracle Adhesive Sales Corp., Bellmore, New York. The forwarding agent--Schenkers International Forwarders, Inc., FMC 911, New York, N.Y.

The parties admit the invoice value of the shipment was $8,710 (Complaint, p. 2, Para. 5, Answer thereto).

Upon receipt on March 19, 1979, of Container No. 263403 by Sea-Land Service, Seal No. 499 on that container was broken and the cargo inspected. The inspection showed a block stock type loading and wire bound crate type packaging of the cargo; that the container refrigera-

[3] Defined under Rule 30 of the applicable Tariff as "Container stuffed by shipper and at the shipper's expense."

[4] Respondent's June 12, 1980 Answering Memo, Exh. 6, plainly shows perforations No. 749640 for No. of B/L and 3/31/79 for date. On the copy of the B/L there is written the word "adhesive" and "Temperature Control--Maintain 40°." There is not correction stamp on this copy. "Stow under Deck" is inked out. Complainant's Schedule Rule F, attached to its June 20, 1980 Reply Brief, shows "Stow Under Deck"; it bears no date or correction. The Complainant's May 30, 1980 Brief and Memo, Schedule C shows B/L with written date 4-1-77, and Sea-Land correction; the "Stow Under Deck" was inked out. It is noted that Rule 30 C-1, lst Rev. Page 40, effective November 19, 1976, of the applicable tariff, states, "Since it is necessary that Containers be stowed on or under deck at the Member Line's option, Bill of Lading specifically claused to provide under-deck storage will NOT be issued."

[5] No invoice was ever presented herein.

tion unit was set at 40 degrees; the temperature was tested and read to be 45 degrees and the cargo was "pulped" or tested and found to be at 45 degree temperature. A new seal was affixed to the container bearing the number 956665948. (Respondent's Answer of June 12, 1980, Exh. 5.)

The Bill of Lading numbered 749640 and dated 3/31/79, furnished by the forwarder, Schenkers International Forwarders, Inc., FMC - 911 (Complainant's June 20, 1980 Reply Brief, Schedule F), and accompanying the cargo, contained standard stamped instructions, one of which was "stow below deck" but contained no instructions as to the temperature control required with respect to the cargo. Sea-Land Service, Inc., deleted the phrase "stow below deck" and added a handwritten notation: "Temperature Control--Maintain 40 degrees" (Respondent's June 12, 1980 Answer, Exh. 6).

From March 19, 1979, when received by Sea-Land Service, Inc., in Baltimore until April 1, 1979, the loaded container continued to be activated and a controlled temperature maintained. On April 1, 1979, the cargo at issue was moved by Respondent under the bill of lading and applicable tariff.

## DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The complainant contends that "it is clear beyond argument that the cargo did not in fact require refrigeration." (May 30, 1980, Brief, p. 6). The respondent replies (Answer, p. 18) "For Complainant to attempt to allege and prove violations of 18(b)(3) by Respondent on the basis of a bare conclusion of fact without record support or legal precedent, is inadequate proof of its claim." Respondent contends the "Complainant bears the burden of proving this allegation." The Complainant in its June 20, 1980 Reply Brief argued (p. 9) the Respondent erred in regard to burden of proof under section 18(b)(3) of the Shipping Act. The Complainant asserts the two cases cited by the Respondent deal with alleged errors in weight, measurement or description, and that this case does not involve such matters.

The Presiding Administrative Law Judge cannot agree with the complainant that respondent erred in regard to the burden of proof being upon the Complainant. The two cases referred to above as cited by the Respondent are (1) *Johnson & Johnson International v. Venezuelan Lines*, Docket Nos 71-46 and 71-67, 16 F.M.C. 84 (1973), in which the Commission stated at p. 85, "The proper test we have required is for the claimant to sustain a 'heavy burden of proof.' *Ocean Freight Consultants, Inc. v. Italpacific Lines*, Docket No. 71-81 served June 20, 1972 (15 F.M.C. 312)"; (2) *United States of America v. Farrell Lines, Inc.* Docket No. 71-4, 16 F.M.C. 41 (1972), in which Complainant U.S. of A. was denied reparation because it failed to adduce sufficient evidence to indicate with reasonable certainty how a shipment of plastic pipe

from Bayonne, New Jersey, to Freetown, Sierra Leone, should have been rated.

The Complainant argues (May 30, 1980 Brief at 6) that it is clear beyond argument that the cargo did not in fact require refrigeration and that it behooves respondent to justify a refrigerated rate when the cargo did not require the service. *Au contraire*, the complainant as the moving party bears the burden of proving what the commodity moved was. Complainant says the proper rate of $209.50 should have been assessed for glue or adhesives. Item 599.5, pursuant to page 166 of the tariff. Then, as pointed out above, posed the issue in this case as whether the shipment of adhesive cement should have moved as refrigerated cargo at a rate of $515.75 or as glue or adhesives at a rate of $209.50.

Sea-Land Service, Inc., Bill of Lading 749640, submitted as Schedule C to Complainant's May 30, 1980 Brief, is dated April 1, 1979, shows Container No. 263403 - "1 container said to contain: 18 Palleys (792 Pails) ciment golle as per pro forma invoice dated 17th January, 1979." In writing (really printing) is "Temp. Control Maintain 40°."

A bill of lading is both a receipt and a contract.

In giving effect to provisions of bill of lading conditions and circumstances which evidence proves were known to parties and contemplated by them in making it are to be taken into consideration. *Isthmian S.S. Co. v. California Spray Chemical Corp.*, 300 F.2d 41 (1962). In the instant case there are conditions and circumstances. For example, the complainant (the freight forwarder of the cargo) on March 12, 1979, made the booking with the respondent to dispatch and who did dispatch a refrigerated container to the shipper. The refrigerated container was No. 263403. The respondent received from the shipper loaded refrigerated container No. 26403 on March 19, 1979. The refrigeration unit was set at 40 degrees. From March 19, 1979, when received by respondent in Baltimore, Md., until April 1, 1979, the loaded container continued to be activated and a controlled temperature maintained.

The assistant traffic manager of the ocean freight forwarder complainant in his affidavit sworn to May 1, 1980, states, *inter alia*, that about 3 or 4 days prior to the loading of the cargo he received a telephone call from a representative of the respondent[6] in Baltimore and that he (the assistant traffic manager) in response to the question as to what temperature the loaded refrigerated box should be maintained, said the container should be appropriately located in the vessel so that the adhesive cement not freeze.

The complaint alleges (para. 3) and the respondent in its answer admits "ciment golle" is an adhesive cement. The respondent by such

[6] Respondent in its June 12, 1980 Answer (at 7) said it has no record of any telephone call of the sort alluded to.

admission, raised no question as to what commodity was shipped. Thus, there is no information in this record as to what classification by type[7] this adhesive is.

The parties not being concerned with classification of the adhesive that was shipped, attention is directed to the manner--whether refrigerated or not.

Contracts such as bills of lading are to be interpreted from language within the four corners of documents, and any ambiguous language is best resolved against the one who has prepared it. In the present instance the Bill of Lading apparently had stamped thereon "Stow Under Deck" (Schedule F of Complainant's June 20, 1980 Reply Brief). The "Stow Under Deck" was overridden by inking out (Schedule C, Complainant's May 30, 1980 Brief). Also there was a stamp Respondent Correction, there was lettered in "TEMP CONTROL MAINTAIN 40°."

Rule 30, lst Rev. Page 40, effective November 19, 1976, of the applicable tariff, reads, "Since it is necessary that Containers be stowed on or under deck at the Member Line's option, Bill of Lading specifically claused to provide under-deck storage will NOT be issued." This Rule 30, would, it seems, justify an overriding stamp or inking out of the "Stow Under Deck." Overriding stamp on printed bill of ladings is to be considered as superseding printed form if there is a conflict. *Singapore Nav. Co., S/A v. Mego Corp.*, 540 F. 2d 39 (1976).

The complainant is an ocean freight forwarder licensed by this Commission. By an unconfirmed phone call by him to the carrier, concerning commodity that has been in a refrigerated container as ordered by the freight forwarder since March 1979, the freight forwarder who knew or should have known of the carrier's tariff and Rule 30 as well as the contract aspects of a bill of lading, by parol direction with no writing, allegedly says to locate the container in the vessel so the adhesive cement not freeze, and despite the fact the commodity is in a refrigerated container, says no specific degree of temperature was required and that the container should not have been transported under refrigerated conditions.

With no instruction in writing save the bill of lading, the situation is presented of a licensed ocean freight carrier attempting to use "Stow Under Deck," without more, as a direction of what to do with a refrigerated container. If the ocean freight fòrwarder complainant did not want the commodity shipped in the refrigerated container, he should have specifically conveyed that direction, not by indirection, or suggestion. And, under the circumstances herein, the carrier could

[7] The *Condensed Chemical Dictionary*, 8th Edition, Hawley 1971, p. 17, defines Adhesive--Any substance, inorganic or organic, natural or synthetic, that is capable of binding other substances together by surface attachment. Types under inorganic and organic are listed.

hardly have handled the refrigerated container other than it did. The complainant has not proved otherwise.

The Complainant's Schedule E attached to its May 30, 1980 Brief, Sea-Land Bill of Lading No. 956744158-6, dated January 6, 1979, according to complainant, shows a movement of identical cargo from the same supplier to the same consignee did not require refrigeration. The respondent disagrees, pointing out that the Container No. 20469 is a refrigerated container; that a move from Baltimore, Maryland, to Le Havre, France, would be one made pursuant to the terms and conditions of a different conference tariff than the tariff here at issue--that is, the North Atlantic French Atlantic Freight Conference Tariff No. (3), F.M.C. No. 4 applicable to carriage from U. S. North Atlantic Ports to French Atlantic ports in the Bordeaux-Dunkirk range. The complainant did not deny that a different conference was involved, in its reply complainant said its purpose in calling the January shipment to the attention of the Commission was to establish that it had moved at the commodity and not refrigerated rate.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that the complainant has failed to meet the burden of proving, under the circumstances presented in this case, that the commodity was improperly charged or that the respondent has violated section 18(b)(3) of the Shipping Act, 1916. Also, the showing of the bill of lading from another conference than that concerned herein did not provide complainant any help in meeting its burden of proof.

Complainant argues that "Stow Under Deck" on the Bill of Lading was an explicit instruction and can be read to mean that the initial instruction of the complainant that the refrigeration was necessary was withdrawn; that at the very least, respondent had a duty to inquire; that for the respondent unilaterally to strike out the complainant freight forwarder's explicit instructions without checking was arbitrary and capricious action constituting an unreasonable practice under section 17(Reply Brief, p. 4). Using the complainant's words (Reply Brief, p. 3) no authority is cited to support this contention and it is without merit.

The complainant asserts it is not necessary to show an actual discrimination to support a finding of a violation of the second paragraph of section 17 (Reply Brief, p. 7). He cites *Rates, Hong Kong-United States Trade*, Docket No. 1083, 11 F.M.C. 168, 176 (1967). (Interestingly, in the complainant's submission of its May 30, 1980 Brief of 10 pages, in which not a single case is cited in support of any contentions, and the June 20, 1980 Reply Brief of 12 pages, the above is the only case cited by the complainant in this proceeding.) On the cited page, the Commission pointed to the second paragraph of section 17 and said, "This paragraph of the Act is directed at unjust or unreasonable regulations as well as improper practices." The complainant has not in this pro-

ceeding proved any unjust or unreasonable regulation or improper practices.

The complainant has not proved the respondent violated section 16 First of the Act.

As to allegations of violations of section 18(b)(5) of the Act, the complainant argues that the freight assessed was almost twice the value of the merchandise. The complainant asserts the respondent a few months before had transported similar commodity at a lesser charge, but the complainant ignores that transportation was in a different conference and route. Nevertheless the complainant says such difference is detrimental to the commerce of the United States. And adds that respondent has engaged in an unreasonable practice in violation of section 17. (May 30, 1980 Brief, p. 9.) In its June 20, 1980 Reply Brief, the complainant says nothing about any 18(b)(5) violation.

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

(1) The claimant has failed to meet its burden of proving, under the circumstances presented in this case, violations of sections 16 First, 17, 18(b)(3) and 18(b)(5) by the respondent as alleged.

(2) Reparation should be denied.

(3) The complaint should be dismissed.

(4) This proceeding should be discontinued.

Wherefore, it is *ordered* that:

(A) Reparation is denied.

(B) The complaint be and hereby is dismissed.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

Washington, D. C.
August 12, 1980

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 699(I)

GLADISH & ASSOCIATES

*v.*

SEA-LAND SERVICE, INC.

## ORDER PARTIALLY ADOPTING DECISION OF SETTLEMENT OFFICER

*September 25, 1980*

This proceeding is before the Commission upon its determination to review the decision of Settlement Officer Robert G. Drew, awarding reparation to Gladish & Associates for freight overcharges on three of fourteen shipments of toothbrushes from Keelung, Taiwan to Seattle, Washington.

The Commission concurs with the Settlement Officer's conclusion that, with respect to the three shipments, the carrier collected freight charges in excess of those provided in the applicable tariff, in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817). The Commission also agrees that with respect to the remaining shipments, Claimant has failed to meet its burden of proof, and that its request for reparations as to those shipments must be denied.*

The record reflects, however, that Claimant was not the shipper, but rather served as customs broker/freight forwarder, and that it had paid the ocean freight. The Commission therefore directs Claimant to reimburse, within thirty days, the shippers of the three shipments in question the portion of any freight charges awarded as reparation which the shippers may have already paid to Claimant. In addition, any brokerage fees Claimant may have received from the carrier on these shipments must be adjusted to reflect the lower rates.

THEREFORE, IT IS ORDERED, That the Decision of the Settlement Officer is adopted by the Commission to the extent indicated; and

* Three weeks after issuance of the Settlement Officer's Initial Decision, Claimant submitted additional evidence, consisting of copies of two letters and a box of toothbrushes, in support of its claim. The Commission has accepted the evidence for consideration in its review of this proceeding. However, Claimant's submissions remain inadequate proof of its claim, and its burden still has not been met with regard to these shipments.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.**

(S) JOSEPH C. POLKING
*Assistant Secretary*

** Chairman Richard J. Daschbach did not participate.

Separate Opinion of Chairman Daschbach.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The settlement officer's decisions in informal dockets do not have precedential value, Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 699(I)

GLADISH & ASSOCIATES

*v.*

SEA-LAND SERVICE, INC.

## DECISION OF ROBERT G. DREW, SETTLEMENT OFFICER[1]

*Partially Adopted September 25, 1980*

Reparation Awarded in Part

The claimant, Gladish & Associates (Gladish) is a corporation located at 1319 Second Avenue, Seattle, Washington. It is engaged in the business of customs brokerage and ocean freight forwarding.

The claim involves fourteen (14) shipments of toothbrushes carried by Sea-Land Service, Inc. (Sea-Land) from Keelung, Taiwan to Seattle, Washington under the bills of lading indicated below. The shipments were assessed the rate for "Brushes, all kinds, excluding plastic" as designated under Item 390 of Sea-Land Tariff No. 245-A, FMC No. 138. The shipments moved on a freight collect basis, and the freight charges were paid by Gladish as evidenced by copies of cancelled checks submitted by Gladish at the request of this Settlement Officer.

The shipments involved in this claim are identified as follows:

| | B/L No. | Vessel & Voyage | Rate Assessed | Rate Claimed | Amount of Claim |
|---|---|---|---|---|---|
| 1. | 970110536 | S/L Exchange 61E | $79 | $61 | $ 367.56 |
| 2. | 970119940 | S/L Finance 51E | 79 | 61 | 118.08 |
| 3. | 970114714 | S/L Finance 50E | 79 | 61 | 233.10 |
| 4. | 970117577 | S/L Commerce 59E | 79 | 61 | 120.24 |
| 5. | 970125691 | S/L Finance 52E | 84 | 65 | 561.12 |
| 6. | 970129735 | S/L Commerce 61E | 84 | 65 | 252.13 |
| 7. | 970133652 | S/L Finance 53E | 84 | 65 | 103.74 |
| 8. | 970135545 | S/L Exchange 65E | 84 | 65 | 121.98 |
| 9. | 970133049 | S/L Trade 62E | 84 | 65 | 116.09 |
| 10. | 970146049 | S/L Finance 55E | 84 | 65 | 101.72 |
| 11. | 970112043 | S/L Mclean 96E | 79 | 61 | 95.94 |
| 12. | 970112598 | S/L Mclean 96E | 79 | 61 | 114.12 |
| 13. | 970129771 | S/L Commerce 61E | 84 | 65 | 131.67 |

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

| | B/L No. | Vessel & Voyage | Rate Assessed | Rate Claimed | Amount of Claim |
|---|---|---|---|---|---|
| 14. | 970153583 | S/L Finance 56E | 89 | 65 | 148.08 |
| | Total amount claimed | | | | $2,585.57 |

With the exception of No. 14 above, each of the rates assessed was the Overland Common Point (OCP) rate for "Brushes, all kinds, excluding plastic" under Item 390 of Sea-Land's Tariff No. 245-A, FMC No. 138. Shipment No. 14 above was assessed the Local rate under Item 390 of the same Sea-Land tariff. Item 390 of the tariff excludes plastic brushes for which it directs the reader to Item 2100. Item 2100 is described as "Plastic Goods and Manufactures N.O.S. including Plastic Inflatable Furniture and Plastic Dresser Sets (Containing comb, brush and mirror)."

Gladish claims that "To the best of our knowledge these toothbrushes are PLASTIC..." and that the lower Item 2100 O.C.P. rate should apply. Accordingly, reparation in the amount of $2,585.57 is claimed.

When Gladish filed this claim with Sea-Land, Sea-Land refused to honor the claim under Item 305 of Sea-Land Tariff No. 245-A, FMC No. 138 which prohibits acceptance of a claim beyond six months of the date of shipment. However, the claim herein under consideration was filed within the time limit specified by statute[2], and it has been established by the Commission that the so-called "six month" rule may not act as a bar to recovery of an otherwise legitimate overcharge claim in such cases.

The shipment identified as No. 1 above is described on the bill of lading as "polypropylene" toothbrushes and the shipment identified as No. 7 above is described as "styrene" toothbrushes. The remaining twelve (12) shipments were described on the bills of lading as "toothbrushes" without indicating the material of manufacture. Accordingly, the Settlement Officer requested Gladish to submit, in the form of packing lists, commercial invoices, or other such documentation, evidence that the toothbrushes were in fact plastic.

In reply to the Settlement Officer's request Gladish submitted commercial invoices covering each of the fourteen (14) shipments. These commercial invoices describe the toothbrushes exactly as on the respective bills of lading. Only the shipments identified as Nos. 1 and 7 above are confirmed by the commercial invoices to be of polypropylene and styrene manufacture. The commercial invoices do not indicate the material of manufacture with respect to the remaining twelve shipments.

[2] 46 C.F.R. 502.302. The earliest shipment involved here was carried aboard a vessel which sailed on January 9, 1978 and the claim was filed on June 14, 1979.

The United States Department of Commerce, Bureau of the Census, Schedule B classification publication, 1978 edition, includes under the term "plastics," polypropylene[3] and styrene.[4] Accordingly, I find that the shipments identified as Nos. 1 and 7 above were toothbrushes of plastic manufacture and should have been rated under Item No. 2100 of Sea-Land's Tariff No. 245-A, FMC No. 138. However, I also find that with respect to the other twelve (12) shipments Gladish has not met the burden of proving that those shipments were toothbrushes of plastic manufacture, and, therefore the rates assessed by Sea-Land were correct.

As previously indicated the shipment identified as No. 14 above was assessed the "Local" rate under Item 390 of Sea-Land's Tariff No. 245-A, FMC No. 138. Since this shipment was destined for Nashville, Tennessee, it should have been rated at the O.C.P. tariff rate of $84 per cubic metre pursuant to Item 390 of Sea-Land's Tariff No. 245-A, FMC No. 138, rather than the Local rate of $89. Therefore, the overcharge is calculated as follows:

| | |
|---|---|
| Ocean freight assessed: | |
| 6.17 cubic metres/$89 per cubic metre | $549.13 |
| Correct ocean freight: | |
| 6.17 cubic metres/84 per cubic metre | 518.28 |
| Overcharge | $ 30.85 |

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled under its tariff. In addition, since this claim was filed within the time specified by statute (see Footnote 2) the so-called "six month" rule of Sea-Land's tariff cannot act as a bar to these overcharge claims. Accordingly, based on the foregoing discussion and findings. Gladish is awarded reparation on the shipments identified as Nos. 1 and 7 above in the amounts of $367.56 and $103.74 respectively, and in the amount of $30.85 for the shipment identified as No. 14 above. The total amount of reparations is $502.15 In addition, twelve (12) percent interest per annum is awarded, to be calculated from the date that the ocean freight was paid. The claim with respect to the remaining eleven (11) shipments is denied.

(S) ROBERT G. DREW
*Settlement Officer*

June 26, 1980

[3] The Condensed Chemical Dictionary, Eighth Edition (1971), defines polypropylene as a synthetic crystalline thermoplastic polymer.

[4] The Condensed Chemical Dictionary, Eighth Edition (1971), defines styrene as a thermoplastic synthetic resin.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-26

JUTE CARPET BACKING COUNCIL, INC., AND ITS MEMBERS

*v.*

CALCUTTA, EAST COAST OF INDIA AND BANGLADESH/U.S.A. CONFERENCE AND ITS MEMBERS

## NOTICE

*October 2, 1980*

Notice is given that no appeal has been taken to the August 26, 1980 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-26

JUTE CARPET BACKING COUNCIL, INC., AND ITS MEMBERS

*v.*

CALCUTTA, EAST COAST OF INDIA AND BANGLADESH/U.S.A. CONFERENCE AND ITS MEMBERS

## MOTION FOR LEAVE TO WITHDRAW COMPLAINT GRANTED; COMPLAINT DISMISSED

*Finalized October 2, 1980*

The Jute Carpet Backing Council, Inc. and its members, complainants in this proceeding, have filed a motion requesting leave to withdraw their complaint. Complainants explain that they have decided not to proceed against respondent Calcutta, East Coast of India and Bangladesh/U.S.A. Conference at this time. In reply to the motion, respondent Conference filed their "consent" to the withdrawal of the complaint.

This case began with the filing of the complaint in which the Council and its members, importers of jute carpet backing materials, alleged that the Conference had increased its rates on these commodities by means of a general rate increase of 17 percent on April 10, 1980, and had allegedly also increased bunker surcharges. The Council alleged that these increases caused the rates on their commodity to be so unreasonably high as to be detrimental to the commerce of the United States, in violation of section 18(b)(5) of the Shipping Act, 1916, and asked the Commission to find these rates to be unlawful, issue a cease and desist order, and order an indeterminate amount of financial reparation. The Conference admitted certain rate increases but denied the central allegation of violation of section 18(b)(5) of the Act.

Had this case proceeded into litigation it would most likely have entailed considerable expense with uncertain results. Cases litigated under section 18(b)(5) have traditionally involved the development of lengthy evidentiary records with results often not supporting the positions of complainants or protesting shippers. See, e.g., *Investigation of Ocean Rate Structures,* 12 F.M.C. 34 (1968); *Iron and Steel Rates, Export-Import,* 9 F.M.C. 180 (1965); *Outbound Rates Affecting Export High-Pressure Boilers,* 9 F.M.C. 441 (1966); *Pacific Westbound Conference--Investigation of Rates, Rules and Practices of Wastepaper,* 19 SRR 19 (1979). Moreover, it is well established that the Commission cannot

grant an award of reparation retroactively under section 18(b)(5). See *Westinghouse Electric Corp. v. Sea-Land Service, Inc.*, 19 SRR 1056 (1979), and the cases cited therein. Termination of the case at this time would undoubtedly result in considerable savings to all parties concerned regarding costs of litigation. Furthermore, even though complainants have determined not to pursue the question of lawfulness of respondent's present rates on the commodity which they import under the standards of section 18(b)(5), withdrawal of the complaint, even if construed to constitute a dismissal of the complaint, does not bar complainants from filing a complaint addressed to future rate increases, if they believe that relief is required. Finally, there are no exceptional circumstances which would preclude application of the general rule that complainants have the right to choose not to engage in litigation if they believe it to be in their best interests to withdraw.

Accordingly, the motion for leave to withdraw the complaint is granted. The complaint is dismissed and the proceeding discontinued subject to Commission review under Rule 227(b), 46 C.F.R. 502.227(b).

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

August 26, 1980

# FEDERAL MARITIME COMMISSION

## TITLE 46 - SHIPPING
## CHAPTER IV - FEDERAL MARITIME COMMISSION
## SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES
## [GENERAL ORDER 24; AMDT. 1; DOCKET NO. 80-32]
## PART 522 - FILING OF AGREEMENTS BETWEEN COMMON CARRIERS OF FREIGHT BY WATER IN THE FOREIGN COMMERCE OF THE UNITED STATES

*October 2, 1980*

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission exempts agreements solely involving terminal facilities located in foreign countries from the filing and approval requirements of section 15 of the Shipping Act, 1916.

DATE: Effective October 8, 1980

SUPPLEMENTAL INFORMATION:

By notice filed in the *Federal Register* on May 27, 1980, the Federal Maritime Commission solicited comments on a proposed rulemaking to exempt pursuant to section 35 of the Shipping Act, 1916 (46 U.S.C. 833a) leases or arrangements solely involving terminal facilities located in foreign countries from the filing and approval requirements of section 15 of the Act (46 U.S.C. 814).

Section 35 provides that the Commission, upon application or on its own motion, may by order or rule exempt any class of agreements between persons subject to the Act, or any specified activity of such persons from any requirements of the Act, where it finds that such exemption will not impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce.

In the main, comments expressed the view that leases or arrangements solely involving terminal facilities located in foreign countries are not within the Commission's jurisdiction under the Shipping Act.

The Commission has occasionally approved agreements involving terminal facilities located abroad. These agreements, between two vessel operating common carriers, as defined in section 1 of the Shipping Act, provided for joint use of a terminal in a foreign port which necessarily involved a degree of rationalization of sailings and coordination of schedules which could affect service and frequency at U.S. ports. The Commission considered these agreements to be within its

jurisdiction. Therefore, it can be said that some agreements involving terminal property at a foreign port are subject to section 15. On the other hand, the Commission is not unmindful that international law principles of comity and sovereignty, the fact that these foreign terminal operators have no direct contact with the United States, and the frequent lack of practical means to carry out any regulations, militate against the positive assertion of jurisdiction in many of these cases. However, to separate those agreements which have such remote contacts with any area of regulatory concern as to compel a determination that no jurisdiction exists, from those within the jurisdiction of the Commission, is difficult in the abstract and unnecessary for the purpose of this order. The Commission is of the opinion that it should exempt the entire class of these agreements rather than attempt to draw an abstract jurisdictional line between them.

Since terminals located in foreign countries have no significant contact with the commerce of the United States, exemption of agreements which solely involve such terminals will not impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce. Therefore, the Commission will exempt these agreements, to the extent of our jurisdiction, from the filing and approval requirements of section 15.

NOW, THEREFORE, pursuant to sections 15, 35, and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a, and 841a) and section 4 of the Administrative Procedure Act (5 U.S.C. 553) IT IS ORDERED, That, effective upon publication in the *Federal Register*, Title 46 C.F.R. Part 522 is hereby amended by the addition of a new section 522.8 as follows:

> Section 522.8 - Exemption of Agreements Between Common Carriers by Water in Foreign Commerce Solely Involving Terminal Facilities.
>
> Authority: Sections 15, 35, 43, Shipping Act, 1916 (46 U.S.C. 814, 833a, 841a); Section 4, Administrative Procedure Act (5 U.S.C. 553).
>
> (a) *Exemption* - To the extent the Commission has jurisdiction, agreements solely involving foreign terminal facilities are exempted from the filing and approval requirements of section 15 of the Shipping Act, 1916.
>
> (b) *Compliance with the Filing and Approval Requirements of Section 15* - Notwithstanding paragraph (a) of this section, persons who desire Commission approval of agreements solely involving foreign terminal facilities may file such agreements

with the Commission for section 15 consideration in accordance with ordinary filing procedures.

By the Commission.

(S) JOSEPH C. POLKING
*Assistant Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 80-6
## SPECIFIC COMMODITY RATES OF FAR EASTERN SHIPPING COMPANY IN THE PHILIPPINES/U.S. PACIFIC COAST TRADE AND U.S. GULF/AUSTRALIA TRADE

Controlled carrier's rates on "Buri and Rattan Furniture from Cebu" and "Beer, mineral water, etc." found to be unjust and unreasonable and are, therefore, disapproved.

*Steven B. Chameides* and *John F. Dorsey* for Far Eastern Shipping Company.

*Polly Haight Frawley, Alan J. Jacobson,* and *Paul J. Kaller* for Bureau of Hearing Counsel.

## REPORT AND ORDER

*October 3, 1980*

BY THE COMMISSION: (RICHARD J. DASCHBACH, *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY, *Commissioner*. COMMISSIONER LESLIE L. KANUK CONCURS IN THE RESULT. COMMISSIONER PETER N. TEIGE DID NOT PARTICIPATE).

By Order served January 31, 1980, the Commission: (1) directed the Far Eastern Shipping Company (FESCO)[1] to show cause why six of its rates on three commodities in the Philippines/U.S. trade and one F.A.K. (freight all kinds) rate in the U.S. Atlantic and Gulf/Australia and New Zealand trade[2] should not be disapproved; and (2) suspended those rates for 180 days pursuant to section 18(c)(4) of the Shipping Act, 1916 (46 U.S.C. 817(c)(4)) pending the Commission's determination of their justness and reasonableness. The Philippines North America Conference (PNAC) intervened but later withdrew from the proceeding.

This proceeding was assigned to Administrative Law Judge Charles E. Morgan for the expedited development of an evidentiary record. On May 30, 1980, the Presiding Officer certified to the Commission a record which consisted of 10 exhibits. In addition, all exhibits which were introduced in Docket No. 70-104, *Specific Commodity Rates of Far Eastern Shipping Company in the Philippines/U.S. Pacific Coast Trade,*

[1] FESCO is a "controlled carrier" subject to regulation under the Ocean Shipping Act of 1978, P.L. 95-483, 92 Stat. 1607, which amended sections 1 and 18 of the Shipping Act, 1916 (46 U.S.C. 801, 817). FESCO is directly or indirectly owned and controlled by the government of the U.S.S.R. under whose flag its vessels operate.

[2] *See* Attachment A.

were incorporated by reference. FESCO and the Commission's Bureau of Hearing Counsel filed simultaneous opening and reply briefs. FESCO also filed a request for oral argument, which was denied by the Commission.

## POSITIONS OF THE PARTIES

FESCO first claims that its rates are the same as or similar to the rates of other carriers in the same trades. In doing so, it relies upon other carriers' rates in existence on the date of the Commission's Order initiating this proceeding and also on more current rates. In addition, a portion of its rate comparison is based upon Military Sealift Command rates of other carriers. FESCO also contends that its slower and less frequent service from the Philippines requires it to maintain lower rates than two major carriers in the trade - American President Lines and Sea-Land Service, Inc. Lastly, FESCO argues that some of its rates are required to assure the movement of particular cargo - buri furniture.

Hearing Counsel initially asserts that FESCO's total charges on all four subject commodities are lower than the total charges assessed by its competitors. However, because four of the seven rates under consideration have not resulted in trade disruption (injury to other carriers from the capture of an unduly large portion of the market), Hearing Counsel finds them justified. Hearing Counsel further contends that the other three rates - "Buri and Rattan Furniture from Cebu" (Local and OCP) and "Beer, mineral water, etc." (Local) - have disrupted the market for their carriage and have not, therefore, been justified. Finally, Hearing Counsel does not agree that FESCO's rates on buri and rattan furniture have been shown to be required to assure the movement of this commodity.

## DISCUSSION

Once a rate is questioned by the Commission under the Ocean Shipping Act of 1978, the burden is on the controlled carrier to demonstrate that the rate is just and reasonable. *See* 46 U.S.C. 817(c)(1). For the purposes of determining whether rates of a controlled carrier are just and reasonable, the Commission is permitted to take into account "appropriate factors," four of which are set forth in section 18(c)(2).[3] In

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[3] Section 18(c)(2) states in part:

. . . the Commission may take into account appropriate factors, including, but not limited to, whether:

(i) the rates . . . which have been filed . . . are below a level which is fully compensatory to the controlled carrier based upon the carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade;

(ii) the rates . . . are the same as or similar to those filed or assessed by other carriers in the same trade;

(iii) the rates . . . are required to assure movement of particular cargo in the trade; or

this particular proceeding, FESCO has addressed only the second and third of these factors. Upon thoroughly reviewing the entire record and the arguments of the parties, the Commission finds that the rates on two of the four commodities at issue are unjust and unreasonable and they will, therefore, be disapproved.[4]

*Footwear (OCP and Local), Beer (Local), and F.A.K. Rates*

FESCO's total charges on all four commodities are lower than those of other carriers in the same trades.[5] *See* Attachments B through E. However, FESCO did not move any beer or footwear under its OCP rates in 1979 (Exhibit 8); nor has it carried any F.A.K. cargo from Houston to Australia (Exhibit 6).[6] Moreover, FESCO's local carriage of rubber sandals — approximately 527 revenue tons in 1979 (Exhibit 6) — represents a minuscule portion of this market. *See* Attachment F. It does not appear, therefore, that any of FESCO's rates for these commodities have disrupted these trades or harmed other carriers. Accordingly, these rates will not be disapproved.

*Buri and Rattan Furniture from Cebu*[7]

FESCO's total charges for buri and rattan furniture are about 17 percent less than PNAC's and range as high as almost 32 percent less than that of Seatrain Pacific Services, S.A., a major independent carrier in the trade. However, FESCO's charges for this commodity are within 4.25 percent of the charges assessed by Evergreen Line for local carriage. *See* Attachment B. This limited similarity between FESCO and

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(iv) the rates . . . are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

[4] In reaching this conclusion, the Commission: (1) considered only rate comparisons which employed rates in effect at the initiation of this proceeding; (2) considered any applicable charges relating to the subject rates which would affect the total transportation charge to a shipper; and (3) gave little weight to comparisons which used rates available only to the military.

[5] FESCO has offered a study which purportedly proves that its slower and less frequent service justifies lower rates. This theory is based upon the assumption that slower service results in increased inventory and insurance costs to shippers. However, the levels of insurance and inventory costs as they pertain to these particular commodities during the time in question have not been established. Moreover, the transit times employed in FESCO's study are subject to dispute. It appears that FESCO offered a more frequent service from Cebu (3 times a month) than alleged in its study (bi-weekly) (Exhibit 9). In any event, even if the differences due to transit time costs are accepted, they do not justify the disparity of rates between FESCO and its competitors.

[6] This F.A.K. rate was FESCO's first such published rate between Houston and Australia. Because it was suspended prior to its effective date, there is no history of carriage under it. Attachment E indicates that Karlander Kangaroo Line is the only other carrier with a like rate, but that Karlander's total charge is significantly higher than FESCO's. The record does not reveal whether Karlander actually carries any cargo pursuant to its rate.

[7] The local and OCP rates for buri and rattan furniture from Cebu are merely two of several rates published by FESCO under the general commodity description of "furniture." Much of the data which has been introduced in this proceeding does not distinguish among these various rates. However, this data remains relevant because: (1) 86 percent of FESCO's carriage from the Philippines originates at Cebu (Exhibit 5, at 6), and (2) the rates on furniture from Cebu obviously contribute substantially to FESCO's overall market penetration for the carriage of furniture.

Evergreen is not controlling, however, because of the differences in their service characteristics. Unlike FESCO, Evergreen does not serve the Philippines by direct service, but rather employs feeder vessels (Exhibit 7, at 6). In any event, it is the effect of FESCO's rates on its market share and the share of the other carriers which is particularly relevant.

Furniture is one of the seven major-moving commodities in the Philippines/United States Pacific Coast trade and comprises 77 percent of PNAC's cargo (Exhibit 7, at 13). Since 1977, PNAC has seen a gradual decline in its carriage of this commodity during a period when furniture exports in general from the Philippines were increasing (Exhibit 10, at 4; Exhibit 14, at 4 and 5, Docket No. 79-104). In 1979 (the only year for which FESCO provided data) FESCO carried 50,847 revenue tons of furniture compared to 64,847 revenue tons for the entire 17 member conference. *See* Attachment F. This amounted to more than 44 percent of the total market for the carriage of furniture (Exhibit 10, at 5). During the last quarter of 1979, FESCO outcarried PNAC (Exhibit 10, at 5). No other independent carrier appears to have carried any appreciable amount of this commodity.[8]

The affidavits offered by FESCO (Exhibits 3 and 4) do not justify FESCO's apparently low rates on furniture as being necessary to assure its movement. Two Philippine shippers generally assert that, because of the nature of the commodities they ship, FESCO's low rates have been an important factor in their businesses. However, these two affiants make no claim to speak for the entire export furniture industry; nor do they unequivocally state that FESCO's particular rates in question are necessary to assure the movement of all such cargo from the Philippines. Even though FESCO has captured a significant portion of the market for the carriage of this commodity, the Conference continues to carry substantial amounts. Accordingly, these rates do not appear to be *necessary* to assure the movement of buri and rattan furniture from Cebu.

*Beer, mineral water, etc.*

Beer is also one of the seven major-moving commodities from the Philippines (Exhibit 7, at 13), and FESCO's total charges for this commodity are at least 18 percent less than the Conference and almost 33 percent less than Seatrain. *See* Attachment C. What data is available indicates that FESCO carried 6,554 revenue tons of beer locally in 1979, while at the same time, the Conference carried only 4,583 revenue tons, both locally and OCP. *See* Attachment F. FESCO thus outcarried the Conference by 43 percent. While there is no data for

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[8] Census data for 1978 indicates that independents other than FESCO carried only 1.54 percent of all the furniture. (Exhibit 7, at 17).

FESCO's carriage of beer other than for 1979, the record does reveal that PNAC's carriage has decreased significantly from 1978 to 1979 - 14,857 revenue tons to 4,583 revenue tons. *See* Attachment F. Again, as with furniture, other independents have not played an important role in the carriage of this commodity, transporting only 2.7 percent of all beer, mineral water, etc. in 1978. (Exhibit 7, at 17).

The Commission finds, therefore, that FESCO has significantly penetrated the market for the carriage of furniture and beer from the Philippines, due in large part to the past and present disparity between FESCO's rates and those of its competitors. The Commission further concludes that the rates under consideration have not been adequately justified by FESCO and, because they are unjust and unreasonable, they will be disapproved.

THEREFORE, IT IS ORDERED, That the rates of Far Eastern Shipping Company for "Buri and Rattan Furniture from Cebu" (Local and OCP) and "Beer, mineral water, etc." (Local), as listed in Attachment A, are hereby disapproved as unjust and unreasonable; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
*Assistant Secretary*

## ATTACHMENT A

*Far Eastern Shipping Company*

A. FROM: Ports in the Philippines
TO: U.S. Pacific ports and Overland Common Points

| DESCRIPTION | TARIFF ITEM | RATE SUSPENDED | EFFECTIVE DATE |
|---|---|---|---|
| Furniture made of . . . | | | |
| From Cebu only | | | |
| Special rate | | | |
| Buri and Rattan Furniture only | 480 | Local 41.00M | 2-3-80 |
| | 480 | OCP 36.25M | 2-3-80 |
| Beer, mineral water, soft drinks, and spirits in cases, cartons or pallets | 100 | Local 41.50M | 2-8-80 |
| | 100 | OCP 38.50M | 2-8-80 |
| Footwear, viz: | | | |
| Rubber Sandals, Flat Soles with thongs | | | |
| | 470 | Local 43.00M | 2-8-80 |
| | 470 | OCP 41.50M | 2-8-80 |

B. FROM: U.S. Atlantic and Gulf
TO: Australia and New Zealand

| DESCRIPTION | TARIFF ITEM | RATE SUSPENDED | EFFECTIVE DATE |
|---|---|---|---|
| Freight, All Kinds, in containers | | | |
| Special Rate from Houston only | 2800 | 2600PT 20 | 2-1-80 |

## ATTACHMENT B

### BURI AND RATTAN FURNITURE

| CARRIER | RATE | CEBU BUNKER SUR-CHARGE | ARBI-TRARY CHARGE | TOTAL CHARGE | PERCENT BY WHICH FESCO'S TOTAL CHARGE IS LOWER THAN COMPETI-TOR'S TOTAL CHARGE |
|---|---|---|---|---|---|
| FESCO | LOC 41.00M | 4.00 | | 45.00 | |
| | OCP 36.25M | 4.00 | | 40.25 | |
| [1]PNAC | BURI | | | | |
| | LOC 45.00M | 9.50 | | 54.50 | 17.43 |
| | OCP 39.00M | 9.50 | | 48.50 | 17.01 |
| | RATTAN | | | | |
| | LOC 51.25M | 9.50 | | 60.75 | 25.92 |
| | OCP 46.75M | 9.50 | | 56.25 | 28.44 |
| [1]SEA-TRAIN | BURI | | | | |
| | LOC 41.00M | 8.00 | 9.50 | 58.50 | 23.07 |
| | OCP 35.00M | 8.00 | 9.50 | 52.50 | 23.33 |
| | RATTAN | | | | |
| | LOC 46.00M | 8.00 | 9.50 | 63.50 | 29.13 |
| | OCP 42.00M | 8.00 | 9.50 | 59.50 | 32.35 |
| [2]EVER-GREEN | LOC 39.00M | 8.00 | | 47.00 | 4.25 |

1 Exhibit 7.
2 Exhibit 2.

# ATTACHMENT C

BEER, MINERAL WATER, ETC.[1]

| CARRIER | RATE | BUNKER SURCHARGE | TOTAL CHARGE | PERCENT BY WHICH FESCO'S TOTAL CHARGE IS LOWER THAN COMPETITOR'S TOTAL CHARGE |
|---|---|---|---|---|
| FESCO | LOC 41.50M | 4.00 | 45.50 | |
| | OCP 38.50M | 4.00 | 42.50 | |
| [1]PNAC | LOC 46.00M | 9.50 | 55.50 | 18.02 |
| | OCP 43.00M | 9.50 | 52.50 | 19.05 |
| [1]SEA-TRAIN | LOC 59.75M | 8.00 | 67.75 | 32.84 |

1 Exhibit 7. FESCO has compared its local measurement rate for beer to Seatrain's local per container rate for beer. Exhibit 2. However, since Seatrain also offers a local measurement rate for this commodity, FESCO's comparison is of considerably less value than a measurement rate to measurement rate comparison.

## ATTACHMENT D

FOOTWEAR, VIZ: RUBBER SANDALS,

FLAT SOLES WITH THONGS

| CARRIER | RATE | BUNKER SURCHARGE | TOTAL CHARGE | PERCENT BY WHICH FESCO'S TOTAL CHARGE IS LOWER THAN COMPETITOR'S TOTAL CHARGE |
|---|---|---|---|---|
| FESCO | LOC 43.00M | 4.00 | 47.00 | |
| | OCP 41.50M | 4.00 | 45.50 | |
| [1]PNAC | LOC 48.00M | 9.50 | 57.50 | 18.26 |
| | OCP 46.00M | 9.50 | 55.50 | 18.02 |
| [1]SEA-TRAIN | LOC 50.00M | 8.00 | 58.00 | 18.96 |
| | OCP 47.00M | 8.00 | 55.00 | 17.27 |
| [2]ZIM | LOC 54.50M | 9.50 | 64.00 | 26.56 |
| | OCP 51.50M | 9.50 | 61.00 | 25.41 |

1 Exhibit 7.
2 Exhibit 2.

# ATTACHMENT E

## FREIGHT, ALL KINDS

| CARRIER | RATE | BUNKER SUR-CHARGE | CURREN-CY ADJUST-MENT FACTOR | TOTAL CHARGE | PERCENT BY WHICH FESCO'S TOTAL CHARGE IS LOWER THAN COMPETI-TOR'S TOTAL CHARGE |
|---|---|---|---|---|---|
| FESCO | 2,600 P/C 20 | | | 2600.00 | |
| [1]KAR-LANDER | 3,150 P/C 20 | 441.00 | 94.50 | 3685.50 | 29.45 |

1 Exhibit 7.

# ATTACHMENT F

## CARGO MOVEMENTS (REVENUE TONS) IN THE

## PHILIPPINES - U.S. PACIFIC COAST TRADE

| | COMMODITY | FESCO[1] | PNAC[2] | SEA-LAND[3] |
|---|---|---|---|---|
| 1979 | Furniture | 50,847 (1994 TEU's x 25.5 cbm stow) | 64,486 | 6,288 |
| | Beer | 6554 (257 TEU's x 25.5 cbm stow) | 4,583 | |
| | Footwear | 1581 (62 TEU's x 25.5 cbm stow) | 24,985 | |
| 1978 | Furniture | | 66,782 | 7,530 |
| | Beer | | 14,857 | |
| | Footwear | | 36,697 | |
| 1977 | Furniture | | 66,939 | 12,183 |
| | Beer | | 12,186 | |
| | Footwear | | 4,762 | |

1 Exhibit 8 provides data in TEU's. Stowage factors are available from Exhibit 2, at 3. Beer and footwear data reflect local movements only because no OCP movements occurred.
2 Exhibit 10, at 4.
3 Exhibit 7, at 16.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-53

U.S. GULF/NORTH EUROPE DISCUSSION

AGREEMENT NO. 10178-1

## DISCONTINUANCE OF PROCEEDING

*October 21, 1980*

Respondents have filed a motion to discontinue proceedings in this matter. The motion demonstrates that proponents no longer wish to pursue the agreement in question. Inasmuch as the proponents have withdrawn the agreement in question and the only issue ordered to be heard was the approvability thereof under section 15, the motion to discontinue should be granted. It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

## FEDERAL MARITIME COMMISSION

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DOCKET NO. 69-57
AGREEMENT NO. T-2336
NEW YORK SHIPPING ASSOCIATION
COOPERATIVE WORKING ARRANGEMENT

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## NOTICE CONCERNING SATISFACTION OF REMAINING VALID CLAIMS AND DISCONTINUANCE OF PROCEEDING

*October 23, 1980*

On September 9, 1980, we issued an order in this proceeding directing New York Shipping Association, Inc. (NYSA) to satisfy, within 30 days of service of such order, the outstanding claim for assessment adjustments of Zim-American Israeli Shipping Co., Inc. (Zim) as well as the other still remaining valid claims, or to show cause why such other claims should not be satisfied.

On October 9, 1980, we received notification from NYSA that the outstanding claims of Zim and the other claimants which we had determined were still owed assessment adjustments had been satisfied in the amounts set forth in our September 9th order by the extension of full credits against assessments for cargoes handled at the Port of New York on or after October 9, 1980, one of the methods of satisfaction which we had prescribed in that order. NYSA asks, accordingly, that we now confirm its complete satisfaction of the claims, release and discharge it from any further liability with respect thereto, and close this proceeding.

We have only one observation to make with respect to the manner in which NYSA has chosen to satisfy the claims. As we have frequently explained, should a successful claimant cease to serve the Port of New York, credits will no longer be a satisfactory means of assessment adjustments, and cash refunds will be required to satisfy the remaining liability. See *Agreement No. T-2336*, 19 F.M.C. 248, 262-265 (1976), *affd. sub nom. New York Shipping Ass'n. v. F.M.C.*, 187 U.S. App. D.C. 282, 292, 571 F.2d 1231, 1241 (1978); Orders of December 27, 1976, pages 5, 9-10, and April 3, 1978, page 21; notice of July 5, 1978, pages 3-4; and order of September 9, 1980, page 6. We are thus unable to hold definitively at the present time that credits will continue to be a proper and sufficient method of satisfying the claims. At the present time, however, we find NYSA in full compliance with our September 9th order directing complete satisfaction of the remaining valid claims. Should the method of satisfaction here recognized as proper at the

present time become improper, because a claimant ceases operations at the Port, NYSA is directed to satisfy the remaining portions of its liability to such claimant by a cash refund.

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

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-82

PIER SERVICES, INC.

*v.*

PORTSIDE REFRIGERATED TERMINALS

ORDER ADOPTING INITIAL DECISION

*October 23, 1980*

This proceeding is before the Commission upon Exceptions filed by Portside Refrigerated Terminals, Inc., to the Initial Decision of Administrative Law Judge Joseph N. Ingolia. Replies to Exceptions have been filed by Pier Services, Inc. and the Commission's Bureau of Hearing Counsel, an intervenor.

The proceeding was initiated as a result of a complaint filed by Pier against Portside (Respondent) alleging that: (1) a $.10 "per carton" inspection charge assessed by Respondent is unlawful under sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C. 815 and 816) and contrary to the tariff filing provisions of the Commission's Rules (General Order 15, 46 C.F.R. Part 533); and (2) a partnership agreement entered into between Respondent and Louis and Vincent D'Annello to form Robideau Portside is in violation of section 15 of the Shipping Act, 1916 (46 U.S.C. 814) because it was not filed with the Commission and is otherwise unjustly discriminatory and unfair.

The Presiding Officer found that Portside was an "other person" within the meaning of section 1 of the Shipping Act and that it had violated sections 16 and 17 as well as the tariff filing provisions of Part 533. He found that Portside violated section 16 by assessing a "per carton" charge against Pier that was not assessed against Pier's competitor and that the assessed charge was an unreasonable practice within the meaning of section 17. The Presiding Officer further found that Portside violated Part 533 and section 17 by failing to file a proper tariff with the Commission and by charging rates other than as specified in its tariff on file with the Commission. Finally, the Presiding Officer determined that there was insufficient record evidence to support a finding that the agreements in issue are subject to section 15 of the Shipping Act. No party took exception to the section 15 aspects of the Initial Decision.

## EXCEPTIONS AND REPLIES

Generally, Portside argues that it is a warehouse and as such is exempt from the Commission's terminal tariff filing requirements. Accordingly, Portside submits that the Presiding Officer erred in finding that it violated section 17 and Part 533 for failing to file a terminal tariff. Moreover, because the services performed for Pier are allegedly incidental to Portside's warehouse activities, Portside argues that the Commission lacks jurisdiction over the rates charged for such incidental services as temporary removal from storage.

Portside further contends that in any event it performed services for Pier for which it should be compensated and that its charge is neither unreasonable nor unduly preferential. Finally, Portside submits that its arrangement with the Robideau/Portside partnership justifies assessing a different type of charge to the partnership than to Pier.

Complainant and Hearing Counsel support the Presiding Officer's Initial Decision. They argue that Portside's warehouse services are included within the scope of sections 1, 16, and 17 of the Act because these services are provided in connection with a common carrier by water. Moreover, these parties submit that the exemption for tariff filings provided in Part 533 does not apply to Portside because there is no evidence in this proceeding that the services in issue are performed for *water carriers* pursuant to *storage agreements* covered by issued warehouse receipts. On the contrary, Hearing Counsel point out that Portside's President has admitted that it does not have any contracts with oceangoing carriers.

Complainant and Hearing Counsel argue that Portside's practice of assessing a $.10 per carton charge is an unreasonable practice within the meaning of section 17 because it is applied to all cartons whether they are actually inspected or skipped; and because the charge is not applied to the Robideau/Portside partnership. Finally, because this charge is not assessed against the Robideau/Portside partnership, Hearing Counsel and Pier submit that the Presiding Officer also properly found a section 16 violation.

## DISCUSSION

Portside's Exceptions and the record in this proceeding present the Commission with no reason for disturbing the findings and conclusions of the Presiding Officer's Initial Decision. Indeed, Portside's Exceptions generally constitute nothing more than a restatement of arguments presented to and properly considered and disposed of by the Presiding Officer. The record presented clearly supports the Presiding Officer's findings that Portside is an "other person" within the meaning of section 1 of the Act and that Portside violated Part 533 and section 17 by failing to file proper tariffs with the Commission and by charging rates in excess of those rates which were currently on file with the

Commission. Moreover, the record supports the Presiding Officer's findings that the charges assessed against Pier were unlawful and that the assessment gave the Robideau/Portside partnership an unreasonable preference and advantage which resulted in an unreasonable prejudice or disadvantage to Pier within the meaning of section 16.

THEREFORE, IT IS ORDERED, That the Exceptions of Portside Refrigerated Terminals, Inc., are denied and the Initial Decision served in this proceeding on June 19, 1980 is adopted as the decision of the Commission and made a part hereof; and

IT IS FURTHER ORDERED, That, in accordance with the provisions of the Commission's General Order 15, 46 C.F.R. 533, Portside Refrigerated Terminals, Inc., file a tariff with this Commission within 30 days of the date of this Order showing its *current* rates, charges, rules, and regulations; and

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

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

NO. 79-82

PIER SERVICES, INC.

*v.*

PORTSIDE REFRIGERATED TERMINALS, INC.

HELD:

(1) Section 22, Shipping Act, 1916. A complaint filed under section 22 does not require a showing of direct or indirect injury or require a claim for reparations as a condition to its filing, and therefore the complainant has standing in this proceeding even though it has not made a claim for reparations.

(2) Sections 1, 16 and 17, Shipping Act, 1916. Where the respondent carries on the business of operating a refrigerated warehouse as well as providing services incident to such business in the Port of Philadelphia, it is an "other person" within the meaning of sections 1, 16 and 17 of the Shipping Act and is subject to the jurisdiction of the Commission.

(3) Section 17, Shipping Act, 1916. Where the respondent undertakes to provide services making imported frozen meat available to the importer or those acting on his behalf, for inspection required by the U. S. Department of Agriculture; and where after the inspection the meat is returned to the respondent's warehouse to be delivered to the inland carrier or consignee so that it may enter the commerce of the United States, the services are related to or connected with the receiving, handling, storing and delivery of property within the meaning of section 17.

(4) Section 17, Shipping Act, 1916 (General Order 15). Where the respondent initially failed to file its rates in a tariff for services performed as a terminal operator; and where it did file rates in a tariff after being requested to do so by the Commission but subsequently failed to file increases in those rates, and finally; where the respondent adopted a "package" rate which it failed to file in a tariff with the Commission, the respondent violated section 17 and General Order 15. The respondent also violated section 17 and General Order 15 by assessing a $.10 per carton charge against the complainant, which charge was not filed in any tariff with the Commission and was an unjust and unreasonable practice related to or connected with the handling, storing and delivering of property.

(5) Section 16, Shipping Act, 1916. Where the respondent assessed a $.10 per carton charge against the complainant; where such charge was uncorrelated to the cost of the services rendered; where the facts of record indicate the charge gave an undue and unreasonable advantage to a partnership favored by the respondent and subjected a competing party to undue and unreasonable prejudice or disadvantage; the $.10 per carton charge violated section 16.

(6) Section 15, Shipping Act, 1916. Where various agreements were entered into by several entities regarding the lease and sub-lease of property in the Port of Philadelphia; where the respondent was sub-lessee of a refrigerated warehouse in the Port; where a partnership agreement was executed regarding the providing of meat inspection service on behalf of importers of frozen meat; and where the facts of record were insufficient to allow a determination as to the nature and effect of each of the agreements, such agreements need not be filed under section 15. However, the record does warrant further investigation and inquiry by the Commission or its staff

to further develop the facts and surrounding circumstances, should the Commission deem such action feasible.

*Theodore W. Flowers, Michael H. Malin,* and *Ronald J. Restrepo* for complainant, Pier Services, Inc.

*Israel Packel* for respondent, Portside Refrigerated Terminals, Inc.

*John Robert Ewers, Aaron W. Reese,* and *Deana E. Rose* for intervenor Hearing Counsel.

## INITIAL DECISION OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE[1]

*Adopted October 23, 1980*

### PRELIMINARY MATTERS

On August 6, 1979, the complainant, Pier Services, Inc. (Pier), filed a complaint against respondent, Portside Refrigerated Terminals, Inc. (Portside), under section 22 of the Shipping Act, 1916, as amended, and in accordance with the Rules of Practice and Procedure of the Federal Maritime Commission (Commission).[2] In its complaint Pier alleges that:

IV.

A. That by reason of the facts stated in the foregoing paragraphs, Complainant has been subjected to liability to Respondent for charges for alleged services at the rate of $.10 per carton which charges were when exacted and still are:

(1) unjust and unreasonable in violation of 46 U.S.C. §816;[3]

(2) illegal and improper under 46 U.S.C. §816 because of Portside's failure to file with the FMC such modification to its tariff as required by 46 C.F.R. §§533.3, 533.4, 533.6(b) and (d), (6); and

(3) unjustly discriminatory against Complainant in violation of 46 U.S.C. §815. [4]

B. By reason of the facts stated in Paragraph K above, the lower rehandling charge given by Respondent to importers who use the services of Robideau-Portside Services is unjustly prejudicial and discriminatory in violation of 46 U.S.C. §816.

C. Portside has contravened 46 U.S.C. §816 and the regulations promulgated pursuant thereto, 46 C.F.R. §533.1 *et seq.*, by assessing charges greater than those set forth in its most recent tariff, FMC Tariff No. 2.

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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] Rule 62, Rules of Practice and Procedure; 46 C.F.R. 502.62.

[3] Section 17, Shipping Act, 1916.

[4] Section 16, Shipping Act, 1916.

D. The partnership agreement between Respondent and Louis and Vincent D'Annello (Robideau Portside Services) is unjustly discriminatory and unfair as between competing meat inspection services and is in violation of 46 U.S.C. §814[5] because it was not filed with the FMC. (Footnotes supplied.)

The complainant asks that the Commission order the respondent to cease and desist from violations of the Shipping Act, that it apply in the future only such charges as the Commission determines are lawful and that the respondent be required to submit to the Commission all "agreements or understandings for the exclusive use or rental of Portside's facility at the Packer Avenue Marine Terminal."

On August 16, 1979, the respondent filed a Motion to Dismiss alleging, in essence, that the Commission lacks jurisdiction and that the complaint fails to set forth a cause of action. The motion was denied by Order dated September 24, 1979. Also, Hearing Counsel filed a Motion to Intervene on September 7, 1979, which motion was later granted.

In its reply of October 11, 1979, the respondent asks that the proceeding be dismissed and denies any violation of the Shipping Act on its part. It specifically denies that (1) its activities with respect to Pier are subject to the Shipping Act, (2) it is required to file any agreement it has entered into with others under section 15 of the Shipping Act, (3) it is required to file tariffs relating to meat inspection services, although it admits that Portside is an "other person" within the meaning of section 1 of the Shipping Act, 1916, (4) its $.10 per carton charge is illegal or predatory or contravenes its tariff.

Concurrent with this proceeding the complainant filed a complaint against the respondent in the United States District Court for the Eastern District of Pennsylvania,[6] seeking an injunction against the collection of the $.10 per carton charge, pending the outcome of this proceeding. On agreement of both parties the District Court enjoined the collection of the $.10 per carton charge subject to the posting of a bond by the complainant during the period the injunction is extant.

On November 16, 1979, the parties filed a stipulation of facts (SF), together with various exhibits, some of which have been included in the Findings of Fact section of this decision. Subsequently, hearing was held in Philadelphia, Pennsylvania, and original and reply briefs were submitted. At the hearing the parties submitted certain stipulated documents[7] which have also been incorporated into the Findings of Fact section of this decision, where necessary.

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[5] Section 15, Shipping Act, 1916.

[6] *Pier Services, Inc. v. Portside Refrigerated Terminals, Inc.*, C.A. 79-2394.

[7] Exhibit, C-10.

FINDINGS OF FACT

1. Pier Services, Inc. (Pier), is a Pennsylvania corporation, with its principal place of business at 126 Federal Street, Philadelphia, Pa. 19147. Pier provides meat inspection services in the ports of Philadelphia, New York and San Francisco, on behalf of importers of containerized frozen meat products in order for those importers to comply with the federal inspection requirements of 21 U.S.C. 620. Regulations of the United States Department of Agriculture (USDA), require the importer to provide facilities and labor to assist the Meat Inspection Division (MID) of the USDA in its inspection of imported frozen meat products. Importers do not usually have such facilities and normally have a company such as Pier provide them as well as the necessary labor, or a company associated with a warehouse or a warehouse itself. (SF. 1; Tr. 27)

2. Portside Refrigerated Terminals, Inc. (Portside), is a Pennsylvania corporation with its principal place of business at Delaware and Packer Avenues, Philadelphia, Pa. 19148. It carries on the business of operating a refrigerated warehouse as well as providing services incident to that business. (SF. 2; Tr. 126, 127)

3. Portside operates the terminal refrigerated warehouse facility at the Packer Avenue Marine Terminal under an arrangement with Pennsylvania Refrigerated Terminals, Inc. (PRT), a Pennsylvania corporation, whose officers, directors and shareholder ownership is identical to that of Portside. No memorandum of the arrangement has ever been filed with the Commission. PRT is the sublessee of the refrigerated warehouse facility under a sublease agreement with Lavino, which in turn is the lessee under a lease agreement with the City of Philadelphia. Neither the lease agreement nor the sublease agreement has ever been filed with the Commission. (SF. 6)

4. The sublease between Lavino and PRT was executed on July 29, 1965. In pertinent part it provides:

> 1. From and after the commencement of the term hereof, Sublessor hereby leases to Sublessee, and Sublessee hereby leases from Sublessor, the exclusive use of all that certain space marked in red on the site plan marked Exhibit "A" attached hereto and made part hereof; together with the refrigerated warehouse building and appurtenant improvements to be constructed in such space in accordance with subparagraph 3(a) and 3(b) of the Lease (hereinafter referred to as "premises" or "demised premises"), to be used for the storing and warehousing of goods, wares and merchandise requiring refrigeration, primarily incoming and outgoing; together with the use in common with Sublessor, its employees, agents, customers, guests and invitees of the roadways and railway sidings indicated as "common use facilities" as shown on Exhibit "A", by Sublessee, its employees, agents, customers, guests

and invitees, provided that such use in common shall in no way obligate Sublessee to repair and maintain such roadways and railroad sidings, or to contribute to the cost of any such repair or maintenance.

The demised premises shall be a part of the Packer Avenue Marine Terminal to be erected concurrently herewith by Landlord and/or the General State Authority of the Commonwealth of Pennsylvania (hereinafter referred to as "Marine Terminal"), which Marine Terminal shall be laid out and comprise the area designated therefor in Exhibit "A", and shall include, but is not limited to, the buildings and other structures, parking areas, sidewalks, roadways, railroad sidings, tracks, lighting and sanitary deposit systems indicated therefor in Exhibit "A".

* * *

11. Sublessee shall observe and comply with any and all requirements of the constituted public authorities and with all Federal, State or local statutes, ordinances, regulations and standards applicable to Sublessee or its use of the demised premises including, but not limited to, rules and regulations promulgated from time to time by Landlord's Port Division and other authorities having jurisdiction over any phase of operation in and about the terminal; *provided, however,* that Landlord shall be obligated to comply with such requirements where they relate to matters involving structural integrity in the building in the demised premises, as required by the LEASE.

12. Neither Sublessor nor Sublessee (except as to its obligations to pay rent or maintain insurance under all the provisions of this Sublease) shall be deemed to be in violation of this Sublease if it is prevented from performing any of its obligations hereunder for any reason beyond its control, including without limiting the generality thereof, acts of God or the public enemy, the elements, flood, fire, explosion, any law, order or regulation of the Federal or State Government or any agency thereof, strikes, lockouts or other work stoppages or failure or delay of performance by suppliers or contractors.

* * *

14. Sublessee agrees to permit any railroad tracks upon the demised premises to be operated on the Belt Line principle, i.e., all railroads shall have the privilege to deliver and receive cars to and from the premises.

15. Sublessee agrees to be bound by all of the obligations and conditions imposed upon Landlord by the terms of the Lease between Landlord and the Department of Property and Supplies of the Commonwealth of Pennsylvania relating to their joint participation in the Marine Terminal to the extent

such obligations and conditions affect Sublessee and pertain to the premises demised hereunder, except for such obligations or conditions which concern or affect the rent payable hereunder or provisions with regard to maintenance.

* * *

35. This agreement is conditioned upon the passage of an authorizing ordinance to be enacted by the Council of the City of Philadelphia and approved by the Mayor within three (3) months of the date of the LEASE.

(Exhibit C-10, page 1)[8]

5. Imported frozen meat cannot enter the free flow of United States commerce until it receives United States' government approval. (21 U.S.C. §620; SF. 1, Tr. 71, 124-126)

6. Pier has been in the business of providing meat inspection services since 1971. In October of 1975 Pier entered into a partnership agreement with Portside Services, Inc. (PSI), a corporation whose ownership is essentially the same as that of Portside, wherein each retained a 50 percent ownership. In pertinent part the agreement is as follows:

2. The purpose of Pier Services will be to engage in the inspection services of perishable foodstuffs or other perishables that may be required by the U.S. Government or any agency thereof, prior to their entry into the commerce of the United States through the ports of Philadelphia, Pennsylvania or Camden, New Jersey. Such items shall include but shall not be limited to, fresh frozen meats, frozen cooked meats and canned meats. All such services which might be performed by either of the parties hereto in the Philadelphia or Camden area shall be performed by Pier Services and not by them individually or in conjunction with others.

* * *

4. The principal operations of Pier Services will be located in the U.S. Department of Agriculture Inspection Room located in the facilities of Portside, Packer Avenue, Philadelphia, Pennsylvania. As may be needed by the partnership, the similar type of facility owned by Pier, located at 126 Federal Street, Philadelphia, Pennsylvania, will be available to Pier Services. No rent as such will be charged Pier Services for the use of such facilities.

5. The day to day operations of Pier Services will be under the supervision of Ray Tippett ("Tippett"). He shall be paid a salary by Pier Services of approximately $420.00 per week, in addition to fringe benefits consisting of Blue Cross and Blue Shield medical insurance. Pier Services will also employ a

[8] In using page numbers to Ex. C-10, disregard the first 3 pages of the exhibit.

> secretary, who will be paid approximately $150.00 per week, in addition to applicable fringe benefits. Pier Services, Inc. will pay Tippett and the secretary weekly and the partnership will reimburse Pier Services, Inc. the gross amount of such payroll including the employer's share of payroll taxes. In addition to those expenses, Pier Services will be responsible for and will pay the direct expenses incurred in its operations, including without limitation, salary of a foreman, other direct labor, all applicable fringe benefits and payroll taxes, motor vehicle rentals, insurance, light, heat and power, supplies, linens and daily maintenance of facilities.
>
> * * *
>
> 7. In the event of a termination of this partnership, all liabilities of the partnership shall be paid and the remaining assets shall be distributed to the partners equally after adjusting the capital accounts so that each partner's capital account will be equal. At the time of such termination, the use of the name "Pier Services" will revert to Pier, and the facilities and equipment located in the premises of Portside at Packer Avenue shall no longer be available for use by Pier or any of its related operations. Such facilities and related equipment shall at that time be returned to Portside in the same condition as when their use began by Pier Services, normal wear and tear excepted. At that time, the facilities of Pier at 124 Federal Street shall no longer be available to Portside.
>
> (SF., Appendix)

7. On April 17, 1979, PSI entered into a partnership agreement with Louis and Vincent D'Annello to form Robideau Portside Services of Philadelphia (Robideau-Portside). The term of the agreement is four years and the agreement is presently operative. In essence, the agreement is the same as the earlier agreement PSI had with Pier, and on its execution Robideau-Portside became a competitor of Pier. (SF. 12; Ex. C-10, pages 35-39)

8. Portside is the only refrigerated warehouse facility within the Packer Avenue Marine Terminal area in the Port of Philadelphia and is located 275 feet from the dock. Its facility is the nearest refrigerated warehouse facility to a dock in the Port of Philadelphia. (SF. 3, 4; Ex. C-9)

9. Ships carrying containerized frozen meat products into the Port of Philadelphia dock at the Packer Avenue Marine Terminal because, among other reasons, containers can be unloaded into Portside's facility at less expense, by means of forklift trucks. Other refrigerated warehouses or other distribution points are at such distance as to require ordinary trucking. (SF. 5)

10. Containerized frozen meat unloaded at the Packer Avenue Marine Terminal originates from Australia and New Zealand. (SF. 18; Tr. 48, 72, 91)

11. At least 85 percent of the frozen meat unloaded at the Port of Philadelphia is discharged at the Packer Avenue Marine Terminal. (Tr. 33-34, 314)

12. Portside assumes custody of the frozen meat as a warehouseman in the name of the owner of the cargo or whoever is storing it and retains custody until the frozen meat is released to the consignee or inland carrier. The meats are conveyed to Philadelphia by common carrier by water. (Tr. 48, 49, 72, 337-339)

13. When an importer selects Pier to provide the necessary inspection services for meats at Portside's warehouse, Portside, after due notice makes arrangements and does the work necessary to move the meat out of its regular storage and to move selected cartons to trucks in front of its premises. Pier then picks them up and transports them to 126 Federal Street for inspection by the MID inspector. The MID inspector selects approximately 15 to 18 cartons per container; each container holds 600 cartons. The cartons selected for inspection are then defrosted and inspected at Pier's establishment. Thereafter, Pier transports them back to the front of Portside's premises and Portside moves them back into storage. Before the inspection process is completed, the cartons not selected for inspection are stamped by Pier at Portside's facility on the assumption that the samples will pass inspection. The stamps are removed if the samples are rejected. (SF. 9; Tr. 69-71, 227-229)

14. Whether Pier or Robideau-Portside is used in the meat inspection process by the importer, Portside removes the cartons selected as samples from storage and places them on a different pallet by forklift. (SF. 10, Tr. 69-71, 228)

15. Portside's removal of the samples to the loading dock for inspection and their return to the warehouse is included in the "MID Sample Selection," charge described as "(a)ssessment by Terminal Operator for cost of ILA Labor involved in assisting in selection of frozen meat samples by the Meat Inspection division of the United States Department of Agriculture, covering containerized product only * * *." The charge appears in Portside Tariff No. 1, at $.11 per carton, in Tariff No. 2, at $.12 per carton and in Portside's October 1, 1978, "Explanation of Charges" at $.13 per carton. (Ex. C-10, pages 47, 59 and 63; FF 20, 23, 24; Tr. 196, 197)

16. In 1979 the USDA instituted the "skip system," whereby the MID inspector does not inspect any cartons of frozen meat coming from a packing house with an historically low rejection rate. "Skipped cartons" are not taken to a meat inspection facility, but are stamped with an identifying number. The "skip system" is employed for ap-

proximately two-thirds of all cartons of frozen meat entering the Port of Philadelphia. By letter dated February 27, 1979, Portside notified its customers that cartons which were "skip" inspected would be subject to a $.07 per carton charge rather than the $.13 per carton charge applicable to "random sampling" inspections. (SF. 11; Ex. C-10, page 46)

17. On May 17, 1973, the Commission sent a letter to Portside stating:

> Dear Mr. Skelly:
>
> We have received inquiries concerning the scope of Portside Refrigerated Terminals' operations at Philadelphia and specifically, the handling of frozen meats discharged from water carriers and placed in Portside's facility for storage.
>
> It is our understanding that Portside assesses a charge to the importer for the movement of frozen meat from dockside to Portside's adjacent facility; that 72 hours free time is allowed on meat; that after expiration of free time storage charges are assessed; and that a charge is assessed against the importer for the pulling of samples for inspection by U.S.D.A. inspectors. In view of these services, there is some question as to whether Portside is performing marine warehousing services subject to the jurisdiction of the Federal Maritime Commission.
>
> For your information we are enclosing a copy of the Commission's General Order 15, which pertains to the filing of tariffs by terminal operators. We suggest that you review the information in General Order 15 to determine whether a tariff should be filed with the Commission setting forth the rates, rules and regulations pertaining to the handling of frozen meat by Portside.
>
> We would appreciate your comments regarding Portside's operations including your views regarding the filing of a terminal tariff.
>
> (Ex. C-13)

18. On June 5, 1973, Portside sent a letter to the Commission stating in pertinent part:

> In answer to your letter of May 17, 1973, the rate information requested by Pier Services has been supplied to them. We would also like to point out that Portside Refrigerated Terminals operates as a warehouse issuing warehouse receipts. Therefore, Chapter IV Federal Maritime Commission, Part 533 does not apply to our operation.
>
> Your attention to this matter is greatly appreciated.
>
> VERY TRULY YOURS,
> PORTSIDE REFRIGERATED TERMINALS, INC.
> GERALD T. SKELLY
> *Vice President*

(Ex. C-10, page 75)

19. On August 9, 1973, the Commission transmitted a letter to Portside stating in pertinent part:

> Dear Mr. Skelly:
>
> This refers to your letter of June 5, 1973, regarding Portside Refrigerated Terminals operations at Philadelphia.
>
> It is our informal opinion that Portside Refrigerated Terminals, Inc. is an "other person" subject to the Shipping Act, 1916, inasmuch as it is carrying on the business of "forwarding or furnishing wharfage, dock, *warehouse*, or *other terminal facilities* in connection with a common carrier by water" and therefore subject to the jurisdiction and regulation of the Federal Maritime Commission. (Emphasis added.) In view of the foregoing, it is requested that you furnish the information previously requested in our letter of May 17, 1973, regarding Portside's operations as they relate to the receiving or delivering of cargoes moving by water carrier in the foreign commerce of the United States. We are particularly concerned with your operations as they relate to services performed for, or in conjunction with, Pier Services, Inc.
>
> With respect to the tariff filing requirements of this Commission, and the exemptions contained in General Order 15 for warehouses issuing warehouse receipts, we would appreciate more detail regarding the issuance of such receipts. For example, to what extent are you regulated at the present time? Please also furnish a sample copy of the receipts issued.
>
> Upon receipt of this information we will advise you further as to the need to file a terminal tariff.

(Ex. C-10, page 74)

20. On September 25, 1973, the Commission again contacted Portside as follows:

> Dear Mr. Skelly:
>
> This refers to our correspondence of August 9, 1973 (copy enclosed) advising you of our informal opinion with respect to Portside Refrigerated Terminals' subjectivity to the jurisdiction of this Commission. We also requested additional information to determine whether a tariff should be filed.
>
> As of this date, we have received no response to our letter and we would appreciate your attention to this matter.

(Ex. C-10, page 73)

21. On July 3, 1974, the Commission advised Portside in pertinent part:

> Dear Mr. Skelly:
>
> Since your letter of December 3, 1973, we have reviewed the information which you sent us, as well as additional informa-

tion received from Lavino Shipping Company concerning the operations conducted by Portside.

After reviewing this information, it is our informal position, as previously stated in our letter of August 9, 1973, that Portside Refrigerated Terminals, Inc. is an "other person" subject to the Shipping Act, 1916. As we have already pointed out, section 1 of the Act defines an "other person" as "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, *warehouse,* or *other terminal facilities* in connection with a common carrier by water." (Emphasis added).

The above conclusion concerning Portside was reached for the following reasons:

1. Portside services cargo transported by common carriers by water,
2. Portside's facility is physically adjacent to a marine terminal area, and
3. Portside performs storage, warehousing and related services.

In addition, Lavino Shipping Company, upon our request, provided us with information which indicates that:

1. The number of comparable freezer facilities in the area is limited, thus the number of alternatives open to the shipper is correspondingly limited,
2. Lavino prefers to move all frozen meat through Portside and as such it operates under the premise that shippers prefer this treatment, and
3. If the cargo were delivered ex-dock, Lavino itself would pick the samples for the M.I.D. Inspection and effect delivery to the trucker for the ultimate receiver.

A copy of Lavino's letter dated March 18, 1974, is enclosed. It appears that while Portside is performing services for the importer, such services are not always performed at the direction of the importer. In other words, Portside provides certain services, *including warehousing,* on cargoes moving through the Port without direct authorization by the consignee. This is the type of service generally provided by a marine terminal operator. Under such circumstances, the ability of the individual shipper to dictate the manner in which this frozen meat is handled through the Packer Avenue facility appears limited.

For your information, we are enclosing a copy of General Order 15 which requires the filing of tariffs by terminal operators. Your particular attention is directed to 533.6(b) which includes a cold storage plant in the definition of a "port terminal facility."

In view of the foregoing, it is requested that you send us a copy of the rates which you assess for your services, as well

as any comments you may have with regard to our conclusions.

(Ex. C-10, page 69)

22. Effective October 1, 1974, Portside filed its Tariff No. 1 (F.M.C. No. 1) as follows:

PORTSIDE REFRIGERATED TERMINALS, INC.

EXPLANATION OF CHARGES, EFFECTIVE OCTOBER 1, 1974

*ITEM #1-EXPEDITING $13.25 PER SHIPMENT* An expediting charge shall be assessed to the consignor for each shipment delivered or released from his account. The charge shall include the preparation of an inland bill of lading, scheduling of carriers for straight time appointment pick-up and returning of the signed inland bill of lading to the consignor. The charge will be applicable whether the consignor should supply an inland bill of lading, or not, whether the product is released to a carrier under a prepaid, freight collect basis or to an ex-dock customer. A charge of $10.00 per shipment shall apply on any distribution change which requires reprocessing of delivery ticket/inland bill of lading in addition to initial expediting charge.

*ITEM #2-PARTIAL OR TAILGATE LOADING* Partial or Tailgate Loading is the service of transporting cargo from the freezer facilities to a truck tailgate. In this instance, the actual truck loading is performed by the carrier's agent. A charge of $.25 CWT will be assessed the shipper for this service.

*ITEM #3-FULL TRUCK LOADING* Full Loading is the service of transporting cargo from the freezer facilities into a truck. In this instance, the actual truck loading is performed by labor supplied by the terminal facility. A charge of $.56 cwt will be assessed the shipper for this service.

*ITEM #4-RAILCAR LOADING* Railcar Loading is the service of transporting cargo from the freezer facilities into a railcar. The railcar loading is performed by the terminal acting as agent for the rail carrier. A charge of $11.11 PER TON shall be billed directly to the railroad carrier for this service.

*ITEM #5-MID SAMPLE $.11 PER CARTON* Assessment for cost of labor involved in assisting in the selection of frozen meat samples by the Meat Inspection Division of the United States Department of Agriculture.

*ITEM #6-HANDLING** Handling is the service of physically moving cargo into public warehouse facilities. Rates for this service will be made available upon request.

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*These items are not subject to the filing requirements of General Order No. 15. This exemption is granted by virtue of the fact that these types of services are performed in conjunction with a bona fide public warehouse operation and pursuant to storage agreements covered by issued warehouse receipts.

*ITEM #7-STORAGE** Storage is the service of providing public warehouse facilities for the storing of cargo after the expiration of free time. Rates for this service will be made available upon request.

*ITEM #8-WEIGHING* The service of recording cargo weights will be performed at a rate of $.08 PER CARTON.

*ITEM #9-BILL OF LADING* The service of processing a BILL OF LADING so that cargo may be released OUT OF STORAGE will be performed at a rate of $6.25.

*ITEM #10-DELIVERY CHARGE* The service of retrieving cargo OUT OF STORAGE will be performed at a rate of $1.25.

*ITEM #11-FREE TIME* Free Time is the specified period during which perishable cargo may occupy space assigned to it on the terminal facilities free of terminal storage charges subsequent to the discharge of such cargo off the vessel.

A Free Time period of 72 hours shall be allowed on all frozen cargo moving across the terminal facilities.

(Ex. C-10, pages, 58-61)

23. On November 28, 1975, the Commission again contacted Portside by letter. It states:

Dear Mr. Skelly:

Enclosed is a copy of a self-explanatory letter received from the Delaware River Port Authority. The staff has not received changes to Portside's Tariff No. 1 currently on file except for Supplement 1A. Supplement 1A as you know, states that: "All charges are based on straight time labor rates. When such services are required during overtime periods and on Saturdays, Sundays, and holidays contained in ILA labor agreements for Port of Philadelphia, prior arrangements must be made and the difference in labor costs between straight time and overtime will be charged to those responsible for authorizing such overtime." For your information, we received Supplement 1A on April 14, 1975.

You are reminded that if the rates, rules or regulations in Portside's tariff have or are currently undergoing further changes, such revisions should be promptly submitted in accordance with General Order 15.

It is requested that you review Portside's tariff and if necessary, take immediate steps to see that any further adjustments in the originally submitted tariff are reflected by appropriate filings to this Office.

(Ex. C-10, pages 65-66)

24. Portside replied on December 5, 1975, as follows:

In reference to your letter of November 28, 1975, I should like to apologize for your not receiving your copy of our FMC Tariff #2.

I have contacted my personnel and we are under the opinion that we had mailed one to you.

Enclosed please find a new copy of Tariff #2 and please forgive the delay.

I have also, at this time, contacted people at the Port Authority and have brought them up to date.

VERY TRULY YOURS,
PORTSIDE REFRIGERATED TERMINALS, INC.

GERALD T. SKELLY
*Vice President and General Manager*

(Ex. C-10, page 67)

25. Effective October 1, 1975, Portside filed its Tariff No. 2 (F.M.C. No. 2), as follows:

PORTSIDE REFRIGERATED TERMINALS, INC.

EXPLANATION OF CHARGES, EFFECTIVE OCTOBER 1, 1975

*ITEM #1-EXPEDITING $14.00 PER SHIPMENT* An expediting charge shall be assessed to the consignor for each shipment delivered or released from his account. The charge shall include the preparation of an inland bill of lading, scheduling of carriers for straight time appointment pick-up and returning of the signed inland bill of lading to the consignor. The charge will be applicable whether the consignor should supply an inland bill of lading, or not, whether the product is released to a carrier under a prepaid, freight collect basis or to an ex-dock customer. A charge of $10.00 per shipment shall apply on any distribution change which requires reprocessing of delivery ticket/inland bill of lading in addition to initial expediting charge.

*ITEM #2-PARTIAL OR TAILGATE LOADING* Partial or Tailgate Loading is the service of transporting cargo from the freezer facilities to a truck tailgate. In this instance, the actual truck loading is performed by the carrier's agent. A charge of $.28 cwt will be assessed the shipper for this service.

*ITEM #3-FULL TRUCK LOADING* Full loading is the service of transporting cargo from the freezer facilities into a truck. In this instance, the actual truck loading is performed by labor supplied by the terminal facility. A charge of $.63 cwt will be assessed the shipper for this service.

*ITEM #4-RAILCAR LOADING* Railcar Loading is the service of transporting cargo from the freezer facilities into a railcar. The railcar loading is performed by the terminal acting as agent for the rail carrier. A charge of $12.23 PER TON shall be billed directly to the railroad carrier for this service.

*ITEM #5-MID SAMPLE $.12 PER CARTON* Assessment for cost of labor involved in assisting in the selection of frozen meat samples by the Meat Inspection Division of the United States Department of Agriculture.

*ITEM #6*-HANDLING* Handling is the service of physically moving cargo into public warehouse facilities. Rates for this service will be made available upon request.

*ITEM #7*-STORAGE* Storage is the service of providing public warehouse facilities for the storing of cargo after the expiration of free time. Rates for this service will be made available upon request.

*ITEM #8-WEIGHING* The service of recording cargo weights will be performed at a rate of $.09 PER CARTON.

*ITEM #9-BILL OF LADING* The service of processing a BILL OF LADING so that cargo may be released OUT OF STORAGE will be performed at a rate of $6.25.

*ITEM #10-DELIVERY CHARGE* The service of retrieving cargo OUT OF STORAGE will be performed at the rate of $1.25.

*ITEM #11-FREE TIME* Free Time is the specified period during which perishable cargo may occupy space assigned to it on the terminal facilities free of terminal storage charges subsequent to the discharge of such cargo off the vessel.

A Free Time period of 72 hours shall be allowed on all frozen cargo moving across the terminal facilities.

(Ex. C-10, pages 62-64)

26. Effective October 1, 1978, Portside issued an "Explanation of Charges Effective October 1, 1978," as follows:

*HANDLING $.24 CWT* Handling covers transportation of all frozen meat moving through our facility, from our delivery platform to freezer protection with seventy-two hours free time beginning the following day after completion of the vessel discharge on break-bulk vessels. Free time begins the following day after stripping on container vessels. The charge will be billed directly and only to the Importer of Record and will not be rebilled or handled in any other manner.

*EXPEDITING $16.00 PER SHIPMENT* An expediting charge shall be assessed to the consignor for each shipment/container delivered or released from his account. The charge shall include the preparation of an inland bill of lading, scheduling carriers for straight time appointment pick-up and returning of the signed inland bill of lading to the consignor. The charge will be applicable whether the product is released

*These items are not subject to the filing requirements of General Order No. 15. This exemption is granted by virtue of the fact that these types of services are performed in conjunction with a bona fide public warehouse operation and pursuant to storage agreements covered by issued warehouse receipts.

to a carrier under a prepaid, freight collect basis, or to an ex-dock customer. A charge of $10.00 per shipment shall apply on any distribution change which requires reprocessing of delivery ticket/inland bill of lading in addition to initial expediting charge.

*LOADING (PARTIAL WORK ORDER) $.43 CWT* Partial Work Order consists of transporting product from our freezer to the truck tailgate with loading by carrier's agent. Charges to be assessed to consignor or carrier as requested.

*LOADING (FULL WORK ORDER) $.84 CWT* Full Work Order consists of transporting product from our freezer into truck with loading by labor supplied by our facility. Charges to be assessed to consignor or carrier as requested.

*M.I.D. SAMPLE SELECTION $.13 PER CARTON* Assessment by Terminal Operator for cost of I.L.A. Labor involved in assisting in the selection of frozen meat samples by the Meat Inspection Division of the United States Department of Agriculture, covering containerized product only. Charge will be billed directly and only to the Importer of Record and will not be rebilled or handled in any other manner.

*REHANDLING $.84 CWT* To be assessed if "documents" are not available upon discharge of the vessel/container, as any product placed under freezer protection without necessary M.I.D. documents will require, upon receipt of such documents, rehandling from freezer to platform in order Meat Inspection Division may select samples for "Random Sampling/Defrost Inspection." Rehandling also to be assessed for any requested operation which necessitates actual rehandling of product. The charge for rehandling product due to unavailable documents will be billed directly to the Importer of Record and will not be billed, rebilled or handled in any other manner.

*OVERTIME LOADING $76.00 PER HOUR* Will apply in addition to normal partial or full work order rates per cwt assessed to the consignor at his request only. The charge will not be billed, rebilled or handled in any other manner.

| 30 DAYS | 15,000# & OVER | 5/14,999# | UNDER 5,000# |
|---|---|---|---|
| Handling: | $.84 cwt | $.89 cwt | $1.00 cwt |
| Storage: | *$.53 cwt | *$.68 cwt | *$ .71 cwt |
| 10 DAYS | | | |
| Handling: | $.17 cwt | $.22 cwt | $ .33 cwt |
| Storage: | *$.27 cwt[a] | *$.34 cwt | *$ .36 cwt |
| Handling: | $.60 cwt | $.65 cwt | $ .76 cwt |
| Storage: | *$.27 cwt[b] | $.34 cwt | *$ .36 cwt |
| Handling: | $.84 cwt | $.89 cwt | $1.00 cwt |
| Storage: | *$.27 cwt[c] | *$.34 cwt | *$ .36 cwt |

*PLUS 12% POWER SURCHARGE ON STORAGE.

[a]Less Vessel Handling & Loading.
[b]Less Vessel Handling and Includes Loading.
[c]Includes Vessel Handling & Loading.

*IN-BOND STORAGE* An additional 10% charge on handling and storage will apply to cover cost for documentation and United States Custom Inspector per hour "entry" and "withdrawal" charges.

*NOTE*: In the event product remains in warehouse after initial "10 DAY" storage period, an additional "30 DAY" storage period will automatically accrue.

| | | | |
|---|---|---|---|
| MINIMUM CHARGE: | $15.00 | DELIVERY CHARGE: | $1.25 EA. |
| TAKING WEIGHTS: | $ .13 PER CARTON | BILL OF LADING: | $6.50 EA. |

*TRANSFER: $.18 CWT* Transfer covers transportation of all frozen meat moving through our facility, from the vessel's berth at dock side to our delivery platform. The charge will be billed directly and only to the Importer of Record and will not be rebilled or handled in any other manner. This charge will apply to Break-Bulk vessels only.

## HOLIDAY CLOSINGS

New Year's Day
Martin Luther King, Jr. Birthday
Washington's Birthday
Good Friday
Memorial Day
Flag Day
Lincoln's Birthday
Richard Askew's Birthday
Independence Day
Columbus Day
Labor Day
November Election Day
Veteran's Day
Thanksgiving Day
Christmas Eve Day
Christmas Day

*Note*: Please check with "order department" for actual closing dates.

Neither the above "Explanation" nor the increased charges set forth in it has been filed with the Commission although Portside has charged the rates set forth. (Ex. C-10, pages 47, 48)

27. By letter dated April 19, 1979, two days after PSI entered into a partnership agreement with Robideau, Portside notified Pier that Portside would assess Pier a $.10 per carton charge, covering the total number of cartons contained within each container, for the purpose of making meat products available to Pier for "stamping and for delivering, loading checking, and unloading samples," plus, if necessary, overtime labor expenses. The $.10 charge would cover every container in the importer's shipment and not merely the ones designated for defrost-

ing and inspection. This charge has not been listed in any tariff filed with the Federal Maritime Commission. (SF. 7; Ex. C-10, page 40)

28. By letter dated May 9, 1979, Portside informed Pier that the $.10 per carton charge was based upon Portside's maintaining available space on a year round basis and paying for a definite leased area, insurance, taxes, sewer, water maintenance, Wells Fargo Alarm System, all International Longshoremen Association personnel, consisting of at least one carloader and a fork truck. (SF. 14; Ex. C-10, page 41)

29. By letter dated May 25, 1979, Robideau Distribution Center (RDC) gave notice of a $.10 per carton charge to Pier in connection with meat inspection services to Pier at RDC's refrigerated warehouses. (SF. 19; Ex. C-10, page 43)

30. In 1971, when Pier began trucking frozen meat samples from Portside to its meat inspection facility at 126 Federal Street, and through 1974 Portside did not assess any charge against Pier for the labor supplied by Portside in making samples available to Pier. (Tr. 142)

31. From some time in 1950 to 1975, Erb Strapping (Strapping) offered meat inspection services in the Port of Philadelphia. During that period, Strapping rented the inspection room located on Portside's premises and paid Portside for labor hired for his use. (Tr. 127, 128, 231, 327)

32. In 1975, immediately before PSI entered into a partnership agreement with Pier, Portside began assessing a $.045 charge per container to Strapping to pay Portside for removing meat products from their freezer and loading onto and loading off of Strapping's trucks. Subsequently, Strapping went out of business, still owing money to Portside. (Tr. 187, 232, 234).

33. At the present time, Pier and Robideau-Portside are the only two meat inspection companies in the Philadelphia area offering their facilities and services to importers of frozen meat. (Tr. 124-125)

34. Between 1977 and 1979, Portside lowered its rates to become more competitive with the Port of New York, and to help cover expenses, Portside assessed the partnership (Pier-Portside) a $2.00 a carton charge on each carton the partnership handled. (Tr. 119)

35. Portside does not now assess the present partnership (Robideau-Portside) a $2.00 per carton charge. (Tr. 341-343)

36. As to Portside's $.10 per carton charge against Pier, Portside prepared no written cost studies to justify its imposition. Portside's President testified he prepared some notes which he threw away. (Tr. 165)

37. Portside does not assess a $.10 per carton charge against the Robideau-Portside partnership. (Tr. 346, 347)

38. In connection with warehousing and other terminal services and facilities for containerized frozen meat, the only additional service Port-

side performs for Pier that it does not perform for the Robideau-Portside partnership is the loading and unloading of Pier's trucks when samples are selected for inspection. No services are performed for "skipped" inspections. (Tr. 352)

39. The time required by Portside's labor to load 10 or 11 pallets onto Pier's trucks and to unload the pallets off Pier's trucks is approximately one-half hour for each act of loading or unloading. (SF. 10)

40. Other refrigerated warehouses in the Philadelphia area, i.e., Northern Metals, U. S. Cold Storage, Camden Refrigeration, and Hill Creek Farms, do not charge Pier for providing the necessary labor and equipment to make cartons designated as MID samples available to Pier so that Pier can perform the required meat inspection. (Tr. 119)

41. While Pier is not charged for picking up meat for inspection at warehouses other than Portside, the importer currently pays $.18 per inspected carton to the warehouse or to the pier. The $.18 tariff is adhered to by the Philadelphia Marine Terminal Association and includes assisting in the selection of cartons, loading trucks, returning inspected cartons, and returning them to the freezer or storage point. There is no charge to the importer for skip lots. (Tr. 259, 260, 287)

42. Pier charges the importer for the services it provides with respect to the government inspection of frozen meat. Pier charges the importer $7.45 per carton for meat that is defrosted and $4.75 per carton for meat that is individually wrapped and does not require defrosting. Those charges are assessed only against the cartons actually inspected and the charge includes stamping, picking up samples at Portside and other warehouses, trucking the samples to the Federal Street facility, unloading the samples, defrosting, presenting the samples to the MID inspector, reloading the samples into cartons and reloading the truck and returning the samples to Portside or other refrigerated warehouses. On "skip lots" Pier charges the importer $.12 per carton for stamping "approved" on the containerload of cartons. (Tr. 72, 73)

43. On approximately October 1, 1979, Portside published and distributed to its customers a form letter describing a "complete new program for the handling of Australian and New Zealand frozen meat containers on a 'house to house' basis," effective October 19, 1979. The charges are based upon a "package arrangement" with an all inclusive per container rate to cover stripping, sample selection, inspection/stamping, immediate transfer to frozen protection, expediting and outbound tailgate loading, and credit to importer and charge to ex. dock customers on ex. dock deliveries. These rates, charges and services have not been filed with the Commission. (Ex. 14; Tr. 176, 330, 331)

44. Since it has begun the $.10 per carton charge Portside has billed Pier approximately $25,000 for May and June of 1979, $11,000 for July, $9,000 for August, $6,700 for September and $3,900 for October. Pier has not paid any of the charges. (SF. 13)

45. There are currently pending before the National Labor Relations Board two unfair labor practice proceedings styled *International Longshoremen's Association Local 1242* and *Hill Creek Farms*, Case Nos. 4-CC-1133 and 4-CE-55. These cases charge the ILA Local 1242 with violations of the National Labor Relations Act, section 8(b)(4)(ii)(B), 8(c) and 2(b) and (7). In these proceedings, the National Labor Relations Board is challenging the legality of Rule 2(B)(4) of the CONASA-ILA[9] Containerization Agreement in effect between the Philadelphia Marine Trade Association and the ILA. Section 2(B)(4) reads:

> Rule 2. Containers Not To Be Loaded or Discharged by ILA Labor:
>
> Cargo in containers referred to below shall not be loaded or discharged by ILA labor:
>
> * * *
>
> B. Import Cargo:
>
> * * *
>
> (4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions:
>
> 1. The container cargo is warehoused at a bona fide public warehouse.
>
> 2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and
>
> 3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

46. On June 12, 1979, the court issued an injunction in *Hirsch v. ILA Local 1242*, C.A. No. 79-2022, enjoining the enforcement of Rule 2(b)(4). Prior to the injunction almost all frozen meat cargo coming into the Port of Philadelphia was stripped there because Lavino which operated the Port as well as providing stevedoring services, discouraged any other procedure. Since the injunction, containers of frozen meats as well as other cargo are being stripped outside the Port and there has been at least an 80 percent drop in the Robideau-Portside partnership's business. (Ex. C-8; Tr. 92, 93, 215)

## DISCUSSION

This proceeding raises six basic issues, each of which will be considered in turn by setting forth, as is necessary, the argument of each of

[9] Council of North American Shipping Associations-International Longshoremen's Association.

the parties and arriving at a decision based on those arguments, the facts of record and the applicable statutory and case law.

*Issue No. 1 - Does the Complainant Have Standing to File a Complaint and Seek the Relief Requested, under Section 22, Shipping Act, 1916?*

Section 22 of the Shipping Act, 1916, as amended states:

> SEC. 22. That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. . . .

It seems clear enough that by its terms the statute allows *any person* to file a complaint without a showing of direct or indirect injury and without a claim for reparations. If there was any doubt in this regard it was resolved long ago in *Isthmian S.S. Co. v. United States*, 53 Fed. 251 (S.D.N.Y., 1931). There, in response to the petitioner's objection that the complaint must be filed by a "person" directly affected by the alleged violations of the Act, the Court stated:

> . . . The statute contains no such limitation. Section 22 (46 USCA §821) provides that "any person may file * * * a sworn complaint setting forth any violation of this Act by a common carrier by water * * * and asking reparation for the injury, if any, caused thereby." While it is evident that in order to obtain "reparation" for injury "a person" must be directly affected by the violation, the words "injury if any" indicate that the remedy does not necessarily include "reparation," but may relate only to the prevention of unfair or discriminatory rates in the interest of the public. As was said in the analogous interstate commerce case of Baer Bros. Mercantile Co. v. Denver & R.G.R. Co., 233 U.S. at page 488, 34 S. Ct. 641, 645, 58 L. Ed. 1055: "The grounds of complaint may be joint or separate, and the very fact that they may sometimes be separate shows that the presence of both is not jurisdictional. * * *" The Supreme Court in that decision likewise said that "Awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi legislative capacity to prevent future injury to the public." . . .

The complainant and Hearing Counsel agree with the holding in *Isthmian, supra*. Despite the clarity of the holding, respondent clings to the belief that some injury must be shown. He attempts to obviate *Isthmian* by asserting there was indirect harm, ignoring the fact that the court clearly held that the presence or absence of that fact made no difference in resolving the issue. The respondent then proceeds to cite

*Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726, 790 (1973), in support of his view, quoting the language:

> Finding that "the likelihood of any impact at all upon [Seatrain's] operations which might result from the approval of the agreement is a matter of mere speculation," the Commission concluded that "Seatrain has no standing in this matter and that its protest is without substance."

A reading of *Seatrain Lines* indicates it is totally inapplicable to the issue under consideration. It does not involve section 22, but rather the approval of an agreement under section 15. Furthermore, the language quoted by the respondent is a recitation by the court of what the Commission had done and omits a footnote that explains that since the Supreme Court decided the Commission did not have jurisdiction over the agreement it was not passing on the question of whether or not the Commission's decision that Seatrain was not entitled to a hearing would have been proper in a case where the Commission had properly asserted its jurisdiction.

Finally, respondent takes issue with complainant's citing of *FMC v. Zim Israel Navigation Co.*, 263 F. Supp. 618, 621 (S.D.N.Y. 1967), stating that since the complainants "asked for a cease and desist order and reparations as well," the language stating that complainants may seek relief whether or not they have been directly injured, is "dicta." The respondent is mistaken and indeed seems to have reversed what is dicta and what is not. For in *Zim, supra*, after citing *Isthmian*, the court said:

> * * * Their standing to file a complaint on the grounds alleged and the Commission's jurisdiction to entertain the proceeding does not stand or fail on whether the insurers can use the proceedings before the Commission as a vehicle to recover cargo claims which, as Zim contends, should be maintained in the courts. Whether or not the insurers are entitled to reparations in the proceedings before the Commission--a question which need not be decided here--they have standing to file the complaint and the Commission has jurisdiction to entertain it. Cf. Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 145, 57 S.Ct. 407, 81 L.Ed. 562 (1937).

Here then, it is held that Pier has standing to file a complaint under section 22, and to seek the relief requested.

*Issue No. 2 - Is the Respondent Portside an "Other Person" Within the Meaning of Sections 1, 16 and 17 of the Shipping Act, 1916?*

Section 1 of the Shipping Act defines "other person subject to this act" as:

> * * * any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing

> wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

Section 16 of the Shipping Act provides in part:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
>
> First: To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . .

Section 17 of the Shipping Act states in part:

> Every such carrier [common carrier by water] and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

While consideration of the specific allegations of wrongdoing regarding sections 16 and 17 will be reserved for later portions of this decision, it should now be noted that it is obvious from the facts as found that Portside is an "other person" within the meaning of sections 1, 16 and 17 of the Shipping Act. Indeed, it has stipulated that Portside "carries on the business of operating a refrigerated warehouse as well as providing services incident to that business," in other words, that Portside is a terminal operator.

In its brief Pier argues that Portside is an "other person" citing *California v. United States*, 320 U.S. 577 (1944), *United States v. American Union Transport, Inc.*, 327 U.S. 437, 443 (1946), and *Baltimore and Ohio Railroad Co. v. United States*, 201 F. 2d 795 (CA 3rd, 1953). Hearing Counsel also cites *California, supra*, and relies heavily on the holding in *Investigation of Storage Practices*, 6 F.M.B. 301 (1961). He notes that Portside is located in the Packer Avenue Marine Terminal, that it receives custody of frozen meat from common carriers by water in the United States foreign commerce after the cargo is unloaded at a dock or pier, and that the operators of the Packer Avenue Marine Terminal are agents of the common carrier by water for the purposes of the carrier fulfilling its obligation to deliver cargo to the consignee. Further, Hearing Counsel points out that Portside acts as a terminal operator by providing free time for frozen meat cargo to fulfill the carrier's obligation to its shippers, since the carrier's tariff offers no free time for refrigeration, and that Portside maintains custody of the meat in its warehouse at the Port until it relinquishes the meat to an inland carrier or consignee, noting that Portside's warehouse facility is favored by carriers because of its advantageous location within the Port area.

Insofar as can be ascertained Portside's argument apparently does not deny that it is a warehouseman and terminal operator generally, but rather it seeks to characterize itself differently insofar as the activities involved in this proceeding are concerned. That aspect of its argument is discussed more fully in later portions of this decision.

As has been noted, the record compels a holding that Portside is an "other person" within the meaning of sections 1, 16 and 17 of the Shipping Act. In *California, supra,* where charges for wharf demurrage and storage were in question the Court at page 568 stated:

> * * * Whatever may be the limitations implied by the phrase "in connection with a common carrier by water" which modifies the grant of jurisdiction for those furnishing "wharfage, dock, warehouse or other terminal facilities," there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission.

In *Baltimore and Ohio Railroad, supra,* it was found that water carriers entering the Port of Philadelphia generally did not own piers, but rather used piers owned by others, including railroads. The Court concluded at page 797 that:

> If the railroads, for their own business reasons, provide the facilities which it is the obligation of the water carriers to furnish, it becomes very clear to us that they are furnishing "wharfage . . . in connection with a common carrier by water." It seems to us inescapable that they come within the very terms of the Shipping Act.

and further, with regard to the fact that railroads might also be simultaneously subject to the jurisdiction of the Interstate Commerce Commission that:

> All we are deciding about that point in this decision is that these railroads who open their piers, for a charge, to truckers to take away or bring cargo to or from sea-going ships are subject to regulation under the terms of the Shipping Act.

Finally, in *Investigation of Storage Practices*, 6 F.M.B. 301 (1961), the question arose as to the jurisdiction of the Commission where a company (TOA) provided free warehousing in the Port of Stockton in order to induce carriers to use the Port. TOA claimed the Commission had no jurisdiction over it since the ocean transportation ended when TOA took possession of the goods at its warehouse. The Commission rejected the argument stating at page 314:

> The terminal character of the facilities furnished continues *until the inland carrier takes possession.* The Board has assumed jurisdiction up to this point. . . . The terminal aspect of handling property is not complete at the time goods are deliv-

ered by Stockton to the "lessee" of its assigned warehouse space.

In citing *Investigation of Storage Practices* with approval, the Initial Decision in *Marine Terminal Practices of the Port of Seattle*, Docket No. 70-50, issued September 15, 1978, stated:

> The Port derides Hearing Counsel's contention that until the cargo is relinquished to an inland carrier, the Port's services still fall within the jurisdiction of the Shipping Act. The Port sees no significance to the time of transfer of cargo to inland carriers since it believes the service in question relates to inland dispatching and not ocean shipping. The Port errs.
>
> It is elemental law that the obligations of a common carrier by water do not terminate merely because it has discharged cargo at a marine terminal. The carrier, through his agent or contractor, who is usually a marine terminal operator, must provide adequate terminal facilities for deposit of the goods and allow a reasonable period of time for consignees or their agents to pick up the goods at an accessible place.

In *Marine Terminal*, the Port was contesting the Commission's jurisdiction by alleging that the consolidation service it performed was a "totally separate, independent service with no physical, operational or data connection with any other Port operation." The Commission rejected the Port's argument holding that:

> The Commission agrees . . . that the consolidation service is part of a broader marine terminal process, to the extent that the Port, in providing it, is furnishing terminal facilities in connection with common carriers by water. We also concur that the service relates to the receiving, handling and storage, or delivery of property. . . . (21 F.M.C. 397, 399)

So here, it is clear that Portside is a warehouseman providing a terminal service, that it is an "other person" within the meaning of that term as used in the Shipping Act, and that therefore Portside is subject to the jurisdiction of the Commission.

*Issue No. 3 - Are the Services Provided By Portside in Connection With the Inspection of Imported Containerized Frozen Meat Related to or Connected With the Receiving, Handling, Storing or Delivery of Property Within the Meaning of Section 17, Shipping Act, 1916?*

Section 17, second paragraph, provides that:

> Every such carrier and *every other person* subject to this act shall establish, observe, and enforce just and reasonable regulations and practices *relating to or connected* with the receiving handling, storing or delivery of property. (Emphasis supplied.)

It is well-settled that the Shipping Act and other similar regulatory statutes are remedial in nature and are to be broadly construed to

eliminate wrongdoing and carry out the remedies intended. *Reduced Rates-Atlantic Coast Ports to Puerto Rico*, 9 F.M.C. 147, 149 (1965). *Richland Development Co. v. Stapler*, 295 F. 2d 122, 128 (5 Cir. 1961), *Gerusco, Inc. v. Aulling*, 327 U.S. 244, 260 (1945). This legal tenet is compatible with the Supreme Court's direction that an agency should not construe a statute so narrowly as to frustrate the intent of Congress. *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 273 (1968); *United States v. American Union Transport, Inc.*, 327 U.S. 437, 457 (1946).

Here, the facts as found indicate that Portside, a refrigerated warehouse, takes frozen meat into its warehouse delivered to it by Lavino stevedores. In order to comply with a Department of Agriculture statute which requires the importer to have the meat inspected and provide meat inspection facilities, Portside moves the meat from its warehouse to a place from which it is delivered to an inspection facility within the Port, or to trucks which take the meat to an inspection facility without the Port. Once inspected, the meat returns to Portside's warehouse to be later delivered to an inland carrier or a consignee.

Given the above facts, and the law calling for a liberal interpretation of the Shipping Act there should not be any difficulty in adding the above activity to those the Commission has already held to be subject to its jurisdiction either because they are terminal related:

> i.e., independent contractors who transferred property between railroad cars and the place of rest on an ocean terminal, *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946); terminal operators engaging in practices regarding the payments of penalties for truck detention, *American Export Isbrandtsen Line, Inc. v. Federal Maritime Commission*, 389 F. 2d 962 (D.C. Cir. 1968); terminal operator imposing charges on stevedores for the furnishing of "water, toilets, telephones and utilities," *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, 18 F.M.C. 140, 163 (1975), aff'd *sub nom. Cargill, Inc. v. Federal Maritime Commission*, 530 F. 2d 1062 (D.C. Cir. 1976); a public grain terminal operator assessing an equipment rental charge against stevedores using the operator's equipment, *California Stevedore and Ballast Co. et al. v. Stockton Elevators, Inc.*, 8 F.M.C. 97 (1964); and a port furnishing "bookkeeping" consolidation services, *Marine Terminal Practices of the Port of Seattle, Possible Violations of section 17, Shipping Act, supra*;

and/or because they constitute the operation of a terminal facility in that they furnish an important link in the chain of the transportation of goods:

> i.e., *Status of Carloaders and Unloaders, supra; Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 F.M.C. 155, 163 (1965); *Shipping Association, Inc. v. Port of Boston*, 10 F.M.C. 409, 414 (1967), collateral appeal denied, *sub nom., Port of*

*Boston Marine Terminal Assn. v. Rederi, Transatlantic,* 400 U.S. 62 (1970); *Marine Terminal Practices of the Port of Seattle--Possible Violations of Section 17, Shipping Act, 1916, supra.*

Portside's practices in connection with shipments of imported containerized frozen meats, like the practices considered in the above-cited cases, furnish a vital link in the chain of transferring goods from the common carrier by water to the inland carrier or consignee. Certainly, they constitute "practices relating to or connected with the receiving, handling, storing, or delivering of property" within the meaning of section 17. The facts clearly establish that the imported frozen meat cannot enter the free flow of U.S. commerce without government approval, that Portside has a minimum 72 hour free time period, that it segregates the frozen meat to be inspected during that period, that its location at the Port gives it a favored position in that importers prefer using facilities at the terminal, that Portside or PSI operates the meat inspection room at the terminal and that the room is supplied to a partnership of which PSI is a member on a preferential basis, that Portside charges importers for "selecting MID samples," and that Pier performs inspection services on behalf of the importers.

Despite the above and despite the fact that it admits it operates a refrigerated warehouse and is a terminal operator, Portside would have the Commission hold that it is not an "other person" within the meaning of sections 1 or 17 as applied to the facts of this case. It cites no case law whatsoever and states:

> If, for example, it [Portside] discriminates against a common carrier by water it could be subjected to Commission control for such conduct. . . .

and further:

> Lavino or its affiliates did the stevedoring and also operated as an independent terminal operator. Stevedoring itself conceivably might qualify as an agency relationship but as a terminal operator it is not an agent of the common carrier by water. Portside received the meats, just as would any other warehouse, from Lavino as a completely independent operator and did not receive the meats from the common carrier by water.

and finally:

> The contention that inspection was a necessary link in the transportation network misses the mark. The record shows that inspection was the concern of another agency of the government. Importers could provide their own inspection facilities or look to others. Warehouses, like Portside, could at their option provide inspection services by themselves or by permitting off-sight inspections. These voluntary operations were no more a necessary link to justify commission regula-

tion that services to effect local sales of the imported meats would be.

Certainly, the fact that Portside is a terminal operator for some purposes does not mean that everything it does must or should be regulated by the Commission. However, here we are not considering ownership of some remote facility or the operation of an activity unrelated to ocean transportation. We are rather considering an activity which we have found as a fact is related to or connected with the receiving, handling, storing or delivering of property. That being so the Commission cannot accept the respondent's own declaration of its status, *Possible Violations of Shipping Acts*, 16 SRR 425, 434-435 (1975), and it must look to what the respondent does, *United States v. California, supra*. Further, where outward appearances (interlocking ownership of close-held corporations, intervening partnerships) do not properly reflect the true nature of a business the Commission will look behind the surface to pierce the ambiguity. *Lifschultz v. United States*, 144 F. Supp. 606, 611 (SDNY, 1956). Even more appropriately in this particular case, where the respondent seems to pick and choose how it wants to characterize and charge for its services, the Commission must make certain that a person subject to the Shipping Act is not segregating its activities for the purpose of avoiding lawful regulation and engaging in discriminatory acts. *New Orleans Steamship Association v. Bunge Corp.*, 8 F.M.C. 687, 695 (1965); *Agreement 9597*, 12 F.M.C. 83, 101-102 (1968).

In view of the above, it is held that the services provided by Portside which are related to the inspection of imported frozen meats entering the commerce of the United States, are services that are related to or connected with the receiving, handling, storing and delivery of property within the meaning of section 17.

*Issue No. 4 - Has Portside Violated Section 17 of the Shipping Act and General Order 15?*

Section 17 provides in pertinent part:

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

General Order 15[10] provides in pertinent part:

> Section 533.2-Purpose. The purpose of this part is to enable the Commission to discharge its responsibilities under Section

[10] 46 C.F.R. 533.1, *et seq.*

17 of the Shipping Act, 1916, by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

Section 533.3-Persons Who Must File. Every person . . . carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities as described in Section 533.1, including, but not "limited to terminals owned or operated by states and their political subdivisions . . . shall file in duplicate . . . a schedule or tariff showing all its rates, charges, rules and regulations related to or connected with the receiving, handling, storing and/or delivering of property at its terminal facilities."

The facts as found detail the history of how Portside filed tariffs regarding the services it performed for importers in the selection of frozen meat samples. Initially, it did not file any tariffs until the Commission notified it that it was a terminal operator and should do so. Its first filing, effective October 1, 1974, listed an $.11 per carton charge. Its second filing which again was occasioned by Commission prodding was made effective October 1, 1975, raised the charge to $.12 a carton. Later, on October 1, 1978, Portside raised the charge to $.13, as follows:

M.I.D. SAMPLE SELECTION $.13 PER CARTON

Assessment by terminal operator for cost of I.L.A. labor involved in assisting in the selection of frozen meat samples by the Meat Inspection Division of the United States Department of Agriculture, covering containerized product only. *Charge will be billed directly and only to the Importer of Record and will not be rebilled or handled in any other manner.* (Emphasis supplied.)

While Portside collected the $.13 charge from the importer it did not file a new tariff with the Commission, despite the fact that all the correspondence between it and the Commission indicated it was required to do so. Further, on October 19, 1979, Portside sent a letter to its customers instituting "a complete new program for the handling of Australian and New Zealand frozen meat containers on a 'House to House basis,'" as follows:

* * *

TOTAL ALL INCLUSIVE RATE

1 TO 10 CONTAINERS---------------$525.00 EACH
11 TO 15 CONTAINERS--------------- 515.00 EACH
16 AND OVER---------------------- 500.00 EACH

"HOUSE-TO-HOUSE" at Portside Refrigerated Terminals, Inc., will include:

| | |
|---|---|
| STRIPPING | IMMEDIATE TRANSFER TO FREEZER PROTECTION |
| SAMPLE SELECTING | EXPEDITING & OUTBOUND TAILGATE LOADING |
| INSPECTION/ STAMPING | EX. DOCK DELIVERIES-CREDIT TO IMPORTER-<br>CHARGE TO EX. DOCK CUSTOMER |

* * *

As you know, Portside Refrigerated Terminals, Inc., located within seconds from dockside, is by far, the most advanced freezer facility on the entire East Coast, with such advantages as 1,500,000 cubic feet of frozen storage, appointment loading, a complete meat inspection operation equipped with fully automated conveyors and "defrosting" tank and automatic strapping, all performed under *controlled* refrigerated temperatures, a U.S.D.A. consumer and Marketing Service office located directly within our building, with the services of the Animal Health Division, the U. S. Customs Service and U. S. Food & Drug Administration within the terminal. . . .All this, plus a *MINIMUM* of seventy-two (72) hours free time, availing shippers and importers the additional time for processing documents or conducting sales before the added expense of warehousing "unsold" product which completely avoids the necessity of "restuffing charges."

* * *

The House-to-House rates quoted above were and are being charged by Portside to customers although, once again, they have not been filed in any tariff with the Commission. Finally, on February 27, 1979, Portside initiated a "skip" inspection charge of $.07 per carton as opposed to the $.13 charge made for what it termed "random sampling" inspection. The $.07 charge has not been filed by Portside in any tariff with the Commission.

On the basis of the above facts alone it is clear that Portside has violated section 17 of the Shipping Act and General Order 15. Not only did it fail to file a proper tariff in the first instance, but it has been charging a rate ($.13 per carton) which differs from the rate set forth

with the tariff on file and instituted a $.07 per carton charge for "skip" inspection which it did not place on file with the Commission in any tariff. Further, since October 19, 1979, it has instituted a "package deal" plan whereby it charges an all inclusive rate for the terminal services it performs--none of which has been made part of any tariff on file with the Commission.

When one moves to consideration of the $.10 per carton charge Portside seeks to assess against Pier, the violation changes in character from a failure to file a tariff or a failure to charge a proper rate to a violation which constitutes an abuse of the regulatory process by the use of unfair, discriminatory acts. In seeking to assess the $.10 charge against Pier, Portside made no real attempt to correlate the charge for the service it allegedly performed to the cost of the service rendered. No cost studies were made and although Portside's President testified he prepared some notes which were thrown away, the testimony attempting to justify the charge is weak and unconvincing. For example, it fails to address the fact that Portside would apply the $.10 per carton or $60.00 per container (600 cartons x $.10) charge on "skipped" cartons even though it performs *no* services regarding them and even though Pier receives only $72 per container from the importer for stamping the cartons. Obviously, Portside's charge, if allowed to stand, would effectively put Pier out of business. Further, given the fact that the $.10 assessment came within two days of the dissolution of the Pier-Portside partnership agreement, and the creation of Robideau-Portside, the fact that Portside's principal officer had made prior statements that Portside would impose "all kinds of costs" on any meat inspection company which had to get its meat from Portside, the fact that it did assess such a charge against a Pier-Portside competitor (Erb Strapping), which subsequently went out of business still owing money to Portside and the fact that other warehouses did not charge Pier or other similar businesses for picking up meat for inspection, it is all too clear that the $.10 per carton charge indicates that Portside has failed to adopt reasonable practices related to or connected with the use of warehouse terminal facilities in the Port of Philadelphia.

Perhaps the best way to understand what has transpired in this case is to consider the arguments raised by the respondent on brief. While those arguments are somewhat vague they tend to emphasize just how flagrant and basic the violations are. The respondent argues that there is an "absence of maritime tariff control over incidental services of a warehouse," without bothering to define what it means by "incidental services" and without addressing those cases cited in the preceding section where a host of so-called "incidental services" (loading, consolidating, equipment-rental charge, penalties for truck detention, charges for water, toilets, etc.), have been held to come under section 17. In citing *State of California, supra,* and *City of Los Angeles v. Federal*

*Maritime Commission*, 385 F. 2d 678 (D.C.C.A., 1967), for the proposition that:

> . . . as to warehouses, there is no rate control unless and until such control has been found necessary or desirable to effect a remedy after it has been established that there was some violation of the Act.

the respondent misreads the import of the cases and simply "begs" the question involved here. In the *California* case, for example, the Court precisely delineates the difference between rate-making and the power of the Commission to establish reasonable practices under section 17.[11]

The respondent also argues that the tariff filing requirement is only for informational purposes citing 46 C.F.R. 533.2:

> The purpose of this part is to enable the Commission to discharge its responsibilities under section 17, Shipping Act, 1916, by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

Respondent also cites *Alabama Great S. R. Co. v. Federal Maritime Commission*, 379 F. 2d 100, 103 (4th Cir. 1967):

> . . . where the court acknowledged with approval the Commission viewpoint that:
>
> > The Commission's order is designed only to keep the Commission fully informed concerning matters subject to its jurisdiction.

While the exact import of the respondent's argument is unclear, if it is meant to convey the idea that the tariff filing requirement is informational only, as opposed to the use of such information to effect "reasonable regulations and practices," then it is in error and contravenes the clear language of the statute itself. As to the case cited, it involves a Commission order asking for tariff information. The petitioner contested the order because he feared the Commission would attempt to regulate rates. The court rejected the argument and allowed the order to stand thereby affirming the Commission's section 17 jurisdiction.[12]

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[11] The Court stated:

> . . . We fully agree that no rate-making power such as the Commission has been given over water carriers is conferred over other persons subject to the Shipping Act. But the order of the Commission, though it pertains to demurrage charges, is not an exercise of conventional rate-making. By §17 all those who are subject to the Act are under a duty to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property." When the Commission finds a breach of this duty, the same section authorizes it to "determine, prescribe, and order enforced a just and reasonable regulation or practice." . . .

[12] The Court stated:

> What seems most to disturb the Petitioners is not that they are asked to supply tariff information, but that such data are called for in advance of the effective date of the tariffs. As the Petitioners see it, the contested Order is the first step leading to Maritime Commission regula-

The respondent also argues that Portside did not violate section 17 by failing to file or correct its tariff because the regulation contains a specific exception, at 46 C.F.R. 533.3, as follows:

> *Provided, however,* That rates and charges for terminal services performed for water carriers pursuant to negotiated contracts, and for storage of cargo and services incidental thereto by public warehousemen pursuant to storage agreements covered by issued warehouse receipts need not be filed for purposes of this part.

The respondent's argument was first made to the Commission in 1973 and was rejected.[13] At that time it presented no documentary evidence, even when requested to do so, and none is presented in the record of this case despite the unsupported allegation that "the undisputed evidence is that Portside is a public warehouse and it issues warehouse receipts." The fact is the respondent has not even requested the "undisputed fact" be found as a fact. Further, even assuming that Portside was a public warehouseman issuing warehouse receipts, that fact alone would hardly justify its failure to publish a tariff regarding the services it performed in making available frozen meats for inspection. Portside itself apparently recognized that fact because when it filed its tariff it specifically pointed to only two items directly related to warehousing (Item #6--Handling and Item #7--Storage), which it noted were "not subject to the filing requirements of General Order No. 15." The item involving selection of MID samples (Item #5) was not so delineated. It is clear that the filing exemption for public warehousemen, contained in General Order No. 15, was meant to protect public warehousemen from the unfair competition which might ensue from public disclosure of their warehouse rates. Certainly, it was not meant to allow a public warehouse to avoid publication of rates for services which did not constitute warehousing and which are "related to or connected with" the handling, or delivery of property. The respondent's attempt to do so here is improper and invalid.

The respondent further argues that the $.10 per carton charge was fair and reasonable. It argues that the work for which Pier was charged "commenced after the original physical selection of samples to be selected. For the prior service the importer was charged." The respondent then proceeds to cite testimony, most of which is somewhat

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tion of their rates, rules and practices pertaining to facilities over which Petitioners claim the Maritime Commission has no jurisdiction. Although the Maritime Commission insists it is only seeking information, it points out that this information is necessary in advance to avoid the possibility of deferring corrective action until after it is required. We need not seek to penetrate all background to ascertain some vague but unspoken Commission intent. We take the Order at its face and view it in light of what the Commission represents to the court as its purpose and appraise the Order in terms of the applicable statutes. . . .

[13] Ex. C-10, pages 69, 74, 75.

argumentative and unclear, allegedly supporting the notion that what Portside did for the importer was something separate and distinct from what it did for Pier. The respondent's arguments lack validity because they ignore too many pertinent facts. First of all, when Portside first published its tariff in October of 1974 it (or PSI) was not a partner of Pier. The $.11 per carton charge to the importer for the "selection" of the MID samples did not limit the importer to the use of the Portside inspection facility and Pier, which used its own facility, was not assessed a charge by Portside for labor in making samples available to Pier. This seems to indicate that Portside included in its charge to the importer whatever labor was necessary to make the samples available for inspection and to place them back in the warehouse, once the inspection was completed. It is also consistent with the idea that the inspection of frozen meat was the responsibility *of the importer* under the law, and whether or not Pier was an agent of the importer as Hearing Counsel suggests, certainly Pier was acting on behalf of the importer in performing the inspection services. The parties have stipulated this fact. Secondly, the respondent's brief studiously avoids consideration of the fact that no other warehouse assessed a charge against Pier or other inspection companies for making frozen meat available for inspection. Instead, an $.18 per carton charge was assessed *against the importer* for samples actually selected, and no charge was made for "skip" shipments. A comparison of the $.18 charge with Portside's $.13 charge for selected samples, $.07 charge for "skipped lots" which the evidence indicates involved two-thirds of the shipments of frozen meat, and $.10 charge against Pier--all unfiled in any tariff--emphasized the fact that Portside was improperly segregating its activities and services as it saw fit.

Finally, the respondent argues that its dealings with Pier should be contrasted and differentiated from its dealing with Robideau-Portside because:

> . . . there was an entirely different system of operations with Pier in contrast to the operations with Robideau-Portside.

The record in this case indicates that rather than a "different system of operations," Robideau-Portside (as did Pier-Portside) represents an attempt by Portside to use its favored position as a refrigerated warehouseman at the Philadelphia port to acquire some of the meat inspection business that evolved as a result of the Agricultural Department's requirements. While this of itself might not be wrong, the manipulation of the charges relating to the meat inspection, which inspection was necessary before the meat could enter the commerce of the United States and be delivered to the consignee, was a violation of section 17.

Here, the facts show that Portside does have a favored position at the Philadelphia Port and that a large percentage of frozen meat coming into the Port is handled by Portside. When the Pier-Portside

partnership was entered into PSI with the same ownership as Portside was a party to the partnership. While the record contains no documentary evidence regarding the exact relationship of PSI to Portside, it is clear from the testimony that all of the parties consider Portside to be the controlling entity. Further, while the partnership agreement talks of the use of Portside's inspection room (apparently meaning PSI) there are several instances where the testimony indicates Portside considered itself the owner. As to the Pier-Portside partnership agreement, it does provide that Pier will use "Portside's" inspection room without charge or Pier's inspection room at 124 Federal Street with no rent to be charged to the partnership for the use of either room. The agreement specifically provides that the partnership will:

> . . . engage in the inspection services of perishable foodstuffs or other perishables that may be required by the U.S. Government or any agency thereof, *prior to their entry into the commerce of the United States*. . . . (Emphasis supplied.)

So given this factual background where Portside did not charge the partnership for making samples available for meat inspection, even though they ostensibly were being inspected by a separate entity and even though the inspection may or may not have taken place at the Packer Avenue Terminal, Portside now seeks to justify a $.10 per carton charge against Pier by differentiating between what it did formerly with the partnership and what it did once the partnership was terminated. Its attempt at that differentiation is invalid. Actually, whether the first partnership, or Pier or the second partnership performed the inspection service, the actions of Portside should have been the same. It was required to move the samples from the warehouse to a point where they could be made available for inspection and then after inspection, to move them back to the warehouse for delivery to the consignees. If the partnership and Portside had a different arrangement than did Portside and Pier, that difference ought not to be allowed to thwart and defeat the purpose of section 17. By manipulating the partnership agreement, the tariff filed with the Commission, and the $.10 per carton charge against Pier, Portside is simply attempting to compete in a discriminatory fashion. Ultimately, not only does it fail to file a proper tariff of its charges to the importer but in attempting to assess the $.10 per carton charge against Pier, it damages Pier and favors the Robideau-Portside partnership. The $.10 per carton charge is ostensibly for services different from services connected with the selection of the MID samples. Actually the only conceivable difference is the loading and unloading of Pier's trucks which consists of 15 to 18 cartons per container and which takes about an hour of labor. Given Portside's original tariff filing and its failure to initially charge Pier for the same service, it is held that the original tariff filing included the loading and unloading service performed by Portside. Even assuming,

*arguendo,* that it did not, a $.10 per carton charge is completely unreasonable, especially when one considers that it is levied on "skipped" cartons, where, as has been noted, Portside provides *no* services at all.

Perhaps, the best indicator of what Portside is attempting to do in this matter is to note the fact that during the Pier-Portside partnership, Portside had to lower its rates to become more competitive with the Port of New York. Portside forced the partnership to subsidize the alleged loss by assessing the partnership a $2 per carton charge on cartons the partnership handled. As to Robideau-Portside, it does not pay the $2 per carton charge, and instead, Portside absorbs it. In effect then, while Portside implies that its rates are not compensatory despite assessing the importer a multitude of charges for the services offered, it neglects to file proper tariffs reflecting fully compensatory rates and instead "picks and chooses" how and where the charges will be made to its competitive advantage. Its actions violate section 17.

What Portside is attempting to do here is comparable to what transpired in *California Stevedore & Ballast Co., et al. v. Stockton Elevator Inc.*, 8 F.M.C. 97 (1964). In *Stockton,* the grain terminal operator employed a company to perform its stevedoring exclusively and did not assess its own stevedore an equipment rental charge for the use of certain loading equipment. However, Stockton assessed outside stevedores using its loading equipment a $.15 per ton charge. Other grain elevators in the area did not assess any rental charge to the complaining stevedores for the use of similar equipment. Further, there was no evidence of record giving cost figures justifying the $.15 charge.

The Commission found Stockton Elevators in violation of section 17 by engaging in an unreasonable practice of assessing a charge designed to exclude complainants and other stevedores from the terminal area, of failing to assess the charges against the company which performed Stockton's own stevedoring under exclusive contract, and of assessing the charge exclusively against the complaining stevedore.

The Commission's ruling in *Stockton* compels the same finding in this proceeding. The facts are strikingly similar, i.e., Portside, a public warehouse terminal, has entered into an agreement with Robideau (via PSI), to perform all its own meat inspections; Portside imposes a $.10 per carton charge on Pier but none on the partnership; other Philadelphia area refrigerated warehouses do not assess Pier a charge for unloading Pier's trucks and even assess importers a different charge than does Pier; and there is a conspicuous absence in the record of cost data to justify the $.10 charge.[14]

[14] In its brief Portside argues that the burden of proof is on Pier to show that the $.10 per carton charge is unreasonable. The facts of record as discussed above show that Pier has sustained that burden and that Portside has failed to refute or rebut the facts of record presented by Pier.

The favored position in the Port of Philadelphia of Portside, its attempts to "orchestrate" the charges it alleges should be assessed to its own competitive advantage and the deleterious impact of the $.10 per carton charge on Pier, warrants a finding that the $.10 charge results in an unreasonable and unjust practice under section 17, and it is so held.[15]

*Issue No. 5 - Has Portside Violated Section 16?*

Section 16, First, Shipping Act, 1916, provides that it shall be unlawful for any common carrier or other person furnishing wharfage, dock, warehouse or other terminal facilities:

> [t]o make or give any undue or unreasonable preference or advantage to any particular person . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Since the facts and surrounding circumstances involved in the preceding issue (section 17) overlap this issue they are incorporated in this section by reference insofar as they are pertinent. The facts in this case clearly establish that the Robideau-Portside partnership has been given unreasonable preference or advantage by Portside and that conversely Pier has been subjected to unreasonable prejudice or disadvantage. There is no real basis for the $.10 per carton charge Portside seeks to impose on Pier. The service performed is either already included in the rate charged the importer, or if not, is not justified on the basis of the cost data presented. The $.10 charge is more a reflection of Portside's attempt to destroy anyone in competition with the Robideau-Portside partnership performing meat inspection services, rather than a good faith attempt to publicize and record a justifiable rate for a necessary service. The evidence is clear that the $.10 per carton charge is out of all proportion to the service rendered and may well force Pier out of business so that the shipping public will have no choice with respect to meat inspection service.

In *A. P. St. Philip, supra,* the respondent terminal operator was found in violation of section 16 for granting an "exclusive right to one party to furnish tugboat services to all vessels loading or unloading at a public marine terminal." The Commission stated:

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[15] See *California Stevedore & Ballast Co. v. Stockton Port District,* 7 F.M.C. 75 (1962); *A. P. St. Philips, Inc. v. The Atlantic Land and Improvement Company, et al.,* 13 F.M.C. 166 (1969); *In the Matter of Agreements Nos. T-2455/T-2553 Between Philadelphia Port Corporation and Delaware River Terminal and Stevedoring Co., Inc./Lavino Shipping Company, Respectively,* 18 F.M.C. 115 (1974); *Berthing of Seatrain Vessels in San Juan, Puerto Rico,* 21 F.M.C. 279 (1978); *Greater Baton Rouge Port Commission v. United States,* 287 F. 2d 86 (5th Cir. 1961); and *Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas,* 19 F.M.C. 548 (1977), where arrangements which grant one party the exclusive right to stevedore vessels or to perform other terminal-related activities at a public terminal are *prima facie* unjust in violation of section 17.

> . . . The manifest purpose of section 16 of the Shipping Act is to impose upon "persons subject to this Act" the duty to serve the public impartially. In no other area is this requirement of equality of treatment between similarly situated persons more important than in the terminal industry. The reason is obvious. Terminals are for all practical purposes public utilities. [Citation omitted.] Thus the operation of terminal facilities imposes upon those who furnish them the same duties and obligations as attached to any other public utility.

In *Investigation of Free Time Practices--Port of San Diego*, 9 F.M.C. 525, 547 (1966), the Commission held that unequal treatment among persons "has no place in a regulated industry," and that a marine terminal's obligation to treat persons equally is absolute.

So here, it is held that Portside's action in imposing the $.10 per carton fee on Pier demonstrates a partiality and inequality of treatment which cannot be condoned under section 16. The fee is unwarranted and illegal. It should neither be collected for past services nor should it be imposed for future services on the basis of the facts presently available in the record.

*Issue No. 6 - Filing of Agreements Under Section 15, Shipping Act, 1916*

Section 15 of the Shipping Act provides that:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The facts in this proceeding indicate that initially Lavino leased the Packer Avenue Marine Terminal, which included a refrigerated warehouse building, from the City of Philadelphia. Then Lavino sub-leased the refrigerated warehouse to PRT, which in turn sub-leased the facility to Portside. As to meat inspection services, PSI entered into a partnership agreement with Pier, and after that agreement expired, with Robideau.

The complainant argues that Portside's sublease agreement with Lavino and the Robideau-Portside partnership agreement must be filed with the Commission under section 15. The respondent replies that the agreements need not be filed because there was no direct "harm" to Pier, because the lease was an "ordinary real estate lease for the use of the premises as a public warehouse without any continuing control over operations," and, as to the partnership agreement, because it was not an exclusive, preferential or cooperative working arrangement, and was similar to the Pier-Portside partnership agreement which was not filed. Hearing Counsel take the position that there are insufficient facts to make a finding as to these violations and that the parties to these agreements, except Portside, were not named respondents in the complaint, so that, "the Commission lacks personal jurisdiction over the parties to these alleged violations."

On the basis of the record made in this proceeding, we agree with Hearing Counsel that the facts are insufficient to warrant a definitive holding that either the Lavino-City of Philadelphia lease or the Robideau-Portside partnership agreement is subject to section 15. Certainly, the nature of the lease would tend to indicate that it is subject to section 15, but the facts are so sparse they do not warrant an affirmative holding at this time. There is no copy of the Lavino-City of Philadelphia lease in the record, and while the Lavino-PRT sublease, which is in the record, seems to involve the operation of a terminal facility, the factual development of the issue as to the Lavino-PRT sublease leaves much open to question. As to the Robideau-Portside partnership agreement there is a host of questions, not only regarding the application of section 15, but as to other issues as well, which questions remain unanswered. For example, while the partnership agreement ostensibly involves an entity different from Portside (PSI), Portside itself speaks of PSI as its "alter ego." The record leaves doubt as to just who has beneficial ownership of the "inspection room" so that it is simplistic to accept the respondent's argument that its dealings with the partnership are to be distinguished from its dealings with Pier. Questions arise as to whether or not the partnership can be preferred over Pier, by Portside, a terminal operator, in the use of the inspection room and what effect that would have on the $.10 per carton charge.[16]

In light of the above facts and discussion, it is held that the various agreements need not be filed under section 15 on the basis of the present record. However, we would recommend that should the Commission deem it feasible a non-adjudicatory investigation be instituted under Rule 281 et seq., 46 C.F.R. 502.281, et seq., whereby the Com-

[16] If Pier and the partnership had equal access to the "inspection room," it would be unnecessary to ship the samples elsewhere so that even were one to adopt Portside's views, the $.10 charge would not be necessary.

mission staff could assimilate all the necessary facts and evidence relating to the agreements involved in this proceeding with a view to ascertaining whether or not they are required to be filed under section 15. Such facts should include inquiry into the ownership of the various entities involved, their relationships with one another and whether or not Portside or any "other person" subject to the Commission's jurisdiction is using the agreements to engage in any activity which violates any provisions of the Shipping Act.

Wherefore in view of consideration of the above issues it is held that:

(1) The complainant has standing to seek the relief requested.

(2) Portside is an "other person" within the meaning of sections 1, 16 and 17 of the Shipping Act, 1916.

(3) Portside's services in making imported frozen meats available for inspection so that they could enter the commerce of the United States are services related to or connected with the receiving, handling, storing, and delivery of property within the meaning of section 17, Shipping Act, 1916.

(4) Portside violated section 17 of the Shipping Act by failing to file proper tariffs with the Commission, and by charging rates in excess of those rates on file with the Commission. Further, the $.10 per carton charge assessed against Pier is an illegal charge and cannot be collected by Portside for past services. Further, Portside is ordered to cease and desist from making such a charge in the future.

(5) Portside violated section 16 of the Shipping Act by subjecting Pier to undue and unreasonable prejudice and disadvantage through the imposition of the $.10 per carton charge on Pier and not on the Robideau-Portside partnership. Portside is ordered to refrain from engaging in such conduct in the future.

(6) The agreements involved in this proceeding are not subject to section 15 on the basis of the evidence in the record. However, further investigation of facts relating to this as well as other issues is warranted should the Commission deem it feasible.

(S) JOSEPH N. INGOLIA
*Administrative Law Judge*

Washington, D. C.
June 19, 1980