# FEDERAL MARITIME COMMISSION

DOCKET NO. 78-29

SEATRAIN GITMO, INC. AND
SEATRAIN INTERNATIONAL, S.A.

*v.*

PUERTO RICO MARITIME SHIPPING AUTHORITY AND
PUERTO RICO PORTS AUTHORITY

## NOTICE

*October 30, 1980*

Notice is given that no appeal has been taken to the September 17, 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*

350352

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 78-29

## SEATRAIN GITMO, INC. AND SEATRAIN INTERNATIONAL, S.A.

*v.*

## PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO PORTS AUTHORITY

## DISMISSAL OF COMPLAINT DISCONTINUANCE OF PROCEEDING

*Finalized October 30, 1980*

On July 11, 1980, the Complainants' Motion to Stay the proceedings herein until the United States Court of Appeals for the District of Columbia issued its further decision in Nos. 78-1950, 78-1969, 78-1970, and 78-1978, was granted.

In a letter (treated as a motion) dated August 29, 1980, Respondent Puerto Rico Ports Authority states: "This is to inform you that the Court of Appeals has denied petitions for rehearing filed by Seatrain Lines and the Federal Maritime Commission in *Puerto Rico Ports Authority and Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission and United States of America*, CA No. 78-1950, 78-1969, and the mandate of the Court's judgment has been issued. Accordingly, we believe the time is now appropriate to dismiss the complaint filed in Federal Maritime Commission Docket No. 78-29."

No party has replied or objected to the above letter.

In a letter (treated as a motion) dated September 3, 1980, Respondent Puerto Rico Maritime Shipping Authority stated: "This letter supplements our response of July 10, 1980, concerning the status of this proceeding. As you know, the Court of Appeals for the District of Columbia has denied the petitions for rehearing filed by the Seatrain companies and the Federal Maritime Commission in CA Nos. 78-1950 and 78-1969, *Puerto Rico Ports Authority and Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission and United States of America*. Thus, we recommend that the complaint of the Seatrain companies in this docket be dismissed."

No party has replied or objected to the above letter.

Upon consideration of the above and the record herein, the motions to dismiss the complaint are granted.

Wherefore, it is ordered:
(A) Complaint is dismissed.
(B) Proceeding is discontinued

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

September 17, 1980

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 720(I)

3M

*v.*

HAPAG-LLOYD

## ADOPTION OF DECISION OF SETTLEMENT OFFICER

*November 5, 1980*

Upon review of the record in this proceeding the Commission has determined to adopt the decision of the Settlement Officer. It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 720(I)

3M

*v.*

HAPAG-LLOYD

Decision of Juan E. Pine, Settlement Officer[1]

*Adopted November 5, 1980*

DISMISSAL OF PROCEEDING

Minnesota Mining and Manufacturing Company (3M--claimant), by informal docket claim filed July 27, 1979, seeks recovery of alleged overcharges of $3,358.44 in behalf of its Belgian subsidiary, 3M Belgium S.A./N.V., Zwivndrecht, Belgium, from Hapag-Lloyd (respondent). Claimant is located in St. Paul, Minnesota, and is engaged in manufacturing of a multi-product line including chemicals. Respondent is a common carrier by water subject to the provisions of the Shipping Act, 1916. Claimant alleges that respondent is in violation of section 18(b)(3) of the Shipping Act, 1916, in charging rates in excess of the lawfully published rate.

This claim involves the movement of 1 container transported on respondent's vessel LUDWIGSHAFEN, from New Orleans, Louisiana to Antwerp, Belgium, on bill of lading No. 27-00642-5, dated July 20, 1977. The bill of lading describes the shipment as:[2]

Compound Textile Processing or
Finishing NOS Item 599.7430 21 plts. 41,830 lbs. 984/6 CFT
Door to Door Movement (12 drums)
Hazardous Material included in this Container:

19 Plts. at 38260 lbs. (74 drums - 912 CFT)
Resin Solution
Flammable Liquid Label
IMC Flashpoint 77 degrees
IMCO #3 UN #1866
Shipper's Load Stowage and Count

[1] Both parties having consented to the informal procedure of Rule 19 (a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 520.301 - 304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

[2] Claimant advises that this description was taken from its bill of lading master which was in stencil form to be used by its agent in New Orleans. A copy of the bill of lading master is in the record.

Respondent assessed the following transportation rates and charges on the movement:

Synthetic Resin, Liquid, having a flashpoint 100 degrees or below:
Declared value per freight ton - over $1500[3]
$^{912}/_{40}$ CFT = 22.8 MT ($221.25) = $5,044.50
Textile Processing or Finishing Compounds, N.O.S.
$^{3570}/_{2240}$ lbs. = 1.59 WT ($125.50) = $200.02 [4]
Total = $5,244.52

Claimant alleges it should have been assessed:

Textile Processing or Finishing Compound, N.O.S. Minimum 40,320 lbs. per container
$^{41830}/_{2240}$ lbs. = 18.67 WT ($101.00) = $1,886.08[5]
Amount of claim - $3,358.44

In effect, claimant states that it believes that the 19 pallets which it described on its bill of lading master and on the actual bill of lading (No. 27-00642-5) as:

Resin Solution
Flammable Liquid Label
IMC Flashpoint 77 degrees
IMCO #3 UN #1866

and on which the carrier assessed a rate of $221.25 per measurement ton of 40 cubic feet per Item No. 581.0004.229 of the subject tariff which covers Synthetic Resin, Liquid, having a flashpoint 100 degrees or below, declared value per freight ton - over $1500, should have moved at the lower rate of $125.50 per long ton of 2,240 pounds per Item No. 599.7401.587 of the subject tariff which covers Textile Processing or Finishing Compounds, N.O.S.

A shipper (or his agent) must be charged with superior knowledge of the proper description of commodities being shipped, particularly where products having highly technical commodity designations, such as chemicals, are concerned. Accordingly, it is not unreasonable to

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[3] Gulf European Freight Association Agreement No. 9360-3, Tariff No. 3 (FMC-3), 3rd Revised Page 148, Item No. 581.0004.229. Claimant's invoice value on the Synthetic Resin Liquid (Description No. 41-2700-3853-6) is $49,284. The bill of lading shows 912 CFT or $^{912}/_{40}$ = 22.8 MT of this commodity was shipped. The actual value per freight ton is $^{\$49284}/_{22.8}$ =$2,161.58. Based on this valuation, the carrier used the correct actual value (over $1500 per freight ton) in assessing the rate of $221.25 per MT. Computing with the claimant's alleged 886/8 CFT or $^{886.867}/_{40}$ = 22.17 MT, results in a slightly higher actual value per freight ton $^{\$49284}/_{22.17}$ = $2,223. However, as the assessed rate of $221.25 applies on any actual value in excess of $1,500 per MT the rate of $221.25 per MT would still apply.

[4] Same tariff as in footnote 3, 2nd Revised Page 152, Item No. 599.7401.000. The Settlement Officer computes this second rate assessment as $199.55. As this difference is less than $1.00, respondent's computation will not be changed.

[5] Same Tariff, 2nd Revised Page 152, Item No. 599.7401.587. The Settlement Officer computes $1,885.67. As this difference is less than $1.00, claimant's computation will not be changed.

attach a strong presumption of correctness to descriptive documentation prepared by the shipper or his agent, and a heavy burden of proof to overcome that presumption.

Claimant states that the cargo does *not* require "on deck" stowage per page 65 of R. M. Graziano's Tariff No. 31. A review of the subject page reveals that Resin Solution under either hazard class, combustible liquid or flammable liquid (flammable liquid was typed on the bill of lading master and bill of lading) is flagged "1, 2" with respect to the authorized locations on board cargo vessels for shipments of said hazardous material. The authorized locations are identified on page 24 of Graziano's Tariff, i.e.:

> "1" means the material may be stowed "on deck" subject to requirements of §176.63(b) of this subchapter. When both "on deck" and "under deck" are authorized "under deck" should be used if it is available.
>
> "2" means the material may be stowed "under deck" in a compartment or hold subject to the requirements of §176.63(c). When both "on deck" and "under deck" are authorized, "under deck" should be used if it is available.

While the rule does not require on deck stowage, it is clear that Resin Solution may be stowed on deck subject to specified requirements or under deck in a compartment or hold subject to specified requirements. When both on and under deck stowage are available, under deck stowage should be used. These are not regulations which apply to a routine commodity.

Claimant's "belief" and its reference to Graziano's Tariff is all that is submitted in the claim proper. However, two letters appended to the claim give every indication that respondent assessed the proper rate on the 19 pallets. Claimant's letter to respondent's agent of June 14, 1979 states in part:

> . . . However, there are not two commodities in the container, but one. The "19 pallets at 38260 LBS" refers only to that portion of the whole which carries hazardous labels. It, therefore, necessitated the hazardous description "Resin Solution Flammable Liquid Label."

On June 26, 1979, respondent's agent wrote to the Gulf European Freight Association Chairman:

> . . . to reduce the problem to a single sentence 3M has advised us that the content of the entire container can be described as Compound Textile Processing or Finishing, NOS, but to serve Coast Guard requirements they had to break out the "Resin Solution" and because of this requirement they feel they have been penalized in the rating of the Bill of Lading claiming that the entire shipment should have been rated as Compound Textile Processing etc.

The Commission has determined that where the goods have left the custody of the carrier, a complainant alleging a misclassification and an overcharge has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. Claimant, having furnished evidence which is uncertain and indefinite, or otherwise lacking in probative value, has failed to sustain this burden. See *Merck, Sharp and Dohme v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973).

As will be apparent in addressing claimant's allegation with respect to a slight overstatement of cubic measurement by the respondent later herein, neither the invoice or the packing list submitted by claimant refute the commodity description of the 19 pallets in question used by claimant on the bill of lading master, i.e., "Resin Solution, Flammable Liquid Label, IMC Flashpoint 77 degrees, IMCO #3 UN #1866." Both claimant's invoice and packing list merely refer to the commodity on the 19 pallets by its stock number, i.e., "41-2700-3853-6." Such an identification in no way can raise any doubt as to the cargo description used in the bill of lading nor the rate assessed thereon by respondent.

In its letter of May 2, 1980, submitting documentation requested, claimant raised for the first time, the question of a possible overcharge based on measurement, i.e.:

> . . . Please note that our master indicates 21 pallets at 41,830 pounds at 968/3 cube. It appears that someone has changed the cube on the bill of lading to read 984/6. Our packing slips support what is shown on our master bill of lading namely 968/3 cube.
>
> As the packing slip indicates, the 21 pallets measure:
>
> | | | |
> |---|---|---|
> | 2 x 40/10 | = | 81/8 |
> | 18 x 46/8 | = | 840/0 |
> | 1 x 46/8 | = | 46/8 |
> | | | 968/4 |

Claimant's first paragraph above alleges the correct cube as 968/3 and in the computations immediately below, claimant arrives at a cube of 968/4. The latter cube will be verified from data obtained from its packing list. Obviously the concern is not 968/3 v. 968/4, but claimant's concern is with the higher cube shown on the bill of lading of 984/6.

An analysis of the packing list develops the cubic measurements of the complete shipment:

2 pallets Scotchguard Fluorechemical

35"L x 42"W x 48"D = 70,560(2)

$^{141120}/_{1728}$ = 81.67 or 81/8 CFT

18 pallets "41-2700-3853-6"

40"L x 42"W x 48"D = 80,640(18)

$^{1451520}/_{1728}$ = 840 CFT

1 pallet Scotchguard Fluorechemical "41-2700-3853-6"
40"L x 42"W x 48"D =
$^{80640}/_{1728}$ = 46.67 or 46/8 CFT
Total is 967/16 or 968/4 CFT

Claimant's May 2, 1980, allegation that the total cube on the bill of lading is overstated is correct. It is overstated by 984/6 minus 968/4 16/2 cubic feet.

However, the two pallets of Scotchguard Fluorechemical which measure 81/8 CFT, and weigh 3,570 pounds per claimant's computations, have been and should be assessed the rate of $125.50 per ton of 2,240 pounds, i.e., $^{3570}/_{2240}$ lbs. = 1.59 WT ($125.25) = $200.02. The tariff description embracing this commodity is Textile Processing or Finishing Compounds, N.O.S., and the tariff rate of $125.50 applies per ton of 2,240 pounds. The commodity is rated only on a weight basis. The fact that this portion of the shipment measures 81/8 CFT is academic as there is no measurement rate to apply. The General Cargo, N.0.S rate is $221.00 per ton of 2,240 pounds, or 40 cubic feet, whichever produces the greater revenue. As the two pallets weigh less than two long tons and cube at greater than two measurement tons, application of the General Cargo rate would result in a transportation charge of $^{81.667}/_{40}$ = 2.04 ($221.00) = $450.84. The $200.02 assessed on this portion of the shipment stands.

Therefore, from the total cube of 968/4 CFT developed from the invoice, must be subtracted the 81/8 CFT covering these two pallets resulting in a cube of 886/8 CFT for the remaining 19 pallets.

It has been determined herein that the 19 pallets are subject to the Synthetic Resin, Liquid, rate of $221.25 per measurement ton of 40 cubic feet. On this portion of the shipment respondent assessed:

$^{912}/_{40}$ CFT = 22.8 MT ($221.25) = $5,044.50

The above analysis of the packing list reveals that the subject 19 pallets measure 886/8 CFT. Thus, on this portion of the shipment respondent should have assessed:

886/8 or $^{886.667}/_{40}$ CFT = 22.17 MT ($221.25) = $4,905.11
Overcharge based on overstatement of cubic measurement =
$139.39

With respect to respondent's overstatement of the cubic measurement of the 19 pallets of Synthetic Resin, documentation submitted by claimant as indicated above, develops that reparations of $139.39 would be due claimant for same. As indicated above, of the total claim for $3,358.44 of claimant, it has only sustained its burden of proof for reparations of $139.39.

However, the claim must be dismissed inasmuch as the evidence shows that it was filed by one other than the payer of the ocean freight, and no showing has been made that claimant has succeeded to the

claim by valid assignment or other means. Such a requirement has been established in *Trane Company v. South African Marine Corp. (N.Y.)*, 19 FMC 375 (1976); *Carton-Print, Inc. v. The Austasia Container Express Steamship Company*, 20 FMC 31 (1977), and recently upheld in Informal Docket No. 623(I), served February 26, 1980. The freight here was paid by 3M Belgium S.A./N.V. and the claim was brought by 3M of St. Paul, Minnesota.

Neither could the claim now successfully be amended to name a new claimant. Amendments to complaints which do not merely add parties but substitute different and indispensible parties are in reality new complaints and must face the two year time limit on their own merits. A complaint cannot be amended to name the proper party nor can an assignment of a claim be obtained after the two year time limit has expired, as here. *Trane v. South African* and *Carton-Print v. Austasia, supra*, and *Mine Safety Appliances Co. v. South African Marine Corp.*, Order on Review, 18 SRR 1467 (1978). Further, the mere fact that the claimant may be the owner of or related to the party paying the freight, without more, does not confer standing to seek reparation. *Trane v. South African, supra.*

The claim is hereby dismissed.

(S) JUAN E. PINE
*Settlement Officer*

August 20, 1980

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 621(I)
## E.S.B. INCORPORATED

*v.*

## SOUTH AFRICAN MARINE CORPORATION

## ORDER ON REVIEW

*November 6, 1980*

The proceeding is before the Commission upon its own Motion to review the Settlement Officer's ruling dismissing the complaint for failure to name an indispensable party.

The complaint filed by E.S.B. Incorporated alleges freight overcharges by South African Marine Corporation, a common carrier by water and a member of the United States/East and South African Conference. A copy of the complaint was mailed to the Respondent in New York. An answer was filed by the South African Marine Corporation (N.Y.) which advised that it was not a common carrier but acted solely as agent for the carrier and asked that the complaint be dismissed for failure to name an indispensable party.

### DISCUSSION

The question presented here is whether "South African Marine Corporation," the name set forth in the complaint, sufficiently identifies the carrier whose full name is "South African Marine Corporation, Ltd.," or whether it must be read to refer to the agent whose full name is "South African Marine Corporation (N.Y.)."[1]

The precedents cited in the answer and on the basis of which the Settlement Officer dismissed the complaint, *Trane Company v. South African Marine Corporation (N.Y.)*, 19 F.M.C. 314 (1976); *Caterpillar Overseas S.A. v. South African Marine Corporation (N.Y.)*, 19 F.M.C. 315 (1976); and *Mine Safety Appliances Company v. South African Marine Corporation*, 18 S.R.R. 1467 (1978), may be distinguished from the instant case. In the *Trane Company* and *Caterpillar* cases the complaints were brought against the agent.

[1] In the Manhattan telephone directory "South African Marine Corporation" is listed at the same address as "South African Marine Corporation N.Y.," the agent. Furthermore, "South African Marine Corporation" advertises its services as carrier in the Journal of Commerce Transportation Telephone Tickler which promotes the "fast, regular service of Safmarine [an abbreviation for South African Marine Corporation]" and emphasizes that "no other carrier sails to South Africa as often as Safmarine." Transportation Telephone Tickler (1980) pp. 452, 453.

In *Mine Safety Appliances*, as in the instant proceeding, the complaint named as respondent "South African Marine Corporation." There, as here, the complaint was mailed to the same address in New York. In the first instance, the carrier "South African Marine Corporation, Ltd." answered the complaint, whereas in this instance, the agent "South African Marine Corporation (N.Y.)" entered the case. No explanation is offered for the different actions taken by South African Marine Corporation in these two cases.

In any event, while the complaint did not set forth the name of the carrier in full nor, for that matter, that of its agent, it was made abundantly clear that the action was being brought against the ocean carrier. Service of the complaint in New York whether on the carrier or its agent was sufficient notice to the carrier of the claim being brought against it. *International Shoe Company v. Washington*, 326 U.S. 310 (1945). Under the circumstances, the filing of an answer by the agent was inappropriate, unless the agent was acting on behalf of the carrier.

In view of the foregoing, the Commission has determined to vacate the decision of the Settlement Officer dismissing the complaint and to remand the proceeding to the Settlement Officer for such further proceedings as the Settlement Officer deems appropriate, including a decision on the merits.[2]

It is so ordered.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

[2] As the bill of lading indicates that freight was collect, the Settlement Officer should, as a threshold matter, address the issue of who paid freight charges and whether E.S.B. has standing with respect to the subject claim.

* The separate opinion of Chairman Richard J. Daschbach is attached.

*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

DOCKET NO. 79-69

RICHMOND TRANSFER AND STORAGE CO.,

D/B/A RICHMOND EXPORT SERVICE AND INTERNATIONAL CARGO SERVICES

POSSIBLE VIOLATIONS OF SECTIONS 16, FIRST, AND 17, SHIPPING ACT, AND GENERAL ORDER 15, 46 C.F.R. 533

## ORDER ADOPTING INITIAL DECISION

*November 7, 1980*

This proceeding is before the Commission upon its own determination to review the Initial Decision of Administrative Law Judge Charles E. Morgan. No Exceptions were filed.

This proceeding was initiated by Order of Investigation and Hearing served July 17, 1979, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821) to determine whether: (1) the activities of Respondent, Richmond Transfer and Storage Co., are those of an "other person" subject to the Commission's jurisdiction under section 1 of the Shipping Act, 1916 (46 U.S.C. 801); (2) Respondent's failure to file a tariff as a terminal operator is violative of the Commission's regulations (General Order 15, 46 C.F.R. Part 533) and section 17 of the Shipping Act, 1916 (46 U.S.C. 816); (3) the free time practices of Respondent on export cargo are in violation of section 16 First or 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816); and (4) Respondent's practice of paying commissions to some freight forwarders is contrary to sections 16 First or 17 of the Shipping Act, 1916.

In his Initial Decision, the Presiding Officer determined that Respondent, which operates an off-dock container freight station, performs terminal services for oceangoing common carriers by water pursuant to negotiated contracts as well as other terminal services in connection with common carriers by water for the general shipping public. He concluded that the section 1 definition of "other person . . . furnishing . . . terminal facilities in connection with common carriers by water" does not require that these services be performed at the dock or on the water's edge. As a result, the Presiding Officer found Respondent to be an "other person" within the meaning of section 1 of the Shipping Act, 1916. In addition, the Presiding Officer found that Respondent had violated 46 C.F.R. Part 533 and section 17 of the Shipping Act, 1916, by failing to file a terminal tariff reflecting its services and charges to the general shipping public. However, the Presiding

Officer found no evidence to support a finding that Respondent's free time and freight forwarder commission practices are in violation of sections 16 First and 17 of the Shipping Act, 1916.

Upon review of the entire record in this proceeding, the Commission finds the Initial Decision to be proper and well founded and accordingly adopts it as its own. Accordingly, and consistent with the Initial Decision affirmed herein, Respondent is directed to file a tariff in accordance with the provisions of 46 C.F.R. Part 533 within 30 days of the date of this Order.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding on July 16, 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 46 C.F.R. Part 533, Richmond Transfer and Storage Co., within 30 days of the date of this Order, file a tariff with this Commission showing all of its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivery of property at its terminal facility; and

FINALLY, IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

* Commissioner Teige concurring in the result and issuing a separate opinion.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 79-69

RICHMOND TRANSFER AND STORAGE CO.,
D/B/A RICHMOND EXPORT SERVICE AND INTERNATIONAL CARGO SERVICES

POSSIBLE VIOLATIONS OF SECTIONS 16, FIRST AND 17, SHIPPING ACT, AND GENERAL ORDER 15, 46 C.F.R. 533

## CONCURRING OPINION

Concurring Opinion of Commissioner Peter N. Teige

I concur in the result in this case. The obligation imposed by Commission General Order 15 on marine terminals in the United States to file tariffs showing their charges to the shipping public is, in my opinion, of questionable regulatory value, and I hope the Commission will soon undertake a re-examination of the desirability of continuing this requirement.

Nevertheless, until that occurs, the requirements of General Order 15 and Section 17 of the Shipping Act must be enforced.

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 79-69

## RICHMOND TRANSFER AND STORAGE CO., D/B/A RICHMOND EXPORT SERVICE AND INTERNATIONAL CARGO SERVICES

## POSSIBLE VIOLATIONS OF SECTIONS 16, FIRST, AND 17, SHIPPING ACT, AND GENERAL ORDER 15, 46 C.F.R. 533

Activities of respondent, an operator of an off-dock container freight station, found to be those of an "other person" carrying on the business of furnishing warehouse or other terminal facilities in connection with a common carrier by water; and respondent's failure to file a tariff as a terminal operator found to be in violation of General Order 15, and of section 17 of the Shipping Act.

*Alan F. Wohlstetter* and *Edward A. Ryan* for respondent.

*John Robert Ewers* and *Aaron W. Reese* as Hearing Counsel.

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

*Adopted November 7, 1980*

The respondent, Richmond Transfer and Storage Company (RTS), doing business as Richmond Export Service (RES), also doing business as International Cargo Services, Inc., (ICS), operates an off-dock container freight station in Richmond, California. This container freight station (CFS) is not adjacent to piers or vessel berths, and is not located within the port areas of San Francisco, Oakland, or Richmond. The respondent furnishes warehouse and other terminal facilities at its CFS for ocean common carriers operating in and out of these three ports. In general the respondent provides terminal services the same as or similar to those which a terminal operator located adjacent to piers or vessel berths would provide for ocean carriers, shippers and consignees.

The Commission, by its order of investigation and hearing, served July 17, 1979, pursuant to sections 16, 17, and 22 of the Shipping Act, 1916 (the Act), instituted this investigation and hearing to determine if the activities of the respondent, are those of an "other person" subject to the Commission's jurisdiction under section 1 of the Act.

Also it was ordered, that it be determined whether RTS's failure to file a tariff as a terminal operator is violative of the Commission's

[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).

General Order 15 (46 C.F.R. Part 533), and is violative of section 17 of the Act; whether RTS's practice of paying commissions to some freight forwarders is violative of section 16, First, or contrary to section 17 of the Act; and whether RTS's alleged practice of allowing up to two weeks free time for outbound cargo is violative of section 16, First or section 17 of the Act.

With respect to RTS's practice of paying commissions to some freight forwarders, and with respect to RTS's practice of allowing free time for outbound cargo, Hearing Counsel found no evidence to support findings that these practices were violative of section 16, First, or contrary to section 17 of the Act. It was ascertained, during the taking of depositions, that RTS did not pay commissions to all forwarders, but that those forwarders who had not been paid had not requested commissions. Upon request of a forwarder, RTS pays commissions to the forwarder for services rendered.

Although the fact sheet distributed by RTS states that up to two weeks free time is allowed, RTS assertedly allows free time only in accordance with the free time provisions of the Port of Richmond's terminal tariff. In accordance with this Port of Richmond tariff, on inbound cargo moving in the foreign trades, a free time period of seven days exclusive of Saturdays, Sundays and holidays is allowed, and on outbound cargo moving in the foreign trades, a free time period of ten days, exclusive of Saturdays, Sundays and holidays is allowed. The free time practices of RTS apparently conform to the free time practices mandated by the Commission for the San Francisco Bay Area marine terminals and by applicable conference tariffs. Hearing Counsel found no information of any irregularities with respect to RTS's free time practices. Nevertheless, RTS hereby is cautioned to avoid any appearance of encouraging possible improprieties with regard to free time, and accordingly RTS hereby is directed to delete from its fact sheet any reference to the allowance of up to two weeks free time, that is, any reference to free time which is inconsistent with the applicable conference tariffs and the Port of Richmond tariff.

There was no oral hearing, but in lieu thereof, both counsel for respondent and Hearing Counsel agreed that certain responses to interrogatories, certain stipulations, and the deposition of Donovan Daniel Day, Jr., Chairman of the Pacific Westbound Conference would constitute the record herein, as follows:

| | | |
|---|---|---|
| Exhibit 1 | = | Stipulation filed 09-17-79; |
| Exhibit 1A | = | Stipulation dated 11-27-79; |
| Exhibit 2 | = | Stipulation dated 11-19-79; |
| Exhibit 3 | = | Responses of RTS to Interrogatories of Hearing Counsel sworn to by Al Burda 10-15-79; |

| | | |
|---|---|---|
| Exhibit 4 | = | Responses of Hearing Counsel to Interrogatories of RTS dated 09-19-79; |
| Exhibit 5 | = | Deposition of Donovan Daniel Day, Jr. |

Hearing Counsel's proposed findings of fact also propose a finding of fact (their number 23) which is based in part on the testimony of Witness Day, Chairman of the Pacific Westbound Conference and in part on the tariff of the Pacific Straits Conference as filed with the Commission, to the effect that Conference tariffs provide for the use of off-dock container freight stations and establish regulations pertaining thereto. The record will be deemed to include this finding 23.

Proposed finding 19 of Hearing Counsel states that in addition to RTS there are numerous other off-dock container-freight-station operators providing service on shipments transported by ocean carriers serving the ports of Oakland, Richmond and San Francisco. Respondent names five specific CFS operators, which are listed in Exhibit 2, which exhibit in its entirety is part of the record. Respondent would add to Hearing Counsel's proposed finding 20, the fact that these other CFS operators perform services for ocean carriers identical to those performed by RTS. Again, this additional finding is part of the record, because it is in Exhibit 2.

RTS also points out (as shown in Exhibit 2) that none of the off-dock CTS operators specifically named in Exhibit 2 have filed marine terminal tariffs with the Commission pursuant to General Order 15, and that the Commission's staff has not requested or directed such filings; and that it was agreed that the parties to this proceeding (No. 79-69) may refer to all pleadings in No. 73-30, *American Warehousemen's Association v. The Port of Portland,* and to other matters such as are set out in Exhibit 2 of the present proceeding, including that the Commission and its staff prior to this proceeding have not issued any statement, and have not suggested, that the Commission has jurisdiction over off-dock CFS operators.

Be that as it may, presently the Commission has undertaken to determine whether it has jurisdiction over RTS as an "other person," furnishing off-dock facilities. As defined in the Act, an "other person subject to the act" means any person not included in the term common carrier by water, carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The additional findings of fact below are not in dispute. *RTS carries on the business of furnishing warehouse and other terminal facilities for common carriers by water.* (Emphasis supplied.) Such carriers serve the ports of San Francisco, Oakland and Richmond, California, and operate in the Pacific Westbound, Pacific Straits, Pacific Australia, and East-

bound land-bridge routes. Both conference and non-conference carriers by water designate RTS as their CFS.

The RTS facility (CFS) in Richmond consists of 9 acres with 75,000 square feet of covered area, it has depressed railroad sidings, and it has a lift capacity of up to 40 tons. Generally the services performed by RTS are in connection with less-than-container-load (LCL) cargo.

RTS holds itself out as a port facility although not located adjacent to piers or vessel berths.

RTS publishes and distributes to steamship agents and common carriers by water a fact sheet (Appendix A to Exhibit IA) which describes RTS's services and rate schedules. This fact sheet with attachments consists of two cover pages and five pages of rates. At the top of each rate sheet is the statement, "Used in the absence of any other agreement or applicable tariff."

RTS's fact sheet provides in part:

> *Extended receiving time*--Cargo may be delivered to the neutral container freight station one working day prior to sailing and as much as two weeks before without charge.
>
> *Accessorial services*--Complete export packing and marking services are available on premises. Thus fragile cargo may still be crated prior to vanning, on request. Warehousing and bonded storage facilities are also available.
>
> *Diversion capabilities*--When requirements arise, shipments can be withdrawn from sea routing and diverted to air or whatever is desired.
>
> *Conclusion*--Our purpose has been to service the transportation industry not only as a port facility but to offer as many connecting services as possible in order to take the burden off the shipper and assure fast, accurate, and safe delivery to the receiver at the lowest possible cost to all concerned.

The rate schedules of RTS attached to its fact sheet provide in part:

> When booked for export "Via Richmond CFS" shipper's payment for services ends when cargo is unloaded and segregated at the "Richmond Off Dock Pier." Services from that point on are included in the Steamship rates regardless of shipside location, Richmond, Oakland, San Francisco. If booked "CY" loading charges and drayage are charged to the Shipper, imports are the reverse.

RTS states in its fact sheet that all cargo (LCL) loaded into containers at the CFS of RTS is at the ocean carrier's count, and that such carrier assumes liability for the cargo when it is received at the RTS facility. RTS consolidates LCL export cargo, loads it into containers, and transports the containers to the designated vessel.

Common carriers by water deliver containers of LCL cargo to the RTS-CFS facility where the containers are unloaded and the cargo made available to consignees.

The services performed by RTS for common carriers by water, consignees and shippers include container loading and unloading, terminal storage, packing and crating, cargo handling, packaging, and drayage.

Cargo delivered to the RTS facility is considered in transit, and is afforded all the privileges of a steamship pier with regard to absorption of terminal charges and overland common point (OCP) freight rates.

RTS's charges for loading and unloading containers, and for drayage of containers between vessel berth and the RTS facility are for the account of and paid by the designated ocean carriers.

A terminal service provided by RTS is free time. RTS's fact sheet is silent as to the payment of commissions to independent ocean freight forwarders.

RTS has not filed a terminal tariff with the Federal Maritime Commission showing RTS's rates, charges, rules and regulations related to or connected with the receiving, handling, storing, and/or delivery of property at its terminal facility.

The services performed by RTS for ocean carriers are part of the transportation obligation of these carriers and are identical to the services performed by the ocean carriers or for the ocean carriers at dockside container freight stations.

Container freight stations at off-dock locations (such as the CFS of RTS) are necessary due to the lack of sufficient dockside property. If container freight stations were restricted to dockside locations, the resulting congestion would virtually bring CFS operations to a halt. This latter finding is supported by the opinion and conclusion of witness Day.

All member lines of the Pacific Westbound Conference have designated RTS as one of their container freight stations.

RTS provides free time at its CFS facility of seven days on inbound cargo, and of ten days on outbound cargo, both exclusive of Saturdays, Sundays and holidays, and both in accordance with the Port of Richmond's Terminal Tariff No. 1.

On both export and import cargo, RTS assesses demurrage charges at the expiration of free time at the rate of $.13 per day, or $1.67 per month, per ton W/M per 1,000 kilograms or 1 cubic meter whichever produces the greater revenue. Apparently the RTS demurrage charges are the same as the wharf storage charges of the Port of Richmond, item No. 480 of its tariff, on merchandise, n.o.s. Notice is taken of this tariff item, 3rd revised page 27.

RTS pays commissions to licensed independent ocean freight forwarders for referring business to RTS, as well as for the performance of various services, such as the pickup, delivery and copying of documents necessary for custom clearances, tracing shipments, and assisting

with handling of claims for loss or damage. Generally the commission is computed at the rate of $1.00 per ton, weight or measurement.

RTS has entered into written agreements with ocean carriers relating to rates, charges, rules and regulations with respect to services performed by RTS for such ocean carriers. Since January 1, 1979, RTS has had such written agreements with members of the Pacific Westbound Conference, Transpacific Freight Conference, Pacific Straits Conference, Pacific Australian Conference, as well as with non-conference lines and other ocean carriers, including Farrell Lines, Sea-Land Service, Seatrain Lines and Lykes Bros. Steamship Co.

At present, there are no tariffs on file with the Commission covering terminal services performed by off-dock terminal operators, and no such tariff ever has been filed.

The Pacific Westbound Conference member lines utilize the services of off-dock container freight stations in the San Francisco bay area as provided by the Conference tariff. This tariff requires members to advise the Conference in writing of the locations of the container freight stations and any changes in container freight station locations prior to using the container freight stations.

The services performed at the container freight stations of the Pacific Westbound Conference include the traditional functions associated with the receipt of cargo and performed by the ocean carrier for the shipper, such as issuance of receipts for the cargo, measurement, weighing, gathering together of the cargo, packing or loading of the cargo into containers, and the transfer of the containerized cargo from the container freight station to container yards or to shipside facilities.

These services above are included as part of the ocean carriers' obligations to transport the cargo, and the costs of these services are included in the overall ocean freight rates or as a container freight station receiving charge as an accessorial charge.

The ocean carrier assumes responsibility for the safe care and custody of cargo at the time the cargo is received at the CFS by the ocean carrier's agent, the CFS operator.

After less-than-container-load cargo is containerized at the CFS, the CFS operator, acting as the ocean carrier's agent, arranges for the movement of the container to the vessel's pierside location, and the ocean carrier assumes the cost of such drayage.

Official notice is taken, according to Pacific Westbound Conference Local and Overland Tariff No. 11, FMC-19, that it is provided that there is a CFS receiving charge of $11 per measurement ton which includes the charges for packing of cargo into containers at the CFS and the transferring of the containers from the CFS to shipside (Rules 55.1.14 and 55.2.3(b) of the tariff). If the containers are packed by the shipper and delivered by the shipper to the ocean carrier's container yard within the port terminal area, then the ocean carrier's CFS receiv-

ing charge does not apply and a lower container yard (CY) receiving charge of $6.50 per measurement ton is assessed (Rules 55.1.13 and 55.2.3(a) of the tariff).

## DISCUSSION AND CONCLUSIONS

Ocean common carriers must provide for shippers and consignees certain services which require the use of terminal facilities. The ocean carriers may provide their own facilities or they may rely in whole or in part on terminal facilities operated by other persons. Where an other person, such as a port, provides the only terminal facility, or where an ocean carrier itself does not provide any terminal facility but relies on others, clearly the port or other persons are the "other person" described in section 1 of the Act as furnishing terminal facilities in connection with common carriers by water. And in accordance with section 17 of the Act and General Order No. 15 of the Commission's General Orders, such other persons must file tariffs with the Commission showing all rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/ or delivering of property at their terminal facilities.

In the present situation ocean carriers serving the ports of San Francisco, Oakland and Richmond rely on the respondent to perform, at least in part, certain terminal services. If respondent had performed these terminal services for these ocean carriers at the waterfront or alongside the docks, it clearly would be an "other person" furnishing terminal facilities. Also, even though located away from the dock, respondent is an "other person," because it performs terminal services for the ocean carriers.

The advent of containerization and the lack of sufficient waterfront property or property alongside docks in recent years has led to the necessity for the performance of some traditional terminal services for ocean carriers at locations away from the docks. If all terminal operations for containerized cargoes were performed at the docks, presently the resulting congestion might bring terminal operations to a halt at some dock locations. Apparently it has become financially feasible to provide terminal services for ocean carriers in connection with containerized cargo at container freight stations away from the docks. Whether or not these terminal services are performed adjacent to or away from the docks, the services of the terminal operators in relation to the shipping public are the same, and equally should be and are subject to regulation.

The respondent, RTS, chose to engage in the business of furnishing terminal facilities in connection with ocean common carriers at its offdock facility in Richmond, California. Since it performs the same service away from the docks as the ocean carrier or some other terminal operator would perform at the docks, the respondent is subject to

regulation by the Federal Maritime Commission just the same as if it had chosen to engage in the terminal business at water's edge.

The definition of an "other person subject to this Act" in section 1 of the Act does not specify at the dock or at water's edge or away from the port area, but in pertinent part refers to carrying on the business of furnishing wharfage, dock, warehouse, *or other terminal facilities in connection with a common carrier by water.* (Emphasis supplied.)

A cursory reading of respondent's brief, according to Hearing Counsel, could convey the impression that RTS is engaged exclusively in providing services for ocean carriers for which services RTS is fully compensated by the ocean carriers, and which charges are included in the ocean freight rates. At page 12 of its brief, the respondent argues that in all cases in which cargo is received at the CFS facilities of RTS, the ocean carrier's tariff expressly sets forth the charges to be assessed the shipper for the CFS services performed for the ocean carrier by RTS. This is true as far as it goes.

The facts are that RTS performs other services for the shipper which are not performed for the ocean carrier by RTS, but which are performed for the shipper and paid for by the shipper. These other services are marine related, and include storage, labeling, etc., as shown in Exhibit 1A.

RTS offers a wide range of marine terminal services and actively solicits the trade to utilize these services. RTS provides free time. RTS pays commissions to forwarders for referring business to RTS's facility, for the pickup and delivery and copying of documents necessary for customs clearance, tracing shipments and assistance with handling of claims for loss or damage. RTS distributes a fact sheet (Exhibit 1A) describing in detail its operation. RTS offers many accessorial services to shippers, including complete export and marking services, crating of fragile cargo, and warehousing and storage facilities, as well as diversion capabilities with routing changes from sea to air. The fact sheet lists two pages (4 and 5 of Exhibit No. 1A) of charges for accessorial services, including container storage. It is concluded that RTS is not merely a private contractor which performs terminal services for ocean carriers, but also performs other terminal services in connection with common carriers by water for the general shipping public.

One contention of RTS sounds plausible, but in reality is not pertinent to the issues. This contention is that no regulatory purpose would be achieved by requiring RTS and other CFS operators to file tariffs setting forth *the charges which the container freight station operators assess the ocean carriers*, because these charges are a matter of private agreement between the CFS operators and the ocean carriers, and because if the ocean carriers elected to provide their own terminal facilities, the shippers would not be interested in the ocean carriers' costs for operating terminal facilities. Also, RTS contends that where the ocean carri-

ers elect to use the terminal facilities of an agent, such as RTS, the shippers have no interest in the financial arrangement between the ocean carriers and their agents. RTS is correct about these ocean carrier costs, but these are not the matters required to be filed under General Order 15. The charges to be shown in the terminal tariff are those to be charged to the shipping public, and not the contract charges agreed to between the terminal operator and the ocean carriers. As provided in General Order 15 the charges for terminal services performed for ocean carriers pursuant to negotiated contracts need not be filed.

Also, as seen, the shippers are provided services by RTS in addition to those services covered by the ocean carriers' obligations.

RTS further contends that the term "other person" in section 1 of the Act excludes any person included in the term "common carrier by water," and that while RTS does not operate as a common carrier by water, that RTS performs its services as an agent for common carriers by water, and that the services of RTS as a container freight station operator are under the direction and control of its principal or principals, which are common carriers by water, and therefore that RTS is included within the term common carrier by water, which excludes RTS from the definition of "other person."

This RTS argument is not valid for at least two reasons. First, RTS does not perform all of its marine terminal services as agent for ocean carriers. Second, respondent's argument, if followed, would mean that every marine terminal operator at every ocean and Great Lakes port which provides or furnishes for common carriers by water any of the ocean carriers' marine terminal obligations would be excluded from the term "other person." It is concluded that there is no basis for holding that "other persons" should be included in the term "common carrier by water" by virtue of the performance of certain terminal services as agents for common carriers by water. Further, if RTS and other CFS operators are to be considered as ocean carriers for the purposes of section 1 of the Act, as RTS contends, then RTS would have to file a tariff as an ocean carrier, in accord with section 18 of the Act. Surely, RTS seriously does not believe that it is an ocean common carrier with all the obligations of such a carrier, including the common carrier's tariff filing obligation.

In its brief, page 13, RTS states that the novel question presented in this proceeding is whether RTS's charges for performing CFS services for common carriers by water must be set forth in a tariff. To repeat, this is not the issue in this proceeding, but rather the central issue is whether RTS's charges to shippers and consignees for its terminal services must be set forth in a tariff. For example, RTS charges 13 cents per ton per day, or 167 cents per ton per month, on both export and import cargo as a demurrage charge (Exhibit 3, No. 13). This is not

in accordance with *wharf demurrage rates* in the Port of Richmond tariff, but rather apparently is in accordance with *wharf storage rates* in that tariff. Needless to say, the shipping and receiving public is entitled to know what demurrage rates are applicable at RTS's facility, and the proper method is through tariffs filed with the Federal Maritime Commission in accordance with General Order 15, and section 17 of the Act.

Respondent contends that the Commission may not amend its General Order No. 15 regulations *sub silentio* by an unauthorized administrative interpretation. The respondent contends that the Commission would be acting so, by including off-dock terminal operators under the same tariff filing requirements as are provided for water's edge terminal operators. The respondent's view is incorrect because no amendment of General Order No. 15 is needed or contemplated in this proceeding. The respondent and other off-dock terminal operators have brought themselves under the ambit of General Order No. 15 and section 17 of the Act, by going into the business of furnishing warehouse or other terminal facilities in connection with common carriers by water in the foreign commerce of the United States.

The respondent argues that the requirement for RTS and other off-dock CFS operators to prepare, file and distribute tariffs will be unduly burdensome on small businesses, and contrary to the President's goal to minimize the paperwork burden on persons outside the Federal government, but there is no good reason shown why off-dock terminal operators should be afforded special and preferential treatment not available to their dockside competitors.

It is ultimately concluded and found that the respondent RTS is an "other person" carrying on the business of furnishing warehouse or other terminal facilities in connection with common carriers by water in the foreign commerce of the United States, and that RTS's failure to file a tariff with the Commission is violative of General Order 15, and of section 17 of the Shipping Act, 1916.

It is further concluded and found that no evidence has been shown to prove that RTS's alleged practice of paying commissions to some freight forwarders is violative of section 16, First, or contrary to section 17 of the Act; and that no evidence has been shown to prove that RTS's alleged practice of allowing up to two weeks free time for outbound cargo is violative of section 16, First, or section 17 of the Act.

(S) CHARLES E. MORGAN
*Administrative Law Judge*

Washington, D. C.
July 16, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NOS. 78-35, 78-42, 78-43, 78-48, 78-55, 79-44 AND 79-62

ALLIED CHEMICAL, S.A.

ALLIED CHEMICAL INTERNATIONAL CORP.

*v.*

FARRELL LINES, INC.

PACIFIC AMERICA CONTAINER EXPRESS

## ORDER ADOPTING INITIAL DECISION

*November 10, 1980*

This proceeding was initiated by the filing of seven separate complaints[1] alleging overcharges in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)), on shipments of polyamide yarn transported from Charleston, South Carolina and Norfolk, Virginia to Sydney and Melbourne, Australia.[2] Each shipment was made in 40-foot dry containers and was assessed on the basis of the U.S. Atlantic & Gulf/Australia-New Zealand Conference's dual-rate contract schedule.

Polyamide yarn is rated solely on a weight basis of $270.25 per long ton.[3] The determination of the correct weight against which to assess this tariff rate is the crux of the dispute before the Commission. This determination is dependent upon the application, *vel non,* of Tariff Rules 31(c)1 and 31(c)6 of the Conference's Freight Tariff No. 3, F.M.C. No. 12.[4] Complainants argued both before the Administrative Law Judge and the Commission that Rule 31(c)6 applies to each shipment and, as a result, serves to limit the lawful freight charges. Respondents claim that this particular rule does not apply at all and that Rule 31(c)1 is the sole basis for the computation of freight charges.

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[1] The complainant in Docket No. 78-35 is Allied Chemical, S.A. The complainant in the remaining six dockets is Allied Chemical International Corporation (ACIC). Both are wholly-owned subsidiaries of the International Division of Allied Chemical Corporation and shall hereafter be referred to collectively as "Allied," when appropriate.

The respondent in Docket Nos. 78-42 and 55 is Pacific America Container Express (PACE). The respondent in the other five dockets is Farrell Lines, Inc.

[2] All seven complaints were subsequently consolidated into the present proceeding.

[3] Item 3236, Tariff No. 3, F.M.C. No. 12, 15th revised page 306.

[4] Tariff Rules 31(c)1 and (c)6 are set forth in the Appendix to this Order.

In his Initial Decision, Administrative Law Judge Seymour Glanzer: (1) held that Rule 31(c)6 was inapplicable to the shipments at issue; (2) held that ACIC was entitled to the contract rates which it had been charged by both carriers; (3) denied reparations; and (4) dismissed the complaints. Complainants filed Exceptions to the Initial Decision, to which Farrell and PACE replied.

## DISCUSSION

After thoroughly considering the basis of Allied's arguments and the entire administrative record, the Commission finds that the Presiding Officer was generally correct and, accordingly, adopts his conclusions concerning the disputed tariff rules and ACIC's entitlement to contract rates.

*Applicability of Rule 31(c)6*

Rule 31(c) of the Conference Tariff sets forth the procedures for the assessment of freight. Subsection (c)1 states that freight shall be paid on the actual weight and/or measurement of cargo in containers, but in no case less than 70% of the cubic or weight capacity. This section of the Rule thus establishes a pricing floor and can be fairly termed a minimum utilization rule. Such a rule is especially appropriate for bulky commodities like polyamide yarn which use up the cubic capacity of a container well before its weight limit is met. Pursuant to this provision of the tariff, the Respondents freighted the subject shipments on a weight basis of 70% of the weight capacity for 40 foot dry containers as stated in Note 1, *i.e.*, on a basis of 34,580 pounds.

Subsection (c)6, relied upon by Allied, states:

> In no case shall the total ocean freight charges assessed for either 20′ or 40′ equipment moving house to house or house to pier be based on weight or measurement factors in excess of either the inside cubic capacity or weight capacity as shown on the manufacturer's plate affixed to the container.

This rule, however, is simply a limit on the maximum charges which can be assessed a shipper in those cases where the container capacities, as stated on the manufacturer's plate, are actually exceeded. Since the weight of each container shipped was less than the weight capacity of the container, this section of the assessment rule does not apply to these shipments. Allied's position that this section, in conjunction with section (c)1, "limits freight charges to those based on the maximum weight of the commodity shipped that could be loaded into the container" is untenable. To reach this position Allied has had to misconstrue certain language and read additional language into these rules. The result, which requires a cumbersome computation on top of what is already a complex process, alters the clear intent of the framers of the rule. The Presiding Officer's conclusion that Rule 31(c)6 was inapplicable to the shipments in question is, therefore, affirmed by the Commission.

*Contract Rates*

In 1964, Allied Chemical Corporation, International Division, signed the Conference's Uniform Merchant's Rate Agreement. Subsequently, in 1971, Allied Chemical, S.A. was added to the contract as a "related company."[5] ACIC was never similarly made party to this Agreement. However, for 10 shipments which are part of this proceeding, both Farrell and PACE billed ACIC and collected from it freight charges based on the contract rate schedule. Neither carrier ever questioned ACIC's qualifications for the contract rate, until this proceeding was instituted. Now, on Exceptions, PACE raises the question of ACIC's entitlement to contract rates. The relevant Merchant's Rate Agreement provides in part:

> 2.(a) . . . . The term "Merchant" shall include the party signing this contract and any of his present, subsidiary, or related companies or entities who may engage in the shipment of commodities in the trade . . . and over whom he regularly exercises direction and working control . . . in relation to shipping matters. . . . The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Merchant" warrants and represents that the list is true and complete, [and] that he will promptly notify the Carriers in writing of any future changes in the list. . . .

Under the express terms of this agreement it would appear that the "Merchant" (Allied Chemical Corporation) would have to notify the carriers that ACIC was a related company in order for ACIC to take advantage of the contract rates. However, it is clear that whether or not a technically correct notification occurred, ACIC was and is a "related company" of Allied Chemical Corporation. The fact that Allied Chemical Corporation never notified the carriers "in writing" of ACIC's status does not defeat its entitlement to contract rates. The actions of the two Conference carriers presently before the Commission indicate that they deemed ACIC a company which had "the unrestricted benefits of this contract."[6] Under principles of waiver or equitable estoppel these carriers will be precluded from maintaining that ACIC was not entitled to the contract rates which they assessed against it. *See Cities Service International, Inc. v. Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976), where the Commission awarded reparations not-

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[5] The Wilputte Coke Oven Division of Allied Chemical Corporation was the only other "related company" added to the agreement.

[6] Since Allied Chemical Corporation became a signator to the agreement, all of its twelve sales and marketing subsidiaries used conference vessels for their shipments.

During 1978, these various subsidiaries were charged contract rates on 118 shipments carried by 6 different Conference members.

withstanding the fact that the shipper had not complied with a similar, related-company notice requirement of a dual rate contract.

*Appropriateness of Reparation*

Because it is unnecessary to do so in this proceeding, the Commission takes no position on the Presiding Officer's holding that even if Rule 31(c)6 were applicable to these shipments, an award of reparations to Allied would be inappropriate under the circumstances. (Initial Decision at 22-24). As discussed above, however, the Initial Decision is adopted in all other respects.

THEREFORE, IT IS ORDERED, That the Exceptions filed by Allied Chemical, S.A., Allied Chemical International Corporation, and Pacific America Container Express are hereby denied, and

IT IS FURTHER ORDERED, That to the extent mentioned above, the Initial Decision is adopted by the Commission as its own, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

## APPENDIX

Rule 31(c) *Assessment of Freight*

1. Freight shall be paid on the actual weight and/or measurement of cargo in containers but not less than:
   - A. Twenty (20) Foot Containers
     1. Cargo freighted on measurement basis - 70% of the inside cubic capacity.
     2. Cargo freighted on weight basis - 70% of the weight capacity. (See Note 1)
   - B. Forty (40) Foot Containers
     1. Cargo freighted on measurement basis - 70% of the inside cubic capacity.
     2. Cargo freighted on weight basis - 70% of the weight capacity. (See Note 1)
   - C. If both weight and measurement rates are involved, freight shall be assessed on the unused weight or cubic, whichever is smaller, to meet the minimum utilization stated in Rule 31(c) A and B. For purposes of clarification aggregate cargo will be rated on an individual basis as freighted. In determining utilization requirements set forth in Rule 31(c)1A and B either the combined total cubic or combined total weight of all cargo in the container, whichever is closer to the utilization requirements of 70% for a 20′ container or 70% for a 40′ container will be used to determine the additional cubic or weight necessary for minimum utilization. The additional cubic or weight necessary will then be rated at the level of the highest rated commodity in the container. If either the total aggregate cubic or weight of the commodities combined equals or exceeds the utilization requirement no additional freight charges will be assessed. SEE NOTE 1.

NOTE 1: For the purposes of this Tariff and the application of rates, in determining the utilization factors the containers shall be considered to have the following capacity:

| TYPE | LENGTH | CUBIC | WEIGHT |
|---|---|---|---|
| Dry | 20′ | 1100 | 40,000 lbs. |
| O/T | 20′ | 1050 | 38,500 lbs. |
| H/H | 20′ | 550 | 38,500 lbs. |
| Flat Racks | 20′ | 1017 | 40,000 lbs. |
| Insulated | 20′ | 940 | 39,500 lbs. |
| Dry | 40′ | 2200 | 49,400 lbs. |
| O/T | 40′ | 2300 | 49,400 lbs. |
| H/H | 40′ | 1100 | 49,400 lbs. |
| Flat Racks | 40′ | 2200 | 49,400 lbs. |
| Self Contained Reefer | 20′ | 816 | 36,512 lbs. |
| Self Contained Reefer | 40′ | 1800 | 49,400 lbs. |

* * *

6. In no case shall the total ocean freight charges assessed for either 20′ or 40′ equipment moving house to house or house to pier be based on weight or measurement factors in excess of either the inside cubic capacity or weight capacity as shown on the manufacturer's plate affixed to the container.

# FEDERAL MARITIME COMMISSION

## DOCKETS NOS. 78-35, 78-42, 78-43, 78-48, 78-55, 79-44 & 79-62

## ALLIED CHEMICAL, S.A. ALLIED CHEMICAL INTERNATIONAL CORP.

*v.*

## FARRELL LINES, INC. PACIFIC AMERICA CONTAINER EXPRESS A/K/A PACE LINE

The complainants have failed to establish that they were overcharged, on shipments of polyamide yarn during 1976 and 1977, in violation of section 18(b)(3) of the Shipping Act, 1916.

In computing the freight charges the respondents properly applied appropriate tariff provisions to the shipments. The shipments, as pertinent to this proceeding, were governed by Tariff Item No. 3236 and Rule 31(c)1, which, together, established a pricing floor for the shipments based on constructive weights determined by a minimum utilization rule. Complainants' arguments, which would make Rule 31(c)6 of the Tariff applicable to the shipments is without merit. Rule 31(c)6 is a maximum charge rule which becomes operative only when container capacities are actually exceeded. Patently, the latter rules cannot be made to apply to shipments whose charges are subject to the constructive weight determinations made in accordance with the minimum utilization rule.

There is no merit to the respondents' contention that Allied Chemical International Corp. is not entitled to the Tariff's contract rates. Although there was no formal written notification given to the Conference that the "Merchant" intended that Allied Chemical International Corp. be bound by the terms of the Merchants Rate Agreement, the course of conduct adhered to by the "Merchant" and the Conference's member lines clearly shows that the parties to the Rate Agreement deemed its terms binding on Allied Chemical International Corp.

The complaints filed in the consolidated proceeding are dismissed.

*William Levenstein* for Allied Chemical, S.A., and Allied Chemical International Corp., complainants.

*Edward Aptaker* and *George J. Weiner* for Farrell Lines, Inc., respondent.

*John R. Mahoney* and *Wade S. Hooker* for Pacific America Container Express a/k/a Pace Line, respondent.

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

*Adopted November 10, 1980*

This is a consolidated proceeding incorporating seven complaints severally filed by two wholly owned subsidiaries of Allied Chemical Corporation against two members (individually) of the U. S. Atlantic and Gulf/Australia-New Zealand Conference (hereafter, the Conference), pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. 821.[2] Each complaint alleges an overcharge in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3),[3] arising from the transportation of house to house containers of "polyamide yarn" from Charleston, South Carolina, or Norfolk, Virginia, to Sydney or Melbourne, Australia. All of the shipments were transported during the period from October 5, 1976 through July 16, 1977, and payment of the freight charges took place between October 27, 1976 and August 16, 1977.[4] Each complaint asks for reparation and the issuance of a cease and desist order.

The complainant, in Docket No. 78-35, is Allied Chemical, S.A. In the other six dockets, the complainant is Allied Chemical International Corp. (ACIC).[5] In Docket Nos. 78-35, 78-43, 78-48, 79-44 and 79-62,

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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] 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.

[3] 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.

[4] Each complaint was filed within two years of the date of payment of the freight charges. Thus, none of the causes of action is time barred by the jurisdictional statute of limitations of section 22. 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).

[5] As will be seen, *infra,* the respondents contend that ACIC is ineligible for the Conference's contract rates because ACIC did not become a signatory to the Conference's Merchant Rate Agreement.

the respondent is Farrell Lines, Inc. In Docket Nos. 78-42 and 78-55, the respondent is Pacific America Container Express a/k/a Pace Line.[6]

There is little or no disagreement regarding the facts. Primarily, the dispute centers on the applicability of a particular tariff rule to the shipments. The complainants urge that Tariff Rule 31(c)6[7] applies to each shipment, while the respondents claim that it does not apply to any of the shipments. That rule is a maximum charge rule and provides:

> In no case shall the total ocean freight charges assessed for either 20′ or 40′ equipment moving house to house or house to pier be based on weight or measurement factors in excess of either the inside cubic capacity or weight capacity as shown on the manufacturer's plate affixed to the container.

There is a second issue in the proceeding. It derives from the primary issue but applies only to ACIC shipments. ACIC was billed for and paid the freight charges for the shipments of polyamide yarn on the basis of the Conference's contract rate schedule. Contending, however, that ACIC was not a signatory to the Conference's Merchant Rate Agreement and, therefore, not entitled to the lower contract rates, the respondents argue that even if ACIC's position on the primary issue is found to be meritorious the amount of reparation should be determined by reference to the non-contract rates in effect at the time of shipment. The case was submitted on stipulated facts.[8]

## FACTS[9]

1. ACT and Farrell are common carriers by water within the meaning of the Shipping Act, 1916, serving the trade from U.S. Atlantic Coast ports to ports in Australia under the trade name Pace Line and Farrell Lines, respectively. At all times here relevant, ACT and Farrell have been members of the U.S. Atlantic and Gulf/Australia-New Zealand Conference (the "Conference") in that trade.

2. ACIC and Allied Chemical, S.A., are wholly-owned subsidiaries of the International Division of Allied Chemical Corporation.

On July 6, 1964, Allied Chemical Corporation, International Division, signed the Conference's Merchant's Rate Agreement. Shippers (merchants) signing that agreement become entitled to contract rates, which are lower than non-contract rates, when shipping with members of the Conference.[10] Under the express terms of that agreement "Con-

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[6] Pace Line's appearance in the proceeding was made in the style of Associated Container Transportation (Australia) Ltd. Trading as Pace Line (ACT).

[7] U. S. Atlantic & Gulf/Australia-New Zealand Conference Freight Tariff No. 3, F M.C. No. 12. 3rd revised p. No. 38, effective May 3, 1976.

[8] Revised Joint Stipulation of Facts dated November 6, 1979.

[9] Additional Facts appear in the Discussion and Conclusion portion of this decision.

[10] Merchant's Rate Agreement. paragraph 6.

tract rates on every commodity or class of commodities shall be lower than the ordinary rates set forth in the . . . tariff by a fixed percentage of fifteen (15) per centum of the ordinary rates."[11]

Generally, that agreement defines "Merchant" to include subsidiaries or other related companies or entities of the shipper, but requires the shipper to list those related companies at the foot of the agreement and to notify the Conference, in writing, of changes to be made in the future.[12] At the time the agreement was signed, no related companies were shown on the list. Thereafter, in accordance with the International Division's letter of October 5, 1965, Wilputte Coke Oven Division of Allied Chemical Corporation was added. Later, Allied Chemical, S.A.,

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[11] *Id.*

[12] As pertinent, paragraph 2 of the Merchant's Rate Agreement provides:

2. (a) The Merchant undertakes to ship or cause to be shipped all of its ocean shipments, for which contract and non-contract rates are offered, moving in the trade on vessels of the Carriers unless otherwise provided in this agreement.

The term "Merchant" shall include the party signing this contract and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant", any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Merchant promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Merchant.

The Carriers agree that they will not provide contract rates to anyone not bound by a merchant's rate agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person.

(b) (1) If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.

(2) If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.

(3) It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(4) For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment:

(a) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(b) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.

was added, pursuant to International Division's letter of August 16, 1971. No such formal written notification was sent by International Division to the Conference concerning ACIC.

3. The two proceedings against ACT involve four shipments of one or more 40-foot dry containers of "polyamide yarn," carried on a house-to-house basis by ACT from Charleston or Norfolk to Melbourne or Sydney under bills of lading issued to ACIC. In the chart below, for each bill of lading by docket number, are the number and issue date of such bill of lading; the date of payment and total amount of freight paid by ACIC to ACT under such bill of lading; and the BIC code (serial) number of the containers[13] carried under such bill of lading:

| Dkt. No. | B/L No. | Issued Date | Payment Date | Freight Paid | BIC Code No(s). |
|---|---|---|---|---|---|
| 78-42 | 6255959 | 11/9/76 | 12/6/76 | $ 4,922.24 | UFCU203831-7 |
| 78-55 | 6257141 | 12/28/76 | 1/21/77 | 4,834.89 | ACTU288342-7 |
| 78-55 | 6257150 | 12/28/76 | 1/26/77 | 9,669.79 | UFCU207909-1 |
| | | | | | ACTU2881199-6 |
| 78-55 | 6257168 | 12/28/76 | 1/21/77 | 14,504.68 | ACTU288036-7 |
| | | | | | ACTU288530-6 |
| | | | | | UFCU204765-9 |

4. The five proceedings against Farrell involve shipments of forty-two, 40-foot dry containers of "polyamide yarn," carried on a house-to-house basis by Farrell from Charleston to Sydney and Melbourne under bills of lading issued to ACIC or Allied Chemical, S.A. In the chart below, for each bill of lading by docket number, are the number and issue date of such bill of lading; the date of payment and total amount of freight paid by ACIC or Allied Chemical, S.A., to Farrell under such bill of lading; and the BIC code (serial) numbers of the containers[14] carried under such bill of lading:

| Docket No. | B/L No. | Date Issued | Payment Date | Freight Paid | BIC Code No. |
|---|---|---|---|---|---|
| 78-35 | 615 | 10/5/76 | 10/27/76 | $39,388.79 | FRLL 2014431-9 |
| | | | | | FRLL 201670-3 |
| | | | | | FRLL 201332-4 |
| | | | | | FRLL 201639-1 |
| | | | | | CTIU 414276-5 |
| | | | | | INTU 428284-P |
| | | | | | ICSU 204157 |
| | | | | | CTIU 411712-4 |
| | | | | | CTIU 411434-6 |
| 78-43 | 608 | 11/3/76 | 11/29/76 | 4,922.25 | ICSU 212144-7 |
| | 609 | 11/3/76 | 11/29/76 | 44,300.23 | FRLL 201123-4 |
| | | | | | FRLL 201600-4 |

[13] Appendix I is a full listing of those containers showing their inside cubic capacity, in cubic feet, according to the manufacturer's plate affixed to each container.

[14] *Id.*

| Docket No. | B/L No. | Date Issued | Payment Date | Freight Paid | BIC Code No. |
|---|---|---|---|---|---|
| | | | | | INTU 423129-0 |
| | | | | | FRLL 201148-7 |
| | | | | | FRLL 201175-9 |
| | | | | | CTIU 200703 |
| | | | | | FRLL 201080-8 |
| | | | | | ICSU 209711 |
| | | | | | FRLL 201561-1 |
| | 610 | 11/3/76 | 11/29/76 | 4,273.88 | FRLL 201451 |
| 78-48 | 604 | 11/24/76 | 12/20/76 | 10,017.40 | FRLL 201379-3 |
| | | | | | FRLL 201302-6 |
| | 606 | 11/24/76 | 12/20/76 | 10,017.40 | FRLL 201131-6 |
| | | | | | FRLL 201220-4 |
| | 608 | 11/24/76 | 12/16/76 | 15,026.09 | FRLL 201016-1 |
| | | | | | FRLL 201513-7 |
| | | | | | CTIU 292617-7 |
| | 612 | 12/11/76 | 1/10/77 | 10,017.40 | INTU 432394-6 |
| | | | | | FRLL 201108-6 |
| 79-44 | 605 (Sydney) | 4/22/77 | 5/22/77* | 4,909.52 | FRLL 201157-4 |
| | 605 (Melbourne) | 4/22/77 | 5/22/77* | $54,004.78 | FRLL 201001-1 |
| | | | | | FRLL 201259-1 |
| | | | | | FRLL 201032-5 |
| | | | | | CTIU 415157-7 |
| | | | | | FRLL 201564-6 |
| | | | | | FRLL 201279-7 |
| | | | | | FRLL 201071-0 |
| | | | | | ICSU 220017-1 |
| | | | | | FRLL 201437-8 |
| | | | | | SSIU 219131-6 |
| | | | | | SSIU 219053-6 |
| 79-62 | 605 | 7/16/77 | 8/16/77 | 4,925.04 | FRLL 201191-2 |

*Approximate.

5. The tariff applicable to the foregoing shipments is the Conference's Freight Tariff No. 3, F.M.C. No. 12.[15] In accordance with applicable provisions of that Tariff, ACT and Farrell performed the following computations to determine the amounts they billed for freight charges:

*Step 1:*

Since the rate under the commodity item applicable to polyamide yarn (Tariff, 15th revised p. 306, Item 3236) is on a weight basis,[16]

[15] See n. 7, *supra.*

[16] As pertinent, Item 3236 provides for a contract rate of $270.25 and a non-contract rate of $317.75 per ton of 2240 pounds from Atlantic Ports to Australia for shipments measuring not more than 100

ACT and Farrell applied Tariff Rule 31(c)1B providing that the freight on a 40-foot dry container would be assessed on the basis of not less than 70 percent of the weight capacity thereof specified in Note 1 to Rule 31(c)1, i.e., on the basis of not less than 34,580 lbs. (70 percent of 49,400 pounds).[17] Since the actual weight of the contents of each container was less than 34,580 pounds, the freight was calculated thereafter on the basis that the cargo carried under èach bill of lading weighed 34,580 pounds for each container.

*Step 2*:

Pursuant to the Note to Item 3236 (specifying procedures for determining the exact number of cubic feet per 2240 pounds), for each bill of lading the cubic measurement per 2240 pounds was calculated on the basis of the number of cubic feet of cargo specified in the bill of lading, divided by the weight of the cargo (i.e., 34,580 pounds) determined under Step 1 above, multiplied by 2,240.

*Step 3*:

Pursuant to the contract rate specified in Item 3236, each bill of lading was given a base commodity rate of $270.25 per 2240 pounds, except for Farrell Bill of Lading No. 615 where, in the belief that Allied Chemical, S.A., was entitled to the rate in effect prior to a contemporaneous rate increase, that bill of lading was given a base commodity rate of $241.50 per 2240 pounds.[18]

*Step 4*:

The additional commodity rate applicable to each bill of lading pursuant to the provisions of Item 3236 was calculated on the basis of $2.80 per ton of 2240 pounds (except for Farrell Bill of Lading No. 615, where it was calculated on the basis of $2.50), multiplied by the amount

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cubic feet per 2240 pounds. For shipments over 100 cubic feet per 2240 pounds. $2.80 per ton of 2240 pounds, for each cubic foot over 100 cubic feet. would be added to the rate.

[17] Tariff Rule 31(c), entitled "Assessment of Freight," appears at 2nd revised p. 36, 1st revised p. 37 and 3rd revised p. 38 of the Tariff. Rule 31(c)1B provides, as pertinent:

1. Freight shall be paid on the actual weight and/or measurement of cargo in containers but not less than:

B. Forty (40) Foot Containers— Cargo freighted on weight basis— 70% of the weight capacity. (See Note 1)

Note 1 provides, as pertinent:

For the purposes of this Tariff and the application of rates, in determining the utilization factors the containers shall be considered to have the following capacity:

| *Type* | *Length* | *Cubic* | *Weight* |
|---|---|---|---|
| Dry | 40' | 2200 | 49,400 lbs. |

Allowances will be granted on cargo meeting the requirements of Rule 31(c)1 as follows:

House-to-House—An allowance of 10% of the total ocean freight charge up to a maximum of $13.00 per ton.

[18] Following an informal conference attended by all parties, Farrell submitted a recomputation of the freight charges for Bill of Lading No. 615. The recomputation utilized the methodology described in paragraph 5 but was based upon a base rate of $270.25 instead of $241.50. The freight charges should have been $44,300.22 instead of $39,388.79, as shown in paragraph 4. In the light of the conclusions which follow, Farrell should determine whether an adjustment in its billing is required.

by which the cubic measurement per 2240 pounds (i.e., the amount derived under Step 2 above) exceeded 100 cubic feet per 2240 pounds.

*Step 5*:

The total commodity rate applicable to the shipment was calculated by adding the amounts obtained under Steps 3 and 4.

*Step 6*:

The total freight payable on each bill of lading under Item 3236 was calculated on the basis of the total commodity rate, multiplied by the weight of the cargo (i.e., 34,580 pounds) determined under Step 1 above, divided by 2,240.

*Step 7*:

Pursuant to Note 1 to Rule 31(c)1, a house-to-house container allowance in the amount of $13.00 per 2240 pounds was subtracted from the amount obtained under Step 6.

*Step 8*:

In the case of the containers shipped with ACT under the three bills of lading dated December 28, 1976, pursuant to Tariff Rule 27, a negative currency surcharge in the amount of 3.47[19] percent was subtracted from the balance obtained under Step 7. In the case of the containers shipped with Farrell under two bills of lading dated April 22, 1977, and one bill of lading dated July 16, 1977, pursuant to Rule 27, a negative currency surcharge in the amount of 1.98[20] percent and 1.67[21] percent, respectively, was subtracted from the balance obtained under Step 7.

6. Under the steps described in paragraph 5 above, the freight charged on each bill of lading amounted to the following:

[19] Tariff, 14th revised p. 27.

[20] Tariff. 15th revised p. 27.

[21] Tariff, 16th revised p. 27.

## ACT Bills of Lading Numbers

| | 6255959 | 6257141 | 6257150 | 6257168 |
|---|---|---|---|---|
| Step 1 (in lbs.) | 34,580 | 34,580 | 69,160 | 103,740 |
| Step 2 (in cu. ft. per 2,240 lbs.) | 122 | 124 | 124 | 124 |
| Step 3 (in $ per 2,240 lbs.) | $ 270.25 | $ 270.25 | $ 270.25 | $ 270.25 |
| Step 4 (in $ per 2,240 lbs.) | $ 61.60 | $ 67.20 | $ 67.20 | $ 67.20 |
| Step 5 (in $ per 2,240 lbs.) | $ 331.85 | $ 337.45 | $ 337.45 | $ 337.45 |
| Step 6 | $5,122.93 | $5,209.38 | $10,418.77 | $15,628.15 |
| Step 7 | $ (200.69) | $ (200.69) | $ (401.38) | $ (602.06) |
| | $4,922.24 | $5,008.69 | $10,017.39 | $15,026.09 |
| Step 8 | | $ (173.80) | $ (347.60) | $ (521.41) |
| Total Freight | $4,922.24 | $4,834.89 | $ 9,669.79 | $14,504.68 |

Farrell Bill Of Lading Numbers

| | 615 | 608 | 609 | 610 | 604 | 606 | 608 | 612 | 605 (Sidney) | 605 (Melbourne) | 605 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Step 1 ( in lbs.) | 311,220 | 34,580 | 311,220 | 34,580 | 69,160 | 69,160 | 103,740 | 69,160 | 34,580 | 380,380 | 34,580 |
| Step 2 (in cu. ft. per 2,240 lbs.) | 122 | 122 | 122 | 107 | 124 | 124 | 124 | 124 | 124 | 124 | 124 |
| Step 3 (in $ per 2,240 lbs.) | 241.50 | 270.25 | 270.25 | 270.25 | 270.25 | 270.25 | 270.25 | 270.25 | 270.25 | 270.25 | 270.25 |
| Step 4 (in $ per 2,240 lbs.) | 55 | 61.60 | 61.60 | 19.60 | 67.20 | 67.20 | 67.20 | 67.20 | 67.20 | 67.20 | 67.20 |
| Step 5 (in $ per 2,240 lbs.) | 296.50 | 331.85 | 331.85 | 289.85 | 337.45 | 337.45 | 337.45 | 337.45 | 337.45 | 337.45 | 337.45 |
| Step 6 | $41,194.97 | $5,122.93 | $46,106.41 | $4,474.56 | $10,418.77 | $10,418.77 | $15,628.15 | $10,418.77 | $5,209.38 | $57,303.23 | $5,209.38 |
| Step 7 | (1,806.18) | (200.68) | (1,806.18) | (200.68) | (401.37) | (401.37) | (602.06) | (401.37) | (200.69) | (2,207.56) | (200.69) |
| Step 8 | — | — | — | — | — | — | — | — | (99.17) | (1,090.89) | (83.65) |
| Total Freight | $39,388.79 | $4,922.25 | $44,300.23 | $4,273.88 | $10,017.40 | $10,017.40 | $15,026.09 | $10,017.40 | $4,909.52 | $54,004.78 | $4,925.04 |

7. It is beyond cavil that, absent the presence of Rule 31(c)6 in the tariff, the freight charges shown in paragraphs 3, 4 and 6, above, satisfied the Tariff's requirements.[22] Indeed, complainants have "no quarrel with the carriers' method of arriving at the total freight charges to this point."[23]

8. However, in the belief that the wording of Rule 31(c)6, which provides that the "total ocean freight charges" shall not "be based on weight or measurement factors in excess of either the inside cubic capacity or weight capacity as shown on the manufacturers plate affixed to the container," is a rule which serves to supersede and further diminish the minimum utilization[24] rule embodied in Rule 31(c)1B, the complainants have constructed a different methodology to compute freight charges. The following chart shows how that method affects the minimum utilization and reflects the amount of freight charges which would result if their method were employed. The chart also compares their result with the respondents' computations and shows the difference between the two methods under the column heading entitled "Amount Claimed."

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[22] This finding assumes that ACIC was entitled to contract rates.

[23] Complainant's letter to me dated November 9, 1979, p. 2.

[24] Rule 31(c)1 is a minimum utilization rule, one part of which, Rule 31(c)1A, deals with measurement utilization, while the other part, Rule 31(c)1B, deals with weight utilization.

| Docket | B/L | Weight (1) | Rate | Subtotal | House to House Allowance (2) | Negative Surcharge | Complainants' Computation of Total Freight | Respondents' Computation of Total Freight (Amount Paid by Respondents) | Amount Claimed |
|---|---|---|---|---|---|---|---|---|---|
| 78-35 | 615 | 214832 as 271291 | $331.85 | $40,190.35 | $1,574.43 | | $38,615.92 | $39,388.79 | $772.87 |
| 78-42 | 6255959 | 23592 as 29783 | 331.85 | 4,412.27 | 172.85 | | 4,239.42 | 4,922.24 | 682.82 |
| 78-43 | 608 | 23215 as 28642 | 331.85 | 4,208.95 | 166.27 | | 4,042.68 | 4,922.25 | 876.79 |
| 78-43 | 609 | 208918 as 263825 | 331.85 | 39,085.29 | 1,531.14 | | 37,554.15 | 44,200.23 | 6,746.08 [25] |
| 78-43 | 610 | 24862 as 35959 | 289.85 | 4,652.06 | 208.69 | | 4,444.37 | 4,273.88 | No Overpayment |
| 78-48 | 604 | 43415 as 54283 | 337.45 | 8,176.41 | 314.99 | | 7,861.42 | 10,017.40 | 2,155.98 |
| 78-48 | 606 | 41573 as 51993 | 337.45 | 7,832.61 | 301.73 | | 7,530.88 | 10,017.40 | 2,486.52 |
| 78-48 | 608 | 65470 as 82053 | 337.45 | 12,360.79 | 476.19 | | 11,884.60 | 15,026.09 | 3,141.49 |
| 78-48 | 612 | 46121 as 57607 | 337.45 | 8,679.21 | 334.36 | | 8,344.85 | 10,017.40 | 1,672.55 |
| 78-55 | 6257141 | 22463 as 27799 | 337.45 | 4,187.84 | 161.33 | 139.72(3) | 3,886.79 | 4,834.89 | 948.10 |
| 78-55 | 6257150 | 44261 as 55231 | 337.45 | 8,320.40 | 320.54 | 277.60(3) | 7,722.26 | 9,669.79 | 1,947.53 |
| 78-55 | 6257168 | 67429 as 83961 | 337.45 | 12,648.50 | 487.27 | 421.99(3) | 11,739.24 | 14,504.68 | 2,765.44 |
| 79-44 | 605 | 20954 as 26211 | 337.45 | 3,848.62 | 152.12 | 75.17(4) | 3,721.33 | 4,909.52 | 1,188.19 |
| 79-44 | 605 | 271187 as 340505 | 337.45 | 51,295.78 | 1,976.13 | 976.53(4) | 48,343.12 | 54,004.78 | 5,661.66 |
| 79-62 | 605 | 23600 as 29526 | 337.45 | 4,447.59 | 171.34 | 74.27(5) | 4,201.98 | 4,925.04 | 743.06 |

(1) The greater weight is that based upon the actual cubic capacity of each container. Formula - Actual Weight divided by Actual Measurement x cubic capacity of containers.
(2) At $13/ton
(3) Negative Surcharge - 3.47%
(4) Negative Surcharge - 1.98%
(5) Negative Surcharge - 1.67%

25 Under complainants' theory, Rule 31(c)6 does not apply to loaded containers with a "weight"(as shown in the third column) which exceeds 70% of the weight capacity of a 40' dry container (34,580 pounds).

## DISCUSSION AND CONCLUSION

### I: RULE 31(C)6

### A: The Rule is a maximum charge and not a maximum utilization rule and clearly does not undercut the minimum utilization rule

*** *** ***

Each complaint was filed under that portion of the Commission's Rules of Practice and Procedure dealing with Shortened Procedure.[26] Among other requirements, the Shortened Procedure Rules provide for a memorandum of arguments to accompany the complaint at the time the complaint is filed.[27]

As indicated in Fact No. 8, the complainants' case is predicated on the theory that Rule 31(c)6 overrides the minimum utilization rule in the Tariff. The argument they make in support of this theory in the memoranda attached to the several complaints, e.g.--Memorandum attached to Complaint in Docket No. 78-43 at p. iii, is that "Rule 31(c)6 of the Tariff limits freight charges to those based on the maximum weight of the *commodity shipped* [emphasis supplied] that could be loaded into the container."

By way of explanation of their belief that Rule 31(c)6 "means that the carrier will not collect freight charges for cargo in excess of those for a fully loaded container of the *commodity shipped* [emphasis supplied],"[28] complainants "note especially that Rule 31(c)6 limits the allowable charges when *either* the weight or the measurement capacity of the container would be exceeded if the 70% utilization factor is used."[29] They go on to point out that "Here the 70% weight utilization factor is 34,580 lbs., which is more than the weight of this commodity, as shipped, that a 2200 cu. ft. 40′ container could actually hold."[30] From this they conclude that "Accordingly, the maximum charges must be those computed on the basis of the theoretical fully loaded weight of this commodity."[31]

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[26] Rules 181-187, 46 C.F.R. 502.181-.187.

[27] Rule 182, 46 C.F.R. 502.182.

[28] Memorandum attached to Complaint in Docket No. 78-43 at p. iii.

[29] *Id.*, p. iv.

[30] *Id.*

[31] *Id.*

The cited Memorandum attached to the Complaint also made two other observations in support of complainants' argument. First, it noted that Rule 31(c)6 is shown in the Tariff as a reduction. It is implicit in their theory, although they do not explicitly say, that it is a reduction of charges computed under Rule 31(c)1B. Second, it noted that it was not relying on the cubic capacity shown on the manufacturer's plate affixed to the container to compute damages under its theory of the case because "the shipper would not as a practical matter even look at the manufacturers plate on the container." Memorandum attached to the Complaint at p. iii. This statement was apparently the justification for using the utilization factor of 2200 cubic feet shown in Note 1 of Rule 31(c) in computing damages, initially. Now that complainants have learned the actual cubic capacity, see Appendix I, they have recomputed their damages. The recomputation is included in the chart in paragraph 8 of the Facts.

All of this means, according to complainants, that "to determine what weight of the commodity shipped the containers could hold we must find out what each cubic foot of the commodity weighed."[32] This calculation is done by performing the exercise of dividing the total actual weight by the number of actual cubic feet the shipment measured and multiplying that result by the cubic feet shown on the manufacturer's plate. The result of that exercise provides the "weight factor" which the complainants contend that Rule 31(c)6 says cannot be exceeded.[33] The entries under the heading "Weight," in the third column of the chart in paragraph No. 8 of the Facts, reflect the application of this exercise to the shipments involved in this proceeding.

At the informal conference, see n. 18, *supra*, I directed complainants to amplify their argument by explaining their understanding of the word "factor" as it appears in Rule 31(c)6. By letter dated September 17, 1979, they made the following answer:

> Staying solely within the tariff itself, you will note that the word "factor" appears in two places in Rule 31(c). Note 1 on page 37 speaks of "determing the utilization factor" and Rule 31(c)6 speaks of "weight or measurement factors". In Note 1 there is one column showing cubic capacities for the listed types of containers and a second column showing the weight capacities of the same containers. The tariff provides that freight will be assessed upon not less than 70% of the weight capacity of the container. Since in our cases the containers were all forty foot dry containers the utilization factor would be 70% of 49,400 pounds or 34,580 pounds. That is the weight factor - not an actual weight, but an arbitrary figure specified by the carrier, which when multiplied by the dollar rate would normally result in the total freight charge.
>
> But Rule 31(c)6 specifies that the charges so obtained, rate times weight factor, shall not exceed those obtained by use of a weight factor in excess of the inside cubic capacity of the container. In each case, excepting the shipment under bill of lading 610, the weight factor obtained by taking 70% of 49,400 pounds, or 34,580, would indeed exceed the cubic capacity of the container. Rule 31(c)6 limits charges to the use of a weight factor which is not in excess of the cubic capacity of the container. In other words, what weight of the commodity as shipped would fit into the container used to carry that shipment? How much polyamide yarn, as actually shipped, could a 40 foot container theoretically hold. That weight is the maximum factor that may be used to compute the charges.
>
> Since Rule 31(c)6 applies, unless otherwise specified, to the assessment of charges for all shipments in containers and since

[32] Reply Memorandum of Complainant, pp. 4-5.

[33] *Id.*, p. 5

> some rates and rate items apply on a measurement basis and some as here, apply on a weight basis, the rule speaks of weight or measurement factors. If the actual weight of a given shipment exceeds 70% of the weight shown in the last column of Note 1, charges would be computed on that weight and the weight factor would be irrelevant. In any event, 70% of the cubic capacity of a container is a measurement factor and 70% of the weight capacity is the weight factor.

The argument thus made by complainants has a surface allure, but its infirmity lies in its dependence upon a contrived misreading of Rule 31(c)6, a rule which "simply has no bearing on the minimum utilization requirements of container shipments."[34] Indeed, the contrived misreading, itself, turns upon complainants' unilateral injection of language into Rule 31(c)6 which that rule neither contains nor was intended to contain, either expressly or inferentially.

The weakness of the complainants' contentions becomes apparent when the role of Rule 31(c)1B and its interplay with Item No. 3236 of the Tariff and the purpose of Rule 31(c) 6 are understood. Rule 31(c)1B is a minimum utilization rule which provides that, with respect to cargo freighted on a weight basis, rates will be assessed on a minimum of 70 percent of the weight capacity of the container if the actual weight of the shipment is below that level. This minimum utilization provision acts to reduce complainants' shipping costs because it is applicable to "bulky" commodities, such as yarn which has a high measurement to weight ratio. Under Tariff Item 3236, such commodities are rated on a weight basis, although they are subject to minimum utilization requirements in view of the "deadfreight" represented by the unused weight capacity of the container.

Because the minimum utilization rule requires the shipper to pay freight on a certain amount of unused weight capacity, Tariff Item No. 3236 allows the shipper to make use of the unused capacity for which he is charged in calculating the measure of cubic feet per long ton of cargo. Thus, Item No. 3236 provides that, where the minimum utilization provision applies, a weight equivalent to the minimum utilization factor, rather than the actual weight of the cargo, will be used in determining the cubic measurement per 2,240 pounds. For example, as reflected in the bills of lading in Docket No. 78-43, these shipments had actual weights and actual measurements as follows:

1) Bill of Lading 608: one container at 23,215 pounds (10.36 long tons), measuring 1,890 cubic feet = 182 cubic feet per long ton.

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[34] See letter dated February 14, 1978, from Farrell to Ocean Freight Consultants, Inc., in Docket No. 78-48, declining polyamide yarn claims filed on behalf of Allied Chemical Corp. See, also, letter dated March 8, 1978, from the Conference to Ocean Freight Consultants in Docket No. 78-48, regarding those claims.

2) Bill of Lading 609: nine containers totalling 208,918 pounds (93.27 long tons), with an aggregate measurement of 17,010 cubic feet = 182 cubic feet per long ton.
3) Bill of Lading 610: one container at 24,862 pounds (11.10 long tons). measuring 1,649 cubic feet = 149 cubic feet per long ton.

In calculating the applicable rate, Farrell used the minimum weight utilization factor of 34,580 pounds per container, for all 11 containers. As a result, the number of cubic feet per long ton was factored in at 122 (Bill of Lading 608), 122 (Bill of Lading 609), and 106 (Bill of Lading 610), instead of the actual cubic feet per long ton, as the Tariff required.

The unadorned language of Rule 31(c)6 makes its twofold purposes clear. It is designed to discourage overloading of containers beyond their stated capacities as shown on the manufacturer's plate and to assure that the shipper is not required to pay more for the shipment than he would for a shipment weighing or measuring the amount shown as the container's capacity.[35] For example, an item such as a sailboat, might fill out the stated cubic capacity of a container, but still leave room for the stowage of spare parts under portions of the curved keel or transom. Thus, if the outside dimensions of the boat measured 2200 cubic feet, but empty space in the container allowed stowage of another 800 cubic feet of parts, it would not be fair to charge the shipper for more than the stated capacity of the container. By limiting the basis for total charges to the measurement or weight capacity of the container as shown on the manufacturer's plate, this result is accomplished, and by accomplishing this result, Rule 31(c)6 causes a reduction of tariff charges separate and apart from the operative provisions of Rule 31(c)1A or B.

But, despite this clarity of purpose, the complaints have innovatively restructured Rule 31(c)6, converting it from a maximum charge rule to a maximum utilization rule. This is demonstrated by the sequence of elaborate calculations, superimposed on the cumbersome Rule 31(c)1B computations, which they engaged in to show that if the cubic capacity of a 40 foot container were loaded with polyamide yarn, the weight of the containers, e.g., in Docket No. 78-43, would have been 28,642 pounds (Bill of Lading 608), 29,314 pounds (Bill of Lading 609),[36] and 35,959 pounds (Bill of Lading 610). Therefore, the complainants contend that except for the container carried under Bill of Lading 610, none of the containers could have physically accommodated 34,500 pounds (the minimum utilization factor) of polyamide yarn. Applying

[35] This accounts for the cumbersome arithmetical computations under the minimum utilization rule.

[36] There were nine containers in this shipment. The figure of 29,314 is an average arrived at by dividing the weight shown in the 3rd column of the chart in paragraph No. 8 of the Facts by nine.

those computations to their argument, complainants conclude that the shipments (except for Bill of Lading 610) were charged for on the basis of a weight factor "of the commodity shipped" in excess of the inside cubic capacity of the container.

This restructuring of Rule 31(c)6 by complainants is not warranted. Rule 31(c)6 simply bars the assessment of freight charges based on measurement or weight factors, respectively,[37] "in excess of either the inside cubic capacity or weight capacity, as shown on the manufacturer's plate affixed to the container." Manifestly, complainants' error in reading "of the commodity shipped" into the rule stems from their failure to differentiate between "weight or measurement factors" as used in Rule 31(c)6 and the weight and measurement "*utilization factors*" as used in Rule 31(c) Note 1. Conveniently and selectively, the complainants treat those factors as being one and the same merely because "the word 'factor' appears in two places in Rule 31(c)."

A further reason for complainants' construction of Rule 31(c)6 seems to lie in the mistaken belief that because the minimum utilization rule allows for constructive weight, Rule 31(c)6 should be deemed to authorize theoretical weights. However, Rule 31(c) clearly states that "freight shall be paid on the *actual* [emphasis supplied] weight and/or measurement of cargo," except in those circumstances in which the minimum utilization rule governs. No similar exception is provided for Rule 31(c)6 which addresses only maximum charges and not minimum utilization.

There are certain well established principles which serve as guides to construing tariffs. Some of the more pertinent principles of tariff construction and interpretation are as follows:[38]

> (a) The terms used in a tariff must be read in the sense in which they are understood generally and accepted commercially. All of the pertinent provisions of a tariff must be considered together and the reasonable construction which results from such consideration is controlling.
>
> (b) Tariffs must be considered as a whole. Their intent is not to be defeated by reason of the uncertainty of any particular item, if some other item in the same tariff clearly indicates how the item should be construed.
>
> (c) Neither carriers nor shippers can be permitted to urge for their own purpose a strained and unnatural tariff construction.

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[37] The meaning of Rule 31(c)6 is clear and not ambiguous, even though the word "respectively" does not appear. This does not mean that the rule could not be improved, grammatically, by the inclusion of that word or a term such as, "measurement or freight factors, as freighted." But, the absence of grammatical purity in this instance scarcely calls for a determination of ambiguity or lack of clarity.

[38] See *National Cable and Metal Co. v. American-Hawaiian Steamship Company*, 2 U.S.M.C. 470, 473 (1941); Docket No. 37027F, *Scope Imparts, Inc. v. The Atchision, Topeka and Santa Fe Railway Company* Interstate Commerce Commission Decision, Decided January 28, 1980, Slip opinion at p. 3.

The application of those principles to the tariff provisions involved in this proceeding underscores the conclusion that complainants' interpretation of Rule 31(c)6 is tortured, illogical and unfair. This may be seen from a brief examination of the shipment carried under Bill of Lading No. 609 in Docket No. 78-43.

The cubic measurement carried in each container was arrived at not by the volume of the commodity shipped, but by the volume of the cartons in which the commodity was packed. Each of the nine containers held 108 cartons measuring 1,890 cubic feet. However, the weight of those 108 cartons varied from 22,227 pounds to 23,640 pounds.[39] It does not take the wisdom of a Solomon to recognize that, under complainants' construction of Rule 31(c)6, a shipper could configure its shipments in such a way that it could obtain transportation for a lower cost than it could under a minimum utilization rule, even though it is well known and understood that a minimum utilization rule is designed as a pricing floor for the carriage of a container.[40] It is just not plausible to reason that the Conference introduced Rule 31(c)6 in its tariff to subvert the minimum utilization rule. Yet it would take just such logic to give Rule 31(c)6 the meaning that complainants attribute to it.

While it is quite correct to say, as complainants do, that "Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with the carrier's canons of construction." *National Cable & Metal Co. v. American Hawaii S.S. Co.*, 2 U.S.M.C. 470, 473. "It is the meaning of express language employed in the tariff and not the unexpressed intention . . . which controls . . ." *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 608; it is inappropriate to conclude that those rules of construction militate in favor of the complainants' argument. In the context of the tariff as a whole, Rule 31(c)6 clearly and unambiguously expresses its framers' intent. It is not applicable to the shipments in this proceeding.[41]

B: Assuming Rule 31(c)6 does supersede the minimum utilization rule, reparation would be inappropriate

Moreover, even if there were some merit to complainants' theory that Rule 31(c)6 does apply to the shipments because somehow despite

[39] Cf. Docket No. 78-48 in which the carton each measured 1,907 cubic feet, but weighed anywhere from 20,577 pounds to 23,566 pounds.

[40] It is significant that the only shipment carried in bales, as opposed to cartons, weighed more than 34,580 pounds. It is this shipment, under Bill of Lading No. 610 in Docket No. 78-48, which complainants agree was not subject to its version of Rule 31(c)6.

[41] Inasmuch as it has been determined that Rule 31(c)6 is not applicable to any of the shipments in this proceeding, it is not necessary to engage in a discussion of subordinate contentions proffered by respondents dealing with errors in methodology in computing charges under Rule 31(c)6.

a patent contrary intent, the Conference drafted that rule in such a way that it could only be construed to have created a new and lower minimum utilization floor, there has been no showing calling for the exercise of the Commission's discretion in favor of reparation.

The complainants have not come forward with any evidence to establish that they acted to their detriment in reliance upon a rationally formed belief, conceived of prior to the shipments, that Rule 31(c)6 applied to those shipments or that they were otherwise harmed.[42] In making this statement I am mindful that the Commission has disavowed equity theories, generally, in section 18(b)(3) overcharge cases involving misdescription of cargo or incorrect weights or measurements, and has awarded reparation without a showing of shipper reliance or damage, even where it was the shipper's fault that he was overcharged because in those cases it is what was actually shipped that determines the rate. See e.g.--*The Carborundum Company v. Royal Netherlands Steamship Company (Antilles) M.V.*, 19 F.M.C. 431, 435-436 (1979); *Pan American Health Organization v. Prudential Lines, Inc.*, 19 F.M.C. 412, 414-415 (1976); *Durite Corporation, Ltd. v. Sea-Land Service, Inc.*, 20 F.M.C. 674 (1978), Order on Reconsideration, November 8, 1978 (unreported), aff'd without opinion, sub nom., *Sea-Land Service, Inc. v. Federal Maritime Commission*, 610 F. 2d 1000 (D.C. Cir. 1978).

This is, however, neither a misdescription, misweighing, or mismeasurement case and is distinguishable in that respect. It is well established that an award of reparation under section 22 is not a mechanistic act dismembered from the judicial function. In *United States v. Columbia Steamship Company*, 17 F.M.C. 8, 9-10 (1973), the Commission emphasized the discretionary nature of an award of reparation, as follows:

> This avenue of relief provided by section 22, however, as clearly stated and maintained, 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", *Consolo v. Flota Mercante Grancolombiana*, 783 U.S. 607 (1965); *Ballmill Lumber v. Port of New York, et al.*, 11 F.M.C. 494, 510 (1968).

In *Columbia Steamship*, the Commission refused to award reparation despite a finding that the carrier had overcharged a shipper in violation of section 18(b)(3). The shipper and carrier had negotiated a rate which was higher than the rate shown in the carrier's tariff, but, due to error, the carrier neglected to file the higher rate. The carrier charged the shipper the higher rate and the shipper paid. In denying the prayer for reparation, the Commission stressed, 17 F.M.C., at 9:

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[42] The record merely shows that Ocean Freight Consultants, Inc., filed its claims on behalf of complainants long after the shipments took place. There is no evidence that either respondent ever applied Rule 31(c)6 in the manner urged by complainants to shipments of any other shipper.

> * * * That application of the negotiated rate was a foregone conclusion by both parties is clearly shown by subsequent issuance of respondent's Bill of Lading No. 1, and the payment by complainant of the negotiated rate stated therein without demurrer. Further, when the discrepancy was found pursuant to audit six months after payment, this error was not brought to respondent's attention for an additional five months thereafter.

The circumstances in the case at bar bear a striking similarity to the ones found to be controlling in *Columbia Steamship*, even if Rule 31(c)6 accomplishes what complainants say it does. From October 1976, complainants had actual knowledge of the minimum utilization rule and paid the charges computed under that rule for the first time on October 27, 1976. They continued to place their shipments for the next nine months--through July 1977--in the certain knowledge that the minimum utilization rule applied to those shipments and paid the charges computed under that rule without protest during that time.[43]

## II. CONTRACT RATES

The argument made by the respondents which would deny to respondent, ACIC, its entitlement to contract rates seems to be a reflexive response to a lawsuit and is not well taken.

Unquestionably, Allied Chemical Corporation's International Division did not fulfil, to the letter, the requirements of the Merchant's Rate Agreement by notifying the Conference, in writing, that ACIC should be added. But, the Merchant's Rate Agreement does not become mutually binding on the Conference's member lines and shippers solely by the act of written notification. Paragraph 2(a) makes the agreement binding on the "Merchant," its subsidiaries and related companies which engage in the shipment of commodities in the trade covered by the Rate Agreement over whom the Merchant regularly exercises direction and working control in relation to shipping matters.

In the first place, it ill behooves the respondents to infer that the charging of contract rates to ACIC was inadvertent or an oversight. It is patent that respondents never varied their practice of charging the contract rates to ACIC because they considered ACIC to be as much bound by the Rate Agreement as Allied Chemical Corporation itself.

Indeed, Allied Chemical Corporation construed the Rate Agreement to be binding on all twelve sales and marketing subsidiaries which make up the International Division. ACIC is one of those subsidiaries. An affidavit signed by Allied Chemical Corporation's Manager of Distribu-

[43] Complainants offered no evidence to show when an audit of charges was made or when the alleged error was discovered. Neither does the record disclose precisely when the alleged error was brought to respondent's attention, although the record does reveal that Farrell declined some claims in February 1978. See n. 42.

tion Operations states that "since becoming a signator of the Dual Rate Agreement with the U.S. Atlantic and Gulf-Australia New Zealand Conference, we have made our shipments between ports covered by this agreement on conference vessels."[44]

A letter sent by that Manager to the Conference confirms the mutuality of the understanding.[45] He wrote:

> We have heretofor considered Allied Chemical Corporation, International Division, to be the "merchant" whose shipments were covered by the contract regardless of which of its operating subdivisions was shown as shipper. The conference carriers have obviously agreed with our understanding, since all shipments were assessed the contract rates regardless of which company was shown as shipper. [46]

The record is clear then that as a matter of custom and usage, the Conference considered ACIC bound by the Rate Agreement and entitled to contract rates and that Allied Chemical Corporation considered itself bound to utilize the Conference's carriers for all ACIC shipments. Custom and usage cannot vary the terms of a tariff. But, custom and usage, as demonstrated by the actions of the carrier and shipper, are useful and reliable factors to be considered in determining the meaning of a tariff item. Cf. *Aleutian Homes, Inc. v. Coastwise Line, supra,* 5 F.M.B. at 608, 609. Here, there is no room for doubt that both the Conference's member lines and Allied Chemical Corporation considered ACIC shipments to be governed by the terms of the Merchant's Rate Agreement.

## SUMMARY

The complainants have failed to establish that they were overcharged, on shipments of polyamide yarn during 1976 and 1977, in violation of section 18(b)(3) of the Shipping Act, 1916.

In computing the freight charges the respondents properly applied appropriate tariff provisions to the shipments. The shipments, as perti-

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[44] Affidavit dated February 9, 1979, attached to Reply Memorandum of Complainant.

[45] Letter dated January 19, 1979. The letter poses an intricate question to the Conference pointing up the frivolous nature of the defense asserted by the respondent. The question, which remains unanswered by the Conference, reads as follows:

> Our records indicate that notification to this conference of various subsidiaries, which change from time to time, has not been made. We will, if necessary, remedy this situation in the near future. Before doing so, however, please advise us if our failure to list a specific division places such divisions outside the coverage of the dual rate agreement for shipments made in the subsidiaries' name, even if the controlling or "parent" company is the signator. If this is the case, we could be in a position to list only a few subsidiaries and ship via non-conference or conference carriers at our discretion to all areas where we have agreements.
> * * *

[46] An attachment to the Reply Memorandum of Complainant establishes that, during 1978, the only year for which records were available at the time the memorandum was prepared, various Allied Chemical Corporation's subsidiaries were charged contract rates for 118 shipments carried by 6 different member lines of the Conference.

nent to this proceeding, were governed by Tariff Item No. 3236 and Rule 31(c)1, which, together, established a pricing floor for the shipments based on constructive weights determined by a minimum utilization rule. Complainants' argument, which would make Rule 31(c)6 of the Tariff applicable to the shipments, is without merit. Rule 31(c)6 is a maximum charge rule which becomes operative only when container capacities are actually exceeded. Patently, the latter rule cannot be made to apply to shipments whose charges are subject to the constructive weight determinations made in accordance with the minimum utilization rule.

There is no merit to the respondents' contention that ACIC is not entitled to the Tariff's contract rates. Although there was no formal written notification given to the Conference that the "Merchant" intended that ACIC be bound by the terms of the Merchants Rate Agreement, the course of conduct adhered to by the "Merchant" and the Conference's member lines clearly shows that the parties to the Rate Agreement deemed its terms binding on ACIC.

## ORDER

In accordance with the foregoing, the complaints filed in the consolidated proceeding are dismissed.

(S) SEYMOUR GLANZER
*Administrative Law Judge*

Washington, D. C.
July 24, 1980

# APPENDIX I

| Dkt. No. | B/L No. | BIC Code No (s). | Inside Cubic Capacity (in cu. ft.) |
|---|---|---|---|
| 78-35 | 615 | FRLL 2014431-9 | 2,385 |
| | | FRLL 201670-3 | 2,385 |
| | | FRLL 201332-4 | 2,385 |
| | | FRLL 201639-1 | 2,385 |
| | | CTIU 414276-5 | 2,362 |
| | | INTU 428284-P | 2,398 |
| | | ICSU 204157 | 2,381 |
| | | CTIU 411712-4 | 2,400 |
| | | CTIU 411434-6 | 2,400 |
| 78-42 | 6255959 | UFCU 203831-7 | 2,386 |
| 78-43 | 608 | ICSU 212144-7 | 2,313 |
| | 609 | FRLL 201123-4 | 2,385 |
| | | FRLL 201600-4 | 2,385 |
| | | INTU 423129-0 | 2,377 |
| | | FRLL 201148-7 | 2,385 |
| | | FRLL 201175-9 | 2,385 |
| | | CTIU 200703 | 2,389 |
| | | FRLL 201080-8 | 2,385 |
| | | ICSU 209711 | 2,381 |
| | | FRLL 201561-1 | 2,385 |
| | 610 | FRLL 201451 | 2,385 |
| 78-48 | 604 | FRLL 201379-3 | 2,385 |
| | | FRLL 201302-6 | 2,385 |
| | 606 | FRLL 201131-6 | 2,385 |
| | | FRLL 201220-4 | 2,385 |
| | 608 | FRLL 201016-1 | 2,385 |
| | | FRLL 201513-7 | 2,385 |
| | | CTIU 292617-7 | 2,400 |
| | 612 | INTU 432394-6 | 2,378 |
| | | FRLL 201108-6 | 2,385 |
| 78-55 | 6257141 | ACTU 288342-7 | 2,360 |
| | 6257150 | UFCU 207909-1 | 2,398 |
| | | ACTU 2881199-6 | 2,360 |
| | 6257168 | ACTU 288036-7 | 2,360 |
| | | ACTU 288530-6 | 2,378 |
| | | UFCU 204765-9 | 2,386 |

## APPENDIX I—Continued

| Dkt. No. | B/L No. | BIC Code No (s). | Inside Cubic Capacity (in cu. ft.) |
|---|---|---|---|
| 79-44 | 605(Sydney) | FRLL 201157-4 | 2,385 |
| | 605(Melbourne) | FRLL 201001-1 | 2,385 |
| | | FRLL 201259-1 | 2,385 |
| | | FRLL 201032-5 | 2,385 |
| | | CTIU 415157-7 | 2,400 |
| | | FRLL 201564-6 | 2,385 |
| | | FRLL 201279-7 | 2,385 |
| | | FRLL 201071-0 | 2,385 |
| | | ISCU 220017-1 | 2,460 |
| | | FRLL 201437-8 | 2,385 |
| | | SSIU 219131-6 | 2,394 |
| | | SSIU 219053-6 | 2,394 |
| 79-62 | 605(Melbourne) | FRLL 201191-2 | 2,385 |

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 774(F)

EXIM, LTD.

*v.*

KUEHNE & NAGEL

## ORDER

*November 13, 1980*

This proceeding has been referred to the Commission by Administrative Law Judge Paul J. Fitzpatrick, while he holds in abeyance a Motion to Dismiss filed by Kuehne & Nagel. The Presiding Officer notes that the status of "Kuehne & Nagel, S.A.," and "Kuehne & Nagel Overseas Corp." is somewhat unclear, and suggests that the Commission's staff conduct an investigation to clarify this matter and take "appropriate action."

The Commission agrees that the role of both "Kuehne & Nagel, S.A.," and "Kuehne & Nagel Overseas Corp." requires further exploration. However, a staff investigation is not necessary to answer the basic question of whether the proper party is before the Commission. It would appear that the Presiding Officer has the authority and the means under the Commission's Rules to explore these questions and dispose of the matter before him. Therefore, the Commission is referring this case back to the Presiding Administrative Law Judge for such further proceedings as he deems appropriate.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-104

SPECIFIC COMMODITY RATES OF FAR EASTERN SHIPPING COMPANY IN THE PHILIPPINES/U.S. PACIFIC COAST TRADE

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## ORDER ON RECONSIDERATION

*November 17, 1980*

Sea-Land Service, Inc. has petitioned the Commission to reconsider its Report and Order in this proceeding served on August 5, 1980. Sea-Land requests review of that portion of the Report and Order declining to find rates of the Far Eastern Shipping Company (FESCO) on "Reefer Cargo, other" and "Fruit Juice Concentrates" unjust and unreasonable in violation of section 18(c) of the Shipping Act, 1916. (46 U.S.C. 817(c)). FESCO and the Commission's Bureau of Hearing Counsel have filed replies in opposition to the Petition.

In its Report and Order, the Commission noted that FESCO's total charges for these commodities were significantly less than those of the Philippines North America Conference and Seatrain Pacific Services, S.A., a comparable independent carrier in the trade. Nonetheless, the Commission did not disapprove the subject rates, finding that: ". . . 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)." Report and Order at 12.

Sea-Land contends that this finding is based on a "substantive error in material fact," one of three acceptable grounds for a petition for reconsideration. *See* 46 C.F.R. 502.261(a). It maintains that FESCO could not have carried any reefer cargo under those rates in 1979 because they were suspended by the Commission on December 28, 1979, before they ever became effective. Sea-Land additionally fears that if the perceived rationale for the Commission's decision is upheld, non-controlled carriers will have to await injury, in the form of reduced market shares before a controlled carrier's lower rates are ever disapproved. This result, claims Sea-Land, is contrary to Congress' intent in enacting the Ocean Shipping Act of 1978.

FESCO and Hearing Counsel make essentially the same arguments in opposition to Sea-Land's Petition. They note that Sea-Land has taken one sentence out of the Commission's Report and Order in an effort to establish a "substantive error of material fact." However, these parties assert that if this one sentence is viewed in the context of the entire

Report and Order its meaning becomes clear and unambiguous. In addition, Hearing Counsel argues that Sea-Land has questioned this one aspect of the Report and Order simply as a pretext for challenging the Commission's determination, in this case, that some sort of "harm" must be evident before rates will be disapproved solely on the basis of rate differentials.

## DISCUSSION

Sea-Land is indeed correct that FESCO could not have carried any fruit juice concentrate or reefer cargo under the subject rates because they were suspended prior to their implementation. Thus, the statement that "these rates have also had a minimal impact on the trade because of FESCO's failure to carry any cargo under them in 1979" may in isolation be misleading. However, Exhibit 15, which was cited by the Commission as its basis for this statement, indicates that FESCO carried *no* fruit juice concentrate or reefer cargo under *any* commodity description in 1979. The point being made was that neither the subject rates nor any predecessor rates for these particular commodities were shown to have caused or could be expected to cause any identifiable harm or injury to this trade. When the finding to which Sea-Land objects is read in context, the Commission's basis for not disapproving these rates is abundantly clear. Though FESCO's rates on "Reefer Cargo, other" and "Freight Juice Concentrates" were somewhat lower than rates offered by relevant competitors, the Commission was unable to conclude on this record that they would have a detrimental impact on the trade.

Sea-Land's broader argument concerning the Commission's reliance on injury or harm in the form of market penetration, is inappropriate for a petition for reconsideration. In any event, Sea-Land's position that, for rate comparison purposes, the Commission should ignore the impacts of a controlled carrier's rates on a given trade seems unwarranted. The Commission has never stated that in all cases where rate comparisons are employed it will require "the sustaining of injury" before it disapproves a rate. There may well be circumstances where a controlled carrier's rate is so much lower than those offered by its competitors that the Commission will find such rates unreasonable solely on that basis. However, in cases like this one, where the differential in total charges is not extreme, the Commission will examine, *inter alia* whether there will be or has been market penetration or other injury to the trade as a result of the subject rate or its predecessors before disapproving them. Such considerations are clearly within the realm of "other appropriate factors" which the Commission is permitted to consider under the Ocean Shipping Act of 1978. (46 U.S.C. 817(c)).

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration filed by Sea-Land Service, Inc. is hereby denied.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

* Chairman Richard J. Daschbach, dissenting and issuing a separate opinion.

Chairman Richard J. Daschbach, dissenting.

I disagree with the majority's decision to deny Sea-Land Service, Inc.'s petition for reconsideration of the Commission's August 5, 1980 Report and Order in Docket No. 79-104, *Specific Commodity Rates of Far Eastern Shipping Company in the Philippines/U.S. Pacific Coast Trade.*

Although I concurred in the issuance of the Commission's order in Docket No. 79-104, I believe that we made a mistake. That order reflects a serious misunderstanding of the purposes of the Ocean Shipping Act of 1978 (P.L. 95-483) and the gravity of the threat that led to its enactment. Regardless of whether the Commission can or should change its findings on the eight commodity rates in question, it must recognize the flaws in its reasoning in order to ensure strict and effective administration of the controlled carrier statute in the future.

In reaching its conclusion in this proceeding, the Commission:

1) Ignored the clear intent of the Congress to place the burden of proof on state-controlled carriers whose rates have been suspended under section 18(c) of the Shipping Act;
2) Went beyond the four factors enumerated in that law for determining whether rates are just and reasonable, despite the fact that additional tests were not needed to make a finding on the reasonableness of FESCO's rates; and
3) Established a vague standard requiring the Commission to determine whether a controlled carrier's rates cause harm to a given trade. This new test may prove impossible to effectively apply in future rate proceedings under the controlled carrier statute, thus creating a major loophole in the law.

In its December 28, 1979 Order to Show Cause, the Commission stated that "under the circumstances presented, particularly since only individual commodity rates are being considered...the Commission believes that the last three factors set forth in section 18(c)(2) are those most appropriate to its decision." It reiterated that "no statements here should be construed to shift the burden of proof under section 18(c)", which lies with the controlled carrier whose rates have been suspended.

This direction to FESCO was consistent with the Commission's final order in Docket No. 79-10, *Rates of Far Eastern Shipping Company* which found that "the second and third factors set forth in section 18(c)(2) of the Shipping Act are those most appropriate in determining the justness or reasonableness of a controlled carrier's individual commodity rates."

The Commission therefore clearly delineated the factors under which FESCO needed to satisfy its burden of proof in order to show that its rates were just and reasonable.

Did FESCO justify its rates by showing that they were "the same as or similar to those filed or assessed by other carriers in the same trade" (section 18(c)(2)(ii))?

No.

Did FESCO prove that its rates were "required to assure movement of particular cargo in the trade" (section 18(c)(2)(iii))?

No.

Did FESCO show that its rates were "required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports" (section 18(c)(2)(iv))?

No.

FESCO thus failed to sustain its burden of proof and the subject rates should have been disapproved as unjust and unreasonable.

It is disturbing that some consideration of equity apparently motivated the Commission to provide FESCO with yet another means of showing that its rates were just and reasonable.

It is essential for the Commission to understand the rationale of the Congress in empowering it to develop criteria beyond those provided in the statute.

The law authorizes the Commission to employ alternative factors in order to give it optimal flexibility in controlled carrier rate proceedings. It is not intended to provide the carrier with another "bite at the apple" when it has failed to justify its rates under criteria embodied in the statute and specifically delineated in the Commission's Order of Suspension as the tests which must be met.

Furthermore, the criterion which the Commission chose to add to its arsenal in enforcing the law, a showing of harm to the trade or injury to its participants, establishes a troublesome precedent. Although the Congress clearly intended the controlled carrier statute to *prevent* harm caused by predatory rate-cutting, this new criterion would enable the Commission to take action in controlled carrier rate proceedings only after a showing that damage had already been done, undermining the basic purpose of the law.

Finally, any additional factors that we use to supplement those already enunciated in the statute should be clear and precise. Requiring a showing of harm to a particular trade carries us into vague and amorphous territory, particularly in a volatile trade influenced by a variety of political and commercial factors. What constitutes actual harm? From whom do we obtain that information? How do we establish a clear correlation between disruption that is found in an entire trade and the rate established by a single carrier in that trade on any given single commodity?

This test inappropriately transfers the burden of proof from the controlled carrier to the Commission and it frustrates our obligation to provide the liner shipping industry with clear and precise regulations.

In reviewing our responsibilities under the controlled carrier statute, we must bear in mind the circumstances that distinguish our activities under this law from other areas in which we exercise far more limited rate regulation. The Ocean Shipping Act of 1978 was not simply an extension of our regulatory authority, but an *expansion* of that authority for the express purpose of *protecting* privately owned steamship lines and the U.S. foreign commerce from the predatory rate-cutting of certain state-controlled carriers.

The Congress viewed the rate-cutting of state-controlled carriers as a dangerous threat to our commerce. The Commission must consider its actions under the controlled carrier statute within the context of that threat. Before a misguided sense of equity encourages us to grant controlled carriers opportunities for justifying their rates not contemplated by our governing statute, we should remember that it was inequitable and unfair competition that led to enactment of the controlled carrier statute in the first place.

I believe that we have strayed from this realization in our final order in Docket No. 79-104. I would therefore grant Sea-Land's petition for reconsideration so that we might have the opportunity to reject the new standard of trade disruption we have created and nullify its potential for interfering with our mandate to protect participants in the U.S. foreign commerce from predatory rate-cutting.

Sea-Land's petition is properly founded on a "material error of law." The Commission's order of August 5, 1980 specifically errs in creating an unnecessary and ambiguous new factor for determining the reasonableness of a controlled carrier's suspended rates which improperly transfers the burden of proof for making that determination from the carrier to the Commission. The August 5 order also commits the larger error of failing to diligently adhere to our strict legal obligation under the Ocean Shipping Act of 1978 to vigorously combat unfair competition.

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 566(I)

## EXCAM, INC.

*v.*

## LYKES LINES AGENCY, INC. AND COSTA LINE

## DENIAL OF PETITION FOR RECONSIDERATION

*November 18, 1980*

The Commission by order served August 29, 1980 in this proceeding determined that claimant had failed to prove its claim. The Commission determined that the shipments in question were not shown to be other than as described on the bills of lading. The bills of lading described them as "firearms" and "rifles". They were rated as "firearms". Claimant had sought a rating for "replica arms". The August 29, 1980 order allowed claimant an additional opportunity to submit evidence to support its contention.

Claimant now has submitted various materials, most of which duplicate what was already in the record. The only new materials are catalogues describing various products of claimant. These catalogues contain descriptions both of replica arms and of firearms. The catalogues are of no value in proving the claim because nothing has been furnished to show that the particular items shipped match any particular catalogue item. If anything, the invoice which was originally in the record and resubmitted now, would suggest that the items were not replica arms because they describe the items as "percussion rifles".

Based on the foregoing it is determined that the petition for reconsideration should be denied. It is so ordered.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

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* Commissioner Teige not participating.

Vice Chairman Kanuk, *dissenting*:

I believe that complainant has met its burden of proof, and therefore I would affirm the Settlement Officer's decision awarding reparation.

# FEDERAL MARITIME COMMISSION

## CHAPTER IV - FEDERAL MARITIME COMMISSION

## SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

## [GENERAL ORDER 23, REVISED; DOCKET NO. 80-34]

## PART 524 - EXEMPTION OF CERTAIN AGREEMENTS FROM THE REQUIREMENTS OF SECTION 15, SHIPPING ACT, 1916

*November 18, 1980*

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission exempts from the filing and approval requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814) non-exclusive equipment interchange agreements between common carriers by water.

DATE: Effective November 28, 1980

SUPPLEMENTAL INFORMATION:

On May 8, 1980, the Commission instituted this proceeding to exempt non-exclusive equipment interchange agreements from the approval requirements of section 15 of the Shipping Act, 1916, (45 F.R. 35368).

Section 35 of that Act (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 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.

Equipment interchange agreements on file with the Commission generally fall within these categories:

1) container, chassis, and related equipment interchange agreements;
2) agreements involving the management of the equipment as well as the exchange of containers, chassis, and related equipment;
3) agreements covering only the repair and maintenance of containers, chassis, and related equipment; and
4) interchange of LASH/SEABEE barges.

These types of agreements are generally approved by the Commission.

Except as hereafter noted, commentators supported the rule on principle. Some commentators argued, however, that the advance filing of agreements for informational purposes substantially defeats the objectives of the proposal. They contend that the advance filing requirement is burdensome in terms of carriers' needs to act quickly to meet operational requirements as they occur.

One carrier urged that the exemption be expanded to include agreements between carriers and "other persons" subject to the Shipping Act to recognize the possible involvement of a terminal operator in routine equipment interchange operations. In addition, it was suggested that the format provision be deleted because it is optional except for the independent agent requirement which it believes is inappropriate, unnecessary, and commercially frustrating. This carrier would also include loaded, as well as empty containers, within the exemption.

Another carrier requests the Commission to continue full section 15 scrutiny over these agreements because the "art" of equipment interchange is presently unsettled due to changes in railroad procedures for repositioning equipment which may substantially increase costs to water carriers. Accordingly, it is recommended that the matter be postponed pending inquiry into the changed competitive circumstances brought about by railroad repositioning plan modifications and their impact upon ocean carriers.

A port authority opposed the exemption because of concerns that such agreements, if exempted, could provide a means of discriminating between ports, shippers, and classes of traffic or commodities by controlling the availability of equipment or by diverting equipment to larger ports, favored shippers, or higher revenue yielding cargo. As a minimum, the port authority requests assurances from the Commission that the anti-discriminatory remedies of sections 16, 17, and 22 of the Shipping Act will continue to be available.

Based upon the comments, the Commission has decided to exempt equipment interchange agreements, but without the advance filing, the independent agent, and format requirements.

With respect to the suggestions to include "other persons" within the scope of the exemption and to extend the exemption to loaded containers, the Commission will study those suggestions further since it cannot now gauge the impact of the proposals and since they were not noticed for comment.

The proposal to defer the rule is not persuasive. There is a demonstrable justification for the exemption now, and if conditions change as a result of railroad practices or other factors, the Commission can readily readdress the situation.

Concerns that the exemption may be used in a discriminatory manner will be met by specifically noting the continuing availability of the Shipping Act's anti-discrimination provisions. The action here affects

section 15 requirements only and all other provisions of the Act will remain fully applicable.

Finally, a clarifying change has been made to the existing definition of nonexclusive transshipment agreement to indicate that a through *route* and not a through *rate* is the substance of such an agreement. This exemption, as modified, will not substantially impair effective Commission regulation of common carrier practices, result in unjust discrimination, or be detrimental to commerce.

NOW, THEREFORE, pursuant to sections 15, 35, and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a, and 841a) IT IS ORDERED, That effective upon publication in the *Federal Register*, Title 46, CFR Part 524 is revised to read as follows: No changes have been made to section 524.1. Former sections 524.3, 524.4, and 524.5 have been redesignated sections 524.4, 524.5, and 524.6 respectively. The section title of former 524.3 (now 524.4) has been revised as indicated below.

PART 524 - Exemption of Certain Agreements from the Requirements of Section 15, Shipping Act, 1916

sec.

524.1 Statement of policy and purpose

524.2 Definitions

524.3 Exemption of agreements

524.4 Conditions for exemption of transshipment agreements

524.5 Form of connecting carrier agreements

524.6 Termination of approved transshipment agreements

524.7 Optional Section 15 approval

§524.1 Statement of policy and purpose

(same)

§524.2 Definitions

(a) A nonexclusive transshipment agreement for the purpose of this Part is an agreement between a carrier serving a port of origin and a carrier serving a port of destination to establish a through route between such ports via an intermediate port at which the cargo is transferred, which agreement does not prohibit either carrier from entering into similar agreements with other carriers.

(b) Nonexclusive equipment interchange agreement is an agreement between two or more common carriers by water for the exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment which agreement does not prohibit a carrier from entering into similar agreements with other carriers, and which provides only for transportation of the equipment as required, payment, management of the logistics of transferring, handling, and positioning equip-

ment, use, repair and maintenance, damages, and liability incidental to the interchange of equipment, and no other subject.

§524.3 Exemption of agreements

Agreements defined in section 524.2 shall be exempt from the provisions of section 15; provided, in the case of a nonexclusive transshipment agreement, the conditions contained in section 524.4 and the form requirements of 524.5 are met.

§524.4 Conditions for exemption of transshipment agreements (same as present §524.3)

§524.5 Form of connecting carrier agreements (same as present §524.4)

§524.6 Termination of approved transshipment agreements (same as present §524.5)

§524.7 *Optional section 15 approval.* Notwithstanding the provisions of this section, persons who desire approval of agreements otherwise exempt under this Part may petition the Commission for section 15 determination in accordance with Part 522.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 79-94

ALL-FREIGHT PACKERS & FORWARDERS, INC.

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE APPLICATION

## ORDER DENYING PETITION FOR RECONSIDERATION

*November 25, 1980*

On August 26, 1980 the Commission issued an Order in this proceeding adopting the Initial Decision of Administrative Law Judge Joseph N. Ingolia, holding that All-Freight Packers & Forwarders, Inc., was fit, willing and able to carry on the business of freight forwarding, but assessing a civil penalty of $5,000.00 for unlicensed forwarding activities.

All-Freight has now filed a petition pursuant to Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261) seeking reconsideration of the Commission's Order Adopting Initial Decision. The Commission's Bureau of Hearing Counsel has filed a reply in opposition to the petition.

In its Petition, All-Freight states that it does not disagree with the findings of the Commission concerning the violations of section 44 or the fitness of the firm to carry on the business of freight forwarding, but seeks a reduction of the $5,000 civil penalty assessed against it. All-Freight contends that the Commission should have given greater weight to the loss of revenue sustained by the firm, estimated to be $31,874.00, due to its inability to carry on forwarding activities during the course of this proceeding. This loss is allegedly severe in light of the modest size of the firm.[1] All-Freight concludes that this potential revenue loss is a more than sufficient penalty to deter freight forwarders from engaging in the violations of section 44 and the Commission's regulations.

Hearing Counsel replies that the financial data submitted with the Petition could have been submitted at earlier stages of the proceeding, and that, in any event, the instant Petition for Reconsideration merely restates arguments previously considered and rejected in this proceeding.

[1] All-Freight submitted a financial statement indicating net income of $34,845.15 for the last ten-month period.

The Commission agrees with Hearing Counsel that All-Freight's underlying contentions have previously been addressed and found to be insufficient to warrant reduction of the civil penalty imposed by the Presiding Officer. Nothing offered in the present Petition persuades us to alter that determination.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of All-Freight Packers & Forwarders, Inc. is denied.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 681(F)

SANRIO COMPANY, LTD.

*v.*

MAERSK LINE

## ORDER OF REPARATION

*November 25, 1980*

On September 5, 1980 the Commission issued an Order Adopting Initial Decision in this proceeding holding that the Presiding Officer had correctly determined that certain shipments transported by Maersk Line for Sanrio Company, Ltd., had been misrated and denying the Exceptions of the Trans-Pacific Freight Conference of Japan-Korea to the Initial Decision. The Commission also affirmed the finding of the Presiding Officer that the parties to the proceeding had not submitted sufficient documentation with which the precise amount of reparation due Complainant could be calculated, and ordered Complainant* to submit a reparations statement pursuant to Rule 252 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.252).

Complainant has now filed a reparations statement which has been certified as correct by Respondent. Based upon this documentation the Commission has been able to compute the reparations due at $3,237.37 plus interest at 12% per annum from the date of payment of the incorrect charges.

THEREFORE, IT IS ORDERED, That Maersk Line pay Sanrio Company, Ltd., reparations in the amount of $3,237.37 plus interest at 12% per annum from the date of payment of the incorrect charges, and,

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

* The last ordering paragraph of the September 5, 1980 Order inadvertently directed the consignee, Sanrio, Inc., to submit a reparations' statement. However, as the correct Complainant filed the reparations statement this error was without consequence.

# FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 701

## APPLICATION OF TRANS FREIGHT LINES, INC., TO BENEFIT SOUTHERN PACIFIC MARINE TRANSPORT

## ORDER OF ADOPTION

*December 9, 1980*

On September 23, 1980, the Commission undertook to review the Initial Decision of Administrative Law Judge Seymour Glanzer in the above-captioned matter. This decision granted the special docket application of Trans Freight Lines, Inc., as to two of the three intermodal shipments for which relief had been requested. The application for the third shipment was dismissed on the grounds that Trans Freight Lines' tariff had not covered transportation between Richmond, California and Bremerhaven, Germany at the time of shipment.

The Commission has examined the record assembled by the Administrative Law Judge and materials on file with the Office of Tariffs, and has concluded that Trans Freight Lines, Inc., Eastbound Joint Container Tariff No. 301, I.C.C. No. 301, F.M.C. No. 8 was too incomplete on September 3, 1979 to form a proper basis for special docket relief. Moreover, Trans Freight's essentially untariffed operations on or about this time appear to violate sections 18(b)(1), (2) and (3) of the Shipping Act, 1916 (46 U.S.C. 817(a), (b) and (c)) and may be an appropriate subject for civil penalty claims.

THEREFORE, IT IS ORDERED, That the Initial Decision served August 21, 1980 in this proceeding is adopted by the Commission and made a part of this Order;[1] and

IT IS FURTHER ORDERED, That this proceeding is terminated.

By the Commission.[2]

(S) FRANCIS C. HURNEY
*Secretary*

[1] The Initial Decision recommended that further inquiry be made into the routings used by Trans Freight Line, Inc., for intermodal shipments from West Coast destinations to Europe. The Commission has referred this matter to the Bureau of Investigation and Enforcement to take appropriate action with respect to any violations of section 18(b) which may have occurred.

[2] Commissioner Peter N. Teige, dissenting and issuing a separate opinion. Vice Chairman Leslie Kanuk concurs in Commissioner Teige's dissent.

*Dissenting Opinion of Commissioner Peter N. Teige.*

I dissent. I recognize that the majority's decision to affirm the Initial Decision of the Administrative Law Judge and deny the carrier permission to waive collection of freight charges for one of the three shipments covered by its application, will have no practical effect on the shipper since the carrier will be unable to lawfully collect the charges it sought to waive. Nevertheless, I disagree with the majority's overly technical conclusion that the carrier's application must be denied because its tariff was too incomplete (as to description of routings) on September 3, 1979, the time of the disputed shipment. The tariff did, however, despite its deficiencies, state as a practical matter the total charges applicable to this through movement. In addition, the corrective tariff amendment filed by Trans Freight on September 10, 1979 stated the exact per container rate agreed upon by Trans Freight and SPMT. This amendment meets the requirement of Section 18(b)(3) of the Act that the new tariff "set forth the rate" and is sufficiently clear to enable us to measure the relief to be given the shipper. The failure of the original tariff and the new tariff filing to technically meet all of the requirements of Section 18(b)(1) should not prevent relief under the provisions of Section 18(b)(3), so long as it is clear from all the circumstances that the rates specified originally and as corrected by the new tariff filing were to be applied to the cargo shipped.

# FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 701

## APPLICATION OF TRANS FREIGHT LINES, INC. FOR THE BENEFIT OF SOUTHERN PACIFIC MARINE TRANSPORT

Application to waive a portion of freight charges dismissed, in part, and granted, in part.

*John F. Spangle* for applicant Trans Freight Lines, Inc.

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

*Adopted December 9, 1980*

By application filed January 15, 1980, Trans Freight Lines, Inc. (TFL), seeks permission to waive collection of portions of freight charges claimed to be due it from Southern Pacific Marine Transport (SPMT) in connection with three shipments of canned goods which TFL carried from Savannah, Georgia, to the discharge ports of Bremerhaven, Federal Republic of Germany (FRG), Rotterdam, The Netherlands, and Bristol, England.

All of the shipments were carried in intermodal service on the same vessel and all originated at rail carriers terminals on the West Coast. Two of the shipments were carried aboard the Visurgis, Voyage No. 3, which sailed from Savannah on September 3, 1979. One shipment was carried on Voyage No. 4, which sailed from Savannah on October 1, 1979.[2]

The aggregate amount of the freight charges sought to be waived is $90,864.15.

The proceeding was first assigned to Administrative Law Judge Stanley M. Levy and was reassigned to me on March 4, 1980, upon Judge Levy's retirement.

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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 CFR 502.227).

[2] The application incorrectly states that the dates of shipment (sailing) were "8/5/79," "8/17/79," and "9/13/79." It is surmised that those dates were selected because they appear within the four corners of an "On Board;" stamp on the bills of lading issued by TFL. However, under the Commission's Regulations governing special docket applications, 46 CFR 502.92, the date of shipment which is the date that starts the jurisdictional timetable for special docket relief (see *Discussion, The Fourth Proviso, infra*), is considered to be the actual date of sailing. The date of issuance of an on board bill of lading is no longer deemed to be the date of shipment. See Docket No. 78-12, *Rules of Practice and Procedure; the Simplification of the Rules Governing Special Docket Applications for Permission to Refund or Waive Portions of Freight Charges*, 43 F.R. 18572, May 1, 1978, Final Rules, 43 F.R. 38578, August 29, 1978.

Pursuant to Judge Levy's and my requests the application was supplemented by the filing of additional documentation.

FACTS

After it decided to institute an intermodal service, TFL issued an intermodal tariff on June 1, 1979. The tariff was filed with the Commission and became effective on July 15, 1979.[3] Section 4 of the tariff contains the class and commodity rates for shipments from the West Coast to Northern Europe. Northern Europe is divided into four rate groups under three column headings. (Groups 2 and 3 are combined.) Because TFL was not entirely certain about the market, when it issued the new tariff it listed only about 25 commodity items in Section 4. Each of those commodities carried rates lower than Section 4's class rate for general cargo.[4] The general cargo (Cargo N.O.S. Not Dangerous) rate from July 15, 1979, to and including the dates of the three shipments was $300.00 W/M[5] to all four destination rate groups.[6] During that same time period, as pertinent, the tariff also provided for a bunker surcharge and a currency adjustment factor.[7]

On July 30, 1979, following negotiations for a commodity rate lower than the Cargo N.O.S. rate, Mr. T. P. McNamara, Vice President, West Coast, Alltrans International, Inc., TFL's agent, and Mr. J. D. Burnett, Vice President and General Manager of SPMT, agreed upon an all inclusive rate (including the bunker surcharge and currency adjustment factor) of $1,470.00 per 20 foot container for canned goods on movements from Los Angeles and Oakland/Richmond, California, and Portland, Oregon/Seattle, Washington, to United Kingdom and North Europe ports on a Container Yard to Container Yard basis. When Mr. McNamara transmitted the terms of the agreement to TFL's office in Secaucus, New Jersey, he requested that the tariff matter reflecting those terms be published quickly because the traffic was ready to move.[8] Upon receipt of that request, instructions were given to a TFL Tariff Compiler to publish the rates agreed upon. Due to a clerical error, the Tariff Compiler failed to carry out those instructions prior to the dates of shipment.[9]

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[3] When the original tariff pages were filed, the tariff was entitled Trans Freight Lines, Inc., Eastbound Joint Container Tariff No. 301, I.C.C. No. 301, F.M.C. No. 8. The same tariff now bears the I.C.C. identification number I.C.C. TFEI No. 301.

[4] See affidavit (statement) of TFL's Pricing Manager, South Atlantic, attached to his letter to me, dated April 14, 1980.

[5] W=Weight of 1000 kilos; M=Measurement of one cubic meter; W/M means W or M whichever produces the greater revenue.

[6] TFL's Tariff, original through 6th revised p. 362.

[7] *Id.*, original and 1st revised p. 7. The tariff abbreviation for bunker surcharge is "BSC" and the abbreviation for currency adjustment factor is "CAF."

[8] See Mr. McNamara's and Mr. Burnett's affidavits attached to TFL's letter to me, dated April 22, 1980.

[9] See affidavit (statement) of the Tariff Compiler attached to TFL's letter to me, dated April 14, 1980.

When the error was discovered, TFL filed a corrective tariff, effective September 10, 1979, containing the agreed rate.[10] But, due to another clerical error, the correction appeared only in the column for Rate Groups 2 and 3. Rate Groups 2 and 3 covered the particular Northern European discharge ports but not the United Kingdom discharge port involved in this proceeding.[11] When the second error was discovered, another corrective tariff covering Rate Group 1, United Kingdom destinations, was filed, effective October 4, 1979.[12]

In the meantime, that is, between July 30, 1979 and October 4, 1979, the three individual shipments were placed in intermodal service for delivery to destination, as follows:

1. Shipment No. 1, shown in the application as shipment (a), was a movement of canned peaches weighing 180,306 kilograms and measuring 237.89 cubic meters, shipped in ten 20 foot House to House Containers[13] by SPMT[14] to a consignee in the FRG. The shipment was received at Richmond, presumably on August 5, 1979, when the on board bill of lading was issued, and was carried by rail from there to Savannah where it was loaded on the *Visurgis*, Voyage No. 3, and discharged at Bremerhaven, FRG, for delivery in Hamburg, FRG. The bill of lading does not disclose the identity of the rail carrier receiving the shipment at Richmond, but TFL's letter to me, dated June 20, 1980, attached as Appendix I, states that the cargo moved "via ATSF [The Atchison Topeka & Santa Fe Railway Company, a rail carrier participating in the Tariff in accordance with concurrence FC2 No. 122]* in Richmond." Pandair Freight Inc., F.M.C. License No. 1514, is shown as the freight forwarder. The shipment was rated as Cargo N.O.S. on a measurement basis and a bunker surcharge and currency adjustment factor were applied. Total charges amounted to $86,056.71. At the agreed rate and, if other tariff provisions permitted, the charges on this shipment should have been $14,700.

2. Shipment No. 2, shown in the application as shipment (b), was a movement of canned tuna weighing 16,329 kilograms and measuring 23.79 cubic meters, shipped in one 20 foot House to House Container by SPMT to a consignee in Rotterdam. The shipment was received at

[10] TFL's Tariff, 6th revised p. 362.

[11] *Id.*, original through 2nd revised p. 11.

[12] *Id.*, 11th revised p. 362.

[13] Pursuant to Rule 23 of the TFL Tariff, original p. 36, House to House and Container Yard to Container Yard are interchangeable terms; a Container Yard (CY) is a facility operated by the water or participating rail or motor carrier for the receipt of loaded containers.

[14] SPMT is a non vessel operating common carrier (NVOCC) which publishes a tariff applicable to shipments of general merchandise between specified ports in the United States, on the one hand, and, on the other hand, specified ports in specified foreign countries. The origin and destination ports involved in this proceeding are within the scope of SPMT's Tariff, Local Freight Tariff No. 3, F.M.C. No. 3, original pp. 7, 8.

*See n. 36 following Conclusion and Order, infra.

Los Angeles, presumably on August 17, 1979, and was carried by rail from the Union Pacific (UP - a participating rail carrier) rail terminal to Savannah where it was loaded on the *Visurgis*, Voyage No. 3, and discharged at Rotterdam. The shipment was rated as Cargo N.O.S. on a measurement basis and a bunker surcharge and currency adjustment factor were applied. Total charges amounted to $8,606.04. At the agreed rate, and other tariff provisions permitting, the charges for this shipment should have been $1,470.00.

3. Shipment No. 3, shown in the application as shipment (c), was a movement of canned salmon weighing 35,997 kilograms and measuring 45.30 cubic meters, shipped in two 20 foot House to House Containers by SPMT to a consignee in London, England. The shipment was received at Portland, presumably on September 13, 1979, and was carried by rail from the UP rail terminal to Savannah where it was loaded on the *Visurgis*, Voyage No. 4, and discharged at Bristol for delivery at Felixstowe, England. The shipment was rated as Cargo N.O.S. on a measurement basis and a bunker surcharge and currency adjustment factor were applied. Total charges amounted to $15,311.40. At the agreed rate, and other tariff provisions permitting, the charges for this shipment should have been $2,940.00.

SPMT did not pay the charges as billed. It remitted $19,110.00, the amount it should have bean charged for the three shipments had the clerical errors not occurred, other provisions of the Tariff permitting. Under the circumstances, TFL asks for a waiver of $71,356.71 for Shipment No. 1; a waiver of $7,136.04 for Shipment No. 2; and a waiver of $12,371.40 for Shipment No. 3.

Other provisions of the Tariff which are pertinent to the issues in this proceeding are as follows:

1. The Scope of the Tariff, insofar as these shipments are concerned, is set forth in Section 4 of Rule 1.[15] As material, it provides that the rates in the Tariff apply from "Rail Carriers Terminals" in "Los Angeles, CA," "Portland, OR" and "Richmond, CA." [16]

2. The identification of the "Origin Rail Carrier Terminals" appears in Rule 100 of the Tariff.[17] At all pertinent times this rule read as follows:

> Whenever the term "rail carrier's terminal(s)" is used, container or trailer on flat car service will be performed at each location by the following rail carrier(s).

[15] TFL's Tariff, 1st revised p. 11.

[16] The same provisions are iterated at the beginning of Section 4 of the Tariff, which, it will be recalled, contains the rates for joint intermodal shipments from the West Coast to Northern Europe. TFL's Tariff, original p. 361.

[17] TFL's Tariff, original p. 60. This page was not changed until August 5, 1960, when 1st revised p. 60 was filed.

| TERMINALS | RAIL CARRIER | TYPE OF SERVICE | ADDRESS |
|---|---|---|---|
| LOS ANGELES, CA. | ATSF | CY | HOBART YARD, SHEILA & INDIANA ST. CITY OF COMMERCE, CA. |
| | SP | CY | N. MISSION RD. |
| | UP | CY | 4341 WASHINGTON BLVD. |
| OAKLAND, CA. | ATSF | CY | 40TH AND SAN PARLO |
| | SP | CY | 1410 MIDDLE HARBOR RD. |
| | WP | CY | 1777 MIDDLE HARBOR RD. |
| PORTLAND, OR. | BN | CY | 3930 N.W. YEON |
| | UP | CY | 2745 N.W. INTERSTATE AVE. |
| SACRAMENTO, CA. | SP | CY | ATLANTIC BETWEEN YOSEMITE AND BERRY, ROSEVILLE, CA. |
| | WP | CY | 3500 - 24TH ST. |
| SEATTLE, WA. | BN | CY | 12400 - 51ST PLACE SOUTH |
| | UP | CY | ARGO YARD, 4TH SOUTH AND DAWSON STREET |
| STOCKTON, CA. | ATSF | CY | FOOT OF DIAMOND ST. |
| | SP | CY | 1010 E. MARKET ST. |
| | WP | CY | 833 E. 8TH ST. |
| SAN FRANCISCO | ATSF | CY | 74 MISSION ROCK |

Richmond, California, is not listed under the column heading "Terminals." Manifestly, too, the table does not identify any rail carrier, type of service or address at Richmond. It was not until August 5, 1980, that Richmond was listed, as follows:

| TERMINALS | RAIL CARRIER | TYPE OF SERVICE | ADDRESS |
|---|---|---|---|
| [C][18] RICHMOND, CA. | ATSF | CY | 861 WHARF STREET |

3. Similarly, at all pertinent times, neither TFL nor any carrier participating in the Tariff held out to perform a transportation service over a through route originating at Richmond, California. Rule 107 of the Tariff lists the service offered by the participating rail carriers from West Coast ports and the Rail-Water Interchange Point in Savannah.

[18] [C] means "Change in Wording which results in neither an increase or a Reduction." See Symbols and Reference Marks, TFL's Tariff, original p. 3.

As pertinent to the carriage of 20 foot containers, until November 1, 1979, Rule 107 provided, as follows:[19]

PARTICIPATING RAIL CARRIER'S SERVICE AND DIVISION OF REVENUE

A. Participating Rail Carrier's service and Division of Revenue between rail carrier's terminal listed below in Paragraph B & Rail-Water Interchange Point in Charleston, SC or Jacksonville, FL or Savannah, GA for 40′ Containers or 20′ Containers applies via the following Route Nos. as shown in Section 5.

B. Rail Carriers Division of Revenue Per Container or Trailer

| Rail Carrier's Terminals | Route Nos. | Division per Container or Trailer[20] | Division Per 20 cft[20] | Division Per 2,240 lbs[20] | No. of 20′ Containers |
|---|---|---|---|---|---|
| Los Angeles, CA ) | | | | | |
| Oakland, CA ) | | | | | |
| San Diego, CA ) | | | | | |
| Stockton, CA ) | 107 | $701.00 | $25.49 | $60.96 | 1 - 40 |
| Seattle, WA ) | 107 | $659.00 | $23.96 | $57.30 | 41 & over |
| Tacoma, WA ) | | | | | |

It was not until May 7, 1980, that Richmond appeared under the column heading "Rail Carriers Terminals" in Rule 107.[21]

4. Section 5 of the Tariff is the segment of the Tariff which describes the routing of all movements from participating overland carriers' terminals to the interchange terminal.[22] As seen, Rule 107 identifies the route number for movements from West Coast rail terminals through the interchange point of Savannah as Route No. 107. But at all times relevant to this proceeding, Section 5 made no reference to a Route No. 107. There was, however, a Section 5 reference to a Route No. 140, which does contain a routing of movements from West Coast rail terminals to Savannah.[23] Among other things, Route No. 140 shows Richmond as a rail carrier terminal and ATSF as the originating rail carrier. Until March 16, 1980, however, there was no routing provision showing UP as an originating rail carrier at either Los Angeles and Portland or any other West Coast port under Route 140. By a tariff

[19] TFL's Tariff, original p. 65.

[20] Reference to notes to Rule 107 deleted.

[21] TFL's Tariff, 3rd revised p. 65.

[22] The interchange terminal is defined as "the point of interchange between participating rail carrier and water carrier." TFL's Tariff, original through 2nd revised p. 364.

[23] Effective July 24, 1980, the information shown previously under Route No. 140 appeared under Route No. 107. TFL's Tariff, 3rd revised p. 364.

filing, which became effective March 16, 1980, Union Pacific was added to Route No. 140 as an originating rail carrier.[24]

TFL carried no other shipments of the same or similar commodities from West Coast origin ports to Northern European destinations from July 30, 1979 through October 3, 1979.

## THE GOVERNING STATUTE

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff is derived from the provisions of section 18(b)(3), 46 U.S.C. 817(b)(3).[25] After stating the requirement that common carriers by water in foreign commerce or conference of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

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

[24] TFL's Tariff, 2nd revised p. 364.

[25] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a), Rules of Practice and Procedure. See n. 2, *supra.*

## DISCUSSION

The discussion which follows will be divided into two parts. The first part will consist of an analysis of the merits of the application concerning all three shipments *on the assumption* that the filing of 6th and 11th revised pp. 362 corrected the inadvertent error of failing to file rates which the carrier and shipper had agreed upon prior to the shipments and *that other provisions of the tariff permit special docket relief to be granted.* The second part will explain why, in my judgment, Shipment No. 1 does not qualify for special docket relief.

"In considering an application for waiver, the Commission is obliged to determine whether the criteria established by the four provisos of section 18(b)(3) have been satisfied." *U.S. Department of Agriculture v. Waterman Steamship Corporation*, 20 F.M.C. 644, 647 (1978).

## PART I

### THE FIRST PROVISO

The first proviso contains two requirements. It must be shown that the error qualifies for remediable action and that granting the relief requested will not result in discrimination among shippers. Both requirements have been met.

The evidence demonstrates that after agreeing to publish a lower rate, TFL failed to do so because of inadvertent clerical error. In circumstances in which the carrier's intent to publish a lower rate has been communicated to the shipper and the shipper is then charged more than he understood the rate to be, special docket relief is warranted and has been authorized. *U.S. Department of Agriculture v. Waterman Steamship Corporation, supra; Union Carbide Corporation v. Gulf European Freight Association on Behalf of Sea-Land Service, Inc.*, 18 SRR 1675 (1979), administratively final per FMC notice served March 26, 1979.

During the relevant time period[26] there were no shipments of the same or similar commodity. Thus, approval of the application is not likely to result in discrimination among shippers. However, as an added precaution, the order, which follows, contains additional safeguards in the event there were other shippers similarly situated.

### THE SECOND PROVISO

The corrective or conforming tariff pages (6th and 11th revised pp. 362) were filed and became effective September 10, 1979, and October 4, 1979, respectively. Those pages set forth the agreed rate and were filed before the filing of the application for tariff relief. These new tariff

[26] The relevant time period for the purpose of prevention of discrimination is the period from the date of agreement to publish a reduced rate to the date of filing the conforming tariff. *Boise Cascade Corp. v. Sea-Land Service, Inc.*, 18 SRR 1041, 1047 (1978), administratively final per FMC Notice served November 13, 1978. See also *Application of Yamashita-Shinnihon Line for the Benefit of Nisso-Iwai American Corporation*, 22 F.M.C. 674 (1980).

pages set forth the rates on which waiver is based and were timely filed. This meets the requirements of the second proviso. Cf. *Munoz y Cabrero v. Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977).

### THE THIRD PROVISO

This application was filed pursuant to the revised Commission Rules governing special docket applications. Under the revised rules, the filing of the application meets the requirements of the third proviso.[27]

### THE FOURTH PROVISO

The fourth proviso requires that the application be filed within one hundred eighty days from the date of shipment. The shipments were made on September 3, 1979, and October 1, 1979. The application was filed on January 15, 1980. I find that the application was filed within one hundred eighty days of the shipment. This satisfies the requirements of the fourth proviso.

## PART II

Shipment No. 1 does not qualify for special docket relief, by way of waiver, because TFL did not have an effective tariff on file showing rates and charges for through transportation from Richmond to foreign ports as required by section 18(b)(1) of the Shipping Act, 1916, 46 U.S.C. 817(b)(1)[28] and the Commission's Regulations implementing that statute, 46 CFR Part 536.

It is evident that TFL intended that its new intermodal tariff contain rates and charges for a through transportation service from Richmond, but it failed to fashion a tariff to fit. The infirmity lies in the failure of the tariff to hold out the performance of a through transportation

[27] Rule 92(a)(4), 46 CFR 502.92(a)(4), provides:

By filing, the applicant(s) agrees that

(1) if permission is granted by the Commission

(A) an appropriate notice will be published in the tariff or

(B) other steps will be taken as the Commission may require which give notice of the rate on which such refund or waiver would be based and

(C) additional refunds or waivers shall be made with respect to other shipments in the manner prescribed by the Commission's order approving the application.

(ii) if the application is denied, other steps will be taken as the Commission may require.

[28] Section 18(b)(1) provides in pertinent part:

From and after ninety days following enactment hereof every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

service from Richmond to a foreign port and the failure, therefore, "to plainly show the places between which freight will be carried."

"Holding out is important not only because of the significance historically given to it," *Interstate Commerce Commission v. AAA Car Drivers Exchange, Inc.,* 340 F. 2d 820, 825 (2 Cir. 1965), but because of the stress placed upon it by the Commission in its Regulations governing intermodal tariffs containing through rates and through routes in the foreign commerce of the United States. In those regulations the Commission has defined a "participating carrier" in an intermodal tariff as "Any carrier holding out to perform a transportation service over a through route."[29]

It is true that Rule 1, Section 4 shows that the scope of the tariff is from particular West Coast ports, including Richmond, to particular foreign destinations, including Bremerhaven. But this hardly can be construed as the requisite holding out contemplated by the Commission's Regulations. Indeed, the Tariff itself confirms this conclusion.

Sandwiched between a page entitled "Participating Rail and Motor Carriers"[30] and Tariff Rule 1,[31] showing the scope of the Tariff, there is an untitled page reciting that:[32]

> This Section contains General Rules and Regulations Applying to intermodal transportation of commodities moved herein. For specific provisions applying to Rail Carriers' participation herein, see Rules 100 to 111.

The unmistakable meaning of those words is that, unless Rules 100 through 111 show a specified transportation service offered by a particular rail carrier, the tariff does not hold out that such service is offered. For example, if Western Pacific Railroad Company (WP -- a participating rail carrier) is not shown in Rule 100 as an offerer of a CY service from a San Francisco terminal location (and at a glance it may be seen that it is not so listed), manifestly there is no holding out of such service over a through route by TFL in participation with WP from San Francisco, even though (as Rule 100 also reveals) TFL does hold out a container yard service from San Francisco in participation with ATSF. Thus, because ATSF is not shown in Rule 100 to offer a CY service from its Richmond terminal location and because no provision is made elsewhere in Rules 100 through 111 for such service (or even for division of revenue), the tariff can scarcely be considered to hold out or to authorize the performance of a transportation service over a through route from Richmond to any foreign port. Nothing said herein concerning the failure of the tariff to hold out the service should

[29] 46 CFR 536.8.

[30] TFL's Tariff, p. 6.

[31] *Id.* Rule 1 begins at p. 10 and continues on p. 11.

[32] *Id.*, original p. 9.

be construed to constitute a finding that TFL did not otherwise undertake to provide such common carrier service.

I am mindful that the Routing Section of the Tariff does show what purports to be a routing from ATSF's terminal in Richmond to the interchange point of Savannah. But this routing, even if correctly numbered to show its nexus with Rule 107,[33] does nothing to alter the fact that the Tariff's Rules, which the Tariff user is directed to consult to ascertain the service offered, do not hold out an intermodal service from the ATSF terminal at Richmond. Moreover, the routing does not hold out the particular service provided by TFL to SPMT -- a CY service.

Two other matters remain to be considered in regard to shipment No. 1. In Appendix I TFL suggests that the failure to show an ATSF service at Richmond "should not result in discrimination against the shipper" and that such failure "could be stated as California points since same divisions of revenue payable to the rail carrier exist from all California points and therefore by common points."

Turning to the latter suggestion first, the short answer is that while the Tariff could have stated the division of revenues as "California points," the fact is that it did not.

The suggestion concerning discrimination, which is taken to mean that if the application is denied then a discrimination might result, is simply not well taken. The application states that there were no other shipments of canned goods during the relevant time period. In the light of TFL's entire presentation, this must be construed to mean that there were no other shipments of canned goods (except, of course, Shipment No. 2) from any West Coast port to Bremerhaven or any other Rate Group 2 or 3 discharge port. Under the circumstances a determination that Shipment No. 1 does not qualify for special docket relief by way of waiver could not result in discrimination amongst shippers.

Moreover, the dismissal of the application, insofar as Shipment No. 1 is concerned, is not likely to result in harm to SPMT. The holding in connection with Shipment No. 1 is that there was no effective tariff on file at the time of shipment authorizing through transportation of

[33] Whatever consequences the errors in the Routing Section, Section 5, of the Tariff may have, those errors are not deemed material to any of the issues in this proceeding. Thus, the failure to show a Route 107 in Section 5 at any pertinent time and the failure to include UP terminals in Route 140 until March 16, 1980, will not bar granting relief for Shipment Nos. 2 and 3. March 16, 1980 was within 180 days of the date of shipment of Shipment No. 3, but more than 180 days after the date of shipment of Shipment No. 2. Nevertheless, if the failure to include UP terminals had been held to bar relief, that result probably would have applied to both shipments because the second proviso requires that a corrective tariff be filed before the special docket application is filed and the Commission has suggested that if supplemental corrections are filed after the application is filed, a new application within the 180-day time period is necessary. See *Application of Maersk Line Agency for the Benefit of Nomura (America) Corporation*, 22 F.M.C. 249, 250 n.8 (1979). Here, of course, no such new application was timely filed.

canned goods from a railroad terminal in Richmond to a foreign discharge port via the interchange point of Savannah. The failure to have an effective tariff on file at the time of shipment has not been corrected in accordance with the four provisos of section 18(b)(3) and the Special Docket Rules, 46 CFR 502.92.[34] Thus, the original condition still prevails, that is: -- there is no tariff authorization for the movement. Consequently, that portion of the application applicable to Shipment No. 1 is not susceptible to handling in this proceeding and must be dismissed. But the order which follows does not require TFL to collect the balance of freight charges,[35] because TFL "may not collect charges based on an untariffed rate," Docket No. 77-13, *First International Development Corporation v. Ships' Overseas Service Inc.*, Report served July 17, 1980, slip opinion p. 12. The upshot is that with regard to Shipment No. 1, vis-a-vis SPMT, this decision leaves TFL in the same position it was found before the filing of the application.

Finally, the question, not addressed in this proceeding, whether TFL transported property in foreign commerce without a tariff on file in violation of section 18(b)(1) of the Shipping Act, 1916, is referred to the appropriate office of the Commission's staff for investigation.

## CONCLUSION AND ORDER

The application for permission to waive collection of a portion of freight charges on Shipment No. 1 is dismissed.

The application for permission to waive collection of a portion of freight charges for Shipment Nos. 2 and 3 is granted. It is ordered:

1. Trans Freight Lines, Inc., shall waive collection of freight charges in the aggregate amount of $19,507.44 due it from Southern Pacific Marine Transport in connection with two shipments of Canned Goods, Commodity Code No. 053.0001, p. 362 of TFL's Tariff No. F.M.C. 8, transported from Los Angeles, California, to Rotterdam, The Netherlands, and from Portland, Oregon, to Bristol, England, on September 3, 1980, and October 1, 1980, respectively.

2. Trans Freight Lines, Inc., shall publish and file the following notice at the appropriate page in the tariff described in paragraph 1 above and at the page in the tariff where Cargo N.O.S. is shown, if different:

> Notice is hereby given as required by the decision in Special Docket No. 701, that effective July 30, 1979, and continuing

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[34] Inasmuch as Tariff Rules 65 and 60 were not changed until May 7, 1980, and August 5, 1980, respectively, the corrections were not timely filed for consideration in this proceeding.

[35] See, e.g., *McCrory Stores v. Sea-Land Service, Inc.*, 18 SRR 911, Initial Decision served August 31, 1978, administratively final, Notice served October 12, 1978; *A.E. Staley Mfg. Co., Decatur, Illinois v. Mamenic Line*, 20 FMC 385, 642 (1978); *Application of Sea-Land Service, Inc. for the benefit of Panasonic Co. Division of Matsushita Electric Corp.*, 19 SRR 757, Initial Decision served September 4, 1979, administratively final, Notice served October 17, 1979.

through September 9, 1979, inclusive, the rate on Canned Goods, Commodity Code No. 053.0001, p. 362 of TFL's Tariff No. F.M.C. 8, for the purposes of refund or waiver of freight charges is $1,470.00 per twenty (20) foot container in container yard to container yard service to discharge ports in Rate Groups 1, 2 and 3, such rate not subject to CAF or BFS but such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

3. Trans Freight Lines, Inc., shall determine whether an adjustment in brokerage due freight forwarders is required in the light of this decision and shall take such measures as are necessary to effectuate such adjustments.

4. The waiver shall not affect the land portion of the through rate.

5. Waiver of the charges and refund shall be effectuated within thirty days of service of notice by the Commission authorizing the same and Trans Freight Lines, Inc., shall within five days thereafter (a) notify the Commission of the date and manner of effectuation of the waiver and refund and (b) file with the Commission an affidavit of compliance with paragraphs 1, 2, 3, 4 and 5(a) of this order.

(S) SEYMOUR GLANZER[36]
*Administrative Law Judge*

Washington, D. C.
August 21, 1980

Editor's Note: Appendix I is included in the official docket file for this proceeding.

[36] After the foregoing Initial Decision was completed and ready to be printed, I received a letter from TFL containing a duplicate of ATSF's concurrence. The concurrence certifies that ATSF asserts and concurs in all tariffs and supplements thereto filed by TFL in which ATSF is shown as a participant (limited to TFL's Tariffs ICC TFEI 301 and 302) "but only to the extent that such tariffs apply." Thus, there is nothing in the concurrence to warrant different conclusions than set forth in the text, above.

# FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 741

## SEATRAIN INTERNATIONAL, S.A. TO BENEFIT FLORISTS' TRANSWORLD DELIVERY ASSOCIATION

## ORDER ADOPTING INITIAL DECISION

*December 12, 1980*

On October 29, 1980, the Commission determined to review the Initial Decision in the above-captioned proceeding on September 26, 1980 in which Administrative Law Judge William Beasley Harris denied Seatrain International, S.A., permission to refund freight charges collected on eight containers of ceramic flower pots transported between Lisbon, Portugal and Oakland, California. Examination of the record reveals that Seatrain's application was incomplete and was therefore appropriately denied.

The Presiding Officer was concerned with inconsistencies between the U.S. Customs Declarations, Bills of Lading and tariff materials submitted in support of the application and wrote to Seatrain requesting clarification of the intermodal routing involved. When Seatrain failed to furnish tariff materials demonstrating the applicability of Tariff No. FMC No. 137 to the Lisbon, Le Havre, Galveston, Oakland route used to transport the eight containers in question, the application was dismissed.

It is the responsibility of the applicant and not the presiding officer to clearly demonstrate the tariff provisions in effect on the date of sailing and the necessary correlation between the bargained for rate and the corrected tariff pages. Although it would defeat the basic shipper protection purposes of P.L. 90-298 to demand exacting explanations of every tariff rule affecting a special docket shipment, the tariff basis for intermodal routings used should be demonstrated with reasonable clarity before an application is granted.

THEREFORE, IT IS ORDERED, That the Initial Decision served September 26, 1980 in this proceeding is adopted by the Commission and incorporated into this Order; and

IT IS FURTHER ORDERED, That this proceeding is terminated.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

* Vice Chairman Leslie Kanuk dissenting and issuing a separate opinion. Commissioner Peter N. Teige dissenting and issuing a separate opinion.

## DISSENTING OPINIONS

### DISSENTING OPINION OF COMMISSIONER PETER N. TEIGE

I dissent. Recently, in Special Docket No. 701, *Trans Freight Lines Inc. to Benefit Southern Pacific Marine Transport*, I argued that the failure of the carrier's tariff to meet all the requirements of Section 18(b)(1) of the Shipping Act should not prevent the Commission from granting special docket relief under Section 18(b)(3), so long as the original and corrective tariffs state the charges applicable to the shipments with clarity sufficient to allow the Commission to measure the relief to be given to the shipper. My review of the record of this case leads me to the same conclusion. Seatrain's application and supporting exhibits show that its original and corrective tariffs clearly stated the charges to the Florists' Transworld Delivery Association for the movement of these shipments of flower pots. That being the case, Seatrain's application should have been granted, particularly since, unlike Special Docket No. 701, the shipper here has paid the freight and will therefore suffer financial detriment as a result of the majority's decision. The question whether Seatrain violated Section 18(b)(1) by failing to include in its tariff authority to route cargo from Portugal to France prior to loading, can be examined in a separate investigation.

### VICE CHAIRMAN LESLIE KANUK, DISSENTING

I cannot agree with the majority's conclusion that the Initial Decision should be affirmed. I believe that the case should be referred back to the Administrative Law Judge for the purpose of having a decision reached as to whether the application was filed within the 180-day time limit.

The conclusion reached in the Initial Decision is that the application should be denied because there is insufficient evidence of record to determine whether it was filed in a timely fashion under the Commission's rules. The pertinent rule requires that an application for refund or waiver be filed within 180 days from the date of shipment. The date of shipment is defined as the date the vessel sails from the port at which the cargo was loaded. 46 CFR 502.92(a)(3).

The cargo in question was loaded at Le Havre, France, and there is evidence of record regarding sailing dates from Le Havre. Thus, contrary to the conclusion reached in the Initial Decision, there is information which permits a determination as to whether the application was timely filed. The concern expressed in the Initial Decision regarding the necessity for having proof of sailing dates from Lisbon is unfounded, since there were no sailings from Lisbon. Thus, Lisbon is irrelevant for the purpose of determining whether there was a timely filing.

Once a determination has been made concerning timeliness of filing, appropriate disposition of the application should follow.

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 741

## APPLICATION OF SEATRAIN INTERNATIONAL, S.A. FOR [1] THE BENEFIT OF FLORISTS' TRANSWORLD DELIVERY ASSOCIATION

Permission denied to refund a $32,455.39 portion of aggregate freight charges of $58,880.72 collected.

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

*Adopted December 12, 1980*

This is a special docket application under section 18(b)(3) of the Shipping Act, 1916, as amended, and Rule 92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92. The application contains a certification that the application was mailed at Oakland, California, August 13, 1980, to the Secretary of this Commission. Under Rule 92(a)(3), the August 13, 1980, date is the filing date of this application.

### DISCUSSION

"The application for refund or waiver must be filed with the Commission within 180 days from the date of shipment. . . . Date of shipment shall mean the date of sailing of the vessel from the port at which the cargo was loaded." (*Ibid.*)

The August 27, 1980, letter referred to in the footnote above, also stated:

> Please supply the date of sailing and proof thereof for the vessels *Bremen* V/22 and *Italy* V/42, respectively, from Lisbon. B/L 3000352/5 of Seatrain, as you noted, is undated, but it accounts for two 40′ Containers said to contain "Ceram-

[1] In an August 27, 1980, letter to Seatrain International, S.A., the Presiding Administrative Law Judge wrote, inter alia, "The information supplied in the application indicates payment for carriage of the freight was made by Harper Robinson and Company. However, there is no explanation why any refund should be made to Florists' Transworld Delivery Association rather than to Harper Robinson and Company."

In a reply letter signed by Carolyn J. Miller, Finance-Accounting, dated September 12, 1980, postmarked Weehawken, N.J., September 15, 1980 (received September 18, 1980), Seatrain International, S.A., stated, *inter alia*, "I spoke with Jim Carrier, Harper Robinson & Co., San Francisco, California who stated they acted as the local representative for F.T.D. He advised me that F.T.D. reimbursed them all monies that were paid to Seatrain on behalf of F.T.D. He also stated they have no claim in this case and requested they not be involved. If you have any questions you may reach him at 415-983-9600 during the day."

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

> ic Posy Pail Floral Containers" being aboard the *Bremen*. B/L 3000362/1 dated Lisbon, February 13, 1980, accounts for six 40′ Containers and one 20′ Container of the commodity "Ceramic Posy Pail Floral Containers" being aboard the *Italy*. These are the nine containers in the shipments involved in this proceeding. . . .
>
> It is respectfully suggested you get this information to the undersigned promptly, along with any other a review by you of the application may suggest should be sent.

In its September 12, 1980, reply, referred to above, Seatrain International, S.A. wrote:

> I have attached the copies of Seatrain International S.A. sailing schedules for January showing that the Bremen 22 was scheduled to sail from Le Havre on February 9th and the February schedule showing the Italy 42 was scheduled to sail from Le Havre on February 21st. The cargo originated in Lisbon but was not physically loaded onto the vessel in Lisbon. The cargo was loaded onto the vessel at our port of call in Le Havre. We did not have Lisbon as a port of call for the vessels. Our tariff did allow us to give Lisbon as an origin bill of lading port through to Oakland, California. I may also refer you to my exhibits A, B and C in my original application to you. These exhibits are Customs Service Cargo Declaration documents and do show the sailing dates."

Exhibits A, B and C are: A--B/L No. 3000352/5 for the *Bremen* V22, loading 4-40′ containers ceramic posy pail floral containers at Le Havre for Galveston and Oakland, date of sailing 2-19-80; B--B/L No. 3000362/1 for the *Italy* V42, loading 4-40′ containers ceramic posy pail floral containers at Le Havre for Houston and Oakland, date of sailing 2-25-80; and C--B/L No. 3000362/1 for the *Saratoga* V/22 loading 2—40′ containers,1—20′ container ceramic posy pail floral containers at Le Havre for Houston and Oakland, date of sailing 3-8-80.

Seatrain B/L 3000352/5, Exhibit D, undated, shows two 40′ Containers-ceramic posy pail floral containers for the *Bremen* V/22 loaded at Lisbon for Galveston and Oakland. Seatrain B/L 3000362/1, Exhibit E, dated at Lisbon February 13, 1980, shows 6-40′ Containers and 1-20′ Container-ceramic posy pail floral containers for the *Italy* V42 loaded at Lisbon for Houston and Oakland.

There is no date, or other information as to any of the cargo leaving Lisbon. The tariff involved is Seatrain International, S.A., Westbound Continental Europe/U.S. Pacific Coast Joint Container Freight Tariff 314 ICC STLV 314 (formerly ICC No. 44) FMC No. 137, and is from Portugal not France. Thus there is no proof of the date of sailing from the port of Lisbon, nor any citation of the part of the tariff which allows the carrier to give as an origin bill of lading port, or what permits Le Havre, France, to be listed at which the Lisbon cargo was

loaded. The critical date is 180 days prior to August 13, 1980, the date this application was filed, to permit a proper determination as to whether this application was filed timely in regard to cargo leaving Portugal not France.

The last paragraph of the September 12, 1980, letter from Seatrain says, "If you have any further questions regarding this case please contact Mr. Harvey Flitter, Seatrain Lines Inc., Port Seatrain, Weehawken, New Jersey 07087. I am forwarding my entire file to Mr. Flitter who is the Vice President of Pricing and Regulatory Affairs." Under date of September 16, 1980, Mr. Flitter wrote:

> Please refer to the last paragraph of our Oakland, California office's letter of September 12 and direct all future communications pertaining to the subject matter to my attention at the following address:
>
> Seatrain Lines, Inc.
> Container Division
> Port Seatrain
> Weehawken, New Jersey 07087
>
> Thank you for your cooperation.

The Presiding Administrative Law Judge has by his letter of August 27, 1980, provided Seatrain with opportunity to review its application and supply information to make it more complete. Seatrain has not supplied the information that permits a proper determination as to whether this application was filed timely, and the Presiding Administrative Law Judge should not be required to point out again the need for certain information or to tell an applicant what else may be needed after previously having communicated with the applicant. Therefore, because of the inadequacy of information and explanation, the Presiding Administrative Law Judge *finds* and *concludes* 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.
September 26, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NOS. 78-15, 78-17, 78-18 AND 78-19

UNITED STATES LINES, INC. ET AL.

*v.*

MARYLAND PORT ADMINISTRATION

## ORDER ADOPTING INITIAL DECISION

*December 15, 1980*

This proceeding is before the Commission on the Exceptions of Complainant United States Lines, Inc. and Respondent Maryland Port Administration (MPA) to the Initial Decision of Chief Administrative Law Judge John E. Cograve, which held that three of MPA's terminal tariff provisions violated section 17 of the Shipping Act, 1916 (46 U.S.C. section 816) but not section 16 (46 U.S.C. section 815).

### BACKGROUND

The proceeding arose from an accident occurring at the Dundalk Marine Terminal at the Port of Baltimore on March 21, 1976. On that date, two ships, *S.S. American Legend* and *S.S. Albert Maersk*, owned and operated by U.S. Lines and A/S D/S Svendborg and D/S af 1912 A/S, respectively, were berthed at the terminal and were in the process of loading and unloading containers with the use of four rented MPA-owned container cranes. A strong wind propelled the four cranes down the pier; two were blown into the water and the other two each struck one of the two ships. All four cranes and both vessels were damaged.

In February, 1977, MPA brought suit in the United States District Court for the District of Maryland to recover for damages to its cranes. Named as defendants were the two vessel owners - U.S. Lines and Svendborg - and the two stevedores hired to load or unload each of the ships on the day in question - ITO Corporation of Baltimore, and John T. Clark & Son of Maryland, Inc.

One of MPA's grounds for recovery was that three of its terminal tariff provisions exculpate it from liability arising from its furnishing the cranes. The Court, in ruling on motions for summary judgment, concluded that the Federal Maritime Commission should have the first opportunity to rule on the validity of the tariff provisions in question. The Court noted:

> Accordingly, this Court will not at this time decide questions concerning the validity and construction of the contested tariff provisions . . . . I do not conclude, as has been suggested, that

> the Court in this case is absolutely bound by any rulings of the FMC. What the Court wants is the FMC's interpretation of these provisions. The Court will then decide the legal questions presented under the particular facts of this case. Therefore, those defendants who wish to press these questions are instructed to file appropriate pleading with the FMC. *Maryland Port Administration v. S.S. American Legend*, 453 F.Supp. 584 (D.C. Md. 1979).

U.S. Lines, Svendborg, ITO and Clark then filed the instant complaints with the Commission, alleging that the tariff provisions subjected them to undue and unreasonable prejudice or disadvantage, in violation of section 16 First, and constituted unjust or unreasonable regulations or practices relating to or connected with the receiving, handling, storing or delivering of property in violation of section 17. The Commission's Bureau of Hearing Counsel and the California Association of Port Authorities intervened.

The tariff provisions in issue are as follows:

Section VII, LIABILITY, Paragraph (2):

> The Terminal Operator accepts no responsibility for damages or accidents occurring when its equipment and/or operator or employees are furnished to perform work for others.

Section VII, LIABILITY, Paragraph (3):

> All persons to whom berths, wharves, transit sheds, mechanical equipment or other facilities have been assigned shall be responsible and liable to the terminal operator for any damage occurring to such property during their tenancy, occupancy and/or use without regard to whom shall cause the damage.

Section VIII, MISCELLANEOUS CHARGES, Paragraph (4) B4:

> The terminal assumes no liability for claims, losses, or expenses by reason of property damage, personal injury or death which may result from the use of the crane, except that caused by structural or mechanical failure and not occasioned by an act or omission on the part of the party renting the crane.

The Presiding Officer concluded that the tariff provisions were unreasonable to the extent they relieved MPA from liability for its own negligence, and that they were, therefore, violative of section 17. He found, however, that Complainants failed to carry their burden of establishing that the tariff provisions were unreasonably prejudicial or disadvantageous in violation of section 16 First.

## EXCEPTIONS AND POSITIONS OF THE PARTIES

MPA excepts to the Presiding Officer's conclusion that its tariff violates section 17, and argues that this conclusion was based upon a series of erroneous findings and the failure to make other, appropriate findings. MPA contends that its insurance premiums reflect the exist-

ence of the exculpatory tariff provisions, and that the savings resulting from the exculpatory clauses are passed on to its users because MPA's rates to its users are based upon analysis of its operating costs. This "rate relationship" between the exculpatory clauses and the rates charged, MPA argues, justifies those provisions under *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411 (1959). Thus, MPA excepts to the Presiding Officer's conclusions that MPA's rates and charges are dictated by competitive necessity and that any savings realized by the port inure to the port's and not the users' benefit.

MPA also excepts to the Presiding Officer's failure to rule on its proposed findings of fact relating to the State of Maryland's costs in subsidizing the port and its users' ability to benefit from those facilities without the necessity of making capital investments. MPA argues that these economic benefits, derived from the use of the port facilities, constitute a *quid pro quo* which justifies the exculpatory clauses.

MPA alleges that the Presiding Officer erred by considering irrelevant MPA's requested findings of fact determining that both steamship lines and stevedores are "users" of MPA's container cranes. Such a determination is relevant to this proceeding, MPA argues, and is supported by the record. According to MPA, such findings would be consistent with the Commission's decision in *West Gulf Maritime Association v. Port of Houston Authority*, 22 F.M.C. 420, 560 (1980), in which it was determined that vessel agents were properly considered users under the tariffs in issue in that proceeding.

Similarly, MPA objects to the Presiding Officer's conclusion that MPA's proposed findings of fact dealing with control over the loading and unloading operations during use of MPA facilities and equipment were not relevant to the issues in this proceeding. The Presiding Officer, MPA contends, could have considered the tariff provisions in light of the evidence MPA presented that the users have control over the cranes during the time the cranes are most subject to damage. MPA contends that the general rule against exculpatory provisions - expressed in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), by the United States Supreme Court, and applied to public terminals by the Commission in *West Gulf Maritime Association v. City of Galveston, (West Gulf)* 22 F.M.C. 101 (1979), 22 F.M.C. 401 (1980) and *Lucidi v. Stockton Port District*, 22 F.M.C. 19 (1979) - is inapplicable to MPA, because MPA is not a public utility in a monopolistic situation. MPA states that reliance on *West Gulf* and *Lucidi* is not consistent with the ruling in *Southwestern Sugar*.

MPA also excepts to the Presiding Officer's failure to determine that Complainants are able but unwilling to develop their own facilities in Baltimore. MPA argues that the imposition of the exculpatory tariff items is reasonable because Complainants have chosen to benefit from

use of MPA's facilities. MPA also excepts to the Presiding Officer's granting of U.S. Lines' Motion to Quash the deposition of a U.S. Lines official. This deposition, MPA contends, would have established that U.S. Lines felt that it was profitable to operate in the Port of Baltimore without choosing to risk its own capital by developing its own container facilities. MPA contends that the Presiding Officer agreed that the information sought by MPA was relevant in that it would prove that MPA was not in a monopoly situation, but that the Presiding Officer nevertheless granted U.S. Lines' motion.[1]

U.S. Lines also filed an Exception, and argues that the Presiding Officer erred in finding that MPA did not violate section 16. U.S. Lines claims that MPA has applied the tariff provisions in issue inconsistently and erratically, and as proof, offers that MPA's damage claim letters normally do not make reference to the exculpatory clauses in its tariff; that in litigation, MPA's complaints filed in court do not cite the tariff as a ground for recovery; that settlements of such claims have been for relatively small amounts; and that MPA's claims for crane damage have usually been directed to stevedores and not to the steamship lines. This demonstrates, according to U.S. Lines, the "benefit or preference bestowed by the MPA upon those whom it chose to favor" in litigation.[2]

## DISCUSSION AND CONCLUSIONS

The Commission is satisfied that the Presiding Officer properly defined the purpose and scope of this proceeding, and that his rulings on the Shipping Act questions raised by the tariff provisions in issue are well founded by the record and are supported by Commission precedent. For the reasons set forth below, the Commission finds that the Exceptions are without merit, and the Commission adopts the Initial Decision as its own.

Many of MPA's exceptions are grounded on its position that the Presiding Officer improperly limited the scope of the proceeding and refused to make findings on relevant matters. The Commission disagrees. The purpose of this proceeding is to determine the validity under the Shipping Act of three terminal tariff provisions, not to determine culpability for the crane accident. That issue was properly reserved by the district court in Maryland. The matter of who maintains control over the cranes is relevant to an estimate of which parties are theoretically more likely to be responsible and, therefore, liable for damage to the cranes. The issue before the Commission, however, is

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[1] Complainants and Hearing Counsel filed Replies to MPA's Exceptions, and generally support the Initial Decision's finding that the tariff provisions violate section 17.

[2] Of the remaining Complainants, Svendborg has belatedly "adopted" U.S. Lines' section 16 exception; Clark is silent on the section 16 issue; and ITO has indicated its "general agreement with Judge Cograve's decision." Hearing Counsel and MPA state that the Initial Decision correctly concluded that there was no violation of section 16.

the reasonableness of the exculpatory language. It is irrelevant whether a port-caused or a user-caused accident is the more likely; the Presiding Officer concluded, and the Commission agrees, that to the extent the provisions exculpate the port from liability for its own negligence, they are unreasonable.

Nor is a determination of who is a "user" of the facilities useful to the interpretation of MPA's tariff provisions. The provisions in issue refer not to "users," but rather to "persons to whom . . . facilities have been assigned," "the party renting the crane," and "others" [vis-a-vis the "Terminal Operator"]. It is by no means unclear to whom these provisions apply, and their interpretation does not require a definition of the term "user." In *West Gulf,* on the other hand, the Commission ruled on the definition of "user" because the tariffs in issue used that term in assigning and disclaiming liability. One of the tariff items challenged in that proceeding, in fact, was entitled "USER, DEFINITION OF:". 22 F.M.C. at 102.

The Presiding Officer's failure to make findings advancing MPA's theory that Complainants' enjoyment of economic gains justifies the tariff, was not erroneous. There is no legal precedent or logical premise for the notion that otherwise unreasonable tariff provisions are permissible if a user subjects itself to them and is making a profit in spite of their existence. Moreover, the validity of the tariff must be adjudged as applied to any user, not merely on the basis of these particular parties' financial circumstances.

Similarly, the Presiding Officer's quashing of the U.S. Lines official's deposition was premised on his opinion that the deposition would unnecessarily broaden the scope of the proceeding. MPA's argument that the Presiding Officer agreed that the information sought was relevant is clearly based on a misreading of his Order. MPA quoted out of context a portion of the Order in which the Presiding Officer was setting forth *MPA's* position on the deposition issue, a position he later rejected. The Commission concurs that the information sought in the deposition is not relevant, and concludes, therefore, that the Presiding Officer's rulings on the peripheral issues raised by MPA are consistent with the specific and limited purpose of this proceeding.

MPA's arguments regarding Commission and court precedent also fail, due to a strained interpretation of the cases cited. In *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), the Supreme Court enunciated the principle that release-from-negligence clauses are invalid as a matter of law in both common carrier and contract carrier relationships. The Court explained the justification for the rule as being:

> (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. 349 U.S. at 91.

The Commission applied that general principle in the *West Gulf* and *Lucidi* cases, finding disclaimers of responsibility and indemnification requirements in two terminal tariffs to be unreasonable, in violation of section 17.

MPA's arguments that *Bisso* does not apply to the instant situation, and its suggestions that *West Gulf* and *Lucidi* were erroneously decided, are not convincing. Although *Bisso* is not controlling on Shipping Act questions, the Commission cited that decision as a gauge for reasonableness in ruling on the lawfulness of tariff provisions in *West Gulf* and *Lucidi* and applied its rationale to the indemnification issues. *See also*, Order on Reconsideration, *West Gulf* , 22 F.M.C. 401 (1980). MPA's attempts to distinguish itself from the towboat owner in *Bisso* or the terminal operators in *West Gulf* and *Lucidi* promote differences without distinctions. A public terminal operator such as MPA is clearly in a position such that exculpatory clauses in its tariff create an unreasonable hardship upon those who would be consequently liable for the port's own negligence. *See also, Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966).

The exception to the *Bisso* rule suggested in *Southwestern Sugar* does not justify MPA's exculpatory provisions. MPA's argument that it has established a "rate relationship" between its supposedly reduced insurance costs due to the exculpatory provisions, and the rates charged to users, is not supported by the record. Although there is some evidence that MPA's insurance costs reflect the tariff's exculpatory language, there is no evidence that MPA's rates for the use of its facilities would be any higher absent those provisions. The record indicates that MPA's rate structure reflects what the traffic will bear, subject to the influence of what its competitor ports are charging. MPA has not shown that its rates reflect savings derived from the existence of the exculpatory clauses, and therefore the *Southwestern Sugar* exception to the *Bisso* principle has not been shown to be applicable to MPA's tariff.

In conclusion, MPA has failed to justify the exclusion of its tariff from the application of the Commission's rulings that exculpatory tariffs of terminal operators are unreasonable to the extent they relieve the terminal operators from liability for their own negligence. MPA's exceptions will, therefore, be denied.

The Commission also concludes that the Presiding Officer correctly resolved the section 16 issue. MPA's strategy in asserting, defending and settling damage claims does not provide a reliable indication that MPA has enforced its tariff in an "inconsistent" manner, nor have Complainants demonstrated how others have benefitted from MPA's alleged preference or how Complainants have suffered prejudice. Moreover, even if MPA had been shown to have preferred others in its enforcement of its tariff, it does not appear that an appropriate remedy

would be to order stricken from the tariff the selectively enforced provisions. U.S. Lines' exception will also be denied.[3]

THEREFORE, IT IS ORDERED, That the Exceptions of United States Lines, Inc. and Maryland Port Administration are denied; and

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

IT IS FURTHER ORDERED, That Maryland Port Administration amend and refile within 30 days its tariff section VII, Paragraphs (2) and (3) and section VIII Paragraph (4)B4 to conform to this decision within 30 days; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

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[3] Any exceptions not specifically addressed have nevertheless been fully reviewed and considered, and found to be without merit.

# FEDERAL MARITIME COMMISSION

NOS. 78-15, 78-17, 78-18, AND 78-19

UNITED STATES LINES, INC., ET AL.

*v.*

MARYLAND PORT ADMINISTRATION

Sections VII(2), VII(3) and VIII(4)B4 of the Maryland Port Administration's Terminal Services Tariff No. 3 (FMC 4) found to be unjust and unreasonable in violation of section 17 of the Shipping Act, 1916.

The Maryland Port Administration found not to have violated section 16 of the Shipping Act, 1916.

*Richard E. Hull, M. Hamilton Whitman, Jr., Kieron F. Quinn* and *Russell T. Weil* for complainant, United States Lines, Inc.

*R. Roger Drechsler* and *J. Paul Mullins* for complainant, John T. Clark & Son of Maryland, Inc.

*Donald A. Krach* for complainant I.T.O. Corporation of Baltimore.

*David W. Skeen* and *Bert I. Weinstein* for complainants, A/S D/S Svendborg and D/S af 1912.

*Robert L. Ferguson, Jr., Robert R. Harrison, III, Scott Livingston* and *Frederick G. Savage* for respondent Maryland Port Administration.

*Burt Pines, Jack L. Wells* and *Frank Wagner* for intervenor, California Association of Port Authorities.

*Aaron W. Reese* and *Polly Haight Frawley*, as Hearing Counsel.

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

*Adopted December 15, 1980*

These cases arise out of a major accident which occurred at the Dundalk Marine Terminal in the Port of Baltimore on March 21, 1976. Briefly, it appears that on that date two container ships, the *SS American Legend* and the *SS Albert Maersk*, were berthed or in the process of being berthed in adjacent slips at the Dundalk facility and were being unloaded or about to be unloaded through the use of two container cranes owned by the Maryland Port Administration. At about 1:15 p.m., two cranes assigned to the *SS Albert Maersk* were blown down the pier, one crane striking the *Albert Maersk* and the other striking the

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

*American Legend.* There was substantial damage to the two ships and to the two cranes that struck the ships and the total loss of the two cranes that rolled into the water.

In February 1977 the Maryland Port Administration (MPA) filed suit in the United States District Court for the District of Maryland. In its amended complaint, MPA named as defendants (1) the *American Legend, in rem*; (2) United States Lines, the owner of the *American Legend*; (3) ITO Corporation of Baltimore, the stevedore hired by U.S. Lines on the day of the accident; (4) the *Albert Maersk, in rem*; (5) A/S D/S Svendborg and D/S af 1912 A/S (Svendborg), the owners of the *Albert Maersk*; (6) Maersk Line Agency, the ship's agent for the *Albert Maersk*; and (7) John T. Clark & Son of Maryland, Inc., the stevedore hired to unload the *Albert Maersk* on the day of the accident.

The filing of the complaint led to a series of counterclaims, cross claims, and third-party claims and at least one motion for summary judgment by each of the parties.

Count 1 of the complaint before the District Court sought recovery under a theory of contract based on certain MPA tariff provisions which MPA argued in a motion for summary judgment exculpated MPA from any and all liability arising out of its furnishing of terminal facilities. The defendants in the District Court argued that the tariff provisions were void as against public policy. MPA then countered by raising the question of primary jurisdiction contending that any challenge to the contested tariff provisions must be made before the Commission in the first instance.

In *Maryland Port Administration v. SS American Legend*, 453 F. Supp., 584 (1979), Judge Harvey concluded that the Commission should have the first opportunity of determining the validity and reasonableness of the tariff provisions in question, and went on to say:

> Accordingly, this Court will not at this time decide questions concerning the validity and construction of the contested tariff provisions. . . . I do not conclude, as has been suggested, that the Court in this case is absolutely bound by any rulings of the FMC. What the Court wants is the FMC's interpretation of these provisions. The Court will then decide the legal questions presented under the particular facts of this case. Therefore, those defendants who wish to press these questions are instructed to file appropriate pleading with the FMC.

U.S. Lines, Svendborg, ITO and Clark each filed complaints against MPA alleging that Section VII, paragraph (2), and Section VIII, paragraph (4)B4 of MPA's Terminal Services Tariff No. 3 (FMC No. 4), effective November 13, 1975, subjected complainants to undue and unreasonable prejudice or disadvantage, in violation of section 16 First of the Shipping Act, 1916, and constituted unjust or unreasonable regulations or practices relating to or connected with, the receiving,

handling, storing or delivering of property in violation of section 17 of the Shipping Act.

THE STIPULATION

The parties to this proceeding have entered into the following stipulation:

1. Maryland Port Administration [hereinafter MPA] is an agency of the State of Maryland which owns the port terminal facilities at Dundalk Marine Terminal in the Port of Baltimore. These facilities include Berths 11 and 12 which are designed for handling of containerized cargo. Four IHI, Ltd., manufactured container cranes are located at Berths 11 and 12. The attached drawing No. PF-1-11/170 "Existing Facility Plan" (Exhibit 1) of Maryland Port Administration Dundalk Marine Terminal shows the location of Berths 11 and 12 and container cranes 9, 10, 11 and 12. Berths 11 and 12 are adjacent piers running approximately east and west. Container cranes run parallel to the berth space on rails. Cranes 9 and 10 are located at Berth 11. Cranes 11 and 12 are located at Berth 12.

2. This case arises out of an accident that occurred at Dundalk Marine Terminal on March 21, 1976. On that date, the SS ALBERT MAERSK, owned and operated by A/S D/S Svendborg and D/S af 1912 A/S (hereinafter Svendborg), was docked at Berth No. 11, and at the time of the accident, was in the process of loading and unloading containers through the use of two MPA container cranes 9 and 10. At the time of the accident, the SS AMERICAN LEGEND, owned and operated by United States Lines, Inc., was either berthed, or in the process of being berthed, at adjacent Berth No. 12 and preparations were underway to begin operating cranes numbers 11 and 12, for the purpose of loading or discharging containers from the AMERICAN LEGEND.

3. The SS ALBERT MAERSK docked at approximately 6:00 a.m. on March 21, 1976 and was scheduled to begin loading and discharging containerized cargo at 8:00 a.m. At approximately 7:00 a.m., MPA employees began to untie and start up cranes 9 and 10 at Berth 11 so they would be available for loading and discharging the ALBERT MAERSK beginning at 8:00 a.m. General agents for Svendborg, Moller Steamship Co., had contracted with John T. Clark & Son of Maryland, Inc., as stevedore to load and discharge the ALBERT MAERSK. A copy of that contract is attached hereto as Exhibit 2. Two ILA crane operators were employed by Clark to operate cranes 9 and 10.

4. United States Lines had contracted with I.T.O Corporation of Baltimore as stevedore to load and discharge the SS AMERICAN LEGEND. A copy of that contract is attached as Exhibit 3. Two ILA crane operators were employed by I.T.O. to operate cranes 11 and 12; ITO employee William

Jarriel to operate crane no. 11 and ITO employee Melvin Jones to operate crane no. 12. The SS AMERICAN LEGEND was scheduled to arrive and dock at Berth 12 at 1:00 p.m. At approximately 12:00 p.m. employees of the Maryland Port Administration began untying and starting up cranes 11 and 12. At the time of the accident, Melvin Jones was in the operator's cab of crane no. 12. William Jarriel had not yet boarded crane no. 11. MPA employees Wayne Bridges and Chang Park were aboard cranes 11 and 12 respectively. Their exact position at the time of the accident is in dispute. At the time of the accident, I.T.0. personnel had boarded the vessel and were either unlashing or preparing to unlash containers, although neither crane no. 11 nor 12 had discharged any containers. To date, MPA has not billed I.T.O. for the use of the container cranes on March 21, 1976.

5. At Dundalk Marine Terminal there are seven container cranes and four Whirley cranes owned by MPA and used for loading and discharging vessels. The operation of container cranes while loading and discharging is by ILA personnel who are not MPA employees. The operation of the Whirley cranes while loading and discharging is by MPA crane operators, who are not ILA members.

6. Normally MPA employees untie and start up the container cranes, position the crane adjacent to the vessel and lower the crane boom over the hatch where cargo operations are expected to begin.

7. At approximately 1:15 p.m. on March 21, 1976, cranes numbers 11 and 12 were blown down the pier, off the end of the pier and into the water by a high wind. At about the same time, cranes 9 and 10 were also blown down the pier. Crane no. 10, struck the mast of the AMERICAN LEGEND and crane no. 9 struck the superstructure of the ALBERT MAERSK. Both vessels and the four cranes sustained physical damage.

8. The stevedoring gangs working the SS ALBERT MAERSK had taken a break for lunch between 12:00 and 1:00 p.m. These two gangs had started working the vessel again at 1:00 p.m.

9. Although the SS AMERICAN LEGEND was scheduled to berth at 1:00 p.m., it was a few minutes late. During berthing, four tugs were assisting the AMERICAN LEGEND. At about 1:07 p.m., the vessel was in position adjacent to Berth No. 12 where it was to be finally located. By the time of the occurrence, the gangway was down, all of the mooring lines were out and all but one of the lines were secure to the pier.

10. The Maryland Port Administration is an agency and instrumentality of the State of Maryland, created in 1956 by enactment of the Maryland State Legislature.

11. The Maryland Port Administration owns and maintains Dundalk Marine Terminal and several other pier and terminal facilities in Baltimore.

12. Dundalk Marine Terminal was, on March 21, 1976, the only public container terminal facility in Baltimore. The only other container terminal facility in Baltimore on March 21, 1976, was located at the Sea Land Terminal. It is privately owned by Canton Company and is privately operated by Sea-Land Service, Inc.

13. The history of MPA Limitation of Liability Provisions and Crane Rental Rates 1962-1976 applicable to Dundalk Marine Terminal is attached hereto as Exhibit 4.

14. The Maryland Port Administration filed with the Federal Maritime Commission a document entitled Terminal Services Tarrif [sic] No. 3 effective November 13, 1975. The three tariff provisions under challenge in these proceedings are as follows:

Section VII, LIABILITY, Paragraph (2) reads as follows:

> The Terminal Operator accepts no responsibility for damages or accidents occurring when its equipment and/or operator or employees are furnished to perform work for others.

Section VII, LIABILITY, Paragraph (3) contains the following provisions:

> All persons to whom berths, wharves, transit sheds, mechanical equipment or other facilities have been assigned shall be responsible and liable to the terminal operator for any damage occurring to such property during their tenancy, occupancy and/or use without regard to whom shall cause the damage.

[In] Section VIII of the Tariff, entitled MISCELLANEOUS CHARGES, Paragraph (4) B4, there is the following provision with regard to liability for the use of the container cranes:

> The terminal assumes no liability for claims, losses, or expenses by reason of property damage, personal injury or death which may result from the use of the crane, except that caused by structural or mechanical failure and not occasioned by an act or omission on the part of the party renting the crane.

15. Terminal Service Tariffs applicable to MPA facilities between 1962 and 1976 are filed herewith as Exhibit 5. Those tariffs comprise the following:

(a) MPA Terminal Services Tariff No. 3, FMC-T No. 4 and revisions thereto issued September 15, 1975, effective: October 15, 1975 (postponed to November 13, 1975).

(b) MPA Terminal Services Tariff No. 2, FMC-T No. 3 and revisions thereto issued October 1, 1974, effective: October 15, 1974.

(c) MPA Terminal Services Tariff No. 1A, FMC-T No. 2 and revisions thereto, issued October 25, 1972, effective: November 1, 1972.

(d) Maryland Port Authority Terminal Services Tariff No. 1, FMC-T No. 1 and revisions thereto, issued February 1, 1971, effective: February 5, 1971.

(e) Baltimore Marine Terminal Association Terminal Services Tariff No. 1, FMC Agreement No. T 1941, FMC-T No. 1 and revisions thereto, issued January 1, 1967, effective February 1, 1967.

(f) Maryland Port Authority Terminal Services Tariff No. 1, FMC-T No. 1 and revisions thereto, issued January 25, 1962, effective: February 1, 1962.

16. On March 21, 1976, the Maryland Port Administration was insured against legal liability to third parties with primary insurance in the amount of $500,000.00 for bodily injury and $200,000.00 for property damage, with excess insurance available up to an amount of $50,000,000.00 and was insured against property damage to the container cranes at issue in the amount of $7,920,000.00.

A. MPA's container cranes were insured against physical damage on March 21, 1976, under the following policies:

| COMPANY | POLICY NUMBER | COVERAGE | DEDUCTIBLE | EFFECTIVE DATE |
|---|---|---|---|---|
| Commercial Union Insurance Co. | U-281819 | All risk | 1% of the loss or $1000, whichever is the greater amount | 11/25/75 |
| Federal Insurance Company | 6291503 | All risk | Same | 11/25/74 |
| United States Fire and Guaranty | SP-161622 | All risk | Same | 11/25/74 |
| Maryland Prop-Casualty | CM-09911167 | All risk | Same | 11/25/75 |

B. MPA was insured against liability for injury and damage to other persons on March 21, 1976 under the following policies:

| COMPANY | POLICY NUMBER | COVERAGE | DEDUCTIBLE | EFFECTIVE DATE |
|---|---|---|---|---|
| Hartford Accident and Indemnity Company | 30C625312E | General Liability | None | 1/1/76 |
| North River Ins. Co. | X53500 | Excess Liability | Underlying Limits | 1/1/74 |
| Lloyds | 75120904 | Same | Same | 1/1/76 |
| | 75120904A | Same | Same | 1/1/76 |
| | 75120904B | Same | Same | 1/1/76 |
| | 77010212 | Same | Same | 1/1/76 |
| | 75120904C | Same | Same | 1/1/76 |
| | 75120904D | Same | Same | 1/1/76 |
| Admiral Ins. Co. | 6CX0446 | Same | Same | 1/1/76 |
| Royal Globe Ins. Co. | H203705 | Terminal Operators Liability | $10,000 | 4/1/75 |

17. The dates of acquisition, completion of installation, beginning of operation, purchase price and value for property damage insurance purposes for each container crane at DMT is listed on Exhibit 8.

18. Ronald G. Shock is and for the last ten years has been Staff Executive Assistant with the Maryland Port Administration and for that period of time has acted in the capacity of insurance manager for the Maryland Port Administration, with responsibility within MPA for placement of insurance and supervision of the insurance and claims program with respect to third-party liabilities and property damage on MPA equipment and facilities.

19. The MPA does not directly negotiate its insurance with insurers or brokers. As part of his duties, Mr. Shock drafts specifications for insurance coverage and forwards them to the State Treasurer for submission to insurance agents and brokers for bid. Specifications drafted by Mr. Shock for MPA's comprehensive general liability insurance for the period January 1, 1976 to January 1, 1979, are attached hereto as Exhibit 8B.

20. Mr. Shock has never sought nor been quoted alternate premium rates which would reflect the presence or absence of any of the tariff provisions set out in paragraph 14 herein.

21. No insurance company which insured MPA's container cranes against physical damage or against liability to third persons for the period including March 21, 1976, provided the MPA with financial data concerning insurance savings, if any, resulting from the tariff provisions at issue.

22. Mr. Shock in ten years as insurance manager of the MPA, has never (on request or on his own initiative) made a study or report of the effect of the tariff provisions set out in paragraph

14 herein or their predecessors upon the premiums charged by the MPA's liability insurers in respect of the MPA's liability to third parties and he knows of no such study or report made by any other person or entity.

23. Mr. Shock in ten years as insurance manager of the MPA, has never (on request or on his own initiative) made a study or report of the effect of the tariff provisions set out in paragraph 14 herein or their predecessors upon the premiums charges [sic] by the MPA's property damage insurers in respect of damage to the MPA's container cranes and he knows of no such study or report made by any other person or entity.

24. Mr. Shock did not draft and did not assist in drafting the limitation provision contained in Section VIII(4) B4 of the tariff referred to in paragraph 14 herein, when the first container crane was installed in approximately 1969.

25. Svendborg vessels have been operated in containerized service in the Port of Baltimore since 1974 by Svendborg's general agent, Moller Steamship Co. and Maersk Line Agency who received a copy of MPA Terminal Services Tariff No. 2 and were on MPA's mailing list of tariff subscribers for changes and tariff reissues thereafter.

26. Since the first receipt of MPA's tariff, neither Svendborg nor its agents have made any comments or complaint concerning the liability provisions now found in Sections VII(2), VII(3) and VIII(4) B4 of MPA Tariff No. 3.

27. ITO Corporation of Baltimore and its predecessor Jarka Corporation of Baltimore, has been doing business as a stevedore in the Port of Baltimore since approximately 1925, and as a terminal operator since the early 1960's. During the time that it has operated in Baltimore, it has received copies of MPA tariffs and changes.

28. United States Lines has been operating its vessels in the Port of Baltimore since before 1962 and U.S. Lines received a copy of MPA's Terminal Services Tariff and has received copies of each tariff change and newly issued tariffs since that time.

29. Since its first receipt of MPA's tariff, neither U.S. Lines nor its agents have made any comments or complaints concerning the liability provisions now found in Sections VII(2), VII(3) and VIII(4) B4 of MPA Tariff No. 3.

30. Each stevedoring company operating at Dundalk Marine Terminal works for more than one ocean carrier.

31. In the documents produced by the MPA in response to U.S. Lines' Request for Production (as modified by the Stipulation between U.S. Lines, Svendborg and the MPA regarding that Request filed on or about September 26, 1978), MPA has not produced any internal communications or memoranda, interoffice memoranda, interagency memoranda or communi-

> cation with any other state or federal agency . . . which contains references to (a) the rental rate for container cranes, or (b) wharfage charges, or (c) dockage charges, and which specifically refer in any way to the three tariff provisions set out in paragraph 14 above.

In addition to the facts stipulated above, the parties offer over two hundred proposed findings of fact. A good many of these proposed findings are not contested and some are merely restatements of matters covered in the stipulation. At least two parties to the proceeding consider the additional proposals irrelevant to the precise issues presented by these cases.

As Hearing Counsel state:

> The voluminous record in this proceeding, and the far-reaching approach of Respondent Maryland Port Administration (MPA) on brief, tend to obscure the limited and uncomplicated issues raised by Complainants. . . .

The questions presented are the validity of the challenged tariff provisions under sections 16 and 17 of the Shipping Act, 1916.[2] Moreover, there is a specific context in which these tariff provisions are to be considered. As noted earlier, MPA in part based its court suit against the defendants (the four complainants in these cases) on the ground that MPA's tariff relieved it of all liability arising out of its furnishing terminal facilities. It was in this context that the Court, under the doctrine of primary jurisdiction, gave the complainants here an opportunity to obtain from the Commission its interpretation of the tariff provisions. The Commission is not called upon to determine the cause of the damages suffered by the respective parties as a result of the incident at Dundalk; nor is the Commission called upon to establish the culpability of any of the parties, for as Judge Harvey said:

> What the Court wants is the FMC's interpretation of these provisions. The Court will then determine the legal questions under the particular facts of this case.

Virtually all of the additional proposed findings that are contested go to the question of whose "negligence" caused the incident at Dundalk--a question which the District Court has reserved to itself. While I have found nothing in the law of primary jurisdiction which would preclude an attempt by me or the Commission to resolve this question, I view such an attempt as an unwarranted encroachment on territory clearly reserved by the Court to itself.[3] The doctrine of primary jurisdiction

[2] On complaint Clark and ITO level the broadside charge that the tariff provisions violate sections "814 through 817" of the Act. On brief, however, the arguments are restricted to sections 16 and 17.

[3] This is the precise approach taken by the Commission in *I. Charles Lucidi v. Stockton Port District,* 22 F.M.C. 19 (1979).

was established to allow an administrative agency such as the Commission to bring to bear its expertise on questions which the agency is better equipped to answer than are the courts. The question of the ultimate liability for the incident at Dundalk is not such a question. Accordingly, except for a few findings made later which are relevant to a particular argument made by one of the parties, all of the other proposed findings have been considered and found either not relevant to the issues properly before me, redundant to the facts stipulated, or not established by the record in these proceedings.

## DISCUSSION AND CONCLUSIONS

MPA's basic position is that once a "user" accepts an "assignment" by MPA of a container crane, a contract is formed and that contract incorporates the rates, charges and conditions of MPA's terminal services tariff--including, of course, the exculpatory clauses at issue here. It is MPA's contention that "as a general rule," such exculpatory clauses are valid "as a matter of law"; that the burden is on complainant to prove that "special circumstances exist to qualify for an exception to the general rule"; and that complainants have failed to sustain that burden.

Except for a somewhat belated attempt to distinguish the cases in its Reply Brief, MPA's argument virtually ignores the relevant precedent which establishes the exception to MPA's "general rule." A review of this precedent will allow the issues presented here to be viewed in their proper light. First, however, MPA's contentions with respect to the individual tariff provisions in issue will be dealt with.

Section VII, paragraph 3, of the tariff provides:

> All persons to whom berths, wharves, transit sheds, mechanical equipment or other facilities have been assigned shall be responsible and liable to the Terminal Operator for any damage occurring to such property during their tenancy, occupancy and/or use *without regard to whom shall cause the damage.* (Emphasis added.)

It is this provision which, in part at least, affords the basis of MPA's claim for damages against complainants in the District Court. Simply stated, it is the position of MPA that any person to whom it has assigned berths, wharves, transit sheds, mechanical equipment or other facilities is absolutely liable for any loss of or damage to the assigned facilities while so assigned, without regard to fault, even if the user is not at fault in any respect, or should the loss or damage be caused in whole or in part by MPA itself.

In the District Court action U.S. Lines, Inc., and Svendborg (complainants in these cases) are seeking to recover for damage to their respective vessels resulting from the same incident in which it is alleged that the property of MPA was lost or damaged. MPA, as a defense to

these actions, contends it has no liability pursuant to the provisions of Section VII, paragraph 2, and Section VIII, paragraph (4)B4, of its tariff which provide:

Section VII, paragraph 2:

> The Terminal Operator will not be liable for any delay, loss or damage arising from strikes of any persons in their employ or in the service of others nor for any causes arising therefrom, nor any causes unavoidable or beyond its control. *The Terminal Operator accepts no responsibility for damages or accidents occurring when its equipment and/or operators or employees are furnished to perform work for others.* (Emphasis added.)

Section VIII, paragraph (4)B4:

> The Terminal assumes no liability for claims, losses, costs or expenses by reason of property damage, personal injury or death which may result from the use of the crane, except that caused by structural or mechanical failure and not occasioned by an act or omission on the part of the party renting the crane.

MPA contends that a user of its facilities may not recover for, and that MPA is not responsible for, property damage, personal injury or death even if such property damage, personal injury, or death is caused in whole or in part by MPA.

While it is true that parties are generally free to contract as they wish, imposing burdens and conferring benefits as they decide, indemnity and exculpatory clauses will not be sustained by the courts where the parties are not on equal footing in the bargaining process, or if one of the parties is charged with the public interest. 15 *Williston on Contracts*, §1751 (3rd Ed. 1972). [4]

The Commission and the Courts have recognized the vital role of terminal operators in the stream of transportation and the importance of terminals to interstate and foreign commerce. In *The Boston Shipping Association, Inc. v. Port of Boston*, 10 F.M.C. 409, 414 (1967), *collateral appeal denied sub nom, Port of Boston Marine Terminal Assoc. v. Rederi Transatlantic*, 400 U.S. 62 (1970), the Commission stated: "Terminal operators form an intermediate link between carriers and the shippers or consignees."

In *American Export-Isbrandtsen Lines, Inc. v. FMC*, 444 F. 2d 824, at 829, the Court discussed the Commission's duties as to terminals, stating:

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[4] For a number of instances in which businesses were found affected as public interest, see *Dixilyn Drilling Corp. v. Crescent Touring & Salvage Co.*, 372 U.S. 697 (1963); *Boston & Maine R. Co. v. Piper*, 236 U.S. 439 (1918); *Denver Consolidated Elec. Co. v. Lawrence*, 73 P. 39 (1903); *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F. 2d 253 (9th Cir. 1965) *cert. denied*, 383 U.S. 936 (1966).

> Because of the vital importance of these terminals to interstate and foreign commerce, Congress in the Shipping Act of 1916 provided for their regulation by the Federal Maritime Commission and authorized it to promulgate and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering of property at harbor terminal facilities. . . . The power thus conferred is . . . to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system.

In construing the role of marine terminals in the transportation of goods in interstate and foreign commerce, the Commission and Courts have imputed to them the status of public utilities. In *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525, 547 (1966), the Commission stated:

> In a very real sense of the term, terminals are public utilities. While not always specifically franchised, they nevertheless are engaged in the business of regularly supplying the public with a service which is of public consequence and need and which carries with it the duty to serve the public and treat all persons alike. This is the essence of the public utility concept.

In *American Export-Isbrandtsen Lines, Inc. v. FMC, supra* at 828, the Court stated:

> The law for centuries has recognized that public wharves, piers, and marine terminals are affected with a public interest. [Footnote omitted.] These terminals stand athwart the path of trade. . . . Efficiency of the manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned.

However, these cases notwithstanding, MPA argues the MPA is not a common carrier or a public utility. This is because MPA says it does not provide a public service; rather it is a State agency that provides facilities so that private companies may conduct their business. These facilities according to MPA are so provided for the "secondary" effect on commerce and growth of the port.[5] In providing these facilities, MPA says it must protect the public interest in the facilities while they are being used by a limited number of private companies.

Aside from the inconsistency inherent in MPA's statement, just how this argument overcomes the clear holdings in the *San Diego* and *Export Isbrandtsen* cases, *supra*, is not apparent from the argument itself and is not explained in any other way. The Port of Baltimore and its

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[5] The argument that the terminal facilities are provided primarily as an aid to private business and only secondarily because of their economic benefit to the State of Maryland is dealt with below.

terminals is a public utility within the meaning of the *San Diego* and *Export Isbrandtsen* cases, *supra*. Moreover, in *West Gulf Maritime Association v. The City of Galveston* 22 F.M.C. 101, 103 (1979), *West Gulf*, the Commission, after declaring the Port of Galveston a public utility, went on to say: "It is well established that exculpatory clauses are invalid as a matter of law in common carrier and public utility relationships." In that case the Commission found a terminal's exculpatory clause to be unreasonable in violation of section 17. However, MPA contends that the *West Gulf* decision can be distinguished from these cases and should not be applied here.

MPA would distinguish *West Gulf* on the grounds (1) the Port of Galveston's tariff applied to the entire port facility, including the cargo areas and back-up facilities that are assigned on a long-term basis; (2) port employees at the Port of Galveston unloaded and stored the cargo; (3) the Galveston provisions in issue were only proposed and had not been in effect for a long period of years; and (4) there was no quid pro quo benefit conferred upon users in consideration of the tariff liability provisions. Except for the last, these are distinctions without differences.

It, of course, makes no difference whether the tariff provision applies to all or just a part of a terminal's facilities when the question is that tariff's validity under section 17 of the Act. If it did, the Commission could be rendered powerless by the simple expedient of tailoring clauses so that they apply only to selected portions of the facilities, a result clearly not contemplated by Congress.

It would appear that in its second attempt at distinguishing *West Gulf*, MPA is trying to set up some kind of estoppel against the complainants and the Commission, i.e., since complainants have for a number of years "consented" to the exculpatory clauses, they are precluded from challenging them now, and the Commission cannot find them invalid.[6] Whatever applicability such a theory may have in the realm of purely private contract, it has none here where the Commission has a continuing duty to ensure those subject to its jurisdiction under section 17 "establish, observe, and enforce just and reasonable regulations. . . ." The right to challenge those regulations before the Commission cannot be barred by some vaguely expressed theory of consent or estoppel.

Thirdly, MPA would distinguish *West Gulf* on the ground that their Port of Galveston employees loaded and stored the cargo. This distinction begs the question. As already noted, the questions of who was in control of what equipment and who if anyone was negligent in the incident at Dundalk have been reserved by the Court. The issue here is

[6] It is by no means clear from the record that the actions of complainants constituted "consent" to the exculpatory provisions of the tariff.

whether the provisions which MPA itself contends relieve it of liability even for *its own negligence* are valid.

Finally, MPA argues that there was no quid pro quo in *West Gulf*. MPA contends that there is a "benefit conferred upon users" for their assumption "of the risk of loss or damage to MPA's facilities." MPA claims that it has shown that its tariff rates and insurance rates are related and that MPA computes its rates with the expectation that the tariff liability provisions will apply. In order to deal with this contention, some exposition of the so-called "rate relationship" is necessary.

In *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411 (1959), the Supreme Court declined to extend automatically the rule in *Bisso v. Inland Waterways Corp*[7]. to a tariff "filed with and subject to the pervasive regulatory authority of an expert body" (the Interstate Commerce Commission). Instead, the Supreme Court allowed the Interstate Commerce Commission the first opportunity to rule on the legality of a tariff exculpatory clause. In doing so, the Court suggested that perhaps the towing rates in question reflected savings to the users of the facilities which were derived from savings on insurance premiums through the application of the exculpatory clause. This came to be known as the rate relationship.

MPA was afforded an opportunity to bring its tariff provisions within the *Southwestern Sugar* case by showing a relationship between the rates charged users of the facilities and the exculpatory clauses in the tariff. On the second day of the hearing, Judge Levy, quite properly in view of the nature of the evidence, entered summary judgment ruling that the proffered evidence did not approach the requisite rate relationship even if all the proffered facts were true.[8] Nevertheless, MPA still argues that "its tariff rates and insurance rates are related."[9] The record, however, shows just the opposite. That the rates and charges of MPA are dictated by competitive necessity is clearly established by the following excerpt from the verified testimony of W. Gregory Halpin, Port Administrator, found in Exhibit 37.

> Charges and assessments in the Port of Baltimore today are in keeping with those which are generally assessed by other port agencies throughout the United States. (Para. 34.)
>
> Today, Baltimore is a strongly competitive port which has made significant inroads to cargo formerly handled through the port of New York. (Para. 35.)
>
> The Port is healthy and competitive despite increasingly strong competitive assaults and efforts by other ports. Balti-

[7] In *Bisso*, 349 U.S. 85 (1955), the Supreme Court invalidated a contract which relieved the owner of a towboat of liability for its own negligence.

[8] MPA never specifically challenges Judge Levy's ruling.

[9] This relationship theory is expanded in its attempt to distinguish yet another Commission decision which complainants and Hearing Counsel argue applies here and is thus dealt with yet again *infra*.

> more's chief competitors have been and remain the Ports of New York, Philadelphia and Norfolk. (Para. 35.)
>
> . . . the Maryland Port Administration was the logical organization to lead in the promotion of the Port and to organize the competitive programs that would attract cargo to the Port of Baltimore. (Para. 36.)
>
> The Administration shall attempt to recover the highest possible return of public investment in port facilities *consistent with maintaining the competitive position of the port.* Where there shall be a conflict between these two objectives, the competitive position of the port shall prevail. (Emphasis added.) (Para. 75.)
>
> The Maryland Port Administration, then, trying to achieve a return on its investment looks at other competitive ports and the rates which they have established. This is done to make certain that Maryland Port Administration does not improperly affect the competitive position of the Port of Baltimore. (Para. 77.)
>
> At the present time, some 16 container lines serve Dundalk Marine Terminal. Only by having a common pool of cranes, sheds, storage space and berths can these users be accommodated and can the port remain competitive. (Para. 83.)

Clearly, then, MPA's rate structure is pegged to what the traffic will bear in order to maximize return on investment, subject, however, to the controlling consideration that its rates and charges must be competitive. Any savings realized by the port in its fixed costs inure to the benefit of the port, not to the users of the facilities. Furthermore, as stipulated by MPA, it has never sought nor been quoted alternate insurance premium rates which would reflect the absence of any of the exculpatory clauses. Nor has any company which insured MPA's container cranes against physical damage or against liability of third persons for the period including March 21, 1976, provided MPA with financial data concerning insurance savings, if any, resulting from the tariff provisions in issue. Indeed, the record is devoid of evidence of and MPA does not say just how its tariff rates and insurance rates are related. MPA has failed to distinguish the *West Gulf* case.

As noted, there is yet another Commission case which MPA would distinguish in order to not have it applied in these cases--*I. Charles Lucidi v. Stockton Port District*, 22 F.M.C. 20 (1979), (initial decision served June 8, 1979).[10] In *Lucidi* the Commission found that Item 85 in Stockton's Terminal Tariff No. 4 constituted an unreasonable regulation under section 17 of the Shipping Act, 1916. Item 85 provided:

> The Port of Stockton shall not be responsible for any injury to freight on or in its facilities, by fire, leakage, evaporation,

[10] The Initial Decision became the decision of the Commission. 22 F.M.C. at 19.

> natural shrinkage, wastage, decay, animals, rats, mice, other rodents, moths, weevils, other insects, weather conditions, sweat moisture, the elements or discharge of water from breakdown of plant, machinery, other equipment, collapse of building or structure, insurrection, war, or shortage of labor; for delay, loss or damage arising from riots, strikes, labor or other disturbances of any persons or of any character beyond the control of the Port of Stockton.

The Commission concluded that to the extent that the provisions of Item 85 exclude the Port from liability from damage to property caused in whole or in part by fault of the Port, and without a *quid pro quo*[11] of any kind, such provisions are unjust and unreasonable in violation of section 17 of the Act. The Commission went on to conclude that the provisions of Item 85 were against public policy insofar as such policy requires businesses affected with a public interest be precluded from taking unfair advantage of those who, by necessity, must use the facilities of such business.

MPA argues that it is clear from the decision in *Lucidi* that the Port of Stockton not only failed to present evidence of rate relationship but did not even contend that there were other benefits conferred upon the users of the Port of Stockton in exchange for the exculpatory provisions in issue there. MPA argues that the users of its facilities do have benefits bestowed upon them which render the exculpatory provisions of its tariff valid. The benefits are said by MPA to be the following:

> The Maryland Port Administration expended huge sums of public tax dollars to develop a modern container facility at Dundalk Marine Terminal. The Complainants and all users of the MPA's facilities received the direct benefits having large capital investments made in terminal facilities and equipment that they needed in order to operate in the Port of Baltimore, without having to make that capital investment themselves, nor do they have to maintain that equipment and terminal facilities in a constant state of readiness. The users of the equipment and facilities benefit directly from the investment in them through the charges which they are able to impose on the cargo which they handle. While in some years the charges assessed by the Maryland Port Administration for the use of its facilities may cover operational costs, the tremendous capital investment made by the Port Administration still leaves it with a deficit to the State Department of Transportation of $112,000,000.00. (Ex. 34, p. 6.) The facts are the MPA facilities that are governed by its tariff are at the complete disposal of the user from the time that the equipment or berth facilities are assigned to the user. The evidence in this case shows that

[11] The *quid pro quo* referred to is the establishment of a "role relationship" of the kind discussed above in connection with the *West Gulf* case.

> if not in every case, certainly in the vast majority of cases damage to MPA equipment or berth facilities, or damage as a result of the user of that equipment or berth facilities has occurred while being operated by or for the direct benefit of the user to which the facilities were assigned. In exchange for all of these benefits, the Port Administration requires the user to operate the equipment and use the facilities with reasonable care, and to assume the risk of loss or damage to them for the very short periods of actual use. This is a risk which users can easily insure if they so desire.

The economic argument made by the MPA, simply stated, is that because the MPA has invested substantial amounts in the facilities at Dundalk Marine Terminal, users of those facilities should be absolutely liable to the MPA for any damage, even damage caused by the MPA itself. This argument appears to be grounded on the premise that the investment by the MPA benefits the users and the users should therefore acknowledge absolute liability to the MPA. In making this argument, the MPA has conveniently ignored the fact that the MPA was established and its facilities were brought into being in order to benefit the economy of the state of Maryland. The massive economic impact of the port facilities upon the state belies any attempt by the MPA to argue that the benefits of its investment accrue only, or even primarily, to entities which actually operate at or use the port facilities. Furthermore, although the MPA attempts to paint a sorry picture of its financial condition, it should be kept in mind that the MPA was not created to make money itself and further that the port facilities do in fact generate substantial operating revenue which the MPA turns over to the state Department of Transportation.

The policy and intent of the General Assembly of Maryland with regard to port facilities and commerce are set forth in Section 6-102 of the Transportation Article of the Annotated Code of Maryland (1977), which formerly appeared as Article 62B, Section 1, of the Annotated Code prior to revision. The declarations of legislative intent and policy contained in that section include the following:

> (b) *Ports and harbors are valuable State assests.* -- The ports and harbors of this State are assets of value to the entire State. The residents of all parts of this State benefit directly from the waterborne commerce that they attract and service. Any improvement to these ports and harbors that increases their export and import commerce will benefit the people of the entire State.
>
> (c) *Increase of commerce.* -- (1) The purpose of this title is to increase the waterborne commerce of the ports in this State and, by doing so, benefit the people of this State.

Pursuant to this legislative policy, the MPA was given the power to acquire, construct and operate facilities and installations to support commercial activity in the port.

W. Gregory Halpin, the Maryland Port Administrator, testified to the economic impact of the port facilities at length and that testimony demonstrates that far from being made for the benefit of users of the Port, the investment was made to produce jobs and revenue for the State. For example, Mr. Halpin stated:

> I would - Dundalk Terminal represents a tremendous generator of economy, jobs, and so forth. It has also been a, my opinion - I think that is shared by anyone else - has been a major factor in maintaining the competitive posture of this port as we went into the container period. Therefore, it is certainly - it, as such, deserves a lot of credit for what it's done; not MPA, but the terminal. But you can't, you can't take that figure and put it on top of the 0 figure. I don't see how you can.
>
> Yes, it generates four, I would say - I guess you could say it generates somewhere in the neighborhood of a hundred and twenty million dollars worth of economic impact every year - maybe more. When you put in the multiplier factors, because it handles four million tons, you can multiply that by thirty, forty dollars per ton. (*Id*., p. 21.)

The MPA itself published in May 1975 a special report entitled "The Economic Impact . . . of the Port of Baltimore on the Maryland Economy." (Exhibit 161.) This report was based on the University of Maryland report for 1973 which Mr. Halpin mentioned in his testimony and a brief review of the figures contained in this special report shows the substantial economic benefit which the Port of Baltimore, including the facilities invested in by the MPA, brings to the State. The graphic representation on page 2 of the report shows that the total economic impact of the Port of Baltimore on the Maryland economy in the year 1973 came to the enormous figure of $2,537,500,000, or 2.5 *billion* dollars. This amount represented nearly 10 percent of the overall gross state product (GSP) (Exhibit 161, p. 4). The Port was found to be responsible for more than $317 million in taxes which went to the state and local governments of Maryland and to be the ultimate source of nearly 170,000 jobs throughout the state. (*Id*., p. 3.) Adjusted for inflation, a real annual growth rate of 3.18 percent was found for the period 1966 through 1973. (*Id*., p. 6.)

In light of the policy statements and economic impact figures which the MPA itself has provided, it is difficult to see how the MPA can reasonably argue that the economic benefit of the investment at the Port accrues solely or primarily to the entities which use and operate the actual Port facilities to such an extent that those users should be held responsible for any damage occurring to those facilities, no matter

how caused. That argument might conceivably have had some weight if the MPA could show a policy of carefully and finely calculating rates to the users in order to barely cover operating expenses and avoid charging users of facilities more than is absolutely necessary. The reality of the situation, however, is just the opposite: the MPA calculates its rates based on what the market will bear, by charging users of the Port as much as it possibly can without charging so much that it jeopardizes its competitive position viz-a-viz other ports in other states.

Again Mr. Halpin's testimony is illustrative. According to him, "It is the objective of this Agency to generate the highest possible return on the public investment in Port facilities consistent with maintaining the competitive position of the Port" (Exhibit 155, p. 1) and, of course, to put as much money as possible into the state treasury.

It is clear from the record that the MPA is not some sort of eleemosynary institution created to benefit carriers, stevedores, and other users of the facilities. Moreover, the fact that the MPA constructed its facilities because no private interest was willing to do so is irrelevant to the question of the presence or absence of a *quid pro quo* for the imposition of the exculpatory clauses.

Clearly then, under the precedents of the *West Gulf* and *Lucidi* cases, the MPA's tariff provisions here in question constitute unjust and unreasonable regulations under section 17. However, MPA offers yet another argument which it contends renders its exculpatory clauses valid. It is based upon the contention that complainants have misread *West Gulf* and *Lucidi* as well as the Supreme Court's decision in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). MPA claims that the complainants' arguments are based upon the proposition that *Bisso, West Gulf* and *Lucidi* "create a presumption that exculpatory clauses are invalid." This, according to MPA, "simply is not a valid reading of these cases or the authorities upon which these cases are based."

In *Bisso*, the Supreme Court struck down a contract exempting a tow boat owner from liability for its own negligence. In doing so, the Court found its precedent in towage cases including *The Steamer Syracuse*, 79 U.S. 167 (1871), and *The Wash Gray*, 227 U.S. 66 (1928), but the Court characterized the rule accepted and reaffirmed by it as:

> . . . merely a particular application to the towage business of a general rule long used by the Courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships.

According to the Court:

> The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. . . . The dangers of modern

> machines make it all the more necessary that negligence be discouraged. And increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions.

MPA concentrates mainly on the second reason cited by the Court and argues that it is not in a position to drive a "hard bargain." [12] Again MPA's argument is bottomed on the proposition that the complainants were not interested in investing capital and developing their own container facilities. To avoid the risk of misinterpreting MPA's argument I have indulged in the somewhat lengthy quote set out below:

> There has been no evidence offered that the Maryland Port Administration in any way hindered these Complainants or any other users in the Port of Baltimore from developing their own facilities. In fact, it is the Port Administration's legislative mandate to encourage private developers to develop their own facilities in the Port of Baltimore. Perhaps the best encouragement that the Port Administration gives to private developers is through the Port Administration's Trade Development office. The Port Administration expends large sums of money through the Trade Development office which has offices all over the world and whose sole function is to promote the Port of Baltimore and encourage shippers to ship their cargo through the Port of Baltimore. (Tr. 738.) This operation inures to the benefit of all operators in the Port of Baltimore, whether they use Dundalk Marine Terminal or whether they operate their own facilities. The intent of the Trade Development office is to encourage cargo to use the Port of Baltimore. The Complainants readily admit that as a matter of economics they prefer to use the Port Administration's facilities no matter what the cost rather than to develop their own facilities in the Port of Baltimore. Others have taken the view that they would rather develop and/or operate their own facilities in the Port of Baltimore. Two prime examples of private operators utilizing their own facilities, are Sealand which owns and operates a facility in the Port of Baltimore, and Atlantic and Gulf Stevedores which operates the South Locust Point Marine Terminal on a long term lease with the Maryland Port Administration.
>
> The Complainants' assertions of unequal bargaining position and MPA's monopoly of container handling facilities in the Port of Baltimore are artificial, and they are largely a product of their own corporate decision-making process which caused them to fully decide to accept the benefits conferred by the

[12] MPA goes to some lengths to show that other courts have restricted Bisso to towage contracts. This argument ignores the Commission's decisions in *West Gulf* and *Lucidi*, perhaps because MPA feels it had distinguished those cases.

> Maryland Port Administration's investment in port facilities rather than developing or leasing their own facilities.

If this argument were accepted, no cartel could be accused of monopoly because it could always say that the accuser was free to start his own business. As one of the complainants says, on the basis of this argument,"electric power companies do not occupy monopoly positions because any user of electricity is free to buy his own windmill." MPA cites no authority to support its "freedom of choice" argument and I have found none. It is irrelevant how the MPA arrived at its present position, and that it is in a position to drive a "hard bargain" is clear from the record.

The only container facilities available to complainants at Dundalk are those owned by MPA. By its own admission, any user of those facilities is subject to the provisions of the applicable MPA tariff--a tariff which is promulgated by MPA. Although MPA urges that complainants are free to go to other ports if they do not like the terms offered by MPA, one can easily imagine MPA's reaction were complainants to do this. [13] The argument of MPA is without merit. That MPA is in a position to drive a hard bargain is established by the record here.

On the basis of the foregoing, I conclude that to the extent that section VII paragraph (3), section VIII paragraph (4)b4, and section VII paragraph (2) would relieve the MPA of liability for damage from its own fault or negligence, they constitute unjust and unreasonable regulations under section 17 of the Shipping Act, 1916.

In its reply brief, MPA, for the first time suggested an "alternative interpretation."[14] As a prelude to its alternative interpretation, MPA proposes two alternative findings of fact:

> 1. If the Federal Maritime Commission does not accept the Maryland Port Administration's proposed finding of fact No. 16, the Maryland Port Administration requests the following alternative finding of fact: A crane is assigned to a steamship line and a stevedore for loading or discharging the vessel. The tariff applies as soon as the assignment begins. The assignment begins as soon as the crane has been positioned by the Maryland Port Administration and the boom has been lowered. (Exhibit 154, pgs. 15-16, T. 622).

[13] MPA's contention ignores its own statements concerning the reason for constructing the facilities. They were constructed to attract cargo to the Port of Baltimore and if the cargo is there, the carriers will call. All of this was with the aim of increasing jobs and revenues. MPA cannot now be heard to suggest that having achieved this goal, their superior bargaining position is irrelevant because complainants could have constructed their own facilities.

[14] Since the "alternative interpretation" was offered for the first time on a reply brief to which the other parties had no opportunity to respond, I allowed the filing of supplemental briefs.

2. From the time that the assignment is made, the stevedore and steamship lines have actual control of the container crane. (Exhibit 21, Nos. 2-9).

Originally, MPA's position on when an "assignment" occurred was found in its proposed finding No. 16:

> A crane is assigned to a steamship line and a stevedore for loading or discharging a vessel. The tariff applies as soon as the assignment begins. The assignment begins with the startup of the crane and its removal from the tie-down position. (Transcript pages 632-634; Exhibit 37, pp. 24-25.)

According to MPA this new interpretation of the term "assignment" is supported by the fact that once the boom is lowered the crane is completely available to users to begin the loading and unloading process and from that point actual control is in the hands of the users. While MPA is considerably less than clear as to just which of the three provisions the new interpretation would apply, it would appear that MPA would have it go to all three. Thus, MPA argues that it is not unreasonable for it to exculpate itself from liability to third parties once the cranes are turned over to the users. This argument apparently applies to section VIII(b)(4) and VII(2) because MPA offers a specific alternative to interpretation for VII(3) which MPA now argues the Commission can read as applying only when there is no negligence on the part of MPA or when there is concurrent negligence on the part of the users. It may be that MPA is attempting to prove too much.

In *Matson Navigation Company v. Port Authority of Guam*, 20 F.M.C. 505, 511-12 (1978), the Commission laid down the principles for the construction of tariffs:

> When dealing with the proper application of the definition of wharfage in a terminal tariff, the Commission in *Sacramento-Yolo Port Dist. v. Fred V. Noonan Co., Inc.*, 9 F.M.C. 551 (1966), laid down the following general principles:
>
> > . . . It is a basic principle in the law of tariff construction that tariffs must be clear and unambiguous to avoid possible discrimination among users of tariff services. When a tariff is clear on its face, no extrinsic evidence may be used to vary its "plain meaning." Tariffs are, moreover, drawn unilaterally and must therefore be construed in the case of ambiguity against the one making and issuing the tariff, and "it is the meaning of express language employed in the tariff and not the unexpressed intention . . . which controls. . . ." *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 608. . . . (9 F.M.C. at 558.) [*]
>
> *Although I have not found a case which specifically states that the same principles of construction apply to terminal tariffs as well as carrier tariffs, the *Sacramento* case, *supra*, and others make it clear that they do.

Section VII(3) provides:

> All persons to whom berths, wharves, transit sheds, mechanical equipment or other facilities have been assigned shall be responsible and liable to the terminal operator for any damage occurring to any such property during their tenancy/occupancy or use *without regard to whom shall cause the damage.* (Emphasis added.)

The phrase "without regard to whom shall cause the damage" is "clear and unambiguous" and "no extrinsic evidence" such as who has control of the equipment "may be used vary its 'plain meaning'." *Matson Navigation Co. v. Port Authority of Guam, supra.* Moreover, complainants contest MPA's alternative interpretation of the term assignment and as Hearing Counsel suspects ". . . the question of whose cranes are assigned to whom and when an assignment takes place may be a factor in the actions pending in the District Court." Hearing Counsel urges, and for the reasons already stated I agree, those questions should be left to the Court.

MPA's alternative interpretation is equally invalid when applied to sections VII(2) and VIII(4)B4. Those two sections do not even contain the word "assignment" and their application is in no way dependent upon when an "assignment" takes place.

Section VII(2) reads:

> The Terminal Operator accepts no responsibility for damages or accidents occurring when its equipment and/or operator or employees are furnished to perform work for others.

Section VIII(4)B4 provides:

> The terminal assumes no liability for claims, losses, or expenses by reason of property damage, personal injury or death which may result from the use of the crane, except that caused by mechanical failure and not occasioned by an act or omission on the part of the party renting the crane.

These provisions are not conditioned upon the absence of negligence on the part of MPA and to "interpret" them to be so conditioned would be to rewrite the provisions. The provisions are clear. By their plain meaning they relieve MPA of liability for its own negligence and no amount of extrinsic evidence can be used to alter the language of the provisions or to add words not in them. Initially I suggested that MPA may be trying to prove too much. By that I meant, if MPA would, by an "interpretation" of the exculpatory clauses, work such a drastic alteration in the apparent meaning MPA can only be admitting that the provisions are fatally ambiguous and invalid under section 17 for that reason. However, the language of the provisions in question is not susceptible to the interpretation suggested by MPA and even if it were

to the extent that they would still relieve MPA for liability for its own negligence they would remain invalid.[15]

Complainants also argue that enforcement of the tariff provisions against them in these cases would constitute a violation of section 16 First of the Act which declares it unlawful for other persons subject to the Act:

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

While some variations on the theme are offered there are three basic grounds offered for this allegation: (1) Over the years in specific cases MPA has not been consistent in its reliance on the tariff provisions; (2) In claims involving damage to MPA equipment including container cranes and spreaders, MPA has failed to follow a consistent pattern as to what party is the user of the equipment for purposes of seeking to make that party liable for damage; and (3) Despite the presence of the tariff provisions purporting to grant absolute immunity from liability or to make other parties absolutely liable for damages, the MPA has compromised and settled numerous claims.

Each complainant seems to see a slightly different form of prejudice arising from these asserted actions of MPA. U. S. Lines citing a number of cases in which the Commission has imposed upon terminals what U.S. Lines calls the "highest duty to serve the public equally and impartially," it goes on to argue that it would grossly violate the "absolute equality and impartiality provisions of section 16 First to permit the MPA to rely upon its tariff provisions to impose a $6,000,000 judgment against U.S. Lines and to excuse its liability in the counter-claim against it by U.S. Lines."

Clark views the alleged actions as resulting in "the fact that the MPA by the tariff provisions has given itself an unfair advantage" which violates Section 16 First.

Svendborg, among other things, says that because in other instances MPA did not consider the shipowner to be user of equipment it is prejudicial to Svendborg for MPA to do so in these cases. In short, it is Svendborg's position that to the extent that other shipowners have not

[15] An example of why questions of who was negligent are best left to the Court is provided by the argument of U.S. Lines that MPA's new interpretation is invalid because it is "unable to impose liability upon assignees in situations of comparative negligence." U.S. Lines views the MPA interpretation as imposing full liability upon the assignee even if MPA is 90% at fault and the assignee only 10%. Tort questions of comparative negligence and the like are not within the peculiar expertise of the Commission.

been sued as "users" in crane damage cases in the past, those shipowners have been given an undue and unreasonable preference. [16]

Aside from the cases cited to show a terminal operator's duty to treat similarly situated persons equally, complainants refer to no authority which treats the question of section 16's applicability to charges that a terminal's "inconsistency" in handling claims and lawsuits.[17] However, two of the arguments can be dismissed at the outset.

The argument is made that MPA has preferred itself through the exculpatory clauses in its tariff; however, the Commission has expressly found that section 16 does not apply to self-preferences. *Anglo Canadian Ship. Co. Ltd. v. Mitsui S.S. Co.*, 4 F.M.B. 535 (1955). Next it is contended that MPA by settling some claims for less than the full amount has failed to apply the exculpatory provisions uniformly or consistently. Apparently the argument is that since the tariff frees MPA from all liability for damage to its facilities, it cannot settle a claim for anything less than the full amount. MPA calls this position "ludicrous," and it certainly isn't far from it. Apparently, complainants would have MPA go to trial on a claim even if it cost more to litigate the claim than the total claim was worth even though the other party was willing to reach a reasonable settlement in the matter. The law does not demand such an absurd result. One cannot help but wonder what the complainants' reaction would be if the MPA offered to open settlement negotiations in their cases.

Complainants also assert that MPA has been capricious in its reliance on the exculpatory clause when asserting or defending against claims. This charge is based in part on some letters written over the years by one Ronald Shock who was for approximately 12 years involved in the handling of claims for MPA. These letters, it is argued, demonstrate the failure of MPA to establish proper policies and guidelines and that this lack of guidance within the MPA and between the MPA and its insurers and legal representatives has resulted in "concrete violations of the duty to treat all users of the facility in an equal, fair and even handed fashion." To buttress the argument a number of instances of berth damage are cited, some in which the "notice letter" made no reference to the tariff and some involving litigation in which the complainants made no reference to the tariff.

By now the difficulties inherent in these charges should be apparent. The absence of any reference to the tariff in a letter noticing a claim does not mean that MPA would not invoke the tariff should it become necessary to do so at some later stage. The failure to specifically cite the tariff in a complaint would of course depend upon the nature of the

[16] ITO concentrates on its position as a "non-user" also.

[17] A similar allegation was made in *I. Charles Lucidi v. Stockton Port District, supra,* but the charge was dismissed for lack of evidence. No discussion of the applicability of the section was had.

incident forming the gravamen of the complaint--it could be that damage to a berth occurred in such a way that there could have been no question of MPA's negligence and thus no need to raise the exculpatory clauses or the pleadings may have been so broadly drafted as to allow the exculpatory clauses to be offered in defense or as part of the claim. [18]

It is obvious that any finding of a section 16 First violation on the grounds argued by complainants requires among other things the second guessing or a critique of the work of counsel representing MPA. It certainly requires more evidence than is to be found in this record. But a more significant difficulty presents itself, a difficulty which is inherent in the intended purpose of section 16 itself.

Section 16 was intended to prohibit the disturbance of existing commercial relationships through the granting by carriers or other persons subject to the Act of arbitrary preferences or advantages to one person but not the other. Thus, in the vast bulk of cases, the question presented was whether a particular rate allowed one shipper a competitive advantage over another shipper in a common market place.[19] Normally the cases required a competitive relationship between the allegedly preferred shipper and the allegedly prejudiced shipper. However, there is another line of cases in which a competitive relationship between the parties is not necessary to a finding of a violation of section 16. See, e.g., *Investigation of Free Time Practices--Port of San Diego*, 9 F.M.C. 525, 546 (1966); *New York Foreign Freight F. & B. Assn v. FMC*, 337 F. 2d 289 (1964). In these and other like cases the alleged preference or prejudice involved rates or charges which were not dependent upon the particular commodity shipped.[20] However, even if a competitive relationship is not necessary, a complainant must show that the alleged prejudice has in some quantifiable way worked not only to his disadvantage but resulted in a positive advantage to another identifiable interest. See, e.g., *Phila. Ocean Traffic Bureau v. Export SS Corp.*, 1 U.S.M.C. 538 (1936); *Household Goods, supra*. Here each of the complainants relies only upon the assertion that they have been prejudiced while others whom they assert have not had the exculpatory clauses

[18] In a complaint and answer attached to its brief, U.S. Lines makes much of the fact that MPA did not specifically raise the tariff provisions as a defense against a claim for damage caused by a crane dropping a "pontoon" on a container. MPA does assert that the incident was entirely due to the negligence of others and raises as an "affirmative" defense a "breach of contract" by another party to the suit. Whether or not this defense would allow MPA to raise the exculpatory clauses is of course a matter for the Judge of the District Court. However, in this day of liberal construction of pleadings such a result would not appear probable.

[19] See *North Atlantic Med. Frght. Conf. - Rates on Household Goods*, 11 F.M.C. 202 (1967), for a review of cases arising under section 16.

[20] In the *New York* case, supra, the Court said "Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas bears no relationship to the fees levied for heavy industrial equipment." (337 F 2d at 299.)

invoked against them have been preferred. The only monetary figure alluded to is the $6,000,000.00 asserted involved in the District Court suit. But there is simply nothing in the record which allows any comparison between this preliminary figure and the extent to which those allegedly preferred were benefited if they were benefited at all. Again the evidence of record fails to sustain the allegation.

Moreover, there is a problem in the relief requested by the complainants, i.e., that the exculpatory clauses be found in violation of section 16 and therefore "null and void." Put another way complainants would have the Commission forbid the MPA to apply the exculpatory clauses against them. Complainants have in actuality confused two separate issues. On the one hand there is the question of the validity of the tariff provisions themselves. On the other there is the question of the manner in which the MPA has applied the provisions to users of its facilities. If we can assume for the moment that the provisions in question are valid the inappropriateness of the relief requested becomes apparent.

A terminal tariff, once it is published and filed with the Commission, fixes the terms, conditions, rates and charges applicable to users of the terminal facilities; and as complainants themselves argue, they must be applied to everyone using the terminal. The fact that they may not have been applied to some in the past cannot as a matter of law work to prevent their application in the present or the future. By law the terminal is bound to apply them. If a terminal's past practices in applying the provisions of its tariffs violate section 16 of the Act the remedy is not a prohibition against the present or future application of otherwise valid provisions.

Finally, there remains the contention that MPA's failure to be consistent in its determination as to who is the user of its equipment has resulted in a violation of section 16 First. The argument here can best be summed up in the words of U.S. Lines which after summarizing the "evidence" in the record states:

> If all this evidence shows any pattern, that pattern is in the fact that the MPA has tended to hold the stevedore liable as the assignee and user under Section VII(3) of the tariff for damages to container cranes. Yet MPA in this proceeding claims the right to pursue both stevedores and ocean carriers as assignees and users of container cranes pursuant to the tariff.

This, says U.S. Lines, is a "transparent attempt" to apply the "draconian" provisions of the tariff against the "deep pockets" of the carrier "because of the large dollar amounts" at issue. And this attempt clearly shows why this practice should be declared to be in violation of section 16 First of the Shipping Act.

MPA says, and there is evidence in the record to show, that it has always considered both the carrier and the stevedore as users of the

cranes. However, MPA says because most of the carriers had arrangements with their stevedores under which the stevedores paid MPA's charges under the tariff, it simply billed the stevedores for all charges arising under the tariff. The record does not establish that MPA has violated section 16 of the Act in this regard. Since these terms are inextricably interwoven with questions of control and negligence they belong properly in the District Court.

## ULTIMATE CONCLUSIONS

Sections VII(2), VII(3) and VIII(4)B4 are unjust and unreasonable regulations and are violative of section 17 of the Shipping Act, 1916.

MPA has not violated section 16 First of the Shipping Act, 1916.

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

Washington, D. C.
August 11, 1980

# FEDERAL MARITIME COMMISSION

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## DOCKET NO. 80-68

## U.S. CARGO OVER CANADA - PETITION FOR DECLARATORY ORDER

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## DISCONTINUANCE OF PROCEEDING

*December 19, 1980*

This proceeding was instituted by the filing of a petition by Sea-Land Service, Inc. seeking the issuance of a declaratory order by the Commission with respect to the movement of United States cargoes through Canadian ports. A number of replies were received in response to the notice of filing of the petition.

Sea-Land has now withdrawn the petition stating, in pertinent part that it would not ". . . be in the best public interest to press . . . for such an order on anything less than the most complete record possible." The withdrawal is made without prejudice to the right of Sea-Land to further petition the Commission.

In light of the foregoing, this proceeding is discontinued.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 78-6

## ADEL INTERNATIONAL DEVELOPMENT, INC.

*v.*

## PUERTO RICO MARITIME SHIPPING AUTHORITY AND STAR LINES, INC.

## ORDER ADOPTING INITIAL DECISION

*December 30, 1980*

This proceeding is before the Commission on the Exceptions of Adel International Development, Inc., to Chief Administrative Law Judge John E. Cograve's Initial Decision dismissing its complaint. The complaint alleged that Puerto Rico Maritime Shipping Authority and its agent, Star Lines, Inc., violated sections 16, 17, 18(b)(3) and 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 815, 816, 817(b)(3) and 817(b)(5)) with regard to a shipment of 20 mobile homes from Baltimore to Dammam, Saudi Arabia on a PRMSA vessel.

## BACKGROUND

J.S. Connor, Inc., a freight forwarder acting on behalf of Adel, and Star Lines, Inc., PRMSA's booking agent, negotiated a rate for the shipment of mobile homes for the lump sum amount of $240,000.[1] The agreement was confirmed in writing on a "Conline Booking" Liner Booking Note, dated November 22, 1976. The Conline note describes 20 mobile homes at "abt 133,330 cft," to be transported for $12,000 each, or $240,000 "lump sum/berth terms." The contract also states: "cargo on wheels for benefit of carrier and cubic to be based on without wheeled measurement." At this time, no PRMSA tariff covering mobile homes was on file with the Federal Maritime Commission.

On December 17, 1976, the Star Lines booking agent who entered into the Conline agreement arranged the filing of a PRMSA tariff covering mobile homes, at the rate of $1.80 cft. This calculates to approximately $240,000[2] when applied to the 133,330 cubic foot measurement of the homes *without* wheels and hitches. On December 21, 1976, the vessel sailed with Adel's shipment aboard.

[1] PRMSA at this time had operated in the Baltimore/Persian Gulf trade. PRMSA's Mid-East service terminated in May of 1977.

[2] The exact calculation is $239,994, or $6 less than the lump-sum amount.

In January, 1977, PRMSA billed Adel $345,600 for the shipment, at which point Adel, through Connor, protested that there had been an agreement with Star Lines on a lump sum figure of $240,000, and that the $1.80 cft. tariff rate was to be applied to the cargo as if "knocked down," or without hitches and wheels. PRMSA, noting that under the terms of its filed tariff, the rate applies to the cargo *with* wheels and hitches, continued to press its claim for the $105,600 difference between the $240,000 which Adel has paid and the $345,600 which is due pursuant to the tariff, and filed suit against Adel on September 13, 1977 in the U.S. District Court for the Northern District of Texas for the additional freight. Adel filed this complaint on March 30, 1978. On September 26, 1979, the court granted Adel's motion to stay the proceedings pending the Commission's decision in this proceeding.

The Initial Decision, served July 11, 1980, concluded that PRMSA violated no provisions of the Shipping Act and that its tariff rate must apply. The Presiding Officer dismissed Adel's contention that section 18(b)(3) bound PRMSA to file in its tariff the lump-sum rate negotiated by its agent. Nor did he accept Adel's contention that PRMSA's failure to file a special docket application for permission to apply retroactively the lump-sum rate violated section 18(b)(3). The Presiding Officer stated that there is no obligation for a carrier to seek a waiver of charges, and that even if PRMSA had filed a special docket application, it could not have met the statutory requirements.[3] He also determined that section 18(b)(3) does not give the Commission discretionary power to award equitable relief.

The Presiding Officer concluded that the record did not support a finding that Adel was in competition with any particular shipper of mobile homes which received a preference from PRMSA to the prejudice or disadvantage of Adel. Thus, he found that Adel had not proven a violation of section 16 of the Act. Similarly, he determined that Adel had not shown that PRMSA carried other shipments of mobile homes

[3] Adel argues that Star Lines' filing of the $1.80 cft. PRMSA tariff was based on a Star Lines employee's interpretation of PRMSA Tariff rule 17 which he had read to provide that measurement of the mobile homes would be calculated without including the wheels and hitches. That rule reads as follows:

> *Special Conditions for Ro/Ro Cargo*: On completely set up Ro/Ro Units which are driven under their own power onto the vessel and on which the shipper could present units to the carrier in Semi-Knocked Down Condition, but elects, for carriers convenience, to present same units in a completely setup Ro/Ro condition, the Ocean Rate will be calculated on the Cubic measurement of the Semi-Knocked Down Condition. Such units will not be subject to special Lash Charge.

PRMSA contends that Rule 17 clearly does not apply to Adel's mobile homes, because they cannot be driven under their own power. Adel argues that even if PRMSA is correct in asserting that Rule 17 is inapplicable, then Star Lines' misinterpretation of the rule was the type of clerical or administrative error which would have been a proper ground for a special docket application. The Presiding Officer rejected this argument, noting that a misreading of a tariff is not a ground for a waiver under section 18(b)(3).

under the same transportation circumstances and conditions as the shipment in issue and therefore failed to establish a violation of section 17 of the Act.

Finally, the Presiding Officer dismissed Adel's section 18(b)(5) claim because that section is prospective in nature, and is violated only if the carrier continues to charge unreasonable rates *after* the Commission has formally determined them to be unreasonable. He also found that Adel did not establish that PRMSA's tariff rate was so unreasonably high as to be detrimental to the commerce of the United States.

## EXCEPTIONS AND POSITIONS OF THE PARTIES

Adel excepts to the Initial Decision on a number of grounds. It protests that the Presiding Officer did not "specifically" rule on its 83 proposed findings of facts. Adel states that although "perhaps it is true that an administrative decision need not rule upon each proposed finding if the rulings are evident from the findings and conclusions in the decision," the Initial Decision is "confusing and misleading."

Although Adel states that "there is, except for certain irrelevancies, no dispute over the essential facts," Adel goes on to raise 12 alleged instances of factual "omissions" or errors in the Initial Decision.[4] Adel also excepts to what it calls "a number of apparent irrelevancies" in the Initial Decision, and argues that the Presiding Officer did not explain how the discussion of these topics affects the ultimate conclusion.[5]

Adel's final exception, entitled "Legal Conclusions," states that the Presiding Officer's legal analysis contains three fatal flaws, in that he failed to recognize that: (1) Star Lines was PRMSA's exclusive agent; (2) when the Conline note was signed, PRMSA had no tariff item covering mobile homes; and (3) PRMSA was guilty of bad faith in not

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[4] The factual findings which the Presiding Officer allegedly did *not* make include the following:

(1) certain facts about Star Lines and its relationship with PRMSA;

(2) the background and history of Connor, Adel's freight forwarder;

(3) the fact that PRMSA had heavy competition among carriers in the Mid-East trade;

(4) a specific version of the negotiating process between PRMSA's and Adel's agents;

(5) that there is a "custom and usage" that when a carrier enters a lump-sum contract with a shipper which does not conform to the tariff on file, it is the responsibility of the carrier to amend its tariff to conform to the contract;

(6) that Star Lines honestly attempted to file a tariff rate effectuating the lump-sum agreement; and

(7) that PRMSA repudiated the Star Lines-Adel rate agreement.

Adel alleges that the Presiding Officer made "factual errors" in that:

(1) he did not explain that the Conline note form was "commonly known" to Star Lines and Connor;

(2) he did not find that Adel did not benefit from the wheels and hitches;

(3) he found that the mobile homes were difficult to load;

(4) he made what Adel acknowledges to be a typographical error in using the figure $905,600 instead of $105,600; and

(5) he found that Adel would make a profit on the shipment at the tariff rate.

[5] Adel lists some examples of irrelevant topics as: "(1) who initiated the booking, (2) who insisted upon the wheels and hitches and (3) whether the Conline Note is widely used . . . ."

correcting Star Lines' "error" in filing the tariff at $1.80 cft. Adel then summarizes its arguments that section 18(b)(3) was violated when PRMSA did not amend its tariff to correct Star Lines' "administrative error"; that 18(b)(3) authorizes the Commission to afford equitable relief; that PRMSA subjected Adel to a comparative disadvantage in violation of section 16 because PRMSA routinely honored other shippers' booking contracts; that PRMSA subjected Adel to unreasonable prejudice by not filing a "corrector" reflecting the Conline note rate; that Adel was discriminated against in violation of section 17 in that PRMSA has shipped other shippers' mobile homes for less than that charged Adel; and that PRMSA's tariff rate was so unreasonably high as to violate section 18(b)(5).

In its Reply, PRMSA generally supports the Initial Decision in its entirety.

DISCUSSION AND CONCLUSIONS

The Commission finds that the Presiding Officer properly disposed of the issues raised in this proceeding and that his findings and conclusions are well-supported by the record. Accordingly, for the reasons set forth below, the Commission concludes that the Exceptions of Adel are without merit, and adopts the Initial Decision as its own.

Adel protests the Presiding Officer's failure to rule individually on each of its 83 proposed findings of facts. The Presiding Officer stated:

> It is not necessary to make findings of fact upon all items of evidence submitted nor even necessarily to answer each and every contention made by the contestants to the hearing but rather to make findings which are sufficient to resolve the material issues. 23 F.M.C. at 484.

Because so many of the proposed findings of both parties were not relevant to the material issues, the Presiding Officer's findings did not address each proposed finding specifically. He also added:

> Any proposed finding not made or discussed above, and not specifically dealt with below, [was] considered and found either to be argument, not supported by the evidence, or irrelevant to the issues. 23 F.M.C. at 494.

Adel has not shown how individual rulings on each proposed finding of fact would have affected the outcome of this proceeding. The Commission is satisfied that the Presiding Officer's manner of ruling on the findings of fact was appropriate, and Adel's exception on this point is, therefore, denied.

Although Adel itself states on several occasions that the parties agree on the critical facts, its exceptions primarily deal with factual matters, many of which involve issues which even Adel concedes are irrelevant to the outcome of this proceeding. Several of the factual errors allegedly made by the Presiding Officer - *e.g.*, his failure to find that the homes

were difficult to load, and his failure to "find" certain facts illustrating Connor's history and expertise - are of as uncertain consequence as those matters acknowledged to be "irrelevant" by Adel. Other alleged errors - *e.g.*, the failure to find that Star Lines was PRMSA's agent and that PRMSA refused to enforce the Conline agreement - were matters which, if not specifically noted as a finding of fact, were clearly acknowledged and relied upon by the Presiding Officer.

Adel excepts to findings of fact which do not support its version of matters such as which of the parties initiated the negotiations over this booking; whether the Star Lines employee who computed the tariff rate had attempted to approximate the lump-sum amount; and whether the Conline booking form was commonly used. The relevance of these factual disputes turns on Adel's theory of recovery on "equity" grounds. Adel cites *United States v. Columbia S.S. Co., Inc.*, 17 F.M.C. 8 (1973) as authority for the proposition that the Commission has discretionary power to afford equitable relief under section 18(b)(3). The Commission finds that case to be inapposite, and Adel's argument unconvincing.

In *Columbia S.S. Co.*, the Commission found a section 18(b)(3) violation, but exercised its discretion under section 22 not to award reparations, because of the particular circumstances in the proceeding. This does not support Adel's contention that the Commission has discretion under section 18(b)(3) to award reparations on "equity" grounds independently of any findings of violations of the Shipping Act. It is only by finding violations of the Shipping Act that the Commission can award reparations. Thus, many of Adel's proposed facts, intended to establish PRMSA's "deliberate bad faith" or "unconscionable conduct," have not been shown to be relevant to Shipping Act considerations. The Commission concludes that there was no error by the Presiding Officer in his treatment of these factual matters. These matters may be relevant to a breach of contract action, but the Commission is not the proper forum for such claims.

The Presiding Officer is also correct in noting that section 18(b)(3) does not impose the obligation to file a special docket application.[6] In fact, for PRMSA *not* to have charged the rate in its tariff and to enforce instead the "Conline" note amount would have been a violation

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[6] Even had an application for waiver of tariff charges been filed, it is not apparent that PRMSA could have met the statutory requirements. Adel has not established that the $1.80 cft. tariff rate was intended to effectuate the lump-sum amount of the Conline note; in fact, there is some evidence that Star Lines had no intention of effectuating that agreement. Star Lines' entry into the booking sheet sent to PRMSA was based on measurement ton, made no mention of the lump-sum rate or the Conline note, and would have resulted in charges of $20,520 per mobile home - substantially more than both the Conline price and the tariff rate. Thus, the evidence fails to support Adel's contention that the filing of the tariff rate was a clerical or administrative error as prescribed in section 18(b)(3) as grounds for waiver of the tariff rate.

of section 18(b)(3).[7] The Commission agrees with the Presiding Officer that the facts of this proceeding do not reveal a violation of section 18(b)(3).

The Initial Decision is also correct in finding that the evidence does not indicate that Adel was in competition with any particular shipper of mobile homes which received a preference resulting in prejudice to Adel, nor that the services rendered to the various shippers of mobile homes to Dammam were identical in terms and conditions to those rendered to Adel. Thus, Adel has failed to prove its section 16 claim, as well as its allegation of a section 17 violation - there is no evidence that other shipments of mobile homes carried by PRMSA moved under the same transportation circumstances and conditions as Adel's shipment.

Finally, Adel's allegation that PRMSA violated section 18(b)(5) is unfounded. Adel has failed to establish that PRMSA's tariff rate was so unreasonably high as to be detrimental to the commerce of the United States. Moreover, regardless of Adel's failure of proof, it is doubtful that section 18(b)(5) could serve as the basis for reparation here. Only after the Commission has determined a particular rate to be unreasonable under section 18(b)(5) may a carrier's continued assessment of that rate be considered a violation of section 18(b)(5) for which reparation may be awarded. *Federal Maritime Commission v. Caragher*, 364 F.2d 709 (2d Cir. 1966); *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970). Section 18(b)(5) does not afford a remedy with regard to rates which have not already been found to be violative of the Act, and which are no longer in effect.[8]

THEREFORE, IT IS ORDERED, That the Exceptions of Adel International Development, Inc. are denied; and

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

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

[7] Moreover, the Conline note itself is confusing. The note specifies what to include in calculating the cubic measurement of the cargo, but it also prescribes a lump-sum amount of $12,000 per unit. A plain interpretation of "lump-sum" suggests that the measurement of the cargo should be irrelevant.

[8] Adel also protests that the Presiding Officer's "attitude" was unacceptable, and suggests that he was biased against it and in favor of PRMSA. It does not appear, however, that Adel's rhetoric on this point is intended to constitute an exception. At any rate, the Commission finds no evidence of bias or predisposition toward the facts of the case on the part of the Presiding Officer.

*Commissioner James V. Day did not participate.

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 78-6

## ADEL INTERNATIONAL DEVELOPMENT, INC.

*v.*

## PUERTO RICO MARITIME SHIPPING AUTHORITY AND STAR LINES, INC.

The obligation of a common carrier by water to charge the rates specified in its published and filed tariffs cannot be altered by a separate agreement between the carrier and the shipper or between their agents.

Complainant has failed to establish that respondent's rate on a shipment of mobile homes violated sections 16, 17, 18(b)(3) or 18(b)(6) of the Shipping Act, 1916.

The complaint is dismissed.

*Richard W. Kurrus, James N. Jacobi, Diane M. Willkens,* and *Margaret Chao,* for complainant, Adel International Development, Inc.

*Amy Loeserman Klein, Morris R. Garfinkle, Kathleen Mahon,* and *David P. Street* for respondent Puerto Rico Maritime Shipping Authority.

*John E. Sprizzo* for respondent Star Lines, Inc.

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

*Adopted December 30, 1980*

This case arises out of the efforts of the Puerto Rico Maritime Shipping Authority (PRMSA) to collect $105,600 in freight charges on a shipment of twenty mobile homes by Adel International, Inc., from Baltimore, Maryland, to Dammam Saudi Arabia, on PRMSA's vessel the *S.S. Puerto Rico* on December 22, 1976.

Before dealing with the merits of the case, a word on a specific request of Adel is necessary. Adel, on brief, offers a series of proposed findings of fact which it believes "to be the essential basic or constitutive findings of fact" and requests that "in accordance with section 8(b) of the Administrative Procedure Act . . . that the Initial Decision show: 'the ruling on each finding . . . presented.' "

If by this, Adel is requesting a specific discussion and ruling on each and every one of the 83 findings of fact proposed by it, the request goes far beyond the spirit, intent and purpose of section 8(b) of the APA (5 U.S.C. 557(b)). It is sufficient if an administrative decision

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

makes those findings sufficient to furnish the parties, the Commission and any reviewing court with a sufficiently clear basis for understanding the premises used in preparing the conclusions of law and applying them to the findings made. *Gilbertville Trucking Co. v. U.S.*, 196 F. Supp. 351 (D.C. Mass., 1961), *rev'd on other grounds*, 371 U.S. 115. It is not necessary to make findings of fact upon all items of evidence submitted nor even necessary to answer each and every contention made by the contestants to the hearing but rather to make findings which are sufficient to resolve the material issues. *Raye & Co. Transports v. U.S.*, 314 F. Supp. 1036 (D.C. Mo. 1970).

Not much imagination is needed to see how long this decision would be were it necessary to explain the rejection or adoption of each or a part of each of Adel's 83 proposed findings. For example, PRMSA in its Opening Brief devotes some 50 pages to a discussion of only a portion of the evidence. The request is denied. However, the differences between the findings of fact as proposed by each side do warrant some discussion before the actual findings of fact are made. To make the discussion meaningful, it is necessary to provide some narrative framework within which to view the areas of basic conflict. The narrative which follows is taken from the Prehearing Statement of Adel.

Petitioner, Adel International Development, Inc. ("Adel") is a corporation, incorporated in the State of Texas, with its principal place of business at 7616 LBJ Freeway, Suite 204, Dallas, Texas 75251. Adel is an exporter, and in that capacity is a shipper within the meaning of the Shipping Act of 1916, as amended, 46 U.S.C. Section 801 *et seq.* ("the Act"), and at all times relevant to this action was engaged in the business of exporting mobile homes to Saudi Arabia.

Respondent, Puerto Rico Maritime Shipping Authority ("PRMSA"), is a corporation and was engaged in the common carriage of goods by water, including limited operations in the foreign commerce of the United States between the ports of Baltimore and ports in the Persian Gulf at all times relevant to this controversy, and at all such times was subject to the provisions of the Act. PRMSA's address in the United States is that of its agent, Puerto Rico Marine Management, Inc. ("PRMMI"), 2700 Broening Hwy., Baltimore, Maryland.

Respondent, Star Lines, Inc. ("Star Lines"), is a corporation engaged as a shipping agent for ocean common carriers and is subject to the provisions of the Act. At all times with respect to this controversy, Star Lines acted as the exclusive booking agent for PRMSA. Star Lines' principal office is 25 Broadway, New York, New York 10014.

On November 18, 1976, pursuant to a request received from John Adel, T. Connor Spigelmire ("Spigelmire"), Manager of the Chartering Department of John S. Connor, Inc. ("Connor"), made several phone calls to carriers and agents to secure rates and conditions for the transportation of twenty (20) mobile homes to Dammam, Saudi Arabia.

Specific price quotations were received from Central Gulf Lines, Inc. ("Central Gulf"), Star Lines, and Kuwait Boulder Shipping ("Kuwait Boulder") as follows: Central Gulf offered $13,000/unit for a total charge of $260,000, lump-sum, berth-term on a Ro/Ro vessel, the *S.S. Arizona*; Star Lanes offered $12,000/unit for a total charge of $240,000, lump-sum, berth-term on a Ro/Ro vessel, the *S.S. Puerto Rico*; Kuwait Boulder offered $11,000 per unit, but this transportation would have involved less desirable carriage on a bulk carrier vessel.

All negotiating contacts between Spigelmire and Star Lines were with Mr. James Murray ("Murray"), an employee of Star Lines.

Both officials at Central Gulf and Murray of Star Lines made clear to Spigelmire that neither carrier was interested in this particular shipment unless the cargo was to be placed on wheels at Adel's expense.

The reason for insistence by the carrier that the units be on wheels were well understood to be:

1. To facilitate loading by the carrier;
2. To reduce the loading costs for the carriers;
3. To permit the carrier to adapt the cargo for shipment in a Ro/Ro vessel; and
4. Most importantly, to facilitate dispatch and unloading at the Port of Dammam.

In addition, severe congestion existed at the Port of Dammam, and Ro/Ro vessels were being given preferential berthing and discharging privileges.

On November 22, 1976, Spigelmire, acting as agent for Adel, entered into a contract with PRMSA, acting through its booking agent, Star Lines, wherein PRMSA agreed to ship via the *S.S. Puerto Rico*, on or about December 14, 1976, twenty (20) mobile homes, twelve (12) feet long by sixty (60) feet wide from Baltimore, Maryland to Dammam, Saudi Arabia, for a price of $12,000 each, or a total of $240,000 freight prepaid Baltimore.

The contract between PRMSA and Adel was confirmed by a written agreement called a "Conline Booking" Liner Booking Note, dated November 22, 1976. The booking note was assigned Contract No. 7 DAM 10 8 B and was executed by Star Lines as exclusive booking agents for PRMMI and John S. Connor, Inc., as agents via phone authority for Adel International.

At all times relevant to this controversy PRMSA's tariff on file with the FMC was one prepared and filed by Murray. After correctly computing the carriage of the mobile homes under the PRMSA tariff, Murray communicated his price quotation to PRMSA officials in Puerto Rico, whereupon the correctness of the tariff quotation was confirmed and their desire to accept the business was stated.

The booking with PRMSA was made on a berth-term, lump-sum basis.

At all times relevant herein, there has existed and now exists a custom and usage in the foreign oceanborne commerce of the United States of long-standing and wide acceptance to the effect that when a common carrier enters into a berth-term, lump-sum contract with shipper, and if at that time the carrier's tariff does not permit shipment in accordance with the contract, it is the responsibility of the carrier to file promptly with the Federal Maritime Commission an amendment to its tariff so as to cover the contract in question. This custom, usage and practice is so well accepted that it is not necessary that the parties negotiating such a contract even discuss the point.

As evidenced by a letter from W. E. Huresky of PRMMI to Dr. Yurom Almogy of Star Lanes, PRMSA, through its agent PRMMI, knew as early as January 17, 1977, of the agreement between Murray and Spigelmire and that its tariff had not been specially amended for this shipment of mobile homes in accordance with Contract No. 7 DAM 10 8 B.

Notwithstanding the terms of the lump-sum agreement between Adel and PRMSA, and notwithstanding the obligation of PRMSA to file a special tariff request with the Federal Maritime Commission evidencing this agreement, PRMSA deliberately decided to violate its contractual obligation and to proceed with a claim for additional revenue against Adel.

PRMSA and its agent, PRMMI, were fully aware of the agreement between Star Lines and Connor well within the 180-day period for filing a special docket application with the Federal Maritime Commission under section 18(b)(3) of the Act. However, the decision was made by PRMSA and Star Lines to disavow the contractual agreement and to proceed with an attempt to collect the rate charges in accordance with the tariff on file with the Commission as applied to a with-wheels-and-hitches measurement.

During the negotiations between Murray and Spigelmire with respect to the shipment here involved, Murray advised Spigelmire that in light of the fact that the port of Dammam was giving preferential berths to vessels having roll-on/roll-off cargo at that time, and because of prior damage experience with cargo of this nature, PRMSA did not want the shipment of mobile homes unless it was to be a roll-on/roll-off shipment, that is, with wheels and hitches attached. It was at the carrier's insistence, and for its convenience, that the wheels and hitches remained on the mobile homes. The contract of affreightment, as evidenced by the Conline Booking Liner Booking Note, contains a statement which reads as follows: "Cargo on wheels for benefit of carrier and cubic to be based on without wheeled measurement."

The cargo arrived in a timely fashion at the pier of Baltimore in December and was thereafter loaded aboard the *S.S Puerto Rico.*

Sometime on or about January 27, 1977, John S. Connor, Inc. rendered a check to PRMMI, as agent for PRMSA, in the amount of $228,000 as payment in full for freight as per the berth-term, lump-sum contract.

Rule 6 on the tariff provided that all freight rates would be based on the actual overall measurement of each freight unit and would be computed in accordance with "Tweeds' Accurate Cubic Tables"; and further that "in determining the cubical contents of any irregular piece or package, the three greatest dimensions shall be measured."

Rule 17 of the tariff superseded Rule 6 in measuring Ro/Ro cargo, and provided in pertinent part:

> *Special Conditions for Ro/Ro Cargo*: On completely set up Ro/Ro Units which are driven under their own power onto the vessel and on which the shipper could present units to the carrier in Semi-Knocked Down Condition, but elects, for carriers convenience, to present same units in a completely setup Ro/Ro condition, the Ocean Rate will be calculated on the Cubic measurement of the Semi-Knocked Down Condition. Such units will not be subject to special Lash Charge.

The cubic measurement of the mobile homes, calculated without including the wheels and hitches in accordance with Rule 17, was 133,330 cubic feet.

On March 31, 1977, Spigelmire informed Brunelle by return letter that Connor's Chartering Department had negotiated a berth-term, lump-sum rate of $240,000 with Star Lines, New York, as agent for the *S.S. Puerto Rico,* and that Brunelle's letter dated March 24, 1977, was in error concerning the freight calculations regarding the Bill of Lading. Spigelmire suggested that Brunelle should contact Mr. James Murray in New York, who had made the arrangement for PRMSA and disclaimed responsibility for filing tariffs concerning lump-sum negotiations.

Since the date of the shipment was December 21, 1976, the one hundred and eighty day time limitation contained in section 18(b)(3) of the Act for the filing by PRMSA of an application with the FMC to "waive the collection of the portion of the charges for the shipment wherever it appears that there is . . . 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 . . ." did not run until June of 1976.

On April 21, 1977, Brunelle by written correspondence informed Spigelmire for the first time that the subject rate based on the berth-term, lump-sum basis was never "published (validated)" in PRMSA's tariff and that as a result PRMSA was insisting on an additional payment in the alleged amount due of $105,600.

The above represents Adel's version of the controversy prior to the hearing in this case. As the 83 "findings of fact" proposed by Adel on brief demonstrate, the evidence adduced at the hearing has not caused Adel to deviate from that version in any significant way. There are several crucial areas, however, where the evidence contradicts or at least casts more than considerable doubt on that version of the controversy. These are dealt with below.

### 1. THE INITIATION OF THE BOOKING

In his written direct testimony, John Adel stated:

> On November 18 1976, I engaged freight forwarder John S. Connor, Inc. ("Connor") in Baltimore, Maryland, to arrange for the shipment of the twenty mobile homes to Saudi Arabia. I spoke with Mr. Timothy Spigelmire . . . head of the chartering department and indicated my desire to have the mobile homes shipped . . . as soon as possible under a competitive freight rate. Spigelmire indicated that he would make several inquiries concerning freight rates and get back to me.

The clear implication here is that Adel made the first overture to Connor; however, on cross-examination at the hearing, Mr. Adel was asked why, after arranging thirteen consecutive shipments with Mohegan as his forwarder, he called Spigelmire. He answered:

> . . . I think John S. Connor came to us with a telex making this offer, knowing we had the cargo on the dock.
>
> * * * * *
>
> I think that good merchandising, perhaps John S. Connor saw the merchandise at the docks in Baltimore and decided they would throw their hat in the ring. (Tr. 39.)

Mr. Spigelmire in his written direct testimony stated:

> My involvement in this matter commenced on November 18, 1976, when Mr. John Adel, President of Adel, requested in a telephone call to me that our firm make arrangements for the shipment of twenty (20) mobile homes from the United States to Dammam, Saudi Arabia.

On cross-examination Mr. Spigelmire stated:

> To the best of my recollection, and I could be in error, I believe that [Adel] made the call. But it certainly is not inconceivable at all that Mr. Ikramulla[2] brought this to my attention and I made the call to Mr. Adel as opposed to Mr. Adel making the call to me. (Tr. 272.)

[2] Mr. Ikramulla is an assistant to Mr. Spigelmire, and the record indicates that Mr. Jim Murray of Star Lines had discussed the mobile homes with Mr. Ikramullah in mid-November 1976.

Other evidence of record suggests that contrary to the written direct testimony of Mr. Adel and Mr. Spigelmire, it was Connor who contacted Adel; and when that contact was made, Adel already had rate quotations from Central Gulf and Kuwait Boulder.

2. THE CONTROVERSY OVER THE WHEELS AND HITCHES

In his written direct testimony, Mr. Spigelmire stated:

> From the outset of my discussions with . . . Central Gulf and Mr. Murray of Star Lines, they made it clear to me that neither carrier was interested in this particular shipment unless the cargo was to be placed on wheels at Adel's expense. The reasons for this insistence by the carriers that the units be on wheels were . . . (1) to facilitate loading by the carrier; (2) to reduce the loading costs for the carrier; (3) to permit the carrier to adapt the cargo for shipment in a Ro/Ro vessel; and (4) most importantly, to facilitate dispatch and unloading at Dammam where severe congestion existed and where Ro/Ro vessels were given preferential berthing and discharging privileges provided that the discharging cargo was on wheels. It was absolutely immaterial and unimportant [to Adel] how the cargo was loaded on or carried on the vessels; it was at the carrier's insistence that the wheels and hitches be provided at Adel's expense . . . .

The clear import of all this was that because of PRMSA's insistence that the units be on wheels, Adel was put to additional expense which it would not otherwise have incurred. However, Mr. Adel's testimony at the hearing paints a different picture. Mr. Adel, when questioned about the wheels and hitches, stated that on all the shipments in the record the mobile homes arrive at the port with the wheels and hitches attached; that he purchased the homes FOB at port; that "in most instances" he desired the homes to have the wheels and hitches attached; and that having the wheels and hitches attached "facilitates" Adel.[3] (Tr. 61-65.)

3. THE CONLINE NOTE

Mr. Spigelmire in his written direct testimony stated that the "Conline Note" is a universally utilized form "of contract . . . constituting a binding commitment of both the shipper and the carrier that the cargo will be carried at precisely the rates, terms and conditions specified therein." However, at the hearing, a decidedly less clear picture of the

[3] It is clear from the record that the homes are placed on wheels with the hitches attached in order that they may be hauled over-the-road from the factory to the port of destination. When asked ". . . how would these mobile homes have arrived at the port of loading from the manufacturing site without wheels and hitches. Mr. Adel answered, "They could have been put on a flatbed truck." When asked if he had ever seen this done, Mr. Adel said, "No."

function of the Conline Note was formed. Some of the salient facts developed were:

1. PRMSA did not know of the Conline Note until after this litigation began.
2. Mr. Huresky, then Director of PRMSA's Mid-East Operations, with eleven years' experience in the steamship industry, had never seen such a document used either in the Mid-East or elsewhere.
3. Mr. Adel did not know that a Conline Note had been used on this shipment until this litigation began.
4. That the primary purpose of a Conline Note was for use with tramp vessels.

Other inconsistencies in the testimony of Mr. Spigelmire lead inevitably to the conclusion that far from being the normal way to confirm a booking with a common carrier in the United States trades, the use of a Conline Note was unusual.

4. THE NATURE OF THE AGREEMENT BETWEEN ADEL AND PRMSA

Mr. Spigelmire in his direct testimony characterizes the agreement between Star Lines and Connor as a "contract to ship at a lump sum rate of $240,000 and measurement based on cubic less wheels." The inconsistency here is obvious -- if the rate is a "lump-sum" rate, the cubic measurement of the cargo is of no concern; it is irrelevant.

The Conline Note itself describes the shipment consisting of "20 REDMAN MOBILE HOMES ABT 325,000 lbs. abt 133,330 cft." Also under the heading "Description of goods," there is the notation "cargo on wheels for benefit of carrier and cubic to be based on without wheeled measurement." Under "Freight rate" there appears "$12,000.00 ea., $240,000.00 LUMP SUM/BERTH TERMS." Again the inconsistency is obvious. If the rate is $12,000 per unit, the cube of the individual unit is unnecessary; and if the total "lump sum" is $240,000, the overall cube of the 20 homes is also irrelevant.

On cross-examination, Mr. Spigelmire said that it was apparent that he and Mr. Murray had different ideas as to how the deal was to be worked out but that it would be worked out.

Mr. Murray was not called as a witness; however, his affidavit and deposition are in the record. Mr. Spigelmire's testimony that PRMSA knew about the agreement he and Mr. Murray had reached is based upon statements made to him by Murray that Murray had communicated the price quotation to PRMSA officials, who had confirmed the correctness of the tariff quotation and their desire to get the business. In his affidavit Murray states:

> After entering into a verbal booking agreement with Connor, I returned to New York and entered the agreement on a book-

> ing sheet. The booking sheet always includes a statement of the agreed upon tariff rate. (Ex. 20, p. 3.)

The booking sheet, however, describes the shipment as "20 mobile homes" -- "Housetrailers," with each unit weighing "18,000 lbs." and measuring "8640" cubic feet. The dimensions of each unit are given as "60' X 12' X 12'," and the rate is quoted as "95.00 NSS." Mr. Huresky testified that from this booking sheet the shipment was "fairly good paying cargo." He says:

> In fact the booking control sheet received from Star Lines for this shipment . . . clearly shows 20 mobile homes at 8,640 cu. ft. each with a rate of $95.00 per measurement ton not subject to surcharges. The dimensions on the booking sheet are 60' X 12' X 12' which includes the dimensions of the wheels but not the hitches. From the booking sheet, the trailers would yield $20,520 per unit (8,640 cu. ft. divided by 40 cu. ft. X $95.00 per measurement ton). (Exhibit 23, p. 7.)

The booking sheet contains no reference to a lump-sum rate of $240,000 or a unit rate of $12,000. It contains no indication that the cubic was to be measured on a "without wheeled basis."

There are other equally troublesome inconsistencies in the evidence presented by Adel, but the above affords a representative sample of the difficulties presented by the record in this case. The findings of fact presented below are based upon my examination of the exhibits and my observation of the demeanor of the witnesses. Where inconsistencies exist, the inferences made are drawn from the entire record and represent my best judgement as to what the record establishes.

## FINDINGS OF FACT

Adel was incorporated in Texas in 1976 and is an exporter in the foreign commerce of the United States engaged in the business of exporting mobile homes to Saudi Arabia.

J. S. Connor, Inc., was established in 1917. Connor performs freight forwarding services under FMC License No. 496. Connor also operates a Chartering Department with T. Connor Spigelmire as its manager. In addition, Spigelmire is the director of Connor's General Agency Department, which acts as general agents for marketing and managing ships.

The Puerto Rico Maritime Shipping Authority is a corporation and was engaged in the common carriage of goods by water and is subject to the Shipping Act of 1916. During the period here relevant, PRMSA operated a common carrier service from Baltimore to Dammam, Saudi Arabia. Puerto Rico Maritime Management, Inc. (PRMMI) is a Delaware corporation, is a subsidiary of PRMSA, and was during the relevant period the management company and agent in the United

States of PRMSA. One Walter Huresky was Director, Mid-East Operations, during the time in question.

PRMSA's sole venture into the foreign commerce of the United States was its service to the Persian Gulf from Baltimore, which began in January of 1976 and concluded in May of 1977. During this period, PRMSA used the short form bill of lading it had utilized in its operations in the offshore domestic trade. On one occasion, PRMSA used Marine Transport Service, Inc., bill of lading.

The relationship between PRMSA and PRMMI on the one hand and Star Lines on the other was somewhat less than harmonious. Mr. Huresky frequently experienced difficulty with the rate negotiation practices of Star Lines. While PRMSA made attempts to acquaint the shipping public with its difficulties with Star Lines in general and Jim Murray in particular, Mr. Spigelmire was well aware of the reputation of Star Lines. Mr. Spigelmire's use of the Conline Note in this instance was due in part to his lack of confidence that a "handshake" with Murray would have been sufficient to close the deal.

In mid-November, Jim Murray of Star Lines visited Connor soliciting cargo. It would appear that it was at this time the shipment in question was discussed. Mr. Spigelmire contacted Adel with Star Lines' offer of $12,000 per unit for a total charge of $240,000. Other quotations received by Adel were Central Gulf offering $13,000 per unit and Kuwait Boulder offering $11,000 per unit on a breakbulk vessel. During his negotiations with Spigelmire, Murray apparently represented PRMSA as being extremely desirous of obtaining this piece of business.

The Conline Note as executed by Spigelmire and Murray described the cargo of 20 Redman Mobile Homes weighing about 325,000 lbs. and measuring about 133,330 cubic feet. This measurement was without the wheels and hitches. The Conline Note contained the notation "cargo on wheels for benefit of carrier and cubic to be based on without wheeled measurement." The rate agreed to by Murray and Spigelmire and set out in the Conline Note was "$12,000.00 ea., $240,000.00 LUMP SUM/BERTH TERMS, FREIGHT PREPAID/ BALTIMORE." Stowage was to be under deck.

The Conline Note used to confirm the verbal booking made by Conner with Star Lines is not widely or even frequently used in the U.S. liner trades. No totally adequate explanation of its use in this case appears in the record except for Spigelmire's apprehensions concerning Murray.

Although the Conline Note states that the mobile homes were on wheels "for benefit of [the] carrier," the record shows that the units were purchased FOB Baltimore with wheels and hitches already attached and that this "fallicated" Adel's handling of the total transaction. There was no additional expense incurred by Adel by leaving the units on wheels for loading aboard the *S.S. Puerto Rico.* Moreover, it

was not irrelevant to Adel that the homes had the wheels and hitches attached.

At the time the Conline Note was executed, PRMSA had no rate for mobiles to Dammam. After the verbal booking was entered into, Murray returned to New York and entered "the agreement" on a booking sheet. The actual entry made by Murray on the booking sheet was for 20 mobile homes measuring 8640 cubic feet each with a rate of $95.00 per measurement ton which would have resulted in a per unit rate of $20,520. The booking sheet entry made no reference of a per unit rate of $12,000 or of a lump sum rate of $240,000.

The rate ultimately filed for PRMSA by Trans World Tariff and Research Service, Inc., and on Murray's instruction, was $1.80 per cubic foot. Based on a measurement of 133,330 cubic feet, the measurement of the homes without wheels and hitches, the total rate would have been $239,666.

The homes were loaded aboard the *S.S. Puerto Rico* with some difficulty and the ship sailed on December 21, 1976. On December 30, 1976, Connor received an unrated receipt bill of lading for the shipment. There was nothing in this bill of lading to indicate that there was any misunderstanding over the rate applicable to the shipment.

In mid-January 1977, Spigelmire received a bill of lading on which the units were described as "motor homes" with a total freight charge of $456,000. The bill was accompanied by a claim of an additional $216,000. Adel later paid the $240,000. Spigelmire telephoned PRMMI to advise them of the error and asked that a corrector be issued reflecting the $240,000 rate.[4]

On January 17, 1977, Mr. Huresky, then PRMMI's Director of Mid-East Operations, wrote to Star Lines stating that until J.S. Connor had called that day, he was unaware of any agreement between Star Lines and Connor that the $1.80 rate was to be applied to the mobile homes "as if they had been received knocked down," i.e., without wheels and hitches. Huresky said that no corrector would be issued until some further explanation was given by Star Lines.

Correspondence over the correct amount of freight to be applied to the shipment continued between the various parties until Adel on September 6, 1977, filed with the Commission a petition requesting the issuance of an order declaring that Adel was not obligated to pay the $905,600 demanded by PRMSA. About a week later, on September 13, 1977, PRMSA brought suit against Adel in the U.S. District Court for the Northern District of Texas for the additional freight.

In its reply to Adel's petition for declaratory order, PRMSA sought its dismissal on the ground that the issues raised in the petition were

[4] The claim was subsequently reduced to $105,600 on the basis of the proper description and a 5 percent commission paid to Connor.

before the U.S. District Court and there was no need to decide them. Hearing Counsel in its reply took the position that the declaratory order should not issue because Adel was wrong on the merits. After the replies were in, Adel withdrew its petition and some six months later filed this complaint.

On August 24, 1978, I withheld ruling on a motion of PRMSA to dismiss this case and stayed further proceedings to allow the District Court (1) to rule on a motion of PRMSA's for summary judgment and (2) to rule on a motion by Adel that the Court stay its proceedings pending a decision by the Commission in this case. It was not until September 26, 1979, that the Court in two one-page orders ruled on the motions. The Court denied PRMSA's motion for summary judgment and granted Adel's motion that the Court proceedings be stayed pending the Commission's decision here.

Proceedings were resumed, hearing was held, and briefs have been filed.

Any proposed finding not made or discussed above, and not specifically dealt with below, were considered and found either to be argument, not supported by the evidence, or irrelevant to the issues.

## DISCUSSION AND CONCLUSIONS

Adel charges PRMSA with violations of sections 18(b)(3), 18(b)(5), 17 and 16 of the Shipping Act, 1916. Basically, Adel states the specific actions of PRMSA which resulted in these violations as (1) PRMSA's failure to file the "special lump-sum, berth-term rate" and its failure to make "an application to file a corrected tariff, which it could have done within one hundred and eighty days from the date of shipment" constitutes a violation of section 18(b)(3) and (2) "PRMSA's *ex post facto* assessment of a total freight charge of $17,280 per unit or $345,600 lump-sum subjects Adel to undue and unreasonable prejudice . . . in violation of Section 16 of the Act, is an unjustly discriminatory and prejudicial rate in violation of Section 17 of the Act, and such rate is so unreasonably high as to be detrimental to the commerce of the United States." The arguments are dealt with below in the order they were presented by Adel on brief.

### 1. THE SECTION 18(B)(3) VIOLATION

Adel's argument here would appear[5] to be grounded upon the basic premise that PRMSA is bound by the actions of its agent Murray.

[5] Adel spends the first 10 or so pages of its argument on the law rehashing and summarizing its proposed findings of fact and spends a goodly amount of space dealing with PRMSA's "deceptive practices" -- the use of short form bill of lading when no long form existed -- which are simply irrelevant to the issues here. Indeed, the major portion of Adel's discussion of the "law" of the case is nothing more than a restatement of matters covered in its proposed findings.

From this, Adel argues, it follows (1) that PRMSA was bound to file the rate quoted by Murray; or (2) failing that, it was PRMSA's duty to accept Murray's alleged interpretation of Rule 17 and base the $1.80 rate on the mobile homes measured as if the wheels and hitches were not attached to the homes; or (3) failing both of these, it was PRMSA's obligation to file a Special Docket application for permission to retroactively apply the "lump-sum" rate. Any one of the above is said to constitute a violation of section 18(b)(3). Adel cites no legal authority in support of its theory.[6]

Setting aside for the moment the question of PRMSA's obligation to file a Special Docket application, Adel's case, if it is to have any validity at all, hinges on the meaning of Rule 17. This is so because Murray filed a rate of $1.80 per cubic foot which when applied to the knocked-down measurement of the mobile homes would have resulted in total freight charges of about $239,996, $4.00 less than the $240,000 quoted by Murray. Rule 17 provides:

> *Special Conditions for Ro/Ro Cargo*: On completely set up Ro/Ro Units which are driven under their own power onto the vessel and on which the shipper could present units to the carrier in Semi-Knocked Down Condition, but elects, for carrier's convenience to present same units in a completely setup Ro/Ro condition, the Ocean Rate will be calculated on the Cubic measurement of the Semi-Knocked Down Condition. Such units shall not be subject to special Lash Charge.

Adel's argument for applying Rule 17 to the shipment in question is stated as follows:

> It is undisputed that Murray applied Rule 17 to the Adel shipment when stating that the cubic would be based on a without wheels and hitches measurement. This was Murray's position from the time the Booking Contract was executed throughout the duration of the rate dispute . . . begun in January, 1977. PRMSA has offered no evidence to indicate that Murray did not apply Rule 17 in good faith, stating only that Murray's interpretation was erroneous. (Record references omitted.)

Adel's premise is that Murray as the preparer or drafter of the tariff was in the best position to know what its provisions were intended to mean;[7] but Murray's actions prior to his reliance on Rule 17 cast

[6] All of the cases cited by Adel go only to (1) the proposition that a principal is bound by the acts of its agent; (2) the proposition that the Conline Note was a binding contract; (3) the standard for filing and obtaining Special Docket relief; and (4) the proposition that the Commission has the equitable power to afford relief in this case.

[7] However, a basic principle of tariff construction is that it is not what the writer intended but what the words actually say that controls.

considerable doubt on the "good faith" of Murray's interpretation of the Rule.

First, Murray quotes Connor a rate of $12,000 per mobile home with a "lump-sum" of $240,000. He then returns to New York and makes an entry on a booking sheet which is intended to inform PRMMI of the agreement made with Connor. However, the entry on the booking sheet shows a rate of $95.00 per measurement ton which would have resulted in a rate of $20,520 per mobile home. Finally, Murray instructs the tariff filing agent, Trans World Tariff and Research Service, Inc., to file a rate of $1.80 per cubic foot.

It is only when asked by Mr. Huresky of PRMMI to explain the agreement for the $240,000 total freight charge that Murray falls back on Rule 17.[8]

Murray's action can only lead one to conclude that for whatever reason, Murray foresaw a problem in getting PRMSA to accept the rate he had negotiated and set about to present PRMSA with a *fait accompli.* However, Murray's motives are irrelevant to the question of whether Rule 17 applies to Adel's shipment.

On its face the Rule applies only to "Ro/Ro units which are driven under their own power onto the vessel." In his written direct testimony, Mr. Spigelmire stated:

> The cargo arrived in a timely fashion at the Baltimore pier in December, having been placed on hitches and wheels at Adel's expense as required by the carrier. The cargo was loaded immediately. Since it was on wheels, it was easily rolled on board *powered by its attached cabs* . . . . (Emphasis mine.)[9]

The clear implication of Mr. Spigelmire's statement is that the mobile homes moved on board the ship under their own power -- *their* attached cabs. Captain Taylor, who supervised the loading of the homes on the *S.S. Puerto Rico* testified that the mobile homes were moved aboard the ship by a "yard hustler" or "tractor trailer" which was hitched to a mobile home and the home was then pulled up the ramp into the hold. On cross-examination, the following colloquy took place between counsel for PRMSA and Mr. Spigelmire:

> Q. Now when you go on and say "powered by its attached cabs," by cabs, you mean hustlers?
>
> A. By cabs, I mean a piece of equipment that is capable of pulling this type of cargo on and off a ship.

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[8] Adel's only other reference in support of Murray's good faith is to the direct testimony of Spigelmire where he states that in January 1977 "I telephoned PRMMI to explain that an incorrect calculation had been made and to ask that a corrector be issued reflecting a lump-sum rate of $240,000 based on the without wheel measurement as negotiated . . . by their agent, Mr. Murray."

[9] Later on cross-examination, Mr. Spigelmire admitted that he had not observed the loading and that he meant the homes were loaded "in the normal course of events," not "immediately."

Q. Commonly called hustlers?

A. Commonly called whatever you want to call them . . . . It could be done with a tractor.

Q. Why did you use the word its? In what sense were they its attached cabs?

A. They were not its. That was not meant to be possessive from the cargo point of view. It was only possessive when they were hooked up.

Q. Once they were hooked up, they were its cab?

A. That is correct.

Q. But the minute they split, it was over?

Q. That is correct.

Despite Mr. Spigelmire's strained use of the word "its," it is patently clear that the provisions of Rule 17 do not apply to Adel's mobile homes. The meaning of the phrase "units driven under their own power onto the vessel" is unambiguous. It requires that the equipment or engine be either an integral part of the unit or that it be an attached part that remains with the unit. It does not apply to a unit for which the power unit is supplied by either the carrier or the terminal. PRMSA's refusal to apply the Rule here is proper and does not constitute "a violation of section 18(b)(3)."

Although I stated earlier that I would take up the alleged violations in the order they were presented by Adel, this appears the best time to discuss the allegation that Rule 17 violates section 16 of the Act. Although Adel flatly asserts that PRMSA's interpretation of Rule 17 prefers Ro/Ro cargo and prejudices all other cargo such as Adel's mobile homes, there is no reference to the record or argument on brief to support the charge. The record shows that the Rule is for the carrier's convenience, and it exchanges a reduced rate in return for the elimination of the need to use the carrier's stevedoring power units. To take the case at hand, the mobile homes required the use of a yard hustler and a forklift truck to get the units aboard the ship and properly positioned in the hold. This may be contrasted with cargo such as bulldozers and road graders, for instance, which are relatively easily driven aboard the ship under their own power.

The record here does not establish that Rule 17 unduly prefers Ro/Ro cargo or unduly prejudices other cargo.

Adel says that "PRMSA was obligated to file a corrected tariff and to make a special docket application for waiver of additional charges under section 18(b)(3) of the Shipping Act . . . ." But aside from some cases which Adel says show that such an application by PRMSA would have obtained the permission to waive the charges, I am cited to no authority which stands for the proposition that PRMSA's failure to

file a special docket application constituted a violation of section 18(b)(3).

PRMSA counters Adel's "argument" by saying that the circumstances of this case "make it clear that PRMSA could not have obtained a waiver under the terms of the statute even had it attempted to do so." I am inclined to agree with PRMSA.

Section 18(b)(3) permits the Commission in its discretion to allow a carrier to waive the collection of a portion of the freight charges under narrowly circumscribed conditions "where there is an error of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff." The specific error which Adel alludes to as supporting its argument that this was a case for waiver is stated by Adel as follows:

> Assuming for argument's sake, that PRMSA's interpretation of the tariff was correct and that Murray had made an error as Huresky contends, PRMSA was obligated to file a corrected tariff and to make a special docket application . . . .

The error Adel is referring to is Murray's interpretation of Rule 17 as applying to the mobile homes.[10] A misreading of the tariff is not a ground for a waiver under 18(b)(3). *Farr Co. v. Seatrain Lines*, 20 FMC 411, 663 (1978). See also, *Capital Trading Co., Inc. v. Sea- Land Service, Inc.*, 20 FMC 315 (1977), misquotation of rate; *Application of Sea-Land Service, Inc.*, 19 SRR 432 (1979), unauthorized representations made to shipper.

I can find no authority which imposes upon PRMSA under the facts of this case an obligation to file a special docket application; and my examination of the precedents leads me to conclude that even if PRMSA had filed such an application, it could not have met the statutory requirements.

Ultimately Adel's request for relief depends on a rather ill- defined conception of some equity power of the Commission, but before dealing with it, it is necessary to deal with that enormous body of law which Adel has studiously ignored throughout its argument.

In some ways the law embodied in section 18(b)(3) and statutes like it can be considered harsh and has in a number of cases worked hardship on those who have run afoul of it. But from the beginning, both the agencies and the courts have uniformly, consistently, and virtually without fail strictly construed and enforced the prohibition against collecting or charging rates different from those in its published and filed tariffs. A few excerpts from some representative opinions offer examples of the strictness of the prohibition.

[10] The record shows that there was no clerical or administrative error. Nor was there an inadvertent failure to file a new rate. Murray intended to and did file the rate of $1.80 per cubic foot.

> Once a tariff is established by the carrier and approved by the Federal Maritime Commission the tariff binds both the shipper and the carrier with the force of law. The statutory policy behind the strict enforcement of federally approved tariffs is so strong that the rate must be charged and paid regardless of mistake, inadvertence or contrary intention of the parties. *Gilbert Improved Hardwoods, Inc. v. 245 Packages of Guatambu Squares, More or Less*, 508 F.2d 116, 1120-21 (5th Cir. 1975) (citations omitted).

"Binding" contracts between the parties cannot work to alter the tariff rate. As the Supreme Court said in 1924:

> The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus they were fixed by law. *No contract of the carrier could reduce the amount legally payable*, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount from the person liable therefor. *Louisville & N.R Co. v. Central Iron & Co.*, 256 U.S. 59, 65 (1924). (Emphasis mine.)

Citations could easily be multiplied and, as an example, respondent PRMSA offers the following:

> *See e.g., Dayton Coal & Iron Co. v. Cincinnati, New Orleans & Texas Pacific Ry.*, 239 U.S. 446 (1915); *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *Louisville & Nashville Ry. v. Mottley*, 219 U.S. 467 (1911); *Texas & Pacific Ry. v. Mugg & Dryden*, 202 U.S. 242 (1906); *New York, New Haven & Hartford Ry. v. ICC*, 200 U.S. 361 (1906); *Gulf, Colorado & Santa Fe Ry. v. Hefley & Lewis*, 158 U.S. 98 (1895); *United States v. Associated Air Transport, Inc.*, 275 F.2d 827 (5th Cir. 1960); *United States v. Pan American Mail Line, Inc.*, 359 F. Supp. 728 (S.D.N.Y. 1972).

All of these cases stand four-square for the proposition that a carrier cannot charge compensation other than that in its published tariff.

It is against this background that Adel asserts that "PRMSA's actions demand that equity be done." Adel says:

> PRMSA unilaterally and without notice overruled a reasonable tariff interpretation by Star Lines. PRMSA unilaterally determined that the agreed rate of $240,000 lump-sum was insufficient in view of the total billed revenue for the voyage. And, PRMSA unilaterally decided not to publish a corrected tariff and seek a waiver application under Section 18(b)(3). These unilateral actions demand that equity be done.

What Adel seems to be arguing is that PRMSA's actions estop it from collecting the additional freight. However, the Courts have dealt with

this argument before. Estoppel cannot be invoked against a common carrier to avoid a tariff provision.

> Neither the intentional or accidental misstatement of the applicable published rate will bind the carrier or the shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay . . . . It is clear that no act or omission of the carrier can estop or preclude it from enforcing payment of the full amount of the tariff charges . . . and equitable considerations may not serve to justify failure of the carrier to collect, or retention by the shipper of, any part of the lawful tariff charges . . . . *U.S. v. Associated Air Transport, Inc.*, 275 F.2d 827, 833 (5th Cir. 1972).

Even fraudulent misrepresentations by the carrier will not work estoppel. In *Feraco, Inc. v. Georgia Pacific Corp.*, 313 F. Supp. 66 (D. Del. 1970), a shipper sought to defend an action by the carrier for the balance of the rate due on the ground that the carrier had fraudulently induced it to ship with the carrier. The court cited with approval the following language from *Arctic Roofings, Inc. v. Travers*, 32 A.2d 559 (Del. Sup. Ct. 1943):

> The Act being primarily for the public good, the principles of estoppel will not defeat the carrier's rights though he intentionally misquoted the scheduled rate to the shipper before the delivery of the goods for transportation and material losses were incurred thereby . . . . Nor can there [be] any real distinction between a mere unintentional representation and a fraudulent misrepresentation . . . . [11]

Adel, however, insists that the Commission has "equitable powers inherent under section 18(b)(3)" to "find that Adel has paid the entire freight rate for which it was responsible." For this proposition, Adel cites *United States v. Columbia S.S. Co., Inc.*, 17 FMC 8 (1973). In *Columbia*, the shipper, the General Services Administration, negotiated a rate on some unboxed trucks of $1,150.50 per vehicle with Wall Shipping Company. However, due to a clerical error, the rate actually filed was $1,000.00 per vehicle. The GSA paid the $1,150.50 rate; however, some eight months later an audit discovered the error and some five months after the audit, the government filed a complaint with the Commission alleging a violation of 18(b)(3) and seeking reparation

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[11] Again the citations can be multiplied, and again PRMSA offers a few:
See also *Southern Pacific Co. v. Miller Abattoir Co.*, 454 F.2d 357, 359-60 (3d cir. 1972); *Silent Sioux Corp. v. Chicago & North Western Ry.*, 262 F.2d 474, 475-76 (8th Cir. 1959); *Armour & Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 254 F.2d 719, 723-24 (7th Cir.), *cert. denied* 358 U.S. 840 (1958); *Bernstein Bros. Pipe & Machinery Co. v. Denver & R.G.W.R. Co.*, 193 F.2d 441, 444 (10th Cir. 1951); *Bull S.S. Lines v. Thompson*, 123 F.2d 934, 944 (5th Cir. 1941), *cert. denied* 315 U.S. 816 (1942); *Central Warehouse Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 20 F.2d 828 (8th Cir. 1927); *Prince Line Ltd. v. American Paper Exports, Inc.* 45 F.2d 242 (S.D.N.Y. 1930).

of $10,384.50. The Commission found that the carrier had violated section 18(b)(3) but failed to award reparation to the government. To Adel the facts of the *Columbia* case are remarkably similar to the facts of this case and "though finding that the respondent (the carrier) had charged and accepted payment of a rate other than the one on file, the Commission denied reparations."

Adel would have it that the "discretion" exercised by the Commission was that given it under section 18(b)(3). It was not; and there are crucial distinctions between what the Commission did in *Columbia* and what Adel is asking it to do here. The Commission was very careful to make it clear that the discretion it was exercising was that granted it by section 22 of the Act. It said at pages 9-10:

> Complainant here prays that it be awarded reparation. Pursuant to section 22 of the Act, the Commission is authorized to award this avenue of relief, ". . . and may direct the payment . . . of full reparation to the complainant for the injury caused by . . . violation [of the Act]."
>
> This avenue of relief provided by section 22, however, as clearly stated and maintained, 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 reparations." . . . In this case, and limited strictly to the peculiar facts of this case, it is our determination that an award of reparation is not warranted.

The first crucial distinction is that unlike *Columbia*, where the carrier charged a rate other than that on file, here PRMSA is attempting to collect the published and filed tariff rate.[12] It is obligated by section 18(b)(3) to do so. Secondly, there is no violation of section 18(b)(3) to be found here upon which to base the exercise of discretion under section 22 of the Act. Indeed, the Commission was quite explicit in dealing with the violation question; it said at page 10:

> Our action does not, nor can it, excuse a party [the carrier] from any statutory penalties to which he may be subject, but simply indicates our disinclination to award reparation in light of the compelling facts of this case. (17 FMC at 10.)

PRMSA points out that were the Commission to order it to cease and desist from its collection of the published tariff rate, the Commission would be "compelling PRMSA to violate section 18(b)(3) and simultaneously subjecting it to statutory penalties." Considering the uninterrupted construction of statutes like section 18(b)(3) beginning with the

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[12] It is always necessary, but at times difficult to keep in mind, the Congressional policy of protecting the shipping public by requiring strict adherence to the published tariff rates. Contracts, agreements, understandings or whatever cannot alter that rate. See pages 498-500 above.

Interstate Commerce Act well over fifty years ago, it is hard to disagree with PRMSA's logic.[13]

On the basis of the foregoing, I conclude that there has been no violation of section 18(b)(3) established on the record in the case.

2. THE SECTION 16 VIOLATION

As noted above, Adel in its complaint alleged that PRMSA's Rule 17 gave an undue and unreasonable preference or advantage to self- propelled Ro/Ro cargo and prejudiced cargo that was not self-propelled. Adel now appears to have shifted its ground. Adel now maintains that PRMSA has violated section 16 by (1) failing to honor its booking contract or to seek a waiver of freight charges; (2) refusing to issue a corrector; and (3) failing to make refunds of overpayments by other shippers on the same voyage.

Adel's argument on PRMSA's alleged violation is one of its least coherent statements. Adel seems reluctant to come to grips with the essential element of its charge against PRMSA. All of the acts or omissions of PRMSA cited by Adel had the same result -- the application of the $1.80 per cubic foot rate to Adel's mobile homes; and unless that rate subjected Adel to undue prejudice or disadvantage, there has been no violation of section 16. But before dealing with that question, it is necessary to deal with Adel's assertion that it is unnecessary to show competition between Adel and any other shipper to establish a violation of section 16. Adel places its main reliance on the Commission's decision in *Valley Evaporating Co. v. Grace Line, Inc.*, 14 FMC 16 (1970) -- probably the most misconstrued case in the Commission's history.

The *Valley* case involved two shipments of dehydrated apples on which it was alleged that the rate charged violated section 16 of the Act. For six years prior to the two shipments, the Conference had maintained a specific commodity rate on dried fruit including dehydrated apples. Just prior to the two shipments, the rate was $52 per long ton. It had reached that level by a process of gradual increases from a rate of $44 established in 1962. Every year since 1962, complainant had shipped on a gradually increasing scale somewhere between 100 and 275 long tons of dehydrated apples.

In November 1967, the Conference agreed to further general rate increases to become effective in March and April of 1968. In compiling the new tariff, the Conference Secretary had prepared lists of commodities moving in sufficient quantities to warrant retention of specific commodity rates. The aim was to eliminate "paper rates" on nonmoving commodities. Dehydrated apples had moved in sufficient quan-

[13] As a practical matter, however, it is unlikely that PRMSA would be actually prosecuted for penalties. Nevertheless, a decision as requested by Adel would not only fly in the face of the overwhelming precedent, but it would condone a violation of the Act.

tities to meet the Conference's criteria for the retention of a specific commodity rate. However, due to some "oversight," the dried fruit commodity rate was omitted and the two shipments of apples moved at an N.O.S. rate of $88 per measurement ton -- more than triple the previous commodity rate. Complainant alleged that the rate violated section 16. Respondent defended against the charge by pointing out that complainant had failed to show the necessary "existing and effective competitive relationship between the prejudiced and preferred shipper." In dealing with the question of competition, the Commission began by saying:

> . . . while an effective competitive relationship is a necessary part of liability under section 16 in situations where the allegedly preferential or prejudicial *rates or charges are geared to transportation factors or the differing characteristics of commodities, it is not required where the carrier's obligation to render a particular service is "absolute" and not dependent upon such factors* . . . . (14 FMC at 21.) (Emphasis mine.)

The Commission went on to point out that in its effort to delete paper rates, the Conference applied only a single criterion, that the commodity move in sufficient volume to warrant retention of a commodity rate. On the use of the criterion, the Commission went on to say:

> Having once established the "sufficient volume" criteria using whatever factors were warranted, respondents, in determining what commodity rates were to be discarded were then required to apply them in a totally fair and impartial manner. At this point the single question involved was whether a given commodity moved in sufficient volume or not. Questions as to the characteristics inherent in the particular commodity involved were irrelevant as were questions of whether the particular commodity competed with any other commodity. (14 FMC at 22.)

In support of its rationale in the *Valley* case, the Commission cited *New York Foreign Frgt F & B Ass'n v. Federal Maritime Commission*, 337 F.2d 289 (1964). Indulgence in a rather long quote from that opinion will show why the rationale of the *Valley* case does not apply here:

> The forwarders argue that a Section 16 (First) violation is shown only when (1) two shippers are given unequal treatment, (2) the shippers are competitors, and (3) the preference to one or disadvantage to the other is the proximate cause of an injury; these prerequisites, they urge, are not supported by the Commission's record. We hold, however, that the substantial evidence that forwarders, in random fashion, charge shippers disguised markups of widely varying amounts, for no apparent reason, suffices to establish discrimination in violation of Section 16 (First). In urging that all three prerequisites must be met, the forwarders rely upon cases involving alleged dis-

> crimination in transportation or wharfage charges. See, e.g., *Agreement 8765-Gulf/Mediterranean Trade*, 7 F.M.C. 295 (1963); *Wharfage Charges and Practices at Boston, Mass.*, 2 U.S.M.C. 245 (1940). We find those cases not apposite. Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas, for example, bears no relation to the fees levied for heavy industrial equipment. To find an unlawful discrimination in transportation charges thus quite properly requires a showing of competitive relationship between two shippers who are charged different prices. But forwarders render substantially the same service to all shippers in procuring insurance or arranging for cartage; the commodity being shipped has little or nothing to do with the reasonableness of the fee exacted for the forwarder's service. The very practice of charging shippers disguised markups of widely varying amounts on substantially identical services, without justification, seems to us to be prima facie discriminatory in a regulated industry.

At issue here is just such a "transportation charge" which the court found requires "a showing of [a] competitive relationship between two shippers who are charged different prices."

Adel, however, in the alternative "believes that a competitive relationship exists with other shippers which warrants a finding that PRMSA has subjected Adel to preferential or prejudicial rates and practices which are not justified by differences in competitive factors." As the only support for the existence of the necessary competitive relationship, Adel offers the following testimony of Mr. Adel:

> Q. . . . How would a freight rate of $17,280 per mobile home, how would that rate have affected the sale of these homes in Saudi Arabia?[14]
>
> A. Well, it would have priced us out of the market and would not have allowed for a legitimate profit. We were at that time under severe pressure by overland transportation from Europe, and it was sold on the basis of square footage. They knew no other mentality except how many square feet can I get for X number of Re-Yal [sic]. And we were under severe, severe pressure from the Europeans. (Tr. 119-120.)

Adel then cites three other shipments of mobile homes on two voyages of the *S.S. Puerto Rico*, one in May 1976 and one in June 1976, that it alleges moved at lower rates and goes on to say:

> Services rendered the various shippers of mobile homes to Dammam by PRMSA were identical as were the terms and

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[14] The $17,280 per unit rate was the result of applying the tariff rate of $1.80 per cu. ft. to each mobile home measured with wheels and hitches.

> conditions of shipments, i.e. lump-sum, with wheels and hitches.

Finally Adel concludes:

> The record reflects that there was close competition in the market and that the marketability of mobile homes depended on the ultimate freight rate.
>
> Inasmuch as Adel was not afforded equal treatment with respect to the tariff rate charged or PRMSA's underlying acts . . . a finding is warranted that PRMSA acted in violation of Section 16.

In *North Atlantic Med. Frgt Conf. - Rates on Household Goods*, a case cited by Adel, the Commission discussed the criteria necessary to establish a violation of section 16. The Commission pointed out that the purpose of the prohibitions of section 16 are "designed to deal with two or more competing shippers or localities receiving different treatment [by a carrier] which is not justified by differences in competitive or transportation conditions." (11 FMC at 209.) The Commission went on to say:

> Since the section is intended to prevent unlawful favoritism among competitors in the same marketplace, the allegedly preferred shipper must ordinarily be in competition with the allegedly prejudiced shipper.[15]

The only competition testified to by Mr. Adel was that from "the Europeans" using "overland transportation." No explanation is offered as to how PRMSA's actions were responsible for the preference seemingly enjoyed by the Europeans' overland rates. There is simply no evidence in the record that Adel was in competition with any particular shipper of mobile homes which received a preference from PRMSA which resulted in prejudice to Adel.

Despite Adel's assertion that "the services rendered the various shippers of mobile homes to Dammam . . . were identical in terms and conditions," on the shipments cited by Adel the sizes of the various mobile homes differed both from each other and from Adel's.

Adel has failed to show that PRMSA has violated section 16 of the Act.

### 3. THE SECTION 17 VIOLATION

As Adel itself states, in order to find a violation of section 17, "there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions." Adel again points to the fact that PRMSA had made three other shipments of mobile homes on two prior voyages and says that no mobile home was

[15] The qualifying "ordinarily" obviously refers to those cases involving other than "transportation charges" where the carrier's duty is "absolute."

ever carried by PRMSA at an effective rate of $17,280 per unit. And here again, Adel ignores the question of the characteristics of the other mobile homes carried by PRMSA. It simply states:

> A total of eight homes moved on the voyage of May 22, 1976, all with wheels and hitches attached -- six homes for one shipper and two homes for a second shipper -- however, the rates charged were inexplicably different -- $12,000 per unit for the six homes and $11,000 per unit for the two homes . . . the rates applied were lump-sum rates and were not based on cubic footage.
>
> PRMSA's second shipment of mobile homes . . . involved six house trailers. The tariff rate . . . was $9,200 per unit

To Adel it "is clear that all of the units for these two shipments should have moved at the same unit rate since the rate was not based on a cubic measurement." Adel's logic is flawed to say the least. This kind of reasoning could require the same per unit rate for a Fiat as for a roadgrader. Furthermore, Adel makes an assumption it has not established on the record -- that the several units were identical. There is no evidence of record from which to infer this much less establish it as a fact. Indeed, Adel simply makes the assertion without a single citation to the record.[16]

Adel has failed to establish that the other shipments of mobile homes carried by PRMSA moved under the same transportation circumstances and conditions as the shipment is question. Adel has failed to establish that PRMSA has violated section 17 of the Act.

### 4. THE SECTION 18(B)(5) VIOLATION

According to Adel, a violation of section 18(b)(5) is established if it is proved (1) that the rate is unreasonably high and (2) the unreasonable rate would be detrimental to United States commerce. Adel argues that it has established a *prima facie* case by showing (1) that "the rates charged for the same commodity moving in the same trade are substantially lower than the rate PRMSA seeks to impose," and (2) that the mobile home market in Saudi Arabia would not have borne an ocean freight rate of $17,280 per unit. Before dealing with the argument, it is necessary to consider an argument by PRMSA that the Commission cannot find a violation of section 18(b)(5) in this case. That section provides:

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[16] The only citation to the record in Adel's entire discussion of the two shipments is to PRMSA's revised tariff page 75B which shows the per unit rate of $9,200 for the July 22d shipment of six house trailers. PRMSA states that documents furnished Adel during discovery make it perfectly plain that on the May 22d shipment, the cubic measurements of each of the six units which moved under the $12,000 rate were substantially greater than that of each of the two used mobile homes that moved at $11,000 each. One can readily see why these documents were not made part of the record by Adel -- I have not been cited to them, nor have I been able to find them among the several hundred pages of exhibits.

> The Commission shall disapprove any rate or charge filed by a common carrier by water in the 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.

It is PRMSA's position that the Commission cannot find a violation of section 18(b)(5) if the rate in question is no longer in effect. Indulgence in yet another somewhat long quote from *Valley Evaporating, supra,* will demonstrate the rationale of PRMSA's position:

> *This section is purely prospective in nature* and, as the court explained in *Federal Maritime Commission v. Caragher,* 364 F.2d 709, 717 (1966):
>
> > . . . simply reflects Congress's awareness that whether a certain rate is "unreasonable" is often a close question and that consequently a regulated carrier should be liable for . . . penalties *only if it continues to charge unreasonable rates after the Commission has determined they are unreasonable.* (Emphasis added.)
>
> We see no reason to distinguish the situation where an allegation of "unreasonableness" under section 18(b)(5) forms the basis for a request for reparation rather than a suit for penalties. Therefore, we find that the court's rationale in the *Caragher* case, *supra,* applies with equal force to the present situation and conclude that only after the Commission has determined a particular rate to be unreasonable under section 18(b)(5) may a carrier's continued assessment of that rate be considered a violation of section 18(b)(5) for which reparation may be awarded. *Complainant's reliance on the provisions of section 18(b)(5) in this proceeding is therefore clearly misplaced. Since the alleged "unreasonable" rate is no longer in effect, the Commission has nothing before it to consider for "disapproval" under the provisions of section 18(b)(5).* 14 FMC at 26-27 (emphasis added, footnote omitted).

As in *Valley Evaporating,* there is nothing here to disapprove since PRMSA's rate which is here challenged by Adel is no longer in effect. Thus, since there is nothing to disapprove and since PRMSA's $1.80 rate was never before disapproved by the Commission, there can be no violation of section 18(b)(5).[17]

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[17] Adel argues that since it is not seeking "reparation," the cases cited by PRMSA are inapposite. This is really a distinction without a difference. Had Adel paid the additional freight charges and brought this suit to recover them, the clear precedent would bar that recovery. The prospective intent of the statute cannot be avoided by the simple expedient of refusing to pay the freight charges and then filing a complaint asking that the carrier be ordered to cease and desist its attempts to collect them. Finally, Adel cites *United Nations Children's Fund v. Delta Steamship,* 16 FMC 423 (1972), as support for its position. In that case the Commission found the rate in question to be unreasonable under section 18(b)(5) and concluded that it was all right for the carrier to make a *voluntary* refund -- a decidedly different situation than the case here.

PRMSA, however, perhaps out of an excess of caution, argues that even were PRMSA's rate now before the Commission, the evidence of record would not support a finding that the rate was so unreasonably high as to be detrimental to the commerce of the United States and therefore could not in any event be disapproved by the Commission.

Adel's entire case under section 18(b)(5) consists of the argument that Adel has never paid and PRMSA has never charged (except in this one instance) a rate as high as $17,280 per mobile home. It says that PRMSA cannot justify its rate on the basis of exceptional service, terms, or conditions because (1) no such circumstance existed in its service, (2) the offer made to Adel was not based on exceptional services but was upon the same terms and conditions as the Central Gulf offer, and (3) the rate offered and accepted was $12,000, not $17,280. Finally, Adel argues that it has established a *prima facie* case for a violation of section 18(b)(5) because (1) the rates charged for the same commodity moving in the same trade are substantially lower than the rate PRMSA seeks to impose and (2) PRMSA's rate would " have priced [Adel] out of the market" and thus the units would not have moved in U.S. commerce.

First, the mere existence of a disparity between rates, in and of itself, does not establish that a rate is so unreasonably high as to be in violation of section 18(b)(5). *Investigation of Ocean Rate Structures*, 12 FMC 34, 58 (1968), *aff'd sub nom, American Export Isbrandtsen Lines, Inc. v. FMC*, 417 F.2d 749 (D.C. Cir. 1969); *Outbound Rates Affecting Exportation of High Pressure Boilers*, 9 FMC 441, 457 (1966); *Iron and Steel Rates Export-Import*, 9 FMC 180, 191 (1965).

Secondly, the argument that the mobile homes would not have moved at the $17,280 rate is based solely on the testimony of Mr. Adel that the rate ". . . would have priced us out of the market *and would not have allowed us a legitimate profit*." (Emphasis mine.) But having asserted that "a legitimate profit" was an element in its case, Adel seeks to dismiss evidence introduced by PRMSA (Exhibit 8 as amended by Exhibit 70) which shows that Adel made a profit at the $17,280 rate as "totally irrelevant."[18]

[18] In arguing that profit is irrelevant, Adel cites cases which were decided more than 25 years before section 18(b)(5) was enacted and which deal with a different section of the Act.

Adel cannot have it both ways; and on the record before me, Adel has failed to establish that PRMSA's rate was so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5).

The complaint is dismissed.

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

Washington, D.C.
July 11, 1980

# FEDERAL MARITIME COMMISSION

## FORMAL DOCKET NO. 699(I)

## GLADISH & ASSOCIATES

*v.*

## SEA-LAND SERVICE, INC.

## ORDER ON RECONSIDERATION

*December 30, 1980*

This proceeding is before the Commission upon receipt of a letter from Gladish & Associates constituting a petition for reconsideration of the Commission's September 25, 1980 Order Partially Adopting Decision of Settlement Officer. The Commission denied Complainant's request for reparations on a number of shipments of toothbrushes on the ground that it had failed to meet its burden of proof.

Complainant requests "re-examination of the documentation heretofore presented," and argues that its submission of evidence established that the shipments in question were "plastic toothbrushes." Complainant's petition does not meet the criteria for reconsideration set forth in section 502.261 of the Commission's Rules. This rule provides that a petition for reconsideration will be summarily rejected 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. 46 C.F.R. 502.261(a).

Complainant merely reargues its position, which was already rejected by the Settlement Officer and the Commission as insufficient to prove the exact nature of the commodities in question. Accordingly, Complainant's petition will be denied.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Gladish & Associates is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

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*Chairman Richard J. Daschbach did not participate.

# FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 683
## FLOMERCA LINE TO BENEFIT THE U.S. DEPARTMENT OF AGRICULTURE

## ORDER ADOPTING INITIAL DECISION

*December 31, 1980*

The Commission has before it the Exceptions of Flomerca Line to the October 7, 1980 decision of Administrative Law Judge Seymour Glanzer denying Flomerca's special docket application. This decision was largely based upon Flomerca's failure to furnish the supplementary information required by the Commission's July 3, 1980 Order of Remand. 20 S.R.R. 131.

Flomerca now contends that the confusion which resulted from its June 1, 1979 change in steamship agents constitutes good cause for granting it special permission to file a lower rate for "Corn in Bags" upon less than the 30 days notice prescribed by 46 U.S.C. 817(c)(3). Flomerca also claims it carried no other shipments of bagged corn between July 2 and October 9, 1979 so that the inclusion of a 500-ton minimum requirement in Flomerca's corrective tariff filing was an immaterial deviation from the terms of the Flomerca/USDA booking contract.

Flomerca's tardily presented contentions provide an insufficient basis for granting special docket relief and clearly do not meet the standards set forth in the Commission's Order of Remand. 20 S.R.R. at 135, n.13. It would be particularly inappropriate if a controlled carrier were allowed to rely upon the same inadvertent conduct which created the need for a special docket application in the first instance to establish good cause for waiving the 30 day notice requirement of section 18(c)(3).

THEREFORE, IT IS ORDERED, That the October 7, 1980 decision in this matter is adopted and the Exceptions of Flomerca Line are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 683

## APPLICATION OF FLOMERCA LINE FOR THE BENEFIT OF U.S. DEPARTMENT OF AGRICULTURE, A.S.C.S. COMMODITY OFFICE

Pursuant to directions contained in Order of Remand, the application is denied for inadequacy of proof.

## ON REMAND, FURTHER INITIAL DECISION[1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

*Adopted December 31, 1980*

This matter is before me in accordance with the Commission's Order of Remand served July 3, 1980.

On February 7, 1980, I issued an initial decision denying Flomerca Line's application for permission to waive portions of freight charges due it from the United States Department of Agriculture in connection with two shipments of corn transported from Galveston, Texas, to Puerto Cortez, Honduras. The application sought a waiver in the aggregate amount of $25,415.03 for the two shipments.

The initial decision set forth two separate grounds for denial of the application. One was bottomed on what has come to be known as the *Munoz y Cabrero* doctrine.[2] The second was a determination that "controlled carriers"[3] operating in cross trades are not eligible for special docket relief.

In denying the application, among other things, I ordered Flomerca Line to take appropriate action to collect the balance of freight charges due it from the United States Department of Agriculture.

No exception was filed, but, on its own initiative the Commission undertook to review the initial decision.[4]

On review, the Commission held that "controlled carriers" are eligible to file special docket applications, but that in addition to the need to

[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] "It is well settled that a corrective tariff must conform to the tariff originally intended." *Munoz y Cabrero v. Sea-Land Services, Inc.*, 20 F.M.C. 152 (1977)." *Application of Sea-Land Service, Inc. for the Benefit of New Era Shipping as Agent for Central National Corporation*, Order on Remand, 22 F.M.C. 270 (1979). Served November 21, 1979.

[3] Carriers subject to regulation under the Controlled Carrier Act, section 18(c) of the Shipping Act, 46 U.S.C. 817(c).

[4] See Notice of Determination to Review, Served March 10, 1980, 20 S.R.R. 131.

meet the usual requirements for special docket relief, controlled carriers must also demonstrate that the intended rate was not unreasonable on or about the date of shipment--a condition "which would have warranted the grant of a timely filed special permission request to implement [an intended] rate."[5]

In the light of its reversal of the initial decision's holding on the eligibility of controlled carriers to file special docket applications, and for other reasons, the Commission determined that a limited remand[6] should be ordered. On the "controlled carrier" issue, the remand was fashioned to provide Flomerca with an opportunity to demonstrate that the intended rate was not unreasonable on or about the date of shipment. On the *Munoz y Cabrero* issue the remand was fashioned to provide Flomerca Line with the opportunity to establish that the corrective tariff did not differ from the intended rate, or, alternatively, whether any deviation in those rates was material.[7] Incorporating those concepts in formal terminology, the Commission ordered the proceeding remanded 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? [8]

To simplify Flomerca Line's undertaking on remand, the Order of Remand explained the nature of the evidence the Commission required on the enumerated issues and specified the manner in which the evidence was to be furnished to the Presiding Officer on remand.[9]

Aware, however, that Flomerca Line's prosecution of the application earlier in the proceeding did not exemplify diligence, the Commission stressed that the application was at risk if the additional evidentiary material were not timely filed. The Commission put it this way, Order of Remand, 20 S.R.R. at 135:

> The Presiding Officer previously encountered difficulties in obtaining complete and verified information from Flomerca. *If*

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[5] Order of Remand, 20 S.R.R. at 135.

"Controlled Carriers'" tariff filings may not become effective within less than thirty (30) days following the date of filing with the Commission unless special permission of the Commission is sought and granted. See Initial Decision, 19 S.R.R. 1383, text and n.15.

[6] Order of Remand, 20 S.R.R. at 133.

[7] Order of Remand, 20 S.R.R. at 135.

[8] *Id.*

[9] See, e.g., Order of Remand, 20 S.R.R. at 135, n. 13.

> *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. [Emphasis supplied.]

Three months have gone by since the Order of Remand was served. I have received no written or oral communication from Flomerca Line or anyone authorized to act on its behalf.

Accordingly, I find that Flomerca Line has failed to produce the information requested by the Order of Remand in a timely fashion and deny the application for inadequacy of proof.

## ORDER

It is ordered that the application for permission to waive portions of freight charges for the benefit of the U. S. Department of Agriculture in connection with two shipments of corn from Galveston, Texas, to Puerto Cortez, Honduras, be denied. It is further ordered that Flomerca Line take appropriate action to collect the balance of freight charges due under its tariff rates in effect on July 6, 1979. It is further ordered that within 30 days of service of notice by the Commission that this decision has become administratively final that Flomerca Line shall notify the Commission of the steps taken to effect compliance with this order.

(S) SEYMOUR GLANZER
*Administrative Law Judge*

Washington, D. C.
October 7, 1980

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 757
APPLICATION OF HAPAG-LLOYD FOR THE BENEFIT OF GENERAL FOODS INTERNATIONAL

ORDER ADOPTING INITIAL DECISION

*December 31, 1980*

This proceeding was instituted pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817), upon the application of Hapag-Lloyd Aktiengesellschaft for permission to refund $7,329.00 of the applicable freight charges collected from General Foods International on a shipment of goods rated as "Foodstuffs N.O.S." transported from New York to Limassol, Cyprus.

Administrative Law Judge William Beasley Harris served his Initial Decision on October 24, 1980 granting Hapag-Lloyd's application. No exceptions were filed, but the Commission on its own motion determined to review the Initial Decision.

Upon determining that the application should be granted, the Presiding Officer noted that this action would have the effect of reducing the amount of "compensation" that should have been paid to Rapid World Forwarders, the forwarding agent in the transaction, and, accordingly, directed the forwarder to refund to the shipper any excess "brokerage compensation" resulting from the grant of the application.[1]

Because the freight forwarder, Rapid World Forwarders, is not a party to this proceeding, the Commission cannot order it to remit any excess payments herein. However, in order to preclude the forwarder from retaining excess compensation as a result of the grant of the application in this proceeding, the Commission is directing the carrier, Hapag-Lloyd, to collect any such excess compensation from the forwarder and to advise the Commission of its collection efforts within thirty days of service of this Order.

[1] On October 30, 1980, the Presiding Officer issued an "Errata" to his Initial Decision which substituted "carrier" for "shipper" as the entity to whom a refund should be made and correspondingly modified the discussion of the excess "brokerage compensation" noting that "brokerage is paid by a common carrier by water to an ocean freight broker for performance of functions specified -- 46 C.F.R. 510.21." Despite these corrections, the Initial Decision fails to adequately distinguish between freight forwarder "compensation" and "brokerage." These terms are defined in our regulations and should be used to prevent confusion. "Compensation" is payment to a licensed freight forwarder by a carrier for rendering specific forwarding services (46 C.F.R. 510.21(h)). "Brokerage" is payment by a common carrier by water to an ocean freight broker for marketing that carrier's transportation services. (46 C.F.R. 510.21(i)).

With these modifications, the Initial Decision is determined to be proper and well-founded and is adopted by the Commission.

It is so ordered.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## SPECIAL DOCKET NO. 757

## APPLICATION OF HAPAG-LLOYD FOR THE BENEFIT OF GENERAL FOODS INTERNATIONAL

Permission granted to refund $7,329.00 portion of aggregate freight charges of $10,557.88 collected because of error due to inadvertence in failing to file a new tariff to comply with agreed upon rate.

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

*Adopted December 31, 1980*

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

The instant application contains certification that it was mailed at New York September 25, 1980, to the Secretary of this Commission. Under Rule 92(a)(3) and such circumstances, the date so certified is the date of filing of the application. The date of sailing of the shipment involved on the vessel *Stuttgart Express* from New York is given as August 30, 1980. The filing of the application, being within 180 days of the sailing date, is timely.

Hapag-Lloyd Aktiengellschaft (Hapag-Lloyd) Bill of Lading No. 17393162, dated August 29, 1980, describes the packages and goods as 1 "20 ft. House to House Container said to contain"

60 ctns. cooked cereal
10 ctns. bran cereals
111 ctns. cooked cereal
30 ctns. rice cereal
500 ctns. coffee roasted

Gross weight 17,453 lbs. Measurement 939 cu.ft. Rate 440.00 M (234.75 X $4.40 = $10,329.00 + 228.88 tariff bunker charge = $10,557.88). Total freight charges to be prepaid $10,557.88. The cargo loaded as indicated above was shipped by General Foods International to Limassol, Cyprus, via Hamburg, to consignee Cosmos Trading Ltd. The freight charges of $10,557.88 were paid by the shipper, General Foods International.

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

The tariff applicable is that of Hapag-Lloyd, FMC 108, an independent service which is not a member of any conference, from Hampton Roads, Philadelphia. Baltimore, New York, Boston and Portsmouth to ports in the Med. Sea, Benghazi, Libya, Spanish Morocco, via ports in the United Kingdom or Bordeaux/Hamburg Range.

On August 10, 1980, Hapag-Lloyd quoted the shipper, General Foods, with a lump sum rate for 20 ft. containers of Foodstuffs N.O.S. from New York to Limassol, Cyprus, for the amount of $3,000 plus the applicable tariff bunker surcharge.

On August 25, 1980, General Foods booked 1 X 20 ft. container from New York to Limassol, Cyprus, of Foodstuffs N.O.S. for the *Stuttgart Express*, Voy. 939/036, which sailed New York on August 30, 1980.

FMC 108, the applicable tariff, did not contain the entry or rate for Foodstuffs N.O.S.; therefore, the general cargo entry had to apply and the bill was rated at $440.00 W/M plus the applicable tariff bunker surcharge -- total freight charge of $10,557.88. The new tariff page -- 31st Revised Page 12, effective September 20, 1980, was filed by Hapag-Lloyd for Foodstuffs N.O.S. at a lump sum rate of $3,000.00. The rate of $3,000.00 plus tariff bunker surcharge of $228.88 totals $3,228.88, to be subtracted from the $10,557.88 collected, leaving $7,329.00 to be refunded.

The application states the failure to file with this Commission the proper rate of $3,000.00 for Foodstuffs N.O.S. as agreed upon by the shipper, General Foods, and the line, Hapag-Lloyd, was due to an administrative oversight at the time of the agreement.

No information is supplied as to whether there are other special docket applications or decided or pending formal proceedings involving the same rate situation. Nor is information supplied as to whether there are shipments of other shippers of the same or similar commodity which (a) moved via applicant during the period of time beginning on the day before the effective date of the conforming tariff and (b) moved on the same voyage of the vessel carrying the shipment described above.

## DISCUSSION

The instant application was filed September 25, 1980, and the effective tariff setting forth the rate on which refund was based was effective September 20, 1980. Thus the Commission received the effective tariff before the application was filed in conformity with Rule 92. Too, the application was filed timely.

The application speaks only of this one shipment. If there are others, appropriate notice of this proceeding published in the appropriate tariff should enure to the benefits of any similarly situated.

Rapid World Forwarders, Inc., FMC No. 624, are shown as the forwarding agent herein. Consistent with Commission policy, the

freight forwarder is required to refund a proportionate percentage of brokerage compensation it has received for the shipment. *Application of Sea-Land Service, Inc., for the Benefit of BDP International, Inc., as Agent for Champion International Export Corporation.* 20 F.M.C. 226 (1979).

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* the applicant has pointed out satisfactorily and explained the error due to inadvertence in failing to file a new tariff to comply with the rate quoted the shipper on August 10, 1980, so that along with other factors warrants the conclusion that this application, under section 18(b)(3) of the Shipping Act, 1916, and Rule 92 should be granted.

For the reasons given, the Presiding Administrative Law Judge *finds* and *concludes* in addition to the findings and conclusions hereinbefore stated:

(1) The application should be granted.

(2) The freight forwarder of the shipment, Rapid World Forwarders, Inc., FMC No. 624, shall refund to the carrier (brokerage is paid by a common carrier by water to an ocean freight broker for performance of functions specified-- 46 C.F.R. 510.21) the excess brokerage compensation it has received by virtue of the adjusted freight charges; and the said freight forwarder shall certify to the Commission that such refund has been made.

(3) The refund will not result in discrimination as between shippers.

Wherefore, it is *ordered* that:

(A) The application be and hereby is granted.

(B) Applicant-carrier, Hapag-Lloyd, is granted permission to refund to the shipper, General Foods International, a $7,329.00 portion of aggregate freight charges of $10,557.88 collected.

(C) Appropriate notice shall be published by the applicant in the appropriate tariff.

(D) Freight Forwarder Rapid World Forwarders, Inc., FMC No. 624, shall refund to the carrier the excess brokerage compensation it received by virtue of the adjusted freight charges; and the freight forwarder shall certify to the Commission that such refund, based on a percentage of the freight charges, has been made.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

Washington, D.C.
October 24, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-51

MISSOURI PACIFIC RAILROAD COMPANY

*v.*

GULF EUROPEAN FREIGHT ASSOCIATION, ET AL

## NOTICE

*January 2, 1981*

Notice is given that the time within which the Commission could determine to review the November 17, 1980 order of discontinuance in this proceeding 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. 80-51

MISSOURI PACIFIC RAILROAD CO.

*v.*

GULF EUROPEAN FREIGHT ASSOCIATION, ET AL.

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## JOINT MOTION TO DISCONTINUE PROCEEDING GRANTED

*Finalized January 2, 1981*

On November 10, 1980 (received November 13, 1980), the Missouri Pacific Railroad Company, Complainant, and the Gulf European Freight Association, Lykes Bros. Steamship Co., Inc., Gulf Europe Express, Hapag Lloyd A.G., Sea-Land Service, Inc., United States Lines, Inc., and Seatrain International S.A.,[1] Respondents, served this motion to discontinue this proceeding. In support of the motion it is stated:

(1) The complaint challenged the validity of the Railroad Usage Surcharge imposed by Tariff No. 4 (FMC-4), pages 6-a through 6-j, inclusive. This surcharge has been cancelled as of November 7, 1980, by all participating steamship lines. (Seatrain International S.A. resigned from the Gulf European Freight Association on October 8, 1980 and did not participate in this cancellation.)

(2) This cancellation renders moot all issues involved in this proceeding. The Commission can accord to Complainant no relief that has not already been provided by its cancellation of the tariff surcharge.

(3) The Complainant and Respondents agree that this requested discontinuance will not prejudice Complainant's continuing right to challenge before the Federal Maritime Commission any subsequently published Railroad Usage Surcharge.

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[1] On November 5, 1980, the appearance of Neal M. Mayer and Peter J. King of Coles & Goertner was filed as separate counsel for respondent Seatrain International S.A. for the limited purpose of the submission of a motion to dismiss Seatrain International S.A. as a respondent in this proceeding. The motion to dismiss complaint as to Seatrain was filed November 5, 1980. Time to respond has not expired.

Wherefore upon consideration of the above and the record herein, it is *ordered*:

(A) The motion is granted.

(B) The proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

November 17, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-64

CUTTER LABORATORIES OVERSEAS CORPORATION

*v.*

MAERSK LINES

## NOTICE

*January 6, 1981*

Notice is given that the time within which the Commission could determine to review the November 21, 1980 order of discontinuance in this proceeding 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. 80-64

## CUTTER LABORATORIES OVERSEAS CORPORATION

*v.*

## MAERSK LINES

*Eugene Simonalle*, Assistant Corporate Counsel of Cutter Laboratories, Inc., for Complainant.

*Robert B. Yoshitomi*, of Lillick, McHose & Charles, for Respondent.

## (1) SETTLEMENT AGREEMENT APPROVED
## (2) MOTION TO WITHDRAW COMPLAINT GRANTED
## (3) PROCEEDING DISCONTINUED WITH PREJUDICE

*Finalized January 6, 1981*

This proceeding was instituted by a complaint served September 19, 1980, under section 22 of the Shipping Act, 1916, alleging the respondent Maersk Lines has violated sections 17, 18(a) and 18(b)(3) of the Shipping Act, 1916.

An unopposed motion to enlarge time for answer to the complaint was served October 10, 1980, by the respondent. By Order served October 15, 1980, the motion was granted extending time to answer the complaint to and including November 19, 1980.

On October 13, 1980, the complainant served an unopposed motion for leave to amend its complaint by adding an additional ground on which relief is due by adding the following language at the bottom of page 5 of the complaint:

> Cutter alternatively alleges that the parenteral solutions shipped by Cutter during the period in controversy, the first nine months of 1979, were misrated. During this period, the correct rating should have been:
>
> > Parenteral solutions, for human use, put up in measured doses or in forms for packings of a kind sold in retail. Ordinary stowage.

In support it was stated that after the filing of the complaint Cutter and Respondent Maersk conferred to discuss the merits of Cutter's claim. Maersk agrees that relief is due on the additional ground set forth and it is expected the parties will shortly reach a settlement.

The unopposed motion for leave to amend the complaint was granted by Order served October 21, 1980.

On November 11, 1980, the complainant served its motion to withdraw the complaint, setting forth, *inter alia*, the parties have entered into a settlement agreement which is to be submitted to the Presiding Officer for approval; that if the settlement agreement is approved, then Maersk will pay to Cutter the amount which the parties have agreed to in the Settlement Agreement as settlement for the claim. Then, the complaint should be withdrawn and the proceeding should be dismissed with prejudice

Under date of November 10, 1980, respondent sent a letter (received November 17, 1980) which states in part:

* * *

> Cutter's Complaint, as amended, alleges that certain of its cargo carried in 1979 by Maersk from California to Hong Kong was misrated. Upon a review of the pertinent bills of lading, export declarations, packing lists, and other documents, Maersk agrees that the cargo was inadvertently misrated. A review of the thirteen shipments in controversy results in twelve adjustments in favor of Cutter and one adjustment in favor of Maersk. On this basis the parties have agreed, subject to your approval, to settle this claim.
>
> Accordingly, the enclosed Settlement Agreement contains a stipulated statement of facts as well as references to and attachment of the pertinent shipping documents. As you will see, Exhibit 25 to the Settlement Agreement contains a recalculation of the freight for each of these shipments. We have attempted to state the factual basis for the settlement in a simple yet complete manner, sufficient to show what the cargo was and correct freight payment should have been. While we believe that these freight calculations are self-explanatory, should you need additional information, we, of course, stand ready to provide whatever you may require.

* * *

Enclosed was the following Settlement Agreement (the exhibits attached have been filed in the docket in this proceeding):

SETTLEMENT AGREEMENT

> THIS AGREEMENT is made as of the 10th day of November, 1980, by and between Cutter Laboratories Overseas Corporation ("Cutter") and A. P. Moller-Maersk Line, known as Maersk Line ("Maersk"):
>
> W I T N E S S E T H:
>
> WHEREAS, during the period January through September, 1979, Cutter shipped certain cargoes of parenteral solutions and disposable intravenous equipment on Maersk vessels from Long Beach and Oakland, California to Hong Kong
>
> WHEREAS, in regard to these shipments, Cutter has filed a Complaint against Maersk with the Federal Maritime Commis-

sion ("FMC"), designated as Docket No. 80-64, alleging that the freight rates charged to and paid by Cutter were contrary to the terms of the Shipping Act, 1916, as amended, and therefore Cutter was harmed;

WHEREAS, Cutter has filed an Unopposed Motion to Amend its Complaint to allege, *inter alia,* that all of the subject cargo was misrated, and this motion has been granted;

WHEREAS, Cutter and Maersk have conferred for the purpose of discussing Cutter's claim and of attempting to negotiate a settlement thereof consistent with their respective commercial positions as well as the requirements of the Shipping Act;

WHEREAS, the parties seek to avoid the great expense and inefficiency necessarily involved in litigation;

NOW, THEREFORE, the parties agree to settle Cutter's claim as follows:

1. The parties stipulate to the following statement of facts:

a. During the period in controversy, January through September 1979, Maersk served the trade from Long Beach and Oakland, California to Hong Kong as a member of the Pacific Westbound Conference ("PWC"). The PWC is a conference of carriers, authorized by the FMC, which serves the outbound trades from the Pacific Coast of the United States (including California) and Canada to the Far East (including Hong Kong).

b. Effective January 1, 1979, the PWC reconstituted its tariffs and, in particular, its tariff governing the local movements from California to Hong Kong. This tariff was designated No. 11-FMC-19 ("Tariff No. 11").

c. During the first nine months of 1979, Cutter shipped cargoes of parenteral solutions and disposable intravenous equipment (and certain other cargoes not germane to this controversy) on Maersk vessels from California to Hong Kong. These cargoes were shipped on thirteen separate voyages with one bill of lading for each such voyage. Copies of these bills of lading are attached hereto and designated Exhibits 1 through 13, respectively.

d. Although some of these voyages carried both of the subject cargoes--parenteral solutions and disposable intravenous equipment--through inadvertance not all of the bills of lading for such voyages reflect the actual cargoes. Therefore, the other pertinent transit documents such as export declarations, inland drayage receipts, packing lists, etc. are attached as Exhibits 3A through 3F, 7A through 7C, 8A through 8D, 9A through 9C, and IIA and IIB to identify the cargo actually carried.

e. The freight rate *applied* to all of the parenteral solutions (including the disposable intravenous equipment erroneously

grouped with it on certain bills of lading) was the local rate to Hong Kong for:

> "Preparations affecting electrolytic, caloric and water balance (except diuretics preparations) for human use, put up in measured doses or in forms or packings of the kind sold at retail. Ordinary Stowage."

This description is listed on page 421 of Tariff No. 11 (and is assigned PWC commodity item number 442 4900 00). The freight monies calculated under this rate were paid by Cutter to Maersk.

f. Regarding the *parenteral solutions*, the bills of lading show this cargo to be listed as "parenteral solutions". The parties agree that it was misrated and, for those cargoes listed in Exhibit 1 through 12, that the correct rate should have been the local rate to Hong Kong for:

> "Parenteral solutions, for human use, put up in measured doses or in forms or packings of the kind sold at retail. Ordinary Stowage."

This description is listed on page 423 of Tariff No. 11 (and is assigned PWC commodity item number 442 8500 30).

g. For the *disposable intravenous equipment*, the bills of lading and other transit documents show this cargo to be listed as "disposable intravenous equipment." The parties agree that it was misrated and that the correct rate is the local rate to Hong Kong for:

> "Bougies, Catheters, Drains, and Sondes and Parts Thereof".

This description is listed on page 681 of Tariff No. 11 (and is assigned PWC commodity item number 709 0900 20).

h. During the period January 1 through September 27, 1979, the rates pertaining to these three tariff categories were as follows:

| Effective | Preparations affecting...(see ¶ 1.e above)[1] | Parenteral solutions...(see ¶ 1.f above)[2] | Bougies...(see ¶ 1.g above)[3] |
|---|---|---|---|
| Jan. 1, 1979 | $160.00 W/M | $111.00 W/M | $88.00 W/M |
| Apr. 1, 1979 | $170.00 W/M | $121.00 W/M | $97.00 W/M |

1 The tariff pages reflecting these rates are attached hereto as Exhibits 14 to 16.

2 The tariff pages reflecting these rates are attached hereto as Exhibits 17 to 19.

3 The tariff pages reflecting these rates are attached hereto as Exhibits 20 to 22.

i. Review of the traffic which is the subject of Cutter's claim also reveals a misrating in favor of Cutter. Exhibit 13 is a bill of lading for cargo (including some parenteral solutions) all of which was refrigerated--as evidenced by the reference

"Chill Room" in the bill of lading. Therefore, this movement should have been rated under the tariff category

"Refrigerated Rule No. 58".

This description is listed on page 410 of Tariff No. 11 (and is assigned PWC commodity item number 004 0300 03). The bill of lading for this shipment is dated September 15, 1979, and the pertinent freight rate on this date was $258.00 W/M, as evidenced by the pertinent tariff pages, attached hereto and designated as Exhibits 23 and 24.

j. Based on the foregoing, the table attached hereto and designated as Exhibit 25 contains a calculation of the freight rate paid by Cutter as well as the freight rate which it should have paid. (Additionally Exhibits 1 through 13 also contain certain handwritten. supporting calculations.) Based on these calculations, the net amount of $13,116.41 is due and owing to Cutter from Maersk, as excess freight paid.

k. Effective September 28, 1979, Tariff No. 11 was amended to add a category entitled:

"Parenteral solutions affecting electrolytic, caloric and water balance, for human use".

This description is contained on page 421 of Tariff No. 11 (and is assigned PWC commodity item number 442 4900 30). See 4th Revised page 421 (Exhibit 16 hereto). Once this category was added to the PWC tariff, it was the one under which the parenteral solutions should be, and now correctly are, rated. Prior to that time, however, the correct rating for parenteral solutions was as stated above.

2. This Settlement Agreement shall promptly be submitted to the presiding Administrative Law Judge for his approval.

3. At least seven days before Maersk's Answer to the Complaint is due (which is now November 19, 1980), Cutter shall file a Motion to Withdraw its Complaint and dismiss the proceeding with prejudice, conditioned upon acceptance of the Settlement Agreement by the presiding Administrative Law Judge and, if it reviews the matter, the Commission.

4. If the settlement is accepted and the Complaint is withdrawn and the proceeding is dismissed with prejudice, then Maersk shall pay to Cutter within fifteen days thereafter the amount of $13,116.41 in settlement of this claim.

5. Upon such payment, Cutter releases Maersk, its successors, assigns, and agents, from all claims whatsoever, known or unknown, arising out of the transportation, litigation, or other transactions which are or could be the subject matter of F.M.C. Docket No. 80-64. Cutter understands that this is a general release and it waives the benefit of California Civil Code section 1542 (or any other comparable provision under any law) which states as follows:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release which if known must have materially affected his settlement with the debtor.

6. Each of the parties shall use its best efforts, consistent with the requirements and spirit of this agreement, to promote acceptance of this Settlement Agreement.

7. If the settlement is refused, then at such time each party is no longer bound by any aspect of this Settlement Agreement.

Cutter Laboratories Overseas Corporation

By
Treasurer

A.P. Moller - Maersk Line

By
Jens J. Raun, Attorney-in-fact

DISCUSSION

The settlement agreement is silent as to and thus negates any admission of violation of law, and if the settlement agreement is approved, there will be no finding of violation of law. The law, of course, encourages settlement and every presumption is indulged in which favor their fairness, correctness and validity generally. *General Discount Corp. v. Shram*, 47 F. Supp. 845 (D. Ct. E.D. Mich. 1942); *Florida Trailer & Equipment Company v. Deal*, 284 F. 2d 567, 571 (CA 5, 1960).

The Presiding Administrative Law Judge *finds* and *concludes* that the settlement agreement is a bona fide attempt to terminate the controversy and not a device to circumvent the requirements of law. The settlement agreement reflects a rational, valid and fair solution of the dispute and obviates the need for further extensive and expensive litigation. The settlement itself is proper and does not violate any provision of law.

Wherefore, it is *ordered*:

(A) The Settlement Agreement is approved.

(B) Motion to Withdraw the Complaint is Granted.

(C) This proceeding is discontinued with prejudice.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

November 21, 1980

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 724(I)

COTTON IMPORT AND EXPORT CO.

*v.*

SEA-LAND SERVICE, INC.

## ORDER ON RECONSIDERATION

*January 6, 1981*

On August 11, 1980, the Commission reversed the Decision of the Settlement Officer and denied Cotton Import and Export Co.'s request for reparation on the ground that it had failed to meet its burden of proof. Specifically, the Commission cited several inconsistencies and unanswered questions in Complainant's case.[1]

This proceeding is now before the Commission upon receipt of a letter from Complainant constituting a petition for reconsideration of the Commission's August 11 Order.[2]

Complainant's request does not meet the criteria for reconsideration pursuant to the Rules of Practice and Procedure. Rule 261 provides that a petition for reconsideration will be summarily rejected 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. 46 C.F.R. 502.261(a).

Complainant alleges neither error nor change in material fact, but rather offers explanation and proof which were previously requested of it and which were not forthcoming until the case had been decided. Thus, none of the criteria for reconsideration under the Rules has been met.

---

[1] Clarification of several of the problem areas had been sought from Complainant on two occasions prior to issuance of the Commission's decision: by the Settlement Officer on September 18, 1979, and by the Commission's Secretary pursuant to the Commission's instructions, on May 19, 1980. On both occasions, Complainant's response was unsatisfactory, and the Commission's August 11 Order denying reparation ensued.

[2] The letter, dated September 9, 1980, was addressed to then Vice Chairman Moakley.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Cotton Import and Export Co. is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

* Vice Chairman Kanuk concurs in the result.

# FEDERAL MARITIME COMMISSION

## INFORMAL DOCKET NO. 720(I)

## 3M

*v.*

## HAPAG LLOYD

## ORDER DENYING RECONSIDERATION

*January 8, 1981*

By Petition filed December 5, 1980, Complainant 3M requests that the Commission reconsider its order of November 5, 1980, adopting the Settlement Officer's decision issued August 20, 1980.[1]

3M's Petition for Reconsideration must fail unless it meets the criteria set forth in Rule 261 of the Commission's Rules.[2] 3M's Petition essentially consists of a restatement of arguments already considered by the Settlement Officer and properly disposed of by him.[3] The Petition therefore must be denied.

It is so ordered.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

[1] The Commission adopted the decision of the Settlement Officer upon reviewing it on its own motion.

[2] 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.

[3] 3M's explanation that it has the policy of filing claims worldwide in its own name does not warrant a different conclusion. Such a policy does not, in the absence of a valid assignment, confer standing upon 3M to seek reparation for freight overcharges it has not paid.

* Chairman Richard J. Daschbach did not participate.

# FEDERAL MARITIME COMMISSION

## (46 C.F.R. 503; DOCKET NO. 80-48)
## APPEALS OF DENIALS OF REQUESTS FOR INFORMATION

*January 9, 1981*

ACTION: Discontinuance of Proceeding

SUMMARY: The Commission has determined to discontinue this proceeding without issuing a rule. A change in the present system of processing of appeals from denials of requests for information under the Freedom of Information and Government in the Sunshine Acts is considered unnecessary.

DATES: Effective January 14, 1981

SUPPLEMENTARY INFORMATION:

By notice published in this proceeding (45 F.R. 48172; July 18, 1980), the Federal Maritime Commission proposed to amend its rules regarding appeals from a denial by the Secretary of certain requests submitted pursuant to the Freedom of Information and Government in the Sunshine Acts. At present, section 503.34 of 46 C.F.R. provides that such appeals are made to the Chairman. The proposed amendment would have the appeals addressed to the entire Commission where they involve a request for transcripts of closed Commission meetings and "other documents which have been prepared through joint action or effort of a quorum of Commissioners."

In response to the notice, comments were received from The Adherence Group; a number of conferences in the North European trades; the "8900" Lines; a number of conferences in the Latin American trades; Sea-Land Service, Inc.; and the firm of Kominers, Fort, Schlefer and Boyer.

The Commission has considered the comments in this proceeding and reviewed its experience over the years with respect to appeals of denials of requests and concluded that a change in the current procedure is unnecessary. Appeals are made in relatively few circumstances and appeals of the type contemplated in this proposed rulemaking are extremely rare. The present procedure of appeal to a single authority,

viz., the Chairman of the Commission is efficient and fair. Accordingly, this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

* Dissenting Opinion of Vice Chairman Kanuk is attached.

*Vice Chairman Leslie Kanuk, dissenting.* The majority bases its decision to discontinue this proceeding on grounds that appeals of the type involved in this rulemaking are rare and that, in any event, the present appeal process is "efficient and fair". In my opinion, neither of these rationales forms a basis for the result reached.

The fact that the appeals involved may occur infrequently is certainly not grounds for refusing to institute a rule to deal with them when they do occur. Furthermore, the proposed rule would be a more appropriate and certainly a fairer way to handle appeals which involve requests for documents resulting from actions taken by the Commission as a collegial body. The Commission itself pointed out in its notice of proposed rulemaking (published July 18, 1980) that "each of the Commissioners should have an equal voice" in decisions relating to the release of transcripts, recordings, or minutes of sessions during which the Commissioners jointly conduct the agency's official business. In addition, the Commission stated that "each Commissioner has an equal interest in whether to release other 'sensitive' agency documents which are the product of joint effort or action of the Commission." Implicit in the proposed rule was the intent to remove any basis for an allegation of bias, which can arise if one Commissioner alone is deciding an appeal.

It appears to me, as it appeared earlier to the rest of the Commission, that there is a sound basis for adopting the rule. In addition, all of the parties filing comments, with one exception, support its adoption. Therefore, in light of the Commission's own statements, and public support for the proposed rule, I cannot agree with the majority's latest conclusion that the current system is "fair" and should remain unchanged.

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 80-5

## DYNAMIC INTERNATIONAL FREIGHT FORWARDER, INC., INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION AND POSSIBLE VIOLATION OF SECTION 44, SHIPPING ACT, 1916

The terms "dispatching" and "carrying on the business of forwarding" are interchangeable terms referring to services performed for shippers in connection with the movement of cargo to port for ocean carriage.

Respondent violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding. Respondent is found unfit to be licensed and is fined $2,500 in civil penalties.

*Richard N. Sharood*, of Wilcox and Sharood, for Respondents.

*Joseph C. Slunt*, *Deana E. Rose* and *John Robert Ewers*, for the Commission's Bureau of Investigation and Enforcement.

## REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISION

*January 16, 1981*

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

This proceeding was instituted by Order of Investigation and Hearing, served January 23, 1980, to determine:

(1) Whether Dynamic International Freight Forwarders, Inc. (Dynamic) violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;

(2) Whether civil penalties should be assessed against Dynamic International Freight Forwarders 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; and

(3) Whether, in light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Dynamic and its corporate officers possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

On June 16, 1980, Administrative Law Judge William Beasley Harris served his Initial Decision wherein he found that:

(1) The respondent had engaged in "*unlicensed forwarding activities*" in violation of section 44(a) of the Act.

(2) A $2,500 civil penalty should be assessed against respondent for violating the Shipping Act, 1916 and that "payment of said penalty is a condition precedent to the issuance of the respondent's license;" and

(3) Upon payment of the civil penalty respondent will possess the "requisite fitness" within the meaning of section 44(b), Shipping Act, 1916 to be licensed as an independent ocean freight forwarder.

The Commission's Bureau of Investigation and Enforcement (BIE, formerly Hearing Counsel) and Dynamic filed Exceptions to the Initial Decision. Both parties filed Replies to Exceptions.

BACKGROUND

The facts in this proceeding as stipulated by the parties and found by the Presiding Officer are essentially as follows:

1. Dynamic, a Michigan corporation, applied for a freight forwarder's license on January 18, 1979. Evelyn Siegel is the President and qualifying officer of the applicant.

2. On January 25, 1979 Mrs. Siegel advised the Commission's Office of Freight Forwarders by telephone that Dynamic had engaged in some "ocean freight forwarding" which she considered permissible so long as no compensation was received from the ocean carrier. She further indicated that Dynamic had received $120 in "documentation fees" for forwarding services on four shipments.

3. Mrs. Siegel was warned on August 31, 1978, January 25, 1979, and January 30, 1979, about unlicensed freight forwarding. On March 7, 1979, Mrs. Siegel, in response to Commission staff inquiries, advised that "no further forwarding work will be performed" until the company is licensed.

4. Autoliner, Inc., agent for Hoegh-Ugland Auto Liner (HUAL), provided 13 HUAL bills of lading covering the period September 28, 1979 through February 2, 1980 on which Dynamic's name appeared as freight forwarder.

5. Motorship, Inc., agent for Wallenius Line, provided 24 bills of lading dated between July 28, 1979 and October 13, 1979 on which Dynamic's name appeared as freight forwarder. On an additional 42 Wallenius bills of lading issued during the period November 1, 1979 through February 3, 1980, Dynamic's name appeared in the forwarder's box, although the carrier's "freight statement" provides that "no forwarder" was involved in the shipments. Motorship advised that Dy-

namic appeared as forwarder on all of these shipments at its request. The request was made for accounting purposes.

6. By affidavit of May 21, 1980, Mrs. Siegel attested that Dynamic's name appeared on the Wallenius and HUAL bills of lading to note that the credit arrangements had been made through Dynamic. She further advised that the documentation services were performed either without charge or for a nominal fee.

7. Autos International was the shipper on virtually all of the above-referenced bills of lading. Autos did not pay nor was it billed by Dynamic for its service, although Autos was invoiced by Dynamic for ocean freight charges advanced by Dynamic.

8. In connection with the subject shipments, Dynamic prepared the bill of lading or the export declaration, advanced ocean freight charges, or was extended credit by the carrier or its agent on the shipper's behalf. Dynamic did not seek nor was it paid brokerage by the carrier's agents, Autoliners and Motorship.

9. Robert Hunter, a shipper from Mission Viejo, California, furnished four Dynamic invoices dated September 9, 1979 through December 4, 1979 which listed charges for inland transportation, estimated ocean freight, insurance, documentation, telexes and mail.

## POSITIONS OF THE PARTIES

Dynamic excepts to the Presiding Officer's finding that it violated section 44(a). Dynamic contends that the Presiding Officer "side-stepped" its argument that "carrying on the business of forwarding," as that term is used in section 1 of the Act,[1] requires *both* the dispatching of shipments (which Dynamic interprets to include booking cargo space and ordering cargo to port) *and* the handling of the formalities incident to such shipments (which Dynamic interprets to include preparing or processing ocean bills of lading, preparing or processing export declarations, or arranging for trucking or lightering).[2] Dynamic submits that Commission General Order 4, upon which both BIE and the Presiding Officer rely, "unlawfully merges the two distinct provisions of section 1 into a unified concept of freight forwarding service *or* dispatching of shipments." (46 C.F.R. 510.2(c)).

BIE supports the Presiding Officer's finding that Dynamic had engaged in unlicensed forwarding within the meaning of sections 1 and 44 of the Act. It points out that the term "carrying on the business of

[1] Section 1, Shipping Act, 1916, provides in pertinent part:

The term "carrying on the business of forwarding" means the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States . . . to foreign countries, . . . and handling the formalities incident to such shipments.

[2] The Initial Decision does not clearly address this issue. The Presiding Officer couched the violations only in terms of "unlicensed forwarding activities."

forwarding" was first addressed in Docket No. 621 - *Port of New York Freight Forwarder Investigation,* 3 U.S.M.C. 157 (1949), where the Commission delineated the scope of forwarding services and noted that a forwarder engages in a wide range of activities, any one of which constitutes freight forwarding. In so doing, the Commission described a wide range of activities performed by forwarders and noted that these services may vary from shipment to shipment. BIE submits that section 1, as subsequently enacted, reflects the Commission's reasoning in Docket No. 621 and that any forwarding service, set forth in General Order 4, 46 C.F.R. 510.2(c), constitutes the "carrying on the business of forwarding."[3]

BIE therefore concludes that the Commission's "longstanding" interpretation of section 1 as reflected in section 510.2(c) of General Order 4 is correct and consistent with the statute's legislative history and the Commission's regulatory policy. In this regard, BIE points out that a construction given to a statute by the administrative agency whose duty it is to carry out its provisions is entitled to "great weight" and should not be overruled unless clearly unlawful.

BIE disagrees, however, with the Presiding Officer's finding that Dynamic is fit to be licensed as an independent ocean freight forwarder because the unlicensed forwarding activities were performed in good faith on the advice of counsel. It contends that dynamic did not retain counsel until October 1979 and that Dynamic had engaged in unlicensed forwarding on at least 32 instances prior to that date.[4] BIE therefore urges the Commission to find Dynamic unfit and assess a civil penalty of $10,000 for past violations of the statute and the Commission's Rules.

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[3] Section 510.2(c) of General Order 4 describes services similar to the services detailed in Docket No. 621. That section provides:

> The term "freight forwarding service or dispatching of shipments" means a service rendered by an independent ocean freight forwarder on behalf of other persons in the process of dispatching or facilitating an export shipment as authorized by such person. Such service includes, but is not limited to the following: examining instructions and documents received from shippers; ordering cargo to port; preparing or processing export declarations; booking cargo space; preparing or processing delivery orders and dock receipts; preparing instructions to truckmen or lightermen, or arranging for, or the furnishing of trucks and lighters; preparing and processing ocean bills of lading; preparing or processing consular documents and arranging for their certification; arranging for or furnishing warehouse storage when necessary; arranging for insurance when so instructed; clearing shipments in accordance with United States government regulations; preparing advance advice notices of shipments and sending copies thereof to banks, shippers, or consignees as required; sending completed documents to shippers, banks or consignees as directed; advancing necessary funds in connection with the foregoing; providing supervision in the coordination of services rendered to shipments from origin to vessel; rendering special services on unusual shipments or when difficulties in transit arise; and giving expert advice to exporters as regard letters of credit, licenses, and inspection.

[4] In response to BIE's Exceptions, Dynamic advises that it retained counsel in August 1979 and not October 1979; also that Mrs. Siegel, prior to the retention of counsel, performed services on 9 shipments rather than 32.

## DISCUSSION

### I. THE DEFINITION OF "CARRYING ON THE BUSINESS OF FORWARDING"

Dynamic's Exceptions to the Initial Decision raise the following issues:

(1) Does carrying on the business of forwarding within the meaning of sections 1, 44(a), and 44(e) of the Act require a person to both dispatch and handle the formalities incident to such shipments?

(2) What does the term "dispatching shipments" include?

Section 1 of the Act defines "carrying on the business of forwarding" as:

> [T]he *dispatching of shipments* by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, *and handling the formalities* incident to such shipment. (Emphasis supplied).

Section 1 of the Act would, on first impression, require both "dispatching" and "handling the formalities incident to such shipments" in order for an activity to constitute "carrying on the business of forwarding." Section 44(a) prohibits a person from "carrying on the business of forwarding" without a license. Dynamic argues that it did not carry on the business of forwarding because it did not "dispatch" any shipments (as it construes that term) but merely handled certain "formalities incident to such shipments." Fundamentally, Dynamic's argument rests upon the conjunctive language of section 1. There is no legislative history, nor has Dynamic attempted to cite any, which clearly defines "dispatching" or "handling the formalities."[5] Moreover, nowhere in the Shipping Act are the terms "dispatching" and "handling the formalities" defined. However, while the term "handling the formalities" does not appear anywhere in the body of the freight forwarder legislation set forth in section 44 of the Act, the term "dispatch" appears three times, once in section 44(a) and twice in section 44(e).

If Dynamic is correct, section 44(a), which uses the term "dispatch", would have to be interpreted in a manner clearly inconsistent with the

[5] As support for its position, Dynamic states:
"Respondent readily acknowledges that this analysis is based not upon explicit statements of legislative history tracing the development of the law which are simply non-existent, but rather upon a reading of the English language and grammatical usage coupled with the factual development of these bills which evolved over a period of five years prior to enactment of the Public Law." Respondent's Submission in Response to Notice of Further Procedural Schedule at 9.

Act and the intent of Congress. The proviso clause of section 44(a) reads:

> That a person whose primary business is the sale of merchandise may *dispatch* shipments of such merchandise without a license. (Emphasis added.)

It is beyond dispute that Congress intended to allow shippers to forward their own shipments without a license. This suggests that "dispatch" and "forward" have the same meaning. However, if Dynamic is correct in arguing that "dispatching" and "handling the formalities" were intended to refer to separate and distinct activities, a shipper who both "dispatched" and "handled the formalities" of his own shipment would be required to be licensed because section 44(a) would only exempt his dispatching functions.

Section 44(e) reads, in part:

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

Under this section a carrier may grant compensation to a licensee who performs certain enumerated services. The language clearly suggests that "dispatching" is a service which is performed for a person other than a common carrier by water, i.e., for the shipper. As previously indicated, "handling the formalities incident to such shipments" is omitted.

"Handling the formalities" is also omitted from the proviso clause of section 44(e) in which the term "dispatch" again appears.

The legislative history also strongly indicates that the terms "dispatching" and "carrying on the business of forwarding" are interchangeable terms referring to services performed for shippers in connection with the movement of cargo to port for ocean carriage. In passing H.R. 5068, it was said on the floor of the House:

> The bill provides for the licensing of a person engaged in the business of dispatching shipments on behalf of other persons. An exporter who forwards his own goods or that of a subsidiary or affiliate as an incidental activity of his main occupation is not engaged in the business of forwarding . . . . (S)ince the goods he forwards are his own, he is not dispatching shipments on behalf of others. 106 Cong. Rec. 16073 (1959) (Remarks of Rep. Tollefson).

Two years later, the Senate Committee on Commerce, reporting out essentially the same bill, said:

> Section 43(a)[6] would provide that a person must hold a license issued by the (Commission) to carry on the business of forwarding but would permit a person whose primary business is the sale of merchandise to dispatch shipments of such merchandise without a license. S. Rep. No. 691, 87th Cong. 1st Sess. 2 (1961).

BIE correctly points out that Respondent has failed to identify a source for its categories of activities which constitutes "dispatching" and those which constitute "handling the formalities". BIE's Reply to Exceptions at 2. As BIE further points out, the definition of freight forwarding in section 1 originated from the Commission's decision in *Port of New York Freight Forwarder Investigation*, 3 U.S.M.C. 157 (1949). There the Commission said:

> We are of the opinion that any person carrying on the business of dispatching shipments by ocean going vessels . . . and of handling the formalities incident thereto, is a forwarder within the provisions of the Shipping Act, 1916. 3 U.S.M.C. at 163.

Earlier in the same decision, the Commission said:

> A forwarder in foreign commerce in many instances furnishes a necessary link in preparing shipments for export. These services are diverse in character and may vary as to almost every shipment. 3 U.S.M.C. at 159.

In that decision the Commission listed several services performed by forwarders. 3 U.S.M.C. at 159, note 2. All of the services listed in the Commission's decision now appear, virtually verbatim, in the Commission's current rules and regulations. 46 C.F.R. 510.2(2).

From the very outset of its investigation of ocean freight forwarding, Congress fully understood that the definition of carrying on the business of forwarding originated in the Commission's *Port of New York* decision, *supra*. See *Investigation Into the Activities of Foreign Freight Forwarders and Brokers*, H.R. Rep. 2939, 84th Cong. 2nd Sess. 5-7 (1956). The definition of freight forwarding as conceived by the Commission in 1949 survived without significant alteration and is embodied in section 1 of the Act and the Commission's rules and regulations. The terms "dispatching" and "handling formalities" have been treated as a single concept to describe a range of activities, any one of which may constitute "forwarding," from the inception of their use by the Commission in 1949; through approximately six years of Congressional investigations and hearings; and for the past twenty years since enactment of section 1.

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[6] Section 43(a) is now section: 44(a) which reads, in part:
That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license.

The Commission concludes that the rules and regulations contained in Part 510 are not inconsistent with section 1 of the Act. The terms "dispatching" and "handling formalities" are separate and distinct *only* in grammatical construction. The term "handling the formalities" has never been ascribed any meaning and has been deleted from use in connection with the term "dispatch" elsewhere in the Shipping Act, the legislative history, and the Commission's rules and regulations. "Dispatch" is interchangeable in meaning with "forwarding," and describes the activities set forth in the Commission's regulations at 46 C.F.R. 510.2(c).

II. DYNAMIC'S FITNESS TO BE LICENSED

Under the analysis set forth above, a freight forwarding license is required for anyone who proposes to engage in any of the "forwarding" (or "dispatching") activities described in the Commission's regulations at 46 C.F.R. 510.2(c). A review of the record in this proceeding shows that the Presiding Officer was correct in holding that Dynamic engaged in one or more of these activities on numerous occasions without a license, and therefore violated section 44(a) of the Shipping Act.

Mrs. Evelyn Siegel, Dynamic's president and qualifying officer, was first warned by the Commission's staff not to engage in unlicensed forwarding in a letter dated August 31, 1978, which accompanied a license application form she had requested. The same letter also advised Mrs. Siegel of the civil penalties and prejudice to the issuance of a license which might result from unlicensed forwarding.

On January 18, 1979, Dynamic applied for a freight forwarder's license. The description of Mrs. Siegel's experience as a qualifying officer, which was submitted in connection with Dynamic's application, stated that she had worked for three freight forwarders since 1970 and had engaged in a wide variety of forwarding activities during the course of her employment.

On January 25, 1979, Mrs. Siegel admitted to a member of the Commission's staff that Dynamic had engaged in some unlicensed forwarding activities. It was later developed that Dynamic had provided documentation services on four shipments during January, 1979. The provision of services relating to the preparation or processing of documents such as export declarations, bills of lading and dock receipts are specifically included in the range of "forwarding" activities described in the Commission's regulations.

On January 30, 1979, the Commission's staff again warned Dynamic in a letter to Mrs. Siegel not to engage in unlicensed forwarding and of the possible adverse consequences of such activity.

By letter dated March 7, 1979 to the Commission, Mrs. Siegel acknowledged that Dynamic had violated the Shipping Act by engaging in forwarding without a license. She contended that these violations

were not wilful, and that no further freight forwarding would be performed by Dynamic until it was licensed.

Despite Mrs. Siegel's promise, and despite the repeated warnings given to her by the Commission's staff, the facts of this case summarized above, which Dynamic does not dispute, show that Dynamic continued to engage in unlicensed forwarding through February 3, 1980. On 13 shipments carried by Hoegh-Ugland Auto Liner from September 28, 1979 through February 2, 1980, and on 66 shipments carried by Wallenius Line from July 28, 1979 through February 3, 1980, Dynamic performed documentation services or advanced ocean freight charges for the shipper, or was extended credit by the carrier or its agent on the shipper's behalf.[7] Like documentation services, the extension of credit by a forwarder to a shipper (either directly or from the carrier) is specifically included within the range of "forwarding" activities set forth at section 510.2(c) of the Commission's regulations.

Ultimately, the issue to be determined by the Commission is whether Dynamic, in view of the above-described activities, possesses the requisite fitness to be licensed as an independent ocean freight forwarder. We believe it does not.

Section 44(b) of the Shipping Act, 1916 (46 U.S.C. 841(b)) limits the issuance of a forwarder license to those applicants found by the Commission to be ". . . 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."

In *Harry Kaufman, Independent Ocean Freight Forwarder*, 16 F.M.C. 256, 271 (1973), the Commission enunciated the standard of conduct required of an applicant seeking a license:

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

The Commission has emphasized its responsibility in maintaining and preserving high standards for the licensing of ocean freight forwarders:

> The profession of ocean freight forwarding is a highly responsible one requiring honorable conduct by all its practitioners . . . [W]e can make our influence felt only by establishing and maintaining high quality standards of access to licenses. *Inde-*

[7] On at least four of the shipments carried by Wallenius Line, Dynamic's activities were more extensive. As noted above, Robert Hunter, a shipper from Mission Viejo, California, furnished four Dynamic invoices dated September 9, 1979 through December 4, 1979 which listed charges for inland transportation, estimated ocean freight insurance, documentation, telexes and mail.

*pendent Ocean Freight Forwarder License Application, James J. Boyle,* 10 F.M.C. 121, 127 (1966).

The existence of past Shipping Act violations by an applicant for a freight forwarder license is highly pertinent to the issue of whether the applicant "intends to or will obey" the U.S. shipping laws.

The Commission, in denying a freight forwarder license application in *Concordia International Forwarding Corporation Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916,* 21 F.M.C. 587 (1978), emphasized that disregard of the shipping statutes would not be tolerated. The Commission said:

> In determining whether an applicant possesses the requisite fitness, a past violation of the Shipping Act militates against the issuance of a license. 21 F.M.C. at 592.

In *Concordia,* the Commission rejected the applicant's excuse for violating section 44(b) of the Shipping Act, 1916, i.e., that it was "acting as a good samaritan" by forwarding without a license, and found that where "violations [were] committed by persons, who, by their own admissions, [had] many years of experience in ocean freight forwarding, the attempt to justify their unlawful activities . . . must be viewed with extreme skepticism. The applicant knew or should have known that its activities were in violation of the Shipping Act." *Id.*

Likewise, Evelyn Siegel has been actively involved in the ocean shipping industry since 1970, during which time she was employed by three licensed ocean freight forwarders. The Commission is justified in expecting from an individual, with her experience in the forwarding industry, knowledge, or at the very least, awareness of the laws and regulations governing the business in which she elects to operate.

Despite numerous warnings by the Commission to Mrs. Siegel to refrain from unlicensed forwarding activity and despite Mrs. Siegel's assertion to the Commission that she would cease all future unlicensed ocean freight forwarding, there is substantial evidence that Dynamic continued to engage in its unlawful activity.[8]

The integrity of the U.S. shipping laws must be preserved in order to effectuate their intended purpose and to protect the public interest. The activities of Dynamic do not constitute the standard of conduct the law imposes upon those seeking to be licensed as an independent ocean freight forwarder. "Section 44 of the Shipping Act . . . requires the Commission to make qualitative judgments concerning the . . . integrity of the forwarder applicants before issuing a license." *Concordia, supra,* at 591. The record fully supports a finding that Dynamic, having

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[8] The fact that Dynamic did not collect ocean freight compensation payments from ocean carriers is irrelevant to the issue of whether section 44(a) of the Act was violated. The prohibition against carrying on the business of forwarding without a license is absolute and cannot be avoided by not collecting ocean freight compensation. *Concordia, supra.*

Evelyn Siegel as its qualifying officer, has failed to meet this burden of demonstrating the requisite character qualifications and fitness to operate as a freight forwarder and to conform to the provisions of the Shipping Act. Dynamic's application for a license is therefore denied.

There is one final matter requiring discussion. The Bureau of Investigation and Enforcement takes exception to the Administrative Law Judge's conclusion that a civil penalty against Dynamic of $2,500 is appropriate in the circumstances of this case, and urges a penalty of $10,000. Upon consideration of the record, and particularly the evidence that Dynamic played a relatively small forwarding role in the shipments involved here and received little or no compensation for its activities, the Commission agrees with the ALJ that a civil penalty of $2,500 is appropriate.

## CONCLUSION

For the foregoing reasons, the Commission finds that Dynamic is, at this time, unfit to be awarded a freight forwarder license.

THEREFORE, IT IS ORDERED, That the application of Dynamic International Freight Forwarder, Inc. for an independent ocean freight forwarder license is denied; and

IT IS FURTHER ORDERED, That Dynamic International Freight Forwarder, Inc. is hereby assessed a civil penalty of $2,500; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

## SEPARATE OPINION OF VICE CHAIRMAN LESLIE KANUK.

While I agree with the majority's assessment of the $2,500 civil penalty, I disagree with the conclusion that Dynamic is unfit and its application for a license should be denied. Based on the *de minimis* nature of the violations involved, I would find Dynamic fit and grant its application.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 80-5
## DYNAMIC INTERNATIONAL FREIGHT FORWARDERS INC., INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION AND POSSIBLE VIOLATION OF SECTION 44, SHIPPING ACT, 1916

Applicant found to have engaged in unlicensed forwarding activities. However, the respondent appears to have acted in good faith upon the advice of counsel. Draconic action of denying the application is not taken. Nevertheless, the Commission cannot countenance flagrant disregard of the statutes it is charged with enforcing. A civil penalty of $2,500 is assessed to the applicant pursuant to section 32(e) of the Shipping Act, 1916. Payment by the applicant of the civil penalty is a condition precedent to the issuing of the license applied for. Failure to meet the condition precedent, the application is denied.

Upon payment of the civil penalty imposed upon the applicant, and applicant notifying the Secretary of this Commission thereof, and filing with the Secretary originals or copies of all pertinent documents, the Secretary is to record Dynamic International Freight Forwarders, Inc.'s application granted.

*Richard N. Sharood* of Wilcox & Sharood for respondent.

*Joseph B. Slunt, Deana E. Rose* and *John Robert Ewers,* Director, Bureau of Hearing Counsel, for Commission's Bureau of Hearing Counsel.

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

*Partially Adopted January 16, 1981*

This is a proceeding pursuant to sections 22, 32 and 44 (46 U.S.C. 821, 831 and 841(b)) of the Shipping Act, 1916, and section 510.8 of the Commission's General Order 4 (46 C.F.R. 510.8), instituted to determine:

1. Whether Dynamic International Freight Forwarders, Inc. violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;
2. Whether civil penalties should be assessed against Dynamic International Freight 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;

[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).

3. Whether, in light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Dynamic International Freight Forwarders, Inc. and its corporate officers, possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

The Commission's Bureau of Hearing Counsel is a party in this proceeding by Commission Rule 42, 46 C.F.R. 502.42.

## BACKGROUND

The January 23, 1980, Order of Investigation and Hearing assigning this proceeding for hearing before an Administrative Law Judge of the Commission's Office of Administrative Law Judges provided, *inter alia*, that the hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions or other documents, or that the nature of the matters in issue are such that an oral hearing and cross-examination are necessary for the development of an adequate record. The Presiding Administrative Law Judge under the circumstances of this proceeding, in which the respondent agreed to all findings of fact proposed by Hearing Counsel, *finds* and *concludes* there has been proper regard to due process of law, and in his discretion could not do other than also to *find* and *conclude* that oral testimony and cross-examination was not necessary under the circumstances and did not have to be included in this proceeding. The respondent in its March 20, 1980, opening memorandum of law admitted all 15 of Hearing Counsel's proposed findings of fact. While the opportunity to cross-examine is regarded as of great importance and may usually be insisted upon, the requirement is not enforced as rigidly in administrative proceedings. As has been pointed out, with the admission of the facts herein, there is no need for cross-examination. Further, the respondent was fully advised of all matters to which to respond with ample and sufficient time to respond thereto. Thus, this proceeding was conducted upon memoranda of law and affidavit of facts submitted herein.

By notice served February 8, 1980, the Presiding Administrative Law Judge had advised the parties of the following schedule to which they would, and did, adhere in this proceeding:

Thursday, February 28, 1980 - Opening Memorandum of Law, Request for Penalty and Affidavits of Fact from Hearing Counsel.

Thursday, March 20, 1980 - Opening Memorandum of Law and Affidavits of Fact from respondent.

Thursday, April 10, 1980 - Reply Memorandum of Law and Affidavits of Fact from Hearing Counsel.

On or before Thursday, April 24, 1980, which is two weeks following the Reply Memorandum of Law of Hearing Counsel, the parties will submit written statements identifying any unresolved issues of fact and specifying the type of procedure they feel is best suited to resolve them and why.

Following the above submissions, and his careful reading of them, on April 30, 1980, the Presiding Administrative Law Judge served the following Notice of Further Procedural Schedule:

> Hearing Counsel served and filed an opening memorandum of law, request for penalty and affidavits of fact on February 28, 1980. The Respondent on March 20, 1980, served and filed an opening memorandum of law and no affidavits of its own. The Respondent used the affidavits supplied by Hearing Counsel and other attachments, but no affidavit to present Respondent's proposed findings of fact, which opens with the statement (p. 3) "Since all 15 of Hearing Counsel's proposed findings of fact are admitted subject only to inferences to be drawn therefrom, Respondent will number its proposed findings of fact commencing with number 16 for ease of reference." The Respondent then lists proposed findings of fact 16 through 28.
>
> Hearing Counsel on April 10, 1980, served and filed a reply to the Respondent's opening memorandum, saying, *inter alia*, that while the Respondent admits the activities it performed involved handling the formalities incident to shipments the Respondent denies that it dispatched those shipments. Thus Hearing Counsel contends that the Respondent failed to establish that the activities admittedly performed constitute only handling formalities of shipments as opposed to acts which constitute dispatching.
>
> In a statement regarding outstanding factual issues and recommended procedure served and filed April 24, 1980, the Respondent contends the evidence introduced by Hearing Counsel not only fails to impute any violation of law but rather affirmatively disproves any violation. The Respondent says, "There is no factual issue to be resolved by an evidentiary hearing." That is possible.
>
> Neither Hearing Counsel nor the Respondent has supplied any cases or legislative history anent the interpretation of section 1 of the Shipping Act, 1916, as to dispatching of shipments and handling the formalities incident to such shipments.
>
> Hearing Counsel in its statement regarding further procedural scheduling, served and filed April 22, 1980, stated, *inter alia*, ". . . There still remains unresolved the following issues: whether the activities performed by Dynamic International constitute dispatching and to what extent these activities have been performed." Hearing Counsel continues, "In order to

elicit facts related specifically to these issues we intend to commence discovery pursuant to Rule 201 . . . 46 C.F.R. 502.201, thereafter we request an evidentiary hearing be scheduled. . . ." Suffice it to say that the Order of Investigation and Hearing instituting this proceeding was published in the *Federal Register*, Vol. 45 No. 21, on Wednesday, January 30, 1980, page 6836, and that under Rule 201--discovery shall be commenced no later than 30 days after the date of publication in the *Federal Register* of the Commission's order instituting the proceeding. Rather than discovery, a legal brief by each party on the issue should be submitted.

The Respondent in its April 24, 1980, statement regarding outstanding factual issues contends that Hearing Counsel acknowledges that a violation of section 44(a) depends upon a finding that Respondent both dispatched and handled the formalities incident to each of the shipments identified through the various affidavits and attachments. Respondent says further that the burden is upon Hearing Counsel to proffer sufficient evidence of both acts constituting the offense, before there is any burden upon Respondent to go forward with evidence to overcome a showing of violation.

However, it must be faced, that the Respondent, as an applicant for an Independent Ocean Freight Forwarder license, has the burden of proof in this proceeding. *Independent Ocean Freight Forwarder Application Lesco Packing Co., Inc.*, Docket No. 74-31, 19 F.M.C. 132, 136 (1976). To date the Respondent-applicant has not presented any evidence to support that burden. The Respondent shall submit in writing as hereinafter directed its direct case.

The Respondent also has ignored the possibility of the assessment against it of civil penalties. Hearing Counsel has suggested the imposition against the Respondent of a civil penalty of $25,000, however asked that all possible factors in mitigation be considered. Again, the Respondent has not touched on this area.

Receipt of the materials enumerated in this further procedural schedule may obviate need for evidentiary oral hearing, as it is hoped to do.

Upon consideration of the above and the record herein, it is *ordered*, that on or before Monday, May 12, 1980,

(A) the parties shall clearly state, in writing, severally or jointly, those facts therein upon which they agree.

(B) The parties each shall submit a brief and documents on the issue as to the interpretation of section 1 of the Shipping Act, 1916, as to "dispatching of shipments and handling the formalities incident to such shipments."

(C) Hearing Counsel is denied the use of discovery under Rule 201, not having commenced same within time. Each

party is briefing issue as provided in (B) above. Parties are not precluded from consulting and stipulating where possible.

(D) The Respondent having the burden of proof in this proceeding shall submit, in writing, its direct case.

(E) The Respondent shall respond to Hearing Counsel's suggestion as to civil penalties herein.

Counsel for respondent on May 8, 1980, moved for an enlargement of time to file its brief and other matter required by the April 30, 1980, Notice of Further Procedural Schedule. Hearing Counsel on May 9, 1980, filed a response to said motion stating that Hearing Counsel has no objection and that grant of motion would provide an opportunity for counsel to discuss possible stipulations of fact. The motion was denied by notice served May 15, 1980, for reasons stated therein.

Hearing Counsel and respondent filed statements on May 22, 1980, required by the April 30, 1980 notice. Hearing Counsel entitled it "Brief of Hearing Counsel"; the respondent entitled it "Respondent's Statement Regarding Outstanding Factual Issues and Recommended Procedure."

In the absence of oral testimony and cross-examination in this proceeding, there is no transcript of testimony. The exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision. Rule 169 (46 C.F.R. 502.169).

Hearing Counsel proposed 15 findings of fact. The respondent wrote (March 20, 1980 opening memorandum of law, p. 3, and respondent's May 22, 1980 submission, p. 2), "All 15 of Hearing Counsel's proposed findings of fact are admitted subject only to inferences to be drawn therefrom. . . ."

The addition by the respondent of ". . . subject only to inferences to be drawn therefrom . . ." does not alter the agreement with or admission of the proposed findings of fact. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. When not so denied the averments are admitted. The respondent having admitted Hearing Counsel's 15 proposed findings of fact, the 15 compared by the undersigned with the record references, are found as facts, as hereinafter indicated.

Respondent proposed 13 findings of fact in its March 20, 1980, Opening Memorandum of Law.

Hearing Counsel in its May 22, 1980, Brief agreed with most of Respondent's 13 (numbered 16 through 28) proposed findings of fact. Hearing Counsel did not agree with numbers 17, 24 and 28. The Presiding Administrative Law Judge reviewed carefully the disputed proposed findings of fact, the exhibits, reputed to be in support and the arguments and has made adjustments accordingly. Numbers 17 and 24 were as proposed, continued substantially, but more in accord with the

language of the reference. Number 28 was denied as it was drafted as a conclusion, which conclusion is the province of the Presiding Administrative Law Judge and upon which he must rule relative to respondent's and Hearing Counsel's positions as to definitions of terms of ocean freight forwarders found in section 1 of the Shipping Act, 1916, and supports proffered.

## FACTS

Upon the consideration of the record herein and the above the Presiding Administrative Law Judge finds these facts herein.

The following facts proposed by Hearing Counsel, and agreed to by the parties, are found:

1. Dynamic International, applicant for a freight forwarder license, is a Michigan corporation with its place of business at 19400 West Ten Mile Road, Suite 103, Southfield, Michigan, 48075. Evelyn Siegel, Dynamic International President, is the qualifying officer of the applicant. (Klapouchy Affidavit, Para. 4.)

2. By letter of August 31, 1978, Evelyn Siegel received a warning not to engage in the business of forwarding without a license and of possible penalties and prejudice to the issuance of a license as a result of unlicensed forwarding. This warning accompanied the license application form which Mrs. Siegel had requested from the Office of Freight Forwarders. (Klapouchy Affidavit, Para. 3.)

3. Mrs. Siegel has worked in the field of ocean freight forwarding since 1970 during which time she developed extensive experience while in the employment of three licensed ocean freight forwarders. (Klapouchy Affidavit, Para. 5.)

4. On January 25, 1979, following the Office of Freight Forwarder's January 18, 1979 receipt of Dynamic International's application, Robert James Klapouchy of the Commission's Office of Freight Forwarders discussed the application with Mrs. Siegel. Mrs. Siegel advised Mr. Klapouchy that Dynamic International engaged in ocean freight forwarding and believed that such unlicensed activity was permissible because she did not collect compensation from the ocean carrier. Mr. Klapouchy told her that Dynamic International may not perform ocean freight forwarding prior to receiving a license. (Klapouchy Affidavit, Para. 6.)

5. On January 30, 1979, the Office of Freight Forwarders sent two letters to Mrs. Siegel: the first letter, a follow-up to Mr. Klapouchy's conversation with Mrs. Siegel described in PFF 4 above, requested detailed description of Dynamic International's forwarding activities; and the second letter acknowledged receipt of Dynamic International's application, again reiterating the statutory requirement of a license and the possibility of penalties and prejudice to the issuance of a license as a result of unlicensed forwarding. (Klapouchy Affidavit, Para. 7.)

6. By letter of March 7, 1979, to the Office of Freight Forwarders, Evelyn Siegel advised that Dynamic International had performed forwarding services with respect to four shipments, receiving a total of $120.00 in "documentation fee(s)," and that as a result of the telephone conversation with Mr. Klapouchy, discussed in PFF 4 above, Mrs. Siegel said that Dynamic International ceased performing any forwarding work. Subsequently, the Office of Freight Forwarders received documentation supplied by Evelyn Siegel covering Dynamic International forwarding activities. (Klapouchy Affidavit, Paras. 8 and 9 and Attachments E-1 through E-4.)

7. On October 16, 1979, Alfred J. Stretz, President of Autoliners, Inc., Agents for Hoegh-Ugland Auto Liners ("HUAL") advised Investigator Christopher M. Kane of the Commission's Atlantic District Office that Dynamic International's name was appearing in the space or box which calls for the name of the freight forwarder on certain HUAL bills of lading, but that Autoliners neither paid Dynamic International ocean compensation nor was Autoliners invoiced by Dynamic for compensation. (Kane Affidavit, Paras. 3 and 4.)

8. On October 17, 1979, Kenneth J. Campbell, Outward Traffic Manager of Motorships, Inc., Agents for Wallenius Line ("Wallenius") provided Christopher Kane with data freight receipts covering two separate vehicle movements to Europe under data freight receipt Nos. W80005 and W80006, both dated October 13, 1979. On these documents the name Dynamic International was written in the space or box which calls for the name of the freight forwarder (Kane Affidavit, Para. 6; Ex. A-1 and A-2.)

9. Motorships, Inc., and Autoliners, Inc., subsequently provided a combined total of thirty bills of lading or data freight receipts (twenty-four Wallenius plus six HUAL) covering shipments during the period July 28, 1979 through October 13, 1979 in which the Dynamic International name appeared in the freight forwarder box. (Kane Affidavit, Paras. 9 and 10; Ex. B-1 through B-31.)

10. Evelyn Siegel maintained frequent contact with Motorships, Inc., continuing into February 1980 and the name Dynamic International continued to appear in the freight forwarder box on bills of lading dated after October 13, 1979; and, Motorships, Inc., was extending ocean freight credit to Dynamic International on prepaid shipments where Dynamic International's name appeared as forwarder and Autos International, an exporter of automobiles, appeared as the shipper. (Kane Affidavit, Para. 12.)

11. Motorships, Inc., supplied 42 additional Wallenius bills of lading or data freight receipts covering shipments dated November 1, 1979 through February 3, 1980, on which the Dynamic International name appeared in the freight forwarding box and Autos International ap-

peared as the shipper. (Kane Affidavit, Paras. 12 and 13; Ex. D-1 through D-43.)

12. Autoliners, Inc., supplied nine additional HUAL bills of lading dated January 23, 1979 through February 2, 1980, on which the Dynamic International name appeared as the forwarder. Included in this group of nine bills of lading were two previously furnished, thus resulting in a total of thirteen HUAL bills of lading on which Dynamic International appeared as forwarder covering the period January 23, 1979 through February 2, 1980. On six of these thirteen HUAL bills of lading, Autos International was shown as the shipper. (Kane Affidavit, Para. 14; Ex. E-1 through E-8.)

13. Dynamic International's name began appearing as freight forwarder on bills of lading for Autos International shipments about the end of September 1979 and continued to appear until the beginning of February 1980. Dynamic International did not prepare the bills of lading and export declarations for Autos International shipments to Europe, even though Dynamic International appeared in the freight forwarding box on the bills of lading covering these European shipments. However, payment of the ocean freight on all Autos International prepaid shipments, including European, was made by Dynamic International. With respect to Autos International shipments to the Middle East, Dynamic International prepared the documentation, including the ocean bills of lading and export declarations. (Kane Affidavit, Paras. 15, 16 and 17.)

14. Dynamic International advanced ocean freight charges on behalf of Autos International on shipments covered by 42 Wallenius bills of lading or data freight receipts. On five Autos International Middle Eastern shipments via HUAL, Dynamic International prepared export documentation, including bills of ladings and export declarations (Kane Affidavit, Para. 18.)

15. On February 20, 1980, Commission Investigator Michael A. Murphy obtained from Robert Hunter, Mission Viejo, California, four invoice statements by Dynamic International Freight Forwarders to Robert Hunter, dated September 9, 1979 through December 4, 1979, which list charges for inland transportation, estimated ocean freight, insurance, documentation, telexes and express mail. (Murphy Affidavit, Para. 2.)

The following facts proposed by respondent, and agreed to by the parties, are found:

16. The Commission received Dynamic's application on January 18, 1979, and received a response to its inquiries regarding forwarding activity by letter dated March 7, 1979. (Klapouchy Affidavit, Paras. 4 and 8.)

17. Following receipt of the March 7, 1979, letter from Dynamic, there was no communication from the Commission staff in Washington,

D. C., until Christopher M. Kane, a Commission investigator, during the course of an unrelated investigation on October 16, 1979, determined that Dynamic was "appearing as forwarder" on bills of lading of Autos International, Inc. (Kane Affidavit, Paras. 2, 3 and 7.) (Adjustment made as indicated above.)

18. By letter dated October 17, 1979, the Commission was advised that Dynamic had retained legal counsel in the matter of its pending application. (Attachment 2.)

19. By letter dated November 15, 1979, counsel to Dynamic submitted to the Managing Director of the Commission samples of Wallenius Line bills of lading and explained the basis for Dynamic's name appearing as forwarder. (Attachment 3.)

20. Notice of intent to deny the Dynamic application was given by the Commission Secretary by letter dated December 10, 1979, and the Commission acted on the matter January 17, 1980, one year after the application was filed. (Attachments 4, 5 and 6.)

21. After its letters of January 30, 1979, acknowledging receipt of an application and requesting information regarding forwarding activity, the Commission staff in Washington, D. C., did not communicate further with Dynamic regarding its application until advised that counsel had been retained and then communicated with counsel beginning on October 24, 1979. (Klapouchy Affidavit and Attachment 7.)

22. Autoliners, Inc., agents for HAUL (sic "HUAL"--Hoegh-Ugland Auto Liners) did not pay compensation to Dynamic nor did Dynamic seek compensation. (Kane Affidavit, Para. 4.)

23. It is not alleged that Motorships, Inc., agents for Wallenius Lines, paid compensation to Dynamic nor that Dynamic sought compensation, and Motorships, Inc., knew Dynamic was not licensed. (Kane Affidavit, Para. 13.)

24. Motorships, Inc.,[2] requested Dynamic to appear so that Motorships would be able to know who the forwarder was and who could be billed for ocean freight. No credit was extended to Autos International, but Motorships extended credit to Dynamic on prepaid shipments where Dynamic appeared as the forwarder and Autos International

[2] Counsel for respondent in a letter dated June 5, 1980, requested the following affidavit to be entered as a late-filed exhibit: (Affidavit is signed by Kenneth J. Campbell, Outward Traffic Manager, Motorships, Inc., Sworn to by Notary May 13, 1980.)

February 5, 1980

To whom it may concern:

Re: Dynamic International

Please be advised that Dynamic International placed their name on the bill of lading in the space reserved for freight forwarders at the request of our office. This was requested in order to use identification for our accounting purposes.

The ocean freight statement prepared by our office always indicated "No Forwarder" and brokerage was not billed to us by Dynamic International, nor was it ever paid out to Dynamic International.

appeared as the shipper. (Kane Affidavit, Para. 12.) (Adjustment made as indicated above.)

25. Autos International, Inc., was not charged by Dynamic for forwarding services but handled payment of freight on prepaid shipments. On certain shipments documentation was prepared by Dynamic on behalf of Autos International. (Kane Affidavit, Paras. 15, 16 and 17.)

26. Based upon affidavit of Investigator Kane and supporting exhibits, Dynamic either advanced freight money and/or provided certain documentation services to shippers at no charge to either shipper or carrier. These shipments involve 55 Wallenius and five HAUL (sic "HUAL") shipments. (Kane Affidavit, Paras. 15 and 18.)

27. Based upon Investigator Murphy's affidavit, Dynamic advanced freight and insurance money, and provided documentation services on four shipments for Mr. Robert Hunter at a charge of $60.00 per shipment for documentation. There is no evidence offered that Dynamic sought forwarder compensation from any carrier with respect to these shipments. (Murphy Affidavit and Attachments.)

Additional facts found are:

A. Dynamic International Freight Forwarders, Inc., was established November 28, 1978. It's application for a license as an independent ocean freight forwarder dated January 5, 1979, was received in the Commission January 18, 1979.

B. The stock in Dynamic International is held: 33⅓% by Evelyn Siegel, who is its President-Treasurer; 33⅓% by Kenneth Peter, who is its Financial Vice President; and 33⅓% by Walter Baker, who is its Vice-president Secretary. Evelyn Siegel is the proposed qualifying officer of the applicant.

C. Evelyn Siegel, after forming Dynamic International, continued to work with shippers of automobiles by preparing documentation and in some instances enabling them to secure credit through her credit standing with the carriers (respondent's Exhibit No. 1, page 1, attached to its May 22, 1980, submission). The documentation work she performed was for a very nominal charge or at no charge. She did this work to maintain a relationship with people she hoped to serve, if licensed (*Ibid.*, p. 2).

## DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

Hearing Counsel, in presenting this proceeding, served on February 28, 1980, the affidavits of Robert-James Klapouchy, who is employed in the Office of Freight Forwarders of this Commission as a Transportation Industry Analyst; Christopher M. Kane, who is employed as a District Investigator in the Commission's Atlantic District Office in New York City; and of Michael A. Murphy, who is employed as the Supervisory Investigator in the Pacific District, Los Angeles Office of the Commission. Evelyn Siegel, President-Treasurer of the applicant

corporation, has examined the affidavits of Mr. Kane and Mr. Murphy and the exhibits submitted by Hearing Counsel (Siegel affidavit of May 21, 1980, attached as Exhibit 2 to respondent's May 22. 1980, submission).

It is the position of Hearing Counsel that Dynamic International performed unlicensed forwarding activities on at least 79 instances in violation of section 44 of the Act, and absent mitigating factors, Dynamic International should be found unfit to be licensed as an independent ocean freight forwarder pursuant to section 44, Shipping Act, 1916 (Hearing Counsel's February 28, 1980, Opening Memorandum of Law, pp. 2 and 3).

Hearing Counsel says Mrs. Siegel acknowledged that Dynamic International conducted unlicensed forwarding, evidenced by her letter of March 7, 1979, to the Office of Freight Forwarders and by her subsequent submission of documentation covering 4 shipments she advised were the ones forwarded by Dynamic International (*Ibid.*, p. 8).

Hearing Counsel also says, while the appearance of the Dynamic International name on the bill of lading freight forwarder box does not conclusively establish Dynamic International as performing the freight forwarding function incident to each of these 79 shipments, it raises a strong presumption of unlicensed forwarding. This box is intended for the insertion of the name of the person performing as freight forwarder on each shipment, i.e., dispatching the shipment and handling the formalities incident thereto (*Ibid.*, p. 11).

The fact that Dynamic International did not collect ocean freight compensation payments from ocean carriers, according to Hearing Counsel, is irrelevant to the issue of whether section 44(a) of the Act was violated. The prohibition against carrying on the business of forwarding without a license is absolute and cannot be avoided by not collecting ocean freight compensation. (*Ibid.*, p. 12).

Hearing Counsel points to section 510.2 of the Commission's General Order 4 (46 C.F.R. 510.2) for definition of the term "freight forwarding service or dispatching of shipments" as "a service rendered by an independent ocean freight forwarder on behalf of other persons in the process of dispatching or facilitating an export shipment as authorized by such persons." Hearing Counsel argues that Mrs. Siegel acknowledged that Dynamic International conducted unlicensed forwarding, evidenced by her letter of March 7, 1979, to the Office of Freight Forwarders and by her subsequent submission of documentation covering four shipments she advised were the ones forwarded by Dynamic International (*Ibid.*, p. 8). Also, Hearing Counsel, comparing this situation to that in the case of *Concordia International Corp.--Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, 21 F.M.C. 587 (1978), argues that Evelyn Siegel has been actively involved in the ocean shipping industry since 1970,

during which time she was employed by three licensed ocean freight forwarders; that the Commission is justified in expecting from an individual with her experience in the forwarding industry knowledge, or at the very least, awareness of the laws and regulations governing the business in which she elects to operate.

The respondent in its March 20, 1980, opening memorandum of law (p. 6) contends that the undisputed facts established by the Commission's investigation of Dynamic's alleged unlicensed forwarding activity reveals that Dynamic either acted as a credit source on prepaid shipments, prepared various shipping documents, or both. According to the respondent the admitted activities of Dynamic involve handling the formalities incident to shipments and not the dispatching thereof. It is urged by the respondent that the Commission's rules and regulations governing the licensing and activities of independent ocean freight forwarders, General Order 4 (46 C.F.R. Part 510) creates a new term not found in the Shipping Act, 1916, "freight forwarding service or dispatching of shipments." (46 C.F.R. 510.2(c).) (*Ibid.*, p. 7.)

46 C.F.R. 510.2(c), according to the respondent, is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law and in excess of statutory authority, all within the meaning of 5 U.S.C. 705 (*Ibid.*, p. 8).

Hearing Counsel in its April 10, 1980, reply memorandum of law contends that the respondent failed to establish that the activities which it admittedly performed constitute only handling formalities of shipments as opposed to acts which constitute dispatching.

The respondent in its May 22, 1980, submission says its position is, "simply that the definition of 'carrying on the business of forwarding' within the meaning of the Shipping Act, 1916 consists of two acts. By mathematical analogy the definition may be stated as: one plus one equals two; not one or one equals one." The respondent continues that, "While this is essentially an exercise in English grammar, the statute does support this interpretation." (p. 4.)

The respondent's counsel, in his November 15, 1979, letter (Attachment 3 to respondent's March 20, 1980, opening memorandum of law) to the Managing Director of this Commission, had advanced that "Carrying on the business of forwarding" by statute means the "dispatching of shipments" *and* "handling the formalities incident to such shipments."

Respondent in its May 22, 1980, submission argues that the Commission's General Order 4, 46 C.F.R. 510.2(c), merges the terms "dispatching" and "handling the formalities incident to such shipments" into a single agency created open ended term, "freight forwarding service or dispatching of shipments" coupled with a list of activities which is broad in the extreme but not inclusive. The respondent then gives

dictionary definitions of "and" as well as "or"--and discusses use of the semicolon.

Purporting to delve into the legislative history of the freight forwarder licensing question (*Ibid.*, p. 6) the respondent asserts that H.R. 8382, 85th Cong., 1st Session, introduced by Mr. Boykin, a Member of Congress from the State of Alabama, defined "independent foreign freight forwarders" and attached as respondent's Exhibit No. 2, the text of the bill.

Hearing Counsel in its May 22, 1980, brief (p. 2) contends the term "dispatching of shipments and handling the formalities incident to such shipments" originated in the Commission's decision in Docket No. 621-*Port of New York Freight Forwarder Investigation*, 3 U.S.M.C. 157, 163 (1949), wherein the Commission stated:

> We are of the opinion that any person carrying on the business of dispatching shipments by ocean going vessels in foreign commerce and domestic commerce with or between our territories and possessions, and of handling the formalities incident thereto, is a forwarder within the provisions of the Shipping Act, 1916.

Hearing Counsel asserts (*Ibid.*, p. 4) that in the same decision the Commission also established that a freight forwarder engages in a wide range of activities, any of which constitutes freight forwarding and none of which are, as respondent claims, assignable into distinct categories of dispatching shipments or handling formalities incident to such shipments.

The Presiding Administrative Law Judge has considered the above positions and arguments of the parties. He has noticed that the respondent in its exercise in English grammar did not define dispatching and handling. Little wonder that Hearing Counsel in its April 10, 1980, Reply Memorandum of Law says that, "while Dynamic International admits that the activities it performed involved 'handling the formalities incident to shipments,' it denies that it 'dispatched' those shipments (Resp. Op. Mem., at 7). We contend that Dynamic International failed to establish that the activities which it admittedly performed constitute only handling formalities of shipments as opposed to acts which constitute dispatching."

Perhaps respondent's exercise in English grammar should have considered also Bastard enumeration and otiosity. The Presiding Administrative Law Judge is not persuaded by the respondent's exercise in English grammar. The respondent's legislative history stops with 1957. The respondent did not tie bill H.R. 8382 with bills H.R. 2488 or S-1368. S-1368, to Amend Shipping Act, 1916, to provide for licensing independent freight forwarders, and for other purposes, was passed by the House in lieu of H.R. 2488. Approved (Public Law 87-254), signed by President September 18, 1961.

The respondent does not explain whether what it did was dispatching or handling.

It is deemed by the Presiding Administrative Law Judge that the respondent engaged in unlicensed forwarding activities in violation of section 44(a), Shipping Act, 1916.

Counsel for respondent ". . . advised Mrs. Siegel that in my opinion she has done nothing illegal in attempting to perform minor services for shippers to maintain contact with them while her application is being processed. . . ." (Attachment 3 to respondent's March 20, 1980, Opening Memorandum of Law.) Under agreed Fact 4 above Mrs. Siegel advised that Dynamic International engaged in ocean freight forwarding and believed that such unlicensed activity was permissible because she did not collect compensation from the ocean carrier. Under Fact 6 above Mrs. Siegel advised that Dynamic International had performed forwarding services with respect to four shipments, receiving a total of $120.00 in documentation fee(s). Under Fact 27 above Dynamic International advanced freight and insurance money and provided documentation services on four shipments for Mr. Robert Hunter at a charge of $60.00 per shipment for documentation. Under Fact 13 above, with respect to Autos International shipments to the Middle East, Dynamic International prepared the documentation, including the ocean bills of lading and export declarations.

Under most circumstances, willful violations of law of the nature set forth above would be sufficient standing alone to deny respondent's application for a forwarder license. However, the record establishes the respondent appears to have acted in good faith upon the advice of counsel. While the activities of respondent are violations of section 44(a), Shipping Act, 1916, nevertheless, the Presiding Administrative Law Judge is disinclined at this point to deny respondent a license when respondent appears to have acted in good faith upon the advice of counsel. See *Bolton & Mitchell, Inc.--Independent Ocean Freight Forwarder License No. 516*. Docket No. 70-9, 15 F.M.C. 248, 255 (1972).

It seems clear that respondent admits it was performing such services with consideration for future of the Dynamic International corporation. Section 44 of the Shipping Act requires the Commission to make qualitative judgments concerning the business expertise and integrity of forwarding applicants before issuing a license. The Commission cannot countenance a flagrant disregard of the statutes it is charged with enforcing. The functions performed herein are looked upon as an attempt to evade regulation. See *Concordia* case, cited above. An attempt to evade regulation, under different circumstances than here, is a significant act of unfitness. Because, as already stated, the respondent appeared to have acted in good faith upon the advice of counsel, such draconic action is not applied.

There must be, however, resort to imposition upon the applicant Dynamic International a civil penalty under section 32 of the Shipping Act, 1916. Hearing Counsel in its February 20, 1980, Opening Memorandum of Law (p. 15) urges that the Presiding Administrative Law Judge find that Dynamic International has carried on the business of forwarding without a license on at least 79 shipments. Hearing Counsel recommends a penalty in the amount of $25,000 be assessed Dynamic International, based upon the flagrancy of its unlawful activities and that Dynamic International, having Evelyn Siegel as its President and qualifying officer, be found unfit for licensing and its application for an independent ocean freight forwarder license be denied. In its May 22, 1980, brief (p. 6), Hearing Counsel revised the statement by adding--in the absence of mitigating factors that a penalty of $25,000.00 be assessed, the respondent be found unfit for licensing and the application be denied.

Respondent in its May 22, 1980, submission asserts that Hearing Counsel's suggested penalty assessment is clearly extreme in light of the evidence in this proceeding; that if respondent is found to have violated section 44 of the Shipping Act, 1916, a nominal penalty is the most that the circumstances might justify.

Mrs. Siegel in her affidavit sworn to May 21, 1980, and attached as Exhibit No. 1 to respondent's May 22, 1980, submission, states, 13 (p. 3 of Exh. No. 1), "I have no means of paying a fine if the Commission rules that I have violated the law. I have been precluded from earning a living as an independent ocean freight forwarder and have consumed my resources awaiting the opportunity to engage in compensatory work."[3] Mrs. Siegel appears to forget that this application is for a license for Dynamic International--a corporation, and that she owns only 33⅓% of the corporation stock; that two others also hold 33⅓% each of the stock.

Great consideration already has been shown for the applicant having acted upon the advice of counsel. Counsel for applicant also complained of amount of time between the receipt of the application by the Commission on January 18, 1979, and urged the time interval as a mitigating factor. It is not a mitigating factor under the circumstances of this case.

The imposition of a nominal civil penalty under the circumstances herein is another great consideration given to the applicant. Therefore, the payment of the civil penalty by the applicant should be made a condition precedent to the granting of the application. Failure of the

[3] The instant application dated January 5, 1979, and signed by Mrs. Siegel gives her employment from 1970-76 with A. F. Burstrom & Son, Inc.; from 1976-77 with S. H. Moultor & Co.; and from 1977 to present with Air & Sea Pak Co.; Evelyn Siegel will be leaving this company to devote her full time to working for the applicant should this license be granted.

applicant to pay the civil penalty as a condition precedent is denial of the application.

The Presiding Administrative Law Judge *finds* and *concludes* that civil penalties should be assessed against Dynamic International pursuant to section 32(a) of the Shipping Act, 1916, and that payment of the civil penalty is a condition precedent to issuing the license. The unpaid civil penalty causes the violations for which imposed not yet expunged, and those violations preclude finding applicant to have requisite fitness within the meaning of section 44(b) of the Act. The amount of such civil penalty under the circumstances shall not be $25,000 as proposed by Hearing Counsel, but a nominal penalty, the payment of which by applicant is a condition precedent[4] to issuance of license applied for, since the applicant does not now qualify for a license. That nominal penalty the Presiding Administrative Law Judge determines shall be $2,500.00. Dynamic International Freight Forwarders, Inc., therefore, is assessed a civil penalty for violations of section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities and payment of the civil penalty of $2,500 is a condition precedent to granting a license herein.

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

(1) Dynamic International Freight Forwarders, Inc., violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

(2) Civil penalties in the amount of $2,500 should be assessed against Dynamic International pursuant to section 31(e) of the Shipping Act, 1916, and that payment of the civil penalty of $2,500 shall be and is a condition precedent to the issuance of a license herein.

(3) Upon payment of the civil penalty of $2,500 and notice thereof given to the Secretary of this Commission with original or copies of all documents involved, Dynamic International Freight Forwarders, Inc., should then be found to possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder; and the Secretary shall note in the record the application is granted and shall issue same.

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

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[4] Perhaps the procedure should be as the Commission did in Docket No. 66-17, *Independent Ocean Freight Forwarder License Application No. 552, Heskel Saleh Doing Businss as Eastern Forwarding Service*, 10 F.M.C. 281, 288 (1967). Deny the application--postpone the effective date of the denial to enable the applicant to comply with conditions, in which event the denial order would not be entered.

In the above the decision was made February 14, 1967, and denial of application was postponed until August 1, 1967.

*It is the view of the Presiding Administrative Law Judge that either procedure is acceptable.*

(A) Dynamic International Freight Forwarders, Inc., applicant-respondent herein, is found to have violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

(B) Civil penalties in the amount of $2,500 be and hereby are assessed against Dynamic International Freight Forwarders, Inc., pursuant to section 31(e) of the Shipping Act, 1916, and that payment of said civil penalty of $2,500 be and hereby is a condition precedent to the issuance of a license herein.

(C) Upon compliance with the said condition precedent to issuance of a license herein by the applicant, the applicant shall give notice thereof and copies of all pertinent documents to the Secretary of this Commission; Dynamic International Freight Forwarders then shall, having met the condition precedent, be found to possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder. The Secretary of the Commission shall note in the records that the application is granted, and shall issue the license to applicant.

(D) Failure of compliance by applicant as set out above, the license is denied.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

Washington, D. C.
June 16, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-31

BILLIE IONE CRTALIC, VIRGO INTERNATIONAL CORPORATION AND MERCURY INTERNATIONAL CORPORATION; POSSIBLE VIOLATIONS OF SECTION 44 (A) - BILLIE IONE CRTALIC; INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

## REPORT AND ORDER

*January 19, 1981*

The Commission initiated this proceeding by Order of Investigation and Hearing on January 17, 1980, to determine:

1. Whether Respondents Billie Ione Crtalic, Virgo International Corporation, and Mercury International Corporation engaged in unlicensed freight forwarding in violation of section 44(a) of the Shipping Act, 1916 and 46 C.F.R. 510.3(a)2, and, if so, whether civil penalties should be imposed; and
2. Whether Billie Ione Crtalic should be licensed as an independent ocean freight forwarder.

The proceeding was assigned to Administrative Law Judge William Beasley Harris for hearing. Prior to the submission of opening memoranda, Billie Ione Crtalic withdrew her application for a freight forwarder's license and, together with Virgo, entered into a stipulation of facts with the Commission's Bureau of Investigation and Enforcement (BIE), which was submitted, together with a proposed settlement agreement, to the Presiding Officer. Under the terms of this agreement Virgo would pay $1,900 and Billie Ione Crtalic $2,500, in full compromise of the claims against them.

On September 24, 1980, the Presiding Officer issued an Initial Decision in which he declined to approve the proposed settlement and suggested that any additional settlement proposal meet certain stated concerns and assess penalties equally against Crtalic and Virgo. Respondents filed "Exceptions" to the Initial Decision, and BIE filed a reply.

### POSITIONS OF THE PARTIES

Respondents and BIE argue that their negotiated settlement should have been accepted and approved by the Presiding Officer. They contend that, based upon the circumstances of this proceeding, the amounts agreed upon serve a regulatory purpose. The parties advise that they

considered a variety of factors in arriving at the settlement amounts, including: (1) the number of alleged violations; (2) the percentage of violations committed after receipt of a written warning (75); (3) the termination of activities after a second, oral warning; (4) the cooperation of Respondents in disclosing information and also entering into settlement negotiations; (5) the withdrawal of Crtalic's freight forwarder's application; and (6) the nature of Crtalic's conduct.[1]

Based upon these considerations, BIE initially determined that the proper settlement amount against both Respondents should be $15,000. Crtalic agreed to pay $2,500 of this amount, even though her percentage of shipments might have warranted a lesser amount (27 out of 300). The remaining $12,500 was deemed to be Virgo's obligation. However, because Virgo (1) has only $1,901 in assets, (2) received only $1,516 net profit, and (3) is presently "inactive," BIE doubted its ability to pay more than $1,900 and, therefore, accepted that amount as appropriate.[2]

DISCUSSION

Pursuant to the Commission's rules, proposed settlements of civil penalties must be submitted to the presiding officer for approval, and are, therefore, subject to disapproval at his discretion. 46 C.F.R. 505.3. However, it is also important to recognize that negotiated settlements are encouraged by the Commission as an expeditious and equitable means of resolving proceedings before it. *See Consolidated International Corporation v. Concordia Line*, 18 F.M.C. 180, 183 (1975).

The Commission has been mindful of these sometimes conflicting principles in its assessment of the instant appeal. It has thoroughly reviewed the proposed stipulation of facts and settlement agreement, along with the briefs of the parties. Although a settlement totalling $15,000 against both Respondents would generally be appropriate in a case such as this, because of the special financial circumstances presented, the Commission concludes that the settlement amounts recommended by BIE are not unreasonable and, therefore, approves this settlement.

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[1] Because Virgo was a legitimate corporation, the parties agreed that the responsibility for forwarding activities after its incorporation should fall upon Virgo alone. Mercury International Corporation was never formally incorporated. The shipments forwarded under that name have therefore been attributed to Ms. Crtalic.

[2] Respondents also argue that the Presiding Officer erred in finding them in violation of the Shipping Act and General Order 4 and in "piercing" Virgo's corporate veil. BIE responds by stating that such arguments are without merit at this stage of the proceeding. These issues are indeed without merit. The Presiding Officer did not make "findings" that Respondents violated the Shipping Act. His rejection of the proposed settlement was based upon the stipulation of facts submitted by the parties. If no settlement were subsequently approved, Respondents would have their opportunity for a hearing to contest the alleged violations. Nor has the Presiding Officer "pierced the corporate veil" by concluding that Virgo and Ms. Crtalic should be assessed equal penalties. If anything, he has simply arrived at this conclusion without clearly articulating his reasons therefor.

THEREFORE, IT IS ORDERED, That the settlement agreement jointly proposed by Respondents and the Bureau of Investigation and Enforcement is hereby approved; and

IT IS FURTHER ORDERED, That Respondents comply with the terms of said agreement within 30 days of the date of this Order, at which time this proceeding will be dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 80-31

## BILLIE IONE CRTALIC, VIRGO INTERNATIONAL CORPORATION AND MERCURY INTERNATIONAL CORPORATION; POSSIBLE VIOLATIONS OF SECTION 44(A) - BILLIE IONE CRTALIC; INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

Proposed settlement of civil penalties not approved.

Respondents Crtalic and Virgo assessed civil penalties pursuant to section 32(e) of the Shipping Act, 1916, which are to be against each equally.

*Charles C. Hunter, Joseph B. Slunt, Janet G. Speck and Paul J Kaller,* Acting Director of the Bureau of Hearing Counsel, for Commission's Bureau of Hearing Counsel.

*Carlos Rodriguez* for Respondents.

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

*Finalized January 19, 1981*

This is a proceeding instituted May 21, 1980, pursuant to sections 22, 32, and 44 (46 U.S.C. 821, 831 and 841(b)) of the Shipping Act, 1916, and action 510.8 of the Commission's General Order 4 (46 C.F.R. 510.8), to determine:

1) Whether Billie Ione Crtalic, and/or Virgo International Corporation and/or Mercury International Corporation violated section 44(a) of the Shipping Act, 1916, and section 510.3 of the Commission's General Order 4, by engaging in unlicensed forwarding activities;

2) Whether civil penalties should be assessed against Billie Ione Crtalic, and/or Virgo International Corporation, and/or Mercury International Corporation pursuant to section 32 and Part 505.3 of the Commission's regulations (46 C.F.R. 505.3) for violations of the Shipping Act, 1916, and section 510.3 of the Commission's General Order 4, and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty; 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).

3) Whether in light of the evidence adduced pursuant to the foregoing issues, together with any other evidence adduced, Billie Ione Crtalic possesses the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, and section 510.5 of the Commission's General Order 4 to be licensed as an independent ocean freight forwarder.

Under date of July 14, 1980, Billie Ione Crtalic through her counsel withdrew her application for a license as an independent ocean freight forwarder. (July 24, 1980, Prehearing Conference TR 3). That action eliminates from the proceeding the issue of possession by her of the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, and section 510.5 of the Commission's General Order 4, to be licensed as an independent ocean freight forwarder (TR 4).

The parties herein entered into the following stipulation.

STIPULATION

Pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, Respondents and Hearing Counsel, the only parties to this proceeding, hereby file this joint stipulation.

1. Billie Ione Crtalic had been employed by Darwin Liao d/b/a Pegasus International Corporation (Pegasus), holder of Independent Ocean Freight Forwarder License No. 1500, as office manager for Pegasus for approximately five and one half years. Ms. Crtalic left Pegasus in late July, 1978.

2. Thereafter, Ms. Crtalic established another office.

3. Respondents forwarded more than 300 ocean freight shipments without benefit of an independent ocean freight forwarder license during the period July, 1978 through July, 1979. In forwarding these shipments, Respondents utilized Pegasus' name and FMC license number.

4. During the period July, 1978 through September, 1978, Ms. Crtalic conducted activity under the name of Mercury International Corporation (Mercury). In September, 1978, it was discovered that she could not incorporate as Mercury because that name had been registered with the California State Department of Corporations by another firm. Ms. Crtalic, during this period, forwarded twenty-seven ocean freight shipments. Ms. Crtalic owned 50% of the stock in Virgo and served as its President and Chairman of the Board. On July 24, 1979, she resigned as President and Chairman of the Board and transferred her holdings in the corporation.

5. Although respondents received freight forwarding fees from their shipper principals, they did not receive a share of the compensation paid by ocean going common carriers.

6. On April 19, 1979, the Commission's Office of Freight Forwarders received an application for an Independent Ocean

Freight Forwarder License from Ms. Crtalic. The application was dated March 26, 1979.

7. By letter dated April 19, 1979 and signed by Charles L. Clow, Chief, Office of Freight Forwarders, the Commission's Office of Freight Forwarders acknowledged receipt of Ms. Crtalic's application. This letter contained the following language:

> 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 of forwarding" is defined under Section 510.2 of the enclosed General Order 4 and Section 1, Shipping Act, 1916.

8. Virgo forwarded approximately 75 ocean freight shipments after the receipt of the letter referred to in section 8 above.

9. On July 15, 1979, Eleanor V. Navickas, District Investigator, Los Angeles Office, advised Ms. Crtalic that it was unlawful for Virgo to utilize the name and FMC license number of a licensed independent ocean freight forwarder to engage in carrying on the business of ocean freight forwarding.

10. Thereafter, Virgo ceased all ocean freight forwarding activities in July, 1979.

11. Ms. Crtalic withdrew her application for an Independent Ocean Freight Forwarder License by a letter dated July 14, 1980.

RESPECTFULLY SUBMITTED,

Carlos Rodriguez
Counsel for Respondent

PAUL J. KALLER, ACTING DIRECTOR
*Bureau of Hearing Counsel*

JOSEPH B. SLUNT
*Hearing Counsel*

CHARLES C. HUNTER
*Hearing Counsel*

The parties submitted the following:

## PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Hearing Counsel and Respondents Billie Ione Crtalic and Virgo International Corporation (Respondents). It is submitted to the Presiding Officer for approval pursuant to Rule 162 of the Commission's Rules of Practice and Proce-

dure, 46 C.F.R. 502.162, and section 505.3 of the Commission's General Order 30, 46 C.F.R. 505.3, and is to be incorporated into the Final Order in this proceeding, if so approved.

Whereas, by Order of Investigation and Hearing dated May 21, 1980, the Commission instituted the present proceeding to determine whether the Respondents had violated section 44(a) of the Shipping Act, 1916, 46 U.S.C. §841b(a), and section 510.3 of the Commission's General Order 4, 46 C.F.R. 510.3, and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of Section 44(a) of the Shipping Act, 1916, and section 510.3 of the Commission's General Order 4, 46 C.F.R. 510.3;

Whereas, the Order of Investigation alleges that the Respondents may have violated section 44(a) of the Shipping Act, 1916, and section 505.3 of the Commission's General Order 4;

Whereas, the Respondents have stipulated that they have engaged in specified activities which may be violative of section 44(a) of the Shipping Act, 1916, and section 505.3 of the Commission's General Order 4;

Whereas, the parties, in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of expeditiously settling the issue of the amount of the appropriate civil penalty to be assessed against Respondents in accordance with the terms and conditions of this agreement;

Whereas, section 32(e) of the Shipping Act, 1916, U.S.C. §831(e), authorizes the Commission to assess or compromise all civil penalties provided for by the Shipping Act, 1916; and

Whereas, the Respondents have terminated all ocean freight forwarding activities and have instituted, and have indicated their willingness and commitment to maintain measures designed to eliminate, discourage, and prevent future violations of the Shipping Act, 1916, and the Commission's General Order 4;

The undersigned Respondents hereby agree to pay to the Federal Maritime Commission the following sums in accordance with the designated terms of settlement:

1. In compromise of all civil liability which may have been incurred by Billie Ione Crtalic between July, 1978 and July, 1979 under the Shipping Act, 1916, and the Commission's General Order 4, Ms. Crtalic agrees to pay to the Federal Maritime Commission the sum of Two Thousand and Five Hundred Dollars within 30 days from the date of the approval by the Commission of this Proposed Settlement;

2. In compromise of all civil liability which may have been incurred by Virgo International Corporation between July, 1978 and July, 1979 under the Shipping Act, 1916, and the

Commission's General Order 4, Virgo International Corporation agrees to pay to the Federal Maritime Commission the sum of One Thousand Nine Hundred Dollars within 30 days from the date of the approval by the Commission of this Proposed Settlement;

3. In consideration of the payment of the civil penalties agreed upon by the parties and approved by the Presiding Administrative Law Judge and the Commission, the commencement of any civil or administrative action for the recovery of civil penalties from the Respondents which would be based upon activities engaged in by Respondents between July, 1978 and July, 1979 shall be barred; and

4. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Ms. Crtalic or Virgo International Corporation or its officers, directors or employees of the violations alleged in the Order of Investigation and Hearing.

Carlos Rodriguez
Counsel for Respondents

PAUL J. KALLER, ACTING DIRECTOR,
*Bureau of Hearing Counsel*

JOSEPH B. SLUNT
*Hearing Counsel*

CHARLES C. HUNTER
*Hearing Counsel*

Hearing Counsel and Respondents submitted on August 29, 1980, memoranda in support of the proposed settlement. Hearing Counsel pointed out in its memorandum, *inter alia*, that during the period July, 1978 through July, 1979, Respondents forwarded over 300 ocean freight shipments without benefit of a license issued by the Commission; that of these 300 shipments, Ms. Crtalic was responsible for the forwarding of twenty-seven and Virgo was responsible for forwarding the remainder; that only seventy-five of the shipments for which Virgo is responsible were forwarded after the receipt of a written warning that unlicensed ocean freight forwarding activity is unlawful. Upon the receipt of a second such warning, Virgo ceased all such activities.

The Respondents in their memorandum refer, *inter alia*, to 300 alleged violations; that the acts of Respondent(s) may not be characterized as knowing and willful conduct within the strict meaning of the terms; and precedes such references with "The facts of the case support the provisions of the proposed settlement." They are not the facts in the proceeding.

The Respondents and Hearing Counsel urge approval of the settlement.

## DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The parties to this proceeding stipulated that from July, 1978 through July, 1979, Respondents forwarded over 300 ocean freight shipments without benefit of an independent ocean freight forwarder license. The Respondent Virgo International Corporation, according to its financial statement herein, dated August 18, 1980, was incorporated May 28, 1975, licensed to do business in California. The corporation has no Profit and Loss Statement or Balance Sheets. The financial statement shows Virgo's income for the last taxable year of:

| | |
|---|---|
| $17,565.00 | gross income |
| 15,749.00 | expenses (fixed & current) |
| 1,716.00 | gross profit |
| 1,516.00 | net profit after taxes |

The corporation is presently active according to its financial form; yet Hearing Counsel says Virgo is apparently an inactive corporation at this time. Both Hearing Counsel and Respondents refer to Virgo showing assets of only $1,900.00, neither mentions Virgo's gross income of $17,565 for the year in which it engaged in unlicensed ocean freight forwarding activities, however, Hearing Counsel in saying the net profit was only $1,516.00, tacitly recognized the gross income.

As to Respondent Ms. Crtalic, who had been employed as office manager of another licensed Independent Ocean Freight Forwarder (License No. 1500) for approximately 5½ years until late July 1978, Ms. Crtalic owned 50% of the stock in Virgo and served as its President and Chairman of the Board, and didn't resign and transfer her holdings in the corporation until July 24, 1979. She was involved in these violations from July 1978. Her experience as office manager should have taught her better. There is no financial data submitted as to Ms. Crtalic, who agreed to payment in settlement of a greater civil penalty than Virgo.

Under the circumstances presented, it appears to the Presiding Administrative Law Judge that the proposed settlement accepting a net profit of $1,516 from gross income of $17,565 tends to condone the activities herein of violation of the Act as though the violators are persons who have not violated the provisions of the Shipping Act. The stipulation herein is to more than 300 ocean freight shipments without benefit of an Independent Ocean Freight Forwarder License during the period July 1978 through July 1979, utilizing the name and FMC license number of another in so doing.

Under section 32(e) of the Shipping Act (46 U.S.C. 831(e)) there is authority to assess civil penalties; under section 32(a) thereof, violators are subject to a civil penalty not to exceed $5,000 for each such violation; under section 32(c) thereof, violation of any order, rule, or regulation of the Federal Maritime Commission made or issued in the

exercise of its powers, duties, or functions, are subject to a civil penalty of not more than $1,000 for each day such violation continues. Thus it is seen, 300 violations at $5,000 or 1 year at $1,000 per day could result in assessments herein of a civil penalty of some magnitude. The Presiding Administrative Law Judge cannot *find* and *conclude* that the settlement proposed should be approved under the circumstances of this case. The current status of Respondent Virgo as a corporation is ambiguous as reflected in this proceeding. There is no reflection of the financial status of the Respondent Ms. Crtalic. Under the proposed settlement Ms. Crtalic agrees to pay $2,500 and Virgo agrees to pay $1,900, for a total assessment in this proceeding of $4,400. Such settlement tends to treat the $17,565 gross income of Virgo as presented above as the income from a non-violator of the Shipping Act, 1916, which the Presiding Administrative Law Judge *finds* and *concludes* is not acceptable.

The matter of mitigation is regarded in the cooperation of the parties herein in resolving this proceeding.

Upon review of the situation and record herein the gross income of $17,565, obtained during the period as to settlement of civil penalties, in the opinion of the undersigned, should not be regarded the same as income brought in under a period free from such cloud, because a violator of the Shipping Act could then possibly profit from such violations. The Presiding Administrative Law Judge *finds* and *concludes* that while Ms. Crtalic and Virgo International Corporation have each expressly understood and agreed the proposed settlement is not to be construed as an admission of having violated section 44(a) of the Act and section 510.3 of the Commission's General Order 4, or of engaging in unlicensed forwarding activities, that the situation presented herein warrants assessment of civil penalties against the Respondents, considering mitigation, to disabuse any show of gains possible were there violations. Pursuant to section 32(e) of the Shipping Act, it is deemed such assessment should be made; that because of the circumstances, the assessment be against Ms. Crtalic and Virgo equally in an amount higher than that in the proposed settlement, which is not approved.

Wherefore, upon consideration of the above, it is ordered:

(A) The Settlement of Civil Penalties proposed by the parties hereto is not approved.

(B) Civil Penalties, in a renewed settlement proposal should provide for the concerns expressed herein and be assessed against Billie Ione Crtalic and Virgo International Corporation equally.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

Washington, D. C.
September 24, 1980

DOCKET NO. 76-34

TARIFF FMC 6, RULE 22 OF THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

DOCKET NO. 76-36

TARIFF RULES CONCERTEDLY PUBLISHED DEFINING PRACTICES OF CONFERENCES AND RATE AGREEMENT MEMBERS REGARDING THE ACCEPTANCE AND RESPONSIBILITY FOR SHIPPER-OWNED OR SHIPPER-LEASED TRAILERS OR CONTAINERS

## ORDER ON REMAND

*January 27, 1981*

On November 18, 1980, the United States Court of Appeals issued its decision in D.C. Cir. No. 79-1194, *Interpool, Ltd. v. FMC*, vacating the Commission's Report and Order in these consolidated dockets and remanding the case to the Commission.

The issue before the Court was whether the Commission correctly held that certain conferences of shipping lines were authorized by their approved section 15 agreements to publish tariff rules which effectively shifted responsibility for the rental costs associated with the use of leased or "neutral" containers from the conference member lines to the shippers using such containers. The Court held that the Commission erred in failing to consider the competitive effect of the tariff rules before determining whether the rules concerned a type of ratemaking activity authorized under the relevant conference agreements.

Although the Court remanded these dockets for further proceedings, the purpose and direction to be taken by this Commission-instituted investigation (as opposed to a private party complaint) is presently unclear. There is reason to believe that certain facts and litigation positions have changed since the Commission first acted in this matter. All but one of the participating conferences have seemingly abandoned any present interest in implementing container use practices of the type prescribed by the tariff regulations which were the subject of this proceeding.*

* Except for the Pacific Coast European Conference (PCEC), the original tariff rules were cancelled shortly after the Commission's Show Cause Order was issued in 1976. The PCEC rule pre-

Accordingly, in order for the Commission to fashion an appropriate vehicle for examining the remaining issues in these dockets, interested parties -- and especially the container leasing companies -- should state whether they believe further proceedings are necessary, and, if so, to describe in detail the evidentiary issues which require determination and the appropriate procedures for resolving such issues. Based on these submissions, the Commission will provide an opportunity to participate in further proceedings of such nature and extent as may be warranted. In any further proceedings, those persons alleging competitive harm caused by container use practices would have an opportunity to adduce evidence of such harm. The Commission would also welcome comment from interested parties as to whether it might be desirable to approach the general question of container use practices and allowances from a broader perspective, including both conference and nonconference carriers.

THEREFORE, IT IS ORDERED, That interested parties file with the Commission on or before February 27, 1981, a statement which describes any further administrative proceedings believed to be necessary and the exact issues which would be developed in such proceedings.

By the Commission.*

(S) FRANCIS C. HURNEY
*Secretary*

existed the others and may reflect the absence of a "neutral container system" on the West Coast. Thus, in any further proceeding involving the PCEC rule, it will be necessary to develop evidence as to whether such a "system" exists on the West Coast and, if so, the effect, if any, of the rule on that system.

* Vice Chairman Kanuk dissents.

*Vice Chairman Leslie Kanuk, dissenting.*

I can not agree with the majority's approach to the Court's remand in this case. The majority states that the purpose and direction of a Commission investigation are "presently unclear", and suggests, in effect, that this proceeding may be moot. The problem with this approach is that the Court (1) specifically found that a justiciable controversy does exist regarding the correctness of the Commission's prior decision, and (2) set out the issue to be addressed on remand.

In its opinion, the Court vacated the Commission's prior order and remanded the case "for further proceedings in accordance with this opinion". *Interpool Ltd. v. Federal Maritime Commission*, No. 79-1194, Slip Op. at 18 (D.C. Cir. Nov. 18, 1980). The Court found that the Commission had misapplied the appropriate legal standard in making its decision, since it failed to consider how the involved neutral container rules would affect competition. The Court pointed out that the Commission itself had, in its 1976 Show Cause Order, raised serious antitrust questions about the effects of the rules. The Court noted, however, that in its subsequent report, the Commission merely concluded that the neutral container rules did not require separate approval under section 15 because they were routine implementations of authority contained in the carriers' basic conference agreements. *Interpool Ltd. v. Federal Maritime Commission, supra* at 9. Therefore, the Court directed the Commission, on remand, to reconsider the rules in terms of their effect on competition.

I cannot understand how the majority can now conclude that the purpose and direction of further proceedings are unclear. The Court's instruction seems clear to me. The Commission is to consider the actual competitive effect of the involved rules. In addition, the majority's suggestion that the case may be moot is clearly untenable. If the majority is basing this suggestion on the grounds that all but one of the involved conferences have cancelled the neutral container tariff rules in issue, the relevance of this fact is not clear, since the tariff rules were cancelled well before the Commission issued its Report in 1978. In point of fact, these rules were cancelled shortly after the Show Cause Order was issued in 1976. Despite this fact, the Commission found, in its 1978 Report, that the case was *not* moot, and proceeded to reach a decision on the merits. Furthermore, the Court itself concluded that since the Commission's decision allowed the conferences to implement the neutral container rules, and since the container leasing companies argued that the Shipping Act prohibits their implementation, a justiciable controversy exists regarding the Commission's final decision. *Interpool v. Federal Maritime Commission, supra* at 9, n. 9.

Thus, at this point, it appears to me that the Commission has no choice but to re-examine the involved rules, taking into consideration

their anti-competitive effects, if any. The Commission should not be asking interested parties to describe any further proceedings believed to be necessary, since the Court has concluded that further proceedings are necessary, and has set out the specific issue to be addressed in such proceedings.

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-39

UNION CARBIDE CORPORATION

*v.*

THE SHIPPING CORPORATION OF INDIA, LIMITED

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## NOTICE

*January 27, 1981*

Notice is given that no exceptions have been filed to the December 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. 80-39
UNION CARBIDE CORPORATION

*v.*

THE SHIPPING CORPORATION OF INDIA, LIMITED

Reparation granted.

*Warren Wytzka* for complainant.

*T. Ciminello* for respondent.

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

*Finalized January 27, 1981*

Union Carbide Corporation, in the business of marketing chemical products, charges the Shipping Corporation of India with the assessment of a higher rate than was properly applicable to a shipment of its products. Reparation of $19,628.98 is sought. Respondent has agreed to the use of the shortened procedure provided in Subpart S of the Commission's Rules of Practice and Procedure.

Complainant contends that the shipment in question consisted of 520 drums & pallets consisting of 220 bags of Polyethylene Resin (Non-Hazardous) and should have been so classified under Item 1270 of respondent's Tariff No. 14.[2] Respondent classified the shipment as Chemical N.O.S. The only issue presented is that of the proper classification of the commodity shipped.

On the bill of lading the shipment was described as Chemicals N.O.S. On the shipper's Export Declaration it was described as (LOW DENSITY POLYETHYLENE) Chemicals N.O.S. On the Dock Receipt the cargo was described as 520 drums Insulation Compound and 5 pallets Insulation Compound. Finally on an unnamed document of Union Carbide the cargo was variously described as "INFILLED XLPE COMPOUND, HFDE 4201;"SEMICONDUCTING XLPE INSULATION COMPOUND, HFDA 0580 BLACK;" and "FILLED XLPE INSULATION COMPOUND, HFDA 5630." Complainant submitted an

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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 Third revised page 233, item 1270, Tariff No. 14, FMC No. 3 of the India, Pakistan, Bangladesh, Ceylon and Burma Outward Freight Conference, Synthetic Resin: Non-Hazardous, Polyethylene.

overcharge claim to respondent which rejected it on the ground that it was untimely filed under Rule 20 of the Conference Tariff which requires that claims involving changes in description of the cargo be filed before the cargo leaves the custody of the carrier.

Complainant's contention is that the export declaration and Union Carbide's Chemical Brochure, page 70 (submitted with the complaint), establish that the commodity shipped was in fact Polyethylene Resin. Respondent's answering memorandum (actually a one page letter) simply asserts its belief that complainant has failed to sufficiently prove that the commodity description was erroneous, particularly when the bill of lading listed the goods Chemicals N.O.S. and the Dock Receipt described the goods as insulation Compound.

Polyethelene Resin is generically described as Synthetic Resin. The Schedule B number 444.1610, shown on the Export Declaration is applied to Polyethylene: Low and Medium Density (with specific gravity not over 0.940). Thus the shipment was classified as Polyethylene Resin on the Export Declaration. Page 70 of Union Carbide's Brochure, under the overall heading of Polyethylene Resins, lists "Semiconductive Shielding HFDA 0580 Black 55;" "Primary Vulcanizable Insulation HFDE 4201 Natural," and "weatherproof Vulcanizable Insulation HFDA 5630 Black." The numbers following the description of the three commodities coincide with the numbers on the previously mentioned unnamed document which would appear to be some kind of Union Carbide order form or more probably packing list.

In *Western Publishing Company v. Hapag Lloyd A.G.*, the Commission said:

> The description on the bill of lading is not the single controlling factor in cases of this nature (overcharge cases). 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 the shipper's misdescription on the bill of lading. Likewise claimant is not bound at least where the misdescription results from unintentional mistake or inadvertence.

In order to sustain a claim the complainant "must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim." *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 245 (1973). The decision must be based on "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. 84, 85 (1976).

On the basis of the record as a whole, I conclude that the shipments should have been classified under Item 1270 as Synthetic Resin: Non-Hazardous, Polyethylene with total freight charges in the amount of

$14,646.90. The freight charges actually paid under the Cargo N.O.S. classification were $34,275.88. Reparation is awarded in the amount of $19,628.98.[3]

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

Washington, D. C.
December 16, 1980

[3] See Appendix.

## APPENDIX

Below are all Pertinent data concerning this shipment:

| | |
|---|---|
| Our shipment consisted of: | 520 Drums & 5 Pallets consisting of 220 bags Polyethylene Resin (Non-Hazardous) |
| Our shipment measured: | 6607 cubic feet |
| Our shipment weighed: | 157880 lbs. |
| Shipment's origin: | New York |
| Shipment's destination: | Bombay |
| Name of Vessel: | Vishva Nayak |
| Bill of Lading No.: | 126 |
| Bill of Lading date: | March 9, 1979 |
| Freight rate assessed: | $148.75 per 40 cu.ft. plus 4% Suez Transit Surcharge, plus $30.50 per 40 cu.ft. Bunker Surcharge, plus 15% Bombay Port Detention Surcharge |
| Total freight: | $34275.88 |
| Paid by: | Union Carbide Corporation |
| The amount herewith claimed as overcharged is: | $19628.98 |
| Correct B/L description: | Polyethylene Resin as Synthetic Resin (Non-Hazardous) |
| Correct freight rate: | $149.00 per 2240 lbs. plus 4% Suez Transit Surcharge, plus $30.50 per 2240 lbs. Bunker Surcharge, plus 15% Bombay Port Detention Surcharge |
| Correct Total freight: | $14646.90 |

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-58

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE

*v.*

CIA. SUD AMERICANA DE VAPORES

## NOTICE

*January 27, 1981*

Notice is given that no appeal has been taken to the December 17, 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. 80-58

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE

*v.*

CIA. SUD AMERICANA DE VAPORES

SETTLEMENT APPROVED; COMPLAINT DISMISSED

*Finalized January 27, 1981*

This case began with the service of a complaint on August 29, 1980. Complainant Latin America/Pacific Coast Steamship Conference alleged that respondent Cia. Sud Americana de Vapores (Chilean Line) had on three occasions in February and March of 1980 carried fruit from Chile to Long Beach or Los Angeles, California, as a common carrier by water without having first filed a tariff with the Commission, thereby violating section 18(b) of the Shipping Act, 1916, 46 U.S.C. 817(b). Complainant alleged, furthermore, that respondent's failure to file a tariff subjected complainant's member lines to unjust and undue prejudice and unlawful competition and caused damages in an amount not ascertainable at the time of filing the complaint. Respondent admitted that it had operated three ships from Chile to California during the time mentioned in the complaint but denied that it had acted as a common carrier by water or that it had been required to file a tariff.

After the issue had been joined, respondent commenced discovery on September 29, 1980, by serving a detailed set of interrogatories and requests for production of documents. Shortly before this time, however, the parties had begun to consider possible settlement which would avoid the expense of litigation, a problem aggravated by the distance between respondent in Chile and complainant in California. In order to permit settlement discussions to continue, the parties requested permission to defer the normal discovery schedule, a request which I granted. Relieved of the burden of continuing with discovery and litigation, the parties continued with their discussions which ripened into a settlement. On December 4, 1980, the parties filed (mailed) a request that their settlement be approved and that the complaint be dismissed.

In their papers describing their settlement and urging its approval, the parties describe the terms of their settlement which are rather simple.[1] The complainant Conference recognizes the extreme difficulty

[1] The papers embodying the settlement were received by the Commission Secretary on December 5, 1980. They consist of a three-page request for approval of the settlement with explanation, signed

of proving the amount of damages which its member lines allegedly suffered as a result of respondent's three sailings from Chile many months ago. Of course, it would also have been necessary for complainant to prove that respondent had operated as a common carrier by water subject to the tariff-filing requirements of the Shipping Act since respondent denies that it had operated as such. If complainant had been able to prove everything it alleged and, in addition, had been able to develop some type of formula and evidence proving financial injury, complainant might have obtained all that it had asked in its complaint, namely, an order requiring respondent to file a tariff if it resumed carriage in the future as well as reparation. By the terms of the settlement, however, complainant is willing to resolve its controversy with respondent on condition that respondent file a tariff if it resumes carriage and complainant agrees to forego the difficult task of proving damages and violations of law for past sailings. In return respondent promises to file a tariff in case of future sailings in which it may carry fresh fruit from Chile to United States West Coast ports without admitting that it had violated the law in the past. Both parties therefore believe that it is more beneficial to their respective interests to settle on such a basis rather than to attempt to vindicate such interest at great expense associated with litigation. Since a continuation of litigation in this case would undoubtedly entail further discovery, possibly with complications because of the distant location of respondent and respondent's records in Chile and the difficulties of proving damages and the exact status of respondent when it operated the three ships in early 1980, it appears that the settlement is far more economical to each side than protracted litigation.

## DISCUSSION AND CONCLUSIONS

It is well settled that both the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid. See *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978) and the many cases cited therein. See also Commission Rules 91 and 94, 46 C.F.R. 502.91; 502.94, and the Administrative Procedure Act on which Rule 91 is based, 5 U.S.C. 554(c)(1).[2] The general policy favoring settlements is summa-

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by counsel for both parties, and a one-page letter, dated November 26, 1980, signed by respondent's General Manager. My ruling describes the contents of these documents.

[2] The APA, 5 U.S.C. 554(c)(1) provides:

> The agency shall give all interested parties opportunity for --
>
> (1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit;

The courts view this provision and its legislative history "as being of the 'greatest importance' to the functioning of the administrative process." *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). Congress encouraged agencies to make use of settlements and wished to advise private parties that "they may legitimately attempt to dispose of cases at least in

rized in the following passage drawn from a recognized authority, which language was adopted by the Commission in the *Old Ben Coal Company* case, cited above, 21 F.M.C. at 512.

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy . . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims . . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy. 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976). (Footnote citations omitted.)

Consistent with these policies, the Commission has in recent years approved a wide variety of settlements and discontinued numerous complaint cases under various provisions of the Shipping Act, 1916. See list and description of settled cases recited in *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 364, 368-369 (1979). As explained in *Old Ben*, cited above, 21 F.M.C. at 512, the Commission recognizes the advantages to settlements but exercises some judgment before approving them. Mainly the Commission is concerned that the settlement not contravene any law or public policy, for example, that it not be the result of fraud, duress, or mistake, that it not constitute a discriminatory device or consummate a desire to contravene any provision of the Shipping Act, or, if a certain type of agreement, that it be filed for approval under section 15 of that Act.

The present settlement seems fully consistent with all the principles cited above that favor its approval. It represents the considered judgment of both partes that it is an amicable solution to a controversy that is far preferable to the uncertainties and expense of protracted litigation. It gives complainant the assurance that respondent will file a tariff if it carries fruit in the subject trade in the future and relieves complainant of the burden of trying to prove damages as well as violations of law. It also relieves respondent of the expense of showing that it had not operated as a common carrier in connection with the past sailings in

part through conferences, agreements, or stipulations." Senate Judiciary Committee, APA-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at 24.

question. Regardless of which party might have prevailed on the merits had the case proceeded to conclusion, both parties apparently believe that the cost of protracted litigation would outweigh the benefits of ultimate vindication.

The present settlement shows every sign of being a traditional, amicable resolution of a controversy which, as noted, the law has long encouraged. Moreover, it shows no indication of violation of any principle or policy.[3] Hence, I find it deserving of approval. Accordingly, the settlement is approved, the complaint is dismissed, and the proceeding is terminated.

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

December 17, 1980

[3] This settlement is not affected by the complications relating to settlements reached under section 18(b)(3) of the Act concerning alleged tariff overcharges nor is the settlement an anticompetitive agreement among carriers falling under one of the seven categories of section 15 of the Act. The settlement merely means that respondent Chilean Line will file a tariff in accordance with section 18(b)(1) of the Act if it resumes carriage of fresh fruit in the subject trade, an act which the law would require anyway if the Chilean Line operates as a common carrier.

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 76-59
## AGREEMENT NOS. T-3310 AND T-3311

## NOTICE

*January 28, 1981*

Notice is given that no exceptions have been filed to the December 18, 1980 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 76-59
## AGREEMENT NOS. T-3310 AND T-3311

The Indiana Port Commission and Ceres, Inc., found not shown to have violated section 16 First and section 17 of the Shipping Act. Proceeding discontinued.

*Theodore L. Sendak, William E. Daily, Timothy J. May, Richard A. Earle,* and *John V. E. Hardy, Jr.* for respondent Indiana Port Commission.

*Warren C. Ingersoll* for respondent Ceres, Inc.

*Paul J. Kaller, Joseph B. Slunt,* and *Deana E. Rose* as Hearing Counsel.

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

*Finalized January 28, 1981*

The subject proceeding originally encompassed a number of issues, but now is concerned only with the alleged violations by the Indiana Port Commission (Port Commission) of sections 16, First, and 17 of the Shipping Act, 1916 (the Act), and the alleged violation by Ceres, Inc. (Ceres),[2] of section 17 of the Act. The subject proceeding also includes an investigation of whether Ceres violated section 16, First, but Hearing Counsel state that they do not believe that the record supports a finding against Ceres under section 16, First, and this issue will not be considered further herein.

The alleged violations are said by Hearing Counsel to have resulted from the Port Commission's alleged grant to Ceres of exclusive control of every berth at Burns Waterway Harbor, Portage, Indiana (Burns Harbor), adequate in size for serving ocean vessels, thereby precluding a competing stevedore, Lakes and Rivers Transfer Corporation (LRTC), from access to all berths at Burns Harbor suitable in size to serve ocean vessels (section 16, First), and by the alleged failure of the Port and Ceres to adopt reasonable rules or practices regarding a public terminal (section 17).

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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] Ceres, Inc., owns 100 percent of Calumet Harbor Terminals, Inc. (Calumet). Ceres and Calumet own 100 percent of Ceres Marine Terminals, Inc. (Ceres Marine). Ceres Marine was formerly known as Tri-State Terminals, Inc. Ceres, Ceres Marine and Tri-State Terminals, Inc., have operated or operate terminal facilities, and have performed or perform stevedoring services at Burns Waterway Harbor, Portage, Indiana. For convenience, these three entities will be referred to as Ceres or Ceres, Inc, and where leases and agreements were made at Burns Harbor with Tri-State Terminals or with Ceres Marine, they will be referred to as if made with Ceres.

To put the above remaining issues in this proceeding into proper perspective, it is appropriate to go into the history of this proceeding and into what has taken place in a related proceeding, No. 76-22, *Lakes and Rivers Transfer Corporation v. The Indiana Port Commission.*

Burns Harbor, also known as the Port of Indiana, is a man-made port located on the south shore of Lake Michigan. It consists of a breakwater on the north and west, which protects a turning basin running east and west, and it consists of two harbor arms running north and south, known as the West Harbor Arm and the East Harbor Arm.

The west wall of the West Harbor Arm and adjacent property are owned by the National Steel Corporation, and the east wall and one-half of the south wall of the East Harbor Arm and adjacent property are owned by the Bethlehem Steel Corporation. These facilities of the two steel companies are not in issue herein.

The issues are concerned with the inner walls of the two Harbor Arms, that is, the east wall of the West Harbor Arm, and the west wall of the East Harbor Arm, and the south walls of both Arms except the half of the south wall on the East Harbor Arm owned by Bethlehem Steel. The Port Commission owns the land beneath Burns Harbor and about 500 acres immediately south of Burns Harbor.

The Port Commission's facilities at the time of the close of hearings in Docket No. 76-22, on October 21, 1976, on the West Harbor Arm, consisted of a self-unloaded area with mooring dolphins, berth No. 5, at the south end of the West Harbor Arm; a berth at the south end of the east wall of the West Harbor Arm, berth No. 1, which was 250 feet long; and three 500 feet long berths on the east wall of the West Harbor Arm, Berths Nos. 2, 3, and 4. The Port Commission's facilities on the East Harbor Arm at that time consisted of a 688-feet long berth on the west side of the East Harbor Arm, Berth No. 6; and a 360-feet long berth on the south wall of the East Harbor Arm, Berth No. 7.

Berth No. 5 does not have a dock and its use is limited to ships with self-unloading equipment of a type used for bulk cargoes in the Great Lakes. Berths Nos. 1 and 7 are limited by their size to barges and lake vessels, and cannot accommodate large ocean-going vessels.

Ceres (then Tri-State) and the Port Commission on March 1, 1972, entered into an agreement for the lease of Transit Shed No. 1 and an outside storage area immediately adjacent, and agreed for the exclusive use of the wharfage and trucking concourse adjacent to Transit Shed No. 1 and the outside storage area, all located on the West Harbor Arm. This agreement, No. T-2602, was filed with the Commission on March 2, 1972, and approved on March 6, 1973.

Ceres and the Port Commission entered into an agreement dated April 1, 1975, by which Ceres leased Transit Shed No. 2 and was granted exclusive use of the adjacent wharfage and trucking concourse

areas, all located on the West Harbor Arm. This was Agreement No. T-3310.

Ceres and the Port Commission entered into another agreement dated May 1, 1975, by which Ceres leased Outside Storage Area No. 2 and the adjacent wharfage and trucking concourse areas, all located on the East Harbor Arm. This was Agreement No. T-3311. The exclusive use of this area was subject to a concurrent right of the Levy Corporation to use the premises until the Port Commission made other wharfage and dockage facilities available to Levy elsewhere at Burns Harbor. Levy has a plant west of the main road going into Burns Harbor where it processes steel mill slag for road building materials and other aggregate substitutes.

Both Agreements Nos. T-3310 and T-3311 were filed with the Commission on May 25, 1976, which was after they had been entered into and effectuated.

The subject proceeding (No. 76-59) is the second of two related proceedings concerning these lease agreements at Burns Harbor. In this second proceeding (No. 76-59), the Commission ordered an investigation and hearing to determine whether Agreements Nos. T-3310 and T-3311 are unlawful and should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (the Act); whether these two agreements had been implemented prior to their approval; whether these agreements constituted the parties' complete understanding with respect to the use of the facilities covered thereunder or whether there was implementation of unfiled agreements; whether these two agreements resulted in undue or unreasonable preference or advantage or in undue or unreasonable preference or disadvantage to any person in violation of section 16, First, of the Act; and whether these two agreements resulted in unjust or unreasonable practices relating to or connected with the receiving, handling, storing or delivering of property in violation of section 17 of the Act. This second proceeding (No. 76-59) was consolidated with the first proceeding (No. 76-22). As early as December 7, 1976, the Administrative Law Judge, in his denial of a first motion for a cease and desist order, had suggested that LRTC and the Port Commission negotiate the lease of new berthing space, and in effect resolve their own problems.

As of November 24, 1976, the Port Commission advised that it had contracted at a cost of $1,465,241.02 to extend by 600 feet the berth on the East Harbor Arm, estimating completion of the additional berthing space by April 22, 1977, one week after the opening of the 1977 shipping season on the Great Lakes. The construction of a new berth was intended to enlarge the Port's facilities and such increased facilities were intended to provide adequate facilities for any and all stevedores who might use them. However construction was delayed by adverse weather and other problems. On May 2, 1977, the Administrative Law

Judge, in response to a second or renewed motion for a cease and desist order, recommended that a cease and desist order be issued against the Port Commission regarding Agreements Nos. T-3310 and T-3311 so that the parties could make other arrangements to serve LRTC.

Two orders were served by the Commission on August 9, 1977, requiring the Port Commission and Ceres to cease and desist implementation of Agreements Nos. T-3310 and T-3311. The parties thereby were required to cease and desist from carrying out all terms of these agreements, and otherwise were required to cease providing for the exclusive or preferential use of any facilities at Burns Waterway Harbor.

In its cease and desist orders the Commission found that Agreements Nos. T-3310 and T-3311 were subject to section 15 of the Act, and had been implemented without prior approval of the Commission. In its order regarding No. T-3311, the Commission stated that by virtue of Agreements Nos. T-2602, T-3310 and T-3311, Ceres had exclusive control of every berth at Burns Harbor capable of receiving a vessel larger than a barge or small lake vessel, and that LRTC was precluded from access to all berths which could be used to service customers using ocean vessels.

In time, LRTC and the Port Commission settled all their differences largely through the construction of new facilities at Burns Waterway Harbor, and the execution of new lease agreements filed with and approved by the Commission.

In particular, on July 19, 1979, the Administrative Law Judge approved a settlement agreement (No. T-3762), between the Port Commission and LRTC, and also approved six other agreements, namely, No. T-3763 between the Port Commission and LRTC regarding Outside Storage Area No. 2, etc.; No. T-3764 between the Port Commission and LRTC regarding 6.36 acres for storage of bulk cargo, etc.; No. T-3765 between the Port Commission and Ceres regarding Outside Storage Area No. 3, etc.; No. T-3766 between the Port Commission and Ceres regarding Transit Shed No. 2, etc.; No. T-3767 between the Port Commission and Ceres regarding Transit Shed No. 1, etc.; and No. T-3768 between the Port Commission and Ceres regarding a freezer facility, etc.

The lease agreement between the Port Commission and LRTC provided for the lease of Outside Storage Area No. 2 (formerly leased to Ceres under Agreement No. T-3311) and for the preferential use of Berth No. 6 and of the wharfage and trucking concourse adjacent to the berth, initial term to expire September 30, 1980, with a five year renewal option.

The preference granted above to LRTC for the use of Berth No. 6 is applicable only to ships longer than 360 feet. So long as LRTC notifies the Port Commission two days in advance of when one of its ships

longer than 360 feet is to arrive at Burns Harbor, LRTC can utilize Berth No. 6, but otherwise Berth No. 6 is an open berth available on a first-come, first-serve basis by any stevedore licensed at Burns Harbor.

The above settlement agreement and the six lease agreements resolved all the disputes (in both Docket Nos. 79-22 and 79-69) between the Port Commission and the complainant--LRTC, a stevedore of bulk cargoes, and any related disputes with Ceres, a stevedore mainly of general cargoes. On August 28, 1979, the Commission determined not to review the approval of the above seven agreements (No. T-3762 through T-3768, inclusive), and noted that these agreements stood approved.

By ruling and order served October 24, 1979, the Administrative Law Judge, among other matters, ruled that the complaint in No. 76-22 had been withdrawn and that the proceeding in No. 76-22 was terminated. By notice served November 28, 1979, the Commission determined not to review the dismissal of the complaint in No. 76-22, and noted that the dismissal became final.

The settlement agreement (No. T-3762) provided for the withdrawal of the complaint in No. 76-22 and for the withdrawal of LRTC's protests of Agreements Nos. T-3310 and T-3311 in Docket No. 76-59, in consideration for which and for other considerations, the Port Commission agreed to give LRTC a certain preferential use of Berth No. 6 at Burns Harbor, and the exclusive use of Berth No. 7, subject to the stevedoring needs of the Levy Corporation, and subject to other conditions, as well as the lease and rental of certain other facilities to LRTC.

During the course of these proceedings the facilities at Burns Harbor have been expanded by the construction of more dock space and berths at very considerable costs to the Port Commission and the State of Indiana. The Port Commission is an agency of the State of Indiana.

As a result of the approval of the above settlement agreement and approval of the six related agreements, Agreements Nos. T-3310 and T-3311 have been replaced, and approval of these two agreements is no longer sought.

The parties remaining in the proceeding now are the respondents, Ceres and the Port Commission, on the one side, and Hearing Counsel, as the only litigant on the other side.

Presently, as stated by the Port Commission, "It is not clear precisely what interest of the public is being vindicated by Hearing Counsel," inasmuch as the Port Commission assertedly has acted reasonably in accordance with its responsibilities to both the shipping public and the State of Indiana.

It appears to the Administrative Law Judge that this proceeding now has become a case, particularly in its present stage, following the various approved agreements and settlement above, where there should be no further regulation merely for the sake of regulation. This is so,

considering that the Port Commission, as an agency of the State, ostensibly at all times acted in what it believed to be the interests of the shipping public and the State of Indiana. Nevertheless, Hearing Counsel take the position that the Indiana Port Commission violated sections 16, First, and 17 of the Act by the carrying out of Agreements Nos. T-3310 and T-3311, thereby granting Ceres exclusive control at the Port of Burns Harbor, Indiana, over all berths in the port suitable in size for the handling of oceangoing ships (as distinguishable from berths suitable for the handling of self-unloader ships, lake barges and river boats). Hearing Counsel also take the position that Ceres violated section 17 of the Act, and that the Indiana Port Commission violated section 17, by failing to adopt reasonable rules or practices regarding a public terminal, by establishing a stevedoring monopoly.

Contrariwise, it is the position of Ceres that the Port of Burns Harbor was in competition with the Port of Chicago, that Ceres could not have provided desirable service to regularly scheduled liner operators without being able to guarantee berthing space for the prompt and efficient discharge of ocean cargo and that no anti-trust violations were committed either by Ceres or by the Indiana Port Commission.

The Indiana Port Commission takes the position that it entered into the subject two agreements in the belief that they were crucial to the financial survival of Burns Harbor and that they would benefit both the shipping public and the people of the State of Indiana, and that no stevedoring or other monopoly was created at Burns Harbor as a consequence of the said two agreements or their implementation.

Burns Harbor is about 70 miles from the commercial center of Chicago. It is a relatively new port somewhat removed from the established shipping lanes of the Great Lakes. When Burns Harbor was opened in 1970, it had great difficulty in obtaining stevedores, to compete with the Port of Chicago and other Great Lakes ports. Only Ceres (actually Ceres' subsidiary, Tri-State Terminals, Inc.) was interested in coming to Burns Harbor in 1971 and 1972.

Burns Harbor was not known to foreign shippers nor to domestic shippers. The new port's problems were discussed with Mr. Chris Kritikos, the principal officer of Ceres, and a man long experienced in the shipping and stevedoring businesses. Ceres since 1958 has been engaged in stevedoring cargoes at various ports, including Chicago, Ill., Duluth, Minn., Toledo, Ohio, Hamilton and Toronto, Ontario, Montreal, Quebec, and Baltimore, Md., among others. At the listed ports, Ceres has stevedored general cargoes. Ceres is considered to be the largest stevedoring and terminal operating company from Montreal and west in the area of the Great Lakes. In 1975, Mr. Kritikos acted as Chairman of the Great Lakes Association of Stevedores, for the negotiation of the master agreement with the International Longshoremen's Association. Mr. Kritikos also is a member from Illinois appointed by

the Governor, of the Great Lakes Commission, which consists of five Commissioners, one from each Great Lakes state.

Ceres specializes in the stevedoring of general cargo. It began operating out of Burns Harbor, under the name of Tri-State Terminals, in 1972.

Mr. Jack Fitzgerald, the Port Director and Chief Executive Officer of the Indiana Port Commission, so employed since 1969, came to Burns Harbor when the port was under construction. Dredging was not yet finished and there was only one berth, which was at the south end of the West Harbor area. Very little road system existed, the railroad loop was not in place, and there were no transit sheds. An ore ship made the first call in 1969, delivering material to Bethlehem Steel.

The first ship which came to the public part of the port came in 1970.

The Indiana Port Commission was faced with the problem of getting the port started. Mr. Fitzgerald discussed the port's problems with Mr. Kritikos, who advised that Ceres or its predecessor had to have exclusive rights at its berths in order to generate business at a new port.

The Port Commission accepted the views of Mr. Kritikos and granted him the exclusive use of Transit Shed No. 1. The Port Commission recognized that it needed an experienced stevedore which could draw business from the Port of Chicago and elsewhere. The first lease agreement between the Port Commission and Ceres was Agreement No. T-2602, which was approved by the Federal Maritime Commission.

As Ceres' business at Burns Harbor grew, it sought further leases. The Port Commission was able to consider Ceres' proposals only because of the financial commitment Ceres had made to the Port. Ceres and the Port agreed to enter Agreements Nos. T-3310 and T-3311, when no other general stevedore had expressed any interest in operating at Burns Harbor. When these two latter agreements were entered into the Port inadvertently neglected to submit them to the Federal Maritime Commission, although it had earlier submitted No. T-2602 for approval. The Deputy Attorney General for the State of Indiana assumed the blame for this failure to file, stating that he was unaware of section 15 of the Shipping Act and that he was the second-successor Deputy Attorney General having appropriate duties since the first of two prior Deputies filed Agreement No. T-2602 for approval.

This third Deputy never discussed with the Port whether such a filing was necessary, and in May 1976, immediately upon realizing that there existed unfiled leases which might constitute section-15 agreements, counsel for the Port submitted Agreements Nos. T-3310 and T-3311 for approval by the Federal Maritime Commission.

In contrast to Ceres, LRTC in 1976 was a stevedore of bulk commodities with no prior experience. Because of lack of guaranteed berthing space, LRTC was unable to attract, or lost certain bulk cargoes.

Luria Brothers, a dealer and processor of iron and steel scrap, was unable to use the services and facilities of LRTC because LRTC was unable to provide Luria with dock space to accommodate ocean vessels. Luria instead did business at the Port of Milwaukee. Stainless Processing Company, an exporter of stainless steel and copper by barges, would have brought ocean vessels to Burns Harbor if LRTC had the space.

Ceres, as a stevedore of general commodities, was not interested in bulk commodities such as those which LRTC proposed to handle. However, Ceres was not disposed to encourage any rival stevedore, such as LRTC, at Burns Harbor, when such a stevedore in time might seek to handle general commodities. LRTC proposed to handle slag, coal, scrap metal, road de-icing salt, etc. LRTC had a written license from the Indiana Port Commission to stevedore coal, and verbal authorization to unload other bulk cargoes.

Ceres at Burns Harbor was in direct competition with other stevedores of general commodities located at the Port of Chicago. Notice was taken previously, that at the Port of Chicago, there were lease provisions which generally gave the Chicago stevedores a type of exclusive use of terminal facilities. These noticed facts were confirmed by testimony at the last hearing. Ceres points out that its leases at Burns Harbor were "procompetitive" particularly in the sense that they enabled Burns Harbor to compete with the Port of Chicago. Obviously, the competition of Burns Harbor with the Port of Chicago was the far more important factor, rather than the factor of the exclusivity of the leases to Ceres of certain facilities at Burns Harbor. In other words, a substantial nucleus of business was generated for Burns Harbor by the leases, without which Burns Harbor probably could not have gotten established.

It was the practical and sensible thing for a new port such as Burns Harbor to encourage competition with the Port of Chicago, rather than to place undue emphasis on potential competition between two or more stevedores of general commodities at Burns Harbor, when in fact only one stevedore of general commodities had expressed any interest in serving Burns Harbor. Ceres concludes that under the circumstances its lease agreements were neither unjust or unreasonable. In fact, it is concluded that while the two leases in issue were anti-competitive as far as LRTC was concerned, on the other hand viewing the over-all competitive picture and competition with the Port of Chicago, the two leases were predominately pro-competitive.

Hearing Counsel rely on the testimony of Mr. Jack Fitzgerald, Port Director and Chief Executive Officer of the Indiana Port Commission, that there existed sufficient business at Burns Harbor for two stevedores to operate as of October, 1976. Hearing Counsel misunderstand the testimony. The testimony was amplified by Mr. Fitzgerald to mean that

he thought there was room for both Ceres and LRTC in that they were complementing each other, in their operations, because Ceres was handling general cargo, containers and breakbulk, whereas LRTC had shown interest only in bulk cargo. There is no record proof that in 1976 there had been developed sufficient business at Burns Harbor for two stevedores of general commodities.

At all times, Ceres engaged in general cargo stevedoring and LRTC in bulk stevedoring.

The hearing of January 15, 1980, sheds very considerable light on the remaining issues herein. Three witnesses testified at that time. They were officials of Kerr Steamship Company; Inter Ships, Incorporated; and Beam Shipping, Inc., all steamship agents.

The Port of Chicago in the period of 1975-1976 had about five or six stevedores, and there were other ports on the Great Lakes that had only one stevedore. Cleveland may have had two stevedores at the time. Kenosha, Wisc., Milwaukee, Wisc., and Green Bay, Wisc., each have one stevedore.

For a shipping line to make a stop at the Port of Indiana or at the Port of Chicago, certain factors would be considered. For liner operations, the factors considered would be accessibility or availability of cargo, availability of space in a terminal, guaranteed berthing, rates, equipment, the stevedore, and the general record of the performance of the stevedore, among other factors.

Should the facilities, including guaranteed berthing space be not available, for example at the Port of Indiana, it would be feasible for a steamship line to call at the Port of Chicago.

With a liner service in particular, the steamship agent has to know that a berth is there to take care of its vessel when it arrives in a port, because for economy it is necessary to get as many sailings of a vessel as is possible. If a berth is not available at a port, the vessel is delayed and its turn-around time is lengthened. Usually a designated area is necessary for containers and that means an exclusive area dedicated to the container operation.

Therefore, the steamship agent negotiates a contract with the stevedore to make sure that the stevedore commits himself to giving a berth to the steamship line when its ship calls. In the Great Lakes area, for the most part stevedores have the ability to guarantee a berth in advance, and to do this the stevedore must have exclusive use of certain terminal facilities.

If a steamship agent were to be confronted with a situation where its ship were forced to wait two or three days for a berth, it would be the recommendation of the agent to find another stevedore and another terminal.

One of the steamship agents first used Burns Harbor as an emergency solution to a problem at Chicago which resulted from a work stoppage

or crane problem. The agent continued to use Burns Harbor because it had clear clean space for containers, and the space was not congested. However, the geographical position[3] of Burns Harbor (the Port of Indiana) is not as good as is the Port of Chicago, and therefore it is necessary that Burns Harbor offer at least equal or better services and terms and conditions compared with the Port of Chicago, for Burns Harbor to attract general cargo. One of these terms or conditions is an assured berth.

From the steamship agent's point of view it is highly undesirable for a stevedore to handle bulk commodities at the same facilities at which are handled liner cargoes. Open-top containers and half-height containers are subject to contamination, which must be avoided. Flat and clean surfaces are essential for containers. If a facility is used for both bulk stevedoring and general cargo stevedoring, this would be unsatisfactory.

Stevedores at the Port of Chicago can guarantee berths because the stevedore has exclusive use of the berth, and the stevedore at the Port of Chicago is also the terminal operator.

As of January 15, 1980, the Port of Indiana had under contract, the construction of two additional berths. These will be public berths, not under exclusive arrangement or exclusive lease to anyone. These two additional berths will be sufficient in size to handle any ships which may navigate the St. Lawrence Seaway.

GENERAL CONCLUSIONS AND FINDINGS.

Considering the record as a whole, particularly the testimony of the witnesses at the last hearing as to the competitive situation between the Port of Burns Harbor and the Port of Chicago, it is concluded and found that the actions of the Port Commission of the Port of Indiana were reasonable under all the circumstances, and in fact the agreements entered into by the Port Commission (Nos. T-3310 and T-3311) with Ceres were pro-competitive and necessary in view of shipping customs and practices in the Great Lakes area, particularly at the Port of Chicago.

Agreements Nos. T-3310 and T-3311 have in time been canceled, and new agreements in lieu thereof have been entered into and approved by the Federal Maritime Commission. All the parties at interest, save Hearing Counsel, are satisfied, and contend that no violations of the Shipping Act are shown.

Ceres promoted competition in the Great Lakes area by agreeing to serve and by serving Burns Harbor.

[3] The Port of Chicago is located closer to the center of the commercial zone than is the Port of Indiana. Many more truck lines service the Port of Chicago than service the Port of Indiana.

The State of Indiana, through its Port Commission, did what was necessary to establish a new port. The result was more competition than heretofore existed in the Great Lakes area. Agreements Nos. T-3310 and T-3311 were necessary and crucial to the operation of Burns Harbor at the time. The Port of Indiana at very considerable expense has expanded its facilities, so that if enough business in general cargo is developed there will be room for more than one stevedore of general commodities to serve ocean vessels at the same time. These expanded facilities also provide room for stevedores of bulk commodities, using ocean vessels.

It is concluded and found that it has not been shown that there was any violation by the Port Commission of section 16 First or section 17 of the Act; nor has it been shown that there was any violation of these same sections of the Act by Ceres. The proceeding in No. 76-59 is discontinued.

(S) CHARLES E. MORGAN
*Administrative Law Judge*

Washington, D. C.
December 18, 1980

# FEDERAL MARITIME COMMISSION

DOCKET NO. 79-97

QUALITY FOOD CORPORATION

*v.*

TROPICAL SHIPPING CO., LTD.

## NOTICE

*January 28, 1981*

Notice is given that no appeal has been taken to the December 11, 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. 79-97

QUALITY FOOD CORPORATION

*v.*

TROPICAL SHIPPING CO., LTD.

## SETTLEMENT APPROVED; COMPLAINT DISMISSED

*Finalized January 28, 1981*

### PRELIMINARY FACTS

On November 28, 1979, Quality Food Corporation (Quality) filed a complaint against Tropical Shipping Co. Ltd., (Tropical), alleging that Tropical had violated sections 14 and 16 of the Shipping Act, 1916, respectively, and requesting reparations of $1,000,000, with interest and costs, attorney's fees, a permanent restraining order, appropriate fines and such other relief as the Commission deems just and proper.

Quality is a corporation duly organized and existing under and by virtue of the laws of the U. S. Virgin Islands with its principal office in St. Thomas. It is engaged in the business of wholesale food supply. Tropical is a common carrier by water serving the trade between West Palm Beach, Florida, and St. Thomas, Virgin Islands. In its complaint Quality alleged that Tropical discriminated against it by denying service to Quality while at the same time preferring Quality's competitors by making services available to them. Tropical denies that it subjected Quality to any undue prejudice or discrimination, or that it has accorded any unfair preference to competitors of Quality. Further, Tropical makes the affirmative defense that Quality detained refrigerated containers for an inordinate amount of time and refused to pay demurrage charges set forth in the carrier's tariff.

During the pendency of this proceeding there was extensive discovery and several procedural motions, all of which were disposed of in timely fashion. A prehearing conference was held and, in accordance with the time limitation set forth in the Commission's Notice of Hearing, the taking of oral testimony was set for May 22, 1980. Before the hearing began the parties submitted an offer of settlement which they requested be approved concurrently with the dismissal of the complaint, with prejudice. While the settlement agreement was satisfactory for the most part, it did contain one provision which was objectionable. This conclusion was conveyed to the parties and after much negotiation

they agreed to and submitted a second final offer in settlement, a copy of which is attached hereto.

The settlement agreement clearly sets forth what the parties intend, and the meaning of each provision will not be belabored or repeated here. However, some clarification and explanation is warranted as to certain portions of the agreement and it is set forth below.

Paragraph 1, at page 3 of the settlement agreement refers to Quality's claim for cargo damage as to certain shipments not here in issue, and provides that the claims shall be submitted to binding arbitration. Both parties agree that this provision relates to matters not within the Commission's jurisdiction in this proceeding.

Paragraph 6, at pages 4 and 5 of the settlement agreement provides that Tropical will draft and file with the Commission as part of its tariff a forward booking arrangement whereby shippers will ship on a weekly basis and book refrigerated container space in advance. Both parties have agreed that Tropical will in good faith undertake to amend its tariff filing with the Commission staff, but that Tropical is not committing itself to defend the filing in a hearing if a formal investigation is ordered.

Finally, paragraph 10, at page 8 of the settlement agreement is a savings clause which provides that, in the event the settlement agreement is disapproved by the Commission, or is approved upon conditions which are unacceptable to either party, then the agreement "shall be null and void *ab initio* and of no effect whatsoever for any purpose." The parties agree that as to any provision in the settlement agreement which does not come within the jurisdiction of the Commission such as paragraph 1, which deals with arbitration by another authority, then recourse as to any difficulty arising as the result of the operation of the provision shall be resolved by the parties in a separate court action and does not come within the purview of the savings clause in paragraph 10. Likewise, the parties agree that the failure of the Commission to accept the new tariff filing described in paragraph 6 of the settlement agreement does not come within the purview of the savings clause in paragraph 10.

## DISCUSSION AND CONCLUSIONS

It is well established that settlement of administrative proceedings is favored by the Congress, the Courts and the administrative agencies themselves. Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1), provides:

> The agency shall give all interested parties opportunity for-
>
> (1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit.

In *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972), the Court, noting its legislative history,[1] referred to the above provision "as being of the 'greatest importance' to the functioning of the administrative process" and stated:

> The whole purpose of the informal settlement provision is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.

Finally, the Commission has by rule encouraged settlements[2] and has often favorably looked upon them as a matter of policy.[3]

So here, in light of the above discussion and the entire record in the proceeding it is held that the settlement agreement attached hereto is in the public interest and is approved. It is

*Ordered that*:

1. Tropical will not unfairly or unjustly discriminate against Quality in the future, and will not accord undue or unreasonable preference or advantage to any shipper or consignee to the undue or unreasonable prejudice of Quality in violation of any section of the Shipping Act, 1916, particularly as regards the booking of refrigerated cargo containers.

2. Quality will pay all demurrage bills as provided in Tropical's tariff no later than 10 days following receipt of such bills.

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

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

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

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

[3] In furtherance of this policy, the Commission has authorized settlements of administrative proceedings on the basis of a compromised reparation payment absent admissions or findings of violation of the Shipping Act. *Foss Alaska Line Inc. Proposed General Rate Increase Between Seattle, Washington and Points in Western Alaska*, Docket No. 79-54, (1979); *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau*, Docket No. 71-83, (1978); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.*, Docket No. 75-22, (1978); *Old Ben Coal Co. v. Sea-Land Service, Inc.*, Docket No. 78-13, (1978); *Organic Chemicals v. Atlanttrafik Express Service*, Docket Nos. 78-2, 78-3, (1979).

3. Quality will pay all demurrage bills currently outstanding in favor of Tropical.

4. Quality does not owe Tropical any monies for damage that may have occurred to Tropical's refrigerated container 6210.

5. Tropical will draft and file with the Commission, to become part of its tariff, a Forward Booking Agreement in accordance with paragraph 6 of the settlement agreement.

6. Tropical will appoint an account executive to be responsible for liaison with Quality with respect to all matters relating to the cargo which it ships via Tropical, including advance notice of any tariff changes, and Quality will appoint a representative who will be responsible for communication with Tropical on such matters.

7. Tropical will pay Quality two thousand one hundred and fifty dollars ($2,150.00), without admitting thereby any liability for any of the allegations set forth in the complaint.

8. The claim for reparations by Quality is deemed withdrawn, and/or satisfied.

9. This proceeding is terminated with prejudice and is hereby discontinued. It is

*Further Ordered* that within thirty (30) days after this order becomes final the parties file an affidavit of compliance with the terms of the settlement.

(S) JOSEPH N. INGOLIA
*Administrative Law Judge*

December 11, 1987

## SETTLEMENT AGREEMENT

Agreement made this 28th day of November 1980, by and between TROPICAL SHIPPING AND CONSTRUCTION COMPANY, LTD. ("Tropical"), a common carrier by water serving, *inter alia*, the trade between West Palm Beach, Florida, and St. Thomas, U.S. Virgin Islands, and QUALITY FOOD CORPORATION ("Quality"), a consignee of cargo via Tropical in said trade.

WHEREAS, Quality has filed a complaint before the Federal Maritime Commission, docketed as No. 79-97, alleging that Tropical has violated certain sections of the Shipping Act, 1916, by unreasonably and unduly discriminating against Quality in favor of certain shippers with which it competes;

WHEREAS, said complaint seeks reparations in the amount of $1,000,000 for damages allegedly incurred by Quality by reason of such discrimination;

WHEREAS, Tropical has answered said complaint denying any liability with respect to the matters alleged therein;

WHEREAS, Quality and Tropical desire to terminate this controversy without resort to further litigation, and to settle certain outstanding grievances of both parties as described hereinafter;

WHEREAS, Quality has certain claims against Tropical for damage to refrigerated cargoes carried by Tropical under bill of lading 10, voyage 208; bill of lading 10, voyage 1407; and bill of lading 1, voyage 1418, which damage Quality alleges to be the result of a malfunction of the refrigeration units furnished by Tropical;

WHEREAS, Tropical has to date neither admitted nor denied liability for said cargo damage claims;

WHEREAS Tropical has a claim against Quality for damage to its container number 6210, which Tropical alleges to be the result of mis-treatment of the container while in Quality's possession;

WHEREAS, Quality has denied liability for the damage to container number 6210;

WHEREAS, Tropical and Quality desire to eliminate the mutually disagreeable relationship which has heretofore existed between them, and to foster a harmonious and mutually beneficial and proper relationship in future business transactions;

NOW THEREFORE, in consideration of these premises and the mutual undertakings hereinafter set forth, it is agreed as follows:

1. The parties agree that Quality's claims for cargo damage shall be submitted to binding arbitration under the rules of the American Arbitration Association, through its New York City office, or such other arbitration association as the parties may

mutually agree upon. Said arbitration shall be conducted upon written and oral presentation to be held in St. Thomas, U.S. Virgin Islands by a single arbitrator, who the parties agree shall be a person knowledgeable concerning the business of wholesale distribution of refrigerated food and the shipment of perishable refrigerated cargo by ocean carrier, and shall be selected by the process of alternate eliminations from a list of qualified arbitrators provided by the arbitration association, or such other method as the parties may agree upon. To facilitate a prompt resolution of the matter, Tropical will deliver to Quality copies of the G.A.B. survey reports on the damage to cargoes carried under bill of lading 1, voyage 1418 and bill of lading 10, voyage 1407 within one week following the execution hereof. The arbitration process shall be commenced within 30 days following the submission by Quality of a completed claim for the latter two incidents, or upon the date of approval hereof, whichever is later, and the parties agree that the arbitrator's decision and payment of any award of the arbitrator shall be expedited to the fullest extent permissible under the prevailing rules. The costs of the arbitration, including the arbitrator's fees and a court reporter, but not including attorneys' fees, shall be borne by the prevailing party, or in the event that a pretrial award is made, shall be apportioned accordingly.

2. Without admitting that it has committed any violations in the past, Tropical warrants, represents and agrees that it will not unfairly or unjustly discriminate against Quality, or accord undue or unreasonable preference or advantage to any shipper or consignee to the undue or unreasonable prejudice of Quality in violation of any section of the Shipping Act, 1916, particularly as regards the booking of refrigerated cargo containers.

3. Quality agrees that it will henceforth pay all demurrage bills as provided in Tropical's tariff, promptly and in no case later than 10 days following receipt of such bills.

4. Quality agrees that it will pay all demurrage bills currently outstanding in favor of Tropical.

5. Tropical hereby withdraws from its contention that the damage to its refrigerated container 6210 resulted from the fault of Quality, and will make no claim against Quality for reimbursement therefor.

6. Tropical agrees that it will draft and file with the Federal Maritime Commission, to become part of its tariff, a Forward Booking Agreement embodying the following principles:

(a) The agreement shall apply to the carriage of refrigerated cargo containers in the trade between West Palm Beach, Florida, and St. Thomas and St. Croix, U.S. Virgin Islands.

(b) It shall provide for the forward booking of refrigerated containers for carriage in such trade on a regular weekly basis.

(c) It shall provide for such forward booking with respect to a stated number of twenty and forty foot containers per week, which number shall constitute a reasonable proportion of the total number of such containers normally available for carriage in such trade, but in no event more than 60 percent or less than 40 percent.

(d) It shall be offered to all shippers on an equal basis, and in the event of oversubscription, the specified number of containers available for forward booking shall be prorated among the applicants therefor.

(e) It shall contain a force majeure clause, and shall provide that, where, for reasons beyond the control of Tropical, an insufficient number of containers is available, the containers which are available shall be apportioned in accordance with a specified priority wherein the shippers having the most containers booked under agreement would forego a container first.

(f) It shall require that the shipper-party confirm by telephone its booking or bookings thereunder for the following week each Friday between the hours of 9:00 and 10:00 a.m. E.D.T. or E.S.T., as appropriate. Any container not so confirmed shall be available for booking by other shippers during the regular booking period on Friday.

(g) It shall provide that the shipper may cancel a confirmed booking at any time prior to 4:00 p.m., E.D.T. or E.S.T., as appropriate, on the same Friday. Thereafter, if a confirmed container is not utilized by the shipper, he shall pay to the carrier "dead freight" in a stated amount equal to the carrier's average revenue for the size of refrigerated container booked, less 10 percent.

(h) The tariff filing shall be effective for an initial experimental period of 90 days and if workable from a practical operational standpoint, it shall thereafter be renewed on an annual basis, so long as workable.

(i) Tropical undertakes to pursue and defend such tariff filing in good faith before the Federal Maritime Commission staff. It does not, however, commit itself to defend the filing in a hearing if a formal investigation is ordered.

7. Tropical will appoint an account executive to be responsible for liaison with Quality with respect to all matters relating to the cargo which it ships via Tropical, including advance notice of any tariff changes, and Quality will appoint a representative who will be responsible for communication with Tropical on such matters, the mutual intent of the parties

being to eliminate the misunderstandings which have occurred between them in the past.

8. Tropical shall pay Quality the sum of $2150.00 (two thousand one hundred fifty dollars) but without admission of liability for any of the allegations set forth in the complaint.

9. Quality hereby withdraws its claim against Tropical for reparations as described above and docketed as number 79-97, acknowledges that the same has been satisfied, and consents that it be dismissed with prejudice.

10. This agreement shall be submitted to the Federal Maritime Commission for approval. In the event that it is disapproved, or approved upon conditions which are unacceptable to either party, it shall be absolutely null and void *ab initio* and of no effect whatsoever for any purpose. Nor shall it be admissible before the Commission or any court or agency as evidence with respect to any matter contained herein.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by their authorized representatives, this 24th day of November, 1980.

Witness:

TROPICAL SHIPPING AND CONSTRUCTION COMPANY, LTD.

*By:*

Witness:

QUALITY FOOD CORPORATION

*By:*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 80-45

AGREEMENT NOS. 10386, AS AMENDED, 10388, 10382, AS AMENDED, AND 10389 CARGO REVENUE POOLING/EQUAL ACCESS AGREEMENTS IN THE UNITED STATES ARGENTINE TRADES

## ORDER DENYING MOTION TO TERMINATE, VACATING THE STAY OF PROCEEDINGS, AND APPROVAL OF AGREEMENT NOS. 10388 AND 10389

*January 29, 1981*

This proceeding was initiated by Order of Investigation and Hearing and Conditional *Pendente Lite* Approval (Order), served June 30, 1980, to determine the approvability of certain cargo revenue pooling agreements in the United States/Argentine trades, filed with the Commission pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814).[1]

On October 20, 1980, Moore-McCormack Lines, Inc. (Mooremac), a party to Agreement Nos. 10382 and 10388, filed a Motion to Terminate the Proceeding, Or in the Alternative, Suspend Proceedings Pending Receipt of Certain Evidence. Responses were filed by the Commission's Bureau of Investigation and Enforcement (BIE), Companhia de Navegacao Lloyd Brasileiro, Companhia Maritima Nacional, Delta Steamship Line, Inc., and A/S Ivarans Rederi. The Commission, on November 6, 1980, stayed the proceeding pending resolution of the Motion to Terminate.

Mooremac's request to terminate this proceeding is based on the Deposition of Samuel B. Nemirow,[2] which it views as resolving the principal issues raised in this proceeding. Lloyd, Nacional and Delta generally support Mooremac's Motion. Ivarans takes the position that while there may not be a need for a full evidentiary hearing to resolve the issues raised in the proceeding, the Commission should consider

[1] Agreement Nos. 10382, as amended, and 10386, as amended, provide respectively for cargo revenue pooling in the northbound trades from Argentina to United States Gulf and Atlantic Coast ports. Agreement Nos. 10388 and 10389 establish respectively a cargo revenue pooling agreement in the southbound trades from United States Gulf and Atlantic Coast ports to Argentina. (The aforementioned Agreements are collectively referred to herein as "the Agreements").

[2] Mr. Nemirow is Assistant Secretary of Commerce for Maritime Affairs. His deposition was taken at BIE's request. All parties to this proceeding were afforded an opportunity to examine Mr. Nemirow.

other evidence in making its decision.[3] BIE opposes the discontinuance of the proceeding as it relates to the investigation of the northbound Atlantic agreement, Agreement No. 10386, as amended.

The Motion and Responses reflect some misconception concerning the principal focus of the Commission's June 30th Order initiating this proceeding. As the Agreements are *per se* violative of the antitrust laws, it must be shown that they are required by a serious transportation need, necessary to secure important public benefit, or in furtherance of a valid regulatory purpose of the Shipping Act. *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238, 243 (1968). Proponents submitted supporting statements with the Agreements. However, as the Commission stated in its Order initiating this proceeding, these submissions "and the protest [which was later withdrawn] raise factual and legal issues that require further examination." (Order at page 12). These "factual and legal issues" relate primarily to the third-flag section of the Agreements. The concern here was with the Agreements' restrictive features and the apparent circumstances surrounding them which "appear to run counter to that part of the public interest reflected in the antitrust laws favoring free and open competition." (Order at 15). Specifically, these matters concern: (1) the division of the 20% share allocated to third-flag carriers; (2) the impact of the Blackwell-Guevara Memorandum of Understanding; and (3) the role of the Argentine Government in the circumstances which led to the execution of these Agreements.

Mr. Nemirow's Deposition does not squarely address or resolve the basic issues raised in this proceeding. Mr. Nemirow's Deposition primarily addresses the narrow issue:

> Whether the facts surrounding the negotiation and execution of these Agreements indicate conduct inconsistent with the provisions of the United States/Argentine Memorandum of Understanding [the so-called Blackwell-Guevara Agreement] of March 31, 1978, providing for "commercial agreements." (Order at page 20).

The substance of Mr. Nemirow's responses is that Argentina *agreed* that there would be "commercial agreements" in these trades that would delineate the details of the cargo sharing arrangements and that the Agreements in issue are consistent, or not, on their face, inconsistent, with the Blackwell-Guevara Memorandum of Understanding. This testimony does not, however, address or resolve issues relating to: (1) the justification for the specific third-flag shares provided for in these Agreements; and (2) whether the role of the Argentine Government in

[3] Ivarans suggests that the Commission should have the benefit of the Answers of Mr. Eric Holter-Sorensen to BIE's Written Interrogatories as well as the transcripts of the May, 1980 pool meetings dealing with the negotiations of Agreement No. 10386, as amended.

the circumstances which led to the execution of these Agreements, particularly with respect to third-flag shares, caused these Agreements not to be "commercial" agreements as required by the Memorandum of Understanding.[4]

Given the apparent misunderstanding as to the focus of this proceeding, the Commission is amending its June 30th Order to expressly delineate the specific issues that should be addressed in this proceeding. These issues are set forth in the Appendix to this Order and are incorporated herein by reference.

Accordingly, Mooremac's Motion to Terminate this proceeding will be denied and the November 6, 1980 Order staying this proceeding will be vacated. As a result of the delay in the proceeding occasioned by the stay, the Commission will extend the date by which the Presiding Officer shall serve his Initial Decision.

There is one final matter to be addressed. As heretofore mentioned, this proceeding includes the investigation of the two southbound agreements, Nos. 10388 and 10389. There are no third-flag carriers party to these Agreements, apparently because various Argentine laws, decrees, and resolutions generally restrict the carriage of Argentine import cargoes exclusively to Argentine-flag vessels except where there is a government or commercial arrangement with the exporting nation or its flag carriers allocating no less than 50% of the earned freight revenues to Argentine-flag carriers.[5] Similarly, certain United States controlled cargoes in the southbound Argentine trade are restricted to United States-flag vessels except where the importing nation does not discriminate against United States-flag vessels and permits access to their government controlled cargoes. In such event, similar to Argentine law, the United States will permit the "recipient" nation's vessels to carry up to 50% of such United States controlled cargo.

Because the principal focus of this proceeding relates primarily to third-flag issues, it is appropriate to discontinue the investigation of the southbound Agreements, Nos. 10388 and 10389, providing they are otherwise approvable under the standards enunciated in section 15, Shipping Act, 1916. Examination of the statements filed in support of these Agreements, as well as the Nemirow Deposition, leads the Commission to find that these Agreements meet the standards for section 15 approval.

The southbound Agreements provide the means for increased shipper service with respect to government controlled cargoes in these trades by permitting United States and Argentine-flag carriers equal access to

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[4] Mr. Nemirow was not in attendance at the meetings where these Agreements were negotiated, nor did he receive daily reports or closely monitor these meetings or the circumstances surrounding them. (Nemirow Deposition at pages 46, 47 and 48).

[5] Docket Nos. 78-51 and 78-52, served June 22, 1979.

these otherwise restricted cargoes. Moreover, these Agreements facilitate the free flow of the United States foreign commerce with Argentina. In the absence of these Agreements, Argentine import cargoes would be subject to the 30-day pre-waiver requirements of Argentine Resolution 507.[6]

Agreement Nos. 10388 and 10389 are not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest or otherwise violative of the Shipping Act, 1916. Moreover, the extent of the anticompetitive impact of these Agreements is not sufficient to outweigh the benefits found and warrant disapproval.

THEREFORE, IT IS ORDERED, That Moore McCormack's Motion to Terminate this Proceeding is denied; and,

IT IS FURTHER ORDERED, That this proceeding is discontinued as to Agreement Nos. 10388 and 10389 and that Agreement Nos. 10388 and 10389 are approved pursuant to section 15, Shipping Act, 1916;[7] and,

IT IS FURTHER ORDERED, That the November 6, 1980 Order staying this proceeding is vacated; and,

IT IS FURTHER ORDERED, That the fourth ordering paragraph of the June 30, 1980 Order initiating this proceeding be amended to include the issues set forth in the Appendix to this Order; and,

FINALLY IT IS ORDERED, That the eighth ordering paragraph of the June 30, 1980 Order initiating this proceeding be amended to read: "The Presiding Administrative Law Judge shall issue his Initial Decision in this proceeding on or before July 31, 1981."

By the Commission*

(S) FRANCIS C. HURNEY
*Secretary*

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[6] Resolution 507 requires that Argentine-flag carriers be given the right of first refusal on all Argentine imports controlled by Argentine Law 18.250. These cargoes amount to a substantial portion of the southbound trade and can only be carried on non-Argentine vessels if the consignee applies for and receives a waiver from the reservation laws 30 days in advance of shipment. These pre-waiver requirements do not apply to cargoes carried by parties to agreements such as Agreement Nos. 10388 and 10389. (See Docket Nos. 78-51 and 78-52, served June 22, 1979).

[7] The styling of this proceeding in all future pleadings and documents should not refer to the approved Agreements.

* Vice Chairman Kanuk and Commissioners Day and Teige concur in that portion of the Order which denies the Motion to Terminate and amends the Order of Investigation. Vice Chairman Kanuk and Commissioner Teige dissent to the approval of Agreement Nos. 10388 and 10389 and will issue separate opinions. Chairman Daschbach and Commissioners Day and Moakley concur in the approval of Agreement Nos. 10388 and 10389. Chairman Daschbach and Commissioner Moakley dissent to that portion of the Order which amends the Order of Investigation. Chairman Daschbach and Commissioner Moakley would approve rather than investigate Agreement No. 10382 and would limit the scope of the investigation of Agreement No. 10386 to that contained in the June 30 Order of Investigation.

## APPENDIX

Whether fixed, individual shares for third-flag carriers in these trades are necessary to meet serious transportation needs, to achieve important public benefits, or to fulfill valid regulatory purposes of the Shipping Act and, if so, whether the specific third-flag shares fixed by these Agreements are unduly discriminatory or unfair between carriers, whether they are based on valid commercial considerations, and whether they are the result of direct or indirect coercion by the Government of Argentina or any other person.

Whether the facts surrounding the negotiations and execution of these agreements indicate conduct inconsistent with the provisions of the United States/Argentina Memorandum of Understanding of March 31, 1978, requiring that the "mechanisms and procedures necessary to the implementation", of the Memorandum be determined by "commercial agreement," either by showing imposition of the will of the Government of Argentina, directly or indirectly, or coercion by any other party.

Whether the provisions of the Agreements providing for penalties for overcarriage and undercarriage unnecessarily restrict competition among third-flag lines within the 20 percent share to these lines and, if so, whether those provisions should be amended.

Whether the provisions of the Agreements giving third-flag carriers who are parties to the Agreements control over the cargo shares assigned to any new third-flag parties are unnecessarily restrictive or unduly discriminatory among carriers and, if so, whether those provisions should be amended.

In addressing these issues, the parties to this proceeding should develop information in response to the following specific questions. They should not, however, consider the proceeding limited to these questions if circumstances indicate other areas of inquiry.

1. Does Argentine law require fixed third-flag shares and, if so, does it specify the size of any such shares?

2. Is there any evidence that the decision to renegotiate Agreements Nos. 10346 and 10349, to provide for fixed third-flag shares, resulted from requests to do so by non-Argentine carriers?

3. Are executives of the involved Argentine carriers Government officials? If not, were they appointed to their positions by the Argentine Government, or can they be disciplined or discharged by the Argentine Government?

4. Are there transcripts available of the negotiations for third-flag participation in the northbound trades?

5. What are the carryings (by shares of total revenue tons) of all third-flag carriers in the northbound trades for the period from January 1, 1975 through the most recent date for which such information is available?

6. Have any of the third-flag parties to these Agreements accepted a significantly larger or smaller share of the pooled cargo than its historical share? If so, what is the basis for the new share?

7. Did the divisions of third-flag shares in the northbound Argentine trades under these Agreements arise from any agreement or understandings, formal or informal, between the Argentine Government and any other third-flag government?

8. Is the current fixed share of northbound pool cargo held by the Argentine flag lines in the Brazil/U.S. trades the result of an agreement or understanding, formal or informal, between the Governments of Brazil and Argentina?

9. Did open competition among third-flag lines under Agreements Nos. 10346 and 10349 result in overtonnaging, unstable rates, rebating or any other malpractices in the northbound trades?

10. Were any third-flag lines discouraged from participating in the 20 percent open competition share, required by the Commission under Agreements Nos. 10346 and 10349, by any actions of the national-flag lines or the government of Argentina?

11. Is the United States a signatory to any treaties on maritime matters with any of the countries under whose flags the third-flag carriers participate in the northbound trades? If so, would approval by the Federal Maritime Commission of fixed third-flag shares conflict with the United States' obligations under those treaties?

12. Have any carriers withdrawn from the northbound trades or been unable to enter them during the period January 1, 1978 through September 30, 1980? If so, what were the circumstances surrounding such occurrences?

13. What will be the short-term and long-term effect of these Agreements (if they are approved) on U.S. importers in these trades?

14. May a carrier (national or third-flag), who is not a party to these Agreements, obtain cargo in the northbound trades? If not, what is the mechanism which excludes such a carrier from obtaining cargo?

## DISSENTING OPINION

Dissenting Opinion of Commissioner Peter N. Teige.

I dissent from the majority's conclusion that the southbound agreements, Agreement Nos. 10388 and 10389, should be approved without further investigation and hearing. Aspects of these Agreements, the southbound U.S./Argentina trades in which they operate, and their relationship to the agreements proposed for the northbound Argentina/U.S. trades raise issues which should not be decided on the basis of the record before us, and which, therefore, require further investigation before approval can be granted.

At the time these Agreements were filed with the Commission for approval, there were also filed cargo revenue pooling and equal access agreements which would apply to the northbound trades from Argentina to the U.S. Gulf and Atlantic Coasts (FMC Agreements Nos. 10382 and 10386, respectively). The Commission has determined that these northbound Agreements raise a number of serious and substantial issues which require that they be subjected to a full investigation and hearing before the question of their approvability can be resolved. Despite this action, however, the majority has also concluded that the agreements which will operate in the reciprocal southbound trades may be segregated from this investigation and summarily approved. I cannot agree with this approach.

This case raises fundamental policy questions affecting our international ocean commerce. Under heavy pressure from the Argentine Government (including threats, in part carried out, of preventing U.S. flag vessels from carrying cargo between the United States and Argentina) our Government in 1978 entered into a bilateral agreement on ocean transport between the two countries. The agreements in this case arise from that bilateral.

As bilateral agreements on ocean transport appear likely to become more commonplace in the years ahead, it will be essential for the Commission to develop some general guidelines for dealing with the supplementary commercial agreements that arise from these agreements. It would be appropriate to do that briefly here in view of the disagreement among members of the Commission on the significance of the agreements before us.

The Federal Maritime Commission does not determine whether our Government should enter into bilateral agreements. This is a policy decision to be made by the Executive Branch. It would be preferable if these sensitive agreements, affecting as they do not only our merchant marine but our shippers, our trade, our relations with other maritime countries and with the trading partner entering into the agreement,

were so complete as to make supplemental agreements to such bilaterals unnecessary. Typically these bilateral agreements have had as a principal goal assuring participation by the U.S. flag carriers in the trades concerned. If the manner in which this is to be done is not fully delineated in the bilateral, the gaps must be filled by supplemental agreements among the carriers. It is these agreements that come before the Federal Maritime Commission under our responsibility to examine agreements between carrier competitors that would violate our U.S. antitrust laws unless receiving our approval under Section 15 of the Shipping Act, 1916.

Our authority in examining such agreements is very restricted. Most importantly, we are prohibited from approving agreements that discriminate unfairly between carriers (Section 15, 1916 Act). Thus we normally are prohibited from favoring any country's carriers over those of another, even U.S. carriers. An exception to this prohibition would be a supplemental agreement that is clearly carrying out the specific intention of the bilateral. Speaking in general terms, there would appear to be four alternatives open to the Commission in dealing with these supplemental agreements. (1) The Commission, it seems to me, has a clear responsibility to approve commercial agreements between carriers implementing a bilateral agreement, if freely arrived at, that are clearly of the type contemplated by and are consistent with the bilateral understandings entered into by the Executive Branch. To do otherwise would make a mockery of the bilateral agreement process and the orderly performance of our nation's international obligations. (2) Similarly, and for the same reasons, commercial agreements between carriers that are directly inconsistent with the clear intent of a bilateral agreement should be disapproved by our Commission. (3) Where the terms of a carrier agreement purporting to implement a bilateral agreement deal with issues which the bilateral does not require to be covered or provides that certain issues should be dealt with by the carriers but does not indicate what the resolution of the issues should be, the Commission should consider the supplemental agreement under the same principles it applies to other Section 15 agreements coming before it, with the fact it is related to the bilateral agreement simply being one of the elements to be considered in reaching a decision on the matter. (4) Finally, if an agreement which purports to be a commercial agreement between carriers in implementation of a bilateral agreement is, in fact, one dictated unilaterally by the foreign government signatory to the bilateral, the Commission should neither disapprove nor approve the "agreement" but instead refuse to take jurisdiction, passing the matter back to the Executive Branch for renewed negotiation of the matter with the other country under the continuing negotiation provisions contained in most bilaterals. The Commission's jurisdiction is over

*commercial* agreements between carriers, not agreements unilaterally forced upon carriers by a foreign government.

These general principles are easy to state but not always simple to apply.

The Commission in this case has, in effect, found that the northbound agreements may not fit into the first two categories set forth above and that they must, therefore, be investigated further to determine their status and to aid the Commission in its decision on the approvability of the agreements. With this conclusion I am in complete accord.

The southbound agreements present a somewhat less clear situation. These agreements provide that substantially all of the liner cargo moving to Argentina from the United States Atlantic and Gulf Coasts will be divided between one U.S. flag carrier and two Argentine flag carriers in each of the two trades on a fifty-fifty national flag basis. There are no third flag carriers. Apparently the third flag carriers that were in the trade have withdrawn, primarily because virtually all of the liner cargo moving to Argentina has been designated "government cargo" by the Argentine Government and hence is not available to third flag vessels.

The fifty-fifty division between the U.S. and Argentine carriers results from the agreements executed by these carriers which we are considering, not the bilateral agreement. That legal document is silent as to the division to be made of the southbound traffic (or the northbound traffic for that matter) or the mechanics to be followed in the southbound division except to state that the two governments "will enter into an understanding providing for access to government-controlled cargoes in accord with the appropriate legislation in each country." The meaning of this provision is obscure. There is nothing in the record to indicate that such an intergovernmental understanding has been reached permitting virtually all southbound cargo to be treated as "government controlled cargo" by unilateral edict of the Argentine Government. One must conclude from the record presently before the Commission that the United States has not agreed with the Argentine Government to this apparently broad definition that appears to turn cargo that in most ocean trades would be ordinary commercial liner cargo into "government controlled cargo." If that has not been agreed to in the bilateral or otherwise by the United States, these supplementary agreements between the U.S. and Argentine carriers, which by their very nature accept this arbitrary, unilateral definition, would appear to be the operating force that perpetuate the exclusion of third flag carriers which would normally be active on important sea routes of this kind. While such discrimination might conceivably be in the policy interests of the United States, and hence be something a bilateral might agree to, the absence of such approval here would appear to present the Commission with agreements that on their face at least are not

consistent with the statutory restrictions under which the Commission operates.

The record covering these agreements and their predecessors is replete with indications of unilateral activity by the Argentine Government, activity which appears to have inhibited the normal competitive activities of ocean carriers. The Commission has a responsibility under the Shipping Act to disapprove agreements that unjustly discriminate between carriers. This obligation covers not only agreements specifically discriminatory by their terms but also agreements where the entire setting in which they arise inhibits carriers from participating at all in the trades in question. Thus in these U.S./Argentine trades there are third flag carriers operating in the northbound trades, none of whom are in the southbound trades. This is not a normal pattern of ocean shipping.

This possible *sub silentio* exclusion of carriers is one of the bases for my position that these southbound agreements require investigation. If the very subject matter of the agreements has been unilaterally defined by the Argentine Government so as to exclude formal participation by third flag carriers, as may be the case here, we cannot under the Shipping Act give these agreements our stamp of approval unless they reflect the execution of specific provisions of the bilateral agreement involved. In fact, if this is what has happened here, such agreements would appear to be beyond our jurisdiction and they would have to be dealt with in intergovernment negotiation, as was apparently contemplated by the bilateral. It should also be pointed out that the bilateral agreement here appears to contemplate the participation of third flag carriers in the southbound trades. Paragraph 1 of the Memorandum states:

> "Each Party recognizes the intention of the other Party in carrying a substantial portion of its liner trade in vessels of its own flag in accord with appropriate legislation in each country. ...This provision, established in the light of the reciprocal interests of the two countries, does not affect the rights of flag vessels of third parties to carry goods between the ports of the two Parties..."

Thus, in addition to being contrary to ordinary commercial practice, the failure of these Agreements to provide for participation by third flag carriers may not only be unauthorized specifically by the bilateral but it may exceed the restrictions on prevention of competition in the Argentine trades negotiated by the United States.

In taking this position on these agreements I am not passing on the wisdom of the division of virtually all of the liner cargo between one U.S. flag carrier and two Argentine carriers in each of these two important southbound trades. But such a fundamental decision, affecting as it does our exporters, our foreign trade and ultimately our

economy, as well as the economic position of the U.S. carriers involved, should be negotiated by the Executive Branch using its broadest authority. It should not be made by the Argentine Government alone, or by the carriers without the sanction of bilateral approval of the two governments. Without such bilateral approval it would not appear to be an action which this Commission could properly take under the statutory constraints against discrimination that govern the Commission. Nor can we hope to work out a reasonable solution by negotiation. We are a quasi-judicial body operating under strict due process requirements. The normal informal give and take of the negotiating process is not available to us.

These southbound agreements appear to be deficient in another respect. They contain provisions that seem to prevent any new U.S. carrier from entering these trades without getting the approval of the incumbent U.S. flag carrier in each trade affected and of the Argentine Government. If this is their effect, it is difficult to believe that our negotiators intended a foreign government to be able to exclude a U.S. flag carrier from one of our trade routes or to permit one U.S. carrier to veto the competition of another.

The undercarriage provisions also appear to be potentially unfair and need investigation.

For all of the foregoing reasons, these agreements require the further scrutiny of a thorough investigation. Such an endeavor has been discouraged in a rather obvious fashion by the maritime authorities of Argentina. Strong suggestions have been made to the Federal Maritime Commission, the State Department and the Maritime Administration that our failure to approve these agreements promptly would lead to the resumption of harassment of our carriers. This has made the U.S. carriers involved understandably uneasy and it has been suggested that the Commission must approve the agreements without further ado because of these thinly-veiled threats. We cannot shirk our statutory responsibilities on such a basis, however much we may dislike such tactics and have concern for U.S. flag carriers.

It is also said by some that agreements of this kind should not be investigated or disapproved but instead should be approved perfunctorily because of the principle of comity. While as a civilized country we try to avoid unnecessary conflict with other nations, it does not mean that the Commission can ignore the statutes of the United States under which we operate simply to accommodate the unilateral wishes of another country. Should, after an investigation, our decision lead to disapproval of agreements of the kind before us in this case, the Executive Branch may undertake intergovernment negotiations with the other country on the issues at stake and, if the United States Government is of the view that comity requires acceptance of the other country's views after consideration of the totality of its impact on our economy

and our carriers, it can accede to those wishes. If, on the other hand, it does not feel that the other country's position is consistent with U.S. interests our negotiators, too, have bargaining tools that would not leave us defenseless in such a situation, tools that would be used, one would hope, fairly but vigorously.

We are also told that these agreements should be forthwith approved because they are advantageous to the two U.S. flag carriers in these trades. As stated above, our statutory authority does not give us the right to discriminate in favor of any carrier, U.S. or otherwise. Nor do we play the role in our governmental structure of the promoter of our merchant fleet. That worthy goal is for others to perform. Our task of regulation of international shipping, where many foreign nations feel we are impinging on their sovereignty, is difficult enough without adding the complication of national flag favoritism. Instead our role is to seek to maintain a balance in our commercial sealanes between completely unfettered competition and a market with some restraints on such competition such as is common in most of the maritime countries with which we share these sealanes. We must meet our statutory obligations and deal with the broad economic effect on our foreign commerce and not simply the impact on a few U.S. carriers, however much we may have personal concern for their economic wellbeing. Any harm flowing from such restraint on our part can always be corrected by negotiations by our Executive Branch with the other country involved.

I must stress that I have not made up my mind whether the northbound agreements in this case should be approved and I cannot do so until the results of the investigation we have ordered are at hand. I would have liked in the case of the southbound agreements to have had a similar opportunity for a reasoned decision based on a more complete record than we have now before us. In short, the anatomy of the entire U.S./Argentine ocean trade in both directions is at issue here. The northbound and southbound agreements are inextricably intertwined. The question of the possible unilateral interference by the Argentine government in these agreements and the background from which they spring, permeates the entire ocean transport structure between these two countries. That Government's role and the economic impact of the resultant terms of all of these agreements, both northbound and southbound, require closer scrutiny if we are to fulfill our statutory responsibilities.

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 80-3
## CONTINENTAL FORWARDING, INC.
## INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE STATUTORY VIOLATIONS

Application No. B-349 denied.

Civil penalty of $17,500 assessed for repeated and wilful violations of section 44 of the Shipping Act, 1916.

*Joseph B. Slunt, Charles C. Hunter, William Weiswasser* and *Paul J. Kaller,* Bureau of Hearing Counsel.

*Carlos Rodriguez* for Continental Forwarding, Inc.

## ORDER PARTIALLY ADOPTING INITIAL DECISION

*February 2, 1981*

This matter comes before the Commission on Exceptions to the Initial Decision of Administrative Law Judge William Beasley Harris filed by Continental Forwarding, Inc. A "Reply to Exceptions" was submitted by the Commission's Bureau of Hearing Counsel. Upon review of both parties' arguments and the assembled record, the Commission has determined that the findings and conclusions of the Presiding Officer were for the most part sound and correct. The Initial Decision will therefore be adopted except to the extent it assesses a civil penalty in excess of $17,500 and is otherwise inconsistent with the following discussion of the case.

### BACKGROUND

Continental's license to operate as an independent ocean freight forwarder was revoked on December 2, 1978, along with those of 134 other forwarders, for failure to obtain and file with the Commission the surety bond required by section 44(c) of the Shipping Act, 1916 (46 U.S.C. 841b(c)), and section 510.9 of the Commission's Rules (46 C.F.R. 510.9).[1] The Order of Revocation was published in the January

[1] Section 44(c) states, in pertinent part, that:

> . . . no license shall be issued or remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission in such form and amount as in the opinion of the Commission will insure financial responsibility . . .

The Commission amended section 510.9 on July 24, 1978 to require a $30,000 rather than a $10,000 surety bond following rulemaking proceedings which sought and obtained numerous comments from the forwarding industry. *Report and Order in Docket No. 77-53,* 20 F.M.C. 892, 19 S.R.R. 723, 43 *Fed. Reg.* 32,776 (1980). No appeal was taken of this decision by Continental or any other interested party.

3, 1979, *Federal Register* (44 *Fed. Reg.* 953) and mailed to each affected licensee, including Continental.[2] On January 19, 1979, a follow-up questionnaire was also sent to the 135 persons named in the revocation order.

Petitions for reconsideration could be filed under the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261) until February 2, 1979, but no such petition was filed by Continental. February 2, 1979 was also the deadline for appealing the Commission's December 1, 1978 revocation action to the United States Court of Appeals under 28 U.S.C. 2344, an action Continental also did not take.

Sometime in early March, 1979, Franz Zinssmeister, the President and 99% owner of Continental, telephoned the Commission's Office of Freight Forwarders and inquired as to the steps necessary to regain a license. He was told that a new application was required.[3] Application materials which contained a form letter warning applicants against engaging in the business of forwarding before a license is issued were sent to Continental on March 22, 1979.[4] On March 9, 1979, Continental was issued a $30,000 bond with retroactive coverage to December 1, 1978 by the Investor's Insurance Company of America.[5]

Continental did not tender an application until June 18, 1979, and then only in incomplete condition. A revised application was submitted July 11, 1979, together with a statement that Continental had been continuously operating as an unlicensed freight forwarder since December 1, 1978. The application was finally completed on August 6, 1979, when the Commission received a statement that Mr. Zinssmeister had "read and understood" the Commission's Freight Forwarder Regulations (46 C.F.R. Part 510).[6] On August 14, 1979, Continental was again sent a form letter which cautioned it against unlicensed forwarding.

A Commission field investigator met with Mr. Zinssmeister on August 16 and 17, 1979 and advised Continental to cease freight for-

[2] Prior to December 1, 1978, the Commission had mailed circular letters to each affected licensee, advising it of the need to obtain a $30,000 bond. Circular Letter Nos. FF 1-78 and FF 2-78 August and November, 1978, respectively. These circular letters were summarized in a subsequent *Federal Register* notice published November 13, 1978 (43 *Fed. Reg.* 52,519). Affidavit of Robert G. Drew dated February 28, 1980 and exhibits thereto.

[3] Drew affidavit; Affidavit of Franz Zinssmeister dated August 21, 1979. Mr. Zinssmeister was also told that Continental's application was likely to be granted even if Continental had engaged in unauthorized forwarding since December 1, 1978. Zinssmeister affidavit, *supra. See also* Affidavit of Carlos Rodriquez dated March 31, 1980. These discussions between representatives of Continental and representatives of the Office of Freight Forwarders were limited to an informal evaluation of Continental's *past conduct.* There is no basis in the record for finding that Continental was advised that *continued* unlicensed forwarding past March, 1979 was in any way acceptable to the Commission.

[4] Drew affidavit and exhibits.

[5] Letter of Carlos Rodriguez to Charles Clow dated June 15, 1979. The Commission received notice that this bond had been issued on March 13, 1980.

[6] Drew affidavit and exhibits.

warding operations immediately.[7] This advice was not followed. Shortly after Continental received the Commission's December 10, 1979 "Letter of Intent to Deny," an arrangement was instituted whereby Continental continued to serve its forwarding clients and receive shipper handling fees by using the license and an employee of Pracht International, Inc., another licensed forwarder. At least 107 shipments were handled in this manner until the scheme was uncovered by a Commission investigator.[8]

Continental describes two events which allegedly contributed to its neglect of the surety bond requirements and its unauthorized forwarding operations prior to March, 1979. The first of these is the fact that Mr. Zinssmeister injured his hand during a visit to Germany in August, 1978, for which he was hospitalized for an unspecified period.[9] He returned to the United States and his office at Continental in September, 1978, where he was able to work "sporadically and at reduced levels."[10] No further information concerning the nature or extent of Mr. Zinssmeister's disability between August, 1978 and June, 1979 has been provided and the record similarly fails to describe the arrangements, if any, made to assure responsible administration of Continental's activities during Mr. Zinssmeister's absences from the freight forwarding business.[11]

Continental also states that its failure to meet the increased bonding requirements was due to its customary reliance upon a former bonding company's practice of automatically renewing the various bonds required by Mr. Zinssmeister's business.[12] There is, however, no indication that the December 1, 1978 increased coverage deadline coincided with the "renewal period" of Continental's previous surety bond. Moreover, Continental changed bonding companies before the December 1, 1978 compliance date and presumably had an opportunity to review its

[7] Affidavit of Joseph M. Henderson dated February 26, 1980. Continental handled 365 shipments between December 1, 1978 and August 31, 1979 for which shipper fees totalling $14,862.00 and carrier compensation of $5,241.00 were received. Affidavit of Franz Zinssmeister dated August 31, 1979.

[8] Stipulation of the Parties dated July 3 and Appendix II thereto. Another four shipments were handled directly by Continental between September 1 and December 19, 1979 for which Orient Overseas Container Line paid brokerage to Continental. Henderson affidavit and Exhibits 12-15 thereto.

[9] The injury is described by Respondent's counsel as the "near loss of a hand" necessitating "surgery which included bone transfers." Letter of Carlos Rodriguez, supra. However, Mr. Zinssmeister testified that he had "hurt a finger on a farm in Germany . . . [and] came back and it was operated here." Transcript at 21.

[10] Additional surgery was performed in the United States in September, 1978. *Id.*

[11] Mr. Zinssmeister returned to Germany from December 18, 1978 to late February, 1979 and again from sometime in April until May 28, 1979. Additional "treatment" was performed during these visits. Letter of Carlos Rodriguez, *supra*, Transcript at 21.

[12] Mr. Zinssmeister is also engaged in customhouse brokering and other import/export related business for which he requires over 20 different bonds. Letter of Carlos Rodriguez, *supra*; Continental letterhead found in exhibits to Henderson affidavit. The freight forwarder portion of the business is much smaller than the import portion. Only 10% of Continental's 50-60 clients are engaged in export activities requiring forwarder services. Transcript at 20.

bonding needs and procedures with the newly retained company at this time [13] Again, details which might establish that Continental was unfairly overcome by circumstances beyond its reasonable control are absent from the record.

## POSITION OF THE PARTIES

Continental contends that the Initial Decision is erroneous because: (1) the Commission's failure to conduct an evidentiary hearing before revoking licenses for noncompliance with the December 1, 1978 bonding deadline violated Continental's constitutional right to due process of law; (2) arbitrary, unpublicized and prejudicial standards were employed by the Commission in handling relicensing requests by persons named in the January 3, 1979 Order of Revocation; (3) mitigating factors which bear upon Continental's fitness to be licensed and its civil penalty liability were given inadequate consideration by the Presiding Officer; and (4) the imposition of a $35,000 civil penalty was arbitrary and unreasonable.

Hearing Counsel, in turn, claims that: (1) the validity of Continental's December 1, 1978 license revocation is irrelevant; (2) the Commission did not employ impermissible standards for evaluating relicensing requests arising from the December 1, 1978 bonding violations; (3) the Commission's procedures for handling relicensing requests had no adverse impact upon Continental; and (4) Continental's wilful violations of section 44 were not sufficiently offset by mitigating circumstances to warrant a finding of fitness or a reduction of civil penalty liability below $17,500. Hearing Counsel joins Continental in excepting to the Presiding Officer's rejection of the proposed $17,500 civil penalty settlement negotiated by the parties.

## DISCUSSION

### THE PRIOR REVOCATION

The validity of the Commission's Order of Revocation is relevant to the present proceeding, especially with regard to possible civil penalty assessments. Although Continental's due process argument cannot be disregarded, this contention has slight substantive merit and is presented in a manner which accentuates rather than minimizes the impropriety of Continental's conduct during the period running roughly from August 1, 1978 through June 30, 1980.[14]

Generally speaking, license revocation does require a prior opportunity to be heard on disputed and material questions of fact or law, a principle which is reflected in section 44 of the Shipping Act, 1916 (46

[13] Transcript at 21-23.

[14] Continental has yet to institute administrative or judicial proceedings to affirmatively reinstate its prior license. Instead, it attempts to use perceived due process deficiencies as an ongoing exemption from the requirements of the Shipping Act and the Commission's regulations.

U.S.C. 841b). Yet, exceptions to this general rule can and do occur when a valid governmental interest is at stake which justifies postponing the time or altering the manner of hearing.[15] One such governmental interest is the maintenance of a surety bond by freight forwarder licensees to protect the financial interests of their shipper clients. By enacting Shipping Act section 44(c), which makes adequate bonding an express *precondition* to the issuance or retention of a freight forwarder license, Congress created an exception to the more broadly worded section 44(d) and authorized immediate license revocation for failure to maintain a surety bond.[16] This action was taken following extensive legislative hearings which, among other things, uncovered longstanding abuses in the forwarding industry.[17]

The automatic revocation procedures in section 510.9 of the Commission's Rules merely reflect the statutory requirement of section 44(c).[18] Continental's true complaint therefore lies against section 44(c) itself, and to that extent is beyond this agency's authority to adjudicate.[19]

Moreover, Continental was given an opportunity to be heard which was meaningful under the circumstances. Notice of the $30,000 bond requirement was twice mailed to Continental before the December 1, 1978 deadline and twice published in the *Federal Register*. Following service of the Commission's January 3, 1979 revocation order and the January 19, 1979 follow-up questionnaire, licensees wishing to challenge the factual basis for the action taken against their license could do so upon filing a timely petition for reconsideration.[20] Even licensees

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[15] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-680 (1974); *R.A. Holman & Co. v. Securities and Exchange Commission*, 299 F.2d 127, 131-132 (D.C. Cir. 1962), *cert. den* 370 U.S. 911 (1962). *Cf. Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1970). Section 558(c) of the Administrative Procedure Act (5 U.S.C. 558(c)) imposes prior notice and opportunity for compliance requirements in license revocation proceedings which exceed those necessitated by due process. These statutory procedures are inapplicable, however, in cases of "wilfulness" or those in which prompt action is required by "public health, interest or safety." Although the notices sent to Continental were sufficient to have satisfied section 558(c) under the circumstances, the wilfulness and public interest exemptions both apply to revocations based upon the lapse of a surety bond.

[16] Note 1, *supra*, contains the pertinent portion of section 44(c). The requirement that no license "remain in force" without a bond being on file with the Commission supercedes section 44(d)'s hearing requirements.

[17] *See, e.g., Providing for Licensing and Compensation of Independent Ocean Freight Forwarders*, Sen. Report No. 691, 87th Cong., 1st Sess. (1961); statement of Senator Yarborough in *Hearings before a Subcommittee of the Senate Committee on Commerce*, 87th Cong., 1st Sess. (July 27, 1961) at 1-2.

[18] Section 510.9's proviso clause was adopted on June 12, 1967, 32 Fed. Reg. 8523, corrected 32 *Fed. Reg.* 9170. Objections to the rule based on an alleged right to a prior hearing were denied by the Commission at that time. No appeal was taken.

[19] *See Public Utilities Commission v. United States*, 355 U.S. 534, 539-540 (1958).

[20] Possession of a valid bond in the higher amount was the only issue which could have been examined in a prior hearing. Licensees which subsequently demonstrated that they were in compliance on December 1, 1978 were successful in obtaining orders vacating the Commission's January 3, 1979 Order of Revocation. It is undisputed that Continental did not possess a $30,000 bond on December 1, 1978.

which were without the necessary bond on December 1, 1978 were granted reinstatement if they obtained a retroactive bond and petitioned the Commission by February 2, 1979. For reasons yet to be adequately explained, Continental neglected to take advantage of this opportunity.

USE OF UNLAWFUL PROCEDURAL STANDARDS

Continental finds fault with the relatively lenient procedures extended to forwarders named in the January 3, 1979 Order of Revocation which sought license reinstatement on or before February 2, 1979. Under this arrangement licenses were reinstated if a $30,000 bond with coverage retroactive to December 1, 1978 was obtained and a request for reconsideration was made by February 2, 1979.[21] No inquiry was made into possible unlicensed forwarding activities by persons which met these standards. Forwarders seeking reinstatement after February 2, 1979 or which failed to obtain a retroactive bond were required to submit a new license application, pay a $125 application fee, and undergo the background investigation routinely conducted in the case of new applicants. Continental now states that these practices were arbitrary and unfair, and have adversely affected Continental.

Continental's assertions pertaining to the procedures applied to its relicensing efforts and to those of former forwarders which acted in a more timely and conscientious fashion are difficult to follow. The "insidious secret calendar" allegedly employed by the Commission was anything but arbitrary. The February 2, 1979 cut-off date was the end of the standard 30-day reconsideration period specified in section 502.261 of the Commission's Rules. The failure to publicize the availability of a "grace period" for unlicensed forwarding activities could not have injured Continental in light of its admitted unresponsiveness to its licensing problem until "late February, 1979."[22] Therefore, Continental's complaint of discriminatory treatment seemingly boils down to the following notion: the Commission, by excusing possible unlicensed activities by former forwarders which were properly bonded before February 3, 1979, cannot consider the unlicensed activities of a former forwarder which did not meet the new bonding standards until March 13, 1979, neglected to tender an application until June 18, 1979 and refused to cease forwarding operations when advised of the need to do so.[23]

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[21] The possibility of securing reinstatement by obtaining a retroactive bond before February 3, 1979 originated with the Bureau of Certification and Licensing and was subsequently endorsed by the Commission.

[22] Affidavit of Franz Zinssmeister, *supra*. Although Continental only states that Mr. Zinssmeister was unaware of the license revocation, it must be assumed that any other Continental employees authorized to obtain a higher bond or to seek license reinstatement would have been as immobile in response to the *public* announcement of a 60-day grace period as they were to the Commission's other public and private notices in this matter. *See* Transcript at 23-24.

[23] Mr. Zinssmeister was informed by Office of Freight Forwarder personnel in "early March" that it was too late to obtain reinstatement by petition and that Continental must submit a new license

Although there were procedural irregularities in the Commission's treatment of the large number of reinstatement requests received during the period immediately following the December 1, 1978 revocations,[24] Continental has failed to demonstrate a single instance where substantially similar applicants were treated differently in any material manner. Only three of the cases listed in the Stipulation of the Parties dated June 17, 1980 even suggest the presence of unjustified discrimination. Examination of these cases reveals that they are readily distinguishable from the current controversy.

Pouch Forwarding Corporation and Apollo International Company were former forwarders which contacted the Commission's staff by telephone before February 3, 1979, but did not obtain bonds until after the cut off date. They also failed to arrange for retroactive coverage. Both were required to submit new applications. However, both applicants also ceased all forwarding activities immediately upon receiving oral warnings from the Office of Freight Forwarders so that less than 60 days of unlicensed forwarding was involved.

Ibertresa, U.S.A., Inc., obtained reinstatement of its license without filing a new application despite its failure to request such relief until June 19, 1979. Although in letter form, Ibertresa's written request was treated as a petition for extraordinary relief (*See* 46 C.F.R. 502.69) and was granted on October 17, 1979. There were sufficient differences between Ibertresa's situation and Continental's to account for the fact that Continental was required to file a new application rather than to proceed by petition. Furthermore, the procedures followed were not determinative; the application of different procedures would not have led to a different result in either case.

Ibertresa alleged that it possessed $30,000 bond coverage on December 1, 1978 by virtue of having paid the requisite premium to its bonding company on November 8, 1978, but that the bonding company had failed to complete the necessary paperwork. The bonding company's admission of error and other extenuating circumstances led the Commission to grant Ibertresa's request to vacate the order revoking its license.[25] Unlike Ibertresa, Continental was never alleged to have been properly bonded before March 9, 1979.

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application. Transcript at 25. A complete application was not filed until August 6, 1979 and no attempt was made to petition the Commission for relief from proceeding by application or for expedited consideration of Continental's cause, even though Continental was apparently represented by counsel at least as early as May, 1979. Affidavit of Carlos Rodriquez dated March 31, 1980.

[24] The most noticeable of these irregularities was the failure to require the submission of pleadings which met the formal requirements of 46 C.F.R. Part 502. Even oral requests may have been accepted. *See* Deposition of Charles L. Clow dated April 29, 1980 at 48-52.

[25] Ibertresa subsequently withdrew from the forwarding business and surrendered its license. *See* Order of Revocation served December 15, 1980.

Makeweight as Continental's claims of prejudicial treatment appear to be, it is fair and appropriate that Continental be allowed the same uncritical acceptance of its continued forwarding activities prior to February 3, 1979 that was given other former licensees. Accordingly, no civil penalties will be assessed for conduct which occurred before that date.[26]

## MITIGATING FACTORS

Continental complains that the Presiding Officer gave insufficient weight to certain of the mitigating factors recognized by proposed U.S. Customs Services guidelines applicable to violations of 19 U.S.C. 1592.[27] These factors are: prior good behavior, contributing agency error, cooperation with investigators and immediately taking remedial action. Although the relevance of Customs Service practices to the instant controversy has not been established, each of these factors has been considered by the Commission. On balance, they provide no basis for excusing Continental from civil penalties for violations of section 44 or for finding Continental fit to perform the duties of an independent ocean freight forwarder.

Continental claims it did not "deliberately continue forwarding after December 1, 1978." The evidence plainly establishes that the contrary is true. Notice of the Commission's license revocation action was received by Continental, but was ignored by the person regularly entrusted with handling the freight forwarding aspects of Continental's import/export business.[28] Even if Mr. Zinssmeister rather than the Continental corporation were the licensee, there can be no doubt that he knowingly, wilfully and deliberately continued to operate as a freight forwarder after he "discovered" the license revocation. In fact, Mr. Zinnsmeister went so far as to arrange for Continental's surreptitious use of another forwarder's license.

Continental further contends that Mr. Zinssmeister's unawareness of the revocation action until "late, February, 1979" is itself grounds for mitigation. Under the circumstances, this fact only underscores an ap-

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[26] The August 31, 1979 affidavit of Franz Zinssmeister states that Continental handled 365 export shipments between December 1, 1978 and August 31, 1979, but this statement is supported by documentary evidence detailing only 10 representative shipments. *See* Henderson affidavit, *supra*, and exhibits thereto. Six of the documented shipments apparently did occur after February 2, 1979, but rather than remand this matter to develop further proof concerning shipments which may have been unlawfully handled by Continental after the 60-day December, 1978 through January, 1979 "grace period" afforded other forwarders, the Commission has determined to consider none of the initial 365 shipments for civil penalty purposes. Penalties will be assessed only on the 111 shipments which occurred after Continental was personally visited -- and plainly cautioned --by investigator Henderson. *Id.*

[27] These guidelines appear at 45 *Fed. Reg.* 62954 (1980) and apply to the varying penalties provided for the three types of customs offenses established by 19 U.S.C. 1592 -conduct based upon fraud, gross negligence and negligence.

[28] Transcript at 23-24.

parent failure on the part of Continental's officers and directors to properly administer and control their employees and to make reasonable arrangements for receiving and replying to Commission communications. In *Lesco Packing Co., Inc.*, 19 F.M.C. 132, 136-137 (1976), where a forwarder application was denied on fitness grounds, the Commission stated that licensees have a duty to "possess, read, understand and meticulously follow" agency regulations and to respond to agency communications in a timely, responsible fashion. Continental has offered no plausible excuse for its failure to take appropriate action in response to the Commission's Order of Revocation or the oral and subsequent written statements of the Office of Freight Forwarders.[29]

Continental argues that its continued forwarding operations were not "deliberate" because Mr. Zinssmeister believed the Commission would relicense Continental just as it relicensed other former forwarders which obtained retroactive bonds. A belief that a timely filed license application would eventually be granted and a belief that it was permissible to operate unlawfully until such time as the applicant deemed it appropriate to stop are two quite different beliefs. Continental was advised that continued forwarding was unlawful at each stage of its dealings with the Commission's staff and was expressly advised that its application was deficient by the Commission's December 10, 1979 "Letter of Intent to Deny." Yet the violations continued until June, 1980.

The Commission committed no "errors" which "contributed to" the duration or extent of Continental's unlicensed forwarding activities. Instead, the record indicates that Continental knowingly assumed the risks of ignoring the Order of Revocation based upon Mr. Zinssmeister's personal evaluation of the circumstances. The longer Continental waited to file a complete application, the larger grew the risk of license denial. Consequently, when the Commission was presented with Continental's application in November, 1979, it did not see an applicant which had striven to extricate itself from unlicensed forwarder status in a timely and straightforward fashion, but rather an applicant content to drag its feet at the expense of the regulatory scheme mandated by section 44 of the Shipping Act. Most matters presented to the Commission involve questions of degree. In deciding how much unlicensed

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[29] During the oral hearing, Mr. Zinssmeister indicated that a Mr. Alfred Chestnut had been entrusted with managing Continental's forwarding business during late 1978 and 1979, that the Commission's revocation notices were received by Continental and that these notices were probably seen by Mr. Chestnut. Transcript at 23-24. Continental cannot avoid responsibility for its inaction simply by throwing Mr. Chestnut into the fire. It must offer some justification for its decision to leave Mr. Chestnut -- who had a chronic health problem during this period -- in charge of the forwarding business without meaningful supervision. Moreover, Continental still lists him and Mr. Zinssmesiter in its application as two of three individuals which qualify Continental as "fit, willing and able" to operate as a licensed forwarder. Transcript at 23-24; Exhibit No. 9 to Drew Affidavit.

forwarding was too much, the Commission reasonably concluded that the seven months which elapsed before Continental perfected its application was a period of sufficient length to establish doubt that the applicant had acted in good faith and was otherwise qualified for licensing.[30]

Continental's efforts to obtain a retroactive bond within two or three weeks after Mr. Zinssmeister learned of the license revocation does not constitute "remedial action." The offense Continental has committed is unlicensed forwarding. It can only be remedied by obtaining a valid license or by halting forwarder operations. Although proper bonding is a necessary step in the licensing process, Continental was less than diligent in filing the necessary application and did not stop its forwarding activities until June, 1980. In short, Continental's failure to take remedial action speaks against mitigation of the penalties prescribed for the unlicensed forwarding which occurred after August 31, 1979. [31]

Another of Continental's mitigation arguments is its alleged willingness to cooperate with the Commission's investigation of its activities, but Continental has not established that this "cooperation" consisted of anything more than that required of all licensees under section 510.24(1) of the Commission's Rules.[32] Moreover, Continental's failure to take remedial action until June, 1980 and its affirmative efforts to continue forwarding activities during the first half of 1980 are inconsistent with a finding that Continental warrants any special consideration for "cooperativeness" in this matter.[33]

Continental's final plea in mitigation is that its previous record as a freight forwarder, both before and after its licensing under section 44 in 1965, is completely free of regulatory violations or even allegations of such violations.[34] This factor was recognized by the Presiding Officer (I.D. at 17) and will be given appropriate consideration by the Commission.

## PENALTY ASSESSMENT AND FITNESS TO BE LICENSED

The Commission has decided to reduce the penalty assessment to $17,500 for two reasons. The primary basis for this action is the fact that penalties are being assessed only for the 111 violations of section

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[30] *See also* pages 11-15, *supra*, regarding the procedural errors alleged by Continental.

[31] *See*, note 25, *supra*.

[32] 46 C.F.R. 524(1) provides that:

> Each licensee shall make available promptly all records and books of account in connection with carrying on the business of forwarding, for inspection or reproducing or other official use upon the request of any authorized representative of the Commission.

[33] Continental's use of Pracht's license was discovered in June, 1980 as a result of third party inquiry by a Commission investigator. Transcript at 43-49.

[34] Continental first registered as a freight forwarder on March 24, 1958 under Commission regulations which preceded the freight forwarder licensing legislation enacted in 1961 (P.L. 87-254, 75 Stat. 522).

44(a) which occurred after August 31, 1979. A secondary consideration is Continental's prior good behavior as an ocean freight forwarder.

Finally, it is concluded that Continental is not fit to be licensed as an independent ocean freight forwarder. Except for its attempt to create the false appearance that its forwarding activities had stopped in December, 1979, no single act of Continental's may have been egregious enough to require denial of the application. Taken altogether, however, the picture that appears is one of consistent dereliction of the duty to respond to official communications and to control the activities of its agents. A person proven to be unresponsive to such fundamental regulatory interests as adherence to a widely publicized, industry-wide change in bonding amount, a license revocation order and requests to stop unlawful forwarding activities, is unfit to be licensed. This result is consistent with the Commission's action in similar instances of protracted and deliberate unlicensed forwarding by applicants. *Cargo Systems, International*, 22 F.M.C. 56, 71-72 (1979); *Concordia International Forwarding Corp.*, 21 F.M.C. 587, 592 (1978); *Alvarez Shipping Co., Inc.*, 16 F.M.C. 78, 81 (1973); *Harry Kaufman*, 16 F.M.C. 256, 271 (1973). *See also Fast International Forwarding Corp.*, 21 F.M.C. 1076, 1080-1081 (1979).

THEREFORE, IT IS ORDERED, That the independent ocean freight forwarder application of Continental Forwarding, Inc. (No. B-349), is denied; and

IT IS FURTHER ORDERED, That Continental Forwarding, Inc., pay to the Federal Maritime Commission a civil penalty of $17,500 in accordance with the proposed agreement entered into by Continental and the Bureau of Hearing Counsel in June, 1980; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 80-3

## CONTINENTAL FORWARDING, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION AND POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

Application denied.

Civil Penalty assessed Respondent pursuant to section 32(e) of the Shipping Act, 1916, in the amount of $35,000.

*Joseph B. Slunt, Charles C. Hunter, William Weiswasser, and Paul J. Kaller,* Acting Director, Bureau of Hearing Counsel, for Commission's Bureau of Hearing Counsel.

*Carlos Rodriguez* for Respondent.

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

*Partially Adopted February 2, 1981*

The Commission by its Order of Investigation and Hearing,[2] served January 17, 1980, instituted this proceeding pursuant to sections 22 and 44 (46 U.S.C. 821, 841(b)) of the Shipping Act, 1916, and section 510.8 of the Commission's General Order 4 (46 C.F.R. 510.8) to determine:

1. Whether Continental Forwarding, Inc. violated section 44(a), Shipping Act, 1916 by engaging in unlicensed forwarding activities;
2. Whether Continental Forwarding, Inc. violated section 44(e) of the Shipping Act, 1916 by falsely certifying to ocean carriers that it was licensed as an independent ocean freight forwarder and entitled to receive ocean carrier compensation after its license was revoked and/or by accepting ocean carrier compensation it was not qualified to receive for shipments forwarded after its license was revoked:
3. Whether civil penalties should be assessed against Continental Forwarding, 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;

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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] Published in *Federal Register,* Vol. 45, No. 16, Wednesday, January 23, 1980, Pages 5394-5395.

4. Whether, in light of the evidence adduced pursuant to the first and second issues, together with any other evidence adduced, Continental Forwarding, Inc. and its corporate officers, possess the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder;

## BACKGROUND

Continental Forwarding, Inc. (Continental or Respondent), was licensed as an independent ocean freight forwarder, License No. 457, until its license was revoked, effective December 2, 1978, for failure to file with the Commission a surety bond in the amount of $30,000 pursuant to the decision in *Licensing of Independent Freight Forwarders*, Docket No. 77-53, 20 F.M.C. 892, served July 24, 1978.[3] The instant application by Continental, dated May 30, 1979, seeks a license as an independent freight forwarder.

During the course of the Commission's investigation of Continental's application, it was learned that the firm apparently had engaged in ocean freight forwarding after the revocation of its license.[4] By letter dated December 10, 1979, the Commission notified Continental of its intent to deny its application for a license unless the applicant requested a hearing.[5]

In a letter dated December 31, 1979, Continental requested that it be given a hearing on the intended denial.[6]

On Friday, April 11, 1980, the parties to this proceeding requested and were granted an informal prehearing conference, which was held in the office of the Presiding Administrative Law Judge. At said prehearing conference it was revealed the parties had begun discussion of the issues.[7] It was agreed the parties would file a status report on or before Friday, May 9, 1980. The status report was submitted May 9, 1980, jointly by the parties; additional time to draft stipulations and review depositions taken, was sought to June 6, 1980, and was granted. If hearing is necessary, it was set to begin on June 17, 1980. Hearing in this proceeding began and concluded on Tuesday, June 17, 1980. The parties agreed (1) to file simultaneous opening briefs on or before Thursday, July 24, 1980, and (2) to file simultaneous reply briefs on or before Thursday, August 7, 1980. The briefs were filed timely.

Each party to this proceeding submitted:

(1) Opening Memorandum of Law
(2) Opening Brief

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[3] Instant Order of Investigation and Hearing served herein January 17, 1980, page 1.
[4] *Ibid.*
[5] *Ibid.*, p. 2.
[6] *Ibid.*
[7] Memorandum of Prehearing Conference served April 14, 1980.

(3) Reply Brief

Hearing Counsel in its Opening Memorandum of Law (served March 3, 1980) proposed 30 findings of fact; in its Opening Brief (served July 24, 1980)[8] proposed 20 supplemental findings of fact. These total 50 proposed findings of fact.

The Respondent in its Opening Memorandum of Law (served March 31, 1980) proposed 14 findings of fact; in its Opening Brief (served July 24, 1980) proposed 18 findings of fact; and, in its Reply Brief (served August 7, 1980) proposed 1 supplemental finding of fact. These total 33 proposed findings of fact. Of these 33 proposed findings of fact by the Respondent, Hearing Counsel disputed 6 (Numbers 10, 11, 12, 13 and 14 of those in Respondent's Opening Memorandum and No. 10 in Respondent's Opening Brief).

All proposed findings of fact total 83.

The Presiding Administrative Law Judge has considered all of the 83 proposed findings of fact and the disputation to 6 of them by Hearing Counsel. After consideration, the proposed findings of fact have been granted, granted in substance or denied as shown by the facts hereinafter set forth. In compliance with Rule 169 referred to above and with consideration of the entire record herein the Presiding Administrative Law Judge finds the facts in this proceeding as follows:

FACTS

Continental Forwarding, Inc. (Respondent or Applicant), formed in 1958, has been a freight forwarder since March of that year. On May 3, 1965, Respondent was issued FMC Independent Ocean Freight Forwarder License Number 457, effective as of April 30, 1965.

Respondent's License No. 457 was revoked automatically on December 2, 1978. Respondent had failed to file with the Commission, as required, a surety bond in the increased amount of $30,000 bearing an effective date of December 1, 1978, on or before December 1, 1978. The parties stipulated the Commission issued a Notice of Revocation, published in the *Federal Register* on January 3, 1979, wherein notice was given of the independent ocean freight forwarders who failed to file with the Commission a surety bond bearing an effective date of December 1, 1978, in the amount of $30,000 and whose licenses were revoked effective December 2, 1978[9] (Exhibit No. 1; Stipulation No. 1).

Prior to the December 2, 1978, revocation of Respondent's license, the Respondent was clear of any complaints as to possible violations by

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[8] At page 3, purports to list the material of which the record consists in this proceeding. The Presiding Administrative Law Judge in accordance with Rule 169 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.169, asserts the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision.

[9] The affidavit of Robert M. Drew has attached to it a copy of the Revocation Notice (Exhibit 6) containing a total of 148 licensees among which is listed the Respondent.

it of any of the laws applicable to independent ocean freight forwarders. Only after the December 2, 1978, revocation of Respondent's license did questions of law violations arise.

On March 13, 1979, the Commission's Office of Freight Forwarders received notice of the issuance of a surety bond in the amount of $30,000 bearing the effective date of December 1, 1978, which covered Respondent's ocean freight forwarding activities (Affidavit of Robert M. Drew, page 4, para. 15).

On May 30, 1979, the Respondent applied for an Independent Ocean Freight Forwarder License. That application, on June 19, 1979, was returned to Respondent as incomplete. The application was resubmitted on July 11, 1979, with a covering letter from Respondent's counsel, stating, *inter alia*, that the Respondent had not interrupted its forwarding service. (Affidavit of Robert G. Drew, Attachment (Exhibit) No. 12.)

The parties stipulated that the Commission's Bureau of Certification and Licensing recommended that Continental Forwarding Inc. be issued a new license and that the apparent unlicensed forwarding activities be the subject of a civil penalty claim. The Commission decided instead to issue a letter of intent to deny Continental's application (Exh. No. 1, page 5, Stipulation No. 10 of Parties).

On July 11, 1979, District Investigator Joseph M. Henderson of the Commission's Atlantic District Office, was assigned to investigate Continental Forwarding, Inc., to ascertain whether Continental had continued to engage in carrying on the business of ocean freight forwarding after revocation of their Independent Ocean Freight Forwarder License Number 457 effective December 2, 1979. Investigator Henderson made trips to the offices of Respondent on August 16 and 17, 1979, and each time advised Respondent's President, Franz Zinssmeister that Respondent should cease its ocean freight forwarding activities immediately.

In an affidavit subscribed and sworn to August 31, 1979, Franz Zinssmeister, President, Continental Forwarding, Inc., stated, *inter alia*, that Continental has since December 1, 1978 to the present (August 31, 1979), completed three hundred sixty-five (365) shipments for export; that for these shipments approximately $14,862.00 has been billed for forwarding fees and approximately $5,241.00 brokerage has been collected. (Affidavit of Joseph M. Henderson, Attachment (Exhibit) 1.)

The stipulations 1 and 10 referred to above are part of 11 contained in Stipulation received in evidence herein as Exhibit No. 1. The other stipulations provide substantially as follows: No. 2 - that 8 licensees were erroneously listed in the Notice of Revocation, as they met all bonding requirements prior to December 1, 1976; No. 3 - that 36 licensees who secured valid surety bonds in the amount of $30,000 on or before December 1, 1978, were listed in the Notice of Revocation as the bonds were not submitted to the Commission by December 2, 1978.

The Notice of Revocation as it pertained to those 36 licensees was vacated based upon evidence that the $30,000 bonds were in effect continuously from December 1, 1978; No. 4 - that 2 licensees had their licenses reinstated after they filed the prescribed $30,000 surety bonds with effective dates on or before December 1, 1978; No. 5 - that 7 licensees obtained surety bonds in the amount of $30,000 after December 1, 1978, with effective dates on or before December 1, 1978, and submitted them prior to February 2, 1979. The Commission issued a Notice Vacating Revocation of those licenses; No. 6 - that 4 licensees had their licenses reissued having secured a $30,000 surety bond effective respectively January 24, 1979, February 22, 1979, March 16, 1979, and January 1, 1979. All of these had contacted the Commission prior to February 1, 1979, about having the license reinstated; No. 7 - that no investigation was conducted to determine if any of the (57) forwarders referred to above had engaged in any unlicensed forwarding activities. They were not required to file new applications. If a former licensee whose license was revoked for failure to file a $30,000 surety bond did not contact the Commission prior to February 2, 1979, it was required to file an application in order to obtain a new license; No. 8 - that 2 licensees have had new licenses issued using their old FMC number. Both submitted applications and investigations were conducted to determine if they had performed any forwarding after the revocation of their licenses. Both were issued new licenses after it was determined that they had not performed any unlicensed forwarding; No. 9 - that 1 Notice of Revocation as it applied was vacated on September 17, 1979, based upon evidence that its failure to submit the $30,000 surety bond was primarily the fault of the surety. That forwarder submitted a bond on June 29, 1979, with coverage retroactive to December 1, 1978. No investigation was conducted as to whether that forwarder had performed unlicensed forwarding; No. 11 - that the depositions of Robert Drew and Charles Clow taken in connection with this proceeding may be offered in evidence.[10]

The parties, at the June 17, 1980, Hearing agreed to enter into further stipulations covering certain activities that have been carried on by Continental since the filing of Mr. Henderson's affidavit (Tr. 15). On July 3, 1980, the parties filed a joint stipulation, in which it is stipulated:

> (1) The documents included in Appendix I attached hereto evidence twenty-six (26) of the one hundred and seven (107) ocean freight shipments which are referred to on pages fifteen (15) ad sixteen (16) of the transcript of the hearing held in this docket on June 17, 1980 and discussed on pages fifty-two (52) through fifty-five (55) of that transcript.

[10] Parties agreed that Drew and Clow depositions are part of this record (Tr. 65, 68).

(2) The documents included in Appendix II attached hereto are the signed statement and a subsequent clarification thereof referred to on pages sixty-one (61) and sixty-two (62) of the transcript of the hearing held in this docket on June 17, 1980.

Investigator Henderson conducted further investigation of the Respondent since February 1980. On June 5, 1980, he contacted Velco Enterprises, one of the Respondent's customers, and discovered Respondent was still being used by them as a forwarder (Tr. 45). Velco and other export clients were advised of Respondent's arrangements with Pracht International, Inc., holder of Independent Ocean Freight Forwarder License Number 1880 (Exhs. 3 and 4).

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

Hearing Counsel contends that the Respondent, by engaging in carrying on the business of ocean freight forwarding after its independent ocean freight forwarder license had been revoked, violated section 44(a), Shipping Act, 1916, and by accepting compensation during the period violated section 44(e) of the Act. Hearing Counsel cites the August 31, 1979, affidavit of Respondent's President and 99% stockholder, Franz Zinssmeister, that during the period December 2, 1978 through August 31, 1979, Respondent had forwarded 365 ocean freight shipments; that subsequent to August 31, 1979, Respondent forwarded at least 4 ocean freight shipments. (H.C. Opening Memo. of Law, pp. 11, 12.) Hearing Counsel points to the July 3, 1980, stipulation to 107 violations by the Respondent and asks they be found to have been made during the period December 1977 through early June 1980 (Opening Brief, p. 12).

The Respondent, in its March 31, 1980, Opening Memorandum of Law, July 24, 1980, Opening Brief, of August 7, 1980, Reply Brief, has difficulty in coming to grips directly with Respondent having carried on the business of ocean freight forwarding without a license after December 1, 1978.[11] Instead, the Respondent submits that the Commission is estopped[12] from denying a license to the Respondent and from applying sanctions (civil penalties) for forwarding without a license after December 1, 1978. (Respondent's Opening Memo., p. 5.) Respondent contends its license was revoked permanently without benefit of a hearing and without opportunity to demonstrate that, once its principal

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[11] Tr. 4. Attorney for Respondent: ". . . as far as activities are concerned, there are some activities that we have admitted to, by Mr. Zinssmeister's affidavit, however, the legal consequences of these activities we reserve till we brief again--on the legal point that perhaps there was no initial revocation. . . ."

Tr. : "In my admissions we're admitting activities rather than violations. . . . But as the activities, that Mr. Zinssmeister continued forwarding, that we have admitted to in Mr. Zinssmeister's affidavit. . . ."

[12] The Presiding Administrative Law Judge, Tr. 7, could not and does not find estoppel an appropriate issue under the circumstances of this proceeding.

had actual notice of its inadequate bonding, steps were taken that both corrected the deficiency and provided the desired protection of the public against loss; that had a hearing been held prior to revocation, Respondent's property interest would have been accorded their requisite due process protection. (Respondent's Opening Brief, p. 17.)

The Respondent asks that a finding be made that the initial revocation of the license was unlawful (Respondent's Reply Brief, p. 3).

Hearing Counsel in its Reply Brief, p. 10, say it will not address the legal merits of Respondent's assertion that Respondent was denied procedural due process in the manner in which its license was revoked, as Hearing Counsel takes the position the issue so raised is both moot and not encompassed within the scope of this proceeding; also that it would be improper to consider the lawfulness of the revocation of Continental's license in this proceeding (*Ibid.* p. 11).

Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the government's action. *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. (2d) 287, 90 S. Ct. 1011 (1970).

The Presiding Administrative Law Judge finds authority for the Commission's revocation of Respondent's license in section 510.9 (46 C.F.R. 510.9) which provides, *inter alia*:

> That no license shall remain in force unless a valid surety bond is maintained on file with the Commission. A license will be automatically suspended or revoked without hearing or other proceeding, for failure of a licensee to maintain a valid surety bond on file.

Thus, it is seen that the Presiding Administrative Law Judge thinks it not improper to consider in this proceeding the lawfulness of the revocation of the Respondent's license. The record herein reflects that the Respondent was afforded the fundamental requisite of due process of law, the opportunity to be heard; the hearing was at a meaningful time and in a meaningful manner. *Goldberg v. Kelly, supra.* Thus the Respondent has been afforded Constitutional due process. The Presiding Administrative Law Judge *finds* and *concludes* the initial revocation of Respondent's license was lawful.

The Respondent (Opening Brief) argues that it should be clear that it made no deliberate decision to continue forwarding without a license after December 1, 1978; that the decision to continue forwarding after March 1979 was not one taken lightly by it, but one taken in calculated and good faith anticipation of reinstatement by the Commission retroactive to the revocation date (p. 10).

Hearing Counsel (Reply Brief, p. 3) answers that as to Respondent's activities prior to February, 1979, although Continental may not have

undertaken such conduct deliberately, that conduct was occasioned by a gross neglect of its responsibilities as a licensee. Hearing Counsel argues that a licensee cannot merely elect to ignore Commission actions and then plead that its unlawful conduct was unintentional; that Continental's protestations of good faith do not conform with the evidence in the record.

Hearing Counsel also argues that the Respondent took a calculated risk by engaging in carrying on the business of ocean freight forwarding in the hope that the reaction of the Commission to its conduct would not be adverse. The Commission issued a letter of intent to deny the license (*Ibid.* p. 4).

In considering the above, the Presiding Administrative Law Judge also considered that the Respondent stipulated (Exhibit No. 1) the Notice of Revocation herein was published in the *Federal Register* on January 3, 1979, that independent ocean freight forwarders who failed to file with the Commission a surety bond bearing an effective date of December 1, 1978, in the amount of $30,000, on or before December 1, 1978, those licensees' licenses were revoked effective December 2, 1978. The Respondent attached as an exhibit to its March 31, 1980, Opening Memorandum a copy of the August 31, 1979, affidavit of Franz Zinssmeister, President of the Respondent, which said, *inter alia*, the Respondent since December 1, 1978 to date (August 31, 1979), completed three hundred sixty-five (365) shipments for export. A copy of the same August 31, 1979, affidavit referred to is included as an attachment (Exhibit) No. 1 to the Affidavit of Commission Investigator Joseph M. Henderson. The Respondent and Hearing Counsel in a joint stipulation, July 3, 1980, stipulated to an additional one hundred and seven (107) shipments handled by Respondent since Commission Investigator Henderson's affidavit, February 26, 1980.

The Presiding Administrative Law Judge, under the circumstances herein (affidavit, stipulation and the record) deems he is bound to *find* and *conclude* that the Respondent whose independent ocean freight forwarder license had been revoked properly on December 2, 1978, continued to carry on ocean freight forwarding without a license. Respondent subscribed and swore to 365 as well as stipulating to 107 transactions, a total of 472 (possibly 4 more) all in violation of section 44(a) of the Shipping Act, 1916, that "No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business."

The Presiding Administrative Law Judge also *finds* and *concludes* that Respondent by accepting compensation in the admitted amount of $5,241.00 (Franz Zinssmeister August 31, 1979 Affidavit) from ocean going carriers after Respondent's license had been revoked, violated section 44(e) of the Shipping Act, 1916, that "A common carrier by

water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, said person is licensed hereunder. . . ."

Hearing Counsel contends that Respondent by repeatedly engaging in conduct violative of the Shipping Act, 1916, has evidenced a lack of the requisite fitness to be licensed as an independent ocean freight forwarder (Opening Memo., p. 13). According to Hearing Counsel, weighing even more heavily against Respondent's fitness to be licensed as an independent ocean freight forwarder is the continuation by Respondent of its illegal activities despite warnings issued by the staff of the Commission that such conduct is forbidden by the Shipping Act, 1916 (*Ibid.*, p. 18). Hearing Counsel submits that Respondent's repeated, willful and knowing violations of the Shipping Act, 1916, would appear to constitute conduct unsuited to the profession and therefore, to necessitate swift action to remedy the misconduct by denial of Respondent's application for a license (*Ibid.*, p. 20).

Respondent contends that mitigating circumstances warrant conclusion that alleged violations do not impact on Respondent's fitness (Opening Brief, p. 8). The Respondent argues the singular fact which, it is alleged, impacts on respondent's fitness to carry on the business of forwarding is that Respondent continued to forward after its license had been automatically revoked on December 2, 1978 (to this Respondent added footnote: "The issue of the lawfulness of an automatic revocation is discussed elsewhere in this brief, but in the alternative for purposes of considering issues of fitness and mitigation only, it will be accepted that Continental's license was revoked"), for not having timely obtained and filed an appropriate bond.

The Respondent argues that the President of Respondent did not immediately become aware that its underwriter had not issued the requisite bond; the President first became aware of the problem in late February 1979 while he was in Germany continuing treatment for and convalescense from, the near loss of his hand and the subsequent surgery. Continental had in the past relied on the surety company and broker to renew the bond automatically. Continental obtained a surety bond in the required amount of $30,000 which was filed with the Commission on March 13, 1979, with a retroactive effective date of December 1, 1978 (Opening Brief, pp. 8, 9).

Hearing Counsel (Reply Brief) counters that the Respondent blithely dismisses the massive number of willful violations of section 14 of the Act; that the mitigating circumstances cited by the Respondent clearly do not justify its numerous, willful violations of the Act (p. 2). Also, says Hearing Counsel, the absence of a corporate officer cannot absolve the corporation of its duty to abide by pertinent statutory or regulatory authority (*Ibid.*, p. 3); that Respondent's failure to direct the bonding

company to issue a bond in the required amount is a failure for which Respondent alone is responsible.

The Respondent argues that circumstances of mitigation in this proceeding are:

> 1. The amount of surety bond required ocean freight forwarders was increased from $10,000 to $30,000, effective on or before December 1, 1978.
>
> 2. Mr. Zinssweister did not become aware that the firm's bond underwriter had not issued the requisite bond until late February, 1978.
>
> 3. Respondent was severely impaired in his ability to keep abreast of the needs of his business by the near loss of his hand and the concomitant extensive medical treatment which required hospitalization on several occasions subsequent to his accident.
>
> 4. Respondent had, in the past, relied on his surety company and broker to renew the bonding requirement automatically. Unbeknownst to respondent such was not the policy of the underwriter whom he retained in December, 1978. Transfer of all Continental Shipping's bonding requirements from one company to another at the critical period resulted in the inadvertent failure to increase the requirement to the statutory amount.
>
> 5. Respondent sought to correct the deficiency as soon as it came to his attention, by giving the Commission notice that . . . bond for $30,000 has issued to be effective December 1, 1978, a date within the deadline established by the Commission.
>
> (Respondent's Opening Memo. of Law, p. 13, Opening Brief, pp. 8, 9).

Such arguments by the Respondent as to mitigating circumstances the Presiding Administrative Law Judge *finds* and *concludes* do not overcome the activities admitted to by the Respondent, and also *finds* and *concludes* that those activities were in violation of sections 44(a) and 44(e) of the Shipping Act, 1916. They reflect on the Respondent's fitness to be licensed as an independent ocean freight forwarder.

Hearing Counsel submit that Respondent's repeated, "willful and knowing violations of the Shipping Act, 1916, would appear to constitute "Conduct unsuited to the profession" and, therefore, to necessitate "swift action to remedy the misconduct . . . by denial of Respondent's application for a license" (Opening Memo., p. 20, citing *Independent Ocean Freight Forwarder Application--Guy G. Sorrentino*, 15 F.M.C. 127 128 (1972). Hearing Counsel urge that Respondent does not possess the requisite fitness to be licensed as an independent ocean freight forwarder. Reasserted in its Opening Brief, p. 13 and Reply Brief, p. 21.

The Respondent argues that the Respondent's obtaining and filing with the Commission on March 13, 1979, a surety bond in the required

amount of $30,000, with a retroactive effective date of December 1, 1978, is significant in several ways. "It highlights the purely technical aspect of Continental's original infraction--i.e., not filing the bond in a timely fashion. The ease with which the matter was corrected is completely in keeping with the principles which relate to Section 44, Shipping Act, 1916. It is well established that the emphasis is on correcting abuses in the industry, and not on punishment. *Application for License*, 8 F.M.C. 109, 117-118 (1964); *Hugo Zanelli v. Federal Maritime Commission*, 500 F. 2d 1000 (5th Cir. 1975). The public interest was made whole with the bond, which provided continuous coverage of Continental's forwarding." (Opening Brief, p. 9, Opening Memo, p. 12).

The latter part of the argument as to the emphasis being on correcting abuses in the industry, and not on punishment was made in the case of *Independent Freight Forwarder License No. 1321--Ikeda International Corporation*, 22 F.M.C. 803 (1980, Initial Decision), Partial Adoption of Initial Decision, 22 F.M.C. 799 (1980). The Presiding Administrative Law Judge and the Commission in *Ikeda* did not find support for the contentions of Hearing Counsel and the Respondent as to section 44 of the Act being remedial as opposed to punitive or that the *Zanelli* case supports those contentions. The Commission did make the statement--". . . administrative sanctions should not, however, be blindly or automatically imposed and even in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanction to the facts of the specific case. Section 44 and its regulations are based on an underlying remedial public interest purpose (citing the *Dixie Forwarding Co.* case, Docket No. 1115, 8 F.M.C. 109 (1964), and the sanction imposed must serve such a purpose and not be punitive in character. *Independent Ocean Freight Forwarder License E. L. Mobley, Inc.*, 21 F.M.C. 845, 847.

An underlying remedial public interest purpose does not equate to the view that sanctions are to be corrective and not punitive.

The Respondent argues further that its fate is in astonishing contrast to that of several other forwarders who were re-licensed by the Commission without obtaining retroactive bond coverage to December 1, 1978, leaving the public interest in their operations unprotected (Opening Brief, p. 9).

Hearing Counsel in its Reply Brief, p. 5, says Respondent seems to imply that it was, for some unstated reason, singled out and subjected to harsher treatment than other freight forwarders who were allegedly "similarly situated." Hearing Counsel says the fallacy in Continental's assertion is that other forwarders, the revocation of whose licenses was vacated or whose licenses were reissued either with or without the submission of new applications were not "similarly situated."

The Presiding Administrative Law Judge deems the observation of Hearing Counsel that the Respondent has not shown it and other forwarders were similarly situated is correct and that perhaps is one

reason why Hearing Counsel stipulated to Exhibit No. 1. It cannot be said that the Commission is bound by anything that appears before it to deal with all cases at all times as it has dealt with some that seem comparable. The Commission must be satisfied that the public interest will be served by issuing or renewing a license. *FCC v. WOKO*, 329 U.S. 223, 91 L. Ed, 204 (1946). The number of violations by the Respondent and the period of time from December 2, 1978 through June 1980 they covered, takes away any technical aspect and becomes flagrant violations, leading the Presiding Administrative Law Judge to *find* and *conclude* that at this point the Respondent cannot be found fit to be licensed as an independent ocean freight forwarder.

For the many violations herein of the Shipping Act the Respondent should be assessed a civil penalty pursuant to section 32(e) (46 U.S.C. 831(e)) of the Act.

The Commission's Bureau of Hearing Counsel and Continental Forwarding, Inc., have proposed a settlement of civil penalties. The Respondent agrees to pay to the Commission the sum of $17,500 to be made in four equal installments of $4,375. First payment within 30 days from final approval of the settlement agreement and other installments 4, 8 and 12 months from date of final approval of the settlement agreement. Interest on unpaid balance shall be paid with each installment at the rate of 12% per annum.

The Respondent in its August 31, 1979, affidavit of its President, Franz Zinssmeister, subscribes and swears that since December 1, 1978 to August 31, 1979, the Respondent completed three hundred sixty-five (365) shipments for export; that for these shipments approximately $14,862.00 has been billed for forwarding fees and approximately $5,241.00 for brokerage has been collected. These two figures ($14,862.00 and $5,241.00) total $20,103. The proposed settlement is $17,500. The record does not indicate what was realized by the Respondent from the 107 shipments after August 31, 1979. In any event in this proceeding there are at least 472 shipments by the Respondent after revocation of its license, all in violation of section 44 of the Shipping Act. Section 32(e) gives authority to the Commission to assess or compromise all civil penalties provided in this chapter. Violations of section 44 of the Act subjects one to a civil penalty not to exceed $5,000 for each such violation (section 32(a)); violations of any order, rule, or regulation of the Federal Maritime Commission made or issued in the exercise of its power, duties or functions subjects one to a civil penalty of not more than $1,000 for each day such violation continues (section 32(c)). The Respondent has since December 1978 to June 1980 continued forwarding without a license, that is a period of about 18 months or 540 days.

Upon consideration of the above and the proposed settlement of civil penalties submitted for approval, the Presiding Administrative Law

Judge *finds* and *concludes* that the amount of settlement is insufficient and because it is, the settlement should not be approved. Approval of the proposed settlement is denied. On the other hand, if the civil penalty under the circumstances of this proceeding was doubled to $35,000, it is the opinion of the Presiding Administrative Law Judge such a settlement should be approved, when entered into by the parties.

In a recent case before the Commission, *Rene Lopez and David Romano d/b/a United Dispatch Service--Independent Ocean Freight Forwarder License No. 1381*, 22 F.M.C. 522, 524 n.4 (1980), pointed out--Sanctions under section 44 must be tailored to the facts of each individual case. In that case Respondent admits collecting approximately $2,000 in freight compensation for 82 shipments handled by Foreign Freight Forwarders, Inc., under Respondent's name and license number. In view of Respondent's six-year violation free history, the Commission said it was satisfied that a six-month suspension will serve a remedial interest purpose, and that a more severe sanction is unnecessary to achieve this end in this particular case.

In the instant case the Respondent has been a freight forwarder since 1958, licensed since 1965. The Respondent had a 20 year (13 year licensed) violation free history followed by the spate of violations (over 400) in this proceeding over a period of approximately 18 months.

In the opinion of the Presiding Administrative Law Judge, the Respondent can be the catalyst in determining how quickly the Respondent will be in a position to make another application for an independent ocean freight forwarder license. The Respondent should meet with Hearing Counsel again as to the settlement of civil penalty in the amount of $35,000, which amount the Presiding Administrative Law Judge approves. Upon payment of the civil penalty in the whole amount or first installment as may be provided in the settlement, the Respondent may apply to the Commission for an independent ocean freight forwarder license.

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 Respondent violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities.

(2) Respondent violated section 44(e) of the Shipping Act, 1916, by accepting ocean carrier compensation it was not qualified to receive for shipments forwarded after its license was revoked.

(3) The Respondent at this point is not found fit to be licensed as an independent ocean freight forwarder.

(4) Civil penalties should be assessed against Respondent pursuant to section 32(e) (46 U.S.C. 831(e)), for violations of the Shipping Act, 1916, in the amount of $35,000.

(5) The proposed settlement arrived at between Hearing Counsel and Respondent in the amount of $17,500 is not approved.

(6) Hearing Counsel and Respondent should remake the settlement as to Civil Penalty in the amount of $35,000 with the same schedule of payment. When that is done and the civil penalty of $35,000 is paid or the first installment as may be provided, the Respondent may apply to the Commission for an independent ocean freight forwarder license.

Wherefore, it is *ordered* that:

1. The application of Respondent for an independent ocean freight forwarder license is denied.

2. The Respondent, pursuant to section 32(e) (46 U.S.C. 831(e)) of the Shipping Act, 1916, is assessed a civil penalty of $35,000, which is approved to be the settlement agreement of the Civil Penalty to be set forth in documents similar to those presented herein wherein the settlement agreement was for $17,500 but was not approved by the undersigned.

3. The Respondent upon payment of the civil penalty of $35,000 or first payment as may be provided in its settlement agreement may apply for a license as an independent ocean freight forwarder.

(S) WILLIAM BEASLEY HARRIS
*Administrative Law Judge*

Washington, D, C.
September 18, 1980

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 80-47

LUIGI SERRA, INC.

*v.*

SEA-LAND SERVICE, INC.

## NOTICE

*February 2, 1981*

Notice is given that no exceptions have been filed to the December 9, 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. 80-47
## LUIGI SERRA, INC.

*v.*

## SEA-LAND SERVICE, INC.

Reparation denied.

*Richard L. Furman* for the Complainant.

*J. M. Ridlon* for the Respondent.

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

*Finalized February 2, 1981*

Complainant, Luigi Serra, Inc., International Freight Forwarders, charges respondent, Sea-Land Service, Inc., a common carrier by water in the foreign commerce of the United States, with violations of sections 17, 18(a), and 18(b)(5) of the Shipping Act, 1916, and asks for an award of reparation in the amount of $38,089.21. Serra's complaint is grounded on the theory that the rates charged by Sea-Land on the shipments in question were unjustly discriminatory, unjust and unreasonable, and so unreasonably high as to be detrimental to the commerce of the United States.

On May 31, 1979, Serra booked with Sea-Land a movement of four 35-foot containers of cargo consisting of empty steel ammunition boxes to be transported from Jacksonville, Florida, to Leghorn, Italy. Three of the containers moved under Sea-Land Bill of Lading No. 971-780024, dated June 4, 1979, and the remaining container moved under Sea-Land Bill of Lading No. 971-780313, dated June 10, 1979.

The four containers were carried by Sea-Land pursuant to the terms of 11th revised page 80 of the South Atlantic/Spanish, Portuguese, Moroccan and South Mediterranean Rate Agreement No. 10261, Freight Tariff No. 1-FMC-1 (Section 1), effective February 21, 1979. The tariff contained no specific commodity rate for empty steel ammunition boxes, and the shipment was rated at the Cargo NOS rate $211.50 W/M. Total freight charges, including a bunker surcharge, were $44,034.38. The shipment moved on a freight collect basis; 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).

during a period when the consignee, La Metalli Industriale S.p.A., refused to pick up the shipment, demurrage charges of $2,334.83 accrued.[2]

Sea-Land became a member of Rate Agreement No. 10261 on August 15, 1977, when it was formed, *Approved Conference, Rate, Interconference and Joint Service Agreements and Selective Cooperation Working Arrangements of Steamship Lines in the Foreign Commerce of the United States*, p. 4-122. The Rate Agreement consists of eleven carriers. Prior to Sea-Land's entry into the Agreement, the trade in question was covered by Sea-Land's individual Tariff No. 168-B, FMC 73, which was in effect in June 1977.

## DISCUSSION AND CONCLUSIONS

Section 18(a) provides in relevant part:

> That every common carrier by water in *interstate commerce* shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs . . . . (Emphasis mine.)

Since the shipments in issue here were in the foreign commerce of the United States, section 18(a) is not applicable to them and no violation of that section can be found in this proceeding.

Section 17 of the Act provides:

> That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board [Commission] finds that any such rate, fare or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

To establish a violation of this section, a complainant must show that the rate in issue unjustly discriminates between shippers or ports or that the rate is unjustly prejudicial to exporters of the United States as compared to their foreign competitors. The essential element in each instance is a comparison of the rates charged one shipper with comparable rates charged another shipper, which comparison shows that one shipper's rates were unjustly discriminatory or unjustly prejudicial to an American exporter. No such showing has been made here. In the absence of any facts indicating the existence of other shippers of similar traffic over the same line under substantially the same circumstances

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[2] La Metalli protested what it considered the exorbitant rate and refused to pay Sea-Land until Serra agreed to reimburse La Metalli. All outstanding freight and demurrage charges have been paid to Sea-Land by La Metalli.

who paid different, more advantageous rates, no unjust discrimination in violation of section 17 can be found. *North Atlantic Mediterranean Freight Conference - Rates on Household Goods,* 11 FMC 202 (1967). Similarly, no evidence exists that a foreign competitor of an exporter from the United States received a rate which prejudiced the latter. A showing of different treatment to another similarly situated person is a prerequisite to a finding of a violation of section 17. *Commodity Credit Corp. v. Lykes Brothers Steamship Co.*, 18 FMC 49 (1974).

Complainant Serra's theory is grounded on what can be termed an historical tracking of the rates applied to empty ammunition boxes. Serra points out (1) that in June of 1977 Sea-Land had a rate of $44.50 per 40 cubic feet on steel ammunition boxes from U.S. South Atlantic and Gulf ports to ports in France and Italy; (2) that at the time of the shipments in question, the rate was $211.50 W/M; and finally (3) Sea-Land's present rate on empty ammunition boxes is $130.00 per 2,240 pounds. From this Serra submits that "a variety of inferences can be drawn," the most important of which is "that the general cargo rate is uncompetitive and excessive."

Actually, the reasons for the "fluctuation" of the rates are easily found from the record. In 1977 Sea-Land had its own tariff, which contained a specific commodity rate applicable to empty ammunition boxes. However, when it joined the Rate Agreement, it was bound to apply the Rate Agreement Tariff, which did not have a specific commodity rate for the boxes; and it was compelled to apply the higher Cargo NOS rate. Finally, the present rate of $130.00 per 2,240 pounds was put into the Rate Agreement Tariff at the specific request of Mr. E. Torres of Luigi Serra. An additional inference which can be drawn from the record here is that sometime prior to Sea-Land's entry into the Rate Agreement, Serra shipped some boxes under Sea-Land's individual tariff and then some two years later booked the present shipments assuming the rate had remained the same -- if true, a dubious assumption indeed.[3] In any event, section 17 simply does not address itself to "excessive" or unreasonable rates. Any attempt to use the provisions of section 17 to sustain an allegation that the rates of a carrier are unreasonable would be an attempt to have the Commission prescribe reasonable rates for foreign commerce, a power the Commission does not possess. *Heavy Lift Practices and Charges of Hapag-Lloyd* 21 F.M.C. 637 (1979).

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 such carriers which, after hear-

[3] Serra received no rate quotation from Sea-Land at the time the present shipments were booked.

ing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

While not specifically addressed to the provisions of section 18(b)(5), complainant's entire argument would seem to be in its two assertions that "it is difficult to imagine how the rates under discussion could be justified" and that "this narrow segment of commerce could not exist if freight rates bore a percentage value to the goods as calculated [by complainant]."[4] Unfortunately, the record contains no evidence of the elements of an 18(b)(5) violation which complainant itself, citing *Ocean Rate Structures*, 12 FMC 34 (1968), admits is necessary to its case. But even if Serra had put in any evidence, the remedy it seeks, reparation, is not available under section 18(b)(5) with the case in its present posture.

The language of 18(b)(5) does not initially prohibit any conduct by carriers. It simply requires that the Commission make the requisite finding that a rate is so high or low as to be detrimental to commerce and to order the offending rate discontinued. This order of the Commission is a prerequisite to any sanctions under the section. *Federal Maritime Commission v. Caragher*, 364 F.2d 709, 717 (2d Cir. 1966). And until a violation of that order of the Commission is found, no reparation may be awarded. *Pacific Westbound Conference Investigation of Rates Pertaining to Wastepaper*, 21 F.M.C. 834 (1979); *Commodity Credit Corp. v. American Export Isbrandtsen Lines, Inc.*, 15 FMC 171, 191 (1972); *Valley Evaporattng Company v. Grace Line, Inc.*, 14 FMC 16, 26-27 (1970). Here there is no order of the Commission requiring the discontinuance of the rate in issue, thus no reparation can be awarded.

Finally a word needs to be said about complainant's reliance upon *Volkswagonwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), and *Wolfsburger Transport-Gesellschaft m.b.h. v. Federal Maritime Commission*, 562 F.2d 827 (1977). Serra argues that these cases stand for the proposition that the reasonableness of a rate is whether the "charge levied is reasonably related to the service rendered." Whatever the validity of complainant's analysis, the cases are inapposite. They are representative of a distinct line of cases which deal with situations which do not involve the freight rates of an ocean carrier and they are not applicable to cases such as this one. See, e.g., *Free Time Practices - Port of San Diego*, 9 FMC 525 (1966), at pages 545-547.

[4] Complainant says that the freight charges on the shipment of three containers "represents 64% of the FAS value of the goods" and that the freight charges on the single container shipment "represent 65% of the value of the goods."

For the foregoing reasons, Complainant has failed to show that respondent has violated sections 17, 18(a) and 18(b)(5). The complaint is dismissed.

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

Washington, D.C.
December 9, 1980

# FEDERAL MARITIME COMMISSION

## DOCKET NO. 79-59

## STUTE INTERNATIONAL, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

## ORDER ADOPTING INITIAL DECISION

*February 5, 1981*

The Commission has before it the Exceptions of Stute International, Inc., to the Initial Decision of Chief Administrative Law Judge John Cograve served October 14, 1980 in the above-captioned matter. A "Reply to Exceptions" was filed by the Commission's Bureau of Investigation and Enforcement.

Stute alleges error in the following aspects of the Initial Decision: (1) it failed to find that a shipper would actually *exercise* direct or indirect control over Stute's forwarding operations and the mere possibility of shipper control should not disqualify an applicant; and (2) it applied a standard of absolute licensee/shipper separation which has been discredited by the Eighth Circuit Court of Appeals and abandoned by the Commission. The Bureau of Investigation and Enforcement disputes these contentions and argues that the Initial Decision is correct in all respects.

Examination of Stute's exceptions and the remainder of the record in this proceeding reveals that Stute is merely rearguing points raised before and fully resolved by the Presiding Officer. The critical question in dispute is one of law, that is, whether the statutory prohibition against licensing persons "directly or indirectly . . . controlled by [a shipper]" refers to: (1) the legal right to control; or (2) the actual exercise of control over the applicant's forwarding policies and activities.* The Presiding Officer carefully examined prior Commission decisions on this subject and concluded that a person subject to a shipper's legal right to control lacked the independence required for licensing as an independent ocean freight forwarder under 46 U.S.C. 841b. The Commission believes this conclusion to be correct and consistent with established precedent and will therefore deny Stute's application and adopt the Presiding Officer's decision as its own. *Norman G. Jensen, Inc. v. Federal Maritime Commission*, 497 F.2d 1058 (8th Cir. 1974), is inapplicable to Stute's situation because in that case the court found

* See the definition of "independent ocean freight forwarder" contained in section 1 of the Shipping Act, 1916 (46 U.S.C. 801).

that the challenged ownership interest was not an interest in a "shipper." In this instance, it is undisputed that shipper status is properly attributable to Stute's parent organization.

THEREFORE, IT IS ORDERED, That the Exceptions of Stute International, Inc., are denied; and

IT IS FURTHER ORDERED, That the application of Stute International, Inc., for an independent ocean freight forwarder license is denied; and

IT IS FURTHER ORDERED, That the Initial Decision served October 14, 1980 in this proceeding is adopted by the Commission as its own and made a part of this Order; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
*Secretary*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 79-59

STUTE INTERNATIONAL, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

Application for independent ocean freight forwarder license denied.

*Kenneth L. Everett* for the Respondent.

*Paul J. Kaller, Joseph B. Slunt* and *Deana E. Rose*, Hearing Counsel.

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

*Adopted February 5, 1981*

The Commission initiated this proceeding to determine whether Stute International Inc. (Stute), is an independent ocean freight forwarder and is otherwise qualified to be licensed as required by section 44 of the Shipping Act, 1916, (46 U.S.C. 841b) and section 510.8 of General Order 4 promulgated thereunder.

The order instituting this proceeding states that Stute, acting as a forwarder, may be connected through intercorporate relationships with Chemie-Mineralien K.G. (Chemie), a consignee of shipments in the foreign commerce of the United States. Additionally it is alleged that Chemie was involved in shipments in the foreign commerce of the United States on which it received rebates.

## STIPULATED FACTS[2]

Stute is a Delaware corporation with its principal place of business in New York City, and is a wholly owned subsidiary of Stute Verkehrs GmbH. Stute has four employees and is engaged in the business of handling import shipments to the United States and acting as a consultant for export shipments. Heinrich A. Joost, a Deputy Managing Director of Verkehrs is president of Stute. The Board of Directors of Stute is wholly composed of officers or employees of Verkehrs. In 1978, Stute

[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] For clarity and brevity the entire stipulations entered into by Hearing Counsel and Stute have not been repeated verbatim here. Only those facts which are relevant and material to the issues presented and the resolution are set forth. The full stipulation, which is hereby made a part of this decision, is contained in the Appendix. The attachments and exhibits referred to in the stipulation are of course a part of the record.

had gross billings of $1,040,000 and during the first nine months of 1979 it had billings of $988,915.

Verkehrs has its principal office in Bremen, Germany, and is, among other things, an ocean freight forwarding company which is engaged in worldwide import/export trade. In addition to its ocean freight forwarding activities, it also provides warehousing, trucking, ship chartering, and customs clearance services in Germany. It also acts as a freight traffic consultant. Verkehrs is also the sole owner of subsidiaries operating as freight forwarders in London and Paris and is a 50% owner of a subsidiary which operates as a freight forwarder in Sharjah, United Arab Emirate. Verkehrs has approximately two hundred employees and its gross sales in 1978 were approximately 150 million Deutschmarks (DM) or, approximately 75 million dollars. Verkehrs is an organization known under German Law as a GmbH, which is a company, with its liability limited to the extent of its capitalization. Verkehrs is capitalized at one million DM. The Managing Directors of Verkehrs are Heinrich A. Joost, Dieter Wurmehl, and Gunter Holsing. Holsing and Joost are also directors of Stute. The three Managing Directors of Verkehrs are totally responsible for all its operations.

Kloeckner & Co. is a multinational holding and trading company with its principal place of business in Duisburg, Germany. Fifty-three companies in which Kloeckner owns more than a 5% interest are located in Germany and sixty-two companies in which Kloeckner owns more than a 5% interest are located outside Germany. Kloeckner is the sole owner of Verkehrs. Kloeckner is a partnership of three individuals who are general partners and a limited partner which is the Kloeckner family trust. The capitalization of Kloeckner is 265 million DM, 99% of which is contributed by the Kloeckner family trust and the remaining 1% is contributed by the three partners, who, unlike the family trust, have unlimited personal liability. In 1978 Kloeckner has gross sales of over 7 billion DM. Kloeckner and its subsidiaries, are active in trading in steel products, metals, ores, chemicals, coal, solid and liquid fuels, heating equipment, machine tools and construction materials and equipment. The day-to-day operations of Kloeckner are conducted by the Board of Management. In addition, there exists a Partners' Supervisory Committee which acts as adviser and consultant to the Board. This committee is comprised of persons who are not employees or partners or managers of Kloeckner.

Chemie is a trading company located in Bremen, Germany, which purchases pumice stone, common ground clays, and additives for industrial oils from sources all over the world and sells these products in Europe. Its gross international sales are approximately 15 million DM per year. Its form of organization is that which approximates a limited partnership in the United States. It has two partners, one of which is Kloeckner, and the other is Deutzer Oel K.G. Kloeckner owns 98%

of Chemie. Deutzer, which is affiliated with Kloeckner, owns the remaining 2% interest in Chemie. Chemie's operation is run by its Managing Director, L. F. W. Luksemburg, who is not an officer, director, partner, manager or employee of Kloeckner.

Stute is a wholly owned subsidiary of Verkehrs. Its president is a Managing Director of Verkehrs and its Board of Directors is made up solely of employees or Managing Directors of Verkehrs. Verkehrs, in turn, is wholly owned by Kloeckner. However, none of Kloeckner's officers or employees are officers or employees of either Verkehrs or Stute, and none of the officers or employees of Stute or Verkehrs are officers or employees of Kloeckner. The two directors of Chemie are the Executive Officer of Kloeckner, Dr. Gunther Meyer and L. F. W. Luksemburg. Dr. Meyer is not a partner or member of the Board of General Management or the Partners' Supervisory Committee of Kloeckner.

The business operations of both Stute and Verkehrs are managed independently from Kloeckner, including personnel management. In both cases supervision of the business by Kloeckner is minimal. Chemie makes a monthly report to Dr. Meyer in which the monthly sales of Chemie, both in dollars and tonnage values is stated and an estimate of the gross and net proceeds made. Dr. Meyer, as a director of Chemie, visits the Chemie office once a year. Chemie maintains its own bank accounts and has independent lawyers. Kloeckner does not provide Chemie with any services, except its books are audited annually by Kloeckner. The Managing Directors of Verkehrs function independently from Kloeckner. They have separate authority over their personnel and may commit the company to bank loans. Verkehrs furnishes complete financial and activity reports on a monthly basis to one of the members of the Board of General Managers of Kloeckner. Kloeckner audits Verkehrs' books on an annual basis and provides Verkehrs with computer services for which it is charged. Kloeckner, in the case of Verkehrs, retains veto power over the use of Verkehrs' funds for investments in or acquisitions of new businesses. Both Chemie and Verkehrs retain all their receipts during the year and turn over their profits to Kloeckner at the end of each calendar year. During the year either Chemie or Verkehrs, if it has a surplus in its bank account, may lend all or part of the surplus to Kloeckner and be paid interest on the loan. Conversely, either of them may, during the year, borrow money from Kloeckner and if they do they are then charged interest on that loan. Kloeckner takes no part in the day-to-day operations of either Chemie or Verkehrs. Verkehrs, in some instances, has acted as a freight forwarder, in Germany, for Kloeckner. In those instances, which amount to approximately 28% of Verkehrs' gross billings (this figure includes truck, rail and air forwarding activities, as well as ocean freight activities) Verkehrs has submitted bids to Kloeckner for the

business in competition with other freight forwarders. Verkehrs has never provided forwarding services to Chemie and has no connection with Chemie, nor does it have any knowledge of or control over Chemie's business activities. Neither Chemie nor Verkehrs have any employees, officers or directors in common. Stute and Chemie have no officers, directors or employees in common.

Chemie purchases common ground clays and oil additives from suppliers in the United States and sells these products throughout Europe. It purchases approximately 7,000 tons of ground clays per year and of these purchases, approximately 500 to 700 tons per year are made for its own account. This tonnage is stored in public warehouses in Germany and used as inventory for sale in spot markets in Germany. Except when Chemie purchases for its own account, no purchases of common ground clays are made without there first being an order given to Chemie by one of their customers in Europe. In the case of oil additives, all purchases are made only after a customer's order has been received by Chemie. In the normal course of business, the common ground clays are sold to Chemie f.a.s. a designated vessel in a port in the United States. Chemie's supplier is listed as the "shipper" on the bill of lading and the consignee is "to the order of shipper." The party designated in the bill of lading as the "notify party" is either a freight forwarder designated by Chemie or the customer. Chemie sells the goods to its customers outside Germany on a c.i.f. basis with the exception of customers in Portugal who are sold on either the c.i.f. or "free factor" basis. In the case of 90 to 95% of Chemie's imports of clays from the United States the goods are delivered directly to Chemie's customer. Chemie purchases oil additives only after first receiving a customer's order. In some instances Chemie will purchase for its own account an amount required to fill a container if a customer's order is for less than a full container. Chemie purchases approximately ten full containers of oil additives per year from its supplier in the United States. These containers are shipped on an f.o.b. basis by the supplier. In the case of the common ground clay shipments, Chemie employs an American ocean freight forwarder to handle the shipments. It has employed this forwarder for more than 25 years. At no time has it employed Verkehrs or Stute as a freight forwarder and it has no intention of doing so.

In 1973 a representative of Paul Gunther GmbH & Co., a company located in Bremen, Germany, which acts as agent for Sea-Land Service, Inc., approached Chemie in order to interest Chemie in using its ocean freight services. In the course of his sales call the representative offered to make up part of the inland freight differential which would occur if Sea-Land Service was used by Chemie by paying Chemie $25 per container for each full container shipped via Sea-Land. Chemie, which had no knowledge of the United States laws, agreed to the offer

in order to give it more frequent service. Such an offer is not illegal under German law. Chemie admits that it received payment of the $25 fee per container on shipments of approximately 49 full containers over a three month period during the latter half of 1973 and the first few weeks of 1974. The total amount received by Chemie was $1,500. None of the money received by Chemie was returned to the Shipper in the United States. In fact, it was kept in a separate fund by Chemie and used to purchase Christmas presents for substantial customers of Chemie. Neither Kloeckner nor Verkehrs had any knowledge of the payments received in this manner by Chemie.

## DISCUSSION AND CONCLUSIONS

The threshold issue here is whether the common ownership by Kloeckner of a consignee of goods and, through a subsidiary, of respondent Stute destroys the independence from shippers or consignees necessary to the grant of a freight forwarder license under section 44(b) of the Shipping Act, 1916 (46 U.S.C. 844).

Section 44(b) of the Shipping Act provides:

> 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. . . . (Emphasis mine.)

Section 1 of the Shipping Act, defines an independent ocean freight forwarder as:

> . . . a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or a purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

In a line of cases beginning with *Application for Freight Forwarding License - Louis Applebaum*, 8 F.M.C. 306 (1964), the Commission has held that there were no exceptions to the prohibition against shipper or consignee connection and that the prohibition was absolute.

In *Freight Forwarding License - Wm. V. Cady*, 8 F.M.C. 352 (1964), Cady was an employee of A. E. Chew & Co., Inc., a shipper in foreign commerce. Cady, in an effort to avoid the prohibition against shipper connection, said he would confine his forwarding activities to shipments in which Chew was neither seller, shipper, consignee, nor purchaser. The Commission said:

> The present intentions of Cady and his employer are immaterial since the statute makes licensing depend upon the existence of control and not upon its exercise. (8 F.M.C. 360).

The question of control arose again in *Application for Freight Forwarding License - York Shipping Co.*, 9 F.M.C. 72 (1965). Here again the applicant was an employee of a shipper. The examiner in his initial decision granted the license because the record before him contained no evidence anyone had actually exercised any control over the applicant. The Commission overruled the examiner and denied the license quoting the above language from *Cady*.

In *License No. 790 - North American Van Lines*, 14 F.M.C. 215 (1971), North American, the holder of a forwarder's license was purchased by the PepsiCo Co., Inc. PepsiCo owned stock in Pepsi Cola and Frito-Lay corporations, both shippers in U.S. foreign trade. North American argued that, notwithstanding Commission precedent, the prohibition against shipper connections was not absolute and the Commission should exercise its discretion and permit North American to retain its license subject to appropriate restriction, i.e., North American could not forward for PepsiCo, Pepsi Cola or Frito-Lay. The Commission rejected the argument that the prohibition was not absolute citing *Applebaum, Cady* and *York, supra*. In arguing that the Commission had the discretionary power to "amend or modify" the license so as to permit North American to retain its license despite its shipper connection, North American sought to distinguish between licenses already issued and new or initial licenses. The Commission rejected the distinction and again stated that the law contained "no proviso . . . exempting from the ban on licensing shipper-controlled forwarders who do not forward shipments for the shipper employees. . . ." (14 F.M.C. 222).

Stute concedes that up to and including the decision in *North American*, the cases hold that the prohibition against shipper connection was absolute.[3] However, Stute argues that beginning with the decision of the Eighth Circuit Court of Appeals in *Norman G. Jensen, Inc. v. Federal Maritime Commission*, 497 F.2d 1058 (8th Cir. 1974) the standard of absolute inaependence has been so modified as to permit Stute to be licensed notwithstanding Stute's intercorporate relationship with Chemie.

In *Norman G. Jensen, Inc. - Independent Ocean Freight Forwarder License No. 800*, 16 F.M.C. 370 (1973), the Commission found that the licensee (Jensen) was through its relationship with International Traders & Counselors, shipper connected and could retain its license only if it severed all connections with ITC. Jensen appealed the Commission's decision to the Eighth Circuit Court of Appeals which reversed that decision. Stute argues that the Court in reversing the Commission so

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[3] Stute does however attempt to distinguish the factual situation in those cases from its own. The attempt however depends for its validity upon its argument that subsequent decisions have modified the conclusion that the prohibition against shipper connection is "absolute".

changed the concept of "control" as to permit (indeed require) the licensing of Stute.

On appeal, the Court stated the issue as ". . . whether Jensen is sufficiently independent to come within the definition of 'independent ocean freight forwarder' set forth in 46 U.S.C. 801." Since there was no doubt that Jensen was engaged in the business of forwarding, and there was in fact a connection between Jensen and ITC,[4] the only question remaining was whether ITC was a shipper. The Court found that ITC:

> . . . functions as a service enterprise for, primarily, only four clients. The services performed by ITC consist of making arrangements for transportation to port, preparing export declarations, consular invoices and related documents, translating documents, receiving purchase orders and payments, preparing commercial invoices and inventory reports, investigating credit and selecting freight forwarders. Whenever any of ITC's clients need the services of an ocean freight forwarder, ITC selects Jensen unless its client or consignee has some contrary preference. ITC is paid for its services either as a fee on a retainer basis, an amount equal to 10% of the price of the goods shipped, or a transactional service charge plus the 10% fee.

The Court concluded that ITC was not a "shipper" as that term was commonly understood, i.e., "the owner or person for whose account the carriage of the goods is undertaken." *Compagnie Generale Transatlantique v. American Tobacco Co.*, 31 F.2d 663 (2d Cir.) cert. denied, 280 U.S. 555 (1929). Since ITC was not the owner of the shipments involved the *York, Cady* and *Applebaum* cases, *supra*, were clearly distinguishable and the Court concluded that ITC was not a shipper as used in section 801 of the Shipping Act. The Court next rejected the Commission's contention that ITC had a beneficial interest in the shipments of its clients. The Commission's argument was two-pronged: (1) Since ITC was compensated for its services on the basis of a percentage of the value or proceeds of the goods exported ITC had a beneficial interest in the shipments; and (2) The authority given to ITC by its shipper clients in the handling of their shipments was a proprietary right which also constituted a beneficial interest.

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[4] When the Commission began its investigation Jensen's 150 shares of stock were owned as follows: Norman G. Jensen--74 shares; Gordon W. Jensen and wife--74 shares; Bent Jensen (unrelated to the other shareholders)--2 shares. Jensen's officers were Gordon W. Jensen, President and Treasurer, and Bent Jensen, Vice President and Secretary. ITC was owned 50% by Bent Jensen and wife and 50% by Gordon Jensen. Bent Jensen was president and Director of ITC and Gordon W. Jensen a Director and its Secretary and Treasurer. Subsequently these relationships altered so that the only remaining connection between Jensen and ITC was via Bent Jensen. Bent Jensen became the sole shareholder of ITC. He also retained the two shares of Jensen and continued to serve as an Officer and Director of Jensen.

The Court concluded the proscribed beneficial interest was only that interest in a shipment which could give rise to an indirect rebate, e.g., where a forwarder acquires by purchase or otherwise the right to share in the profit from a shipment and at the same time receives a brokerage fee from the carrier. The Court found that ITC's relationships with its clients were not such as could give rise to an indirect rebate and therefore that ITC had no beneficial interest in its clients shipments.

Since the Court concluded that ITC was neither a shipper nor had a beneficial interest in its client's shipments, it found it unnecessary "to review the Commission's conclusion that Jensen controlled or was controlled by, ITC."

Stute contends that the Court in Jensen rejected the Commission's standard of absolute independence and "held that in a common ownership situation one of the parties may be shipper connected." Moreover, Stute says that the Commission itself has recognized this in its report in *Independent Ocean Freight Forwarder Application--Sequoia Forwarders Company,* 19 F.M.C. 182 (1976).

In *Sequoia* the Commission concluded that "neither the language of section 1, its legislative history nor judicial interpretations of that section require that an applicant for a forwarder's license be free of *all* shipper connections." The *Sequoia* case involved the common ownership of an applicant and a licensed produce broker which acted as a purchasing agent for American Foods A.B., a consignee and purchaser of shipments moving in foreign commerce. The question presented was whether the broker (Cal-West) because of its relationship with American Foods was a shipper, consignee or a person with a beneficial interest in shipments to be forwarded by the applicant. The Commission concluded that Cal-West was not. Cal-West was clearly not a shipper or a consignee and the Commission found that Cal-West's relationship with American Food A.B. (the shipper, etc. in question) was not such as to give rise to a beneficial interest in American Foods' shipments. Finally the Commission concluded that American Foods did not "directly or indirectly" control Cal-West.[5]

Stute contends that the "rationale" of *Jensen* and *Sequoia* is such that the only question to be answered is whether Stute "directly or indirectly is controlled by a consignee." Since *Jensen* did not even take up the question of "control" one might, at first blush, wonder why Stute lavished so much attention to the case on brief. A closer examination of Stute's "rationale" of its position in this case reveals that *Jensen* is a necessary ingredient of Stute's ingenious attempt to mix two distinct principles of law and in the mixing have a portion of one of the principles blend so well that it disappears.

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[5] "Cal-West and American Foods neither have employees in common, nor do they own stock or have a proprietary interest in, or a corporate connection with one another." (19 F.M.C. 188).

To Stute, when *Jensen* rejected the Commission's standard of "absolute independence" it established in its place the principle that not all shipper connections are prohibited, i.e., it is only those connections which lead to indirect rebates which are proscribed. Stute goes on to say:

> Thus on the basis of *Jensen*, respondent would argue that the Shipping Act will permit shipper-connected or consignee-connected affiliations so long as those connections do not lead to forwarder situation of illegal rebate which the Shipping Act was intended to preclude.

So far, so good. In dealing with *Sequoia*, Stute sets up something in the nature of a syllogism. First, the Commission adopted the rationale of *Jensen* saying that the independence requirement was intended to prohibit only "those categories of relationships which give rise to an illegal rebate." Second, the Commission based upon its interpretation of the legislative history concluded that "it is the conduct of the particular person or entity involved and not its mere characterization as 'purchasing agent,' which raises the statutory bar."[6] Still so far, so good. However, Stute goes on to supply their "Rationale" of *Jensen* and *Sequoia* which is:

> Thus, the conclusion that can be drawn from the two cases is that a shipper-connected applicant may qualify as an independent ocean freight forwarder if it complies with the requirement of independence as defined in the statute. The statute established the independence requirement to prohibit those categories of relationships which in and of themselves could be presumed to give rise to an illegal rebate. Thus, if the applicant does not fall within one of the prohibited categories it is presumed, without more to satisfy the independence requirements of the statute. The prohibited categories are shippers, consignees, sellers or purchasers of shipments to foreign countries or persons having any beneficial interest therein *or persons directly or indirectly controlled by a shipper, consignee or by a person having a beneficial interest in shipments to foreign countries.* (Emphasis mine.)

Having thus analyzed *Jensen* and *Sequoia*, Stute says that since it (Stute) is not a shipper, consignee, seller, purchaser of shipments, or a person having a beneficial interest in those shipments, "The only question [to be answered] is whether respondent directly or indirectly is controlled by a consignee." The progression from analysis to conclusion is so artfully done that it is quite easy to overlook the fatal flaw in the

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[6] This dealt with an argument that simply as "purchasing agent" American Foods was shipper connected.

reasoning. To reveal this flaw it is necessary to take up Stute's rationale step by step.

*Jensen* did not deal with the question of control. Stute itself admits this. What *Jensen* did deal with was the question of what relationship was necessary to establish a beneficial interest in shipments in foreign commerce. The Court concluded that the relationship had to be one which would give rise to an illegal rebate. From this it naturally followed that all shipper connections were not prohibited to forwarders.[7] With this principle firmly in hand, Stute shifts its attention to *Sequoia* and it is here that Stute blurs an essential distinction. *Sequoia* dealt with *both* beneficial interest and control.

Cal-West was obviously not a shipper, consignee or purchaser of the goods shipped so the question became whether Cal-West had a beneficial interest in a shipper, etc. It was in resolving this question that the Commission made the statement cited by Stute that "it is the conduct of the particular person or entity and not its mere characterization . . . which raises the statutory bar." The question of control was dealt with separately and exclusively in terms of corporate relationships.[8] The question was not treated as one involving *control* and a course of conduct which demonstrated that the *control* had never been exercised. But this is really what Stute is attempting to establish as a principle, i.e. that control if not exercised is not a bar to licensing. Stute has confused what it takes to establish the proscribed relationship with what are the consequences of that relationship once it is established.

It is not enough to "name" somebody a "shipper," "consignee" or a "person with a beneficial interest." What is required is that the person, named actually engage in conduct which makes him in fact a shipper, etc. However, once it has been established that the person is a shipper, the question of control over the forwarder does not depend upon a course of conduct, whether it be actual past conduct or intended future conduct. It is the *possibility* of control that "raises the statutory bar," and there is no jump high enough to clear that bar. See *Application for Freight Forwarder License--Louis Applebaum*, 8 F.M.C. 306 (1964); *Freight Forwarding License--Wm. V. Cady*, 8 F.M.C. 352 (1964); *Application for Freight Forwarding License--York Shipping Co.*, 9 F.M.C. 72 (1965), and *License No. 790--North American Van Lines*, 14 F.M.C. 215 (1971).

Stute would distinguish these cases by arguing that in each of them the possibility of control was "a probability based upon facts or admissions showing actual control." According to Stute these cases "stand for the proposition that once there is a finding or admission of control

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[7] It should be remembered, however, that *Jensen* dealt not with the forwarder itself, but with ITC, the "man in the middle" standing between the forwarder and the shippers.

[8] See footnote 5, *supra*.

of an applicant by a shipper or consignee, the statute does not permit the granting of a qualified or conditional license allowing an applicant to operate as an independent ocean freight forwarder only in those situations where he is free from shipper control." The obverse of this argument is, of course, that where control even though possible has not been actually exercised, the possibility of future control does not preclude licensing.

To read these cases as Stute does is to make a shambles of the statutory scheme for licensing forwarders. The principle Stute advances when carried just one step further would allow the licensing of the clearly proscribed "dummy" forwarder. All a shipper would have to do is create a corporation which could operate as a broker, then apply for a forwarder's license and simply refrain from actually exercising the power which it clearly possesses to control its own corporation. Under Stute's theory, since actual control could not be shown, the license would have to be granted. The consequences are easily foreseen. With license in hand, control is exercised and the shipper begins receiving illegal rebates from its dummy forwarder. The point need not be labored. Neither the statute nor the Commission's decisions can be read to allow such an absurd result.[9] The question, then, becomes whether there exists the possibility of the control of Stute by Chemie.

As Stute concedes the control would have to be exercised through Kloeckner, i.e., "that Kloeckner and Co. exercises control in such a manner over Chemie-Mineralien and Verkehrs and Verkehrs, in turn, exercises control over Stute in such a manner that the activities of Chemie-Mineralien control the activities of Stute." It is Stute's position that such control would not be exercised because, "If it were, the concept of subsidiary companies of a multinational conglomerate operating as independent profit centers would be obliterated."

This somewhat simplistic view of multinational conglomerates glosses over the purpose of holding companies like Kloeckner. Thus:

> The dominant characteristic of a "holding company" is the ownership of securities by which it is possible to control or substantially to influence policies of one or more operating companies in [a] particular field of enterprise. *North American Company v. Securities and Exchange Commission*, 327 U.S. 686 (1946).

The interrelationship here is much like that at issue in the *North American Van Lines* case *supra*. There PepsiCo a holding company

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[9] The lengths to which Stute finds it necessary to go to construct its theory are illustrated by its analysis of the *North American Van Lines* case. There Stute had to go to the briefs where for the purpose of argument, North American admitted that Pepsi Co. was a shipper and that North American was controlled by PepsiCo. In fact the Commission found that since the purchase of North American by PepsiCo, North American had refrained from forwarding activity until the potential conflict posed by the affiliation with PepsiCo was resolved.

owned North American (the forwarder) and Pepsi Cola and Frito Lay (both shippers) and the Commission had no difficulty in finding that North American "is or can be controlled by Pepsi Co." (14 F.M.C. 221). Here Kloeckner can just as readily control both Stute (through Verkehrs) and Chemie. This possibility precludes the licensing of Stute as an *independent* ocean freight forwarder, and the application is denied.

An additional issue raised in the Commission's order instituting this proceeding was whether the receipt by Chemie of rebates rendered Stute unfit to be licensed. The facts as stipulated show the following.

At the suggestion of a U.S. flag carrier's agent in Germany, Chemie entered into an agreement whereby the agent paid Chemie $25 per container for every full container carried. Chemie agreed to the proposition because it gave Chemie more frequent service from the United States. At that time the price of goods purchased by Chemie in the United States was based upon delivery to the pier in Savannah, Georgia. The carrier did not call at that port, and the payment was intended to make up part of the increase in price due to delivery of the goods to ports other than Savannah. There were 49 payments made over a three month period during the latter half of 1973 and the first days of 1974 for a total of $1,500. No entity in the United States received any of the payments.[10] Neither Kloeckner nor Verkehrs knew of the payments.

Stute's argument is that since Stute's connection with Chemie is such that Stute has the independence necessary to be licensed, the actions of Chemie cannot be imputed to Stute. In Stute's view, "The question of fitness is moot." On this issue Hearing Counsel agrees more or less with Stute. They contend that since Stute fails to meet the required standard of independence the question of rebates need not be reached. However, if the Commission finds that Stute and Chemie are not so closely related as to bar licensing Stute, then, Hearing Counsel contends, the activities of Chemie have no bearing on the fitness of Stute. I agree.

The only circumstances under which the rebates to Chemie can become a real issue would be if it was determined that Stute was independent of Chemie. That finding would, it seems to me, preclude imputing the illegal conduct to Stute for the purpose of rendering Stute unfit for licensing.

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[10] Stute questions the application of section 16 of the Shipping Act to the payments made to Chemie but does not make any argument on the question.

On the basis of the above I conclude that Stute fails to meet the standard of independence required for licensing as a freight forwarder and that the license should be denied.

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

Washington, D. C.
October 14, 1980

## APPENDIX

## STIPULATION BETWEEN HEARING COUNSEL AND STUTE INTERNATIONAL, INC.

This stipulation is entered into between Hearing Counsel and Stute International, Inc. ("Stute"), the only parties to this proceeding.

1. The sole issues presented in this proceeding are as follows:

   (a) whether Stute is independent of shipper connection in view of the relationships between Stute and Kloeckner, between Stute and Chemie-Mineralien K.G. ("Chemie"), and between Kloeckner and Chemie;

   (b) whether Stute is "otherwise fit to be licensed as an independent ocean freight forwarder" because of the acceptance by Chemie of payments totalling $1,500 during the latter half of 1973 until the first days of 1974.

2. The facts in regard to the above issues - i.e., the control exercised by the parent company, Kloeckner & Co.; whether there exist interlocking officers and/or directors among Stute and Kloeckner and Chemie; current shipping activities conducted by Chemie; and the possible involvement of Chemie and/or Kloeckner with regard to the question of rebating - are contained in the accompanying affidavits of L.F.W. Luksemburg and Heinrich A. Joost, with the exception of the additional fact set forth in paragraph 3 below.

3. Kloeckner & Co. ("Kloeckner") is a multinational conglomerate, having affiliate concerns throughout the world and a parent company located in Germany. A listing of the Kloeckner parent and affiliate companies is attached hereto.

## AFFIDAVIT OF L.F.W. LUKSEMBURG

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FREE STATE OF BREMEN

ss.:

FEDERAL REPUBLIC OF GERMANY

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L.F.W. LUKSEMBURG, being duly sworn, depose and say as follows:

1. I am the Managing Director of Chemie-Mineralien K.G. ("Chemie"); which is located in Bremen, Germany.

2. I am personally familiar with the history and operations of Chemie. The facts set forth in this affidavit are based on personal knowledge and are true and correct to the best of my knowledge and belief.

3. Chemie's form of business organization is that which is known under German law as a Kommanditgesellschaft (K.G.) which I am informed and believe is somewhat comparable to a limited partnership in the United States. In Chemie there are two partners. The partner with unlimited liability is Kloeckner & Co. and the limited partner is Deutzer Oel K.G. ("Deutzer"). Kloeckner & Co. is located in Duisburg, Germany and Deutzer in Cologne, Germany. The capital contribution of Kloeckner & Co. to Chemie is 18,000 DM and that of Deutzer is 2,000 DM. Deutzer is a company affiliated with Kloeckner & Co.

4. Kloeckner & Co. purchased a 100% interest in Chemie in 1958 and in 1973 changed the organization of Chemie from that of a company with limited liability (GmbH) to that of a limited partnership. In order to comply with German law, which requires a K.G. business organization to have at least two partners, Deutzer became a partner and made a nominal capital contribution to the company. At the time that Kloeckner purchased Chemie I became general manager. The company, prior to purchase, had been privately owned by one individual. He sold the business to Kloeckner & Co. because he was in ill health and I, who was the assistant manager, continued on as general manager.

5. Chemie has a total of 15 employees, including bookkeepers, receptionists and secretaries. It has seven (7) operating employees. It is a trading company which buys pumice stone, common ground clays, additives for special fuels, such as rocket fuel and colorants for various

industrial oils from sources all over the world and sells them in Europe. Its gross annual sales are approximately 15 million DM per year.

6. In the course of its business Chemie purchases a portion of its requirements of common ground clays and a small quantity (approximately 120 tons per year) of oil additives from suppliers in the United States and sells them throughout Europe. Chemie's source of supply for common ground clays purchased from the U.S. is from processors located in the State of Georgia, U.S.A., represented by Engelhard Minerals of Chemicals Corp. ("Engelhard"). Chemie has done business with Engelhard for 50 years or more and Engelhard is its only source of supply in the United States for common ground clays. Chemie purchases approximately 7,000 tons of common ground clays per year from Engelhard. Of the purchases of common ground clays approximately 500 - 700 tons per year are made for Chemie's account. This tonnage is stored in public warehouses in Germany and used as inventory to supply the spot market in Germany. Chemie does not own, lease or operate any warehouse. The inventory on hand in Germany varies at any one time from 300 to 700 tons.

7. Except in those cases where Chemie is purchasing common ground clays for sale in the spot market, no purchases of common ground clays are made in the United States without there first being an order given to Chemie by one of its customers in Europe. In the case of the oil additives all purchases are made only after the customer's order has been received. In the normal course of business the common ground clays are sold by Engelhard to Chemie f.a.s. a designated vessel in the ports of Jacksonville, Florida or Savannah, Georgia. The shipper on the Bill of Lading for these shipments is Engelhard. The consignee on the Bill of Lading is "to the order of shipper" and the party designated in the Bill of Lading as the "Notify Party" is, either a freight forwarder designated by Chemie or the customer. The freight forwarder in each instance is a freight forwarder in Europe who has received orders from Chemie as to the ultimate destination of the goods. Chemie sells the goods to its customers outside Germany on a c.i.f. basis (with the exception of customers in Portugal, who are sold on a f.o.b. basis). Customers in Germany are sold on either a c.i.f. or "free factory" basis. Thus, on the transactions which constitute approximately 90% - 95% of Chemie's imports from the United States the goods are delivered directly to Chemie's customer. In no instance (including those instances when Chemie purchases for its own account) is Chemie the end user of the product. It acts in every instance only as a trading company.

8. In the case of the oil additives Chemie's purchases are made only after a customer's order has been received. If the customer's order is for an amount less than a full container, Chemie will purchase the amount required to fill the container for its own account, and store it in

a warehouse for sale in small lots. Chemie purchases 10 full containers per year of oil additives from its supplier Ethyl Corporation. The containers are shipped on a f.o.b. basis by Chemie's supplier. The freight forwarder on these shipments is employed by the supplier.

9. Chemie employs an American freight forwarder, Amersped Inc., located in New York City to handle the shipments of common ground clays after they have been delivered to the pier by Engelhard. It has dealt with Amersped for 25 years or more. It employs various freight forwarders in Europe, but it has never at any time employed Stute Verkehrs GmbH as a freight forwarder in Europe and has no intention of doing so either in Europe or in the United States.

10. Chemie does not have officers such as a president, or vice president, as it has been explained to me, exist in an American corporation. I am the managing director or general manager of Chemie. I am not an employee, officer or director of Kloeckner & Co. All of its operations are managed and overseen by me including the hiring, firing and promotion of employees. I am authorized to act on behalf of the company in all respects. My assistant, Horst Martin, has limited authority to act on behalf of Chemie under my direction and only in the ordinary course of Chemie's business. Dr. Gunther Meyer, the executive officer of Kloeckner & Co. in charge of Kloeckner's chemical and oil division is the only other director of Chemie. I make a monthly report to Dr. Meyer in which I give him the monthly sales of Chemie both in DM value and in tonnage and an estimate of the gross and net profit. Dr. Meyer visits the Chemie office in Bremen once a year and at that time we discuss the company's past performance and its prospects. Chemie maintains its own bank accounts and has independent lawyers. Chemie does not utilize any Kloeckner personnel to provide any services, except that its books are audited annually by Kloeckner & Co. At the end of each year the profit that Chemie has made during the year is turned over to Kloeckner & Co. Chemie has never had a loss. Pursuant to arrangements with Kloeckner & Co. Chemie may borrow money from Kloeckner and if it does so it is charged interest on the loan. Conversely Chemie, if it has a surplus in its account at any time prior to the end of the year, may lend that surplus to Kloeckner & Co. and be paid interest on that loan. Kloeckner & Co. serves as a guarantor on a 100,000 DM line of credit which Chemie maintains with a local Bremen bank. This line of credit was opened ten years ago and has never been used. All day to day operations of Chemie are managed by me without reporting to Kloeckner & Co. which serves as a silent owner of the business. This is so because the business is an esoteric one which demands a highly specialized knowledge of the products, its sources of supply and of the market. No one at Kloeckner & Co. has this specialized knowledge or experience.

11. I have read the letter, dated February 26, 1979, addressed to Stute International Inc.. and signed by Mr. Arthur Pankopf, Managing Director, Federal Maritime Commission, in which Mr. Pankopf on behalf of the Commission notified Stute International Inc. of the Commission's intent to deny Stute's application for an independent freight forwarder's license. In that letter, Mr. Pankopf states that Chemie "may have received rebates from an ocean-going common carrier in violation of Section 16, Shipping Act, 1916."

12. Chemie is a German company having its only place of business in Bremen, Germany. It has no offices in the United States. Nor does it have any representatives, agents or employees in the United States. In fact, Chemie's business in the United States is wholly done by telex, telephone or mail. I visit the United States on the average of once every two years to visit our suppliers and exchange sales and product information. Since Chemie has no place of business or operations in the United States, it is difficult for me to see how the provisions of the Shipping Act can be applied to Chemie.

13. At the request of Stute International Inc., I and my assistant, Mr. Horst Martin, have reviewed the documents which were given to Stute International by representatives of the Federal Maritime Commission. It is my understanding that these documents were obtained by the Commission during the investigation of the Sea-Land Service Inc. ("Sea-Land"). It is also my understanding that the Commission's claim that Chemie took rebates from Sea-Land is based upon these documents. I would like to set forth the facts and circumstances relating to those documents.

14. In 1973, there was a large surplus of containers available for the shipment of goods from the United States to Europe. Sometime during that year, a representative of Paul Gunther GmbH & Co. ("Gunther") a German company which acts as agent for Sea-Land in Bremen, approached either me or Mr. Martin. He was making a sales call and was trying to interest us in using Sea-Land, which at that time, operated from Charleston, South Carolina or Jacksonville, Florida for our shipments. We told him that Engelhard's price for the common ground clays ordered by Chemie from the United States varied in accordance with the port from which the goods were shipped because of the inland freight differential. At that time the purchase price was increased if the goods were shipped from any port other than Savannah, Georgia. Sea-Land did not call at Savannah, Georgia, but did call at Jacksonville, Florida and Charleston, South Carolina. Recognizing the problem, the Gunther representative offered to make up a part of that inland freight differential by paying Chemie 25 dollars per container for every full container shipped via Sea-Land from Jacksonville or Charleston. Chemie agreed to the proposition in order to give Chemie more fre-

quent service. Such an offer is not illegal under German law. Of course, we had no knowledge of the United States law.

15. A review of our files shows that we were paid the 25 dollar fee on shipments of approximately 49 full containers over a three month period. At that time, Chemie was importing approximately 50 containers per month.

16. The representative of Gunther told us that for Gunther's bookkeeping purposes he wanted Chemie to bill Gunther in the amount of 25 dollars per container for services rendered by Chemie in returning the empty container from Chemie's customer to the container port. This charge was normally included in the shipping charge. Chemie complied with Gunther's instructions.

17. This practice continued during the latter half of 1973 until the first days of 1974 when suddenly, because of the oil crisis, there came a great shortage in the supply of containers and no containers were available for low tariff goods, such as those classified with the common ground clay tariff. Because of the shortage of containers, Gunther was no longer interested in soliciting Chemie's business for Sea-Land. In fact, Chemie has not used the Sea-Land service since 1974, except for some shipments made from the United States to its customers in the Mediterranean Area.

18. The last payment of 25 dollars for a container was made by Gunther to Chemie in January 1974. The money which was received by Chemie from Gunther representing the aforementioned payments was kept in a separate fund by Chemie and used to purchase Christmas presents for substantial customers of Chemie. At no time was any of the money returned to the United States. At no time, until I read the letter of Mr. Pankopf, did I know or understand that the payments made by Gunther to Chemie were in violation of United States law. Kloeckner & Co. had no knowledge of the payments because the payments were deposited in a special account unknown to Kloeckner & Co. to be used for the aforementioned purpose, and because Kloeckner & Co. did not then and does not now participate in the management or operations of Chemie.

## AFFIDAVIT OF HEINRICH A. JOOST

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FREE STATE OF BREMEN

ss.:

FEDERAL REPUBLIC OF GERMANY

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HEINRICH A. JOOST, being duly sworn, deposes and says as follows:

1. I am the president of Stute International Inc. the applicant in the above-entitled proceeding. I am also deputy managing director of Stute Verkehrs-GmbH.

2. I am personally familiar with the history and operation of Stute International Inc. and Stute Verkehrs-GmbH, as well as the general organization and operations of Kloeckner & Co. The facts set forth in this affidavit are based on personal knowledge and are true and correct to the best of my knowledge and belief.

3. Stute International Inc. is a Delaware corporation having its principal place of business at 405 Lexington Avenue, New York, N.Y. It is a wholly-owned subsidiary of Stute Verkehrs-GmbH, which has its principal office in Bremen, Germany.

4. Stute International Inc. has four employees. It is engaged in the business of handling import shipments from foreign countries to the United States and acting as a consultant for export shipments. In 1978 it had gross billings of 1,040,000 Dollars and during the first nine months of 1979 it had gross billings of 988,915 Dollars.

5. I am the only officer of Stute International Inc. who is also employed in the management of Stute Verkehrs-GmbH. The Board of Directors of Stute International is composed of three persons - myself, Gunter Holsing, managing director of Stute Verkehrs-GmbH and Rudiger Dettmann a "prokurist" and employee of Stute Verkehrs GmbH.

6. Stute Verkehrs-GmbH, the parent company of applicant, is a freight forwarding company operating out of Bremen, Germany, in worldwide import/export trade. It is active as a rail, air, truck and ocean freight forwarder. It was organized in 1957 as J.A.C. Stute GmbH and its name was changed in 1971 to Stute Verkehrs-GmbH. In addition, Stute Verkehrs-GmbH provides warehousing, trucking, ships-chartering, and customs clearance services in Germany and acts as a freight traffic consultant. It is the sole owner of subsidiary companies

operating as freight forwarders in London and Paris and the 50% owner of a subsidiary which operates as a freight forwarder in Sharjah, United Arab Emirate. Stute Verkehrs-GmbH has approximately 200 employees. Its gross sales in 1978 were approximately 150 million DM.

7. The business organization of Stute Verkehrs is known as a GmbH and is that of a limited liability company. Under German law the business organization known as a GmbH has its liability limited to the extent of its capitalization. The capitalization of Stute is 1 million DM.

8. Stute Verkehrs-GmbH is wholly-owned by Kloeckner & Co., whose activities will be described below. It operates, however, independently and separately from Kloeckner & Co. The management of Stute Verkehrs-GmbH consists of three persons. Myself and Dieter Wurmehl, are deputy managing directors and Gunter Holsing, is the managing director. All three of us are wholly responsible for all Stute Verkehrs-GmbH operations and either one of us has authority to act in all respects on behalf of the company. None of us is an employee, officer, or director of Kloeckner & Co. and none of us have any authority for or on behalf of Kloeckner & Co.

9. Kloeckner & Co. is a holding and trading company, with its head office in Duisburg, Germany. Kloeckner & Co. was founded in 1906. It is active in trading in steel, and steel products, metals, ores, chemicals, coal, solid and liquid fuels, heating equipment and construction materials. It also has a subsidiary which finances turn-key construction projects.

10. Kloeckner & Co. is a partnership in which the general partners with unlimited liability are Messrs. Peter Henle, Jorg A. Henle and Karl A. Thoelke. The limited partner with limited liability is the Kloeckner family trust (Peter Kloeckner-Familien-stiftung). The capitalization of Kloeckner & Co. is .265 Mill. DM. 99% of the capital is contributed by the Kloeckner family trust and the remaining 1% by the three individual partners, who have unlimited personal liability.

11. In the year 1978 Kloeckner & Co. had gross sales of 7,798 billion DM. Attached hereto as Exhibit 1 is a concise statement of the financial structure of Kloeckner & Co.

12. The general partners, as the owners of Kloeckner & Co., are responsible for overseeing the general operations of Kloeckner & Co. All three of the general partners together with Messrs. Otmar Franz, Heinz Wolf and Georges Grumieaux are members of the Board of General Management which is responsible for all day-to-day operations of Kloeckner & Co. Messrs. Franz, Wolf and Grumieaux are employees of Kloeckner & Co. and not partners in the company. In addition Kloeckner & Co. has a Partners' Supervisory Committee, which acts as an advisor and a consultant to the partners. This Committee is made up of four persons, none of them are employees or partners of Kloeckner & Co. None of the partners and none of the members of the Board of

General Management or Supervisory Committee are officers, managers, or directors, of Stute Verkehrs-GmbH or Stute International Inc.

13. The managers or directors of Stute Verkehrs-GmbH function independently from Kloeckner & Co. They gave the authority to hire, fire and promote employees and may commit the company to bank loans. Kloeckner & Co. does, however, retain veto power over use of Stute funds for investment in or acquisition of new businesses. Stute Verkehrs-GmbH furnishes complete financial and activity reports to Georges Grumieaux, a member of the Board of General Management of Kloeckner & Co. As in the case of Chemie Mineralien, Stute Verkehrs-GmbH turns over its profit at the end of each calendar year to Kloeckner & Co. Since it was founded in 1957 Stute has never had a loss. Stute has the same arrangement with Kloeckner & Co. as Chemie Mineralien, in that it may borrow money from Kloeckner & Co. and it may lend the money to Kloeckner. In each instance interest is charged on the loans. Kloeckner & Co. does not guarantee a bank line of credit on behalf of Stute International Inc. Kloeckner audits Stute's books on an annual basis and provides Stute with computer services for which Stute is charged. The books and records of Stute International Inc. are audited by Joseph Graf & Co., Certified Public Accountants, 1212 Avenue of the Americas, New York, New York.

14. In some instances Stute Verkehrs-GmbH acts as a freight forwarder for Kloeckner & Co. Approximately 28% of Stute Verkehrs-GmbH gross billings are for freight forwarding services rendered to Kloeckner or its affiliated companies. Since Stute is a full line freight forwarder this percentage figure includes truck, rail and air forwarding activities, as well as ocean freight activities. In order to be employed as a freight forwarder by Kloeckner & Co., Stute must submit bids to Kloeckner & Co. in competition with other freight forwarders. Each department or subsidiary of Kloeckner & Co. is free to employ any freight forwarder it wishes.

15. As can be seen from the facts stated above, the statement in the memorandum dated May 21, 1979, to the Federal Maritime Commission from Arthur Pankopf, Managing Director of the Commission that I am a joint officer/director of Kloeckner & Co. and Stute International Inc., the applicant herein is erroneous.

16. Although Stute Verkehrs-GmbH and Chemie Mineralien KG are located in the same city in Germany, Stute Verkehrs-GmbH has never acted as a freight forwarder for Chemie Mineralien and has no connection with that company and neither I nor any of my colleagues who comprise the management of Stute have any knowledge of or control over Chemie's business activities.