FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 744

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF STONE AND DOWNER CO.

Application for permission to refund a portion of freight charges collected in the amount of $617.15 granted.

Frank A. Fleischer for Sea-Land Service, Inc.

REPORT AND ORDER

February 6, 1981

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

Pursuant to Rule 92(b) of the Commission's Rules (46 C.F.R. 502.92(b)), Sea-Land Service, Inc., filed an application for permission to refund $617.15 to Stone and Downer Co. This amount represents rail yard (RY) service charges of $1.00 per revenue ton on three shipments of vinyl luggage transported from Kaohsiung, Taiwan to Boston, Massachusetts. Sea-Land alleged that it intended to delete this RY delivery charge from its tariff prior to these shipments, but that, because of an administrative/clerical error in the preparation of the applicable tariff page, the page was initially rejected by the Commission, thereby resulting in the previous page (containing the RY charge) being applicable.[1]

Administrative Law Judge William Beasley Harris issued an Initial Decision in which he denied Sea-Land's application on two separate grounds. First, he found that the deletion of the RY charge was conditioned on a prior event - Sea-Land's resignation from certain conferences - but that the record did not reveal whether this had occurred. In addition, the Presiding Officer found nothing in the record from which to conclude that the carrier had advised the shipper of its intention to file the reduction.

Sea-Land has filed Exceptions to the Initial Decision, stating that the Presiding Officer erred in finding that the record failed to reveal that ". . . the shipper was charged more than he understood the rate to be."

[1] The tariff page which was submitted by Sea-Land contained both increases and decreases (including the RY charge). It was rejected because the intended increases were not made effective 30 days from the date of issue. Upon learning of the rejection, Sea-Land published a new page, which became effective March 29, 1980.

Sea-Land claims that its decision to delete the RY charge was a "marketing decision," and, as that term is used in the transportation industry, it connotes prior carrier and shipper negotiations and shipper awareness of the intended rate. In addition, Sea-Land claims that "various shippers" had been advised of its intention to delete the RY charge, but offers no evidence that this particular shipper was aware of the intended change.

DISCUSSION

With respect to the Presiding Officer's first basis for denying Sea-Land's application, it does not matter whether the record contains evidence concerning Sea-Land's resignation from certain unspecified conferences. This was not a "condition precedent" for the deletion of the RY charge, but rather related to other anticipated rate changes. The tariff in question is Sea-Land's independent intermodal tariff (F.M.C. No. 148). The tariff page which contained the deletion of the RY charge was clearly intended to become effective on a date certain, February 22, 1980, irrespective of Sea-Land's membership *vel non* in various ocean conferences.

The more difficult question is whether, in all cases, there must be shipper reliance on a carrier's intention to charge a lesser amount to warrant relief under section 18(b)(3). The Presiding Officer answered this question in the affirmative while finding that there was no evidence ". . . that the shipper was charged more than he understood the rate to be, or that the carrier advised the shipper of the carrier's intention to file a reduced rate and therefore failed to file the reduced rate with the Commission." (Initial Decision at 5). Our review of the legislative history of section 18(b)(3) leads us to a somewhat different conclusion with regard to the necessity for showing shipper reliance.

The purpose of section 18(b)(3) is to permit common carriers by water to make voluntary refunds to shippers or waive the collection of a portion of freight charges in two specific situations: (1) where there is an error in a tariff of a clerical or administrative nature, or (2) where, through inadvertence, there has been a failure to file a tariff reflecting an intended rate. S. Rep. No. 1078, 90th Cong., 2d Sess. 1 (1968). Both the legislative history of section 18(b)(3) and subsequent Commission precedent indicate that there must be shipper reliance in the latter situation. As the House Report accompanying the 18(b)(3) legislation makes clear, Congress was there concerned that ". . . through a *bona fide* mistake on the part of the carrier, the shipper is charged more than *he understood the rate to be.*" H.R. Rep. No. 920, 90th Cong., 1st Sess. 4 (1967) (underscoring added); *see also Munoz Y Cabrero v. Sea-Land Service, Inc.*, 20 F.M.C. 152, 153 (1977). However, there are other situations where shipper knowledge of and reliance on a carrier's intention is not critical. These are generally situations where there has been

an error in a tariff of a clerical or administrative nature. Two illustrations are provided in the Senate Report: (1) a typographical error (*e.g.*, transposing an intended $37 rate to $73) and (2) the unintentional deletion of a specific commodity rate resulting in the imposition of a higher cargo N.O.S. rate. S. Rep. No. 1078 *supra*, at 4. In neither case is there shipper awareness of the carrier's intention, but in both cases Congress intended that relief would be granted.

The present case is yet another example of an error in a tariff of a clerical or administrative nature. Sea-Land's failure to state that the increases contained on its relevant tariff page were to become effective in thirty days was an error in Sea-Land's tariff publishing procedures of an administrative nature. As a result, the unrelated deletion of the RY charge, which otherwise would have been immediately effective, was postponed.

Sea-Land's application meets all statutory and regulatory requirements and its approval will not result in discrimination among shippers. Under the circumstances Sea-Land could properly refund to Stone and Downer that portion of the charges collected representing RY charges of $617.15.

THEREFORE, IT IS ORDERED, That permission is granted to Sea-Land Service, Inc. to refund to Stone and Downer Co. a portion of the freight charges in the amount of $617.15; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. publish the following notice in its Hong Kong & Taiwan/Atlantic & Gulf Coast Joint Container Freight Tariff No. 325, F.M.C. No. 148:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 744, that from February 22, 1980 to March 29, 1980, paragraph 2 of Rule No. 130, Destination Services Charges, shall not apply. This Notice is effective for purposes of refund or waiver of freight charges on any shipments affected by this provision during the specified period of time; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 752

COORDINATED CARIBBEAN TRANSPORT, INC., TO BENEFIT MORISAENZ, S.A.

ORDER OF REMAND

February 6, 1981

On November 24, 1980, the Commission determined on its own motion to review the Initial Decision of Administrative Law Judge William Beasley Harris in the above-captioned matter. This decision denied special docket relief because the carrier-applicant failed to furnish sufficient information to establish that the July 13, 1980 shipment of 11 motor vehicles from Miami to Manta, Ecuador was affected by a "clerical or administrative" tariff error or an "inadvertent" failure to file a new tariff within the meaning of 46 U.S.C. 817(b)(3), or that the requested relief would not result in discrimination between shippers.

Upon examination of the record, the Commission concludes that the Presiding Officer's findings regarding the application's insufficiency under 46 C.F.R. 502.92 were correct. Nonetheless, given the nonadversarial, remedial nature of the special docket process, it would have been appropriate that this special docket applicant be provided at least one opportunity to correct perceived deficiencies before final judgment was rendered. It does not appear that the Presiding Officer made such a request for further information. Accordingly, the matter will be remanded for the purpose of developing a full and complete picture of the arrangements between the carrier and shipper which led to the filing of the July 14, 1980 project rate relied upon in the application, including the nature of the "project" which qualified the subject shipment of motor vehicles for carriage at a rate other than that stated for other Passenger Automobiles at Third Revised Page 46 of Coordinated Caribbean Transport, Inc.'s, Tariff FMC No. 14. Of course, if Applicant fails to respond within a reasonable period of time to a request for further information, it would be appropriate for the Presiding Officer then to deny the special docket application.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 420(I)

STOP AND SHOP COMPANIES, INC.

BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND

BARBER STEAMSHIP LINES, INC.

ORDER REMANDING PROCEEDING

February 11, 1981

This proceeding is before the Commission upon its determination to review the Decision of Settlement Officer James S. Oneto, denying Stop and Shop Companies, Inc.'s request for reparation under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817). The basis of the Settlement Officer's decision is that Complainant's submissions presented contradictory evidence of the weight and measurement of the shipment in issue, and that it had, therefore, failed to meet its burden of proof.

While the Commission agrees that Complainant's presentation does not support an award of reparation, the Complainant nevertheless should have been afforded, especially in an informal proceeding of this kind, an opportunity to explain or correct the inconsistencies in its submissions. The Commission therefore remands this proceeding to the Settlement Officer with instructions to give Stop and Shop a reasonable opportunity to clarify this information, and then to issue an appropriate decision.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Settlement Officer for further action consistent with this Order, and for issuance of a supplemental decision within 45 days of the date of this Order.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Chairman Daschbach did not participate and issues a separate statement.

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

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 13, REVISED, AMENDMENT NO. 6; DOCKET NO. 80-33]

PART 536 - PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

February 12, 1981

ACTION: Final Rule

SUMMARY: Tariff material covering the through movement of cargo between foreign countries transshipped at a U.S. port is not required by Part 536 of the Commission's Rules. This action was taken in response to requests for clarification of Part 536's scope and is intended to lessen the regulatory burden on ocean carriers.

DATE: Effective February 18, 1981

SUPPLEMENTAL INFORMATION:

The Federal Maritime Commission solicited comments on a proposed rule to exempt the through transportation of cargo from one foreign country to another which is merely transshipped at a U.S. port from the tariff filing requirements of 46 C.F.R. Part 536.[1] The transshipment could be from one ocean vessel to another (including vessels of the same carrier) or from an ocean vessel to an inland carrier by rail, motor, water or air.

The comments mainly expressed the view that the movement of foreign-to-foreign cargoes is beyond the jurisdiction conferred upon the Commission under sections 1 and 18(b) of the Shipping Act, 1916 (46 U.S.C. 801, 817(b)).[2]

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[1] Section 35 of the Shipping Act, 1916 (46 U.S.C. 833a) provides that the Commission may by rule exempt activities of common carriers by water in the foreign commerce from statutory and administrative requirements provided the exemption would not impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce.

[2] Sea-Land Service, Inc., urged the Commission to identify precisely the types of foreign-to-foreign transportation which would be exempted under the rule. In Sea-Land's view, a through movement which involves a United States inland point of origin or destination and contact with a United States

The threshold question is whether a carrier's status as a person subject to the Shipping Act when carrying U.S. trade cargo is sufficient, when coupled with the physical presence of the foreign-to-foreign cargo at a U.S. port, to establish jurisdiction over the foreign-to-foreign transportation for purposes of section 18(b). This question is best answered in the negative. Careful review of the legislative history of section 18(b) has led the Commission to conclude that section 18(b)(1) was intended to have the same general geographic scope as section 1 and does not require the routine filing of tariffs for foreign-to-foreign cargo transshipped at United States ports.[3]

Accordingly, the Commission will adopt a rule which states, for the sake of clarification, that Part 536 does not cover foreign-to-foreign transportation.

THEREFORE, pursuant to sections 18(b) and 43 of the Shipping Act, 1916 (46 U.S.C. 817, and 841a), and section 4 of the Administrative Procedure Act (5 U.S.C. 533), IT IS ORDERED, That, effective upon publication in the *Federal Register*, Title 46, Code of Federal Regulations section 536.1 is amended as follows:

Part 536.1 Exclusion and Exemptions

Present paragraphs (a) and (b) are redesignated as paragraphs (b) and (c), respectively.

A new paragraph (a) is added which states that:

(a) This part does not apply to transportation of cargo between foreign countries, including that which is transshipped from one ocean carrier to another (or between vessels of the same carrier) at a U.S. port or transferred between an ocean carrier and another transportation mode at a U.S. port for overland carriage through the United States, where the ocean carrier accepts custody of the cargo in a foreign country and issues a through bill of lading covering its transportation to a foreign point of destination.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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port should not be exempted from the Commission's tariff filing requirements. The Commission agrees, and the instant proposal does not deal with cargo originating in or destined to points *within* the United States, but covers only those situations where cargoes move *through* the United States from a foreign origin to another foreign destination under the continuous custody of the carrier(s) issuing the shipping documents.

Matson Navigation Company suggested that nonexclusive transshipment agreements pertaining to the subject cargo movement be completely exempted from regulation. Whatever the merits of this suggestion, it is beyond the scope of this proceeding.

[3] This conclusion does not preclude the Commission from exercising regulatory authority over foreign-to-foreign traffic under other sections of the Shipping Act in appropriate circumstances, however.

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 13, REVISED, AMENDMENT NO. 7; DOCKET NO. 80-40]

PART 536 - PUBLISHING AND FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

February 13, 1981

ACTION: Final Rule

SUMMARY: These final rules implement certain provisions of Public Law 95-483, 92 Stat. 1607, which provide for the regulation of the rates and charges of certain state-owned or controlled carriers operating as "cross traders" in the United States foreign commerce. These rules amend the foreign tariff filing requirements to provide for the publication, filing, justification and suspension of controlled carrier tariff matter.

DATE: Effective March 23, 1981

SUPPLEMENTAL INFORMATION:

The Commission previously gave notice (46 F.R. 42721-24) that it proposed to amend 46 C.F.R. 536 to prescribe the technical requirements for the publication, filing, justification and suspension of controlled carrier tariff matter. The amendments are necessary to implement portions of the requirements of section 18(c) of the Shipping Act, 1916, which took effect November 17, 1978, pursuant to the Ocean Shipping Act of 1978 (Pub. L. 95-483, 92 Stat. 1607). Comments from the public were invited with respect to the proposed rules, and one set of comments was received from Baltic Shipping Company, Black Sea Shipping Company, Far Eastern Shipping Company and Murmansk Shipping Company (Baltic). The following is a section-by-section analysis of the commentator's position on specific sections of the proposed rules.

1. Section 536.1

Baltic states generally that the exemptions proposed in the rules differ from the statute. Baltic specifically asserts that paragraph (c)(1)(iii) is

more restrictive than that provided in the statute and that the Commission lacks the authority to make such a substantive change.

The Commission believes that the proposed rule accurately reflects the intent of the statute. The proposed change in paragraph (c)(1)(iii) merely clarifies the statutory language, "covered by an agreement approved by section 15 of the Act" in a way which is consistent with the legislative history. As published on page 28 of the Senate Committee on Commerce, Science and Transportation Report No. 95-1260, clarification of the statutory words "covered by" is provided by the following Committee statement:

> . . . [the Ocean Shipping Act is intended] to exempt the rates, charges, classifications, rules or regulations of a controlled carrier which are *established* pursuant to an *agreement* among carriers such as a conference agreement. Rates set independently by a controlled carrier whether in connection with a section 15 agreement or otherwise, should remain subject to the regulatory provisions of these bills. Sen. Rep. No. 1260, 95th Cong., 2nd Sess. 28 (1978).

Paragraph (c)(1)(iii) requires that for a rate of a controlled carrier to be exempt it must be set by the duly authorized action of a ratemaking body approved under section 15 of the Act.

Baltic's view that the proposed paragraph c(1)(iii) is more restrictive than the statute requires may have originated with a statement in the Notice of Proposed Rulemaking under Supplementary Information wherein it was stated in paragraph Number 1 thereof that the proposed section 536.1(c)(1)(iii) "more clearly indicates that only rates actually set by the concerted action of an agreement's membership are exempt." This language was neither contained in the proposed rule nor is it intended to interpret the language actually contained in the proposed rule.

It appears, however, that a reference to "the *vessels* of the controlling state" was inadvertently omitted from proposed paragraph (c)(1)(i) which could be viewed as altering the intended meaning of the statute. This was not the Commission's purpose, and appropriate revisions have therefore been made in the final version of this paragraph.

The proposed exemption requirement makes no predetermination of the authority encompassed by any particular ratemaking body's section 15 agreement. Therefore, the Commission believes that the proposed rule conveys the precise meaning of the statutory language: "covered by."

2. Section 536.3(d)

Baltic states that the extra costs incurred in filing three copies of tariff pages, rather than two, would be very substantial, but fails to

provide any estimate of the additional burden.[1] The Commission believes that the extra copy is an administrative necessity to ensure proper and timely monitoring of controlled carrier tariff filings. We also note that no other classified controlled carrier has chosen to comment on this proposal. Therefore, the Commission will retain the triplicate filing requirement in the final rule.

3. Section 536.5(a)(i)

Baltic states that this designation serves no useful purpose and is an unwarranted attempt to stigmatize certain carriers. To the contrary, the Commission believes that this designation is useful to the general public to alert them that certain carriers are subject to rules which differ from the general tariff filing rules. That difference is important to the shipping public and tariff users who would benefit from knowing that reductions in a certain carrier's tariff are subject to 30 days' notice.

The Commission does not believe that this identification requirement unduly stigmatizes certain carriers. An identification requirement already applies to NVOCCs and carriers party to an approved section 15 agreement primarily for the purpose of alerting the tariff user to important distinctions between common carriers.

The Commission, in addition, has published lists of carriers found to be controlled carriers subject to the provisions of section 18(c) which likewise, do not unduly stigmatize certain carriers, but merely put the public on notice as to which carriers are subject to the requirements of section 18(c). Therefore, the Commission adopts the requirement as proposed.

4. 536.11(g)(3)

The Commission has determined to amend the rule as proposed to avoid the establishment of any single, rigid standard for rejection of replacement rates. However, the lowest comparable charges of U.S. flag or reciprocal flag carriers will continue to be considered as a factor in determining whether to reject such rates.

Under the statute, replacement rates for rates suspended may be filed to be effective during the suspension period. If filed during the suspension period, the rates become effective immediately. Therefore, it is necessary for the Commission to establish a method to expeditiously evaluate and act upon these replacement rates. The lowest total charges then in effect for a U.S. flag or reciprocal flag carrier provide one important factor to assist the Commission in coping with the evaluation and time problem, without establishing minimum levels of rates in the U.S. foreign commerce.

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[1] The Commission notes that the volume of filings made by the companies, on whose behalf the commentator seeks elimination of this requirement, has been severely curtailed in recent months due to the withdrawal of their service from certain U.S. trades.

It should be noted that under the statute, the replacement rate concept was primarily designed to allow the controlled carrier to have a set of rates in effect during the suspension period. Any replacement rates filed under the statute can be effective for the duration of the suspension period. However, the controlled carrier is not precluded from filing other rates (at higher or lower levels) during the suspension period, on 30 days' statutory notice. These rates would "replace" the replacement rates, which may have been filed on immediate notice. In such cases, the Commission would have the benefit of the notice period to evaluate the justness or reasonableness of the new rate level. The Commission could then either act to suspend such rates before they become effective, or allow them to go into effect if it is believed that they are just and reasonable.

The final rule, therefore, would require the Commission to consider the lowest charges then in effect by U.S. or reciprocal flag carrier as proposed, but would not require the rejection of any replacement rate solely upon that criterion.

The commentator notes finally that the concept of "total transportation charge" is improper when considering rate levels. We refer the commentator to *Rates of Far Eastern Shipping Company*, 22 F.M.C. 651, 655-656 (1980), where the Commission held that rate comparisons conducted pursuant to section 18(c)(2)(ii) should include not only the applicable freight rate, as stated in the carrier's respective tariffs, but also any differences in surcharges, accessorial charges and tariff rules which may affect the total transportation charge to the shipper. The total transportation concept was also utilized in *Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U.S. Pacific Coast Trade*, 23 F.M.C. 406 (1980), and in instituting Docket No. 80-6, *Specific Commodity Rates of Far Eastern Shipping Co. in the Philippines/U. S. Pacific Coast Trade and U.S. Gulf/Australia Trade* (served 1/31/80). Commissioner Kanuk's dissenting opinion in *Rates of Far Eastern Shipping Company*, cited by the commentator, was based on opposition to the introduction of the total charge concept after the proceeding was instituted, and not on opposition to the concept itself.[2]

The Commission notes that a controlled carrier may have a rate published at a level which is higher than that of any other carrier in a trade but that it may apply a surcharge in such a manner that the resulting total transportation charge to the shipper is considerably lower than that of any other carrier in the trade. For this reason the Commission will retain the total charge concept in the final rule.

[2] Commissioner Kanuk's dissenting opinion stated: "I concur with the majority that consideration of 'total charges' may well be a matter of great importance in a controlled-carrier proceeding." 19 S.R.R. at 1543.

The Commission has also amended section *536.8 Tariffs containing through rates and through routes* to include a reference to 18(c). This amendment was not included in the Notice of Proposed Rulemaking and appears as part VIII of the attached appendix.

Accordingly, pursuant to the provisions of 5 U.S.C. 553 and sections 18(b), 18(c), and 43 of the Shipping Act, 1916 (46 U.S.C. 817(b), 817(c) and 841(a)), the Federal Maritime Commission hereby amends 46 C.F.R. 536 in the manner set forth in the attached appendix.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

APPENDIX

46 C.F.R. Part 536 is amended as follows:

I. *Authority*:

References to section 18(c) and 46 U.S.C. 817(c) are added.

II. *536.0 Scope.*

The second sentence of paragraph 536.0(b) is amended to read:

> These regulations implement this requirement and, in addition, the requirements of sections 14(b) and 18(c) of the Act.

III. *536.1 Exemptions and exclusions.*

A new paragraph (d) is added to section 536.1 to read as follows:

(d) *Controlled Carriers*

(1) A controlled carrier shall be exempt from the provisions of this part exclusively applicable to controlled carriers when: (i) the vessels of the controlling state are entitled by a treaty of the United States to receive national or most-favored-nation treatment; (ii) the controlling state subscribed, as of November 17, 1978, to the shipping policy statement contained in note 1, Annex "A" of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development; (iii) as to any particular rate, the controlled carrier's tariff contains an amount set by the duly authorized action of a ratemaking body approved under section 15 of the Act; *Provided, however*, that this exemption is inapplicable to rates established pursuant to an agreement in which all the members are controlled carriers not otherwise excluded by paragraph (d) of this section; (iv) the controlled carrier's rates, charges, classifications, rules or regulations govern transportation of cargo between the controlling state and the United States (including its districts, territories and possessions); and (v) the controlled carrier operates in a trade served exclusively by controlled carriers.

(2) The Commission will notify any carrier of its classification as a controlled carrier.

(3) Any carrier contesting such a classification may within 30 days after the date of the Commission's notice, submit a rebuttal statement. The Commission shall review the rebuttal and notify the carrier of its final decision within 30 days from the date the rebuttal statement was filed.

IV. *536.2 Definitions.*

Present paragraphs (f) through (n) are redesignated as (g) through (o) and a new paragraph (f) added to read as follows:

(f) *Controlled Carrier.*

A carrier which is, or whose operating assets are, directly or indirectly owned or controlled by the government under whose registry the vessels of the controlled carrier operate. Ownership or control by such government shall be deemed to exist if a majority interest in the carrier, or its operating assets, is owned or controlled in any manner by such government, an agency of such government, or any person, corporation, or entity controlled by such government. Ownership or control shall also be deemed to exist if the government of registry has the right to appoint or veto the appointment of a majority of the carrier's directors or its chief operating or executive officer.

V. *536.3 Filing of tariffs; general.*

Paragraph (d) is amended to read:

(d) All tariffs published in a foreign language shall be accompanied by two true copies translated into the English language when submitted for filing, except that controlled carriers shall submit three true copies translated into the English language.

Paragraph (f) is amended to read:

(f) All tariff matter, including temporary filings by mail pursuant to section 536.10(c)(1) of this part, shall be filed in duplicate, except by controlled carriers who shall file all tariff matter in triplicate; *Provided, however*, that temporary filings made by telegraph or cable pursuant to section 536.10(c)(1) need not be submitted in duplicate or triplicate.

Paragraph (k) is amended to add a final sentence reading:

Provided further, that a controlled carrier newly admitted to membership in a conference shall, 30 days prior to admission, file notice of cancellation of any applicable independent tariff effective upon the date of admission to conference membership, unless special permission has been granted by the Commission pursuant to section 536.15 of this part.

Paragraph (l) is amended so that the first sentence reads:

Any tariff submitted for filing which fails to conform with sections 14b, 18(b), or 18(c) of the Act, or with the provisions of this part, is subject to rejection by the Commission and, upon rejection, shall be void and its use unlawful. Rejection will be accomplished pursuant to paragraph 536.10(d).

VI. *536.5 Tariff contents.*

Paragraph (a)(1) is amended to add a final sentence to read as follows:

A controlled carrier subject to section 18(c) of the Act shall so identify itself under the carrier name on the title page.

VII. *536.6 Statement of rates and charges.*

Paragraph 536.6(n) is amended to add a final sentence which reads as follows:

> Controlled carriers filing open rates are subject to the 30-day controlled carrier notice requirement of section 536.10(a)(3) of this part, except when special permission is granted by the Commission under section 536.15 of this part.

VIII. *536.8 Tariffs containing through rates and through routes.*

The third sentence in paragraph 536.8(b) is amended to read:

> Such tariffs will be filed and maintained in the manner provided in section 18(b) and 18(c) of the Act, and rules of this part.

IX. *536.10 Amendments to tariffs.*

Paragraph 536.10(a)(3) is amended to add a final sentence which reads as follows:

> *Provided, however,* that all changes to controlled carrier tariffs shall not become effective earlier than 30 days from the date of filing, unless special permission has been granted by the Commission under section 536.15 of this part, or the change affects tariff matters which are the subject of a suspension proceeding, in which case section 536.11(g) of this part shall apply.

Paragraph 536.10(a)(4) is amended by adding a subdivision (iii) which reads as follows:

> and (iii) the carrier is not a controlled carrier and has not received special permission authorizing the amendment.

Paragraph 536.10(b)(2) is amended to add a final uniform symbol "K," defined as follows:

> (K) To denote a rate or charge that is filed by a controlled carrier member of a conference or rate agreement under independent action.

Paragraphs 536.10(b)(4), 10(d)(1) and 10(d)(2) are amended to include a reference to section 18(c).

X. *536.11 Supplements to tariffs.*

Paragraph 536.11(a) is amended to add a new subparagraph (6), as follows:

> (6) To indicate controlled carrier rates which have been suspended by the Commission.

Section 536.11 is amended to add a new paragraph (f), as follows:

> (f) General rate increase/decrease supplements filed by controlled carriers are subject to the 30-day notice requirements of section 536.10 of this part, unless special permission has been granted pursuant to section 536.15 of this part or the change affects tariff matter which is the subject of a suspension proceeding, in which case section 536.11(g) of this part shall apply.

Section 536.11 is amended to add a new paragraph (g), as follows:

(g) Treatment of suspended tariff matter (controlled carriers).

(1) Tariff matter filed by a controlled carrier may be suspended at any time before its effective date. Tariff matter already in effect may be suspended upon issuance of a show cause order on not less than 60 days' notice to the carrier. In either instance, the suspension period shall not exceed 180 days.

(2) Upon receipt of a suspension order the controlled carrier shall immediately file a supplement which: (i) contains the specific rates, charges, classifications or rules suspended; (ii) cites the date upon which the suspension becomes effective; and (iii) states that all use and application of the suspended tariff matter is deferred for 180 days.

(3) Controlled carrier tariff matter filed to become effective during a suspension period in lieu of the suspended matter may become effective immediately upon filing or upon the effective date of the suspension, whichever is later. In determining whether to reject replacement rates, the Commission shall consider whether such rates result in total charges (*e.g.*, rate plus applicable surcharges), that are lower than the lowest comparable charges effective for a U.S. flag or reciprocal flag carrier serving the same trade.

(i) The filing carrier shall identify the specific U.S. flag or reciprocal flag carrier's rates, charges, classifications, or rules resulting in total charges which equal or are lower than its own.

(ii) All replacement filings shall state on the appropriate tariff page the following:

Filed pursuant to 46 U.S.C. 817(c)(4) and 46 C.F.R. 536.11(g).

XI. *536.14 Transfer of operations, transfer of control, changes in carrier name, and changes in conference membership.*

Section 536.14 is amended to add a new paragraph (c), as follows:

(c) Whenever a carrier transfers operations, control or ownership which results in a majority portion of the interest being owned or controlled in any manner by a government under whose registry the vessels of the carrier are operated, the carrier shall immediately notify the Commission in writing of the details of the change.

XII. *536.15 Applications for special permission.*

Paragraph 536.15(a) is amended to add a second sentence, as follows:

. . . Section 18(c)(3) of the Act authorizes the Commission to permit a controlled carrier's rates, charges, classifications, rules or regulations to become effective within less than 30 days of filing.

Paragraph 536.15(b) is amended so that the first sentence reads as follows:

(b) Applications for special permission to establish rate increases or decreases on less than statutory notice. . . .

Paragraph 536.15(f) and footnote 2 thereof is amended to read:

(f) Every tariff or tariff amendment filed pursuant to a Special Permission granted by the Commission shall contain the following notation:

"Issued under authority of Federal Maritime Commission Special Permission No. [2]"

XIII. The statement of General Accounting Office reporting clearance is amended to read as follows:

The reporting requirements contained in sections 536.3, 536.11(g)(2), 536.14 and 536.15 have been approved by the U.S. General Accounting Office under B-180233 (R0226).

[2] "The filing carrier(s) shall fill in the blank with the special permission [letter and] number assigned by the Commission," (for example: No. F-1212 or No. CC-1212).

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-6

ADEL INTERNATIONAL DEVELOPMENT, INC.

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY AND STAR LINES, INC.

REJECTION OF PETITION FOR RECONSIDERATION

February 23, 1981

By petition filed January 15, 1981, complainant, Adel International Development Inc., requests that the Commission reconsider and clarify certain portions of its Order Adopting Initial Decision served December 30, 1980. Respondent, Puerto Rico Maritime Shipping Authority, responded in the form of a motion to reject the petition or alternatively to deny it. Complainant replied.

Rule 261 of the Commission's Rules of Practice 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's petition meets none of the criteria of Rule 261 and essentially consists of a restatement of material already considered by the Commission. Accordingly, the petition for reconsideration is rejected.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

*Chairman Richard J. Daschbach's concurring opinion is attached. Commissioner James V. Day did not participate.

Chairman Richard J. Daschbach, concurring. Adel's Petition for Reconsideration and Clarification fails to allege any change in material fact or applicable law since the issuance of the Commission's order of December 30, 1980, nor does it identify substantive errors in that order. Adel's petition further fails to request clarification of any specific aspect of the Commission's order. It must therefore be denied pursuant to Rule 261 of the Commission's Rules of Practice and Procedure.

However, Adel's petition does raise the issue of the relevancy of its equitable claims, which was not an appropriate consideration within the context of the Commission's narrow statutory proceeding but should ultimately be addressed by the U.S. District Court for the Northern District of Texas in order to ensure resolution of the dispute between Adel and PRMSA.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 716(I)

WARNER-LAMBERT CO.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

NOTICE OF ADOPTION

February 24, 1981

Notice is given that upon completion of its review, the Commission has determined to adopt the decision of the Settlement Officer in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 716(I)

WARNER-LAMBERT COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, SA.

DECISION OF NORMAN D. LEE - SETTLEMENT OFFICER[1]

Adopted February 24, 1981

Reparation Awarded

By complaint dated July 19, 1979, and received in the Office of the Secretary, Federal Maritime Commission, on July 27, 1979, Warner-Lambert Company (Claimant) claims an overcharge of $355.47 from Flota Mercante Grancolombiana, SA. (Carrier). Claimant is a manufacturer of various pharmaceutical and consumer products with corporate headquarters in Morris Plains, New Jersey. The claim results from a shipment made by Parke-Davis & Company, a division of Warner-Lambert Company, of 23 packages described on the carrier's Bill of Lading No. Z-5, dated March 15, 1978, as chemicals, NOIBN harmless and transported from New York, N.Y., to Buenaventura, Colombia on the vessel RIO MAGDELENA.

The shipment described as "chemicals, NOIBN harmless" weighed 2858 pounds and occupied 168 cubic feet. Ocean freight charges were assessed pursuant to Atlantic and Gulf/West Coast of South America Freight Conference Freight Tariff S.B. SA-12, FMC 1, at $188.25 per 40 cubic feet for the entire shipment based upon a description supplied by the shipper. According to the claimant, the commodities shipped were inadequately described and 10 packages contained Magnesium Stearate while another 10 was, in fact, Kaolin, leaving only three packages to be rated under the description of "chemicals, NOIBN harmless." The Atlantic and Gulf/West Coast of South America Freight Conference Freight Tariff S.B. SA-12, FMC 1, at the time of shipment, published a class 15 rate of $109.75 per ton of 40 cubic feet or 2000 pounds, whichever produced the greater revenue, which was applicable to Magnesium Stearate. Kaolin, which is a refractory clay,

[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. 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

also had available to it a rate of $94.25 cents per ton of 2000 pounds under Tariff Item No. 265.

The shipment was rated as follows:

168 cubic feet at $188.25 per 40 cubic feet			=	$790.65
Terminal Charge	$ 1.25			
Congestion Surcharge	6.00			
Port Charge	5.58			
	$12.83	x 4.2 cu.tons	=	53.89
				$844.54

Charges that would have been assessed if specific rates were applied to Magnesium Stearate and Kaolin:

Magnesium Stearate - 112 cubic feet at $109.75 per 40 cubic feet			=	$307.30
Kaolin - 1,412 pounds at $94.25 per 2000 pounds			=	66.54
Chemicals NOIBN - 14 cubic feet at $188.25 per 40 cubic feet			=	65.89
Terminal Charge	$ 1.25			
Congestion Surcharge	6.00			
Port Charge	5.58			
	$12.83	x 3.15 cu.tons	=	40.41
		x .706 wt.tons	=	9.06
				$489.20

Although claimant does not allege a violation of the Shipping Act, 1916, it is presumed that where a carrier assesses rates and charges in excess of those lawfully applicable at the time of shipment, that section 18(b)(3) of the Act has been violated.

Claim for refund was submitted to the carrier by Warner-Lambert's freight auditor on February 2, 1979. The claim was ultimately denied by the carrier on March 19, 1979, citing Item 7(b) of Tariff No. S.B. SA-12, FMC 1. This item reads as follows:

> Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found.

It is well established by the Commission that carrier's so-called "six-month" rules cannot act to bar recovery of otherwise legitimate overcharge claims, if a claim is filed by the shipper within the two (2) year statutory time period.[2] The question remaining to be decided is what were the actual commodities shipped. The test this Commission applies on claims of reparation involving alleged errors of commodity tariff classification is what the claimant can prove, based on the evidence as to what was actually shipped, and how it differed from the bill of lading description.[3] The claimant, however, has a heavy burden of proof once the shipment has left the custody of the carrier.[4] In support of the claim, claimant has submitted a freight bill, bill of lading, invoices and packing lists. A statement in the claim provides that the freight charges were collect and paid by Parke-Davis in Columbia. Examination of these documents provides satisfactory identification for identical weights, measurements, invoice and shipping numbers. Comparison results in my being able to readily determine that the shipment in question did contain 10 Packages of Magnesium Stearate and 10 packages of Kaolin which is a refractory clay. This left three packages described as Polivinilpirrolidona for which the chemicals, NOIBN rate would be assessed.

It is my opinion that the supportive documentation has satisfied the burden of proof placed upon the claimant, the actual commodities shipped have been identified as required by the Commission, and therefore a violation of section 18(b)(3) is involved.

Reparation in the amount of $355.34, plus 12 percent interest from the date freight charges were paid, is awarded to Warner-Lambert Company based on the computation previously indicated.[5]

(S) NORMAN D. LEE

September 23, 1980

[2] The claim was filed with the Commission well within two (2) years of the date on which the cause of action occurred.

[3] *Western Publishing Company, Inc. v. Hapag-Lloyd A.G.*, 12 S.R.R. 1065 (1972).

[4] *Colgate Palmolive Co. v. United Fruit Co.*, 11 S.R.R. 979, 981 (1970).

[5] 46 C.F.R. 530.12.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 717(I)

WARNER-LAMBERT CO.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

NOTICE OF ADOPTION

February 24, 1981

Notice is given that upon completion of its review, the Commission has determined to adopt the decision of the Settlement Officer in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 717(I)
WARNER-LAMBERT COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, SA.

DECISION OF NORMAN D. LEE - SETTLEMENT OFFICER[1]

Adopted February 24, 1981

Reparation Awarded

Warner-Lambert Company (Claimant) is a manufacturer of various pharmaceutical and consumer products and maintains corporate headquarters in Morris Plains, New Jersey. Claimant filed a complaint with the Office of the Secretary, Federal Maritime Commission, on July 27, 1979, against Flota Mercante Grancolombiana, SA. (Carrier), who is a common carrier engaged in the transportation of goods by water from New York, N.Y., to Buenaventura, Colombia. The claim results from a shipment made by Parke-Davis & Company, a division of Warner-Lambert Company, covered by the carrier's Bill of Lading No. Z-5, issued December 9, 1977, and transported from New York, N. Y., to Buenaventura, Colombia on the vessel CIUDAD DE BOGOTA.

The shipment in question consisted of 56 packages, weighed 7083 pounds, and had a total cube of 213 feet. Ocean freight charges were assessed and paid[2] pursuant to Atlantic and Gulf/West Coast of South American Freight Conference Freight Tariff S.B. SA-12, FMC 1. Claimant states that 40 drums described on the bill of lading as "chemicals, NOIBN harmless" was, in fact, Lactose in powdered form. The 40 drums of Lactose were rated by the carrier at $170.75 per measurement ton, while according to the claimant a rate of $124.50 per ton was effective in Item No. 870 of the aforementioned Conference tariff. According to the claimant, another 10 cartons on the bill of lading were described as "chemicals NOIBN harmless (Kaolin NF/Whittaker 372)" which the carrier rated at $137.25 per measurement ton and Item No. 265 of the Conference tariff published a rate on clay of $94.25 per

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[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

[2] The claim states that freight charges were collect and paid by Parke-Davis in Cali, Colombia. Respondent in its answer to claim verifies that ocean freight charges were collected by Flota Mercante Grancolombiana.

weight ton which should have been applied to the Kaolin. The total freight charged the claimant on this shipment, including applicable surcharges was $959.41 calculated as follows:

40 Drums Chemicals NOIBN Harmless - 135 cubic feet at $170.75 per 40 cubic feet			=	$576.28
10 Cartons Chemicals NOIBN Harmless (Kaolin NF/Whittaker 372) - 41 cubic feet at $137.25 per 40 cubic feet			=	140.68
6 Drums Drugs or Medicines NOIBN (Benadryl Hydrochloride) - 37 cubic feet at $188.25 per 40 cubic feet			=	174.13
Terminal Charge	$ 1.25			
Congestion Surcharge	6.00			
Port Charge	5.58			
	$12.83	x 5.325 cu. tons	=	68.32
				$959.41

Although claimant does not allege a violation of the Shipping Act, 1916, it is presumed that where a carrier assesses rates and charges in excess of those lawfully applicable at the time of shipment, that section 18(b)(3) of the Act has been violated.

Claimant states that they were overcharged by the carrier a total of $234.92[3] and claim for refund was submitted to the carrier by their freight auditor on February 2, 1979. The claim was ultimately denied by the carrier on March 19, 1979, citing Item 7(b) of Tariff No. S.B. SA-12, FMC 1, which reads as follows:

> Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found.

It is well established by the Commission that carrier's so-called "six-month" rules cannot act to bar recovery of otherwise legitimate overcharge claims, if a claim is filed by the shipper within the two (2) year statutory time period. In its response, the carrier states this claim should be time barred, since it was brought to their attention two years and two months after sailing. The carrier has erred in their consideration of

[3] Statement in Part III K of the claim uses the figure $234.92, however, calculations in this part show a total overcharge of $234.*42*.

this time frame, the shipment took place on December 9, 1977, was brought to the attention of the carrier by claimant's freight auditor on February 2, 1979, and claim was filed with this Commission on July 27, 1979, well within the two (2) year statutory time period.

The test this Commission applies on claims of reparation involving alleged errors of commodity tariff classification is what the claimant can prove, based on the evidence as to what was actually shipped, and how it differed from the bill of lading description.[4] The claimant, however, has a heavy burden of proof once the shipment has left the custody of the carrier.[5] Evidence available for review includes a dock receipt, bill of lading, freight bill, invoices and packing lists. Examination of these documents enables me to readily identify quantities, weights, measurements, invoice and shipping numbers, and it can be determined that the shipment contained 40 drums of Lactose, 10 cartons of Kaolin, which is a refractory clay, and 6 drums of Benadryl Hydrochloride. At the time of shipment, Item No. 870 in the Atlantic and Gulf/West Coast of South America Freight Conference Freight Tariff S.B. SA-12, FMC 1, published a rate of $124.50 per ton of 40 cubic feet or 2000 pounds, whichever produced the greater revenue, which was applicable to "Sugar, viz.: Milk (Lactose)." A rate applicable to "Clay, viz.: common, ceramic or refractory" was also published at $94.25 cents per ton of 2000 pounds under Tariff Item No. 265 of the same tariff. Utilizing the information as to actual commodities shipped and applicable rates in the governing rate tariff at time of shipment, it is my opinion charges should appear as follows:

40 Drums Lactose - 135 cubic feet at $124.50 per 40 cubic feet			=	$420.19
10 Cartons Kaolin (refractory clay) - 1410 pounds at $94.25 per 2000 pounds			=	66.45
6 Drums Benadryl Hydrochloride - 37 cubic feet at $188.25 per 40 cubic feet			=	174.13
Terminal Charge	$ 1.25			
Congestion Surcharge	6.00			
Port Charge	5.58			
	$12.83	x 4.3 cu. tons	=	55.17
		x .705 wt. tons	=	9.05
				$724.99

Supporting documentation has satisfied the burden of proof placed upon the claimant, the actual commodities shipped have been identified as required by the Commission, and a violation of section 18(b)(3) is involved.

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[4] *Western Publishing Company, Inc. v. Hapag-Lloyd A.G.*, 12 S.R.R. 1065 (1972).

[5] *Colgate Palmolive Co. v. United Fruit Co.*, 11 S.R.R. 979, 981 (1970).

Reparation in the amount of $234.42, plus 12 percent interest from the date freight charges were paid, is awarded to Warner-Lambert Company based on the computation indicated.[6]

(S) NORMAN D. LEE

October 1, 1980

[6] 46 C.F.R. 530.12.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-9

ELLENVILLE HANDLE WORKS, INC.

v.

FAR EASTERN SHIPPING COMPANY

NOTICE

February 25, 1981

Notice is given that no appeal has been taken to the January 21, 1981 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. 80-9
ELLENVILLE HANDLE WORKS, INC.

v.

FAR EASTERN SHIPPING COMPANY

SETTLEMENT APPROVED; COMPLAINT DISMISSED

Finalized February 25, 1981

Complainant, Ellenville Handle Works, Inc., and respondent, Far Eastern Shipping Company, have filed a joint motion requesting approval of a settlement and dismissal of this proceeding. In support of their motion, the parties have attached the text of their settlement agreement, a letter from complainant explaining the background to the settlement and the request for dismissal of the complaint, and an affidavit signed by both parties attesting to the *bona fides* of the settlement. As more fully described below, I find that termination of this case by means of the settlement which the parties have reached is warranted and grant the motion.

This case began with the service of a complaint on February 20, 1980. Complainant, an importer and manufacturer of various types of wooden products, alleged that respondent FESCO overcharged it on eight shipments of what complainant alleged to be "machine processed timber," which shipments were carried by FESCO during the period December 1978 through February 1979. Complainant alleged that respondent rated the commodity as "laminated board" in violation of section 18(b)(3) of the Shipping Act, 1916, and sought reparation in the amount of $11,272.51, which complainant alleged to be the aggregate amount of overcharges. Respondent denied each and every material allegation and claimed that it had correctly rated the commodity as "laminated board."

After issue was joined, both parties began to use the Commission's discovery processes set forth in 46 C.F.R. 502.201 *et seq.*, in an effort to obtain relevant facts concerning the nature of the commodity and to identify the specific issues to be resolved. In this regard, respondent served interrogatories and requests for production of documents and both complainant and respondent exchanged requests for admissions at various times during March, May, August, and September 1980.

During the course of discovery, which consumed more time than would be expected because relevant documents and critical affidavits

were being sought from overseas locations, complainant ascertained that significant amendments to its original complaint were necessary. An amended complaint was thereafter filed and served on August 26, 1980. The most significant amendment concerned the amount of overcharges which complainant now alleged to be only $5,738.58 on the basis of new facts which had been revealed to complainant. Respondent again denied that it had misrated the eight shipments and contended that they consisted of "laminated board" rather than "machine processed timber," as complainant alleged. After the final exchange of discovery information prior to the settlement now reached, the parties were still at issue concerning the true nature of the commodity shipped.

THE NATURE OF THE SETTLEMENT

According to the documents attached to the motion, complainant originally raised the issue of overcharges on the eight shipments by means of a counter-claim in an action which FESCO's agent, Moram Agencies, Inc., had begun in Federal District Court in New York for freight due on completely unrelated shipments. Thereafter, complainant filed its complaint directly against FESCO with the Commission. During the pendency of this case before the Commission, however, complainant reached an agreement with Moram in New York to settle both Moram's claim and complainant's counter-claim in the court action. Moram agreed to credit complainant in the amount of $4,700.00 against Moram's claim for freight due in exchange for the release of Moram and FESCO from complainant's counter-claim for overcharges.

After complainant had obtained further information in the course of discovery, as noted above, complainant found that its original complaint had to be amended so as to reduce the amount of alleged overcharges substantially, to $5,738.58. By obtaining a credit of $4,700.00 in its counter-claim against Moram in the court action, complainant believes that it has obtained a just and reasonable settlement and that it would not be economically reasonable for it to continue litigation in the hopes of obtaining a greater amount. Therefore complainant wishes to have this proceeding terminated so that full effect can be given to its settlement in this and the court case.

EVALUATION OF THE SETTLEMENT UNDER APPLICABLE PRINCIPLES OF LAW

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 and 502.94, and the Administrative Procedure Act on which Rule 91 is

based, 5 U.S.C. 554(c)(1).[1] The general policy favoring settlements is summarized in the following passage drawn from a recognized legal authority, which language was adopted by the Commission in the *Old Ben Coal Company* case, 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, 368-69 (1979). As those cases show, it is possible to settle cases without admissions of violations of law and for amounts of reparation less than those originally sought in the complaint. Moreover, although there had been some doubt at one time whether the Commission would permit settlements in cases involving alleged overcharges under section 18(b)(3) absent findings of violations of that law, the Commission has held that settlements in such cases are indeed permissible provided that there is a showing that the settlement is *bona fide* and not a device for rebating. *See Organic*

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[1] 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 Maritime 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 part through conferences, agreements, or stipulations." Senate Judiciary Committee, APA--Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at 24.

Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlanttrafik Express Service, 18 S.R.R. 1536a (1979); *Celanese Corporation, Inc. v. The Prudential Steamship Company*, 23 F.M.C. 1 (1980).

As explained in *Old Ben*, cited above, 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 tariff law embodied in section 18(b)(3) of the Shipping Act, 1916, and that if it falls under section 15, the settlement be filed for approval under that law and pertinent regulations. *Old Ben*, 21 F.M.C. at 513.

In considering settlements which parties submit with requests that their cases before the Commission be dismissed, the Commission has followed the traditional view that the settlement deserves approval if it avoids wasteful litigation and if it appears that the parties have correctly made an economical judgment that continued litigation would cost more to each side regardless of who ultimately prevailed on the merits than the amount of money which complainant had agreed to accept and respondent had agreed to pay in exchange for a release. *Old Ben*, 21 F.M.C. at 514. Moreover, the Commission has given its approval to settlements which, like the present one, are offshoots of court actions and which serve to bring both the Commission and court proceeding to amicable conclusions. *See, e.g., Robinson Lumber Company, Inc. v. Delta Steamship Lines, Inc.*, 21 F.M.C. 354, (1978); *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 364 (1979); Docket No. 72-20, *Clipper Carloading Company v. Trans-Pacific Freight Conference of Japan, et al.*, Order of Dismissal, July 21, 1975 (unreported).

The present settlement appears to be reasonable and to represent the considered judgment of the parties. First, it settles both a court case and the proceeding brought before the Commission. Therefore, the purpose of settlements regarding termination of expensive litigation would appear to be doubly served. Secondly, the amount of settlement, $4,700.00, seems to be within a zone of reasonableness in which complainant has not undervalued its case and respondent has not conceded too much. Had the case proceeded to full litigation, it would have been necessary to resolve a critical factual dispute, namely, whether the commodity shipped was "machine processed timber" or "laminated board," since both parties have steadfastly adhered to different positions on this question. Complainant, an importer, has had difficulty obtaining affidavits from distant overseas suppliers and respondent apparently believes that certain documentary evidence favors its position. Resolution of a factual dispute of this nature might well have required an oral, trial-type hearing, not to mention post-hearing briefs, exceptions and replies to exceptions following my Initial Decision, etc. In view of the

costs of litigating in such manner, a settlement for $4,700.00 would appear to be more economical to both parties than full litigation to a conclusion in which complainant might have been awarded the full amount of the alleged overcharges, $5,738.58 plus interest, or in which respondent might have been required to pay nothing. In other words, the parties have decided that it is in their own economic best interests to settle upon a particular amount of money which they believe to place them in a better position than they would be in had they pursued litigation fully with all of the attendant expenses and uncertainties. Therefore, the present settlement conforms to traditional principles governing all settlements. *See Old Ben*, 21 F.M.C. at 512-14.

The only remaining problem with approval of the settlement and discontinuance of the Commission proceeding involves the Commission's concern that settlements concerning tariff issues under section 18(b)(3) of the Act be *bona fide* attempts to terminate controversies rather than devices to circumvent tariff law. In this regard, the Commission enunciated certain conditions to be met when parties submit settlements and request discontinuance of litigation. In *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlanttrafik Express Service*, 18 S.R.R. at 1539-1540, the Commission, as noted, decided that settlements in tariff overcharge cases were permissible but, to ensure that tariff law was not being abused, required the parties to do three things: 1) submit a signed agreement to the Commission; 2) file an affidavit setting forth the reasons for the settlement and attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than applicable tariff rates in contravention of law; and 3) show that the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable. The parties have complied with these requirements. They have filed their signed agreement, submitted an affidavit attesting to the fact that the settlement is a *bona fide* attempt to terminate the controversy and not a device to obtain transportation at other than applicable rates, and have shown that there is a genuine dispute concerning the nature of the commodity shipped which, if litigation were to continue, would most likely require trial-type hearings with time-consuming cross-examination. In a previous settlement which was approved, the fact that further litigation of that type was required was considered sufficient reason to conclude that the facts critical to resolution of the dispute were not reasonably ascertainable. *See Celanese Corporation, Inc. v. The Prudential Steamship Company*, cited above, 23 F.M.C. at 7. Moreover, the fact that this settlement is part of another settlement which brings a court proceeding to an amicable conclusion is not only another reason favoring approval of the settlement but also additional evidence that the settlement is a good-faith effort to terminate litigation rather than a

device to circumvent tariff law.[2] There is, therefore, no reason to withhold approval of the proffered settlement nor any legal impediment to its approval.

Accordingly, the settlement is approved, the complaint is dismissed with prejudice, as requested by complaint, and the proceeding is terminated.

(S) NORMAN D. KLINE
Administrative Law Judge

January 21, 1981

[2] It should be noted that although the formal affidavit attesting to the good faith of the settlement was filed in this case, the formal requirement that such an affidavit be filed has been relaxed when there is independent evidence that the settlement was reached without intent to circumvent tariff law. *See Cutter Laboratories Overseas Corporation v. Maersk Lines*, 23 F.M.C. 525 (1981).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 748
APPLICATION OF WATERMAN STEAMSHIP CORPORATION FOR THE BENEFIT OF STOP-SHOCK, INC.

ORDER REMANDING INITIAL DECISION

February 25, 1981

This proceeding is before the Commission upon its determination to review the Initial Decision of Administrative Law Judge Paul J. Fitzpatrick, granting Waterman Steamship Corporation permission to waive collection of $20,784.75 in freight charges for the benefit of Stop-Shock, Inc., pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)). Waterman had alleged that it had agreed to rate a shipment of fabric softener at $140 w/m plus bunker fuel surcharge, and that it would not charge the 30% port congestion surcharge prescribed in Rule 190 of its tariff. Waterman claims it inadvertently filed a tariff rate of "140 w/m plus surcharges." As a result, Stop-Shock was charged, in addition to the freight charges, $20,784.75 as a port congestion surcharge, the amount for which a waiver is sought.

Upon review, the Commission determines that two matters require clarification before it can approve a waiver in this proceeding. First, the agreement entered into between Waterman and Stop-Shock does not indicate that the parties intended to *exclude* the port congestion surcharge. Mere absence of mention of the surcharge in the telex agreement does not alone indicate that the parties had agreed not to apply it. This rationale, carried to its logical conclusion, would also exempt terminal, heavy lift, container demurrage and similar charges unless each such charge was also specifically mentioned in such an agreement.

Secondly, to exempt only liquid fabric softener from the tariff rule imposing a port congestion surcharge would appear to discriminate against shippers of other commodities within the meaning of the proviso in section 18(b)(3). It is difficult to imagine what type of transportation factors might justify the applicability of a port congestion surcharge to some commodities and not to others. It would be useful for this matter to be more fully explored by the parties.

The Commission therefore remands this proceeding to the Administrative Law Judge with instructions to attempt to develop the record on these two areas, and then to issue an appropriate decision.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Administrative Law Judge for further action consistent with this Order, and for issuance of a supplemental decision within 60 days of the date of this Order.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 774(F)

EXIM, LTD.

v.

KUEHNE & NAGEL

NOTICE

March 6, 1981

Notice is given that the time within which the Commission could determine to review the February 2, 1981 dismissal of the complaint in this proceeding has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 774(F)

EXIM, LTD.

v.

KUEHNE & NAGEL

(1) SETTLEMENT AGREEMENT APPROVED
(2) REQUEST TO WITHDRAW MOTION TO DISMISS GRANTED
(3) PROCEEDING DISCONTINUED

Finalized March 6, 1981

This proceeding involves a complaint for alleged overcharges which was originally considered by a Settlement Officer. The rather involved chronological and procedural events necessitating the holding in abeyance of a Motion to Dismiss filed by Kuehne & Nagel Overseas Corp. are detailed in my Ruling on Motion to Dismiss served June 19, 1980.

The exact role of both "Kuehne & Nagel Overseas Corp." of New York City, N.Y., and "Kuehne & Nagel, S.A.," of Barcelona, Spain, in this proceeding has been the subject of concern to the Commission, the Settlement Officer, and this Judge. The Settlement Officer dismissed the original claim before him on the basis that Kuehne & Nagel, S.A.. was a nonvessel common carrier. This Judge sought information concerning both entities and then considered it necessary to request this Commission to order a staff investigation in order to determine the "proper party" respondent. (Memorandum to Commission dated July 10, 1980.) The Commission, in turn, referred the proceeding back to this Judge for "such further proceedings as he deems appropriate." (Order served November 13, 1980.) In the Order the Commission stated:

> 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.

Following the issuance of the Order and at my request, the Secretary of the Commission served a copy of the complaint upon Kuehne & Nagel, S.A., at its address in Barcelona and also enclosed materials (my

Memorandum and a copy of the Order) showing the history of this proceeding to date. By motions served December 16, 1980, and January 13, 1981, counsel for Kuehne & Nagel, S.A., requested extensions of time to file an answer to the complaint based upon a request to pursue settlement negotiations with the complainant. In my granting the extensions, I noted that any proposed settlement of the claim "should be fully responsive to the Commission's Order of November 13" and specifically referred to the Commission's language to the effect that the role of both entities requires "further exploration." On January 26, 1981, counsel for Kuehne & Nagel, S.A., filed (1) Agreement of Settlement and Mutual Release; (2) Joint Affidavit; and (3) Memorandum in Support of Settlement Agreement. For convenience, the documents are attached hereto (Attachment A - the Agreement; Attachment B - the Affidavit; and Attachment C - the Memorandum). Also a request was made on behalf of Kuehne & Nagel Overseas Corp., (1) to withdraw its Motion to Dismiss served May 14, 1980; and (2) that its time to answer the complaint be extended for twenty-one days beyond the date of service of any final Commission ruling on the settlement agreement. The request to withdraw the motion will be granted and the extension will be necessary only if the Agreement is ultimately disapproved.

Basically, the complaint seeks $1,621.87 and $897.45, or a total of $2,519.32, for claimed overcharges on two shipments from Barcelona to Charleston, South Carolina during January and March 1978. The shipments were transported aboard the vessels *S/S Italica* and *Americana 1001*. The basis for the claim is that the applicable freight rate should have been applied to laminated compressed wood rather than plywood pursuant to the provisions of a tariff of the "Med. Gulf Conference." Under the terms of the Agreement, Kuehne & Nagel, S.A., agrees to pay and the claimant agrees to accept $2,000 in full settlement of the complaint. According to the Memorandum, the Agreement represents "a reasonable commercial settlement" to an already lengthy proceeding. And it is claimed that there is "difficulty in ascertaining the data necessary to resolve the dispute without further litigation." In addition, it is stated that:

> The settlement is for the purpose of dealing similarly with Exim's averment that Kuehne & Nagel "is a nonvessel operating common carrier engaged in transportation by water." Although Kuehne & Nagel would, if it filed an answer to the complaint deny that it was such a carrier and assert that it is a Spanish freight forwarding company, this issue, also, is disposed of by virtue of the settlement agreement. The necessity of litigating this issue is thus avoided in the face of a "bona fide attempt to avoid the time and expense of such litigation and to terminate this controversy." (Attachment C, p. 725; footnote omitted.)

In short, it is submitted that the resolution of the issue relating to the role of both entities is now unnecessary since the parties have agreed by settlement to avoid further litigation. Nevertheless, counsel for Kuehne & Nagel, S.A., has offered information "for such aid as it may provide in the final disposition of this proceeding" (Attachment C, p. 726). In any event, the approval of the settlement here would effectively remove from further consideration that issue in this proceeding. The import of the pleadings submitted now constitutes a judgment by the parties to reach an amicable solution with due consideration to the unsureness of a prolonged and expensive proceeding. And to withhold approval from an otherwise acceptable settlement for further contemplation of certain issues would be unwarranted under the circumstances.[1] This is especially appropriate considering the claim is solely for alleged overcharges and the consideration of the other "major issue" is probably of little practical concern to this shipper. The settlement itself represents those traditional considerations utilized by the Courts and this Commission in encouraging resolution of controversies. See, *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505, 512 (1978).

Although an approval of the settlement removes the issue relating to the role of both Kuehne & Nagel Overseas Corp. and Kuehne & Nagel, S.A., from further consideration by me, the matter need not end here. This Commission can consider the record (including the additional explanation submitted) and determine what future course, if any, it wishes to pursue. The Commission has the appropriate procedures (i.e., a staff investigation, Order To Show Cause, Order of Investigation, etc.) to explore the issue, if it is considered necessary. On the other hand, to disapprove or delay the settlement under the existing circumstances and compel the parties to treat this issue and others in this proceeding would negate entirely the considerations posed by the settlement.

Accordingly, the Agreement of Settlement is approved and the complaint is dismissed.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

February 2, 1981

[1] Complainant is not represented by counsel and there is pending a Motion to Dismiss as well as the answer to the complaint. Some of the other issues raised also involve jurisdiction and a claim that service of the complaint upon Kuehne & Nagel Overseas Corp. was defective.

ATTACHMENT A
BEFORE THE FEDERAL MARITIME COMMISSION

EXIM, LTD.

v. Docket No. 774(F)

KUEHNE & NAGEL

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned, Exim, Ltd., Complainant in Federal Maritime Commission Docket No. 774(F) and Kuehne & Nagel, S.A., Respondent in said Docket that Docket No. 774(F) shall be terminated by mutual accord on the terms and conditions hereinafter set forth and for the reasons stated in the accompanying Memorandum in Support of Settlement Agreement and Motion to Dismiss:

1. Kuehne & Nagel, S.A. shall pay to Exim, Ltd. the sum of Two Thousand 00/100 ($2,000.00) Dollars.

2. Exim, Ltd. shall, in consideration of the action of Kuehne & Nagel, S.A. as provided in paragraph "1" above, withdraw its Complaint in Federal Maritime Commission Docket No. 774(F) and shall refrain from further pursuing its claim in this proceeding.

3. Neither Exim, Ltd., Kuehne & Nagel, S.A., nor any successor in interest of either such party, shall initiate any new claim against the other party arising in connection with the complaint in this proceeding except for enforcement of any provision of this Agreement; and Exim, Ltd. and Kuehne & Nagel, S.A. each hereby releases the other from, without limitation, all sums of money, accounts, actions, suits, proceedings, claims, and demands whatsoever which either of them at any time had or has up to the date of this Agreement of Settlement against the other for or by reason of any act, cause, matter, or thing arising from the transactions giving rise to this proceeding.

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

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

6. It is further understood and agreed that this Agreement of Settlement and Mutual Release is in no sense to be understood as constituting

any admission of liability of any party or of any admission of any violation of law by any party.

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

8. In the event this Settlement Agreement is disapproved by the Commission, or is approved on conditions which are unacceptable to either party, then this Settlement Agreement will be null and void *ab initio* and of no effect whatsoever for any purpose.

Dated: January 18, 1981

EXIM, LTD.
(S) BY: CHARLES F. TRAVIS
Title: President
KUEHNE & NAGEL, S.A.
(S) BY: ELIOT J. HALPERIN
Title: Attorney in Fact

ATTACHMENT B
BEFORE THE FEDERAL MARITIME COMMISSION

EXIM, LTD.
v. Docket No. 774(F)
KUEHNE & NAGEL

JOINT AFFIDAVIT

The undersigned Charles F. Travis and Eliot J. Halperin, being respectively the President of Exim, Ltd. and the Attorney in Fact of Kuehne & Nagel, S.A., depose and state as follows:

(1) This affidavit is made in connection with the Agreement of Settlement and Mutual Release in this proceeding, a copy of which is attached hereto.

(2) Said Agreement of Settlement in FMC Docket No. 774(F) is a reasonable commercial settlement of this proceeding.

(3) The complaint in this proceeding, on its face, presents a genuine dispute, raising genuine issues, and the facts and information critical to the resolution of the dispute are not reasonably ascertainable without further lengthy and costly litigation.

(4) The above-mentioned Agreement of Settlement is a bona fide attempt to avoid the time and expense of such litigation and to terminate this controversy; and said Agreement is not a device to obtain transportation at other than the proper rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

(S) NAME: CHARLES F. TRAVIS
Title: President

Sworn to before me, a Notary Public,
this 20th day of Jan., 1981.
Notary Public
My Commission expires: June 4, 1981

(S) NAME: ELIOT J. HALPERIN
Title: Attorney in Fact

Sworn to before me, a Notary Public,
this 15th day of January, 1981.
Notary Public
My Commission Expires: 2/14/82

ATTACHMENT C
BEFORE THE FEDERAL MARITIME COMMISSION

EXIM, LTD.
v. Docket No. 774(F)
KUEHNE & NAGEL

MEMORANDUM IN SUPPORT OF
SETTLEMENT AGREEMENT
AND
MOTION TO DISMISS

Kuehne & Nagel, S.A. offers this Memorandum in support of Agreement of Settlement and Mutual Release entered into between Kuehne & Nagel, S.A. ("Kuehne & Nagel") and Exim, Ltd. ("Exim") and submitted contemporaneously herewith. Kuehne & Nagel also moves that the complaint in this proceeding be dismissed in consideration of approval of the Agreement of Settlement.

I. INTRODUCTION

This proceeding already has been lengthy, the complaint having been received by the Commission in January 1980[1] (docketed as No. 774(I)); and settlement of this proceeding is mutually desired as evidenced by the accompanying Agreement of Settlement and Joint Affidavit.

Exim's complaint was first served on Kuehne & Nagel Overseas Corp. which company declined to consent to determination of the complaint under Subpart S (46 C.F.R. §§ 502.301-502.304) and filed a Motion to Dismiss. In that Motion, Kuehne & Nagel Overseas Corp. asserted that the "claim is jurisdictionally defective for failure to name a common carrier as respondent,"[2] and that service of the complaint was defective.[3] This Motion is still pending. Exim's complaint was subsequently served also on Kuehne & Nagel, S.A. by Commission letter of November 24, 1980. In response thereto Kuehne & Nagel requested[4] and was granted[5] an extension of time to answer. As

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[1] It should be noted that Exim's claims herein were first considered in consolidated Docket Nos. 731(I), 732(I), 733(I) and 734(I). Those cases were dismissed by the Settlement Officer by order served November 29, 1979.

[2] Motion to Dismiss, May 14, 1980, at 1.

[3] *Id.*, at 2.

[4] Motion for Extension of Time to Answer, December 16, 1980.

[5] Motion for Extension of Time to Answer Granted, served December 17, 1980.

grounds for that request, Kuehne & Nagel asserted that discussions had been undertaken to settle this proceeding.[6]

Such settlement discussions have been held resulting in the accompanying Agreement of Settlement.

In granting Kuehne & Nagel's request for extension of time to answer, the Administrative Law Judge admonished that the settlement be responsive to a November 13, 1980 Commission interim Order which stated that "the status of 'Kuehne & Nagel, S.A.' and 'Kuehne & Nagel Overseas Corp.' is somewhat unclear."[7]

Accordingly, set forth hereinafter is an analysis of the settlement and an explanation of the status of Kuehne & Nagel Overseas Corp. and Kuehne & Nagel, S.A. It must be stated, however, that the Agreement of Settlement can and should be considered solely on the basis of Commission criteria for the approval of settlement agreements,[8] and not on the basis of extraneous considerations of the status of certain persons involved in the shipping transactions at issue. These latter considerations are not raised as issues by the complaint except as may be necessary to resolve the specific claims. Settlement of the claims having been reached, however, in order to avoid litigating any such other issues, their resolution is unnecessary since to litigate them would vitiate the purpose and objective of settlement which is favored by the Commission.[9]

II. THE SETTLEMENT

Accompanying this Memorandum is the Agreement of Settlement and Mutual Release and the Joint Affidavit of Kuehne & Nagel, S.A. and Exim, Ltd. These documents are submitted, as explained below, for the purpose of terminating this proceeding by Settlement in accordance with the Commission's criteria favoring settlement, as set forth in *Organic Chemicals, supra*. We believe that this settlement comports in all respects with the Commission's guidelines, and therefore warrants Commission approval.

In its complaint Exim seeks $2,519.32 in alleged freight overcharges for two shipments from Barcelona, Spain to Charleston, South Carolina in early 1978. These shipments were carried aboard the vessels ITALICA and AMERICANA, neither of which is owned or operated by Kuehne & Nagel. The freight allegedly assessed to Exim was $4,368.75 and $2,427.30 respectively. The correct freight assessment claimed is $2,746.88 and $1,529.85, resulting in the total overcharge claim of

[6] *Id.*, at 2.

[7] Order, Docket No. 774(F), served November 13, 1980, at 1.

[8] See, e.g., *Organic Chemicals v. Atlantrafik Express Service*, Docket Nos. 78-2, 78-3 served January 25, 1979 (18 S.R.R. 1536a).

[9] See, *Old Ben Coal Co. v. Sea-Land Service, Inc.*, Docket No. 78-13, I.D.. October 11, 1978 (18 S.R.R. 1085); adopted by Commission December 29, 1978.

$2,519.32, which Exim claims is due from Kuehne & Nagel, S.A. as a nonvessel operating common carrier. The basis of the two claims is that the applicable rate should have been that for "laminated compressed wood per T.S.U.S. item No. 203.1000 (densified wood and/or articles thereof, compression, modified densified wood, blocks, plates sheets and strips) ... Not plywood per T.S.U.S. item No. 240.1000" pursuant to a tariff of the "Med. Gulf Conference"[10] (of which Kuehne & Nagel is not a member).

As noted above, Kuehne & Nagel has not filed an answer to these claims, and if the Agreement of Settlement is approved no answer will need to be so filed. Rather, by agreement between Exim and Kuehne & Nagel, and to avoid the necessity of litigating at length the genuine issue raised by the complaint,[11] Kuehne & Nagel agrees to pay and Exim agrees to accept $2,000.00 in full settlement of the complaint. As already explained, this has already been a lengthy proceeding, and it is asserted that this settlement represents "a reasonable commercial settlement of this proceeding"[12] in view of the difficulty in ascertaining the data necessary to resolve the dispute without further litigation.[13]

The settlement is for the purpose of dealing similarly with Exim's averment that Kuehne & Nagel "is a nonvessel operating common carrier engaged in transportation by water."[14] Although Kuehne & Nagel would, if it filed an answer to the complaint deny that it was such a carrier and assert that it is a Spanish freight forwarding company, this issue, also, is disposed of by virtue of the settlement agreement. The necessity of litigating this issue is thus avoided in the face of a "bona fide attempt to avoid the time and expense of such litigation and to terminate this controversy."[15]

III. OTHER ISSUES

As noted above, the Administrative Law Judge requested that the settlement include information as to the "status" of Kuehne & Nagel Overseas Corp. and Kuehne & Nagel, S.A. By letter of June 26, 1980 counsel responded to certain questions posed by the Administrative Law Judge to counsel[16] concerning these two entities (copy attached hereto as Attachment "A"). It is submitted that pursuit of this issue is unnecessary to the resolution of this case since the parties have agreed by settlement to avoid further lengthy litigation. Nevertheless, we offer

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[10] Complaint, Brief Attachment No. 11 to Claim.

[11] Joint Affidavit, Docket No. 774(F), paragraph "(3)," at 1.

[12] *Id.*, paragraph "(2)," at 1.

[13] *Id.*, paragraph "(3), at 1.

[14] Complaint, paragraph "II."

[15] Joint Affidavit, paragraph "(4)," at 2. See, *Latin America/Pacific Coast Steamship Conference v. Cia. Sud Americana de Vapores*, Docket No. 80-58, Settlement Approved; Complaint Dismissed, I.D. served December 17, 1980, at 3.

[16] Ruling on Motion to Dismiss, served June 19, 1980, at 5-6.

the information below for such aid as it may provide in the final disposition of this proceeding.

Kuehne & Nagel, S.A. is a freight forwarder acting as a transportation agent. In the shipping transactions at issue here, Kuehne & Nagel acted as freight forwarder, as is apparent from the documents submitted with the complaint. These include an October 1, 1979 letter from Exim to "Kuehne & Nagel Overseas, Inc." wherein Exim sought the latter's assistance in filing these claims with "the shipping lines involved," and also the dates Kuehne & Nagel paid over the freight to those carriers.[17] Exim was therefore aware that the "shipping lines" were in fact the carriers, and that Kuehne & Nagel, S.A. was the forwarder. Confirming that those shipping lines were the carriers under whose tariff Exim's cargo was carried, Exim states that "agents for the Med. Gulf Conference in Barcelona have misled Kuehne & Nagel" as to the applicable conference rates.[18]

Furthermore, the Kuehne & Nagel invoices attached to the complaint state that Exim was billed for "All charges as from Fob Brc up to C&F Charleston,"[19] including in a lump sum price the ocean freight and a $75 or $150 fee for freight forwarder handling.[20] No separate specification of the handling charges was made or required for these inbound shipments.

It is thus apparent that Kuehne & Nagel, S.A., with Exim's full knowledge, acted as the freight forwarder only. Kuehne & Nagel, S.A. was not perceived as the carrier until the Settlement Officer rejected Exim's claims against the shipping lines on the ground that Kuehne & Nagel, S.A. was a nonvessel operating common carrier.[21] The sole basis for that conclusion was that the cargo moved under Kuehne & Nagel's "bills of lading."[22] Kuehne & Nagel, of course, was not a party to those proceedings and had no opportunity to rebut that finding; and as shown herein a complete review of Exim's complaint shows that Kuehne & Nagel, S.A. acted as freight forwarder, employing its form "bills of lading" as nothing more than receipts for the shipments.

Kuehne & Nagel Overseas Corp. acted in these transactions merely as agent for Kuehne & Nagel, S.A. for the purpose of assisting Kuehne & Nagel in assuring delivery of the cargoes to Exim and in collecting the freight to be paid over to the shipping lines. Exim's freight payments were directed to this company[23] because it was selected by

[17] Complaint, Attachment 2.

[18] Complaint, Brief Attachment No. 11 to Claim.

[19] Complaint, Attachments 9 and 10.

[20] Although they are difficult to read, the carrier bills of lading (Complaint, Attachments 3 and 5) show total charges (freight plus surcharges) totalling $150 and $75 less than the invoice amounts for the ITALICA and AMERICANA shipments respectively.

[21] See footnote 1, *supra*.

[22] *Id.*

[23] Complaint, Attachments 7 and 8.

Kuehne & Nagel, S.A. as its agent in the United States for receipt of such payments. There is no basis whatsoever for ascribing any other attributes to Kuehne & Nagel Overseas Corp. regarding the transactions at issue.[24]

IV. CONCLUSION

For the foregoing reasons it is respectfully requested that the Agreement of Settlement between Kuehne & Nagel, S.A. and Exim, Ltd. be approved and that the complaint in this proceeding be dismissed.

RESPECTFULLY SUBMITTED,
JOHN P. MEADE
(S) ELIOT J. HALPERIN
Attorneys for Kuehne & Nagel, S.A.

Graham & James
Suite 1200
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-0505

[24] It is understood that contemporaneously with the filing of this Memorandum, the earlier filed Motion to Dismiss of Kuehne & Nagel Overseas Corp. is being withdrawn for the sake of good order in considering the Agreement of Settlement.

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of January 1981 served the foregoing Memorandum in Support of Settlement Agreement and Motion to Dismiss on all parties of record by first class mail, postage prepaid.

(S) JOHN P. MEADE

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-71

IN RE: ROYAL HAWAIIAN CRUISES, INC.

ORDER TO DISCONTINUE AS MOOT

March 18, 1981

On October 27, 1980, the Commission directed Royal Hawaiian Cruises, Inc. to show cause why its Certificate (Performance) No. 201 should not be revoked pursuant to the Commission's General Order 20, (46 C.F.R. 540.8 and 540.9).* Subsequently, Royal Hawaiian returned its Certificate and moved the Commission to dismiss the proceeding as moot. The Bureau of Investigation and Enforcement supports the Motion to Dismiss.

The return of Royal Hawaiian's Performance Certificate effectively moots the issues presented in this proceeding.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.**

(S) JOSEPH C. POLKING
Acting Secretary

* Royal Hawaiian was issued a Certificate (Performance) on January 18, 1980 pursuant to section 3 of Public Law 89-777, 46 U.S.C. 817(e) and the Commission's regulations, 46 C.F.R. Part 540. The statute and the Commission's regulations provide that no person in the United States may arrange, offer, advertise or provide passage on a vessel, with accommodations for 50 or more passengers, unless the Commission has issued that person a Certificate evidencing financial responsibility for non-performance.

** Commissioner Teige did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-49

BULTACO INTERNATIONAL, LTD. AND JOHN GRACE - POSSIBLE VIOLATIONS OF SECTION 16, INITIAL PARAGRAPH, SHIPPING ACT, 1916

NOTICE

March 24, 1981

Notice is given that no appeal has been filed to the bench ruling of the Administrative Law Judge dismissing this proceeding and the Commission has not determined to review. Accordingly, the order of dismissal is administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-25
EMMETT I. SINDIK D/B/A
EMMETT I. SINDIK, CUSTOMS BROKER
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION AND POSSIBLE VIOLATION OF SECTION 44, SHIPPING ACT, 1916

NOTICE

March 31, 1981

Notice is given that no exceptions have been filed to the February 25, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-25
EMMETT I. SINDIK D/B/A
EMMETT I. SINDIK, CUSTOMS BROKER
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION AND POSSIBLE VIOLATION OF SECTION 44, SHIPPING ACT, 1916

Respondent found to have violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities related to three shipments.

Respondent is found fit to be licensed and is fined $1,000 in civil penalties. Application granted.

Emmett I. Sindik, pro se.

Joseph B. Slunt, with whom *Paul J. Kaller* and *John Robert Ewers* were on brief for the Bureau of Investigation and Enforcement.

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

Finalized March 31, 1981

By its Order of Investigation and Hearing served April 25, 1980, this Commission instituted a proceeding to determine whether, Emmett I. Sindik (respondent), a sole proprietor operating under the trade name Emmett I. Sindik, Customs Broker: (1) violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities; (2) whether civil penalties should be assessed for such violations, and if so, the amount of any such penalty; and (3) whether the respondent possessed the requisite fitness to be licensed as an independent freight forwarder.[2]

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

[2] The Commission's Order posed the following issues:

1. whether Emmett I. Sindik d/b/a Emmett I. Sindik, Customs Broker, violated section 44(a), Shipping Act, 1916, by engaging in unlicensed forwarding activities;
2. whether civil penalties should be assessed against Emmett I. Sindik d/b/a Emmett I. Sindik, Customs Broker, 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 if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such penalties; and
3. whether in light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Emmett I. Sindik d/b/a Emmett I. Sindik, Customs Broker, possesses the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

The Order also provided for the submission of affidavits of fact and memoranda of law by the Bureau of Investigation and Enforcement (formerly the Bureau of Hearing Counsel) and by respondent. Initially the Bureau argued that: (1) respondent engaged "in at least three instances of forwarding" without a license; (2) a penalty of $5,000 should be assessed; and (3) respondent is not fit to properly carry on the business of forwarding and that the application be denied.[3] Respondent, acting in his own behalf, filed an "Affidavit of Fact" claiming that, among other things, "I don't feel we did freight forwarding without a license, since the export declaration was signed by a licensed forwarder, however, if ruled otherwise, certainly not flagrantly nor an attempt to circumvent the law or evade regulation, I am an honest man and know I am fit, willing and able to properly conduct the business of freight forwarding in the manner prescribed."[4] The Bureau's reply reflected a change of position as initially submitted in that they considered respondent establishing that the violations were "inadvertent" and that "he should be licensed to engage in the business of forwarding." However, the Bureau also noted that "we disagree with Mr. Sindik on the question of whether he violated section 44(a) by forwarding three shipments" and urged that the civil penalty be reduced from the initial recommendation of $5,000 to $3,000. The recommended penalty reduction represented consideration of the "apparent unintentional and limited nature of the violations and at the same time serves to deter future violations. . . ."[5] The Commission's Order also required statements identifying any unresolved issues of fact and the specifying of the type of procedure best suited to resolve such issues. In response to that procedural requirement, the Bureau indicated that respondent "did not believe there were any factual disputes" but that respondent desired to submit financial information regarding his ability to pay any civil penalty.[6] Also the Bureau added that "we do not believe there are any factual disputes." Respondent then submitted a financial statement describing his company as "very small and [with] profits down."[7]

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[3] Bureau's Opening Memorandum of Law filed June 9, 1980.

[4] Respondent's Affidavit of Fact, p. 2, received July 3, 1980.

[5] Bureau's Reply Memorandum of Law, p. 4, filed July 24, 1980.

[6] Letter addressed to undersigned dated August 5, 1980.

[7] The exact text of respondent's letter of August 11, 1980, is as follows:

Attached please find financial statement as per agreement with Hearing Counsel and as it reflects my company is very small and profits are down, it would seriously jeopardize my business if I have to pay the civil penalty asked by the Hearing Counsel, I realize I used very bad judgement concerning the three exports, and Hearing Counsel agrees that my affidavit establishes that the three violations do not demonstrate a pattern of flagrant violations or an attempt to circumvent the Shipping Act.

I assure Your Honor that I am a honest law abiding citizen and would if granted my FMC license would be most aware of the law, the Hearing Counsel has done its job in this regard, perhaps Your Honor could see to remit the penalty and place me under probation for a period of time. The penalty would be very hard on me.

In the Procedural Order served September 2, 1980, it was noted that, among other things, since the violations were considered "inadvertent" and the financial condition of the respondent less than robust, a chance of a settlement existed. The parties were provided an opportunity to explore that possibility. Respondent replied that he "freely plead(s) guilty" to violating "Commission regulations" and again asked that no penalty be imposed.[8] The Bureau responded by indicating that numerous discussions were held with the respondent in attempting to settle but that the parties were unable to agree "on the terms of a settlement."[9] The record at this point lacked, among other things, an agreed to statement of facts detailing the claimed violation and an appropriate discussion concerning the imposition of a civil penalty, if any, to be imposed. As a consequence, a Second Procedural Order was issued providing an opportunity for a narrowing of issues or a procedural schedule for a hearing if necessary. On October 8, the Bureau responded that the parties were unable to agree upon a statement of facts and that respondent had requested a hearing in order to present a number of witnesses. Hearing was held in New Orleans, LA, on November 6, 1980. The Bureau filed a Memorandum of Law urging that: (1) respondent be found to violate section 44(a) by engaging in unlicensed forwarding activities on three occasions; (2) respondent be assessed a civil penalty in the amount of $3,000; and (3) respondent be found fit and the application be granted. Respondent, in his reply, claims that: (1) he did not violate section 44(a); (2) he should not be assessed a civil penalty; and (3) his application should be granted.

FACTS

On October 24, 1978, the respondent contacted the Commission's Gulf District Office for the purpose of obtaining the necessary forms for an application for a license to be an independent ocean freight forwarder. Also at the time of filing his application, the Commission's letter to respondent clearly indicated the prohibition against engaging

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The financial statement referred to is the FMC's General Counsel's Office "Corporate Form - Financial Statement of Corporate Debtor" supplied by the Bureau to the respondent.

[8] The exact text of the respondent's letter of September 19, 1980, is as follows:

> Your Honor, Hearing Consul has convinced me I violated the Commissions regulations, therefore I freely plead guilty. However I am deeply concerned about the degree of my guilt, Hearing Consul has agreed in their July 24, 1980 reply memorandum of law, that I established that the violations were inadvertent yet to me it seems the civil penalty Hearing Consul is asking for is of an amount that would cover premeditated violations, they state that a $3000.00 penalty gives adequate consideration to the apparent unintentional and limited nature of the violations, I disagree, $3000.00 is very much more than adequate for unintentional and limited violations.
>
> Your honor, I have now paid my tax in full, and have a balance in my savings account of $ 647.53, please take this into consideration when making your decision. Again I ask that any civil penalty be remitted since I have learned a lesson well, and have been penalized by not having been able to do freight forwarding for the last 12 months or so.

[9] Memorandum to this Judge dated September 22, 1980.

in the business of forwarding without a license and the potential penalties and adverse affect upon the issuance of the license if such activities took place.[10] When he filed the application he was a sole proprietor and licensed customs broker d/b/a Emmett I. Sindik Customs Brokers.

As part of the requested supplemental information supplied later to the Commission, respondent indicated that he had 13 years in the import/export transportation field primarily as a manager. He also stated:

> I understand that I am not allowed to do ocean freight forwarding whether or not compensated without holding an FMC license. In reference to work I have done in the past, I was not the freight forwarder. H. E. Schurig & Co. of La. FMC 583, did three export shipments for two of my import customers, Clarke Veneers and Monroe Lange Hardwoods. I only coordinated the shipments to the pier. Bills of Lading and Export Declarations, etc., were executed in the name of H. E. Schurig & Co. of La. However, I do handle export entries without going through H.E. Schurig.

During the course of an investigation into the application, respondent indicated that his office had on three occasions, in 1979, handled export shipments for his customers, using the name and license number of a licensed freight forwarder, H. E. Schurig & Co. As the evidence shows, in performing these services his office was responsible for the booking of the cargo, preparation of the bills of lading, delivery orders, dock receipts and export declarations. In addition his office invoiced the shippers and collected forwarding fees for the services performed. The only "service" not performed on the shipments was the signing of the export declaration which was done by H. E. Schurig & Co., which received no compensation on these shipments. According to the respondent's testimony he believed that he did not require a license since he did not receive any compensation from the ocean carriers involved in the shipments. He also testified that he considered the arrangements "legal" since the documents were signed by a licensed freight forwarder.

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[10] The letter from the Director, Gulf District Office, stated:

> Your attention is specifically directed to Section 44, Shipping Act, 1916 which prohibits any person from engaging in the business of forwarding unless such person holds a license issued by the Federal Maritime Commission to engage in such business. "Carrying on the business of forwarding" is defined under Section 510.2 of the enclosed General Order 4.
>
> If you should engage in the business of forwarding before receiving your license you will be subject to penalties provided by law and may prejudice the issuance of your license. If we can be of further assistance, you may contact this office by telephone * * * or by *mail*. (Exhibit 4.)

DISCUSSION

Section 44(a) of the Shipping Act prohibits a person from "carrying on the business of forwarding" without a license.[11] And section 1 of the Act defines the quoted language 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.

The record here establishes that respondent performed freight forwarding services on behalf of his shipper customers and in doing so violated the provisions of section 44(a). Although respondent adheres to the proposition that a licensed freight forwarder signed the export declarations, that alone does not operate to neutralize all the other freight forwarding activities undertaken by his office.[12] And he should have realized that his role in these shipments was of some consequence when he accepted payment for services and acknowledges that the shippers would turn to him if any transportation problems developed. Accordingly, it is found that the activities of the respondent constitute a violation of section 44(a) by engaging in unlicensed forwarding on three occasions.

The main focus in this proceeding has been upon whether a penalty should be assessed and, if so, the amount to be assessed. Section 32(a) of the Shipping Act, 1916, provides that:

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

And, section 32(a) provides that:

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

The Bureau submits that a penalty of $3,000 should be assessed here. Basically, it is argued that the penalty would act as a deterrent not only

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[11] Section 44(a) provides:

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

[12] The total discussion concerning this issue submitted by the respondent in his Reply to Memorandum of Law is as follows:

DISCUSSION

A. VIOLATIONS OF SECTION 44(A)

Under the definition "carrying on the business of forwarding" "and handling the formalities incident to such shipments" this part is clear that this includes all the formalities, I only handled some of the formalities, and due to the value of the three shipments involved a valid export declaration, properly executed, was needed in order for the steamship company to load the cargoes on board their vessel for export. This document was not executed by my office since I was not a licensed freight forwarder.

to this respondent but to others who might find themselves similarly situated. The Bureau finds little acceptable excuse in respondent's claim that he was not aware that he was violating the law. The Bureau maintains that such a penalty is in accord with prior Commission assessments for similar violations and "gives adequate consideration to the apparent unintentional and limited nature of the violations while serving to deter future violations. . . ." Respondent, on the other hand, claims that no civil penalty should be assessed because of the unintentional nature of the violations. It is also claimed that the Commission's warning not to engage in forwarding activities prior to receipt of a license was observed and that his actions were above-board since he did not sign the export declaration himself. He also claims that he "made valid efforts to comply with the regulations."[13]

The circumstances arising in this proceeding require the imposition of a civil penalty. Respondent is not new to the field of transportation and had clear and ample warning not to engage in any freight forwarding activity prior to the issuance of a license. In order to buttress his argument that his actions were considered "legal," respondent called as a witness a Vice-President of a freight forwarding company. Unfortunately, although this witness provided some support, he was not familiar with the facts, regulations, or Commission precedents and indicated that his testimony was based upon his opinion only. Furthermore, the evidence to the effect that respondent was involved in another business and unable to devote full attention to these transactions and that the involved documentation was handled by his employee--although mitigating--does not constitute an acceptable excuse. Here the respondent received a fee from his shipper customers for the performance of unlicensed forwarding services. And although he stresses that he did not receive brokerage from the carriers that nonetheless does not offset the benefit received from the services rendered. The circumstances presented here would indicate that respondent knew or should have known that the activities performed were in violation of the Shipping Act. The remaining consideration now concerns the amount of civil penalty to be imposed.

The three instances of violations represent a minimal dollar amount received for the services rendered. Respondent produced a witness favorably attesting to his business reputation in the customhouse brokerage field for over ten years. The problem is the present financial posture of the respondent to pay this amount. According to the record, as current assets, respondent has $647.00 in savings and owns three undeveloped lots which could be sold for an estimated $5,000. Respondent considers that the imposition of any fine would be detrimental

[13] Reply Memorandum of Law, p. 1.

to his business and family. The maximum penalty permitted under 46 U.S.C. 831(a) is set at $5,000 per violation which, in this proceeding, would amount to $15,000. In approaching the special financial circumstances presented here it would seem to me that an assessment of $1,000 is more appropriate especially where the Bureau concedes that the violations were "inadvertent." And while the Bureau considers that the imposition of $3,000 would operate as a deterring factor for any future misconduct, it appears from the testimony of respondent and his present financial condition, the amount recommended is not warranted. While, the respondent will be able to improve his financial condition at a later time, his potential future earnings should not be the sole consideration for the imposition of an amount that would presently liquidate a savings account and force the sale of some undeveloped lots. In my view, the delay necessitated in processing this application--albeit necessitated by respondent's activities--is a factor to be considered as well. Certainly during the period of time from the submission of the application to date, the respondent was foreclosed from receiving compensation as a licensed freight forwarder. The loss of such compensation should not be entirely disregarded.

The Bureau points to two proceedings involving the imposition of $5,000 for either six unintentional violations[14] or five shipments by an unlicensed forwarder.[15] On the other hand, the circumstances here surrounding the violations and the special financial condition of the respondent justify the lesser penalty. Indeed, it is recommended that the Bureau arrange payment of the assessed penalty herein from the future earnings of the respondent after his application is approved and when he has a reasonable time to improve his financial condition. The imposition of a penalty in the amount found here should be adequate enough to realistically meet the stated considerations of the Bureau.

The final issue to be determined is whether the applicant is fit to carry on the business of forwarding and to conform to the provisions of the Shipping Act and Commission regulations promulgated thereunder. The Bureau treated this issue as follows:

> * * *[W]e agree with Mr. Sindik that Mr. Sindik's three violations are not of the type to demonstrate a pattern of flagrant violations or a deliberate attempt to circumvent the Shipping Act. In view of these circumstances, the fact that there were only three shipments, and the passage of over a year since the violations, we believe that Mr. Sindik has established that he has the requisite qualifications to be licensed* * * and that he is fit, willing, and able to properly carry on the business of forwarding and to conform with the provisions of

[14] *All-Freight Packers & Forwarders, Inc.*, 23 F.M.C. 131 (1980) and 23 F.M.C. 417 (1980).

[15] *Air/Compak, Inc.--Freight Forwarder License Application*, 23 F.M.C. 223 (1980).

> the Shipping Act and the requirements, rules and regulations of the Commission. Thus, he should be licensed to engage in the business of forwarding.

I agree with the view of the record as stated by the Bureau on this issue.

Accordingly, it is held that the respondent Emmet I. Sindik violated section 44(a), Shipping Act, 1916, by engaging in unlicensed freight forwarding activities, that civil penalties in the amount of $1,000 are hereby assessed against Emmet I. Sindik, that payment of said penalty is a condition precedent to the issuance of a license herein, that within 30 days of the date of a final determination by the Commission, Emmet I. Sindik shall contact the Bureau of Investigation and Enforcement to arrange payment terms on the assessed penalty, that if such arrangement is not reached within this time period, the entire penalty amount shall become due and payable, and that respondent/applicant is 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.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

Washington, D. C.
February 25, 1981

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 800(I)
STOODY INTERNATIONAL CO.

v.

SEA-LAND SERVICE, INC.

ORDER DISCONTINUING PROCEEDING

March 31, 1981

On February 26, 1981, the Commission reviewed the decision of the Settlement Officer in the above-captioned proceeding to consider the method used in computing the award of interest. Chairman Kanuk and Commissioner Moakley voted to adopt the decision of the Settlement Officer. Commissioners Teige and Day voted against adoption and Commissioner Daschbach declined to participate.

Reorganization Plan No. 7 of 1961 requires the affirmative votes of three Commissioners to transact business of the Commission. Because no action has been agreed upon by any three Commissioners, the decision of the Settlement Officer stands.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
Acting Secretary

* Commissioner Richard J. Daschbach does not participate and issues a separate statement.

Separate Opinion of Commissioner Daschbach.

I am not participating because I do not believe 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 have no precedential value and Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 800(I)
STOODY INTERNATIONAL CO.

v.

SEA-LAND SERVICE, INC.

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

Discontinued March 31, 1981

Reparation Awarded

Stoody International Co. (Claimant), by informal docket claim filed February 29, 1980, seeks recovery of alleged overcharges of $568.80 plus interest from Sea-Land Service, Inc., (Respondent). Claimant is a domestic international sales corporation located in Industry, California. Respondent is a common carrier by water subject to the provisions of the Shipping Act, 1916.

Claimant alleges violation of section 22 of the Shipping Act, 1916 and that it has been subjected to the payment of charges for transportation which are inapplicable and unlawful in violation of section 18(b)(3) of the Shipping Act, 1916.

This claim involves two shipments, both of which moved from Long Beach, California to Busan, Korea.

The first shipment moved under respondent's bill of lading No. 995773838, dated February 12, 1979, on the SEA-LAND EXCHANGE. The shipment consisted of:

13	fibreboard drums
6	pallets STC 6 fibreboard drums
3	pallets STC 4 fibreboard boxes
22	pcs. Steel Welding Wire & Rod 17,692 #, 344.5 cft 8.025 kg, 9.755 cm

[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. 592.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

Respondent assessed the following rates and charges on the movement:

Metal Products, N.O.S., Packed	9.76cm[2]	($167.00)[3]	$1,629.92
Handling	9.76cm	($ 11.00)[4]	107.36
CAF	$1,629.92	(.06)[5]	97.80
Total			$1,835.08

Claimant alleges it should have been assessed:

Wire and Rods of Base Metal . . . Used for Soldering or Welding			
Special Rate	9.76cm	($119.00)[6]	$1,161.44
Handling		($ 11.00)	107.36
CAF	$1,629.92	(.06)	97.80
Total			$1,366.60
Amount of claim on this shipment			$ 468.48

The second shipment moved under respondent's bill of lading No. 995784420, dated June 12, 1979, on the SEA-LAND MCLEAN. The shipment consisted of:

7 pallets STC 7 fibreboard cartons

Steel Welding Rod 5,036#, 73.7cft, 2.284kg, 2.087cm

Respondent assessed the following rates and charges on the movement:

Metal Products, N.O.S., Packed	2.09cm	($177.00)[7]	$369.93
Bunker surcharge		($5.00)[8]	10.45
Handling		($11.00)	22.99
CAF	$369.93	(.05)	18.50
Total			$421.87

Claimant alleges it should have been assessed:

Wire and Rods of Base Metal . . . Used for Soldering or Welding			
Special Rate	2.09cm	($129.00)	$269.61
Bunker surcharge		($5.00)	10.45
Handling		($11.00)	22.99
CAF	$369.93	(.05)	18.50
Total			$321.55

[2] Rule 39.2.7 of the Pacific Westbound Conference Local and Overland Freight Tariff No. 11 - FMC-19 provides: "It shall be permissable in computing freight charges on total measurement of a shipment to round off the total cubic meters to three decimal places. . . ." Respondent and claimant have both rounded off two places, i.e., 9.76 cm. However, by rounding off three places, i.e., 9.755 cm, the total charges assessed would have been $1,834.15. As this is less than one dollar lower than the total amount respondent charged, 9.76 cm will be used in the computations for consistency with the claim.

[3] Item No. 006030000, 2nd Revised Page 554, same tariff.

[4] Rule No. 55.2.3(b), same tariff.

[5] Currency Adjustment Factor - Rule 21.3.2, same tariff.

[6] Item No. 653 1700 40, same tariff.

[7] Item No. 006 0300 00, 3rd Revised Page 554, same tariff.

[8] Rule No. 21.4, same tariff.

Amount of claim on this shipment	$100.32

From the above computations, the total claim for both shipments is:

Shipment 1	$468.48
Shipment 2	100.32
Total claim	$568.80

Respondent has reviewed the claim and advises that it is correct as filed.

In processing this claim, an error has been found in claimant's computation of the charges it alleges it should have been assessed on both shipments. In computing the currency adjustment factor, claimant neglected to use the low ocean freight charges of $1,161.44 and $269.61, respectively, resulting from assessment of the lower "special rates" of $119.00 and $129.00, respectively, on the two shipments. The claim is understated accordingly. Below are the computations necessary to amend this oversight:

Currency Adjustment Factor

Assessed	Correct Assessment	Claim Understatement
Shipment 1		
$1,629.92(.06)-$97.80	$1,161.44(.06)-$69.69	$28.11
Shipment 2		
$369.93(.05)-$18.50	$269.61(.05)-$13.48	5.02
Total claim understatement		$33.13

In view of the above, the amount of the claim as amended herein is $568.80 plus $33.13 or $601.93.

Reparation in the amount of $601.93 plus 12 percent interest from the date charges were paid, is awarded to claimant. It is the Commission's general policy to award 12 percent interest on awards of reparation where the carrier had sufficient information at the time of shipment to determine the proper rate and its failure to do so was of its own doing.

Upon evidence of payment of the amount awarded, this record will be complete.

(S) JUAN E. PINE
Settlement Officer

December 31, 1980

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 17, AMDT. 2, DOCKET NO. 80-59]

PART 521 - TIME FOR FILING AND COMMENTING ON CERTAIN AGREEMENTS

March 31, 1981

ACTION: Final Rule

SUMMARY: These final rules amend existing regulations governing the time within which certain modifications of agreements approved pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814) should be filed with the Commission. In the case of (a) an application for extension of an approved agreement due to terminate or (b) a modification of an approved agreement, these rules enlarge the time for filing the application or modification from not less than 60 days to not less than 120 days prior to the date the approved agreement would otherwise terminate or when it is intended that action will begin, change or cease as a result of the modification. These rule changes are deemed necessary to accommodate agreement processing delays, including those imposed by the Government in the Sunshine Act (5 U.S.C. 552b) and the National Environmental Policy Act of 1969 (42 U.S.C. 5321 *et seq.*). The enlargement of time coupled with shortened internal deadlines for the processing of agreements should ensure that agreements are processed within the 120 days notice period.

DATE: Effective July 2, 1981.

SUPPLEMENTARY INFORMATION:

The Commission previously gave notice (45 FR 58923-4) that it proposed to amend 46 C.F.R. 521 to enlarge the time period within which certain modifications of agreements approved pursuant to section 15 of the Shipping Act, 1916 should be filed with the Commission. The rule changes are necessary to allow the staff sufficient processing time

to accommodate delays imposed on the processing of certain agreements by legislation and to ensure that all affected agreements are processed within the 120 days notice period. Experience has also shown that under present time constraints, even where applications for agreement extension or modification are timely filed under the 60 days advance notice standard, there is often insufficient time to permit a detailed analysis of the need for the agreement's continuation.

Comments from the public were invited with respect to the proposed rules and four responses were filed on behalf of 22 representative commentators. Comments from the North European Conferences (NEC) represent the views of 12 conferences and rate agreements and 9 out of a total of ten[1] member lines, while the Far East Conference (FEC) expressed the views of its 11 member lines. Pacific America Container Express (PACE Line) and Delta Steamship Lines, Inc. (Delta) each commented on their own behalf.[2]

Positions of the Commentators

The NEC group expresses support for and urges adoption of the proposed rule change provided the Commission reaffirms its policy expressed in General Order 17 to afford filing parties flexibility to meet extraordinary, unforeseen or special circumstances as they pertain to specific filing deadlines. By substituting the word "should" for "must" in the rule as adopted in 1962, the Commission recognized that situations may arise where it is not possible to file a timely application. Therefore, the referenced flexibility was incorporated into the rule.

The Commission hereby reaffirms that the policy regarding flexibility in filing modifications that applied to the 60 day filing provisions of this rule shall also apply to the 120 day provisions.

NEC's support for the rule change is also contingent upon the inclusion of the following sentence at the end of section 521.2(a):

> In the event such a duly filed application is not acted upon by the Commission prior to said termination date, the agreement shall remain in full force and effect at least until the subsequent date of receipt of service of a Commission order declaring the agreement to have terminated.

Implementation of this proposal for automatic interim approval of timely filed extension amendments would be unlawful and inappropriate. An agreement may not be extended, or otherwise modified, even for a temporary period, unless the Commission makes an affirmative finding that the additional period of implementation meets the requirements of section 15. *United States Lines, Inc. v. Federal Maritime Commission* , 584 F.2d 543 (D.C. Cir. 1978); *Seatrain International, S.A. v.*

[1] United States Lines chose not to participate in NEC's comments.

[2] Pace, however, merely joined in those comments submitted by the FEC.

Federal Maritime Commission , 584 F.2d 546 (D.C. Cir. 1978). In situations where an agreement's anticompetitive aspects require its proponents to submit a justification statement or when substantial protests have been lodged against an agreement, that agreement may not be approved unless and until the initial arguments raised in opposition to approval are overcome. If the proponents fail to establish a sound basis for approval within section 521.2(a)'s 120-day time period, a further evidentiary hearing is ordinarily necessary.

It would turn the intended purpose of section 15 on its head if agreements originally approved with a specific expiration date could be extended indefinitely merely by filing an extension application and electing to participate in an administrative hearing. *See Canadian-American Working Arrangement*, 16 S.R.R. 733 (1976), review petition dismissed *sub nom.*, 15 S.R.R. 76 (D.D.C. 1976).

The Far East Conference (FEC) opposes the rule changes and believes that the Commission's policy of granting approvals for limited time periods is a major factor contributing to delay in section 15 procedures. It also believes that an extra 60 days could result in certain trade data submitted in support of a filing being at least six months old at the time of its review by the Commission.

It suggests that those who fail to supply adequate justification with sufficient promptness should suffer the consequences of their delinquency. In conclusion, FEC opines that environmental considerations should rarely, if ever, be involved in agreement approvals.

Delta Steamship Lines, Inc. joins FEC in its general opposition to the rules changes citing the difficulty and hardship in preparing justification four months prior to the effective date of the action to be taken. Delta is concerned primarily with the hardship placed on pooling agreement members and suggests a compromise expansion of time to 90 days with waivers for minor modifications and for major modifications for good cause shown. Relative to the filing of modifications to existing pooling agreements, Delta submits that:

> Often the need arises for minor modifications to a pooling agreement. For instance, a party may join or withdraw from a trade, without affecting the overall structure of the agreement. In the event that a party wishes to join a pool, that party in the absence of protest should not have to wait four months to participate in the trade. On the other hand the need for a prompt and substantial modification can arise unexpectedly. For instance, the parties may be notified that an approved agreement does not comport with an inter-governmental understanding. In such circumstances the parties must act quickly to avoid disruption of international trade. A four month delay can exacerbate international tension.

There seems to be some confusion here. The rule changes do not mean that a modification *must* be filed with the Commission 120 days prior to the date it is intended that action will begin, else it cannot be processed timely. The Commission's affirmation *infra* and the previous substitution of the phrase "should be filed" as contained in sections 521.2(a) and (b) in lieu of "must he filed" should serve to alleviate Delta's concern.

While the Commission is aware of the potential difficulty faced by certain commentators in meeting the 120 day advance filing requirement, it must also consider the mandated and administrative constraints that the processing of agreement matters places on its staff. The Commission has, therefore, determined it appropriate to adopt the rule as proposed and enlarge the existing 60 days advance notice filing period set forth in General Order 17, to 120 days.

Therefore, it is ordered, that pursuant to 5 U.S.C. 533 and sections 15 and 43 of the Shipping Act, 1916 (46 U.S.C. 814 and 841a), 46 C.F.R. Part 521 is amended as follows:

> Delete the words "sixty (60) days" from sections 521.2(a), (b) and 521.3 of 46 C.F.R. Part 521 and substitute the words "one hundred twenty (120) days" therefor.

By the Commission*

(S) JOSEPH C. POLKING
Acting Secretary

* Commissioner Teige not participating.

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING
CHAPTER IV - FEDERAL MARITIME COMMISSION
SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES
PART 549 - REGULATIONS GOVERNING LEVEL OF MILITARY RATES
[DOCKET 81-9; GENERAL ORDER 29; AMENDMENT 4]
TEMPORARY SUSPENSION OF REQUIREMENTS

March 31, 1981

ACTION: Final Rule

SUMMARY: This Rule suspends regulations governing rates quoted for the transportation of U.S. Department of Defense cargoes pursuant to Military Sealift Command requests for proposals RFP-1600, First Cycle commencing on October 1, 1981, and RFP-1600, Second Cycle commencing on April 1, 1982. This action is taken in light of the determination that military rates are no longer so low as to be detrimental to the commerce of the United States, and with a view toward lessening the regulatory burden on U.S. flag operators.

DATE: This Rule shall be in effect during the period October 1, 1981 through September 30, 1982

SUPPLEMENTARY INFORMATION:

Notice is hereby given that the Federal Maritime Commission is suspending its regulations governing the level of military rates established in Part 549 of Title 46 of the Code of Federal Regulations, Federal Maritime Commission General Order 29.

The Commission's General Order 29 (46 C.F.R. 549) governing the level of military rates was published in the *Federal Register* on December 2, 1972 (37 FR 25720). The Commission's proposed temporary suspension of General Order 29, and the reasons therefor, were published in the Federal Register on February 4, 1981 (46 FR 10767). Comments on the proposed rule were due on March 6, 1981. The only comments received were submitted by the Commander, Military Sealift Command (MSC) on behalf of the Department of Defense. MSC stated

that it strongly supported the proposed temporary suspension and, furthermore, urged that the suspension be made permanent.

Therefore, pursuant to sections 18(b)(5) and 43 of the Shipping Act, 1916 (46 U.S.C. 817 and 841a), the Commission amends Part 549 of Title 46 C.F.R. by the addition of a new section as follows:

"Section 549.9 Temporary Suspension."

"The provisions of this Part are suspended during the period October 1, 1981 through September 30, 1982."

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-2

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

TRANS FREIGHT LINE, INC.

NOTICE

April 7, 1981

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

(S) JOSEPH C. POLKING
Acting Secretary

DOCKET NO. 81-2

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

TRANS FREIGHT LINE, INC.

(1) MOTION OF COMPLAINANT TO DISMISS COMPLAINT GRANTED
(2) PROCEEDING DISCONTINUED

Finalized April 7, 1981

On Friday, February 27, 1981, at approximately 1:00 p.m., the Presiding Administrative Law Judge received a telephone call from Complainant's attorney, Mr. Paul M. Donovan (of LaRoe, Winn & Moerman), who advised there had been a meeting in Secaucus, New Jersey, with the respondents and petitioner for leave to intervene the Massachusetts Port Authority, and settlement had been reached. Request was made to cancel the prehearing conference scheduled for Monday, March 2, 1981, and a motion to dismiss the complaint. The Presiding Administrative Law Judge asked that the requests be reduced to writing. Because of the time limitation between Friday and Monday, the request to cancel the prehearing conference of Monday, March 2, 1981, was granted and steps taken immediately to clear the cancellation with the reporting company.

At 1:50 p.m., on Friday, February 27, 1981, the written requests were received asking for cancellation of the prehearing conference and dismissal of the complaint.

Upon consideration of the above, the prehearing conference of March 2, 1981, having been cancelled, no action having been taken on the petition for leave to intervene of the Massachusetts Port Authority, and the Complainant's request to dismiss the complaint, it is *ordered*:

(A) The motion of the Complainant to dismiss the complaint is granted.

(B) The proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

March 2, 1981

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-7

INGERSOLL-RAND COMPANY

v.

SOUTH AFRICAN MARINE STEAMSHIP CORP.

NOTICE

April 7, 1981

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

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-7
INGERSOLL-RAND COMPANY

v.

SOUTH AFRICAN MARINE CORPORATION

WITHDRAWAL OF COMPLAINT

Finalized April 7, 1981

By request dated February 9, 1981, the Ingersoll-Rand Company asks that its complaint in this proceeding be withdrawn, on the ground that the respondent has agreed to the merits of the complaint and has agreed to refund the amount sought in the complaint.

Good cause appearing, the request to withdraw the complaint is granted, and the proceeding is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

March 2, 1981

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-39

STANDARD FRUIT AND STEAMSHIP CO., INC.
AND UNITED BRANDS, INC.

v.

PACIFIC MARITIME ASSOCIATION

DOCKET NO. 78-40

SALEN SHIPPING AGENCIES, INC.

v.

PACIFIC MARITIME ASSOCIATION

DOCKET NO. 79-103

AGREEMENTS NOS. LM-28, ET AL.

DOCKET NO. 80-16

DAIICHI CHUO KAISEN KAISHA,
TOKO KAIUN KAISHA, LTD., AND
ATLANTIC LINES AND NAVIGATION COMPANY, INC.

v.

PACIFIC MARITIME ASSOCIATION, ET AL.

DOCKET NO. 80-29

WEYERHAEUSER COMPANY

v.

PACIFIC MARITIME ASSOCIATION, ET AL.

NOTICE

April 8, 1981

Notice is given that no appeal has been taken to the March 6, 1981 dismissal of these proceedings and that the time within which the

Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-39

STANDARD FRUIT AND STEAMSHIP CO., INC.
AND UNITED BRANDS, INC.

v.

PACIFIC MARITIME ASSOCIATION

DOCKET NO. 78-40

SALEN SHIPPING AGENCIES, INC.

v.

PACIFIC MARITIME ASSOCIATION

DOCKET NO. 79-103

AGREEMENTS NOS. LM-28, ET AL.

DOCKET NO. 80-16

DAIICHI CHUO KAISEN KAISHA,
TOKO KAIUN KAISHA, LTD., AND
ATLANTIC LINES AND NAVIGATION COMPANY, INC.

v.

PACIFIC MARITIME ASSOCIATION, ET AL.

DOCKET NO. 80-29

WEYERHAEUSER COMPANY

v.

PACIFIC MARITIME ASSOCIATION, ET AL.

APPROVAL OF SETTLEMENT AGREEMENT AND GRANTING OF VARIOUS MOTIONS FILED BY THE PARTIES

Finalized April 8, 1981

PRELIMINARY FACTS

Pacific Maritime Association ("PMA") is a multi-employer collective bargaining association consisting of the principal employers of West Coast dockworkers. The International Longshoremen's and Warehousemen's Union ("ILWU") is the certified collective bargaining agent for those dockworkers.

In 1978, the fringe benefit programs provided under the PMA-ILWU collective bargaining agreements were funded by assessments raised as follows: (1) the PMA-ILWU pension, welfare, holiday and vacation plans covering various categories of dockworkers were funded by uniform man-hour assessments; (2) the Pay Guarantee Plan ("PGP") was funded by a combination of uniform man-hour and weighted tonnage assessments; and (3) the Voluntary Travel Fund ("VTF") was funded on a weighted tonnage basis. The PGP, VTF and Holiday Pay Plan assessment methods were not set forth in collective bargaining agreements and were approved by the Commission as part of Agreement Nos. T-2635, LM-7 and T-2858, respectively. The pension, welfare and vacation plans were either temporarily exempted or temporarily approved by the Commission in 1978 when PMA filed with the Commission the various collective bargaining agreements it had entered into with ILWU. A history of the filing of the various agreements and of their handling by the Commission is set forth in the Commission's Order of Conditional Approval and Investigation and Hearing in Docket No. 79-103, served December 27, 1979, and published at 45 *Fed. Reg.* 837 (Jan. 3, 1980).

On October 6, 1978, Standard Fruit and Steamship Co., Inc. ("Standard") and United Brands, Inc. ("United") jointly filed a complaint against PMA alleging that uniform man-hour assessments under various plans were subject to the Shipping Act, and that these assessment methods were violative of sections 15, 16 and 17 of the Act. Standard and United are principal importers of bananas into the United States, and their complaint alleged that PMA's man-hour assessment method was unfair to them. The allegations were generally that unfairness resulted because their handling of banana cargoes has been labor intensive and that, because of a decline in man-hours worked under PMA-ILWU contracts as a result of mechanization achieved primarily by other industry sectors, their assessment costs had increased. On the same date, a similar complaint was filed by Salen Shipping Agencies, Inc., on behalf of certain citrus fruit exporters whose operations were

also alleged to be relatively labor intensive. The complaints were both served October 17, 1978, were assigned Federal Maritime Commission Docket Nos. 78-39 and 78-40, respectively,[1] and were consolidated for hearing. On November 17, 1978, the Master Contracting Stevedore Association of the Pacific Coast, Inc. ("MCSA") filed petitions to intervene in the consolidated proceedings, alleging that its members had a significant interest in the outcome of the proceeding because they are the direct employers of the ILWU labor for whose fringe benefit plans the PMA assessments are made. On December 12, 1978, the MCSA petition was granted.

In response to the concerns expressed by Standard, United, Salen and MCSA, and pursuant to an undertaking by PMA to the ILWU, PMA commissioned a study of its existing assessment methods which would recommend any changes believed by the consultant to be appropriate to make in the assessment formulae. Pending this review the parties agreed to a stay of the complaint proceedings, Docket Nos. 78-39 and 78-40, and an order to that effect was entered on February 7, 1979. A study was conducted by an independent consulting firm, Temple, Barker & Sloane, Inc. ("TBS"), and a modified funding method to replace all the current PMA-ILWU funding formulae was recommended in a report by TBS to PMA dated July, 1979. The alternative funding method recommended in the TBS Report was adopted by PMA, and was filed with the Commission for exemption or approval,[2] where it received conditional approval pending hearing, effective January 1, 1980. It was designated Agreement No. LM-28.

The filing of Agreement No. LM-28 did not, however, resolve the complaints of Standard, United, Salen and MCSA, and these parties therefore filed further protests to Agreement No. LM-28, although they did not oppose its implementation pending the disposition of their protests. An investigation concerning the lawfulness of Agreement No. LM-28 was instituted as Docket No. 79-103, and the Commission directed that that proceeding be heard together with the earlier complaint proceedings, Docket Nos. 78-39 and 78-40.[3] The filing of Agreement No. LM-28 also prompted a number of petitions for intervention by new parties, all of which were granted.[4] The intervenors participat-

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[1] 43 *Fed. Reg.* 49564 (Oct. 24, 1978).

[2] 44 *Fed. Reg.* 69008 (Nov. 30, 1978).

[3] 45 *Fed. Reg.* 837 (Jan. 3, 1980).

[4] The Bureau of Hearing Counsel and Boise Cascade Corp. both intervened in the proceedings but subsequently withdrew from participation. Intervenors participating in the proceedings were: MacMillan Bloedel Limited, Crown Zellerbach Corporation ("Crown"), Norsk Pacific Steamship Company, Limited ("Norsk"), Weyerhaeuser Co., Georgia-Pacific Corp., Sause Bros. Ocean Towing Co./Crescent City Marine Ways & Drydock Co., ("Sause/Crescent"), Daiichi Chuo Kisen Kaisha ("Daiichi"), Toko Kaiun Kaisha, Ltd. ("Toko"), Atlantic Lines and Navigation Co. ("Atlantic") and Tokai Shipping Co., Ltd. ("Tokai").

ing in the proceedings are shippers and carriers of forest products (MacMillan Bloedel Limited, Crown Zellerbach Corporation, Norsk Pacific Steamship Company, Limited, Weyerhaeuser Co., Georgia-Pacific Corp., Sause Bros. Ocean Towing Co. and Crescent City Marine Ways & Drydock Co.), and carriers of imported iron and steel cargoes (Daiichi Chuo Kisen Kaisha, Toko Kaiun Kaisha, Ltd., Atlantic Lines and Navigation Co. and Tokai Shipping Co., Ltd.), all of whom alleged that their handling methods are labor-efficient and that Agreement No. LM-28 and the substantial tonnage assessments made thereunder were unfair and discriminatory to those labor efficient operations. Complaint proceedings were instituted by the steel carriers (Daiichi, Toko and Atlantic) and Weyerhaeuser Co. seeking reparations for alleged unfair assessments collected under Agreement No. LM-28. These proceedings were assigned Docket Nos. 80-16 and 80-29, respectively, and were consolidated for hearing with Docket Nos. 78-39, 78-40 and 79-103. Extensive discovery was conducted by all parties, and was completed in October, 1980.

Hearings in the consolidated proceedings were commenced in San Francisco, California, on November 18, 1980, and PMA presented the testimony of five witnesses who in turn were subjected to extensive cross-examination. The hearings in San Francisco were recessed on December 2, 1980, and were set to continue on January 6, 1981. In the meantime MCSA filed a motion dated January 2, 1981, to withdraw as protestants and parties. Immediately before the hearings were to resume on January 6, the parties advised the Administrative Law Judge that, notwithstanding their diverse interests, they had come to a common basis for settlement in principle, although they had not yet completed the details of their settlement.

No final settlement having been reached, the matter was called for hearing at 10:00 a.m. on January 6, 1981. The parties had not then completed the settlement stipulation and agreement although they were intensively negotiating a resolution of the complex and difficult issues in the case. The hearings were recessed to permit the parties to complete their negotiations and to report their conclusions, and the parties from time to time reported the progress of the negotiations.

On January 12, 1981, counsel for all the parties advised that they had achieved a settlement of all matters in dispute and had reduced that settlement to writing (subject to execution by principals and ratification by the membership of the Pacific Maritime Association in accordance with its by-laws).[5] At that time they furnished copies of documents which comprised the settlement agreement to the Administrative Law Judge (a "General Agreement of Compromise and Release," a revised

[5] The membership of PMA has since ratified the settlement agreement and the principals have executed all necessary documents.

Assessment Agreement, proposed motions for dismissal and a "Compromise and Release of Claims" by the parties to Dockets 78-39 and 78-40). The parties also furnished a copy of a motion to dismiss Docket No. 79-103 as moot, which they intended to file in view of the cancellation of Agreement No. LM-28 and the withdrawal of all claims for reparations or other retroactive adjustments.[6]

CONTENTIONS OF PARTIES

In essence, these proceedings concern two different assessment methods, in effect at different times. The first consists of man-hour assessment formulae (in Agreements Nos. LM-4, LM-23 and LM-24) and the second is embodied in Agreement No. LM-28 which uses both a man-hours and tonnage formula. As to the first, Standard, United and Salen contend that man-hour assessment formulae as constituted under those agreements tend to shift assessment costs unfairly to labor intensive or low productivity general cargo operators.

The MCSA urged that its members are direct employers of ILWU labor, responsible under the Employee Retirement Income Security Act ("ERISA") for the adequate funding of various PMA-ILWU pension plans, and that tonnage-based formulae would ensure adequate funding better than man-hour-based formulae.

The shippers and carriers of forest products (MacMillan Bloedel, Crown/Norsk, Weyerhaeuser, Georgia-Pacific and Sause Bros./Crescent), and the carriers of imported iron and steel cargoes (Daiichi, Toko, Atlantic and Tokai) all either support or have no objection to the man-hour assessment method of Agreement LM-4, et al., but do object to the substantial tonnage assessments provided in Agreement No. LM-28. These parties offered several alternative contentions as to how Agreement No. LM-28 should be modified to reduce these burdens, including the creation of new cargo assessment categories for their cargoes, and numerous variations of man-hour assessment methods to accommodate different cargo handling characteristics.

During the course of the proceedings the parties marshalled all available data which they believed supported their contentions as to the correct assessment method. A dozen or more different suggested assessment formula methods were urged upon the Commission and the record was inundated with complex expert testimony. None of the formula achieved any consensus. Instead, they all provoked extensive controversy. The principal obstacle to resolution of the disputes between the parties was that the labor-intensive operators (Standard, United and Salen), the high labor productivity parties (forest products

[6] All documents have since been filed formally with the Secretary of the Commission and all parties to the settlement plus the MCSA have filed motions to dismiss their complaints and/or to withdraw their interventions as parties in the consolidated dockets, with prejudice.

and steel carriers) and PMA were unable to reach a consensus as to an assessment method that would meet the needs of all interests (containerized operators, bulk carriers, auto carriers and other general cargo operators). Such a consensus is understandably difficult to achieve where large sums of money must be raised annually (nearly $104,000,000 in 1979) among a finite group of contributors, and where a reduction in one party's contribution under an assessment system necessarily means a corresponding increase in the assessments borne by the others.

SETTLEMENT AGREEMENT

The parties have, after extensive negotiations over a considerable period of time, reached a "General Agreement of Compromise and Release" which was executed by all parties participating in the proceeding except the Master Contracting Stevedore Association, which, as has been noted, sought to withdraw from the proceedings. Under the agreement PMA undertakes to cancel Agreement No. LM-28 and to file a new assessment agreement with the Commission, effective upon filing in accordance with the provisions of the Maritime Labor Agreements Act of 1980, Public Law 96-325 (94 Stat. 1021, Aug. 8, 1980). The new assessment agreement provides for a new assessment formula in two phases. Phase 1, effective upon the filing of the agreement, will continue in effect for two and one half years. Under Phase 1 of the agreement, 80.9% of the estimated monies required by the PMA Plans would be assessed on a uniform man-hour basis and 19.1% on a tonnage basis. The tonnage rates would be weighted according to six categories of cargo: dry bulk, autos and trucks, logs and lumber, low productivity general cargo, other general cargo, and containers. Containers are assessed a basic tonnage rate and the other five categories pay tonnage assessments as a percent of the container rate, as follows:

Dry Bulk	5.2154%
Autos and Trucks	23.4150%
Logs and Lumber	75.0000%
Low Productivity General Cargo	0.0
Other General Cargo	75.0000%

During Phase 2, commencing two and one half years later, the formula shifts from 80.9% uniform man-hour contributions to 100% man-hour contributions. In addition to a uniform man-hour contribution utilized to pay all benefit costs, however, there is a man-hour assessment which is utilized to finance credit adjustments given to low productivity general cargo (called "Credit Adjustment Cargo" under Phase 2 of the agreement). Low productivity general cargo operators thus will pay no tonnage assessments under Phase 1 and will receive comparable credits under Phase 2, and they, therefore, have withdrawn their complaints. At the same time, the complaints of the high produc-

tivity operators as to Agreement No. LM-28 have been alleviated sufficiently by the new formula to produce a settlement since the formula shifts the assessment system substantially back to a man-hour system, which high productivity operators tend to favor. The auto and dry bulk sectors will pay assessments which do not exceed what they paid under Agreements Nos. LM-4, et al., a system which they did not challenge. Containers do have a higher tonnage assessment rate than high productivity general cargo or logs and lumber, but only for a two and one half year period. Here it should be noted that some parties in the case contended that under Agreement No. LM-28, container interests for the year LM-28 was in effect were better off than high productivity general cargo or high productivity lumber.

Under the settlement agreement, the parties have agreed to forego retroactive adjustments or reparations in favor of a prospective, two-phase assessment agreement. Both PMA and the MCSA vigorously opposed retroactivity, in large part because they contend that the impact of retroactive adjustments falls upon stevedoring concerns who pay the assessments and who would likely be unable to pass shortfalls along to customers, and who, in other instances, might receive windfalls that could distort competitive relationships between them. PMA and the fruit shippers have, however, entered into a money settlement set forth in a separate settlement agreement between them. This settlement concerns allegations by the fruit shippers seeking adjustments for 1978 and before (during which period the collective bargaining contracts and uniform manhour formulae contained therein were not filed with the Commission) and claims that the fruit shippers experienced a consistent and abnormally high historical pattern of use of non-registered dockworkers in unloading their vessels. PMA contested the Commission's jurisdiction over these issues but elected to settle them rather than to continue litigation. PMA has agreed to pay Standard, United and Salen as follows:

On January 30, 1981[7]

To Standard	$131,544
To United	$124,626
To Salen	$186,838

On January 30, 1982

To Standard	$131,545
To United	$125,627
To Salen	$186,839

DISCUSSION

It is well established that settlement of administrative proceedings is favored by Congress, the courts and administrative agencies themselves. (*See* 5 U.S.C. §554(c)(1), and *Pennsylvania Gas & Water Co. v. Federal*

[7] These payments for January 30, 1981, have already been made.

Power Commission, 463 F.2d 1242, 1247 (D.C. Cir. 1972)). The parties hereto have already consumed very large amounts of time and money in litigating the issues. Continuance of the litigation would cause further unnecessary expenditure of large amounts of time and money. The direct testimony and cross-examination in the litigation revealed no common ground as to an assessment basis with which the parties could all live. The multi-faceted settlement adopted during negotiations does produce this result.

Further, the parties in these proceedings represent major shipper and carrier elements of the maritime industry. Their interests are diverse and representative. The new assessment formula is a delicate compromise agreed to by the parties and represents a careful balancing of interests achieved during the course of hearings after months of expensive litigation having an uncertain outcome and after months of exhaustive negotiations. A critical element enabling this settlement to go forward at all is the mutual decision by the parties to adopt formulae operating prospectively, which obviated the need for the parties to press claims for retroactive application of whatever formula they contended should have been imposed by the Commission in lieu of Agreement No. LM-28.

It should be noted that during the pendency of these proceedings since 1978, all affected parties have had an opportunity to come forward and be heard by the Commission on the question of fringe benefit assessment methods. No party seeks continuation of these proceedings, and no interest, public or private, would be served by such a perpetuation. Accordingly, it is appropriate at this time to discontinue these proceedings.

Also, under the terms of the settlement agreement, Agreement LM-28 has been terminated, and all parties having claims concerning Agreement LM-28 have withdrawn them. Accordingly, Agreement LM-28 (and predecessor agreements) and the consolidated proceedings concerning these agreements are moot. No purpose would be served by reviving disputes over the lawfulness of superseded agreements. To do so would create wasteful and unnecessary litigation concerning what would have become theoretical issues arising out of agreements which are moot.

One should recognize that at the hearing of these proceedings counsel for all parties were diligent and resourceful and explored exhaustively all aspects of the issues presented. Their settlement, reached after detailed, good-faith negotiation, represents a statesmanlike, practical solution to highly complex problems in the industry by the persons most knowledgeable concerning them and most directly affected by them.

Finally, it is important to note two aspects of the proposed settlement that one might well overlook. First, since the settlement is so complex,

and since the issues overlap, the elements agreed to are interdependent on one another. What is given away or taken from one faction or group directly affects what is given away or taken from a competing faction or group. Therefore, any change in the settlement agreement may well cause the entire agreement to fall. For this reason great care needs to be exercised to insure that the agreement is considered as an entirety rather than a sum of many parts.

Secondly, since a new assessment agreement has been filed as a part of the settlement, consideration must be given to just how Public Law 96-325 should be applied. The law amends the Shipping Act of 1916 and provides in pertinent part that:

> SEC. 15. Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, * * * The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

Section 5 of the law adds a new section 45 to the Shipping Act as follows:

> SEC. 45. The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.

Further, Public Law 96-325 further amends section 15 of the Shipping Act to read:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. * * *

The approval of the settlement agreement in these consolidated proceedings was not predicated on any determination of whether or not the new assessment agreement is or is not exempt from the provisions of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933. The question was not raised in the pleadings in these consolidated proceedings, nor was it later argued by the parties. Therefore, it would be wrong to cite the settlement of these consolidated cases as precedent for the proposition that the provisions of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, do or do not apply to the new assessment agreement, within the ambit of Public Law 96-325.

In light of the above discussion and the entire record in these consolidated proceedings it is held that the settlement agreement reached by the parties is in the public interest and is approved.[8] It is *Ordered* that:

(1) PMA shall pay to Standard, United and Salen at the times specified the amounts set forth in the Compromise and Release of Claims, and that all parties to the compromise will abide by the provisions contained in the Compromise and Release of Claims and will carry out its terms.

(2) All parties to the General Agreement of Compromise and Release will abide by the provisions contained in said document and will carry out its terms.

(3) As between the parties to these consolidated cases, the various formulae set forth in the Memorandum of Agreement Between Members of the Pacific Maritime Association Concerning Assessments to Pay ILWU-PMA Employee Costs, shall be used to pay such employee benefit costs; and as between the parties to these consolidated cases, the provisions of the Agreement shall be binding on the parties thereto. [8a]

(4) The Motion to Dismiss Proceeding as Moot with respect to Docket No. 79-103 is hereby granted.[9]

(5) The various Motions for Dismissal of Intervention and Withdrawal of Protest are hereby granted with prejudice.[10]

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[8] The settlement agreement is comprised of the following documents: (1) General Agreement of Compromise and Release, (2) Memorandum of Agreement Between Members of the Pacific Maritime Association Concerning Assessments to Pay ILWU-PMA Employee Benefit Costs, (3) Motion to Dismiss Proceeding (79-103) as Moot, (4) series of Motions for Dismissal of Complaint and Intervention and Withdrawal of Protests. While necessary to an understanding of the entire settlement agreement, these documents are too lengthy to attach to this Order. They are part of the record of the case and are contained therein.

[8a] Ordering Paragraph (3) is not inconsistent with ordering paragraph (2), or with any provisions of the General Agreement of Compromise and Release and must be considered and read together with them, so as not to preclude any changes in the Assessment Agreement permitted under the terms of the General Agreement of Compromise and Release.

[9] The motion was filed by PMA, Standard, United, Salen, Daiichi, Toko, Atlantic, Tokai, Weyerhaeuser, MacMillan, Sause/Crescent, Crown, Norsk and Georgia-Pacific.

[10] Such motions were filed by the same parties as are set forth in footnote 9.

(6) The Motion for Permission to Withdraw as Intervenor by MCSA is hereby granted, with prejudice.[11]

(7) These consolidated proceedings are terminated with prejudice and are hereby discontinued. It is

Further Ordered that within thirty (30) days after this Order becomes final the parties file a joint affidavit of compliance with the terms of the settlement.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

March 6, 1981

[11] The term "with prejudice" as to MCSA applies to issues determined in this consolidated proceeding. It does not apply to any issues raised in other later proceedings, nor does it apply to any issues raised by Public Law 96-325.

DOCKET NO. 79-30

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. FMC 1728, I.M.S., INC.

NOTICE

April 8, 1981

Notice is given that no exceptions have been filed to the March 6, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MAITIME COMMISSION

DOCKET NO. 79-30

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. F.M.C. 1728 I.M.S., INC.

Proposed settlement of civil penalties rejected; respondent found to have violated the Shipping Act; and a civil penalty of $5,000 assessed.

Philip L. Kellog and *James L. Lyons* for respondent I.M.S., Inc.

Paul J. Kaller, Joseph B. Slunt, and *Alan J. Jacobson* as Hearing Counsel.

REVIEW OF RECOMMENDED SETTLEMENT BY, AND INITIAL DECISION[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Finalized April 8, 1981

By order of investigation and hearing served April 6, 1979, this proceeding was instituted to determine whether respondent I.M.S., Inc. (I.M.S.), a nonvessel operating common carrier by water (NVOCC), has violated section 18(b)(3) of the Shipping Act, 1916 (the Act), by failing to charge and collect fees for ocean transportation in accordance with the tariff filed by I.M.S. with the Commission; whether I.M.S. has violated section 18(b)(1) of the Act by providing a house-to-house ocean transportation service without an applicable tariff provision on file with the Commission; whether I.M.S. has violated section 18(b)(1) by operating as an NVOCC by water prior to the filing of a tariff with the Commission; and whether I.M.S.'s license as an independent ocean freight forwarder should be revoked or suspended.

On May 17, 1979, I.M.S. advised the Commission that it voluntarily has surrendered its Independent Ocean Freight Forwarder License No. 1728, for revocation without prejudice. Thus, this issue became moot.

By amended order of investigation and hearing served August 30, 1979, the Commission noted that I.M.S. has surrendered its forwarder license for revocation, and also that I.M.S. had requested permission to negotiate a settlement of civil penalty claims arising from the activities at issue in this proceeding. The Commission ordered the addition of a further issue to this proceeding, namely, the issue of "whether civil penalties should be assessed against I.M.S., Inc. and/or Peter Kirn,

[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).

President of I.M.S., Inc., pursuant to 46 U.S.C. 831(e) for violations of Shipping Act, 1916, and if so, the amount of such penalties."

It was further ordered by the Commission in its amended order of investigation and hearing, that the Administrative Law Judge shall preside over the taking of evidence; review of any recommended settlement, and render an Initial Decision thereon; and that settlement negotiations, if any, between the parties be concluded on or before November 26, 1979.

At the first prehearing conference Hearing Counsel and counsel for I.M.S. stated that they wanted time to engage in discovery, and for possible future settlement of the issues, and a status report was promised in 45 days.

On November 26, 1979, in lieu of completing settlement negotiations, Hearing Counsel filed a motion to "reactivate" the proceeding, stating that despite the best efforts of all concerned and substantial progress toward a settlement, that it had not been possible to reach a final settlement.

Accordingly, a second prehearing conference was held on December 13, 1979. At that time, Hearing Counsel stated that they had run into the problem of trying to come up with some guidelines or standards for the future conduct of the activities of I.M.S. Hearing Counsel stated that the problem was with the terms of settlement, but not with the monetary amount of a penalty.

Hearing Counsel stated that there was not any dispute as to what had happened in the past, but that there was a question as to whether the past activities of I.M.S. had violated provisions of the Shipping Act.

Hearing Counsel stated that I.M.S. was a freight forwarder licensed pursuant to section 44(b) of the Act, that I.M.S. also had a non-vessel operating common carrier (NVOCC) tariff on file with the Commission so that I.M.S. could act as an NVOCC, that I.M.S. also is known as an exempt Part IV freight forwarder under the Interstate Commerce Act, and that I.M.S. moved household goods only.

The problem in the view of Hearing Counsel related to the facts that I.M.S. performed functions under both the Interstate Commerce Act as well as the Shipping Act, and I.M.S.'s operations were intermodal.

A typical shipment of I.M.S. involved the transportation of household goods from a point in the Washington, D.C., area to the Port of Baltimore, thence by ocean carrier to the Port of Bremen, Germany, and thence to an inland point in Germany, serving German national diplomatic and military personnel.

The ocean transportation would be performed by a vessel operating common carrier pursuant to its tariff. I.M.S. had a port-to-port NVOCC tariff on file with the Federal Maritime Commission, with this tariff providing rates and charges from the Port of Baltimore to the Port of Bremen, among other ports listed.

Hearing Counsel requested two months to work out a stipulation, and February 15, 1980, was set as the time of submission of a proposed stipulation of facts and settlement of the proceeding. The proposed stipulation and settlement were not forthcoming timely, and extensions were granted at the request of Hearing Counsel, but finally to resolve the matter hearing was scheduled on June 11, 1980.

At the hearing on June 11, Hearing Counsel and counsel for I.M.S. offered two papers, both unsigned and both with handwritten insertions and deletions in rough "Draft" form. Counsel also promised to prepare a third document, a memorandum in support of the proposed settlement, which memorandum would be based on guidance from the Administrative Law Judge. Hearing Counsel stated that such guidance had not been requested three or six months earlier because "Until three days ago we did not have the amount." When asked to explain, Hearing Counsel elaborated, that basically the amount was not a problem, but that "What has been holding up the parties is the Commission has had under consideration for a very long time a proposal to exempt from filing with the Commission the tariff for an NVOCC household goods carrier." "In some instances I.M.S. does act as a household good carrier, as a non-vessel operating household carrier." "They have repeatedly sought to work out with the Commission's staff, with myself, and with the Commission's staff a means under which they could file a tariff that would meet the Commission's requirement." "They have been unable to do so." "Because it is an extremely difficult situation to cover a tariff which will cover the movement of household goods from anywhere in this country to anywhere in the world including from an inland destination."

Hearing Counsel went on to state that the Federal Maritime Commission was in the process of proposing that "you" (meaning NVOCC's handling household goods) not have to file such a tariff in the future. Hearing Counsel apparently refer to Docket No. 80-37, 46 C.F.R. 531, 536, *Used Household Goods--Tariff Filing Regulations Applicable to Carriers in the Foreign and Domestic Offshore Commerce of the United States--Proposed Rulemaking*, served June 10, 1980. In the proceeding in No. 80-37, it was proposed (1) to exempt transportation of used household goods by non-vessel operating common carriers from all tariff filing requirements; and (2) to require that rates for used household goods established by vessel operating common carriers be stated on a weight or container basis only and that the weights be substantiated by a public weigher's certificate.

Until June 4, 1980, counsel for the parties had not advised that one of their concerns in settling this proceeding related to the tariff filing rules which became the subject of Docket No. 80-37. But, in any event, this concern relates only to I.M.S.'s future conduct as to the filing of tariffs,

and does not relate to the alleged past violations by I.M.S. of the Shipping Act.

At the hearing on June 11, counsel were advised that the only two papers presented at the hearing, namely, the "Stipulation" and "Proposed Settlement of Civil Penalties," were lacking in factual detail, and that the stipulation was too vague.

In the stipulation (Exhibit No. 1), in paragraph 2, it was stipulated that in "some instances" I.M.S. only provided packing and crating services for export shipments; and in paragraph 3, it was stipulated that in "the majority of instances" I.M.S. offered to make all the shipping arrangements for the transportation of household goods to the foreign destination, and that when I.M.S. provided this service it arranged for the transportation to the export port as well as for the ocean transportation. However there was no stipulation as to how many shipments were handled one way or the other.

In paragraph 7 of the original stipulation presented at the June 11 hearing, it was stipulated that I.M.S. maintained an NVOCC tariff for the carriage of used household goods. This paragraph further stipulated:

> However, *IMS did not uniformly follow its tariff* in arranging for the transportation of the household goods. [Emphasis supplied.]

At the request of counsel, the parties were given two more weeks to present their memorandum in support of proposed stipulation. Counsel were advised also that they could use the same two weeks to revise, if they wished, the stipulation and the proposed settlement, so as to improve upon and flesh out factual details in the stipulation.

In fact, the revised "stipulation" filed on June 25, 1980, was substantially the same as Exhibit 1 of record. But, the revised stipulation was more vague in that it changed the original stipulation in its paragraph 7 to state that I.M.S. "*may not have uniformly followed its tariff.*" (Emphasis supplied.)

Paragraph 7, as revised, added the word "through" in connection with transportation of household goods. The significance of the word "through" is that the I.M.S. NVOCC tariff on file with the Commission provides rates and charges on port-to-port shipments rather than the through house-to-house transportation offered at times by I.M.S. to its clients.

Upon examination of the three papers filed on June 25, 1980, it was clear that factual details of the past operation of I.M.S. were lacking, and the stipulation of facts was too vague. The said "Stipulation" is attached to this decision as Appendix "A," and the "Proposed Settlement of Civil Penalties" submitted June 25, 1980, is attached as Appendix "B."

Accordingly, the proposed settlement was rejected and the matter was set for hearing on August 12, 1980. Only one witness was called by the parties, namely, a district investigator for the Federal Maritime Commission. Following the conclusion of the August 12, 1980, hearing, opportunity was given the parties to petition to reopen the record if they saw fit so to request by August 22, 1980.

No request to reopen was made timely, but by letter dated August 25, 1980, Hearing Counsel and counsel for I.M.S. requested an opportunity to present additional evidence. Hearing Counsel stated that they and counsel for I.M.S. were meeting on September 3, 1980, and would give notification promptly regarding a proposed date for presenting further evidence. No such notification was received by September 25, 1980, and the parties were advised by notice of that date, served the next day, that the record would be deemed closed on October 1, 1980.

On October 1, 1980, the respondent served its "Supplemental Memorandum in Support of Proposed Settlement," with attachments. Therein, in conclusion, the respondent asks that the presiding Administrative Law Judge render an Initial Decision approving the proposed settlement. This supplemental memorandum hereby is accepted as part of the record in this proceeding.

This supplemental memorandum of I.M.S. contains some factual matter and together with the stipulations of the parties, and the transcript of hearing, there appears to be a minimum factual basis for reaching the conclusions necessary for an Initial Decision on the matters at issue in this proceeding. Nevertheless, the record at best is merely minimally adequate to reach necessary conclusions. For example, Hearing Counsel stated, "we have decided that this case is not worth pursuing through a hearing." "We decided instead to propose a settlement. The alternative to your not accepting the settlement, not considering it, is for the case to be dismissed and the U.S. Government getting nothing, Your Honor." "* * * the primary factor that goes into the $2,500 is that we can't prove a case."

At the June 11, 1980, hearing, Hearing Counsel agreed that in the first stipulation, paragraph 7 of Exhibit 1 of the record, there was an admission by I.M.S. that I.M.S. violated the law by not following its NVOCC tariff on file with the Commission.

However, Hearing Counsel went on to say at page 33:

> Yes, your Honor. And what I'm saying to you is that the violations were—the possible violations were so complex and confusing, and their basic operation had nothing to do with the FMC jurisdiction, that we made the decision not to go ahead and establish exactly what shipments may have been in violation and which ones may not have been.

Apparently, Hearing Counsel failed to consider that it might have been advisable to prove that some violations occurred, without attempting to make findings as to all of I.M.S. shipments.

The revised stipulation submitted on June 25, 1980, states in part, "However, not more than twenty percent of its approximately 200 shipments per year may have been handled as an NVOCC." "In connection with these shipments I.M.S. may not have uniformly followed its tariff in arranging for the through transportation of the household goods."

At the hearing on August 12, 1980, a specific example of the operation of I.M.S. was given. This example was of a shipment which occurred during the period in issue herein, the five years between April 6, 1974, and April 6, 1979. In January of 1976, I.M.S. quoted a German national an estimated cost for moving his used household goods from a point in the Washington, D.C., commercial area to Wilhemshaven, West Germany.

In particular for this shipment, I.M.S. estimated a cost for packing, wrapping, and crating material, a cost for loading the container at the residence of the German national, a cost for supplying the steel container and the cartage to the warehouse of I.M.S. in Alexandria, Va., a cost for forwarding fees, a cost for cartage from the warehouse in Alexandria to the Port of Baltimore, a cost of ocean freight from the Port of Baltimore to the Port of Bremen, Germany, and a cost for destination services, that is, from dockside at Bremen to the residence or inland destination at Wilhelshaven.

In this particular instance, the total figure quoted was $4,771.20 to the German national. I.M.S. included in its letter to the German national an estimate that the total charges would amount to $56.80 per 100 pounds. Based upon an estimated weight of 8,400 pounds given to the German national, the total estimated charges ($56.84 times 84) was $4,771.20.

I.M.S. also estimated the volume at 34 cubic meters or 1,200 cubic feet, that is, to the German national.

When I.M.S. sent its bill to the German military representative at the German Embassy in Washington, D.C. (this military representative was paying for the move of the German national), a second set of figures was given by I.M.S. Namely, the weight was listed at 9,190 pounds, and the cubic feet as 1,312. Using the same rate of $56.80 per 100 pounds, and the higher 9,190 pounds, the charges to the shipper apparently became $5,219.92.

In connection with the same shipment, a third set of weight and measurement figures was used by I.M.S. for I.M.S.'s payment of ocean freight to the vessel operating common carrier, Baltic Shipping Company, and its agent Norton and Lilly. Namely, a weight of 6,700 pounds was recorded for the shipment. In other words, Baltic Shipping Compa-

ny received less than its tariff rate and charges from I.M.S. to the extent that this shipment falsely was listed as weighing 6,700 pounds, when in fact it weighed 9,190 pounds. This was an undercharge or rebate to I.M.S., whatever one may wish to call it, of (2,490 divided by 9,190) more than 27.09 percent.

The Commission's witness estimated that an average undercharge or rebate to I.M.S. in connection with the files he examined would be $1,500 to $2,000 per shipment on those shipments in which there were discrepancies in weight. This witness reviewed 60 files, not all of which showed discrepancies of weight, because I.M.S. also moved motor vehicles for which there were no weight discrepancies, so far as he knew, because motor vehicle weights may be checked later with ease. This witness believed that it was fair to say that I.M.S. was the beneficiary of undercharges or rebates on 20 of the 60 shipments which he examined, or about a total of $1,500 times 20, or $30,000.

The predominant carrier offering undercharges or rebates to I.M.S. was the Baltic Shipping Company. Another name which came to the mind of the witness in this connection was the Atlantic Container Line.

As stipulated, the primary service of I.M.S. was packing and crating for export shipment. In some instances the client made its own arrangements for the through transportation.

In the majority of instances, I.M.S. offered and provided for the transportation of the household goods from the client's residence in the Washington, D.C., area to the export port (Baltimore) and for the ocean transportation. Also, I.M.S. offered to make the arrangements and provided for destination services including the unpacking of the household goods at the ultimate destination, or inland point in West Germany.

Though I.M.S. was licensed as an ocean freight forwarder, it used the services of another licensed independent ocean freight forwarder in making arrangements for ocean transportation.

I.M.S. did not receive any brokerage compensation from the vessel operating ocean common carrier, but did receive the benefit of undercharges or rebates from the ocean carrier based on false underweights or undermeasurements of the household goods.

I.M.S. normally expressed the total charge for the through transportation to its clients in terms of costs per 100 pounds for all of the various services of packing and crating, loading into container at residence, supplying of the container and cartage to the I.M.S. warehouse in Alexandria, cartage from warehouse to Port of Baltimore, forwarding fees at the port, ocean freight charges, and destination charges including unpacking of the household goods.

I.M.S. maintained and still maintains an NVOCC tariff, but it is a port-to-port tariff and does not provide rates and charges from a residence in the Washington, D.C. area to an inland point in Germany.

In accordance with section 18(b)(1) of the Act, I.M.S. filed an NVOCC tariff with the Commission on February 14, 1975, showing its rates and charges for the ocean transportation of household goods. (I.M.S. tariff--FMC-1). Effective March 29, 1979, I.M.S.'s tariff FMC-2 cancelled and superseded its tariff FMC-1. In No. FMC-2, the rate from Baltimore to Bremen is listed as $59 per 100 pounds, but again it is a port-to-port rate, rather than a house-to-house rate.

"On the shipments that I examined there was no shipment that reflected the commodity rate on file in I.M.S.'s tariff" was the unrefuted testimony of the Commission's witness.

It is concluded, not only that the underlying ocean carrier knowingly did not charge its proper tariff charges for its services to I.M.S., but also that I.M.S. knowingly did not charge its proper tariff charges to its clients.

It is concluded further that I.M.S. did not have a proper NVOCC tariff on file for the through house-to-house service which it offered to, and provided for, its clients at times.

It has been stipulated that I.M.S. provided its services, including in the majority of instances all transportation to the foreign destination, and that these services were provided between April 6, 1974, and April 6, 1979. It is concluded further that I.M.S. operated as an NVOCC prior to the time which I.M.S. filed a tariff as a NVOCC with the Commission.

It is common knowledge that the transportation of used household goods involves many characteristics which are different from the transportation of manufactured goods or of other commercial products. It is equally common knowledge that a one-time or two-or-three-times-in-his-life-shipper of household goods is not as aware of shipping customs and practices as is a shipper of commercial products who makes dozens of shipments every month or every year.

As the witness for the Commission testified it was "not an uncommon practice" for the household goods carriage industry to engage in certain abuses of shipper clientele. Such abuses include underestimating of weight and costs to a shipper to obtain his business, and the later assessment of higher charges based on higher weights after the business is obtained.

Mr. Kirn, the president of I.M.S., was approached "by representatives of the underlying ocean carrier" who offered to allow Mr. Kirn to declare to that ocean carrier a weight or measure below actual weight or measure to save on the cost of ocean freight. Mr. Kirn accepted the offer. Thus, the shipper client of I.M.S. was billed based at a relatively high weight, whereas the weight on the ocean carrier's bill of lading was lower, the latter fact being at the invitation of the ocean carrier, as reported by Mr. Kirn to the Commission's witness. Insofar as the record shows, the shipper clients were billed ultimately at the correct

weights although before the shipments were made, the weights were underestimated to the shipper clients of I.M.S.

I.M.S. in its normal operations offered and provided for the seven services listed in paragraph 4 of the stipulation, including origin packing and destination unpacking of the household goods, and billed its client shipper for these through house-to-house services as listed on a cost per 100 pounds basis.

The proposed settlement entered into between Hearing Counsel and I.M.S. states that I.M.S. has terminated all its practices related to inflating to its clients the weight of shipments, underdeclaring the weight or cube of shipments to carriers, and is willing and committed to maintaining measures designed to eliminate, to discourage and to prevent violations of the Shipping Act; I.M.S. is agreeable to paying to the Federal Maritime Commission the sum of $2,500 in consideration of the compromise of all civil penalties under the Act that may have occurred between April 6, 1974, and April 6, 1979, and on condition that payment of this civil penalty shall forever bar any civil action or other claim for recovery of civil penalties from I.M.S. arising from the alleged violations between the dates above; and it being understood and agreed that there is no admission of guilt by I.M.S., its officers, directors or employees to the alleged violations above.

This settlement must be rejected, because for one reason the record shows that I.M.S. has violated provisions of the Shipping Act. I.M.S. violated section 18(b)(3) of the Act by charging its clients not in accordance with its rates on file. I.M.S. violated section 18(b)(1) of the Act by providing a house-to-house ocean transportation service without an applicable tariff provision on file with the Commission, and by operating as an NVOCC prior to the filing of a tariff with the Commission.

The settlement must be rejected for a second reason. The amount of $2,500 is less than a minimum reasonable penalty for violations of the nature herein, even considering the character references and other mitigating data cited in I.M.S.'s supplemental memorandum. There is nothing in such data which would show that I.M.S. cannot pay a larger civil penalty.

The facts remain that Peter Kirn, I.M.S. president, pleaded guilty to one count of mail fraud in connection with I.M.S.'s activities prior to 1975. In the present proceeding, I.M.S.'s activities continued into 1975 and 1976, as seen by the typical shipment in January 1976, cited by the Commission's witness at the last hearing. The Federal Republic of Germany on the basis of its investigation of I.M.S. was satisfied that I.M.S. had terminated its improper weight practices in early 1975, and agreed to continue to do business with I.M.S. However, at least as late as January, 1976, I.M.S. was continuing its improper weight practices, record transcript--line 15, page 59, and pages 60 and 61. This evidence

directly negates the statement of counsel for I.M.S. at page 4, first complete paragraph of I.M.S.'s supplemental memorandum, "that I.M.S. terminated the improper practice of inflation of weights in early 1975."

Under all the above circumstances, a minimum penalty of $5,000 is certainly justified in this proceeding.

It is ultimately concluded and found that the proposed settlement of civil penalties herein has not been justified; that respondent I.M.S. has violated sections 18(b)(1) and 18(b)(3) of the Shipping Act, 1916; and that a civil penalty of $5,000 shall be assessed against I.M.S.

(S) CHARLES E. MORGAN
Administrative Law Judge

Washington, D.C.
March 6, 1981

Attachments:
Appendix A
Appendix B

APPENDIX A

BEFORE THE FEDERAL MARITIME COMMISSION

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. F.M.C. 1728 I.M.S., INC.

DOCKET NO. 79-30

STIPULATION

Pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.162) Respondent and Hearing Counsel hereby file this joint stipulation.

1. Between April 6, 1974 and April 6, 1979, I.M.S. provided a variety of services for clients who were primarily foreign military and embassy personnel shipping used household goods to and from the United States. The primary service performed by I.M.S. was the packing and crating, or the unpacking, of household goods at its client's residence in the United States.

2. In some instances, I.M.S. only provided packing and crating services for export shipments. The client made its own arrangements for the delivery of the household goods to the port and for the ocean transportation of the household goods to the foreign destination.

3. In the majority of instances, in addition to providing for packing and crating services, I.M.S. offered to make all the shipping arrangements for the transportation of the household goods to the foreign destination. When I.M.S. provided this service I.M.S. arranged for the transportation of the household goods to the export port as well as for the ocean transportation of the household goods.

4. When I.M.S. offered to make all the export arrangements for the household goods it provided an estimate for the cost of each of the following services:

a) Packing, wrapping, crating and packing material;
b) Loading into container at residence;
c) Supplying of steel container and cartage to the I.M.S. warehouse;
d) Cartage from warehouse to port;
e) Forwarding fees at port;
f) Ocean freight charges;
g) Destination services including unpacking of household goods;

The charges were also expressed in terms of cost per hundred weight (100 lbs.) for all the services.

5. Though I.M.S. was licensed as an independent ocean freight forwarder it used the services of another licensed independent ocean freight forwarder in making arrangements for the ocean transportation. I.M.S. would select and contact the forwarder. The forwarder would book the shipment with the ocean carrier and inform I.M.S. of the ocean carrier booking number. I.M.S. or the forwarder arranged for the spotting of the ocean container at I.M.S.'s warehouse or the client's residence. I.M.S. then arranged for the transportation of the container carrying the household goods to the port.

6. I.M.S. did not receive any ocean freight compensation from the ocean carrier or share in any compensation with the ocean freight forwarder.

7. I.M.S. maintains a non vessel operating common carrier (NVOCC) tariff for the carriage of used household goods on file with the Commission. However, not more than twenty percent of its approximately 200 shipments per year may have been handled as on NVOCC. In connection with these shipments I.M.S. may not have uniformly followed its tariff in arranging for the through transportation of the household goods.

8. Peter Kirn, the former President of I.M.S., plead guilty to one count of mail fraud perpetrated in connection with I.M.S.'s activities prior to 1975. I.M.S. and Peter Kirn were alleged to have engaged in inflating the total net weight of property moved by I.M.S.

9. During 1975 and 1976 I.M.S. would, on occasion, understate the net weight of shipments to ocean carriers. This practice was engaged in following advice from the carriers' sales agents.

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Counsel for I.M.S., Inc.

(S) JAMES L. LYONS
Counsel for I.M.S., Inc.

(S) PAUL J. KALLER
Acting Director
Bureau of Hearing Counsel

(S) JOSEPH B. SLUNT
Hearing Counsel

(S) ALAN J. JACOBSON
Hearing Counsel

APPENDIX B

BEFORE THE FEDERAL MARITIME COMMISSION

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. F.M.C. 1728 I.M.S., INC.

DOCKET NO. 79-30

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This proposed settlement is entered into between the Bureau of Hearing Counsel and I.M.S., Inc. hereinafter referred to as Respondent, the only parties ("The Parties") to this proceeding. This settlement is submitted to the Presiding Officer for approval under 46 C.F.R. 502.162 and 505.3 to be included in the Final Order in this proceeding, if approved.

Whereas, by Order dated April 6, 1979, the Commission has instituted an investigation of Respondent's activities as a non-vessel operating common carrier (NVOCC) and whereas the April 6, 1979 Order was amended by an Order of August 30, 1979 to include a determination of whether civil penalties should be assessed for possible violations of sections 18(b)(1) and 18(b)(3) of the Shipping Act, 1916.

Whereas, the Order of Investigation recites that the Respondent had apparently engaged in violations of sections 18(b)(1) and 18(b)(3) of the Shipping Act, 1916.

Whereas, the Respondent will not contest that it carried out certain practices which have been stipulated to with Hearing Counsel.

Whereas, the parties are desirous of expeditiously settling the matter according to the terms and conditions of this agreement and wish to avoid the delays and expense which would accompany further agency litigation concerning the activities set forth in the Commission's Order of April 6, 1979.

Whereas, section 32 of the Shipping Act, 1916 authorizes the Commission to assess, collect, compromise and settle certain designated civil penalties arising under the Shipping Act, 1916.

Whereas, the Respondent has terminated all its practices related to inflating to its clients the weight of shipments, underdeclaring the weight or cube of shipments to carriers, and has instituted and indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent violations of the Shipping Act 1916.

Now, therefore, in consideration of the premises herein, the undersigned Respondent hereby agrees to pay to the Federal Maritime Commission the sum of Two Thousand Five Hundred Dollars the payment of said amount to be made in accordance with the following terms of settlement:

1. In consideration of the premises herein, and in compromise of all civil penalties under the Act arising from violations set forth and described herein, that may have occurred between April 6, 1974 and April 6, 1979, the undersigned Respondent agrees to pay to the Federal Maritime Commission the sum of Two Thousand Five Hundred Dollars within 15 days from approval of the terms and conditions set forth herein by the presiding Administrative Law Judge and Commission.

2. Upon payment of the civil penalty amount following approval of this agreement of settlement by the presiding Administrative Law Judge and Commission, this instrument shall forever bar the commencement or institution of any civil action or other claim for recovery of civil penalties from Respondent arising from the alleged violations set forth and described herewith, and that occurred between April 6, 1974 and April 6, 1979.

3. It is expressly understood and agreed that this Agreement is not to be construed as an admission of guilt by Respondent, its officers, directors or employees to the alleged violations set forth above.

(S) PHILIP L. KELLOGG
Counsel for I.M.S, Inc.

(S) JAMES L. LYONS
Counsel for I.M.S., Inc.

(S) PAUL J. KALLER
Acting Director
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(S) JOSEPH B. SLUNT
Hearing Counsel

(S) JOSEPH B. SLUNT
for ALAN J. JACOBSON
Hearing Counsel

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-88

PACIFIC COAST OCEAN FREIGHT FORWARDERS CONFERENCE - AGREEMENT NO. 8330, AS AMENDED, AND AGREEMENT NO. 8330-2

NOTICE

April 10, 1981

Notice is given that no exceptions were filed to the February 26, 1981 initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the decision has become administratively final.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-88

PACIFIC COAST OCEAN FREIGHT FORWARDERS CONFERENCE - AGREEMENT NO. 8330, AS AMENDED, AND AGREEMENT NO. 8330-2

1. Where a group of freight forwarders seeks approval of an agreement under section 15, Shipping Act, 1916, which agreement allows them to form a conference to discuss "any and all matters of mutual interest" with other conferences and with direct and indirect carriers by rail, water, truck or air, such agreement is per se violative of United States antitrust laws and requires justification under the ruling in Federal Maritime Commission v. Aktiebalager Svenska Amerika Linian (Swedish American Line), 390 U.S. 238 (1968).
2. In considering the question of approval under section 15, the Commission must have sufficient information and data to determine the impact of the agreement on the commerce of the United States and, where justified, to exempt the proposed anticompetitive combination from the operation of the antitrust laws; and it is incumbent on the proponent to furnish such information. Here, where the record is devoid of substantive, probative facts, approval of Agreement 8330-2 is not justified.
3. Where, as here, an agreement is so broad, indefinite and vague that it fails to apprise the Commission, as well as any interested parties, as to the procedures and arrangements under which the concerted activity permitted by the agreement is to take place, it cannot be approved.
4. Since Agreement 8330-2 is a complete revision and update of Agreements 8330 and 8330-1, these latter agreements likewise do not meet the requirements of section 15 of the Shipping Act, 1916, and must be disapproved.

J. Donald Kenny for proponents the Pacific Coast Ocean Freight Forwarders Conference and members thereof.

Paul J. Kaller, Joseph B. Slunt, and *William D. Weiswasser* for Bureau of Investigation and Enforcement (formerly Bureau of Hearing Counsel).

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

Finalized April 10, 1981

This proceeding arose as a result of an Order of Investigation and Hearing served by the Federal Maritime Commission (Commission) on September 13, 1979.[2] The parties took part in discovery and various documents were made a part of the record. In order to facilitate reference to those documents, as well as the Order of Investigation 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)

[2] Exhibit 5, *Ibid.*

Hearing itself, they have been identified and assigned exhibit numbers as follows:

Deposition of William F. Bosque	Exhibit 1
Deposition of Donald I. Theiss	Exhibit 2
21 Supporting Affidavits	Exhibit 3
Supporting Affidavit of J. Murray Fox	Exhibit 4
Order of Investigation and Hearing	Exhibit 5

As to the agreements involved here, neither of the parties actually offered them into evidence even though they are referred to and discussed in the original and reply briefs. Portions of the agreements as set forth in the briefs will be noted and discussed herein where necessary. Finally, during the pendency of the proceeding, the parties did not offer any oral testimony for the record and the case was submitted on the basis of the written materials previously identified.

FINDINGS OF FACT

1. On December 10, 1958, the Commission approved Agreement 8330, which authorized the formation of a conference of freight forwarders named the Pacific Coast Ocean Freight Forwarders Conference (PCOFFC). (Exhibit 5.)

2. On June 19, 1958, the Commission approved Agreement 8330-1, which was a modification of Agreement 8330. (Exhibit 5.)

3. The PCOFFC never actually functioned in the manner contemplated by the agreements, and recently its members decided to activate the conference realizing that some of the provisions of Agreements 8330 and 8330-1 may be archaic in view of intervening legal and commercial developments. (Exhibit 5.)

4. Agreement 8330-2 was filed by the "Temporary Committee for Revitalization of the Pacific Coast Ocean Freight Forwarders Conference" on September 17, 1978, and was signed by thirteen licensed ocean freight forwarders. It is primarily designed to update Agreements 8330 and 8330-1. (Exhibit 5.)

5. The Commission, in its Order of Investigation and Hearing, ordered:

> That pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. 814 and 821) that a proceeding be instituted to determine:
>
> 1. Whether Agreements Nos. 8330, 8330-1, and 8330-2 are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or may operate to the detriment of the commerce of the United States, or are contrary to the public interest or otherwise in violation of the Shipping Act, 1916;
>
> 2. Whether Agreements Nos. 8330 and 8330-1 should be ordered modified or disapproved pursuant to the standards of section 15 of the Shipping Act, 1916;

3. Whether Agreement No. 8330-2 should be approved, modified, or disapproved pursuant to the standards of section 15 of the Shipping Act, 1916. (Exhibit 5.)

6. The Commission Order designated PCOFFC as the proponent in this case, and Hearing Counsel as a party. While it invited petitions to intervene, none were forthcoming from other parties. However, the Pacific Coast European Conference (PCEC) did file comments on Agreement 8330-2. (Exhibit 5.)

7. Article 13 of Agreement 8330-2 authorizes PCOFFC to "meet with any other Conference, for the purpose of discussing and agreeing upon any and all matters of mutual interest . . . ." It also authorizes meetings with direct and indirect carriers of all modes "as required to fulfill the purposes of this Conference as set forth under Article 2."[3] (Opening Brief of Hearing Counsel, page 6; Reply Brief of PCOFFC, pages 3 and 4.)

8. Agreement 8330-2 is a complete revision of Agreements 8330 and 8330-1. (Opening Brief of PCOFFC, page 4.)

ULTIMATE FINDINGS OF FACT

9. Article 13 of Agreement 8330-2, which would allow discussion of "any and all matters of mutual interest" with other conferences and with direct and indirect carriers by rail, water, truck or air, is per se violative of United States antitrust laws and requires justification under the *Svenska* test. (Entire record.)

10. Article 13 of Agreement 8330-2 is so broad, indefinite and vague that it fails to apprise the Commission, as well as any interested parties, as to the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. (Entire record.)

11. The record is devoid of any substantive, probative facts which would justify approval of Agreement 8330-2 under section 15 of the Shipping Act, 1916. (Entire record.)

12. Since Agreement 8330-2 is a complete revision and update of Agreements 8330 and 8330-1, those latter agreements likewise do not meet the requirements of section 15 of the Shipping Act, 1916, and must be disapproved. (Entire record.)

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[3] Article 2 reads:

The Conference is formed to promote the commerce of the United States; to promote sound, ethical and honorable business dealings and practices among those engaged in the ocean forwarding business and between those engaged in such business on the one hand, and, on the other hand, shippers and receivers of freight and common carriers by water; to promote harmonious relationships between exporters, common carriers by water, intermodal carriers, steamship conferences, and the members of this Conference, and to promote financial responsibility of Conference members for the protection of the exporting public, and other matters of general interest and importance to the members of this Conference.

DISCUSSION

Section 15 of the Shipping Act, 1916, requires "that every common carrier by water or other person subject to this Act shall file immediately with the Commission a true copy . . . of every agreement with another such carrier or other person . . . or modification . . . thereof . . . pooling or apportioning earnings, losses or traffic." Section 15 further provides that once an agreement is filed:

> The Commission shall by order after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds 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, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other(s) . . . .

Since its enactment, section 15 has been the subject of a large body of case law. While not always definitive, there are certain tenets that have been established. It has been held that in enacting this provision, Congress intended to tolerate only minimum anticompetitive behavior necessary to preserve an essentially competitive structure in the Maritime industry *(Seatrain Lines, Inc. v. Federal Maritime Commission*, 460 F.2d 932 (1972). aff'd 411 U.S. 726 (1973)); that once agreements come under the Commission's jurisdiction, the Commission may approve them even though they violate the antitrust laws if they take antitrust principles into account in reaching their decision, *(Seatrain Lines, Inc. v. Federal Maritime Commission, supra)*; that accommodation between antitrust and regulatory objectives by the Commission does not authorize it to ignore the antitrust laws *(Federal Maritime Commission v. Aktiebalager Svenska Amerika Linian (Swedish Am. Line)*, 390 U.S. 238 (1968), Dist. Col. 1968); that antitrust questions in general, and in particular contracts involving all-encompassing restraints, present issues of a kind that should be explored *sua sponte* in order to discharge an agency's duty to guard the public interest *(Marine Space Enclosures, Inc. v. Federal Maritime Commission*, 420 F.2d 577 (1969)); that presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act *(Svenska, supra; Mediterranean Pools Investigation*, 9 F.M.C. 264, 290 (1966)); that under section 15 it is not enough that the Commission is apprised merely as to the terms of an agreement but it is essential that it know at all times the *nature* of the activities undertaken in the agree-

ment *(In re: Pacific Coast European Conference,* 7 F.M.C. 27 (1961)); that section 15 expressly confers on the Commission the power of disapproval, "whether or not previously approved," and necessarily imposes a continuing duty upon the Commission to ensure that the parties to section 15 agreements are complying with the Act and with their approved agreement (*In re: Pacific Coast European Conference. supra*).

In this proceeding the proponent avers that freight forwarders are employed to represent the shipping public and that the only shippers' representatives who could "negotiate collectively on their behalf" with antitrust immunity are freight forwarders. It argues that PCEC is dominated by foreign flag carriers who "dictate to the forwarders as to the amount of brokerage which the Conference members would pay" to freight forwarders, but who nevertheless do not believe that freight forwarders should be in a position to negotiate with the Conference (PCEC) over brokerage. The proponent concludes that:

> It is inconceivable that the Commission could find that it is in the public interest to deny the representatives of American shippers the right to negotiate collectively as to items which directly affect the public's costs while permitting a foreign flag dominated Conference to sit with antitrust immunity and dictate as a collective body the amount of brokerage to be paid and what rules will govern the payment of such sums.

In support of approval of its agreements, the proponent submits the affidavit of J. Murray Fox,[4] the Executive Secretary of the Pacific Agricultural Cooperative for Export, Inc. (PACE), which is an association of exporters qualified under the Webb-Pomerene Act (15 U.S.C. 61-65) as exempt from certain United States antitrust laws. According to Mr. Fox, it was established "to facilitate the movement of American products to foreign markets." Mr. Fox supports the agreement involved here because:

> (a) Under present law groups such as PACE are exempt from antitrust laws as to certain concerted activities by member exporters. Steamship conferences also have antitrust immunity as to certain concerted activities of member lines. Under Agreement 8330-2 the Forwarder Conference could negotiate with steamship conferences such problems dealing with documentation, delivery procedures and certain rate issues in a manner not presently available to forwarders.
>
> (b) Agreement 8330-2 is not a substitute for shipper's councils or exporter associations. It does, however, provide a means for negotiation and agreement between forwarders and confer-

[4] Exhibit 4.

ences under direct Commission supervision which does not presently exist in any other form.

(c) As shippers PACE members recognize that the portion of forwarder overhead not borne by the (conference) carriers must be paid by the shippers. At present, conferences establish levels of forwarder compensation under their approved agreements. There is no requirement that conferences investigate to determine a fair and proper compensation level. While Agreement 8330-2 does not force conferences to negotiate compensation with forwarders, it does permit such negotiations on behalf of the forwarders.

In addition to the affidavit, the proponent offered the testimony of William F. Bosque into evidence.[5] Mr. Bosque is the Acting Committee Secretary, Temporary Committee for Revitalization of PCOFFC. He stated he was the person "most familiar with the need for the agreement and the reasons for the revitalization of the Conference." In discussing the scope of Article 13 of Agreement 8330-2, Mr. Bosque stated:

Q. Why don't we answer the first questions. What would you talk about, what types of matters is it anticipated would be discussed within the membership itself?

A. The Freight Forwarding industry is so involved with international transportation matters that one could picture an entire gamut of interests that Freight Forwarders will have. They would touch upon the involvement of the other Conferences, upon our Conferences, what affect they have on it, what we, as a group, could do to facilitate the public interest, what influence we could have with other portions of the shipping industry to promote exports to the United States. I am sure that there are many specific things that we could involve ourselves with but in general, it was felt that this Conference would serve the industry, our industry, as well as the general industry of exports and public interest because of the Shipping Act allowing us to meet and the current feeling within the international industry. I can't get too much more specific with it.

Q. Fine. Now, to get back to meetings with other Conferences, can you give us a general idea what types of discussions would be held with other conferences under Article 13?

A. Yes. It had been a feeling of our industry, the freight forwarding industry, particularly out on the Pacific Coast here, that the shippers have not been represented sufficiently enough in their contact with Steamship Conferences, for instance, or perhaps Conferences of terminal operators and other people that are under control of the Shipping Act. Therefore,

[5] Exhibit 1.

we envision situations that we could meet with these other Conferences in order to promote the good of the country, all of our exports, the shipping public in general. Now, the freight forwarding industry is probably the one industry that does represent the public to the greatest degree because it is independent, it represents shippers, paid by shippers to represent them so that it opens an opportunity for us to represent them in a better way. Without a Conference structure, the industry, the freight forwarders, have been very frustrated as well as the shipping public because of the limitations that are placed upon us in reacting to Conference cartel type rules and regulations.

We, of course, envision many activities that we could work with at Conferences such as simplification of tariffs, the ability to interface EDP equipment with Conference systems or members of the Conferences, the ability to have Conferences react to rate requests of exporter and industry matters, the problems that are involved with rate matters, such as the inability of the public at the moment to receive instant information as to what rate structures are, matters of interest to the general public, again, such as the ability to depend on the rates that are quoted; questions regarding the financial status of the member carriers of the Conference are of great interest to the public now because of the recent bankruptcies in the industry.

The subject could be almost limitless as to what could be brought up in these matters that our people feel is necessary to have the protection of a Conference status.

* * * * *

Q. Assuming that a particular freight forwarder had the ability to route a particular piece of cargo and the routing was open at the discretion of the freight forwarder and the freight forwarder had this ability to route cargo to a certain carrier and there was a certain carrier in a trade that was taking a position contrary to the uniform position of the forwarder that had been agreed upon within the Conference. Would the possibility under those conditions exist that the forwarder, due to the fact he had agreed to take a uniform position in regard to a certain trade practice would not route the cargo to that particular carrier but route it to another carrier instead?

A. I am afraid I can't answer that question because I just don't have the experience in working within a Conference structure, nor am I certain as to the authority that the Conference has.

* * * * *

Q. Could you elaborate on that, is there still a problem with foreign competition and could you explain that a little bit for us?

A. Three years ago, I believe, there was a concern upon the industry for their welfare because of the entry into the industry of foreign owned and controlled business and there is also the concern of the shipping public and the freight forwarders alike that foreign interests are able to have certain advantages over the United States owned companies, so, I believe that that was the reason why we mentioned it. Again, there is nothing specific there but since it is obviously an international business those concerns are always with our industry, as well as the general shipping public.

* * * * *

Q. Now, the competition within the forwarding industry itself, between the members of the forwarding industry, would that be affected by this group of freight forwarders banding together and having this conference?

A. We would assume there would be some affect, yes. However, the international freight forwarding industry also usually uses the word independent freight forwarder and I think in that respect, independent is meant independent from carriers independent from exporters but, in fact, the industry, historically, is a very independent one, that is, amongst themselves wanting to take independent action and the spirit of the industry has always been one of independence. So, we don't foresee that a group such as ours will be such an influence to eliminate the need from other outside freight forwarders, forwarders that operate from other coasts but I am sure it will have a certain affect, hopefully, a beneficial effect to the general public.

* * * * *

Q. Is there any intention among the members of the Conference if the Conference is reactivated, to discuss the subject of ocean freight forwarding compensation with either ocean carrier conferences or independent ocean carriers?

A. I can't predict what the Conference would do or the members of the conference. I am sure that there is some tendency on the part of some to want to change the different levels of compensation or brokerage but I believe that the impact of it will be more in the conditions that are applied, rather than the rate, the cost of living today, the inflation, the steamship tendency to apply surcharges as methods of receiving compensations, such as bunker surcharges and currency surcharges which are now outside of the areas of compensation to the freight forwarder, indicate to me that there could be questions of this nature brought up but I don't believe at this time that there is any program or that this is the major consideration to any extent.

Q. But certainly the level of compensation would be, wouldn't it, a subject matter which could possibly be discussed?

A. Certainly, I think so, yes.

* * * * *

MR. KENNY: What I am driving at, is it the intent of this Conference to act as a group in discussing and possibly coming to agreement with conferences of ocean carriers with respect to their limitations on brokerage?

THE WITNESS: Yes. I would envision that possibility that this conference would try to eliminate unfair restrictions placed on commissions, yes, by conferences.

* * * * *

MR. KENNY: Now, you mentioned that the group would deal with intermodal carriers to some extent where that is connected with ocean freight. For example, let's say that you have cargo coming into the Pacific Coast by rail, by truck and by air, for forwarding to ocean vessels to carry to the Far East or beyond. Would it be your intention to deal with these rail, air or truck carriers as to matters that involve your customers, your shippers?

THE WITNESS: Yes, indeed. If the Conference could provide the vehicle to deal with these different other regulated groups, it would be a big plus factor for the shipping public since, again, it is my understanding that even in domestic areas the exporting public or the shipping public is somewhat limited in what influence they have on these other groups of carriers.

Finally, the proponent submitted into evidence twenty-one supporting affidavits[6] from members of PCOFFC. Generally, the affidavits are similar in context. All support the approval of Agreement 8330-2 for various reasons, including:

1. The shipping public needs effective representation in resolving problems that arise with ocean carriers.[7]
2. The need for exporters and freight forwarders to be represented by a group empowered to make joint decisions on its behalf.
3. It would further the national goal of increasing exports and creating a more favorable balance of payments.

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[6] Exhibit 3.

[7] The "problems" are characterized in general terms. For example, one affidavit refers to protection against "the arbitrary acts by members of the Pacific Westbound Conference and other member organizations," and identifies those acts as capricious increases in bunker and currency surcharges "without valid justification." It also refers to "brokerage fees which are ridiculously low in view of the fees paid in eastern and gulf ports."

Hearing Counsel opposes the approval of the agreements involved for several reasons. First, it avers that "there is no demonstrated reason to forego the benefits of competitive rate setting by forwarders." It cites *Svenska, supra,* for the proposition that if a price-fixing agreement interferes with the policies of the antitrust laws, it will be approved only if the proponents can "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." In addition, Hearing Counsel notes that section 15 requires that, once approved, an agreement is subject to continued scrutiny by the Commission and argues that the filing of Agreement 8330-2 itself emphasizes that Agreement 8330 is outmoded and irrelevant "to the facts and conditions of the 1980's." It cites the change in the regulatory context of Agreement 8330's original approval wherein, in 1961, section 44 of the Shipping Act was promulgated empowering the Commission to regulate the independent ocean freight forwarder industry.[8] Hearing Counsel also notes that "in 1968 the Supreme Court decided *Svenska,* now seen as one of the fundamental interpretations of the Shipping Act."

Hearing Counsel's second major objection to approval of the agreements is that "the unfettered discussion authority sought by Article Thirteen is unnecessarily vague and may seriously infringe anti-trust principles." As has been noted, Article 13 authorizes the Conference to "meet with any other Conference, for the purpose of discussing and agreeing upon any and all matters of mutual interest . . . ." It also authorizes meetings with direct and indirect carriers of all modes "as required to fulfill the purposes of this Conference as set forth under Article 2." Hearing Counsel points out that the language of Article 13 might allow the Conference to "overstep the permissible." It argues "the question is the legality of the Commission giving section 15 approval (and anti-trust immunity) to anything respondents might decide to do under the broad wording of the agreement," citing *Agreement 9448 - N. Atlantic Outbound/European Trade,* 10 F.M.C. 299 (1967) at 306. Hearing Counsel then proceeds to illustrate the vagueness of the agreements by citing instances in the testimony of Mr. Bosque, where the witness ostensibly exhibited an inability to be specific about the intentions of the Conference and its members and the direction the Conference might take.

Hearing Counsel argues further that General Order 18, *Conference Agreement Provisions Relating to Concerted Activities,* 46 C.F.R. 537, clearly articulates Commission policy that it "ensure that parties to agreements approved under section 15 . . . are at all times complying

[8] General Order 4, 46 C.F.R. 510, has been issued to implement this authority.

with the requirements of the Act . . . . In order to discharge properly this responsibility, the Commission must be fully apprised of the manner in which operations are being and will be carried out." It again cites the testimony of Mr. Bosque in support of the argument that the agreements are vague.

Finally, Hearing Counsel asserts that "the benefits claimed are largely available independently of the agreements." It argues that General Order 4 protects the public with the "payover" provision of section 501.23(f), and by section 510.5(g) also affords as much protection as would the agreements in the area of fiscal responsibility.

In addition to testimony previously discussed, the record contains the affidavit of Donald I. Theiss, the Chairman of PCEC. (Exhibit 2.) In his testimony, Mr. Theiss opposed approval of the instant agreements. Some of the reasons given were that the carriers prefer to handle rate requests through the shipper and not the freight forwarder; that the carriers did not wish to discuss brokerage fees with a freight forwarders' conference; that the agreements do not "spell out" what is intended; that a conference of freight forwarders might exert undue pressure on conference member lines by "playing" an independent line against the conference and might influence more and more the routing of cargo.

In rebuttal to Hearing Counsel and to the testimony of Mr. Theiss, the proponent argues that since Agreement 8330-2 deleted Article 5 of Agreement 8330, PCOFFC "no longer seeks rate setting authority and the issue is moot." The proponent also states that the discussion authority sought by Article 13 is "not unnecessarily vague and satisfies a serious transportation need." It points out that the agreement does not permit agreements "between the forwarders' conference and other parties . . . unless approved pursuant to Section 15 of the Shipping Act, 1916." Once again, the proponent cites the "serious transportation need" satisfied by the agreement; namely, that "shippers presently have no means to negotiate as a collective body with anti-trust immunity except through forwarders." It states that the only area of Article 13 which could be considered vague is the statement "for the purpose of discussing and agreeing upon any and all matters of mutual interest," and proposed a modification which, in pertinent part, is as follows:

> This Conference may meet with any other Conference, the agreement of which has been approved under Section 15 of the Shipping Act of 1916, as amended, for the purpose of discussing and agreeing upon matters related to documentation, terminal practices and procedures, tariff rates and regulations, dual rate and credit agreements, brokerage, container allocations, shipper's requests and complaints, and matters of a similar nature.

Finally, the proponent disputes Hearing Counsel's contention that the benefits available under the agreements are available independent of section 15 approval. It notes that common carriers cannot even meet with shippers or freight forwarders and that section 15 authority is necessary to antitrust immunity.

CONCLUSIONS[9]

In arriving at any determination of the issues in any proceeding, it is first necessary to extract from the record those facts that have been proven. Unfortunately, in this proceeding the record is almost completely barren of any substantive, probative facts. As has been noted, the agreements themselves have not been placed into evidence. However, from the briefs of both parties, which discuss Article 13 of Agreement 8330-2, it is clear that the proponents do intend to meet not only amongst themselves, but with members of conference carriers and with carriers by rail, water, truck or air. It is equally clear, and is admitted by the proponents, that those meetings will involve discussion of "any and all matters of mutual interest," including tariff rates and regulations, dual rate and credit agreements, *brokerage*, container allocations, shippers' requests and complaints, and *matters of a similar nature.* Given these facts, it is clear that Agreement 8330-2 is anticompetitive in nature, as Hearing Counsel suggests. The unfettered discussion authority that is sought is obviously meant to engender concerted behavior as to the setting of freight forwarder commissions, as well as a whole range of subjects affecting the shipping public and the shipping environment.

In considering the antitrust aspects of section 15 agreements, the Commission, in *Mediterranean Pools Investigation, supra,* stated:

> Thus, the question of approval under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act, and (2) a consideration of the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent. The weighing of these two factors determines whether the agreement is to be approved. The essential ingredient in this process is, of course, information or data for without it no intelligent judgment as to the probable future impact of the particular agreement upon our commerce would be possible. Almost uniformly, the kind of information necessary to this judgment is in the hands of those seeking approval of the agreement and the resultant

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[9] As the proponent suggests, Agreement 8330-2 is a complete revision of Agreements 8330 and 8330-1, and whatever determination is made regarding Agreement 8330-2 will be equally applicable to the other two agreements.

> exemption of the proposed anticompetitive combination from the operation of the antitrust laws; and it is incumbent upon those in possession of such information to come forward with it.

Here, when one searches the record for the information needed to make a valued judgment in the antitrust area, he finds allegations that "freight forwarders are employed to represent the shipping public" and that "the only shippers representatives who could negotiate collectively on their behalf with anti-trust immunity are the freight forwarders." However, the record contains no evidence *that under the terms of Agreement 8330-2,* freight forwarders will be acting as "agents" for shippers and in their behalf. Indeed, as to the setting of freight forwarder commissions, for example, Mr. Bosque testified that the freight forwarders' conference would seek to raise those commissions -- an act hardly calculated to aid shippers. Likewise, if freight forwarders can act in concert with carrier conferences generally, what assurance, or even likelihood, is there that the resultant action will benefit shippers? Unfortunately, the record is devoid of any real evidence in this regard.

The proponent also avers that a freight forwarders' conference would have the right to discuss brokerage fees with PCEC because PCEC is "able to act as a conference in unilaterally setting brokerage rates without negotiation and without the impact of the forwarders as a group." It criticizes the fact that PCEC is a "foreign flag dominated" conference. Yet, nowhere in the record is there any evidence relating specifically to anything PCEC has done. Is PCEC operating under an agreement approved by the Commission?; is its act of setting freight forwarders' commissions outside the ambit of the agreement?; is PCEC violating any section of the Shipping Act and, if so, how?; what adverse effect do the foreign flag members have on PCEC activities which causes the conference to act in a manner detrimental to the United States commerce, or contrary to the public interest, or in violation of the Shipping Act; even assuming PCEC is acting illegally in setting freight forwarders' commissions, how would a freight forwarders' conference go about remedying the wrong and would it be consonant with the provisions of the Shipping Act? None of these specific questions or others like them calculated to supply the Commission with the factual information it needs is even asked, much less answered by the proponent. Instead, the proponent leaps to the conclusion that "to permit ocean carriers to meet and arbitrarily establish rates and procedures without negotiation with the representatives of shippers and exporters is discriminatory and unfair." The bare allegation standing alone as it does, without any material factual support of record, is worthless. The same is true of proponent's assertions that "we have shown that the agreement fulfills a serious transportation need and is not discriminatory nor is it unfair. Further, the agreement will support the com-

merce of the United States and will not be a detriment in any way." There simply is no evidence in the record to support these statements. The self-serving statements in the affidavits (Exhibit 3) recite a host of alleged reasons why the freight forwarders' conference should be approved, but nowhere is there any evidence of a single specific incident which would support the reasons given or would demonstrate how the freight forwarders' conference would resolve any alleged wrongdoing. For example, as has been noted, at least one of the affiants characterizes bunker surcharge increases by PCEC as "arbitrary" and "capricious," without valid justification. Yet, the record is silent as to any facts which might support the allegations made.

As to the arguments of Hearing Counsel and the proponents on brief, it must be noted that there are counterbalances on each side. The proponent has deleted Article 5 of original Agreement 8330 so that, as the proponent avers, Hearing Counsel's arguments based on Article 5 rate-setting authority are moot. However, the new Article 13, even as modified as the proponent suggests, would allow concerted activity clearly violative of antitrust laws so that while the specific applicability of Article 5 might be moot in Agreement 8330-2, the issue of antitrust immunity granted under section 15 is not.

In essence then, the record in this proceeding supports the finding that Article 13 of Agreement 8330-2, which allows discussion of "any and all matters of mutual interest" with other conferences and with direct and indirect carriers by rail, water, truck or air, is per se violative of United States antitrust laws and requires justification under the *Svenska* test. The record does not justify a holding that Agreement 8330-2 is required by a serious transportation need, necessary to secure important public benefits, or in furtherance of a valid regulatory purpose of the Shipping Act. Indeed, Article 13 of Agreement 8330-2 is so broad, indefinite and vague, as is the testimony of the proponent's principal witness, that it falls to apprise the Commission, as well as any interested parties, as to the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. Further, the record is devoid of any substantive, probative facts which would justify approval of Agreement 8330-2, under section 15, Shipping Act, 1916. Since Agreement 8330-2 is a complete revision and update of Agreements 8330 and 8331, those latter agreements likewise do not meet the requirements of section 15, Shipping Act, 1916, and must be disapproved.

Finally, it should be noted that the above holding is based on the proponent's failure of proof. There is nothing inherently wrong in freight forwarders forming a conference and it may well be that there are problems in the industry which justify its formation. Certainly, one need not reject such a conference because the carrier conferences simply prefer to talk to shippers directly rather than to freight forward-

ers. Also, there may be a serious transportation need for such a conference and it may be necessary to secure important benefits -- all of which would justify its approval by the Commission. Here, however, there is a complete failure of proof. The record is little more than a conglomeration of unsupported conclusory statements espousing the approval of discussion of almost any activity related to freight forwarders with any group having anything to do with the freight forwarding business. The activity intended is too broad; the record made is too weak.

It is held, therefore that:

1. Agreements 8330, 8330-1 and 8330-2 may operate to the detriment of the commerce of the United States and are contrary to the public interest; and

2. Agreements 8330, 8330-1 and 8330-2 are disapproved pursuant to the standards of section 15 of the Shipping Act, 1916.[10]

(S) JOSEPH N. INGOLIA
Administrative Law Judge

Washington, D.C.
February 26, 1981

[10] In re: Pacific Coast European Conference, supra.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 752

APPLICATION OF COORDINATED CARIBBEAN TRANSPORT, INC. FOR THE BENEFIT OF UNIVERSAL TRANSCONTINENTAL CORP.

NOTICE

April 10, 1981

Notice is given that no exceptions were filed to the March 9, 1981 Order Affirming Initial Decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the March 9, 1981 order has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 752

COORDINATED CARIBBEAN TRANSPORT, INC. FOR THE BENEFIT OF UNIVERSAL TRANSCONTINENTAL CORP. AS AGENT FOR MORISAENZ, S.A.C.

ORDER AFFIRMING INITIAL DECISION SERVED OCTOBER 16, 1980, DENYING APPLICATION FOR PERMISSION TO REFUND A $682.22 PORTION OF AGGREGATE FREIGHT CHARGES OF $6,182.22

Finalized April 10, 1981

In response to the Commission's Order of Remand served February 6, 1981, the Presiding Administrative Law Judge issued on that same date (served February 9, 1981) an Order for Applicant-Carrier to develop a full and complete picture of the arrangements between the carrier and shipper which led to the filing of the July 14, 1980, project rate relied upon in the application, including the nature of the "project" which qualified the subject shipment of motor vehicles for carriage at a rate other than that stated for other Passenger Automobiles at Third Revised Page 46 of the Coordinated Caribbean Transport, Inc.'s Tariff FMC No. 14. It was *ordered*: (A) Within ten (10) days of its receipt (date of receipt to be certified in response) of this Order, the said Applicant-Carrier shall conform to the provisions of the Order of Remand in developing a full and complete picture in which the said Applicant-Carrier fully explains the clerical or administrative error or error due to inadvertence showing why the application should be granted; (B) Failure of the Applicant-Carrier to respond within the time provided will leave denial of the application unchanged.

DISCUSSION

Twenty-eight (28) days have elapsed since the serving of the Order on February 9, 1981, and no response has been received from the Applicant-Carrier. It is deemed that the Applicant-Carrier has been given a reasonable period of time within which to respond to the request for further information. The failure of the Applicant-Carrier to respond to the request for further information, and the Commission's conclusion in its February 9, 1981, Order of Remand that the Presiding Officer's findings regarding the applicant's insufficiency under 46 C.F.R. 502.92 were correct, are reasons why the Presiding Administrative Law Judge *finds* and *concludes* his Initial Decision herein served October 16, 1980, should be affirmed.

Wherefore, it is *ordered*,

The Initial Decision denying the special docket application served herein October 16, 1980, be and hereby is affirmed.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

March 9, 1981

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 752

APPLICATION OF COORDINATED CARIBBEAN TRANSPORT, INC. FOR THE BENEFIT OF UNIVERSAL TRANSCONTINENTAL CORP. AS AGENT FOR MORISAENZ, S.A.C.

Permission to refund a $682.22 portion of aggregate freight charges of $6,182.22 denied.

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

Finalized April 10, 1981

This is a special docket 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 commodity shown on the Bills of Lading is set up motor vehicles ORM-C, Model Scout.

The tariff applicable is that of Coordinated Caribbean Transport, Inc., FMC-14, between Ports of Florida and Ports in Ecuador, S.A.

The commodity set up motor vehicles, a one shipment of project of 11 vehicles were transported on the vessel *Lionheart*, Voy. 84, which sailed July 13, 1980, from Miami, Florida, for Manta, Ecuador. Third Revised Page 46 of the applicable tariff, effective March 18, 1980, for the Commodity, Automobile, viz: Passenger (Includes Jeeps and Scouts) S/U unboxed to Manta, Rate Basis $43.00 W/M, rate was applied on the following Bills of Lading:

Universal Transcontinental Corp. Forwarding Agent FMC No. 394

Prepaid Freight Charge	Date of B/L	B/L No.	Commodity	Weight	Forwarder Date		Vessel/ Voyage
$ 589.56	7/07/80	MA 106120	1 set up Motor Vehicle ORM-C Model Scout weight 3,990 lbs./1,810 K	M- 477 cu.ft.	6/30/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
$3,305.38	7/07/80	MA 106173	6 set up Motor Vehicles OCR-C Model Scout weight 23,519 lbs./10,668 K	M-2,687 cu.ft.	6/26/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84

[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).

Universal Transcontinental Corp. Forwarding Agent FMC No. 394—Continued

Prepaid Freight Charge	Date of B/L	B/L No.	Commodity	Weight	Forwarder Date		Vessel/ Voyage
$ 554.08	7/08/80	MA 106132	1 set up Motor Vehicle ORM-C Model Scout weight 3,920 lbs./1,778K	M- 447 cu.ft.	6/30/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
$ 589.56	7/08/80	MA 106136	1 set up Motor Vehicle ORM-C Model Scout weight 3,990 lbs./ 1,810 K	M- 447 cu.ft.	6/30/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
$ 589.56	7/09/80	MA 106166	1 set up Motor Vehicle ORM-C Model Scout weight 3,990 lbs./ 1,810 K	M- 447 cu.ft.	6/30/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
$ 554.08	7/10/80	MA 106195	1 set up Motor Vehicle ORM-C Model Scout weight 3,926 lbs./1,781 K	M- 447 cu.ft.	7/9/80	Miami, Fla. to Manta, Ecuador	Lionheart/ 84
$6,182.22							

The aggregate freight charges of $6,182.22 are certified to have been paid and borne by Morisaenz, S.A.C., for whom Freight Forwarder, Universal Transcontinental Corp., FMC 394, is Agent.

The rate sought to be applied is $500.00 all inclusive per vehicle. Shipment consists of 11 vehicles at $500.00, equals $5,500. Amount collected, $6,182.22 minus $5,500 equals $682.22 sought to be refunded.

On July 10, 1980, the applicant-carrier had ordered tariff change to be effective July 11, 1980, that movement from Miami, Fla., to Manta, Ecuador, of eleven vehicles, each measuring approximately 504 cu.ft. will be accorded a rate of flat $500 including all charges accrued under the tariff, Bill of Lading to be claused E JOB-2009. Noted that cargo will be moving on July 11, 1980 (approximate date).

The carrier submits as fully explaining the clerical or administrative error or error due to inadvertence for which the application should be granted only the following: "Attached Bills of Lading were rated without knowledge of the existing project rate filed with FMC prior to the sailing."

The carrier filed in its tariff, 14th Revised Page 106, effective date July 14, 1980:

> Movement from Miami, Fla. to Manta, Ecuador of eleven (11) vehicles, each measuring approximately 504 cu.ft., will be accorded a rate, each of Flat $500.00 including all charges accrued under this Tariff. Bill of Lading to be claused Item JOB-E-2009. Rate to expire 8/14/80.

Certification is contained in the application that it was mailed at Miami, Florida, September 10, 1980, to the Secretary of this Commission. Under Rule 92(a)(3) and such circumstances, the filing date of this application is the so certified date of mailing, being within 180 days of July 13, 1980, the sailing date of the shipment, the application is filed timely.

The shipments involved sailed on the vessel *Lionheart*, Voy. 84, July 13, 1980 (date shown on Republica del Ecuador, Declaration General copy attached to application).

DISCUSSION

The application does not explain whether a clerical or administrative error or error due to inadvertence is involved; it merely states, "Attached Bills of Lading were rated without knowledge of the existing project rate filed with FMC prior to sailing." Such a statement tends to raise more questions than it answers. For example, who was without knowledge of the project rate? Who rated the Bills of Lading? When, by whom and with whom was the project rate negotiated? In any event, the applicant should have identified the kind of error and elucidated that it was not a rate agreed upon after shipment.

The application asserts the dates shown on the Bills of Lading are 6/26/80, 6/30/80, and 7/9/80. These dates on the Bills of Lading above are dates next to the name of the Forwarding Agent, Universal Transcontinental Corp., the date of 6/26/80 on B/L MA 106173; 6/30/80 on B/L's MA 106120, MA 106132, MA 106136, and MA 106166; 7/9/80 on B/L MA 106195. There is no explanation as to what the dates mean, so it is surmised the dates show when the cargo came into the possession of the forwarding agent.

The applicant's change order dated July 10, 1980, directed the change to be effective July 11, 1980. To set forth the rate on which to base refund, the Revised Page 106 of the applicant's tariff filed was to be effective July 14, 1980. Third Revised Page 46 of the applicable tariff, effective March 18, 1980, under which the cargo was rated previously, remained unchanged. The 14th Revised Page 106 of the tariff was received by the Commission prior to the September 10, 1980, filing of this application and so conforms to Rule 92(a)(2).

The application is silent as to whether there are other special docket applications or decided or pending formal proceedings involving the same rate situation; or 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 the bills of lading were issued and ending on the effective date of the conforming tariff and (b) moved on the same voyage of the vessel carrying the shipment described herein.

The Commission wrote in *Munoz y Cabrero v. Sea-Land Service, Inc.*, Special Docket No. 491, 20 F.M.C. 152, 153 (1977):

> While we recognize that should the application be denied the consequences of the carrier's consecutive errors would fall upon the shipper, nevertheless the authority granted by P.L. 90-298 to depart from the rigid requirements of section 18(b)(3) of the Act and to make a rate applicable retroactively is strictly limited and in our opinion would not extend to approve a rate which was never agreed upon or intended to be filed.

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

(1) The information submitted is inadequate to prove the requested permission to refund should be granted.

(2) The application for permission to refund should be denied.

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

(A) The application is denied.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

Washington, D.C.
October 16, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-13

CHARLESTON WAREHOUSE ASSOCIATES ET AL.

v.

BARBER STEAMSHIP LINES, INC. ET AL.

NOTICE

April 17, 1981

Notice is given that no appeal has been taken to the March 16, 1981 discontinuance 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 discontinuance has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-13

CHARLESTON WAREHOUSE ASSOCIATES ET AL.

v.

BARBER STEAMSHIP LINES, INC. ET AL.

NOTICE OF WITHDRAWAL OF COMPLAINT AND DISCONTINUANCE OF PROCEEDING

Finalized April 17, 1981

Complainants, seven warehouse operators within a 50-mile radius of Charleston, South Carolina, have filed a motion seeking permission to withdraw their complaint. Complainants had alleged that 17 named respondent vessel-operating common carriers by water or associations of them, had violated sections 14, 16, 17, and 18(a) of the Shipping Act, 1916, and sections 2 and 4 of the Intercoastal Shipping Act, 1933, by implementing the so-called 50-mile container rules at Charleston. However, even before the date on which an answer to the complaint would have been due, complainants, on February 17, moved for permission to withdraw the complaint without prejudice. No replies to the motion were filed.

Complainants give no reason for their decision to withdraw the complaint. Respondents, on the other hand, have said nothing about the request that the complaint be withdrawn without prejudice. I have no reason to disturb the apparent desires of the parties and no authority to compel a private litigant to continue litigating its own complaint against its will under the present circumstances. Accordingly, the motion is granted. The complaint is withdrawn without prejudice and the proceeding is discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

March 16, 1981

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-29

MURAN INTERNATIONAL CORPORATION - POSSIBLE VIOLATIONS OF SECTION 16, INITIAL PARAGRAPH SHIPPING ACT, 1916

ORDER

April 12, 1981

By an Order of Investigation and Hearing dated April 17, 1981, this proceeding was instituted to determine whether Muran International Corporation (Muran) obtained transportation by water for cargo bound for Tunisia at rates in violation of section 16, Initial Paragraph, of the Shipping Act, 1916. The Commission had information that indicated that Muran had misdeclared the weight of certain shipments for the purpose of obtaining transportation by water for property at less than rates and charges which would otherwise be applicable and had refused to pay applicable tariff rates for other shipments. Pursuant to the special settlement procedures set forth at 46 C.F.R. 505, respondent Muran and the Commission's General Counsel's office and the Bureau of Investigation and Enforcement entered into settlement discussions.

Muran and the Commission's Bureau of Investigation and Enforcement entered into stipulations which set forth the factual background surrounding the violations alleged in the Order of Investigation and Hearing. The stipulations provided the factual basis upon which a settlement agreement has been concluded between Muran and the Director, Bureau of Investigation and Enforcement. As an express condition of such settlement and compromise, Muran has consented to the entry of this Order below directing them to cease and desist from practices enumerated below.

THEREFORE, IT IS ORDERED, That Muran International Corporation shall cease and desist from misdeclaring the weight of its shipments and obtaining or attempting to obtain transportation by water for property at less than rates and charges which would otherwise be applicable;

IT IS FURTHER ORDERED, That Muran International Corporation shall cease and desist from refusing to pay applicable ocean carrier tariff rates.

IT IS FURTHER ORDERED, That Muran International Corporation shall cease and desist for a period of five years from the date of this Order from discarding, mutilating, disposing of or otherwise destroying any underlying documents such as warehouse receipts, ship-

pers' instructions or packing lists, delivery receipts, weight bills or other documentation which show or reflect the actual weight or measure of cargo tendered by Respondent and upon which the ocean freight rate is computed and assessed.

IT IS FURTHER ORDERED, That this Order shall continue in force unless and until suspended, modified or set aside by the Commission, provided however that should Muran International Corporation petition the Commission after April 20, 1986 to set aside this Order, such petition shall be favorably considered unless the Commission at that time has reason to believe that Muran International Corporation has in any way violated the Shipping Act, 1916 or this Order while this Order has been in effect.

IT IS FURTHER ORDERED, That Muran International Corporation shall, upon reasonable notice, allow investigators or attorneys of the Federal Maritime Commission unimpeded access to the underlying documents required to be maintained by this Order, and shall allow the removal of such documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

IT IS FURTHER ORDERED, That this proceeding be, and hereby is, discontinued.

By the Commission

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 44: DOCKET NO. 80-82]

PART 525 - EXEMPTION OF COLLECTIVE BARGAINING AGREEMENTS

April 24, 1981

ACTION: Removal of Exemption - Final Rule

SUMMARY: The existing section 35 exemption for collective bargaining agreements from the filing and approval requirements of section 15, Shipping Act, 1916, has been superseded by the Maritime Labor Agreements Act of 1980 (P.L. 96-325).

DATE: Effective May 1, 1981

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

SUPPLEMENTARY INFORMATION:

On December 23, 1980, the Commission gave Notice in the *Federal Register* (45 F.R. 84832) of its intention to revoke 46 C.F.R. 525 (Commission General Order 44), providing for the exemption of collective bargaining agreements from the filing and approval requirements of section 15, Shipping Act, 1916, 46 U.S.C. 814. That Notice was prompted by the enactment of the Maritime Labor Agreements Act of 1980, P.L. 96-325, 94 Stat. 1021, which removes collective bargaining agreements from the requirements of section 15. The American Trucking Associations, Inc. (ATA) filed comments, which do not oppose the proposed revocation of 46 C.F.R. 525, but rather focus on the scope of the Maritime Labor Agreements Act of 1980.

Generally, ATA points out that the Maritime Labor Agreements Act of 1980 does not affect the Commission's responsibility to ensure that carriers provide services and facilities, including access to and the use of containers, to all persons on a nondiscriminatory basis. The Commission does not disagree with this assessment but is of the view that it is not relevant to the matter at issue. The fact is that the types of agreements, *i.e.*, those arising from collective bargaining, which 46 C.F.R. 525 exempts from regulation under section 15, have since been statutorily removed altogether from Commission jurisdiction under that

section. It follows therefore that the administrative exemption provided by 46 C.F.R. 525 is no longer necessary or appropriate.

THEREFORE, IT IS ORDERED, That effective upon publication of this Notice in the *Federal Register*, Part 525 of Title 46 of the Code of Federal Regulations is removed.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

46 C.F.R. PART 510

(GENERAL ORDER 4, REVISED; DOCKET 80-13)

LICENSING OF INDEPENDENT OCEAN FREIGHT FORWARDERS

April 27, 1981

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is revising its General Order 4 (46 C.F.R. 510) which governs the licensing and operations of independent ocean freight forwarders. Ocean freight forwarders, oceangoing common carriers and the Commission have agreed that General Order 4 needs to be substantially revised, updated and clarified. The Commission also wishes to minimize its regulation of this business activity, to the extent its statutory duties permit. This revision of the Order is intended to accomplish those purposes and, at the same time, balance the differing interests of freight forwarders, export shippers, and oceangoing common carriers and where possible, eliminate unnecessary, ineffective or unduly burdensome regulation. The major changes include: a requirement for the licensing of separately incorporated branch offices, increased bond amounts to cover branch office operations, establishment of a minimum period of experience for qualifying individuals, elimination of the so-called payover rule, an increase in fees for licenses, and new anti-rebate certification requirements.

DATES: October 1, 1981, is the general effective date of these revised rules. However, persons who on October 1, 1981, hold valid independent ocean freight forwarder licenses need not comply with the surety bond requirements contained in section 510.15(a) of these revised rules until March 1, 1982. With respect to such persons, the surety bond requirements of the present rules will continue to apply until March 1, 1982. Licensees who fail to comply with the revised surety bond requirements by March 1, 1982, will be issued a notice that their licenses will be suspended effective

May 1, 1982, in the absence of compliance by that date. Failure to achieve compliance with the bond requirements by July 1, 1982, will result in automatic revocation of the license. This rule is being submitted to the Office of Management and Budget pursuant to the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511).

SUPPLEMENTARY INFORMATION:

Sections 18, 21, 43 and 44 of the Shipping Act, 1916 (46 U.S.C. 817, 820, 841a, 841b), and section 4 of the Administrative Procedure Act (5 U.S.C. 553) authorize the Federal Maritime Commission to make rules and regulations affecting oceangoing common carriers and the licensing, activities, obligations and responsibilities of independent ocean freight forwarders engaged in carrying on the business of forwarding in commerce from the United States.

The current rules, General Order 4, were originally issued in December, 1961. Commission and industry experience has indicated a need for updating, clarifying and changing many provisions of the Order. Accordingly, on March 17, 1980, the Commission issued a notice of proposed rulemaking (45 F.R. 17029) requesting comments from interested parties with respect to proposed revisions of General Order 4.

Written comments were received from 30 commentators,[1] some of whom also provided oral comments to the Commission on September 16, 1980. On the basis of the written and oral comments, a number of changes to the rules as proposed on March 17, 1980, are now being

[1] 1.) B.F. Goodrich Company; 2.) North Carolina State Ports Authority; 3.) Fritz Companies; 4.) South Carolina State Ports Authority; 5.) American Council of Voluntary Agencies for Foreign Service, Inc.; 6.) Casey Overseas Corp.; 7.) Joint Association--South Atlantic Marine Terminal Conference Terminal Operators Conference of Hampton Roads; 8.) Emerson Electric Co.; 9.) The Far East Conference; 10.) Associated Latin American Freight Conferences; 11.) McGregor, Swire Air Services (America) Inc.; 12.) Foreign Shipowners Association of the Pacific Coast; 13.) Pacific Coast European Conference, Latin America-Pacific Coast Steamship Conference, and Pacific Coast River Plate Brazil Conference; 14.) National Customs Brokers and Forwarders Association of America, Inc.; 15.) Inter-American Freight Conference; 16.) West Gulf Maritime Association; 17.) Pacific Westbound Conference, Pacific-Straits Conference, and Pacific Indonesian Conference; 18.) Behring International, Inc.; 19.) International Freight Forwarders and Customs Brokers Association of New Orleans, Inc.; 20.) The "8900" Lines, North Atlantic Mediterranean Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conference, U.S. North Atlantic Spain Rate Agreement, and U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement (except Lykes Bros. Steamship Co., Inc.); 21.) Transoceanic Shipping Co., Inc.; 22) Fillette, Green & Co. of Tampa, Smith and Kelly Co., Southern Overseas Corporation, Southern Shipping Company, and Waters Shipping Company; 23.) Independent Customs Brokers and Freight Forwarders Association of Savannah, Inc.; 24.) The North European Conferences; 25.) Interconex, Inc.; 26.) Dorf International, Ltd.; 27.) The Roanoke Companies; 28.) Association of Forwarding Agents and Foreign Freight Brokers of Mobile, Inc.; 29.) Georgia Ports Authority; and 30.) Customs Brokers and Forwarders Association of Miami, Inc. These 30 commentators are comprised of shippers, freight forwarders, common carriers by water, port/terminal interests, surety companies, and charitable institutions.

adopted by the Commission. A brief section-by-section discussion of the newly adopted revisions to General Order 4 follows:[2]

§510.1 *Scope.* This section describes the scope of the entire part and reflects present sections 510.1 and 510.20. No comments on this section were received but changes have been made to reflect the changes adopted in other sections.

§510.2 *Definitions.* This section collects the definitions contained in present sections 510.2 and 510.21.

Proposed section 510.2(b) changed the definition of "beneficial interest" from present section 510.21(l) for purposes of clarification only. One commentator (17), however, recommended that the definition be substantively revised to include the rental, leasing or other furnishing of containers. The Commission does not believe such a change should be made, and only minor editorial changes have been adopted.

A number of commentators raised points in regard to proposed section 510.2(h), the definition of "freight forwarding services." One commentator (16) asked that a provision be added to proposed section 510.2(h)(3) dealing with export declarations, which would make it clear that forwarders are required to file shippers' export declarations in accordance with U.S. Customs Service regulations. The Commission, however, believes that such revision would be superfluous. Commentators 9 and 15 suggested clarification in regard to proposed section 510.2(h)(14) dealing with the advancement of funds by forwarders. The Commission is in general agreement with those suggestions and has revised the definition accordingly. See combined definition in 510.2(h)(11).

One commentator (23) suggested that proposed section 510.2(j), the definition of an "independent ocean freight forwarder," be revised to exclude from the definition any person connected to "any" shipper (e.g., by rail, air or motor). The Commission, however, believes it was the Intent of Congress to proscribe only those shipper connections involving oceangoing common carriers as defined in section 510.2(n) of these final rules.

§510.3 *License; when required.* This section, as proposed, incorporated the requirements of present section 510.3(a), but also included a requirement that every branch office be separately licensed and bonded. In the "Supplementary Information" section of its notice of proposed rulemaking, the Commission stated that one alternative would be graded levels of surety bonds depending on the number of a forwarder's branch

[2] Written and oral comments not mentioned in the section-by-section discussion have nevertheless been considered by the Commission. Further, it should be clearly understood that failure to address or refute a particular comment in no way implies Commission agreement with the comment. This is especially true with respect to commentators' assertions as to the proper interpretation of law, court decisions, and Commission rules, findings or actions.

offices. Proposed section 510.3 also deleted the obsolete grandfather provisions of present section 510.3(b).

The commentators were divided in their opinions as to whether separate licenses and bonds should be required for each branch office.

In order to minimize the impact of its regulations on the forwarding industry while increasing the protection to the shipping industry, the Commission has decided to require a separate license and bond only for branch offices which are separately incorporated. At the same time, $10,000 in additional bond coverage will be required for each unincorporated branch office operated by a licensee. For example, a forwarder operating out of its home office and two unincorporated branch offices would be required to maintain on file with the Commission one surety bond in the amount of $50,000 (i.e., the basic $30,000 bond plus an additional $10,000 for each branch office). The full amount of such coverage (i.e., $50,000) would be available with respect to any obligation of the forwarder originating at any location from which it operates. Thus, branch office coverage under a bond will not be limited to just $10,000.

§510.4 *License; when not required.* This proposed section combined various provisions of the present rules.

One commentator (17) suggested that nonvessel operating common carriers by water be prohibited from engaging in forwarder activity. Another commentator (23) suggested that vessel operating common carriers by water and their agents be denied licenses as there are sufficient forwarders to perform the services on behalf of shippers.

The Commission does not believe sufficient grounds exist for adopting those suggestions. The final rule has been modified, but only to clarify the rule with respect to ocean freight brokers.

§510.11 *Basic requirements for licensing eligibility.* This proposed section retained substantially the same requirements as the present rules, except that a specific minimum experience requirement was prescribed to assure that each applicant has a basic level of expertise to operate an independent ocean freight forwarding business.

Commentators generally supported the minimum experience requirement, but one commentator (11) was opposed to requiring a minimum level of experience for managers of branch offices. One commentator (30) suggested that prospective forwarders should be required to pass a test as the three year experience requirement may not adequately ensure that newly licensed forwarders will have an adequate level of expertise.

The Commission has decided not to impose a specific experience requirement for managers of unincorporated branch offices. The proper operation of an unincorporated branch office is the responsibility of the licensee who will be held strictly responsible for the activities of all its employees. Since, under these revised rules, a separately incorporated

branch office must be separately licensed, an applicant for such a license must meet the same minimum experience requirements as any other applicant. In addition, the Commission has decided that an examination for applicants will not be required. Minor clarifications to this section also have been made.

§510.12 *Persons not eligible.* No change was made to this proposed section.

§510.13 *Application for license.* The license application form is deleted from the body of the rules to enable revisions to be made to the form when necessary without republication of the rule. While not contained in the proposed rule, the requirement to publish notice of applications in the *Federal Register* as provided in present section 510.6 is restored pending its consideration in Docket 80-44.

§510.14 *Investigation of applicants.* No major change was made to this proposed section.

§510.15 *Surety bond requirement.* This proposed section incorporated provisions of present sections 510.5(f), (g), (h) and the provisos in present section 510.9, with some changes for clarification and flexibility.

Many of the commentators expressed the view that the bond should be increased either by a sliding scale based on the volume of cargo handled by the forwarder or by the number of branch offices operated. As mentioned earlier, the Commission has decided to require $10,000 additional bond coverage for each unincorporated branch office.

§510.16 *Denial of license.* Proposed paragraph (b) of this section, "Reapplication within one year prohibited," is deleted. That subject matter is covered under new section 510.18 of the final rules.

§510.17 *Revocation or suspension of license.* This proposed section (originally proposed as section 510.50) retained the criteria of present section 510.9, but added a proposed paragraph (b) which provided for assessment of civil penalties for violations in any proceeding involving the suspension or revocation of a license. In addition, under proposed paragraph (c), the Commission addressed the matter of rejecting an application submitted within one year from the date of revocation of the applicant's previous license.

One commentator (18) urged the deletion of proposed section 510.50(a)(1) which provided for the suspension or revocation of a license for failure to conduct forwarding business consistent with the national maritime policies stated in the Merchant Marine Act of 1936. That provision, as well as proposed paragraph (c), is deleted in the final rules. The subject matter of proposed paragraph (c) is covered under new section 510.18.

§510.18 *Application after revocation or denial.* This section covers the subject matter of originally proposed sections 510.16(b) and 510.50(c).

§510.19 *Issuance and use of license.* This section was originally proposed as section 510.17. It contains provisions of present sections

510.5(a)(3), 8(b) and 8(d) and reflects changes made to other sections of the final rules.

§510.20 *Changes in organization.* This section, originally proposed as section 510.18, includes various provisions in the present rules plus codification of existing policy concerning the conduct of operations in the event of the death of a sole proprietor licensee.

Three commentators (14, 23 and 30) opposed the requirement in proposed subparagraph (a)(5) that prior approval be required for the transfer of 5% or more of the stock of a corporate licensee. The Commission has decided to retain this requirement in order to better ensure that licensees remain independent of shipper connections, a primary reason for the enactment of section 44 of the Act. A new paragraph (d) specifies the conditions under which newly incorporated branch offices may operate until they are independently licensed.

§510.21 *Branch offices; interim operation.* This section, originally proposed as section 510.19, provides for an orderly system of transition from an existing separately incorporated branch office status to a separately licensed status.

This grandfather provision is necessary to cover a separately incorporated branch office during the interim period from the effective date of these rules until it is granted its individual license.

§510.31 *General duties.* This section incorporates the provisions of prior sections 510.5(e) and 510.23(a), (b), (d) and (1), and adds a new provision (paragraph (h)) requiring anti-rebate certifications on invoices and other documents as provided in section 21(b) of the Shipping Act, 1916.

Three commentators (11, 18 and 23) objected to the requirement in proposed paragraph (b) that the name and license number of all related forwarders be included on a licensee's stationery and billing forms as such information would take too much room. The Commission agrees and has deleted the requirement.

Two commentators (14 and 18) objected to the new requirement in proposed paragraph (h) for an anti-rebating statement on forwarders' certifications and invoices, while one commentator (20) supported the proposed requirement. The Commission believes that, consistent with the intent of section 21(b) of the Act, forwarders should certify continuously that they have a policy against rebates, and has retained the certification requirement.

In agreement with a commentator (18) who objected to proposed section 510.31(d)(5) as being unfair and unnecessarily restrictive, the Commission deleted that provision from the final rule. It would have required forwarders to obtain Commission approval before employing persons whose licenses have been revoked or suspended.

§510.32 *Forwarder and principal; fees.* With slight changes, this proposed section incorporated several provisions of the existing rules and,

in order to avoid discrimination between shippers, deleted tne exemption contained in current section 510.24(b), which allowed a forwarder to perform forwarding services for relief or charitable agencies free of charge or at a reduced rate.

Several commentators (14, 18 and 30) objected to the language of proposed section 510.32(e) as it affects a forwarder's obligation for its principal's actions. A new subpart (k) has been added requiring forwarders to account to their principals for certain overpayments and adjustments, and other language in this section has been revised to clarify the fact that a forwarder will not automatically be held responsible for the actions of its principal.

§510.33 *Forwarder and carrier; compensation.* This proposed section included a number of provisions from the current rules and proposed, in paragraph (b), to change the maximum allowable time period for a forwarder to pay over freight monies to a carrier from seven days to twenty days and, in paragraph (c), proposed a new provision to prohibit a carrier from requiring a licensee to assume the obligation of paying freight charges before such sums are advanced by the shipper to the forwarder. A provision in paragraph (d) proposed to require ocean carriers to pay compensation to forwarders within 30 days after the payment of ocean freight charges.

Numerous comments were received both for and against the three new proposals. After fully considering all of the concerns, the Commission has decided to delete all three of the new proposals as well as the existing payover rule. The matters addressed in the new proposals in proposed section 510.33(c) and (d) are best left to the parties' own determination. With respect to the payover rule, ocean freight payments are governed by tariff and bill of lading provisions, and the Commission is of the opinion that any type of payover rule tends to confuse the legal rights and obligations of the parties under such governing provisions. In short, the Commission is of the view that all of these financial arrangements should not be governed by Commission regulations, but instead should be left to the competitive controls of the market place.

§510.34 *Records required to be kept.* This proposed section contained provisions of present sections 510.23(k) and (l), 510.25(a), and 510.26(b). No comments were received in regard to these provisions and no significant changes were made in the final rule.

§510.35 *Reports required to be filed.* This section includes the reporting requirementsof present sections 510.5(c) and 510.26(a). A new provision (paragraph (a)) would require the filing of samples of office stationery and invoice forms within sixty days of changes in organization. Proposed new paragraph (c) requires an annual filing of an antirebate certification pursuant to section 21(b) of the Act.

One commentator (18) opposed the filing of the annual anti-rebate certification. The Commission believes that it is important and consistent with the intent of section 21(b) that the requirement be retained and does not believe that an annual certification will cause any undue burden on licensees.

§510.36 *Section 15 agreements.* This proposed section tracks the present section 510.26.

One commentator (14) objected to the requirement that a copy of non-exclusive working agreements be kept in a licensee's file, while another commentator (17) suggested that the Commission should require the filing of such agreements with the Commission. The Commission has decided to adopt the rule as proposed with a slight modification to cover agreements which have been exempted from the requirements of section 15.

Therefore, 46 C.F.R. Part 510 is amended to read as follows:

PART 510 - LICENSING OF INDEPENDENT OCEAN FREIGHT FORWARDERS

SUBPART A - GENERAL

Sec.
510.1 Scope
510.2 Definitions
510.3 License, when required
510.4 License, when not required

SUBPART B - ELIGIBILITY AND PROCEDURE FOR LICENSING; BOND REQUIREMENTS

Sec.
510.11 Basic requirements for licensing; eligibility
510.12 Persons not eligible
510.13 Application for license
510.14 Investigation of applicants
510.15 Surety bond requirements
510.16 Denial of license
510.17 Revocation or suspension of license
510.18 Application after revocation or denial
510.19 Issuance and use of license
510.20 Changes in organization
510.21 Branch offices; interim operation

SUBPART C - DUTIES AND RESPONSIBILITIES OF FREIGHT FORWARDERS; FORWARDING CHARGES; REPORTS TO COMMISSION

Sec.
510.31 General duties
510.32 Forwarder and principal; fees
510.33 Forwarder and carrier; compensation
510.34 Records required to be kept
510.35 Reports required to be filed
510.36 Section 15 agreements

AUTHORITY: Secs. 18, 21, 43 and 44, as amended; 46 U.S.C. 817, 820, 841a and 841b.

SUBPART A - GENERAL

§510.1 *Scope.*

This part sets forth regulations providing for the licensing as independent ocean freight forwarders of persons, including individuals, corporations and partnerships, who wish to carry on the business of freight

forwarding. This part also prescribes the bonding requirements and the duties and responsibilities of independent ocean freight forwarders, regulations concerning practices of freight forwarders and common carriers by water, and the grounds and procedures for revocation and suspension of licenses.

§510.2 *Definitions.*

The terms used in this part are defined as follows:

(a) "Act" means the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*), as amended.

(b) "Beneficial interest" includes any lien or interest in or right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from the whole or any part of a shipment of cargo where such interest arises from the financing of the shipment or by operation of law, or by agreement, express or implied. The term "beneficial interest" shall not include any obligation in favor of a freight forwarder arising solely by reason of the advance of out-of-pocket expenses incurred in dispatching a shipment.

(c) "Branch office" means any office established and maintained by or under the control of a licensee for the purpose of rendering freight forwarding services, which office is located at an address different from that of the licensee's designated home office. This term does not include a separately incorporated entity.

(d) "Brokerage" refers to payment by an oceangoing common carrier to an ocean freight broker for the performance of services as specified in section 510.2(m) of this part.

(e) "Compensation" means payment by an oceangoing common carrier to a freight forwarder for the performance of services as specified in section 510.33(c) of this part.

(f) "Freight forwarder" is anyone who performs, or holds itself out to perform, the dispatching of a shipment of cargo for another by rendering any one or more of the services enumerated in section 510.2(h) of this part.

(g) "Freight forwarding fee" means charges billed by a freight forwarder to a shipper, consignee, seller, purchaser, or any agent thereof, for the performance of freight forwarding services as specified in section 510.2(h) of this part.

(h) "Freight forwarding services" refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by an oceangoing common carrier, which may include, but is not limited to, the following:

(1) ordering cargo to port;

(2) preparing and/or processing export declarations;

(3) booking, arranging for or confirming cargo space;

(4) preparing or processing delivery orders or dock receipts;

(5) preparing and/or processing ocean bills of lading;

(6) preparing or processing consular documents or arranging for their certification;

(7) arranging for warehouse storage;

(8) arranging for cargo insurance;

(9) clearing shipments in accordance with United States Government export regulations;

(10) preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

(11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;

(12) coordinating the movement of shipments from origin to vessel; and

(13) giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargo's dispatch.

(i) "In commerce from the United States" means oceanborne export commerce from the United States, its Territories, or possessions to foreign countries, or oceanborne commerce between the United States and its Territories and possessions, or between such Territories and possessions.

(j) "Independent ocean freight forwarder" refers to a person performing freight forwarding services for a consideration, either monetary or otherwise, who is not a shipper or consignee or seller or purchaser of property in commerce from the United States and who has no 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.

(k) "Licensee" is any person licensed by the Federal Maritime Commission as an independent ocean freight forwarder.

(l) "Nonvessel operating common carrier by water" is a common carrier by water as defined in section 1 of the Act, which does not operate the vessel by which its ocean transportation is provided but which holds itself out, by the establishment and maintenance of tariffs, by advertisement, solicitation, or otherwise, to provide transportation of property for hire by water in commerce from the United States; which assumes responsibility or has liability imposed by law for the safe transportation of such property; and which arranges in its own name for the performance of such transportation by underlying water carriers.

(m) "Ocean freight broker" is an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean

transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions and terms of transportation.

(n) "Oceangoing common carrier" is a common carrier by water as defined in section 1 of the Act, including a nonvessel operating common carrier by water, engaged in transportation for hire by water of property in commerce from the United States, as defined in section 510.2(i) of this part.

(o) "Principal", except as used in Surety Bond Form FMC 59 Rev., refers to the shipper, consignee, seller, or purchaser of property, and to anyone acting on behalf of such shipper, consignee, seller, or purchaser of property, who employs the services of a licensee to facilitate the ocean transportation of such property.

(p) "Reduced forwarding fees" means charges to a principal for forwarding services that are below the licensee's usual charges for such services.

(q) "Small shipment" refers to a single shipment sent by one consignor to one consignee on one bill of lading which does not exceed the underlying oceangoing common carrier's minimum charge rule.

(r) "Special contract" is a contract for freight forwarding services which provides for a periodic lump sum fee.

(s) "Territory or possession" includes the Commonwealth of the Northern Marianas, the Commonwealth of Puerto Rico, American Samoa, Guam, the U.S. Virgin Islands, and any other Territory or possession of the United States.

§510.3 *License, when required.*

Except as otherwise provided in this part, a person must hold a valid independent ocean freight forwarder license in order to perform freight forwarding services, and, except as provided in section 510.4 of this part, no person shall perform, or hold out to perform, such services unless such person holds a valid license issued by the Commission to engage in such business. A separate license is required for each branch office that is separately incorporated.

§510.4 *License, when not required.*

A license is not required in the following circumstances:

(a) *Shipper.* Any person whose primary business is the sale of merchandise may, without a license, dispatch and perform freight forwarding services on behalf of its own shipments or on behalf of shipments or consolidated shipments of a parent, subsidiary, affiliate, or associated company. Such person shall not receive compensation from the oceangoing common carrier for any services rendered in connection with such shipments.

(b) *Employee or branch office of licensed forwarder.* An individual employee or unincorporated branch office of a licensed independent ocean freight forwarder is not required to be licensed in order to act

solely for such licensee, but each licensed independent ocean freight forwarder will be held strictly responsible hereunder for the acts or omissions of any of its employees rendered in connection with the conduct of the business.

(c) *Oceangoing common carrier.* An oceangoing common carrier, or agent thereof, may perform ocean freight forwarding services without a license only with respect to cargo carried under such carrier's own ocean bill of lading. Charges for such forwarding services shall be assessed in conformance with the carrier's published tariffs on file with the Commission.

(d) *Ocean freight broker.* An ocean freight broker is not required to be licensed to perform those services specified in section 510.2(m) of this part.

SUBPART B - ELIGIBILITY AND PROCEDURE FOR LICENSING; BOND REQUIREMENTS

§510.11 *Basic requirements for licensing; eligibility.*

(a) *Necessary qualifications.* To be eligible for an independent ocean freight forwarder's license, the applicant must demonstrate to the Commission that:

(1) its proposed forwarding business will be consistent with the national maritime policies declared in the Merchant Marine Act, 1936;

(2) it will meet the definition of an independent ocean freight forwarder;

(3) it is fit, willing and able properly to carry on the business of freight forwarding and to conform to the provisions of the Shipping Act, 1916, as amended, and the requirements, rules and regulations of the Commission issued thereunder;

(4) its qualifying individual has a minimum of three (3) years of experience in ocean freight forwarding duties in the United States;

(5) it has obtained and filed with the Commission a valid surety bond in conformance with section 510.15 of this part; and

(6) it and its qualifying individual are otherwise qualified within the provisions of the Shipping Act, 1916 and the requirements, rules and regulations of the Commission.

(b) *Qualifying individual.* The following individuals must qualify the applicant for a license:

(1) *Sole proprietorship* - The applicant sole proprietor.

(2) *Partnership* - At least one of the active managing partners, but all partners must execute the application.

(3) *Corporation* - At least one of the active corporate officers.

(c) *Affiliates of forwarders.* An independently qualified applicant may be granted a separate license to carry on the business of forwarding even though it is associated with, under common control with, or otherwise related to another independent ocean freight forwarder through stock ownership or common directors or officers, if such applicant submits (1) a separate application and fee, and (2) a valid surety bond in the form and amount prescribed under section 510.15 of this part. The proprietor, partner or officer who is the qualifying individual of one active licensee shall not also be designated the qualifying proprietor, partner or officer of an applicant for another independent ocean freight forwarder license.

(d) *Oceangoing common carriers.* An oceangoing common carrier or agent thereof which meets the requirements of this part may be licensed to dispatch shipments moving on other than such carrier's own bill of lading, subject to the provisions of section 510.33(g) of this part.

§510.12 *Persons not eligible.*

No person is eligible for a license who is a shipper, consignee, seller, or purchaser of shipments in commerce from the United States, or who has any beneficial interest therein, or who directly or indirectly controls or is controlled by such shipper, consignee, seller, or purchaser of shipments or by any person having a beneficial interest in such shipment.

§510.13 *Application for license.*

(a) *Application and forms.* Any person who wishes to obtain a license to carry on the business of forwarding shall submit, in duplicate, to the Director of the Commission's Bureau of Certification and Licensing, a completed application Form FMC-18 Rev. "Application for a License as an Independent Ocean Freight Forwarder") and a completed antirebate certification in the format prescribed under section 510.35(c) of this part. Copies of Form FMC-18 Rev. may be obtained from the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, D.C. 20573, or from any of the Commission's offices at other locations. Notice of filing of such application shall be published in the *Federal Register* and shall state the name and address of the applicant. If the applicant is a corporation or partnership, the names of the officers or partners thereof shall be published.

(b) *Fee.* The application shall be accompanied by a money order, certified check or cashier's check in the amount of $350 made payable to the "Federal Maritime Commission."

(c) *Rejection.* Any application which appears upon its face to be incomplete or to indicate that the applicant fails to meet the licensing requirements of the Shipping Act, 1916, or the Commission's regulations, shall be returned by certified U.S. mail to the applicant without further processing, together with an explanation of the reason(s) for rejection, and the application fee shall be refunded in full. All other

applications will be assigned an application number, and each applicant will be notified of the number assigned to its application. Persons who have had their applications returned may reapply for a license at any time thereafter by submitting a new application, together with the full application fee.

(d) *Investigation.* Each applicant shall be investigated in accordance with section 510.14 of this part.

(e) *Changes prior to licensing.* Each applicant shall submit to the Commission, in duplicate, an amended Form FMC-18 Rev., advising of any changes in the facts submitted in the original application, within thirty (30) days after such change(s) occur. Any unreported change will delay the processing and investigation of the application and may result in rejection or denial of the application. No fee is required when reporting changes to an application for initial license under this section.

§510.14 *Investigation of applicants.*

The Commission shall conduct an investigation of the applicant's qualifications for a license. Such investigations may address:

(a) the accuracy of the information submitted in the application;

(b) the integrity and financial responsibility of the applicant;

(c) the character and independence of the applicant and its qualifying individual;

(d) the length and nature of the qualifying individual's experience in handling, freight forwarder duties; and

(e) such further evidence of the fitness, willingness, and ability of the applicant to carry on the business of forwarding as the Commission may require.

§510.15 *Surety bond requirements.*

(a) *Form and amount.* No license shall be issued to an applicant who does not have a valid surety bond (FMC-59 Rev.) on file with the Commission in the amount of $30,000. The amount of such bond shall be increased by $10,000 for each of the applicant's unincorporated branch offices. Surety companies must be certified by the U.S. Department of the Treasury in order to execute Federal bonds. Surety Bond Form FMC-59 Rev. can be obtained in the same manner as Form FMC-18 Rev. under section 510.13(a) of this part, and shall read as follows:

(FORM FMC-59 REV.)

BOND NO. ______________

FMC LICENSE NO. __________

FEDERAL MARITIME COMMISSION

INDEPENDENT OCEAN FREIGHT FORWARDER'S BOND

(SECTION 44, SHIPPING ACT, 1916)

KNOW ALL MEN BY THESE PRESENTS, That ____________ as Principal (hereinafter called Principal), and as Surety (hereinafter called Surety) are held and firmly bound unto the UNITED STATES OF AMERICA in the sum of $ for the payment of which sum we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has applied for, is about to apply for, or holds a license as an independent ocean freight forwarder pursuant to section 44 of the Shipping Act, 1916, and has elected to file this bond with the Federal Maritime Commission;

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall, while this bond is in effect, supply the services of an independent ocean freight forwarder in accordance with the contracts, agreements, or arrangements made therefor, then this obligation shall be void, otherwise to remain in full force and effect.

The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall aggregate the penalty of this bond, and in no event shall the Surety's total obligation hereunder exceed said penalty.

This bond shall inure to the benefit of any and all persons for whom the Principal shall have undertaken to act as an independent ocean freight forwarder.

This bond is effective the ________ day of 19 ____, and shall continue in effect until discharged or terminated as herein provided. The Principal or the Surety may at any time terminate the bond by written notice to the Federal Maritime Commission at its office in Washington, D.C. Such termination shall become effective thirty (30) days after receipt of said notice by the Commission. The Surety shall not be liable for any contracts, agreements, or arrangements made by the Principal after the expiration of said thirty (30) day period but such termination shall not affect the liability of the Principal and Surety for any breach of the

condition hereof occurring prior to the date when said termination becomes effective.

The underwriting Surety will promptly notify the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, D.C. 20573, of any claims against this bond.

Signed and sealed this ________ , day of
19 _______ .

(PLEASE TYPE NAME OF SIGNER UNDER EACH SIGNATURE.)

(Individual Principal or Partner)	(Business Address)
(Individual Principal or Partner)	(Business Address)
(Individual Principal or Partner)	(Business Address)

Corporate Principal

Business Address

(Affix Corporate Seal)

By

Title

Corporate Surety

Business Address

(Affix Corporate Seal)

By

Title

(b) *Filing of bond.* Upon notification by the Commission by certified U.S. mail that the applicant has been approved for licensing, the applicant shall file with the Director of the Commission's Bureau of Certification and Licensing, a surety bond in the form and amount prescribed in section 510.15(a) of this part. No license will be issued until the Commission is in receipt of a valid surety bond from the applicant. If more than six (6) months elapse between issuance of the notification of qualification and receipt of the surety bond, the Commission shall, at its discretion, undertake a supplementary investigation to determine the applicant's continued qualification. The fee for such a supplementary investigation shall be $100, payable by money order, certified check or cashier's check to the "Federal Maritime Commission." Should the applicant not file the requisite surety bond within two years of notification, the Commission will consider the application to be invalid.

(c) *Branch offices.* A new surety bond, or rider to the existing bond, increasing the amount of the bond in accordance with section 510.15(a) of this part, shall be filed with the Commission prior to the date the licensee commences operation of any branch office. Failure to adhere to this requirement may result in revocation of the license.

(d) *Termination of bond.* No license shall remain in effect unless a valid surety bond is maintained on file with the Commission. Upon receipt of notice of termination of a surety bond, the Commission shall notify the concerned licensee by certified U.S. mail, to its last known address, that the Commission shall, without hearing or other proceeding, revoke the license as of the termination date of the bond unless the licensee shall have submitted a valid replacement surety bond before such termination date. Replacement surety bonds must bear an effective date no later than the termination date of the expiring bond.

§510.16 *Denial of license.*

If the Commission determines, as a result of its investigation, that the applicant:

(a) will not conduct its forwarding business in a manner consistent with the national maritime policies declared in the Merchant Marine Act, 1936;

(b) fails to meet the definition of an independent ocean freight forwarder as set forth in section 1 of the Act and section 510.2(j) of this part;

(c) is not fit, willing, and able properly to carry on the business of forwarding, or to conform to the provisions of the Act or the requirements, rules and regulations of the Commission issued thereunder;

(d) has failed to respond to any lawful inquiry of the Commission; or

(e) has made any willfully false or misleading statement to the Commission in connection with its application;

a letter of intent to deny the application shall be sent to the applicant by certified U.S. mail, stating the reason(s) why the Commission intends to deny the application. If the applicant submits a written request for hearing on the proposed denial within twenty (20) days after receipt of notification, such hearing shall be granted by the Commission pursuant to its Rules of Practice and Procedure contained in part 502 of this Chapter. Otherwise, denial of the application will become effective and the applicant shall be so notified by certified U.S. mail. Civil penalties for violations of the Act or any Commission order, rule, or regulation may be assessed in any proceeding on the proposed denial of a license or may be compromised for any such violation when a proceeding has not been instituted in accordance with part 505 of this Chapter.

§510.17 *Revocation or suspension of license.*

(a) *Grounds for revocation.* Except for the automatic revocation for termination of a surety bond under section 510.15(d) of this part, or as provided in section 510.15(c) of this part, a license may be revoked or suspended after notice and hearing for any of the following reasons:

(1) Violation of any provision of the Act, as amended, or any other statute or Commission regulation related to carrying on the business of forwarding;

(2) Failure to respond to any lawful inquiry by the Commission;

(3) Making a willfully false or misleading statement to the Commission in connection with an application for a license or its continuance in effect;

(4) Change of circumstances whereby the Commission determines that the licensee no longer qualifies to be an independent ocean freight forwarder; or

(5) Conduct which the Commission determines renders the licensee unfit or unable to carry on the business of forwarding.

(b) *Civil penalties.* As provided for in part 505 of this Chapter, civil penalties for violations of the Act or any Commission order, rule, or regulation may be assessed in any proceeding to revoke or suspend a license and may be compromised when such a proceeding has not been instituted.

(c) *Notice of Revocation.* The Commission shall publish in the *Federal Register* its order of revocation.

§510.18 *Application after revocation or denial.*

Whenever a license has been revoked or an application has been denied because the Commission has found the licensee or applicant to be unfit, any further application within 3 years of the date of the most recent conduct on which the Commission's notice of revocation or denial was based, made by such former licensee or applicant or by another applicant employing the same qualifying individual or con-

trolled by persons on whose conduct the Commission based its determination of lack of fitness, shall be reviewed directly by the Commission.

§510.19 *Issuance and use of license.*

(a) *Qualification necessary for issuance.* The Commission will issue a license if it determines, as a result of its investigation, that the applicant is fit, willing, and able properly to carry on the business of ocean freight forwarding, and is otherwise qualified within the provisions of applicable statutes and the requirements, rules, and regulations of the Commission.

(b) *To whom issued.* The Commission will issue a license only in the name of the applicant, whether the applicant be a sole proprietorship, a partnership, or a corporation, and the license will be issued to only one legal entity. A license issued to a sole proprietor doing business under a trade name shall be in the name of the sole proprietor, indicating the trade name under which the licensee will be conducting business. Only one license shall be issued to any applicant regardless of the number of names under which such applicant may be doing business.

(c) *Use limited to named licensee.* Except as otherwise provided in this part, such license is limited exclusively to use by the named licensee and shall not be transferred to another person.

§510.20 *Changes in organization.*

(a) The following changes in an existing licensee's organization require prior approval of the Commission:

(1) Transfer of a corporate license to another person;

(2) Change in ownership of an individual proprietorship;

(3) Addition of one or more partners to a licensed partnership;

(4) Change in the business structure of a licensee from or to a sole proprietorship, partnership, or corporation, whether or not such change involves a change in ownership;

(5) Sale or transfer of five (5) percent or more of stock of a licensed corporation to new stockholder interests;

(6) Acquisition of one or more additional licensees, whether for purposes of merger, consolidation, or control (see section 15 of the Act);

(7) Any change in a licensee's name; or

(8) Change in the identity or status of the designated qualifying individual, except as discussed in paragraphs (b) and (c) of this section.

(b) *Operation after death of sole proprietor.* In the event the owner of a licensed sole proprietorship dies, the licensee's executor, administrator, heir(s), or assign(s) may continue operation of such proprietorship solely with respect to shipments for which the deceased sole proprietor had undertaken to act as an independent ocean freight forwarder pursuant to the existing license, if the death is reported within thirty (30)

days to the Commission and to all principals for whom services on such shipments are to be rendered. The acceptance or solicitation of any other shipment is expressly prohibited until a new license has been issued. Applications for a new license by the said executor, administrator, heir(s), or assign(s) shall be made on Form FMC-18 Rev., and shall be accompanied by the transfer fee set forth in section 510.20(e) of this part.

(c) *Operation after retirement, resignation, or death of qualifying individual.* When a partnership or corporation has been licensed on the basis of the qualifications of one or more of the partners or officers thereof, and such qualifying individual(s) shall no longer serve in a full-time, active capacity with the firm, the licensee shall report such change to the Commission within thirty (30) days. Within the same 30-day period, the licensee shall furnish to the Commission the name(s) and detailed ocean freight forwarding experience of other active managing partner(s) or officer(s) who may qualify the licensee. Such qualifying individual(s) must meet the applicable requirements set forth in section 510.11(a) of this part. The licensee may continue to operate as an independent ocean freight forwarder while the Commission investigates the qualifications of the newly designated partner or officer.

(d) *Incorporation of branch office.* In the event a licensee's validly operated branch office undergoes incorporation as a separate entity, the licensee may continue to operate such office pending receipt of a separate license, provided that:

(1) the separately incorporated entity applies to the Commission for its own license within ten (10) days after incorporation, and

(2) the continued operation of the office is carried on as a bona fide branch office of the licensee, under its full control and responsibility, and not as an operation of the separately incorporated entity.

(e) *Application form and fee.* Applications for Commission approval of status changes or for license transfers under section 510.20(a) of this part shall be filed in duplicate with the Director, Bureau of Certification and Licensing, Federal Maritime Commission, on Form FMC-18 Rev., together with a processing fee of $100, made payable by money order, certified check, or cashier's check to the "Federal Maritime Commission."

§510.21 *Branch offices; interim operation.*

A licensee operating a separately incorporated, but not separately licensed, branch office approved by the Commission prior to the effective date of this rule, may continue to operate such office while the application by the branch office for an individual license is pending. No such branch office may continue in operation unless it files an applica-

tion for an individual license with the Commission within one year after the effective date of this rule.

SUBPART C - DUTIES AND RESPONSIBILITIES OF FREIGHT FORWARDERS; FORWARDING CHARGES; REPORTS TO COMMISSION

§510.31 *General duties.*

(a) *License; name and number.* Each licensee shall carry on the business of forwarding only under the name in which its license is issued and only under its license number as assigned by the Commission. Wherever the licensee's name appears on shipping documents, its FMC license number shall also be included.

(b) *Stationery and billing forms.* The name and license number of each licensee shall be permanently imprinted on the licensee's office stationery and billing forms. The Commission may temporarily waive this requirement for good cause shown if the licensee rubber stamps or types its name and FMC license number on all papers and invoices concerned with any forwarding transaction.

(c) *Use of license by others; prohibition.* No licensee shall permit its license or name to be used by any person who is not a *bona fide* individual employee of the licensee. Unincorporated branch offices of the licensee may use the license number and name of the licensee if such branch offices (1) have been reported to the Commission in writing and (2) are covered by an increased bond in accordance with section 510.15(c) of this part.

(d) *Arrangements with forwarders whose licenses have been revoked.* Unless prior written approval from the Commission has been obtained, no licensee shall, directly or indirectly, (1) agree to perform forwarding services on export shipments as an associate, correspondent, officer, employee, agent, or sub-agent of any person whose license has been revoked or suspended pursuant to section 510.17 of this part; (2) assist in the furtherance of any forwarding business of such person; (3) share forwarding fees or freight compensation with any such person; or (4) permit any such person directly or indirectly to participate, through ownership or otherwise, in the control or direction of the freight forwarding business of the licensee.

(e) *Arrangements with unauthorized persons.* No licensee shall enter into an agreement or other arrangement with a person not authorized by this part to transact forwarding business for others so that any resulting fee, compensation, or other benefit inures to the benefit of the unlicensed person. When a licensee is employed for the transaction of forwarding business by an unlicensed person who is not the actual shipper, the licensee must transmit to the actual shipper of the cargo a copy of the invoice for services rendered.

(f) *False or fraudulent claims, false information.* No licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning a forwarding transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, oceangoing common carrier or other person, false information relative to any forwarding transaction.

(g) *Response to requests of Commission.* Upon the request of any authorized representative of the Commission, a licensee shall make available promptly for inspection or reproduction all records and books of account in connection with its forwarding business, and shall respond promptly to any lawful inquiries by such representative.

(h) *Policy against rebates.* The following declaration shall appear on all invoices and certifications under section 510.32(h) and 510.33(c) of this part:

> (Name of Firm) has a policy against payment, solicitation, or receipt of any rebate, directly or indirectly, which would be unlawful under the United States Shipping Act, 1916, as amended.

§510.32 *Forwarder and principal; fees.*

(a) *Beneficial interest.* No licensee shall act in the capacity of a shipper, consignee, seller or purchaser of any shipment in commerce from the United States, nor have any beneficial interest in such a shipment.

(b) *Compensation or fee sharing.* No licensee shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, or purchaser, or an agent, affiliate, or employee thereof; nor with any person advancing the purchase price of the property or guaranteeing payment therefor; nor with any person having a beneficial interest in the shipment.

(c) *Withholding information.* No licensee shall withhold any information concerning a forwarding transaction from its principal.

(d) *Due diligence.* Each licensee shall exercise due diligence to ascertain the accuracy of any information it imparts to a principal concerning any forwarding transaction.

(e) *Errors and omissions.* Each licensee shall comply with the laws of the United States and any involved State, Territory, or possession thereof, and shall assure that to the best of its knowledge there exists no error, misrepresentation in, or omission from any export declaration, bill of lading, affidavit, or other document which the licensee executes in connection with a shipment. A licensee who has reason to believe that its principal has not, with respect to a shipment to be handled by such licensee, complied with the laws of the United States or any State, Commonwealth or Territory thereof, or has made any error or misrepresentation in, or omission from, any export declaration, bill of lading,

affidavit, or other paper which the principal executes in connection with such shipment, shall advise its principal promptly of the suspected noncompliance, error, misrepresentation or omission, and shall decline to participate in any transaction involving such document until the matter is properly and lawfully resolved.

(f) *Express written authority.* No licensee shall endorse or negotiate any draft, check, or warrant drawn to the order of its principal without the express written authority of such principal.

(g) *Receipt for cargo.* Each receipt issued for cargo by a licensee shall be clearly identified as "Receipt for Cargo" and be readily distinguishable from a bill of lading.

(h) *Invoices; list of charges; exceptions.*

(1) Each licensee shall use an invoice which lists separately for each shipment:

(i) the actual amount of ocean freight assessed by the ocean-going common carrier;

(ii) the actual amount of consular fees paid;

(iii) the insured value, the actual insurance rate, and the actual premium paid the insurance company for insurance arranged;

(iv) the actual cost to the licensee for each accessorial service arranged by the licensee to be performed by others in connection with the shipment; and,

(v) the total service fee charged by the licensee unless the licensee has a special contract arrangement with the principal.

(2) Exceptions:

(i) The licensee need not list separately its costs for services set forth under sections 510.32(h)(1)(ii), 510.32(h)(1)(iii) and 510.32(h)(1)(iv) of this part if the licensee has provided its principal with a prior written quotation of total charges for shipment(s), a copy of which it retains in the shipment file, and has received written authorization from the principal to forward the shipment(s) for that total charge.

(ii) Licensees who offer to forward small shipments for uniform charges available to the public at large and duly filed with the Commission shall not be required to itemize the components of such uniform charges on shipments so long as the charges have been quoted in writing to the shipper prior to the time of shipment.

(iii) Licensees who maintain a uniform schedule of fees for placing insurance and for performing accessorial services (stated by dollar amount and/or percentage of markup) need not itemize the components of such charges in their

invoices. Licensees who elect to maintain such uniform pricing schedules must make the current schedule and every superseded schedule available upon request, and shall not assess fees different from those specified in the effective schedule. Such a schedule shall be filed with the Commission, posted in a conspicuous place in the forwarder's office, and shall be mailed upon request to shippers.

(i) *Special contracts.* To the extent that special arrangements or contracts are entered into by a licensee, the licensee shall not deny equal terms to other shippers similarly situated.

(j) *Reduced forwarding fees.* Except as otherwise provided in this part, no licensee shall render, or offer to render, any forwarding service free of charge or at a reduced fee in consideration of receiving compensation from oceangoing common carriers on the relevant shipment or for any other reason.

(k) *Accounting to principal.* Each licensee shall account to its principal(s) for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance monies received for claims, proceeds of c.o.d. shipments, drafts, letters of credit, and any other sums due such principal(s). These sums shall be forwarded promptly to the principal or, with the principal's written consent, may be used to offset the licensee's outstanding receivables due from such principal.

§510.33 *Forwarder and carrier; compensation.*

(a) *Disclosure of principal.* No licensee, acting in the capacity of an independent ocean freight forwarder, shall identify itself as the shipper on the shipper identification line which appears above the cargo description data on the bill of lading. The actual shipper must always be disclosed thereon. The forwarder's name may appear *after* the name of the actual shipper but the forwarder must be identified as agent.

(b) *Certification required for compensation.* An oceangoing common carrier may pay compensation to a licensee pursuant to such carrier's tariff provisions. If the carrier's tariff so provides, such compensation shall be paid for any shipment forwarded on behalf of others when, and only when, such carrier is in possession of a certification in the form prescribed in section 510.33(c) of this part, and the actual shipper has been disclosed on the bill of lading as provided for in section 510.33(a) of this part. The oceangoing common carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect, and shall retain such certification for a period of five (5) years.

(c) *Form of certification.* Prior to receipt of compensation, the licensee shall file with the carrier, in addition to the anti-rebate certification required by section 510.31(h) of this part, a signed certification as set forth below on one copy of the relevant ocean bill of lading which

indicates performance of at least two of the listed services in addition to arranging for space:

> The undersigned hereby certifies that it is the holder of valid FMC License No. ________ , issued by the Federal Maritime Commission and has, in addition to soliciting and securing the cargo specified herein or booking or otherwise arranging for space for such cargo, performed at least two (2) of the following services, as indicated:
>
> (1) Coordinated the movement of the cargo to shipside.
>
> (2) Prepared and processed the ocean bill of lading.
>
> (3) Prepared and processed dock receipts or delivery orders.
>
> (4) Prepared and processed consular documents or export declarations.
>
> (5) Paid the ocean freight charges.

A copy of such certificate shall be retained by the licensee pursuant to section 510.34 of this part.

(d) *Compensation pursuant to tariff provisions.* No licensee, or employee thereof, shall accept compensation from an oceangoing common carrier which is different than that specifically provided for in the carrier's effective tariff(s) lawfully on file with the Commission.

(e) *Compensation; services performed by underlying carrier; exemptions.* No licensee shall charge or collect compensation in the event the underlying oceangoing common carrier, or its agent, has, at the request of such licensee, performed any of the forwarding services set forth in section 510.2(h) of this part, unless no other licensee is willing and able to perform such services, or unless the Commission has granted a portwide exemption from this rule to oceangoing common carriers or their agents in the port of loading. Such exemptions may be granted by the Commission upon (1) application of any licensed forwarder, (2) publication of notice of application for such exemption in the *Federal Register* with a twenty (20) day public comment period, and (3) a finding by the Commission that an insufficient supply of forwarding services is being offered by licensees domiciled at the port of loading. Exemptions shall remain in effect until rescinded by the Commission.

(f) *Duplicative compensation or brokerage.* Where an oceangoing common carrier has paid or has incurred an obligation to pay either brokerage to an ocean freight broker or compensation to a licensee, such carrier shall not be obligated to pay additional compensation to any other person for forwarding services rendered on behalf of the same cargo.

(g) *Licensed oceangoing common carriers; compensation.* An oceangoing common carrier, agent, or person related thereto, acting as an independent ocean freight forwarder, may collect compensation when, and only when, the following certification is made on the "line copy"

of the underlying carrier's bill of lading, in addition to all other certifications required by this part:

> The undersigned certified that neither it, nor any related person, has issued a bill of lading covering the ocean transportation of the shipment covered by this bill of lading or otherwise undertaken common carrier responsibility therefor.

Whenever a person acts in the capacity of an oceangoing common carrier or agent thereof as to any shipment, such person shall not be entitled to collect compensation nor shall any underlying carrier pay such compensation to such oceangoing common carrier or agent thereof for such shipment.

§510.34 *Records required to be kept.*

Each licensee shall maintain in an orderly and systematic manner, and keep current and correct, all records and books of account in connection with its business of forwarding. These records must be kept in the United States in such manner as to enable authorized Commission personnel to readily determine the licensee's cash position, accounts receivable and accounts payable, and to verify information submitted under section 510.35 of this part. The licensee must maintain the following records for a period of five years:

(a) *General financial data.* A current running account of all receipts and disbursements, accounts receivable and payable, and daily cash balances, supported by appropriate books of account, bank deposit slips, cancelled checks, and a monthly reconciliation of bank statements.

(b) *Types of services by shipment.* A separate file for each shipment which includes a copy of each document prepared, processed, or obtained by the licensee with respect to such shipment.

(c) *Receipts and disbursement by shipment.* A record of all sums received and/or disbursed by the licensee for services rendered and out-of-pocket expenses advanced in connection with each shipment, including specific dates and amounts.

(d) *Special contracts.* A true copy, or if oral, a true and complete memorandum, of every special arrangement or contract with a principal, or modification or cancellation thereof, to which it may be a party. Authorized Commission personnel and *bona fide* shippers shall have access to such records upon reasonable request.

(e) *Exempt non-exclusive cooperative working arrangements.* As provided in section 510.36(b) of this part.

§510.35 *Reports required to be filed.*

Each licensee shall file with the Commission information and reports as follows:

(a) *Samples of office stationery and invoice forms.* Within sixty (60) days after licensing or approval of a change in business name or organization.

(b) *Non-exempt section 15 agreements.* As provided in section 510.36 of this part.

(c) *Anti-rebate certification.* By March 1st of each year, the Chief Executive Officer of every licensee shall certify that it has a policy against rebates, that it has promulgated such policy to all appropriate individuals in the firm, that it has taken steps to prevent such illegal practices which measures must be fully described in detail, and, that it will cooperate with the Commission in any investigation of suspected rebates. This certification shall be in accordance with the following format:

(NAME OF FILING FIRM)
CERTIFICATION OF POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

Pursuant to the provisions of section 21(b) of the Shipping Act, 1916, as amended, and Federal Maritime Commission regulations promulgated pursuant thereto, 46 C.F.R. parts 510 and 552,

I, , Chief Executive Officer of (name of firm), holder of valid, independent ocean freight forwarder license # ______, state under oath that:

1. It is the policy of (name of firm) to prohibit the participation of said freight forwarder in the payment, solicitation, or receipt of any rebate, directly or indirectly, to or by any carrier or shipper, which is unlawful under the provisions of the Shipping Act of 1916, as amended.
2. Each owner, officer, employee and agent of (name of firm) was notified or reminded of this policy on or before of the present year.
3. (Set forth the details of measures instituted within the filing firm or otherwise to prohibit participation in the payment of illegal rebates in the foreign commerce of the United States.)
4. (Name of firm) affirms that it will fully cooperate with the Commission in its investigation of suspected rebating in United States foreign trades.

Signature

Subscribed to and sworn before me this _____ day of , 19 ___ .

(S)

NOTARY PUBLIC

§510.36 *Section 15 Agreements.*

(a) *Filing for approval.* A copy of each written agreement and a true and complete memorandum of each oral agreement between a licensee and any other licensee, common carrier, or other person subject to the Act, and modifications or cancellations thereof, must be filed with the Commission for approval in accordance with part 522 of this Chapter, if they are subject to section 15 of the Act and have not been exempted from the requirements of that section. Such submissions shall clearly show the nature of the agreement, the parties thereto, the port(s) involved, and subject matter in detail, and shall refer to any previously filed agreements to which they may relate. Except as provided for in paragraph (b) of this section, no agreements, or modifications or cancellations thereof, shall be implemented without prior approval of the Commission.

(b) *Exemptions.* Nonexclusive cooperative working agreements between licensed independent ocean freight forwarders, which provide for the completion of documentation and performance of other forwarder services on behalf of the parties to the agreements, are exempt from the provisions of section 15 of the Act, and need not be filed with the Commission for approval, but shall be retained in the files of the licensees. Such agreements shall be in the following format:

NONEXCLUSIVE COOPERATIVE WORKING AGREEMENT

Parties to the agreement are:

(a) (Company name) (Street address) (City, State, Zip)
FMC No.______

(b) (Company name) (Street address) (City, State, Zip)
FMC No.______

Terms of the agreement:

1. This is a cooperative, nonexclusive working arrangement (exempted under 46 C.F.R. 510.36(b)) in which either party may complete documentation and perform other freight forwarder functions on behalf of the other party. Either of the parties may engage or be engaged by other forwarder(s) under a similar nonexclusive working agreement or pursuant to an agreement approved by the Federal Maritime Commission under the provisions of section 15 of the Shipping Act, 1916, as amended.
2. Forwarding fees are to be divided between the parties as follows:

3. Ocean freight compensation is to be divided between the parties as follows:

4. This agreement shall not be terminated on less than 15 days' notice to the other party.

(Signature) (Official Title)

(Type in company name)

(Date)

(Signature) (Official Title)

(Type in company name)

(Date)

By the Commission.

(S) JOSEPH POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 420(I)

THE STOP & SHOP COMPANIES, INC., BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND BARBER STEAMSHIP LINES, INC.

NOTICE

April 28, 1981

Notice is given that the time within which the Commission could determine to review the March 25, 1981 order of dismissal of the Settlement Officer in this proceeding has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

INFORMAL DOCKET NO. 420(I)

STOP & SHOP COMPANIES, INC., BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND

BARBER STEAMSHIP LINES, INC.

Complaint dismissed.

DECISION OF JAMES S. ONETO, SETTLEMENT OFFICER[1]

Finalized April 28, 1981

By complaint, timely filed through an auditing service, the complainant, a corporation whose primary enterprise is that of a department store, seeks the return of monies paid for charges alleged to have been in excess of those lawfully applicable for transportation in violation of section 18(b)(3) of the Shipping Act, 1916, on a shipment of hardware from Taiwan to Boston, via New York. Two hundred and fifty-two dollars and sixty-four cents are sought as reparation.

The complaint was dismissed as jurisdictionally defective because the complainant did not appear to be the real party in interest. That decision was reversed and the proceeding remanded for amendment of the complaint. Thereafter the complaint was satisfactorily amended to show the real party complainant.

The second decision denied reparation because the evidence adduced did not demonstrate the validity of the claim with reasonable certainty and definiteness. In reviewing the second decision the Commission agreed that the complainant's presentation did not support an award of reparation, nevertheless it ruled the complainant should have been afforded an opportunity to explain or correct the inconsistencies in its submissions. Accordingly the second decision was also reversed and the proceeding again remanded for the issuance of a supplemental decision within forty-five days from the date of its order, February 11, 1981. The complainant was requested on February 17, to provide any additional information by March 16. No further information having been forthcoming from the complainant, explaining or correcting the incon-

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

sistencies in its submissions as of the date of this decision, the complaint is herewith dismissed.

(S) JAMES S. ONETO
Settlement Officer

March 25, 1981

FEDERAL MARITIME COMMISSION

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

April 30, 1981

On January 27, 1981; the Commission issued an Order on Remand following the decision of the United States Court of Appeals in *Interpool, Ltd. v. FMC,* D.C. Cir. No. 79-1194 which vacated the Commission's Report and Order in these consolidated dockets and remanded the case to the Commission for further proceedings. The Commission's Order on Remand invited interested parties—especially container leasing companies—to file statements indicating whether they believed further proceedings were necessary, and, if so, to describe the evidentiary issues which required determination and the appropriate procedures for resolving such issues. Interested parties were also invited to comment as to whether other procedures, *e.g.* rule making, might be more desirable for considering the general question of container use practices and allowances from a broader perspective.

In response to its January 27th Order, the Commission received five separate submissions. Responses were received from (1) Trans Ocean Leasing Corporation, a petitioner in D.C. Cir. No. 79-1194; (2) the other two petitioners, Interpool Ltd. and ITEL Corporation, as well as a number of shippers; (3) the Pacific Coast European Conference; (4) the North European U.S. Pacific Freight Conference; and (5) four other North Atlantic Conferences. No statements were received from the Pacific Westbound Conference or the Far East Conference, who were intervenors in the appeal of the Commission's previous Report and Order. The Department of Justice, which opposed the Commission on appeal, also filed no response to the Order on Remand. All respond-

ing parties, however, expressed the view that further proceedings were unnecessary and the current proceedings should be discontinued.

In its Order on remand to the Commission, the Court did not indicate whether it believed the neutral container rules should be approved or disapproved.

All of the participating conferences in Dockets Nos. 76-34 and 76-36 have discontinued the "neutral container rules" prescribed by the tariff regulations in issue. While the Pacific Coast European Conference (PCEC) has had a similarly worded tariff rule in operation for nearly 10 years, this conference has represented to the Commission that its rule prohibiting carriers from paying rental or lease charges for shipper furnished containers is different in effect and implementation from the North Atlantic "neutral container rules" that are the primary subject of this proceeding. Despite the existence of PCEC's rule the container leasing companies nevertheless contend that there is no reason to continue these proceedings at this time.

Because there is no known "neutral container rule" presently in effect, and no interested party has expressed an interest in having these, or alternative proceedings involving the neutral container rule continued, the Commission has concluded that there is no immediate regulatory purpose to be served by going forward with this investigation. The Commission has, therefore, decided to discontinue all further proceedings herein. If any conference should seek to implement a "neutral container" rule of the type covered by this proceeding, the Commission can *sua sponte*, or upon application or complaint of an aggrieved party, institute a new proceeding to determine whether such rules are permitted under provisions of the Shipping Act and can be promulgated under the authorization given to conferences by their section 15 agreements.

THEREFORE, IT IS ORDERED, That proceedings in Dockets Nos. 76-34 and 76-36 will not be reopened and are hereby discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

Acting Chairman Leslie Kanuk, dissenting. I cannot agree with the majority's decision to discontinue these proceedings, because I believe that this action is inconsistent with the court's decision remanding this case to the Commission. (See my dissenting opinion to the Order on Remand, served January 27, 1981.) The court specifically directed the Commission to reconsider the rules in terms of their effect on competition. *Interpool Ltd. v. Federal Maritime Commission,* No. 79-1194, Slip Op. at 18 (D.C. Cir. Nov. 18, 1980). By not following this clear instruction, the Commission has failed to satisfy the terms of the remand.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-73

KELCO, DIVISION OF MERCK & COMPANY

v.

JOHNSON SCANSTAR

NOTICE

May 4, 1981

Notice is given that no exceptions have been filed to the March 31, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

NO. 80-73

KELCO, DIVISION OF MERCK & COMPANY

v.

JOHNSON SCANSTAR

Complainant found to have been overcharged $4,597.33 on two shipments, found to have consisted of propylene glycol alginate and xanthan gum, rather than of synthetic resins; and Johnson Scanstar, a joint service, found properly named as respondent.

Albert W. Risch for the complainant, Kelco, a division of Merck & Company.
David C. Nolan and *F. Conger Fawcett* for respondent, Johnson Scanstar.

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

Finalized May 4, 1981

The shortened procedure was followed. By complaint dated at Chicago, Illinois, September 30, 1980, filed October 1, 1980, and served on October 15, 1980, the complainant Kelco, a division of Merck & Company, a New Jersey corporation engaged in the manufacture and distribution of chemicals and chemical products, alleges that respondent, Johnson Scanstar, billed and collected inapplicable freight charges on two shipments made by the complainant from Los Angeles, California, to Liverpool, England, respectively, on September 22, 1978, and on October 26, 1978. The complainant alleges that it was overcharged a total of $4,597.33 in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act).

The shipments both were described on the bills of lading as synthetic resin, dry non-hazardous. The first shipments consisted of one 20-foot container S.T.C. (said to contain) 200 drums synthetic resins, dry non-hazardous, shipper's load & count. The second shipment consisted of two 40-foot containers S.T.C. 1090 drums synthetic resin, dry non-hazardous, shipper's load & count.

Both bill of lading #730302 dated September 22, 1978, and bill of lading #63041 dated October 26, 1978, are marked, "Freight Prepaid."

The first shipment weighed 23,800 pounds, or 10,796 kilograms, and measured 920 cubic feet or 26.052 cubic meters.

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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).

The second shipment weighed 94,704 pounds, or 42,974 kilograms, and measured 2,988 cubic feet or 84.612 cubic meters.

Both shipments were charged on the basis of metric tons of 1,000 kilograms per ton.

The basic freight rate charged was $294.25 per metric ton, applicable on Resins, Synthetic, Viz., NOS (Non-Hazardous), Value per 1000 kilos: over $2,755.75, as per 1st revised page 187-A of Pacific Coast European Conference Tariff No. FMC-16. Thus, basic freight charges on the first shipment for 10.796 metric tons were $3,176.72, and for the second shipment for 294.25 metric tons were $12,645.10.

Other charges of $8.45 per metric ton billed and collected are not in issue. They were $90.15 and $358.83, respectively, on the first and second shipments.

The sought basic freight rate is $208.75 per metric ton, applicable on Algin, in Fiber Drums, Viz., Propylene Glycol Alginate, item 581.9910 as per 8th revised page 89 of the conference's tariff. For the first shipment at this rate basic charges would be $2,253.67, resulting in an alleged overcharge of $923.05.

For the second shipment, the sought basic freight rate also is $208.75 per metric ton, applicable on Algin, in Fiber Drums, Viz., Propylene Glycol Alginate, again as per 8th revised page 89 of the tariff, for part of the second shipment; and for the other part of the second shipment, the same rate applicable on Xanthan Gum, in Fibre Drums, item 292.2090 as per 5th revised page 218 of the conference's tariff, the rate on the latter commodity subject to an expiration date of November 26, 1978. For the second shipment basic charges at the sought rate would be $8,970.82, resulting in an alleged overcharge of $3,674.28.

Total alleged overcharges for the two shipments are $4,597.33.

All of the above three tariff items are in the same "General Section" of the conference's tariff, providing commodity code numbers, and commodity descriptions and packagings. In other words, their location in the tariff is no reason to favor one of these tariff listings over another, as might be the case if these items were listed in different sections of a tariff.

The shipments were described in the bill of lading as synthetic resins. Also, the shipper's export declarations described the shipments as synthetic resins, dry non-hazardous. Packing lists also described the shipments as synthetic resin, and show that the containers were sealed. The second shipment on the *FALSTRIA* made on October 26, 1978, was the subject of a routine cargo policing inspection by the conference's neutral body, and no discrepancies were found. When the complainant's freight forwarder requested space for the two shipments, the commodities were said to be synthetic resin.

On August 2, 1979, Ocean Freight Consultants, Inc., apparently, presented two overcharge claims on behalf of the complainant to Gen-

eral Steamship Corporation, Ltd., acting as general agents for Johnson Scanstar. In reply to a follow-up letter dated December 5, 1979, the general agents advised on February 6, 1980, that they were unable to favorably consider the claims at that time, because of Rule 19.1 of the conference, which states that overcharge claims, based on errors in description unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier, will not be considered.

Of course, a shipper may yet prove his claim of misdescription and misrating of cargo by the filing of a complaint with the Commission, but the shipper bears a heavy burden of proof as to what actually was shipped. The complainant contends that the first shipment should have been described as kelcoloid 0 (propylene glycol alginate), and rated as algins viz: propylene glycol alginate. The complainant contends that the second shipment should have been described and rated partly as xanthan gum, and partly as kelcoloid 0 & HVF (propylene glycol alginate).

GENERAL DISCUSSION AND CONCLUSIONS

Besides the issue as the merits or proper description of the commodities shipped, there are other issues raised in response to the complaint. These other jurisdictional issues will be discussed first.

The complaint was filed more than two years after the first shipment moved. The complainant states that these "claims were received by the respondent within the legal two (2) year Statute of Limitation, * * *." Perhaps, Mr. A. W. Risch, the manager of distribution and sales service, who filed the complaint of Kelco, is aware of the statute of the Interstate Commerce Commission, which provides in part in its section 16(c) that for recovery of overcharges the statute may be tolled if claim for the overcharges has been *presented in writing to the carrier* within the statutory period of limitation, and said period shall be extended to include six months from the time notice in writing is given *by the carrier* to the claimant of disallowance of the claim.

However, the statute of limitations of the Federal Maritime Commission contains no similar provision, and a complaint under the Shipping Act for overcharges *must be filed with the Commission*, rather than with the carrier to toll the statute.

Nevertheless, the response of Johnson Scanstar admits (Exhibit No. 5) that a check for the freight funds for the first shipment herein was received in the custody of the carrier's agent on October 13, 1978. If one treats this date as the date on which the cause of action accrued, then the complaint was filed timely as to the first shipment. Johnson Scanstar states that the complainant was allowed this brief credit period for cash payment, only because it had a surety bond on file with the Pacific Coast European Conference, and the argument is made that this surety bond irrevocably bound the complainant and its surety to pay-

ment of the freight charges on September 22, 1978, the bill of lading date.

It is concluded and found since Johnson Scanstar, or the conference, did not go against the surety bond as of September 22, 1978, that the cause of action did not occur then, but in fact occurred when the check for the freight for the first shipment was received on October 13, 1978. Thus, the first shipment was not time barred.

In respondents' answering memorandum under the shortened procedure, they consent to the shortened procedure, make certain admissions and denials, and assert as an affirmative defense that the respondents are not the proper parties, and that the Commission lacks jurisdiction over them.

The pertinent two bills of lading at their tops list one of the contracting parties as Johnson Scan Star (in large print) and in small print, "Joint Service of REDERIAKTIEBOLAGET NORDSTJERNAN, JOHNSON LINE, STOCKHOLM, THE EAST ASIATIC COMPANY LTD. COPENHAGEN, BLUE STAR LINE LTD., LONDON." The bills of lading at the bottom show "Signed for the Master, Acting for the Owner," "By General Steamship Corporation, Ltd., as Agents Only."

The other contracting party shown is the shipper, Kelco Company, Clark, New Jersey, the complainant.

The shipments were made freight prepaid, and freight payments were made to the General Steamship Corporation Ltd., as agents only.

The complaint listed Johnson Scanstar as the single respondent, and it was served on the General Steamship Corporation, Ltd., 400 California Street, San Francisco, California, as agent for the respondent.

In the answering memorandum, it is stated that the response is made *by Johnson Scanstar, the trade name for a joint service of three common carriers by water in the U.S. foreign commerce*, and by Johnson Scanstar (North America), a partnership consisting of Axel Johnson *Corporation*, the East Asiatic Co., *Inc.*, and the Blue Star Line, *Inc.* (emphasis supplied).

The three common carriers by water listed on the pertinent bills of lading following "Johnson Scanstar Joint Service of" are the Johnson *Line*, the East Asiatic Company, *Ltd.*, and the Blue Star Line, *Ltd.* (emphasis supplied).

The respondents (including Johnson Scanstar, the joint service) who have responded to the complaint state that they are not common carriers by water in the U.S. foreign commerce within the meaning of the Shipping Act.

Respondents state that "Johnson Scanstar" is the trade name for a joint service operated by three common carriers by water in the U.S. foreign commerce pursuant to Federal Maritime Agreement No. 9973, namely, Blue Star Line, Ltd., of the United Kingdom, the East Asiatic

Company, Ltd., of Denmark, and Rederiaktiebolaget Nordstjernan (Johnson Line) of Sweden. The Commission's records, Approved Conference, Rate, Interconference, Pooling and Joint Service Agreements, September 1, 1980, lists Johnson Scanstar (J/S) as having the address of P. O. Box 7494 S-103 92 Stockholm, Sweden.

Insofar as the response is made by Johnson Scanstar (North America) and by its partnership members, these are not proper respondents herein, inasmuch as neither this partnership nor any of its partners own, operate, or control any vessels, have any tariffs on file, or otherwise act as common carriers or persons subject to the Shipping Act.

Johnson Scanstar (the joint service), located in Stockholm, through its agent, General Steamship Corporation, Ltd., located in San Francisco, is a common carrier subject to the Shipping Act.

The shipping contracts here in issue, the bills of lading, listed Johnson Scanstar Joint Service of ________________ as the common-carrier-by-water party to the contract.

While the bills of lading list the vessels *MV-MEONIA* and *MV-FALSTRIA*, respectively, for the first and second shipments, there is no designation on the bills of lading of which underlying carrier of the three may have owned or used these vessels in this joint service.

There was and is no duty on the complainant to ascertain whether Johnson Scanstar (located in Sweden) was or is a corporation, partnership, or other type of entity sanctioned by the Swedish or other law. Suffice it was that complainant dealt with and paid the freight charges to the agent for Johnson Scanstar.

Even the respondents show how questionable their own argument is, in that they first listed on November 10, 1980, in the original answering memorandum, Blue Star Line, Ltd., as the owner and operator of the vessels *MEONIA* and *FALSTRIA*, and Blue Star Line, Ltd., as the signatory member of the Pacific Coast European Conference which issued on behalf of the members the tariff in issue. As of November 21, 1980, by letter amending their answering memorandum under the shortened procedure, the respondents state that the owner and operator of the two vessels above is the East Asiatic Company, Ltd., rather than Blue Star Line, Ltd.

The respondents cite the decision in Docket No. 76-25, *Trane Co. v. South African Marine*, 19 F.M.C. 374 (November 4, 1976), in which it was held that a complaint which fails to name as respondent a common carrier by water or other person subject to the Act, or to allege violation of section 18(b)(3) of the Act by a common carrier by water or conference of such carriers, is jurisdictionally defective and must be dismissed.

The present case has features which distinguish it from the case cited above. In the cited case, no common carrier was named as respondent, but only the general agent of three common carriers. The present

complaint differs in that the agent was not named respondent, and the respondent named as Johnson Scanstar, a joint service of three common carriers.

Furthermore, the complainant had no reasonable means of ascertaining which of the three underlying carriers, providing the Johnson Scanstar joint service, actually owned and operated the ships used.

It is concluded and found that, in effect, Johnson Scanstar, as a joint service, itself is a common carrier by water in the U.S. foreign commerce and was named properly as respondent for the alleged violation of section 18(b)(3) of the Act.

The joint service agreement of Johnson Scanstar (Exhibit 2 of respondent's answering memorandum) shows that the three parties agreed to operate as a group so as to insure uniformity of rates for the service, that the joint service normally would have only one vote when belonging to any conference, that the three parties would have common agents in all areas, that the three parties would share profits and losses from their operations in the joint service, and that the parties might use a uniform bill of lading, among other provisions. All of these provisions in the joint service agreement lead to the conclusion that these three parties to the joint service agreement collectively were acting as one common carrier through their joint service. Thus, the conclusion above seems proper that the complaint naming Johnson Scanstar as respondent named a common carrier by water in the U.S. foreign commerce. The complaint in the present proceeding named a common carrier, rather than only as agent, as did the complaint in the cited *Trane Co.* case.

Turning to the merits of the proceeding, the issue is whether the complainant has met its heavy burden of proof under the circumstances. The bills of lading, export declarations, packing lists and freight forwarder's requests for space, all described the commodities shipped as synthetic resins. The complainant's burden is to counter this evidence.

Long after the fact of shipment, the complainant now advises that what it advised the carrier and what it advised the U.S. Government in the export declarations was false.

The complainant now offers two invoices addressed to a company in Belgium, attachments Nos. 3 and 10 to the complaint, which described the one shipment of 200 drums as kelcoloid 0, and the second shipment of 1,090 drums as Kelzan M. Keltrol, Kelcoloid 0, Kelcoloid HVF, Keltrol F, and Kelzan.

The complainant also offers some of its product literature of unspecified date, and a page from an unspecified edition of a chemical dictionary.

The complainant states that Kelcoloid 0 (first shipment) as per its attachment No. 5 is an algin or alginate, and as per the chemical dictionary is propylene glycol alginate, that alginates are naturally

occurring carbohydrate high polymers, source of the most abundant source of natural resins found in vegetable gums such as sea-weed, Irish moss, kelp and other vegetables like cabbage, rutabagas and cauliflower, and that natural algins, natural alginates or natural resins, these cannot be classified as synthetic resins.

It is hard to believe that the products shipped were natural, when they were manufactured by the complainant and valued at over $2,755.75 per 1,000 kilograms.

Even though concluding that the products shipped were not natural, and were manufactured or synthetic, that does not preclude finding that they were xanthan gum (part of the second shipment) and algin, viz., propylene glycol alginate (part of the second shipment), and all of the first shipment).

The question remains whether they were synthetic resins, or algin and xanthan gum.

The respondents contend that the complainant has not met its burden of proof.

The proper test is does the evidence show what actually moved. What actually moved was propylene glycol alginate, and xanthan gum, and there were tariff items which specifically listed these commodities. These specific tariff items were applicable on the shipments herein; first, because these tariff items more specifically described these commodities than did the tariff item which was charged, namely synthetic resin, and for the second reason that where two items in a tariff cover the same commodity, generally the shipper is entitled, other things being equal, to the tariff item providing the lower rate and charge.

The Commission's Office of Environmental Analysis has examined the complaint in this proceeding, and has determined that section 547.4(a)(22) of the Commission's "Procedure for Environmental Analysis" applies; and has determined further that "No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket."

It is ultimately concluded and found that the complainant was overcharged $4,597.33 on the two shipments herein; and that Johnson Scanstar, the joint service, was named properly as respondent.

(S) CHARLES E. MORGAN
Administrative Law Judge

Washington, D. C.
March 31, 1981

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 748

APPLICATION OF WATERMAN STEAMSHIP CORPORATION FOR THE BENEFIT OF STOP-SHOCK, INC.

NOTICE

May 4, 1981

Notice is given that no exceptions were filed to the March 31, 1981 initial decision on remand in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the initial decision on remand has become administratively final.

Applicant shall waive charges, publish and file with the Secretary a tariff notice, and notify the Commission of its compliance in the time and manner required by the initial decision served November 5, 1981.

(S) JOSEPH C. POLKING
Acting Secretary

SPECIAL DOCKET NO. 748
APPLICATION OF WATERMAN STEAMSHIP CORPORATION FOR THE BENEFIT OF STOP-SHOCK, INC.

Upon remand, initial decision to grant application for permission to waive collection of a portion of freight charged in the amount of $20,784.75 affirmed.

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

Finalized May 4, 1981

By its Order served February 25, 1981,[2] the Commission expressed concern over two matters that were determined as requiring clarification before approval can be granted to the requested waiver of freight charges in this proceeding. First, the Commission seeks a development of the record regarding the agreement entered into between the applicant and Stop-Shock, Inc., and the intent of the parties to exclude the port congestion surcharge. In that regard, the Order states: "Mere absence of mention of the surcharge in the telex agreement does not alone indicate that the parties had agreed not to apply it." And finally, the Commission is concerned with the type of transportation factors that might justify the applicability of a port congestion surcharge to some commodities and not to others.

Under the circumstances, the applicant was provided an opportunity to develop the record in the areas as discussed in the Order by the undersigned.[3] In response to that opportunity, Waterman submitted an affidavit of Mr. Charles G. Boyle, its Vice President-Export Cargo Mid East Service, who was personally familiar with the facts surrounding the booking of the shipment at issue since he computed the rate quoted to the shipper.[4]

In order to place the concern of the Commission in perspective a brief recitation of the facts is appropriate. The initial decision stated:

> On March 11, 1980, Waterman's Dallas office communicated an upcoming movement of 1850 drums of liquid fabric softener, from Houston to Port Sudan, to its New York office and solicited interest and possible rates. On March 18 the New

[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] *Order Remanding Initial Decision.*

[3] Order Upon Remand served March 3, 1981.

[4] The affidavit was submitted on March 25, 1981.

York office informed its Dallas office "AGREEABLE OFFER RATE DLRS 140.00 A TON W/M PLUS APPLICABLE BFS." On April 15 Waterman's Dallas office confirmed the booking of 1850 drums of fabric softener at $140 W/M plus bunker fuel surcharge (BFS). The 1850 drums were delivered to Waterman's loading berth between April 21 and May 8. Shipment was made on May 16, 1980, aboard the *George Whyte V/1.* Pursuant to Waterman's tariff (Freight Tariff 18-C from Atlantic and Gulf Ports to Gulf of Suez, Gulf of Aqaba, Red Sea and Gulf of Aden and to Points in Iraq via Aqaba, Jordan) cargo delivered to the vessel's loading berth shall be assessed the rate in effect at the time of delivery (Rule 3, 2nd Rev. p 13). There was also a port congestion surcharge of 30% to Port Sudan in effect in Waterman's tariff at the time of delivery (69th Rev. p. 31).

Although Waterman intended to exclude the port congestion surcharge, and its offer was based on imposing only the bunker fuel surcharge Waterman inadvertently filed a rate of "$140 W/M PLUS SURCHARGES" on April 17 (April 17, 1980 telex and 88th Rev. p. 73). Surcharges without further qualification include the 30% port congestion surcharge to Port Sudan. On May 22, 1980, Waterman filed a corrected tariff on fabric softener excepting the item from Rule 190 the congestion surcharge (90th Rev. p. 73).

The shipper, Stop-Shock, Inc., by check dated June 18, 1980, paid Waterman $80,405.40 after having deducted the amount invoiced for the port congestion surcharge.

Waterman's original invoice covering the shipment shows that it was erroneously rated: the 101 dispensing units were assessed the fabric softener rate when they should have been assessed the General Cargo rate plus all applicable surcharges. A bunker surcharge of $22.50 was in effect at the time of shipment of 671 of the total 1,850 drums, not the $20 invoiced. As a result Waterman seeks a waiver in the amount of $20,784.75 representing only the port congestion charges erroneously applied. [Footnote reference omitted.)

Based upon consideration of this evidence, the initial decision provided for a granting of the waiver sought. Although the initial decision was silent on the point, the undersigned was aware of the booking practices of Waterman where surcharges are sometimes included within the base rate even though explicit reference thereto is absent from the booking contract. *U.S. Dept. of Agriculture v. Waterman S.S. Corp.*, 20 F.M.C. 645, 660 (1978). And the affidavit makes clear that the practice continues. The affidavit discloses that it was the definite intent of Waterman to include the 30% port congestion surcharge in the quoted rate of $140.00 a ton W/M.

Mr. Boyle's affidavit states:

In March of 1980, I received an inquiry from Waterman's Dallas, Texas Sales Office requesting a rate for a movement of 1850 drums of liquid fabric softener from Houston to Port Sudan. There was no rate for liquid fabric softener in Waterman's tariff 18-C at the time of this rate request. Accordingly, I constructed a fabric softener rate by comparison to analogous commodities and utilizing my experience gained over many years in the shipping business.

Since our Dallas Sales Office advised that Stop-Shock was a new shipper and desired the lowest possible rate for its movement, I thought it preferable from a business viewpoint to include the congestion surcharge in the basic rate quoted rather than quote the lower base rate plus the congestion surcharge, i.e., $108.00 plus $32.00. I saw no reason to include the bunker surcharge in the basic rate because bunker surcharges are contained in most tariffs and are accepted by shippers and consignees as a modern day fact-of-life.

I advised our Dallas Sales Office of the rate I computed for Stop-Shock fabric softener movement via my March 18, 1980 telex (Enclosure 6 to September 10, 1980 Special Docket Application). As will be noted, I requested that our Sales Office secure the movement by offering a rate of "DLRS 140.00 A TON W/M PLUS APPLICABLE BFS,' which rate factored in and included the applicable 30% Port Sudan congestion surcharge.

On April 15, 1980, our Dallas Sales Office telexed me (Enclosure 7, September 10, 1980 Application) that the rate quoted in my March 18, 1980 telex had been accepted and that the Stop-Shock fabric softener booking had been made on that basis.

The initial FMC tariff filing herein (Enclosure 12 to September 10, 1981 Application), which was accomplished by one of my subordinates, was a mistake. As will be noted, the telex filing made no mention of the applicability of any surcharges thereby making the basic $140.00 W/M fabric softener rate subject to both the bunker and Port Sudan congestion surcharges assessed, respectively, by Tariff Rule 250 and Tariff Rule 190. This was not my intention, and I therefore requested our Legal Department to file the necessary Special Docket Application to prevent injustice to shipper Stop-Shock by virtue of its being required--unless this Application is granted--to pay freight charges containing double application of the congestion surcharge.

> I sincerely regret any confusion caused by this Application and hope my affidavit will provide the additional clarification requested for final and favorable action on this Special Docket Application request.

Based upon the submission of Waterman, the intent to exclude the port congestion surcharge is evident and the areas of concern expressed by the Commission have been clarified.

Accordingly, the application for permission to waive collection of a portion of the freight charges in the amount of $20,784.75 is granted under the terms and conditions contained in the initial decision of this Administrative Law Judge served November 5, 1980.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

Washington, D. C.
March 31, 1981

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-42

NEW YORK TERMINAL CONFERENCE

v.

JAPAN/KOREA-ATLANTIC AND GULF FREIGHT CONFERENCE

NOTICE

May 14, 1981

Notice is given that no appeal has been taken to the April 6, 1981 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

NO. 80-42

NEW YORK TERMINAL CONFERENCE

v.

JAPAN/KOREA-ATLANTIC AND GULF FREIGHT CONFERENCE

MOTION TO WITHDRAW COMPLAINT GRANTED PROCEEDING DISCONTINUED

Finalized May 14, 1981

Complainant New York Terminal Conference, pursuant to Rules 73 and 147 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §§ 502.73 and 502.147, has filed a Motion to Withdraw Complaint served March 6, 1981. The complaint against the Japan/Korea-Atlantic & Gulf Freight Conference (respondent) was served June 24, 1980, and alleges that respondent's tariff amendment of its Rule 114(A), which rescinds second and third period demurrage charges, results in violation of sections 15, 16 First, 17 and 18(b)(5) of the Shipping Act, 1916. The tariff amendment institutes a flat *per diem* rate on all import containers discharged by its carrier members in the import trade from ports in Japan and Korea to ports in the Atlantic and Gulf Coasts. Complainant seeks, among other things, that respondent cease and desist from the claimed violations of the Shipping Act, repeal of the tariff amendment, reparation for damages, and that the Commission establish future demurrage rates, charges, regulations and practices.

Petitions for leave to intervene were filed by and granted to the Port Authority of New York and New Jersey, Global Terminal and Container Services, Inc., and the Bureau of Investigation and Enforcement (Bureau). A prehearing conference was held on October 30, 1980, and procedural dates were established for the conduct of this proceeding.[1]

The motion, in addition to seeking approval of the withdrawal of the complaint, requests that it be "without prejudice to the rights of NYTC and its members to challenge at a later date in an appropriate proceeding before the Commission JKAG's tariff amendment which is the subject of this proceeding or any other tariff provision rescinding penal demurrage." The stated grounds for the relief sought are: (1) complainant's conviction that the amendment will "eventually destroy" consign-

[1] Prehearing Conference Report served October 31, 1980. See also Revised Procedural Schedule served January 12, 1981.

ees' incentive in prompt removal of cargo from the terminals; (2) the opinion that other steamship carriers and conferences would adopt similar rules which would lead to pier congestion and inefficient cargo handling throughout the Port of New York and New Jersey; (3) that during the period the amendment has been in effect,[2] the respondent alone has instituted the amendment so that complainant needs more time "to determine the effects of the . . . amendment." The motion concludes that under the circumstances and considering the benefit to all parties in avoiding the costs of litigation, the withdrawal is warranted.

The Bureau supports complainant's request. It points out that dismissals with prejudice are usually based upon factors of a clear record of delay, contumacious conduct by complainant, or a serious showing of willful default. Citing: *Consolidated Express, Inc. v. Sea-Land*, 19 F.M.C. 722, 724 (Complaint Dismissed, March 8, 1977), *aff'd* by Commission's Notice Not to Review, April 7, 1977. And the Bureau observes that the application of these considerations to the current record would not warrant a dismissal of the complaint with prejudice. The Bureau also observes that a dismissal of this nature would preclude complainant from later filing a complaint even if the current circumstances are altered with a resultant harm to the operations of the members of the conference.

The respondent filed an extensive reply[3] in opposition to the request that the withdrawal of the complaint be permitted "without prejudice." Basically it is argued that: (1) the motion is predicated upon the mere unsupported predictions of complainant's attorneys; (2) the motion is predicated upon allegations set forth in a sworn complaint which have since been shown to be utterly false and untrue; (3) contrary to complainant's contentions, there is no single or "historical" method of assessing demurrage at the Port of New York/ New Jersey; (4) contrary to complainant's contentions, review of documents produced by Maher Terminals, Inc., Global Terminals and Universal Maritime Services Corporation in response to discovery in this proceeding demonstrates respondent's tariff rule has produced no ill effects upon complainant, its members or the shipping public; (5) contrary to complainant's claim, respondent's rule does not encourage consignees to leave

[2] Complainant states that although JKAG's tariff amendment was initially adopted, effective March 21, 1980, various orders in FMC Docket 79-86 caused its status to be uncertain until August 4, 1980, when JKAG reinstated the identical tariff amendment. It concludes that the amendment has been in effect from August 4, 1980, to date--a period of approximately seven months. Respondent, on the other hand, claims the tariff rule has been in force not for just seven months, but for over a year since March 21, 1980, when it was incorporated into respondent's tariff. It also points out that the complaint itself was filed on June 10, 1980-over nine months ago.

[3] Respondent's request for an extension of time to file a reply until March 30 was unopposed and granted. The reply (14 pages) includes an affidavit of Mr. Robert D. Grey, Chairman of the Japan/ Korea--Atlantic and Gulf Freight Conference (17 pages) and Appendices A-G (47 pages).

their containers on terminal property for extended periods of time; (6) contrary to complainant's claim, the number of average days a container was on demurrage under the tariffs of other carriers at Maher's terminal did not decline in relation to the number under respondent's tariff rule; and (7) contrary to complainant's claim, it is not being deprived of substantial revenues from demurrage it would have received had respondent's tariff not been amended. The respondent concludes that it has been put to "considerable inconvenience and costs in legal fees and time expended by the Conference office" and that "it is quite evident that had the matter gone to trial, complainant would have been totally unable to show any ill effect from respondent's tariff rule."

It is evident from the arguments submitted by respondent that it views its opportunity to reply to the motion as a vehicle to evaluate existing discovery, draw conclusions therefrom, and in effect, say to the Commission the complainant should or would lose its case if the proceeding went to oral hearing. This may be so but prior to an evaluation of this nature it would seem, at the very least, that the complainant and intervenors might want a word or two themselves. In any event, it would be an unnecessary exercise and clearly inappropriate to appraise the record at this stage and draw conclusions therefrom.[4] A more appropriate consideration of the opposition to the motion should focus upon the arguments of respondent concerning the time, energy and expense incurred in defense against the complaint and whether a legitimate reason has been presented for complainant's need of more time to evaluate the effect of the amendment.

In general, the courts have exercised the power of dismissal of actions (a similar effect of dismissing this complaint with prejudice) with restraint and have found dismissal appropriate "only on the face of a clear record of delay or contumacious conduct by the plaintiff." *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967). Also when considering a dismissal without prejudice, the court bears in mind the interests of the party to be adversely affected, for it is that party's position which should be protected. 9 Wright & Miller, *Federal Practice & Procedure: Civil*, §§ 2362, 2364, at 149, 165 (1971). Furthermore, in order to succeed there should be a showing that there exists some plain legal prejudice "other than the mere prospect of a second law suit." *Holiday Queen Land Corp. v. Baker*, 489 F.2d 1031, 1032 (5th Cir. 1974).

Applying these principles to the arguments raised by respondent requires the approval of the withdrawal of the complaint without prejudice. First, the Bureau is correct that there is no clear record of

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[4] Curiously, after its lengthy treatment of the material, respondent observes: "While we believe that this reply should stand independent of this particular data, the analysis which is made in reliance upon it is indicative of the utter frivolity of complainant's claims."

delay, contumacious conduct by complainant, or a serious showing of willful default. *Consolidated Express, supra*. Second, the concern of the members of the complainant conference that other operators might institute the same action cannot be prematurely invalidated. Certainly a fair reading of the petitions to intervene filed on behalf of the Port Authority of New York and New Jersey, Global Terminal and Container Services, Inc., and the Bureau attest to apprehension of those interests to the imposition of the tariff amendment. And basically all complainant is saying is that the evidence at this stage is insufficient to prove its case since the facts have not developed as anticipated. That circumstance should not operate in a fashion to deny complainant an opportunity to seek recourse at a future time if it may be necessary to pursue its rights. Third, admittedly delay and expenses have been incurred by the respondent, but in balancing that with a denial of complainant's future recourse to this Commission if events dictate, then the balance clearly weighs in favor of the complainant.

Accordingly, the Motion To Withdraw Complaint is granted.

IT IS ORDERED, That the complaint in this proceeding is hereby withdrawn without prejudice;

IT IS FURTHER ORDERED, That the proceeding is discontinued.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

April 6, 1981

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-23
GULF-UNITED KINGDOM FREIGHT CONFERENCE
(AGREEMENT NO. 161-31)

DISCONTINUANCE OF PROCEEDING

May 14, 1981

This proceeding was instituted by order of the Commission served March 23, 1981, to determine the approvability under section 15 of the Shipping Act, 1916 of Agreement No. 161-31. Proponents subsequently have withdrawn the agreement in question and have moved for discontinuance of this proceeding.

Agreement 161-31 having been withdrawn, nothing remains to be litigated in this proceeding. The motion for discontinuance therefore is granted.

By the Commission.*

(S) JOSEPH POLKING
Acting Secretary

* *Commissioner Richard J. Daschbach, concurring.* I concur with the Commission's Order to Discontinue and applaud the Proponents' wisdom in withdrawing their agreement. The Commission's March 23, 1981 Order of Investigation and Hearing would have required the Proponents to address issues of questionable relevance to the instant agreement in excessive detail and at great cost and burden to themselves and the Commission itself. In the future we must temper our zeal to require proponents of section 15 agreements to describe every conceivable competitive contingency arising from their proposed activities with an awareness of the expense such far-reaching adjudication imposes upon all participants.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-12

SPADA DISTRIBUTING COMPANY, INC.

v.

MATSON NAVIGATION COMPANY

NOTICE

May 26, 1981

Notice is given that no exceptions have been filed to the April 15, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

NO. 81-12

SPADA DISTRIBUTING CO., INC.

v.

MATSON NAVIGATION CO.

Complaint dismissed for failure to establish violations alleged.

George Spada for complainant.

Gary E. Koechler for respondent.

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

Finalized May 26, 1981

Spada Distributing Company, Incorporated, the complainant, is "a grower, shipper, distributor and exporter of agricultural commodities." The respondent, Matson Navigation Company, is a common carrier by water engaged in transportation of water between the West Coast of the United States and the State of Hawaii. The complaint filed by Spada accuses Matson of violating sections 16 First and 18(a) of the Shipping Act (46 U.S.C. 815, 817(a)). In paragraph VII of the complaint Spada says, "Complainant shall further consent to a shortened procedure according to section 502.181, Subpart K of the Shipping Act."[2] Rule 182 requires that complaints invoking the "shortened procedure" provided for in Subpart K shall have attached "a memorandum of facts and arguments separately stated" upon which the complainant relies. Spada's complaint was not accompanied by the memorandum required by Rule 182. Rule 183 provides that if the respondent to the complaint consents to the shortened procedure, it must submit an answering memorandum within 25 days of the date of service stamped on the complaint. Matson consented to the shortened procedure and timely filed its answering memorandum of facts and arguments. Finally, Rule 184 of Subpart K allows a complainant to file a reply to the respondent's answering memorandum. The time within which complainant could have filed a reply to Matson's answering memorandum has ex-

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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] Spada is obviously referring to Subpart K of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.181, et seq.) not Subpart K of the Shipping Act.

pired and to date Spada has not submitted any further pleadings in the case.

The complainant bears the burden of proof here. *Western Publishing Co. v. Hapag Lloyd*, FMC Docket No. 283 (I) served March 30, 1972 (12 S.R.R. 1065); *Abbott Laboratories v. United States Lines, Inc.*, 18 F.M.C. 262 (1975). Spada's case consists solely of the unsupported allegations of its complaint.[3]

In its complaint, Spada alleges that it loaded "350 100 # (total weight 35,000 pounds net weight) bags of fresh potatoes" into two containers (Nos. 80014 and 85020) at its plant in Pasco, Washington. The containers were then trucked to Oakland, California, for loading aboard Matson's ship, *The Matsonia*. The containers were consigned to State French Fry in Honolulu on a freight collect basis. The containers were loaded aboard *The Matsonia* on September 29, 1980. The complainant then alleges:

> Freight charges were paid by State French Fry in Honolulu in the amount of $3,367.63. The overcharge was then deducted by State French Fry from the remittance made to complainant Spada.

Presumably the amount of "overcharges" deducted by State French Fry was $1,820.43 since this is the amount claimed by Spada as reparation. It would appear that the gravamen of Spada's complaint is to be found in the following statement made in paragraph III:

> That complainant did book this movement with Matson's office in Portland, Oregon and respondent did not inform complainant at any time of the exorbitant N.O.S. rates it secretly intended to assess this shipment. That complainant could have easily made arrangements for off-dock stuffing of all 350 100 # bags into one container for the total sum of $100.00 and returned it to the Oakland CY for a total sum of $50.00 in order that charges could be assessed on a CY-CY basis. Complainant also alleges that respondent had never informed complainant at any time of this N.O.S. rate of $8.91 plus $.54 per hundred-weight of surcharges (Item 2000 of Tariff 14G) being in or having gone into effect.
>
> Complainant further alleges that respondent has not charged this rate to any other shippers (on full containerloads) in at least several years. The normal tariff rate of $1,387.00 per vanload (35,000 pounds) is under Tariff 14G Item number 2066.

On the basis of these allegations Spada charges Matson with violations of sections 16 First and 18(a) of the Shipping Act.

[3] Having itself invoked the procedures of Subpart K Spada cannot now be heard to argue unfamiliarity with those procedures. Spada's continued silence in the case leads to the quite reasonable assumption that it in fact has no case to plead.

On the basis of the allegations contained in its complaint, it would seem that Spada's dispute with Matson centers on the proper application of Matson's Westbound Container Freight Tariff No. 14-G (FMC-F No. 172). The facts of the shipment in question as established by the documentary evidence submitted by Matson are as follows.

Spada tendered 35,350 lbs. of potatoes to Matson's Oakland container freight station (CFS) for movement on *Matsonia* voyage 182 which departed for Honolulu on September 26, 1980. Rule 1(e) of Tariff No. 14-G provides that "Rates from CFS include container loading at the Container Freight Station. . . ." Spada was rendered the CFS service pursuant to its own booking instructions.[4]

Tariff 14-G contains no commodity rate for the CFS movement of fresh potatoes, thus the Refrigerated Cargo N.O.S. rate (Item 2000) was applicable to Spada's shipment.[5] The N.O.S. rate of 891/cwt together with a Bunker Surcharge of 3.36% and a Mainland Wharfage charge of 3.25/1,000 kilograms all of which were applicable to Spada's shipment under the provisions of Tariff 14-G then in effect resulted in the correctly assessed freight charges of $3,367.63.

Under section 2 of the Intercoastal Shipping Act, 1933, and section 18(a) of the Shipping Act, Matson had no choice but to apply the relevant tariff provisions to Spada's shipment. See, e.g., *Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares*, 508 F. 2d 1116 (5th Cir., 1978). Spada has offered no evidence to support its allegation that Matson has violated section 16 First.

The complainant Spada Distributing Company Incorporated having failed to establish the violations alleged in its complaint against Matson Navigation Company, Inc., said complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

Washington, D. C.
April 15, 1981

[4] Item 2066, called by Spada the "normal tariff rate," is applicable only where the shipper tenders loaded containers to Matson at the container yard and the consignee accepts delivery at the container yard. It should be remembered that the shipper, not the carrier, selects the mode of service.

[5] Original page 24 of Tariff 14-G defines the CFS as "the physical facility where goods are received by MNC [Matson] for loading into containers." A "containeryard" is defined as "the place where (1) loaded containers are received or delivered as provided in this tariff and (2) MNC assembles, holds, or stores its containers or trailers."

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 949(I)

BRISTOL MYERS COMPANY

v.

SEATRAIN INTERNATIONAL, S.A.

PARTIAL ADOPTION OF DECISION OF SETTLEMENT OFFICER

May 27, 1981

The Commission has undertaken a review of Settlement Officer Aaron W. Reese's Decision dated January 29, 1981, awarding reparations without interest for Seatrain International, S.A.'s misrating of Bristol Myers Company's shipments of baby food.

Complainant alleged that Seatrain applied the correct tariff item for the cargo, but that it erroneously computed the freight charges on a measurement basis instead of a weight basis. In response, Seatrain indicated that it would have settled the claim directly with Complainant but for its 6-month tariff rule, Complainant having filed its overcharge claim on the seventh month.

The Settlement Officer awarded Complainant $1,672.32 in reparations. He did not grant interest on the award, however, noting (1) that Complainant waited 16 months after receiving Seatrain's denial of its claim before filing its complaint with the Commission; and (2) that Complainant did not request an award of interest.

Although the Commission agrees with the Settlement Officer's award of reparations, it finds that his decision not to award interest was erroneous. Payment of interest for the period Seatrain has held the excess charges paid by Complainant will not unjustly enrich Complainant. It will merely compensate Complainant for being deprived of the use of its money. As such, the Commission's award of interest is a compensatory rather than punitive measure. Moreover, the Commission will not decline to make whole an injured party merely because it failed to request award of interest in its complaint.

Interest shall be awarded on the Settlement Officer's grant of reparations, to be calculated at the rate of 12%, accruing from the date of payment of freight charges.

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

IT IS FURTHER ORDERED, That Seatrain International, S.A. pay Bristol Myers Company 12% interest on the award of reparations, accruing from the date of payment of freight charges; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
Acting Secretary

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* Commissioner James V. Day concurs in the award of reparation with interest but dissents from that portion of this Order which fixes the level of interest awarded at 12%. Commissioner Richard J. Daschbach did not participate.

INFORMAL DOCKET NO. 949(I)

BRISTOL MYERS COMPANY

v.

SEATRAIN INTERNATIONAL, S.A.

Decision of Settlement Officer Aaron W. Reese

Partially Adopted May 27, 1981

Reparation Awarded

By complaint filed with the Commission's Secretary August 12, 1980, Bristol Myers Company (Myers) seeks reparation in the amount of $2,437.27 for alleged overcharges on two shipments of baby food from New Orleans to Santo Domingo, D.R. The shipments moved on Seatrain International, S.A. (Seatrain) vessel WESER CARRIER under separate bills of lading dated July 26 and July 28, 1978. Ocean freight charges for the two shipments were paid by check dated August 30, 1978. The complaint was filed within two years after the cause of action accrued, as required by section 22, Shipping Act, 1916.

On April 2, 1979, Ocean Freight Consultants, Inc. submitted claims to Seatrain on behalf of Myers. Seatrain's denial, dated April 5, 1979, states:

> Overcharge claims must be presented to the carrier within 6 months from date of shipment. You may file a complaint with the Federal Maritime Commission, Washington D.C. 20573.

The shipment under Seatrain bill of lading number 18 03499/5 included 12 pallets described as "Foods Canned Milk Base," weighing 14,060 pounds and measuring 560 cubic feet. The ocean freight charges for this portion of the shipment were computed at the rate of $102.50/40′. This resulted in a charge of $1,435.00. Myers contends that the applicable tariff provides that freight charges for this commodity are to be based upon weight rather than measurement. Myers' contention is correct.

The applicable tariff is the United States Atlantic & Gulf - Santo Domingo Conference Freight Tariff F.M.C. No. 1. Item 257, 36th revised page 281, effective April 1, 1978, provides that the rate basis for the commodity shipped by Myers is weight. Accordingly, the freight charge should have been computed on the basis of $102.50/2,000 pounds. The correct freight charge for this portion of the shipment should have been $720.58. In addition to the overcharge of $714.42, computation of charges based upon measurement rather than weight

resulted in an additional overcharge of $50.53 for bunker and terminal surcharges.

The shipment under Seatrain bill of lading number 18 03500/6 consisted of one container containing infants canned food weighing 40,000 pounds. The freight charges again were erroneously computed on the basis of measurement instead of weight, resulting in a charge for the infants food portion of the shipment, excluding surcharges, of $2936.63. The proper charge, excluding surcharges, pursuant to item 257 of the applicable tariff, should have been $1305.00 computed on the basis of $65.25/2000 pounds, the volume rate provided for by item 257 of the tariff for a minimum shipment of 40,000 pounds. In addition, the application of a rate different than the rate clearly provided for by the applicable tariff, resulted in an overcharge of $40.19 for bunker and terminal surcharges. Seatrain, in computing the total freight charges for the shipment under bill of lading number 18 03500/6, made an error in addition resulting in an additional overcharge of $.50.

The overcharges complained of by Myers do not involve any dispute as to weight, measurement or commodity description. They were the result of the failure of Seatrain to apply the correct rate basis as clearly set forth in the applicable tariff, as well as an error in addition.

Seatrain, in its response to the complaint filed by Joseph J. Graul, Manager Audits and Tariffs, agrees that overcharges were assessed as claimed by Myers, and further stated:

> We would further state that except for the six months tariff rule, we would have settled this claim directly with the claimant.

It is well settled that a six month tariff rule cannot bar the recovery of a valid claim when a complaint is filed with the Commission within two years after the cause of action accrued.

Accordingly, Bristol Myers company is entitled to reparation in the amount of $2,437.27, computed as follows:

B/L No. 18 03499/5

Overcharge, ocean freight	-	$714.42
Overcharge on surcharges	-	50.53
Total overcharge		$764.95

B/L No. 18 03500/6

Overcharge, ocean freight	-	$1,631.63
Overcharge on surcharges	-	40.19
Error in addition of charges	-	.50
Total overcharge		$1,672.32

On January 5, 1981, the Commission repealed its May 14, 1980 policy statement entitled "Interest on Awards of Reparation." The Commission explained its action as follows:

> Although the policy statement was not intended to establish a binding norm of awarding 12% interest in all instances, it has been repealed to underscore the fact that interest due on reparation awards is evaluated on a flexible, case-by-case basis.

The freight charges on the shipments at issue in this proceeding were paid on August 30, 1978. Seven months later Myers submitted a claim to Seatrain requesting a refund of the overcharges. Seatrain promptly denied the claim, the denial based solely upon the six months tariff rule, and advised that a complaint could be filed with the Commission. Seatrain's denial was dated April 5, 1979. It was not until August 12, 1980, approximately sixteen months later, that the complaint was filed with the Commission. To award interest for a period in excess of two years, from August 30, 1970 to the date the reparation being awarded herein is paid, is not warranted. There is no justification for rewarding Myers for its dilatoriness in prosecuting this claim. It is apparent that Seatrain would have settled the claim except for the six months tariff rule. Even though such rules cannot be invoked to bar recovery of valid claims when a complaint is filed with the Commission within two years after the cause of action accrued, as long as such rules are allowed to remain in filed carrier and conference tariffs carriers are bound to adhere to the terms of the tariff as filed, *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 322 (1974).

Another factor relevant to the issue of interest is that interest was not requested in the complaint.

Accordingly, no interest is awarded. In the event, however, Seatrain should unduly delay making the reparation awarded herein, the payment of interest would be justified. Therefore, it is ordered that if reparation in the amount of $2,437.27 is not paid within thirty (30) days of the date of service of this decision Myers shall be entitled to interest at the rate of 12% per annum from the date of service to date of payment.

(S) AARON W. REESE
Settlement Officer

January 29, 1981

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 771

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE BENEFIT OF TEXAS TURBO JET, INC.

ORDER ON REMAND

May 27, 1981

On February 19, 1981, the Commission served a notice of its determination to review the Initial Decision of Administrative Law Judge William Beasley Harris issued in this proceeding. That decision granted Lykes Bros. Steamship Co., Inc. (Lykes) permission to refund a portion of the freight charges collected from Texas Turbo Jet, Inc. (TTJ), on a shipment of aircraft engines carried from Leghorn, Italy, to Houston, Texas.

The relevant facts as developed from Lykes' application for permission to refund[1] and supporting documents are as follows: Lykes operates both an all-water port-to-port service from Italian and other Mediterranean ports to United States South Atlantic and Gulf ports under the tariff of the Med-Gulf Conference, as well as an individual intermodal joint water-rail service[2] from Mediterranean and Black Sea ports to United States Railroad Destination Terminals in several states including Texas.

In May 1980, Lykes' Dallas sales office entered negotiations with TTJ for the transportation of aircraft engines from Leghorn to Dallas. Subsequently, the following internal telex was sent to Lykes' New Orleans personnel:

> DLS to NOLA OPR
> Please relay the flwg msg. via teletype . . .
> We will quote the following rate for aircraft engines
> microbridge from Italy to Dallas.
> Aircraft engines, $3600 lump sum/40 ft. cntr.
> Bunker surcharge, 320 lump sum total 3920
> Our agents in Leghorn are Coe & Clerici SPA . . .

[1] The application was filed under section 18(b)(3) of the Shipping Act, 1916 and under Rule 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92(a)).

[2] Lykes Bros. Steamship Co., Inc. Import Joint Freight Tariff No. LYKU - ICC #310, FMC No. 99.

Attn. Peter Meneschi
Pls advise us of next shipment as these rates will
only be filed upon receiving a firm booking.

By affidavit Lykes states that this arrangement was made known to TTJ.

On July 9, 1980 the shipment was delivered to the carrier, as evidenced by the bill of lading. The application further states that although "a formal commitment was extended to TTJ," Lykes' Sales Department and Mediterranean Traffic Department failed to communicate any details of the offer to Lykes' Mediterranean representative in Genoa. When the shipper, through its agent, booked the cargo at Leghorn, Lykes' Mediterranean office did not notify the New Orleans Traffic Department of the booking so that "the agreed upon thru rate was not filed in a timely fashion in Lykes' microbridge tariff."

Lykes' agent in Leghorn booked the shipment for a port-to-port Leghorn/Houston, all-water movement under the Med-Gulf Conference tariff at the rate of $192.00 W/M, plus a Port and Terminal Service Charge, Open Top Container Charge, Bunker Adjustment Factor and Congestion Surcharge. Moreover, in lieu of two 40-foot containers which were specified in the internal telex quoted above, Lykes placed the cargo in four 20-foot containers. This further increased the cost of transportation to a total of $29,760.53.[3] In order to obtain immediate delivery of the cargo, TTJ paid the charges in full and filed a complaint with Lykes requesting an explanation for the overcharge.

In his Initial Decision, the Presiding Officer, although noting some questions that remained unanswered, concluded that the application met the requirements of section 18(b)(3) of the Shipping Act, 1916, and that there was "an error in the tariff due to inadvertence in failing to file a new tariff which resulted in the necessity for refund."[4]

DISCUSSION

The Commission is unable to determine on this record whether the requirements of the first proviso clause of section 18(b)(3) of the Act have been met and whether the relief contemplated by that section may be granted.

The application, Lykes' bill of lading, and the affidavit supporting the application confirm that TTJ delivered the cargo to Lykes' agents in

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[3] Lykes' invoice to TTJ shows charges in the amount of $29,818.07, or a difference of $57.54. This difference is apparently attributable to wharfage and is not at issue here.

[4] The Presiding Officer questioned whether delivery of the shipment was the notice to Lykes requested in the May 30, 1980 telex and whether TTJ advised its agent in Leghorn of the special rate agreed upon for this shipment. The Presiding Officer also mentioned "other issues raised by reference to offer and acceptance and the implication of business practices."

Leghorn. It appears, however, that neither TTJ nor Lykes advised their agents in Leghorn of the special arrangements made for this shipment. Lykes maintains that the lack of notice of the firm booking and its failure to timely file the intended rate in its intermodal tariff were caused by a breakdown in communications between its home office in New Orleans and its Mediterranean representatives in Genoa. Thus, while Lykes affirms that it made the offer to TTJ to carry the shipment of aircraft engines to Dallas in two 40-foot containers at the aggregate rate of $3920, nothing in the record shows under what circumstances the offer was relayed to TTJ and whether TTJ notified Lykes of its acceptance before the date of the shipment.

Furthermore, although Lykes filed a tariff purporting to cover transportation to Dallas, the record contains no information on whether the cargo which the shipper picked up at Houston did in fact move to Dallas and if so, who assumed responsibility and costs of the inland transportation.

Finally, Lykes acknowledges that it placed the cargo in four 20-foot containers rather than the two 40-foot containers it promised TTJ. This raises the question of whether Lykes' use of containers which did not conform to the terms of the offer stated in the internal telex leaves this matter outside the coverage of section 18(b)(3).

Therefore, the proceeding is being remanded to the Presiding Officer for the purpose of further developing the record on these points, to wit:

(1) Whether the parties had in fact reached an agreement on the negotiated rate and, if so, the manner in which that arrangement was communicated and accepted by TTJ;

(2) Whether the shipment in question actually moved to Dallas, and if so, who arranged and paid for the inland transportation;

(3) Whether the inland transportation was provided by rail and/or motor carriers named as participants in Lykes' intermodal tariff and, if so, at what rates;

(4) Whether the substitution of four 20-foot containers for the two offered 40-foot containers was caused by an error of the type contemplated in section 18(b)(3) of the Shipping Act, 1916; and

(5) Whether (if it is ascertained that the parties had established an agreed rate for the shipment) the use of 20-foot containers for the shipment bars refund based on the new tariff filed with Lykes' application in this proceeding.

The Presiding Officer is directed to issue a supplemental decision addressing these issues and any other matters deemed relevant to the disposition of Lykes' application, such decision to be issued within 60 days from the date of service of this Order.

It is so ordered.

By the Commission.*

(S) JOSEPH C. POLKING
Acting Secretary

* Commissioner Peter N. Teige did not participate.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 987(I)

J. I. CASE - INTERNATIONAL DIVISION

v.

SOUTH AFRICAN MARINE CORP.

ORDER

June 5, 1981

The Commission determined to review the decision of Settlement Officer Donald F. Norris in which he denied the claim of J. I. Case International Division for freight overcharges allegedly collected by South African Marine Corp. on a shipment of four tractors from Charleston, South Carolina to Elizabeth, Republic of South Africa.

At the time of shipment, the applicable tariff [1] contained four different rates for various types of tractors.[2] Respondent rated the shipment at $85.75 per 40 cubic feet. Claimant contends that it should have been rated at $71.00 per 40 cubic feet, the rate payable on "Tractors, Farm Type." The Settlement Officer denied the claim on the basis that the proper rate depended on the "controlling use" to which the tractors were to be put and the "controlling use" could not be determined in this case.[3]

The shipment contained four tractors of the same type, weight and measurements. As shown on the manufacturer's leaflet, these tractors are clearly of a farm type rather than of a construction type. There is therefore no need to resort to a "controlling use" inquiry. In any event, the principle is well established that where an ambiguity exists as to the nature of a product or where a product comes within two classifications the shipper is entitled to the lower of the two rates.[4] In this instance, the shipment should have been assessed the rate of $71.00 per 40 cubic feet provided for tractors of the farm type, and the collection

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[1] United States/South and East Africa Conference, South Bound Tariff No. 6, FMC No. 8.

[2] Item 5235 - Tractors, Farm Type - $71.00; Item 5240 - Tractors Garden $117.50; Item 5250 Tractors, Industrial, Towing or Warehouse & Parts N.O.S. - $157.25; Item 5260 Tractors, N.O.S. $85.25. Item 4310, which applies to Roadmaking, earthmoving or construction equipment also contains a rate of $85.25 for Tractors, N.O.S., Gasoline, Kerosene, or Diesel Powered.

[3] The Settlement Officer explained that the "controlling use" could only be determined after the consignee in Africa had marketed the four tractors.

[4] *United Nations Children's Fund v. Blue Sea Line,* 15 F.M.C. 206 (1971); see also *Coca-Cola Inc. v. Atchison, T. & S.F. Ry. Co.,* 608 F. 2d 213 (5th Cir. 1979); *Indiana Harbor Belt R.R. v. United States,* 510 F. 2d 664 (7th Cir. 1975), *cert. denied,* 422 U.S. 1045 (1975).

by South African Marine Corp. of freight charges based on the $85.25 rate applicable to Tractors N.O.S. violated section 18(b)(3) of the Shipping Act, 1916. Consequently, the decision of the Settlement Officer is reversed and J. I. Case International Division is awarded reparation from South African Marine Corp. in the amount of $1,735.13 plus twelve percent interest from the date of the payment of the freight charges.

It is so ordered.

By the Commission.*

(S) JOSEPH C. POLKING
Acting Secretary

* Commissioner Richard J. Daschbach did not participate and issues a separate opinion.

Commissioner Richard J. Daschbach's separate opinion:

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

INFORMAL DOCKET NO. 987(I)

J. I. CASE - INTERNATIONAL DIVISION

v.

SOUTH AFRICAN MARINE CORP.

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

Finalized June 5, 1981

Reparation Denied

By its complaint filed with the Commission during December 11, 1980, the J. I. Case - International Division (J. I. Case), through its registered practitioner agent, claims $1,735.13 of the South African Marine Corporation (Safmarine), this amount representing an overcharge arising from a shipment of four "model 2090 tractors" and their "rims and parts" transported in a Safmarine vessel from Charleston, South Carolina to Port Elizabeth, Republic of South Africa pursuant to a bill of lading dated August 23, 1979. Freight and charges were prepaid by J. I. Case. The cargo was consigned to J. I. Case (South Africa) Pty., Ltd. (Case South Africa), J. I. Case's agent describes his principal as a manufacturer of construction machinery. J. I. Case describes Case South Africa as ". . . a wholly owned subsidiary of J. I. Case Company. They are primarily concerned with the marketing of J. I. Case agricultural and construction equipment, although they do manufacture a few components for the units."

There is no dispute or question as to the commodity shipped, its weight, or its measurement. At issue is what rate should have been assessed the tractors and their parts. Safmarine rated the shipment at the rate of $85.75 per 40 cubic feet pursuant, probably, to tariff item No. 4310 applicable to road making, earthmoving or construction equipment, including "tractors, NOS," appearing in the United States/South and East Africa Conference's South Bound Freight Tariff No. 6, FMC No. 8. J. I. Case contends that the proper rating should have been $71 per 40 cubic feet in accordance with tariff item No. 5235 applicable to "TRACTORS, Farm Type, Wheeled, Self-Propelled or

[1] Both parties having consented to the informal procedure set forth in the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301 et seq.), this decision will become final unless the Commission elects to review it within 30 days of the date of service.

Mobile, Boxed or Unboxed."[2] Safmarine is in agreement, and is prepared to process payment given the agent's withdrawal of the complaint. The agent for J. I. Case has so requested. The Settlement Officer (S.O.) considers a request to permit a complainant to "withdraw" a case as tantamount to a request for its dismissal.

The circumstances in which a S.O. may dismiss a complaint are circumscribed by the Commission's decision in Dockets Nos. 78-2 and 78-3, *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation* v. *Atlanttrafik Express Service & Farrell Lines, Inc.*, Order on Appeal, 18 S.R.R. 1536a. There, the Commission established the following, a precedent by which the S.O. considers himself bound:

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

Here, the facts critical to the resolution of the dispute are ascertainable so that a dismissal pursuant to the doctrine cited and quoted above is inappropriate. Consequently, the Commission's directive in Informal Docket No. 372(I), *Yasutomo & Co. v. Y. S. Line*, Order on Review of Dismissal, March 30, 1977 (Unpublished) applies, i.e., the S.O. is obliged to discuss ". . . the question of whether settlement by payment

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[2] No specific violation of section 18(b)(3) of the Shipping Act, 1916, was alleged by complainant inasmuch as none is required with respect to "overcharge" claims. See 46 C.F.R. 502.304, Appendix A. However, a carrier's failure to apply the *correct* rate with respect to any particular shipment would be in violation of section 18(b)(3).

in full results in payment of applicable tariff rates under section 18(b)(3) of the Shipping Act . . . While settlement of litigation is to be encouraged, it is [the Commission's] responsibility to assure that such settlements in matters involving section 18(b)(3) do not result in payment of charges which would not otherwise be permitted . . . specific findings to this effect [must] be incorporated in the order of dismissal."

We turn now to the merits of the claim. The Conference's Tariff No. 6 is unambiguous to the extent that "tractors" may be assessed any of four rates dependent upon use. Under tariff item No. 4310, "Tractors, NOS, Gasoline, Kerosene or Diesel Powered . . . wheel or tracklaying" are accorded the same rate as other "road making, earthmoving or construction equipment" encompassed by that item if used in those capacities. The rate applied is the same as for "Tractors, NOS" under item No. 5260. The highest rated tractors are those intended for "industrial, towing or warehouse" use pursuant to item No. 5250. "Garden" tractors take a lower rate in accordance with item No. 5240. "Farm type" tractors take the lowest rate of all under item No. 5235.[3]

In theory at least, "[t]here is no better entrenched rule in the making of rates and ratings than the one that a commodity cannot lawfully be rated or classified according to the different uses to which it may be put." *Food Machinery Corp. v. Alton & SR.*, 269 I.C.C. 603, 606 (1948) citing *Eastern Clay Products, Inc. v. New York Central R. Co.* 243 I.C.C. 1 (1940). "However, the use for which a product is manufactured and sold can be most important factor in deciding the proper tariff classification of the product." *C.S.C. International v. Lykes Bros.*, 20 F.M.C. 552, 560, March 22, 1978. "When 'use' is a factor in deciding the proper designation of an article, it is the 'controlling use' that determines the nature and character of a shipment at the time tendered and the fact that an article may have other subordinate or secondary uses does not alter the nature of the product. See, *Continental Can Co. v. U.S.*, 272 F. 2d 312 (CA2, 1959)." *C.S.C. International*, 560, *supra*. As the S.0. views it, these are two of the three principles controlling resolution of the matter here. The third is that it is upon the complainant to ". . . set forth sufficient facts to prove with reasonable certainty and definiteness the validity of its claim by a preponderance of the evidence." Informal Docket No. 387(I) *Pan American Health Organization v. Moore-McCormack Lines, Inc.*, Report on Remand, slip decision, September 12, 1979.

At the time the tractors were tendered to Safmarine, neither the shipper nor the carrier seemed to have been concerned as to the

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[3] While not critical to the resolution of the matter here, the S.O. is compelled to observe that the Conference's tariff is lamentably lacking in precision in delineating usages. Most employed are more conceptual than descriptive in nature. A scale of tractor rates predicated upon dimensions, weight, horsepower, value, etc., would be far easier of application than the present scheme, and would obviate the possibility of those unjust discriminations which is the root and reason for the holdings in *Food Machinery Corp.* and *Eastern Clay Products, Inc., supra.*

"controlling use" to which the tractors might be put. This is evidenced by the invoices and the bill of lading both of which are silent on the point. In support of its contention that the tractors are "farm type," U. I. Case has submitted a sheet of what appears to be sales literature, and a copy of the export declaration. The former dwells in considerable detail on the technical features of 2090 tractors but is absolutely silent as to their utility. There is a picture of a 2090 tractor towing something, perhaps a harrow although the S.O. cannot be certain given the poor quality of the reproduction and the fact that the S.O. is nautically rather than agriculturally oriented. Whatever, the S.O. is willing to concede the point, that 2090 tractors can be usefully employed on farms and, conceivably, even in large "gardens", several acres in size. The export declaration provides us with the "Schedule B Commodity" number, 692.3335. That number applies to "Tractors, new or used, [of a specified horsepower] . . . whether or not suitable for agricultural use."[4] However, this description in no way assists in determing what the "controlling use" of 2090 tractors is. The probability is that 2090 tractors can be used in a number of ways.

At the time the cargo here was tendered to Safmarine, it was consigned to Case South Africa. The latter is ". . . primarily concerned with marketing J. I. Case agricultural and construction equipment." Only after Case South Africa had finished "marketing" the four tractors here might we know to what controlling use they had been put.

In conclusion, the S.O. is of the view that the J. I. Case has failed to prove its case ". . . by a preponderance of the evidence." Accordingly, reparation is denied. So ordered.

(S) DONALD F. NORRIS
Settlement Officer
Office of Informal Dockets

March 19, 1981

[4] As extracted from the *Statistical Classification of Domestic and Foreign Commodities Exported from the United States*, U.S. Department of Commerce, Bureau of the Census, Schedule B.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-86

NEWARK TRUCK INTERNATIONAL

v.

PRUDENTIAL LINES, INC.

NOTICE

June 8, 1981

Notice is given that no exceptions have been filed to the May 5, 1981 initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-86
NEWARK TRUCK INTERNATIONAL

v.

PRUDENTIAL LINES, INC.

Reparation granted for violation of section 18(b)(3).

Francis J. DeVito for complainant.

John F. McHugh for respondent.

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

Finalized June 8, 1981

Complainant, Newark Truck International, charges respondent, Prudential Lines, Inc., with a violation of section 18(b)(3) of the Shipping Act, 1916, due, it is alleged, to the misapplication of "heavy lift charges." Complainant requested disposition of the case under the shortened procedure provided for in Rules 181 *et seq.* of the Commission's Rules of Practice and Procedure. The respondent "answered" the same 27 days after it was served by the Secretary of the Commission. The answer made no mention of complainant's request for shortened procedure.

On January 28, 1981, I issued an order which, based on the assumption that respondent may have misread the Commission's Rules, gave respondent until February 9, 1981, to submit the memorandum called for by Rule 184. Complainant was given until February 20 to file the reply memorandum allowed under Rule 185.

On February 19, 1981, counsel sent me a copy of a letter he had written to the Secretary in which he said that he had not received the memorandum required by my order; that he assumed no more pleadings were necessary; and that the case was then "resting on the original papers." A copy of the letter was also sent to respondent. To date I have heard nothing from respondent.

The complaint reads as follows.[2]

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

[2] Quotation marks have been omitted.

I. The Complainant is a corporation with its place of business at 560 Market Street, Newark, New Jersey. Complainant is in the business of selling new and used trucks, trailers and equipment, both domestically and internationally.

II. The Respondent above-named is a common carrier by water engaged in transportation between the United States and Egypt and carries on the business of shipping, forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water and as such is subject to the provisions of the Shipping Act, 1916, as amended.

III. That:

A. On or about November 25, 1979, Newark Truck International shipped nineteen (19) Fontaine Flatbed Trailers, Models PTW 3-5540 from the port of New York to Alexandria, Egypt via the Respondent, Prudential Lines, Inc.

B. The purchaser of the equipment was the Alexandria Port Authority, bid invitation #78/03, U. S. AID Loan No. 263-K-031, Item A-2(b). The shipment was made under the Alexandria Harbour Improvement Project.

C. Prudential's bill #S1800 (see attached) indicates Heavy Lift Charges for Item Nos. 3-21 totalling $9,810.87.

D. According to the bid specifications, permitted charges and freight tariff No. 1-FMC-47, page 202, 3rd revision (copy attached) effective date 11/2/79, "...Heavy Lifts Not Applicable."

E. Despite this and through oversight on behalf of both the Complainant and Respondent, $9,810.87 was improperly charged and improperly paid.

F. Upon notice of the error that Heavy Lift Charges were not in effect, though Complainant was charged $9,810.87 for the Heavy Lift Charges, Complainant contacted Respondent, who suggested they merely write requesting the return of the funds which were admittedly improperly charged and incorrectly paid.

G. Despite repeated demands for the money, the said $9,810.87 has not yet been returned because the Respondent stated the claim was not presented within six months of the incident and as such no refund could be made.

H. See letter dated August 22, 1980 from Complainant to Respondent explaining the situation, all of which is self-explanatory.

I. See letter dated August 26, 1980 from Respondent to Complainant rejecting the claim.

J. By reason of the imposition of the improper charges, Respondent has violated Section 18B(3) in that it admittedly charged Complainant, in error, fees in excess of their tariff and has refused to return the overage on the basis of its unenforcible six month notice provision,

knowing same is inconsistent with the maritime commission's two year statute of limitation for such claims.

IV. That by reason of the facts stated in the foregoing paragraphs, Complainant has been subjected to the payment of rates for transportation and services which were, when enacted and still are (1) unduly or unreasonably preferential, prejudicial or disadvantageous in violation of Section 18B(3); (2) unjustly discriminatory or prejudicial in violation of Section 18B(3); and (3) unjust and unreasonable in violation of Section 18B(3).

V. The Complainant has been injured in the following manner: To his damage in the sum of $9,810.87 as shown by proof of our payment of Check #18276 for $25,000 dated January 11, 1980 and bank wire for $69,714.73 dated February 11, 1980, totalling the original invoice of $94,714.73, which was excessive by the sum of $9,810.87.

I have reviewed the documents attached to the complaint, and they fully support the allegations made in the complaint. Moreover, the only basis for respondent's refusal to allow the claim was its reliance upon its "six months rule." From the evidence, it is clear that "heavy lift charges" were inapplicable to the shipment in question and that respondent's collection of those charges was in violation of section 18(b)(3) of the Shipping Act, 1916.

Accordingly, reparation in the amount of $9,810.87 to be paid by Prudential Lines, Inc., is hereby awarded Newark Trucking International.

(S) JOHN E. COGRAVE
Administrative Law Judge

Washington, D.C.
May 5, 1981

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-74
IN RE: AGREEMENT NO. 5850 DR (W&S); NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION WINES AND SPIRITS DUAL RATE CONTRACT

Respondents' Wines and Spirits Dual Rate Contract found contrary to the standards of section 14b of the Shipping Act, 1916 and permission for its use withdrawn.

Howard A. Levy and *Patricia E. Byrne* for North Atlantic Westbound Freight Association.

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

Douglas W. Metz for the Wine and Spirits Shippers Association.

Paul J. Kaller and *Alan J. Jacobson* for the Bureau of Investigation and Enforcement.

REPORT AND ORDER

June 9, 1981

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

By Order served October 17, 1980, the North Atlantic Westbound Freight Association (NAWFA) and its member lines were directed to show cause why the Commission should not find Respondents' Wines and Spirits Dual Rate Contract (Agreement No. 5850 DR (W&S)) to be contrary to the standards of section 14b of the Shipping Act, 1916 (46 U.S.C. 813a), and either withdraw permission for its use or require it to be modified.

The basis for the Commission's Order to Show Cause was two-fold. First, the Commission expressed concern that the existing NAWFA Wines and Spirits Contract may be unjustly discriminatory or unfair as between shippers, exporters or importers, and may be contrary to the public interest because it specifically provides for consultations with only one segment of the wines and spirits imports industry, *i.e.*, the National Association of Alcoholic Beverage Importers (NAABI), to the exclusion of other segments. Second, the Commission questioned whether the Contract was in the public interest because NAWFA is unwilling to abide by its terms. The Commission noted that although the Wines and Spirits Contract provided for rate discussions to be held between NAWFA and NAABI, since at least 1978 NAWFA has been unwilling to consult with NAABI.

The proceeding was limited to the submission of affidavits of fact and memoranda of law, but provided a procedure for requesting an evidentiary hearing should any party believe one was required.

The Commission's Bureau of Investigation and Enforcement (then Bureau of Hearing Counsel) was made a party to the proceeding by the Commission's Order. The National Association of Beverage Importers (NABI), formerly NAABI, and the Wines and Spirits Shippers Association (WSSA) intervened and filed pleadings. All parties submitted memoranda of law pursuant to the Commission's Order, but only NAWFA filed an affidavit along with its memorandum.[1]

POSITIONS OF THE PARTIES

Respondents do not contest the major allegations made in the Order to Show Cause,[2] nor do they request an evidentiary hearing. Rather, Respondents propose certain modifications to their Wines and Spirits Contract which they believe will resolve the Commission's concerns. The stated purpose of these modifications is to allow NAWFA to consult with all segments of the wines and spirits industry and thereby remove impediments to implementation of the contract. Specifically, the following amendments are proposed:

1. Deletion of NAABI as the sole group with whom rate consultation will occur and incorporation of NAWFA's "Procedures for Handling Shippers' Requests and Complaints" issued pursuant to Commission General Order 14 (G.O. 14).[3]
2. Deletion of a rate table attached to the contract and incorporation by reference of rates published in NAWFA's ocean freight tariffs.
3. Inclusion of new rate negotiation procedures. The requirement for rate change consultation with NAABI and the 45-day mutual agreement requirement[4] would be deleted. The incorporation of G.O. 14 "Procedures" would result in a procedure whereby any shipper could, upon notice of a rate increase, request a meeting or different rate action and NAWFA would determine whether it would act on that request within 45 days. A resulting rate reduction would then be published on 30 days' notice.
4. Amendment of the Contract to provide for the orderly transition of present signatories to the amended contract. Specifical-

[1] The affidavit is that of Robert E. Benedict, NAWFA's U.S. Resident Representative.

[2] NAWFA states that it has met with wines and spirits shippers since 1977 but has refused to meet with NAABI, or any other shippers' association.

[3] G.O. 14 (46 C.F.R. Part 527), requires that ratemaking groups approved pursuant to section 15, Shipping Act, 1916 (46 U.S.C. 814) implement reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

[4] The existing Wines and Spirits Contract requires rate adjustments by mutual agreement of the parties within 45 days of the effective date of a rate increase.

ly, it is proposed that references to the expiration date of prior contracts be omitted from the amended contract, that the Commission direct that the proposed modifications be made by addendum to the existing contracts, and that shippers who do not give notice of termination within 90 days of the date such order is issued be deemed to have consented to the modifications.

The Bureau of Investigation and Enforcement (BIE) believes that the modifications proposed by NAWFA should resolve the concerns expressed in the Commission's Show Cause Order. The other technical changes proposed are viewed by BIE as appropriate and transition procedures outlined by NAWFA are also found acceptable. However, an alternative procedure wherein Contract signatories are provided a new integrated contract with a formal acceptance deadline is suggested.

NABI opposes NAWFA's suggested modifications. Its principal objection to the existing Contract is that NAWFA has refused to negotiate rates as required. NABI accordingly proposes that the Contract be expressly revised to require rate action upon complaint or request by a signatory. NABI further urges that the Contract be modified to make contract rates binding for one year and that the exclusive patronage requirement of the Contract be replaced with a 90 percent fixed portion requirement. NABI concludes that because NAWFA's proposed modifications render the Wines and Spirits Contract indistinguishable from the General Cargo Contract,[5] "unless its [NABI's] modifications for contract modifications are followed, the [former] contract should be cancelled."

WSSA also expresses the opinion that the changes to the Wines and Spirits Contract proposed by NAWFA effectively render it indistinguishable from the General Cargo Contract. It proposes modifications to the Contract similar to those proposed by NABI.[6] Otherwise, WSSA would prefer the cancellation of the Wines and Spirits Contract "in its entirety," with NAWFA being required to present the General Cargo Contract to all existing Wines and Spirits Contract signatories.

DISCUSSION

The Commission finds that Respondents' Wine and Spirits Contract is contrary to the public interest and discriminatory and unfair as between shippers within the meaning of section 14b of the Shipping Act, 1916.[7]

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[5] NABI states that the only difference between the two contracts would be the more stringent termination notice requirements of the Wines and Spirits Contract.

[6] WSSA seeks a three-year fixed rate period and a limited commitment of a majority of signatory shipments.

[7] Section 14b requires the Commission to withdraw any approved dual rate contract which is found to be "detrimental to the commerce of the United States or contrary to the public interest, or . . . unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors."

Therefore, use of Agreement No. 5840 DR (W&S) can no longer be permitted and will be withdrawn. The controlling facts set forth in the Order instituting this proceeding and not disputed by Respondents clearly support this action.[8]

NAWFA's Contract provides for rate negotiations with only one segment of the wines and spirits imports industry, *i.e.* NABI. As a result, other segments of the industry, whose interests might not necessarily be coextensive with NABI's, are bound by the results of its negotiations with NAWFA. In the event NABI and NAWFA fail to agree on rates, NAWFA can terminate the Contract and thereby abrogate the rights of other signatories who have no negotiation rights and who are unrepresented in the rate negotiation process. A contract that grants certain signatory shippers rate consultation and negotiation rights while denying such rights to other signatories is unjustly discriminatory and unfair as between shippers and contrary to the public interest on its face, particularly since section 14b expressly requires that dual rate contracts be "applicable to all shippers and consignees *on equal terms and conditions*" (Emphasis supplied).

Moreover, NAWFA's admitted failure to abide by the terms of its contract not only constitutes a breach of that contract, but evidences further conduct inconsistent with the public interest standard of section 14b. Although section 14b dual rate contracts have been determined by the Commission to be subject to the *Svenska* doctrine,[9] a less stringent justification is required to secure their approval when they contain the protective conditions found presumptively acceptable by Congress. *Agreement Nos. 150 DR-7 and 3103 DR-7*, 22 F.M.C. 378, 386 (1979), consolidated appeal pending *sub nom. SEAPAC Container Service, S.A. v. FMC* and *United States v. FMC*, D.C. Cir. Nos. 80-1248 and 80-1251. Unless justified, however, dual rate contracts are deemed contrary to the public interest because they are in effect tying devices and, as such, are *per se* violative of the antitrust laws.[10] Dual rate contracts are approved pursuant to section 14b on the basis that they will achieve positive public interest or transportation objectives. In order for these objectives to be met, however, it is necessary that the parties to these otherwise unlawful arrangements abide by their strict terms. Failure to

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[8] Because NAWFA has in effect admitted the determinative facts and waived a further evidentiary hearing, the Commission may appropriately dispose of the issues raised as matters of law. *American Export & Isbrandtsen Lines, Inc. v. FMC*, 334 F.2d 185 (9th Cir. 1964); *Admission to Conference Membership*, 9 F.M.C. 241 (1966).

[9] The *Svenska* doctrine is the proposition affirmed in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), whereby agreements which interfere with the policies of the antitrust laws will be disapproved as "contrary to the public interest" unless justified by evidence establishing that the Agreement, if approved, will meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. The burden is on proponents of such agreements to come forward with the necessary evidence.

[10] *See Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

do so undermines the basis for approval and causes the arrangement to become contrary to the public interest within the meaning of section 14b. The Commission must not only ensure that the parties to approved agreements are properly operating within the scope of such agreements, but must also act to disapprove arrangements when the parties are not fulfilling their obligations thereunder. See *States Marine Line, Inc. v. Trans-Pac. Freight Conf.*, 7 F.M.C. 204, 210-211 (1962), *aff'd sub nom. Trans-Pacific Freight Conf. v. FMC*, 314 F.2d 928 (9th Cir. 1963).

While NAWFA's proposed modifications to its Wines and Spirits Contract may alleviate some of the discriminatory aspects of that Contract, they go well beyond the specific issues raised in the Commission's Order to Show Cause. In so doing, other aspects of the Contract are modified, especially the existing rate negotiation rights of shipper signatories. The result is a different arrangement, incorporating terms substantially altering the relationship between the parties in a manner not contemplated by the Commission in its approval of this particular dual rate system. Such a "new" arrangement should be evaluated under the procedures prescribed in 46 C.F.R. Part 538 rather than in the context of this narrow proceeding.

Resolution of all issues raised by the pleadings would also expand the scope of this proceeding beyond that contemplated in the Commission's Show Cause Order.[11] The Commission therefore declines to modify the Contract in this proceeding as suggested by NAWFA because of the extent of such modifications, the objections of the shipper parties to those modifications, the nature and limited scope of this proceeding, and the desirability of noticing those changes, pursuant to Commission rules, to other interested shippers not party to this proceeding.

In view of the foregoing, the Commission hereby withdraws permission for the use of the Contract. In order to permit orderly transition and to avoid prejudice to existing contract rights of signatories, the Commission is deferring the effective date of this Order for 90 days.

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[11] In addition to the disagreement that has arisen over the modifications proposed by NAWFA, an issue has been raised as to the applicability of the existing contract to intermodal shipments. The Commission, by Order dated September 17, 1973, permitted NAWFA to amend clause 2(a) of its Wines and Spirits Contract to cover intermodal shipments moving under through bills of lading if NAWFA wishes to offer contract rates on such shipments. WSSA has alleged that NAWFA has never offered intermodal contract rates. NAWFA has not responded to this allegation. Examination of NAWFA's tariffs reveals that NAWFA does publish separate inland rates for Great Britain, Northern Ireland and Eire and issues through bills of lading reflecting a combination of these rates. No tariff provisions can be found which offer a contract through rate. Thus, it appears that for over seven years NAWFA has restricted its contract rates for wines and spirits to port-to-port shipments.

The record of this proceeding, however, is insufficient to draw any firm conclusions as to whether the effect of the NAWFA Contract or its interpretation by Respondents have served to inhibit the use of independent intermodal services. It should be noted that an exclusive patronage dual rate contract confined to a carrier's all-water service does not prohibit contract shippers from utilizing competing intermodal services. *Lykes Bros. v. Far East Conference*, 19 F.M.C. 589, 594 (1977). However, a dual rate contract may not cover intermodal movements for which no service is provided. *Agreement Nos. 150 DR-7 and 3103 DR-7*, 22 F.M.C., *supra*, at 389.

Within that time, NAWFA is ordered to take appropriate actions to make Wines and Spirits Contract rates available to all shippers of those commodities under its General Cargo Contract.

NAWFA may of course submit a new request for permission to use a separate wines and spirits contract pursuant to the procedures provided in 46 C.F.R. Part 538. However, should NAWFA file such a request, it should be prepared to justify the existence of a separate wines and spirits contract both as a matter of fact and as a matter of law. Specifically, its application should explain why a "different" contract for wines and spirits is warranted.

THEREFORE, IT IS ORDERED, That permission for the use of Agreement No. 5850 DR (W&S) is withdrawn, effective 90 days from the date of this Order, and

IT IS FURTHER ORDERED, That within 30 days of the date of this Order the North Atlantic Westbound Freight Association take whatever action is necessary, including amendment of its applicable tariffs, to allow wines and spirits shippers to sign its General Cargo Contract and to make wines and spirits contract rates available to those signatories, and

IT IS FURTHER ORDERED, That within 45 days of the date of this Order Respondent North Atlantic Westbound Freight Association file with the Commission a written report stating what actions it has taken in compliance with the requirements of this Order.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 941(I)

INFORMAL DOCKET NO. 942(I)

J.T. BAKER CHEMICAL CO.

v.

ATLANTIC CONTAINER LINE

PARTIAL ADOPTION OF DECISION OF SETTLEMENT OFFICER

June 12, 1981

The Commission has undertaken a review of Settlement Officer Jeremiah D. Hospital's Decision dated February 2, 1981, awarding reparations without interest for Atlantic Container Line's misrating of J.T. Baker Chemical Co.'s shipments of sodium hydroxide solution.

Complainant alleged that ACL misrated the cargo as "Chemical NES" when it should have been rated as "Caustic Soda," and that ACL denied Complainant's informal overcharge claim on the basis of its "6-month rule."

In response, ACL argued that Complainant was responsible for the misrating because it failed to declare the commodity by its generally accepted generic or common name ("caustic soda") as required in ACL's tariff rules. ACL requested the Settlement Officer not to award Complainant interest on any reparations granted. The Settlement Officer agreed, awarding $453.14 in reparation but without interest, because "ACL was not entirely at fault in assessing an incorrect rate."

The Commission concurs with the Settlement Officer's award of reparations in these proceedings, but has determined that the failure to award interest was in error. The "fault" of the parties incident to the misrating is irrelevant to the award of interest, for the imposition of interest is compensatory rather than punitive. It is intended to make whole the complaining party. It is not intended to inflict a hardship on the carrier. It provides a means by which the complaining party is compensated for the use of excess monies held and enjoyed by the carrier.

Interest shall be awarded on the Settlement Officer's grant of reparations, to be calculated at the rate of 12%, accruing from the date of payment of freight charges.

THEREFORE, IT IS ORDERED, That the Decision of the Settlement Officer in these proceedings is adopted except as indicated; and

IT IS FURTHER ORDERED, That Atlantic Container Line pay J.T. Baker Chemical Co. 12% interest on the award of reparations, accruing from the date of payment of freight charges; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission*

(S) JOSEPH C. POLKING
Acting Secretary

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* Commissioner James V. Day concurs in the result but dissents from that portion of the order which establishes the level of interest awarded at twelve percent. Commissioner Richard J. Daschbach *did not participate.*

INFORMAL DOCKET NO. 941(I)

INFORMAL DOCKET NO. 942(I)

J. T. BAKER CHEMICAL COMPANY

v.

ATLANTIC CONTAINER LINE

DECISION OF JEREMIAH D. HOSPITAL, SETTLEMENT OFFICER[1]

Partially Adopted June 12, 1981

Reparation Granted

J. T. Baker Chemical Company (Claimant) is engaged in the business of the manufacture and distribution of various types of chemicals. On October 1, 1980, Claimant filed the instant complaints alleging that Atlantic Container Line (ACL), a common carrier by water, had overcharged it a total of $453.14 on two shipments containing packages of sodium hydroxide solution.

The complaint in Informal Docket No. 941(I) states that ACL transported a shipment consisting of 40 packages of chemicals which included two pallets and 25 cartons of sodium hydroxide solution weighing 6,175 pounds and filling 122.3 cubic feet. This shipment moved from New York to Rotterdam aboard ACL's vessel "Atlantic Causeway" on prepaid bill of lading No. A70048 dated November 3, 1978.

The complaint in Informal Docket No. 942(I) states that ACL transported a shipment of 85 packages of chemicals which included 53 cartons of sodium hydroxide solution weighing 2,910 pounds and filling 66.9 cubic feet. This particular shipment moved from New York to Rotterdam aboard ACL's vessel "Atlantic Causeway" on prepaid bill of lading No. A70051 dated March 25, 1979.

Claimant states that ACL assessed a rate for "Chemical, NES" on each shipment of sodium hydroxide solution. Claimant argues that it should have been assessed the rate for "Caustic Soda, Packed" as it appeared in the applicable tariff.[2] Claimant points out that the legal

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

[2] The earlier shipment moved under the North Atlantic Continental Freight Conference Tariff No. 29 FMC 4, while the latter moved under the Conference's Tariff No. 30, FMC 5 which superseded the former tariff.

label name for sodium hydroxide solution is caustic soda and it submitted a copy of a page from the Chemical Dictionary to support its argument.

In response to these complaints, ACL does not take exception to Claimant's argument that sodium hydroxide is caustic soda. To the extent ACL states that Claimant's charge is correct. ACL does point out, however, that its tariff rule 2J9 provides

> "...Shippers are required to declare their commodities by their generally accepted generic or common name."

ACL feels it is unreasonable to expect a rate clerk to know that the two descriptions are synonymous.

It is well settled that in situations as presented here, it is what the Claimant can prove actually moved that is controlling. I am satisfied that Claimant has met its burden and I so find that the shipments of sodium hydroxide solution in question should have been assessed the rate for caustic soda. Accordingly, Claimant is awarded $453.14 in reparation.

As for the matter of interest, it is apparent to me that ACL was not entirely at fault in assessing an incorrect rate because it did not know that sodium hydroxide and caustic soda are synonymous terms, accordingly, no interest will be awarded in these cases.

(S) JEREMIAH D. HOSPITAL
Settlement Officer

February 2, 1981

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-19

CONSOLIDATED FORWARDERS INTERMODAL CORPORATION (AGREEMENT NO. 10235)

ORDER PARTIALLY ADOPTING INITIAL DECISION

June 15, 1981

The record in the above-captioned proceeding is before the Commission on Exceptions to the November 6, 1980 Initial Decision of Administrative Law Judge Norman D. Kline. The Initial Decision recommended disapproval of FMC Agreement No. 10235, a cooperative working arrangement among 39 independent ocean freight forwarders and nonvessel operating carriers (Proponents), enabling them to jointly own and manage a nonvessel operating carrier and cargo consolidation service under the name of Consolidated Forwarders Intermodal Corporation (CONFICO).[1]

Exceptions were filed by the Proponents and by two separate groups of intervenors which opposed approval of the Agreements.[2] Replies to Exceptions were filed by the Commission's Bureau of Investigation and Enforcement (BIE) and several other intervenors which also opposed approval of the Agreements.[3]

Oral Argument was heard by the Commission on March 31, 1981.

POSITION OF THE PARTIES

The Proponents argue that the Presiding Officer erred in: (1) requiring the Proponents to justify their Agreement under the *Svenska* doctrine;[4] (2) not finding that the Agreement was necessary to meet trans-

[1] Jurisdictional aspects of this proceeding were addressed by the Commission in an earlier decision from which no appeal was taken. 21 F.M.C. 553 (1978).

[2] The intervenors filing Exceptions were the International Association of Nonvessel Operating Common Carriers and a group of ten North European steamship conferences.

[3] The intervenors filing only Replies were the Trans-Pacific Freight Conference of Japan/Korea, the Japan/Korea-Atlantic and Gulf Freight Conference and the Pacific Coast European Conference. The International Association of Nonvessel Operating Common Carriers, the North European conferences and the North Atlantic Mediterranean Freight Conference et al. also filed Replies. No Reply was submitted by the Proponents.

[4] The *Svenska* doctrine is the proposition affirmed in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), whereby section 15 agreements which interfere with the policies of the antitrust laws will be disapproved as "contrary to the public interest" unless justified by evidence establishing that the Agreement, if approved, will meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. The burden is on proponents of such agreements to come forward with the necessary evidence.

portation needs, secure public benefits or further a valid regulatory purpose within the meaning of the *Svenska* doctrine; (3) not requiring evidentiary support for the positions advanced by the Protestants; (4) suggesting that the Agreement would be approvable if there were only six rather than 39 Proponents; (5) misconstruing Proponents' arguments regarding the "trustworthiness" of nonvessel operating carriers; and (6) not approving the Agreement on the condition that those Proponents which presently operate as nonvessel operating carriers be omitted from the joint venture.

BIE supports the Initial Decision in all respects. The Intervenors contend that the Initial Decision should be adopted by the Commission in all respects save one -- the discussion at pages 935-938 concerning the "Type of Alternative Agreement Which Could be Approved." This material is alleged to be irrelevant and overly broad. The Intervenors and BIE both stress the dearth of evidence regarding CONFICO's intended operations, their probable competitive impact, and any transportation benefits which would be realized by approval of the Agreement.

DISCUSSION

Other than the objections to the Presiding Officer's discussion of preferred types of nonvessel operating carrier joint ventures at pages 935-938, the arguments raised on exceptions were previously made to the Presiding Officer and correctly and adequately disposed of in the Initial Decision.

Agreement No. 10235 is a joint venture among competitors. As such, it is subject to justification under the *Svenska* doctrine, even though joint ventures are not necessarily *per se* violative of the antitrust laws. *Euro-Pacific Joint Service (Agreement Nos. 9902-3 et al.)*, 21 F.M.C. 911 (1979). The anticompetitive potential of joint ventures is well recognized and the information necessary to evaluate the purpose and probable impact of such agreements must be provided by the proponents of such agreements. It is therefore appropriate that the burden of going forward be placed upon the Proponents in this instance.

The Initial Decision recognizes and applies this established approach to joint ventures and otherwise treats the evidentiary and legal arguments of the parties in a thorough and accurate manner. The burden of justifying Agreement No. 10235 was on the Proponents and they failed to meet it. Under these circumstances, the evidentiary basis for the Protestants factual allegations need not be closely examined. Accordingly, the Initial Decision will be adopted by the Commission with certain modifications.

The Initial Decision is a complete and well-reasoned treatment of the issues presented. However, because the statements found at pages 935 through 938 of the Initial Decision, to which various parties took

exception, are not necessary to support the result reached, portions of those pages will not be adopted. Where deletions have been made from the Initial Decision, they have been made to eliminate any possible confusion regarding the precedential value of the Presiding Officer's statements -- especially concerning procedural matters -- and not to endorse or condemn the underlying principles upon which they are based.[5]

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted with the exception of the following portions:

1) All material beginning with the eighth word on line 23 of page 935 and continuing through line 20 of page 938, with the exception of footnote 23; and [6]
2) The final paragraph on page 940.
3) Headnote 5 on page 905.

The amended Initial Decision, as supplemented by this Report and Order, constitutes the Commission's final decision in this proceeding; and

IT IS FURTHER ORDERED, That the Exceptions of Consolidated Forwarders Intermodal Corporation, the International Association of Nonvessel Operating Common Carriers, and the North European steamship conferences are granted to the extent indicated above, and denied in all other respects; and

IT IS FURTHER ORDERED, That Agreement No. 10235 is disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

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[5] Each joint venture proposed under section 15 must be justified on its own merits; the numerous factors affecting the applicability of the *Svenska* test do not lend themselves well to prognostication as specific as that found in pages 935-938 of the Initial Decision.

[6] Footnote 23 is expressly being retained as part of the Commission's final decision as two separate paragraphs commencing after line 23 of page 935.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-19

AGREEMENT NO. 10235 - CONSOLIDATED FORWARDERS INTERMODAL CORPORATION

Thirty-nine forwarders are seeking approval of a joint venture by which a corporation they have formed will operate an NVO-consolidation service. These proponents claim that their Agreement to do this does not require the type of proof of need, benefits, and purposes mandated by the so-called Svenska doctrine, that their Agreement has minimal anticompetitive effects, is required to protect the forwarders against NVOs who take business away from them, has many benefits and serves valid regulatory purposes. I find that the Agreement has not been shown to merit approval as follows:

(1) The Agreement is a joint venture among parties engaged in the same line of business. As such, it is inherently anticompetitive and highly suspect under antitrust law. Hence, it requires justification under the Svenska test whether or not it is per se violative of antitrust law.

(2) The evidence offered in support of approval is thin and contradictory, long on argument but short on facts. The main reason for approval, furthermore, is based upon allegations that the NVO industry is untrustworthy because it will "wean away" the forwarders' business, therefore the forwarders need a "safe" NVO. Approval of the Agreement, on such evidence, would be tantamount to the Commission's announcing that it agrees that NVOs are to be so characterized and that all 39 forwarders need protection because they fear NVO competition.

(3) Most of the purported benefits stemming from the Agreement are achievable by any individual forwarder who becomes an NVO. It is not necessary for all 39 to band together to achieve such benefits.

(4) There is no persuasive evidence showing why it is necessary for all 39 forwarders to form this NVO, i.e., why each individual forwarder cannot commence an NVO service without joint action.

(5) Although the subject Agreement is too large and inherently anticompetitive to be supported by the limited type of evidence and contradictory arguments offered in support, a more limited agreement confined to truly needy forwarders who cannot by themselves offer NVO services, which they need to remain competitive, deserves favorable consideration if supported by specific, probative evidence.

Gerald H. Ullman, for Proponents.

Donald L. Flexner, *Elliott M. Seiden*, and *Janice M. Reece*, for Protestant United States Department of Justice.

Stanley O. Sher and *John R. Attanasio*, for Protestants North Atlantic Mediterranean Freight Conferences et al.

Howard A. Levy and *Patricia E. Byrne*, for Protestants North Atlantic United Kingdom Freight Conference et al. except Seatrain International, S.A.

Charles F. Warren and *George A. Quadrino* for Protestants Trans-Pacific Freight Conference of Japan/Korea et al.

David C. Nolan and *J. Michael Cavanaugh*, for Protestants Pacific Coast European Conference et al.

Raymond P. deMember, for Protestants International Association of NVOCCs et al.

Alan J. Wohlstetter, for Protestant Express Forwarding and Storage Co., Inc.

Paul J. Kaller and *C. Douglass Miller*, for Bureau of Hearing Counsel.

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

Partially Adopted June 15, 1981

This is an investigation instituted by the Commission on May 23, 1977, essentially to determine the approvability of an agreement originally among 51 licensed independent ocean freight forwarders who desired, among other things, to form a corporation which would operate a common carrier service by water known as CONFICO (Consolidated Forwarders Intermodal Corporation). This common carrier service, furthermore, was to be provided by CONFICO without CONFICO's owning or operating vessels, in other words, as a so-called NVOCC or NVO operation (nonvessel operating common carrier). The agreement in question, designated as No. 10235, was originally executed on March 24, 1976, by 51 signatories, although the corporation known as CONFICO was actually formed by 52 shareholders. The agreement was filed with the Commission under pertinent regulations governing the processing of such agreements on April 23, 1976, and following staff processing during which a number of protests against approval were received, the Commission instituted this formal proceeding.

The background to the formation of CONFICO which led to the filing of the subject agreement has been described by the Commission in its original Order of Investigation and Hearing, in an interim decision which the Commission served on December 13, 1978 (Docket No. 77-19, *Agreement No. 10235 - Consolidated Forwarders Intermodal Corporation*, 21 F.M.C. 533 (1978)) and by several parties in their briefs. In short, that background is as follows.

PROCEDURAL AND FACTUAL BACKGROUND

In April 1967, a corporation known as Forwarders Intermodal Corp. (FICO) was organized under the laws of the State of New York. Its basic purpose was "to engage in the business of consolidating, unitizing, containerizing, distributing and transporting freight and shipments in export and import commerce. . . ." FICO consisted of some 49 shareholders who were licensed forwarders located in the Port of New York. On or about July 1967, FICO filed Agreement No. 9646 with 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).

Commission providing for the formation of a "conference" to carry on the business authorized in its charter. This agreement was approved by the Commission on September 26, 1967. According to the Commission's interim decision, the shareholders of FICO had agreed, on May 23, 1967, to restrict ownership in the corporation to licensed freight forwarders and to restrict sale or other disposal of stock by requiring an offering of shares to the corporation for repurchase before a shareholder could sell the shares. Any licensed forwarder could become a FICO shareholder by buying shares at a price set by the Board of Directors. In December 1967 FICO commenced operations as a consolidator of export shipments and a breakbulk agent on imports at Port Newark. This operation lasted until September 1968, when, according to Mr. G. Feste, the President of the successor company CONFICO, FICO ceased this activity because of inability to obtain labor from the ILA.

On or about October 25, 1968, FICO merged with a similar corporation owned by ten other licensed forwarders known as Confreight, Inc.[2] This latter company operated under FMC-approved Agreement No. 9645 which closely resembled Agreement No. 9646 and was also approved by the Commission in September 1967. According to the Commission's interim decision, both FICO and Confreight had operated as NVOs under tariffs filed with the Commission until shortly before the merger. The Confreight agreement and tariff were cancelled, however, prior to the merger. The FICO agreement was cancelled on August 11, 1970, according to the Commission. After the merger, the corporation was known as Consolidated Forwarders Intermodal Corp. (CONFICO) which began to operate a variety of services, including some sales agency services from 1968 until September 1973, when it agreed to act as sales agent for one carrier, American Export Lines, Inc., on exports and to perform a deconsolidation, documentation service on imports. The arrangement with that carrier, however, terminated in October 1974.

On or about June 1975, CONFICO's Board of Directors decided to commence operations as an NVO and consolidator. FICO, the previous company, had operated as an NVO before the FICO agreement (No. 9646) was canceled in August 1970. However, the shareholders of CONFICO wished to resume operations as an NVO and consolidator and deconsolidator of export and import traffic. Pursuant to this decision, CONFICO filed an NVO tariff with the Commission on or about

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[2] As the Commission noted, however (Interim Report and Order, p. 6 n. 9), the changes in membership affecting Agreement No. 9646, the previous FICO agreement, whose purposes were basically continued after the merger, were not submitted to the Commission for approval. Protestants North Europe Conferences (North Atlantic United Kingdom Freight Conference et al.) (NEC) point out not only that the merger between FICO and Confreight was not submitted to the Commission for approval but that neither were the corporate articles and by-laws of FICO nor the amendments to the FICO agreement occasioned by the merger. (NEC Answering Brief, pp. 4, 5.)

November 25, 1975; however, because of objections raised by the Commission's staff, the tariff was withdrawn and Agreement No. 10235, signed by all but one stockholder, was filed with the Commission in April of 1976, as previously noted.

While the subject Agreement was being processed by the Commission's staff, CONFICO commenced a consolidation service on or about February 1, 1977, at certain piers in the Port of New York, in which CONFICO consolidated shipments into containers at the piers for dispatch to overseas destinations. However, CONFICO terminated this consolidation service long before the Commission's interim decision ordered it terminated, apparently stopping it some time in or before November 1977. Since that time, while awaiting final disposition of the Agreement which would authorize it to resume NVO operations, CONFICO has been acting as general agent for an NVO known as Unimodal, Inc., a corporation owned by Australian freight forwarders, chartered under California law.[3]

THE FIRST PHASE OF THE DOCKETED PROCEEDING

As noted, the Commission instituted a formal proceeding on May 23, 1977, to determine the approvability of Agreement No. 10235 and thus the ability of CONFICO to file an NVO tariff and offer an NVO service in addition to consolidation and related activities. The Commission's Order of Investigation and Hearing states that under the terms of the subject agreement, CONFICO, on behalf of its shareholders, will engage in the following activities at the Port of New York, and at other unspecified ports and inland points in the United States:

(1) Assemble and consolidate export cargo into containers or unit loads for tender to vessel operating carriers either as an NVOCC or as a "consolidator" working on a fee or allowance basis; and/or

(2) Break bulk or deconsolidate import cargo for distribution within local port areas or arrange for the transportation of containers or individual shipments to inland points of destination.

Furthermore, according to the Commission's Order, approval of the Agreement would also permit the shareholders, acting through the corporation, to meet, discuss, and agree with any other person subject to the Shipping Act, 1916, on matters of mutual interest with the proviso that adoption of any agreements would require a majority vote of the shareholders and Commission approval before implementation.

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[3] Mr. Guttorm Feste, President and Chief Operating Officer of CONFICO, testified that Unimodal, Inc., is a California corporation with its principal office in San Francisco, which also conducts operations in Chicago and Los Angeles and is owned by a number of Australian ocean freight forwarders and customs brokers. Approval of the Unimodal formation was not sought from the Commission under section 15 before it commenced operations as an NVO. As general agent for Unimodal, CONFICO solicits forwarders for less-than-carload (LCL) cargo for the NVO operation to Australia, Japan, Hong Kong, Singapore, other Pacific destinations and in the North Atlantic trade, and performs other activities relating to the general agent's functions.

Finally, membership in CONFICO and participation in any activity contemplated by the Agreement would be restricted to current CONFICO shareholders and any other Commission-licensed ocean freight forwarder who applies for membership.

The filing of the Agreement generated protests from several different groups consisting of forwarder/NVOs and 38 Conferences of ocean carriers, according to the Commission's Order, all of whom were named as Protestants in the proceeding. Later other groups intervened so that eight individual companies or groups of companies and the Commission's Hearing Counsel protested approval of the Agreement. The number of active Protestants currently consists of eight parties identified as follows: The United States Department of Justice (DOJ); the North Atlantic Mediterranean Freight Conference and associated conferences (NAM); the North Atlantic United Kingdom Freight Conference and associated North European Conferences (except Seatrain International, S.A.) (NEC); Trans-Pacific Freight Conferences of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference (TP); Pacific Coast European Conferences, et al. (PCEC); International Association of NVOCCs (NVOCCs); Express Forwarding and Storage Co., Inc. (Express); and the Commission's Bureau of Hearing Counsel (Hearing Counsel). All oppose approval of the Agreement although Hearing Counsel, in its last brief, suggest that a more limited agreement might be approvable and that they are not opposed in principle to joint ventures among freight forwarders of this type. (Hearing Counsel's Answering Brief, pp. 19-20.)

Opposition to approval of the subject Agreement at the beginning of the docketed proceeding was described by the Commission under several categories. One or more of the Protestants attacked the Agreement on several grounds. They perceived the Agreement to be a "joint venture" within the meaning of the antitrust laws, specifically, section 7 of the Clayton Act, 15 U.S.C. 18, which prohibits corporations from acquiring stock or assets of other corporations in such a way as "may substantially lessen competition or tend to create a monopoly." Protestants argued that the creation of an NVO by the many forwarder-shareholders would create a larger NVO/forwarding combination which would be capable of engaging in destructive competition with NVOs and forwarders not affiliated with CONFICO. Protestants insisted furthermore that proponents of CONFICO must justify approval of the Agreement under the standards enunciated by the Supreme Court in *F.M.C. v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), commonly known as the Svenska case, meaning that Proponents must show that their agreement is required by a serious transportation need, is necessary to secure important public benefits, or furthers a valid regulatory purpose of the Shipping Act, 1916. Some Protestants argued that CONFICO's proposed inland operations would require separate

approval from the Interstate Commerce Commission so that this Commission's approval would contravene another statute.[4] Other protests expressed concern over the lack of specificity in the written Agreement as submitted and questioned whether the Commission had before it the complete understanding of the parties signatory to the Agreement and whether the Commission could ascertain what activities Proponents would actually be conducting. Other protests questioned whether CONFICO needed to obtain a license to act as a forwarder as required by section 44 of the Act and whether dividends paid to shareholders of CONFICO might be prohibited under section 44(e) of the Act. Many other Protestants urged the Commission to consider the potential economic power which they believed would accrue to a large group of forwarders operating an NVO service and whether outside carriers such as NVOs would lose business to forwarder owners of CONFICO because forwarder owners of CONFICO might steer cargo to CONFICO rather than to other NVOs. The Commission itself expressed concern that CONFICO might be conducting some operations such as consolidation without approval under section 15 of the Act.

In view of the foregoing protests and concerns, the Commission ordered this proceeding to determine:

(1) Whether Agreement No. 10235 is a true and complete copy of the understandings or arrangements between the parties;

(2) Whether the parties have in any manner entered into and implemented any agreement or agreements, understandings, and/or arrangements without prior approval, in violation of section 15 of the Act; and

(3) Whether Agreement No. 10235, or agreements, understandings, or arrangements between the parties shall be approved, disapproved, or modified under the provisions of that section.

THE JURISDICTIONAL ISSUE

From the inception of this proceeding in May 1977 to December 13, 1978, a dominant issue for resolution emerged relating to the Commission's jurisdiction over the subject Agreement. After an early prehearing conference held in June 1977, then presiding Judge Stanley M. Levy established a procedure to resolve this issue including opportunity to pursue certain discovery against Proponents in an effort to develop facts adequate to a determination of the legal questions involved. After

[4] I do not find merit to this particular contention and will not return to it. Approval of an agreement by this Commission does not authorize violation of another statute. This Commission can grant authority to carriers or forwarders to act concertedly but the parties must obviously comply with any other applicable laws. The Interstate Commerce Act does not require this Commission to refuse a group of forwarders authority to seek I.C.C. approval of any segment of their operations, if such approval is necessary. See *Freight Forwarder Agreement 71-7*, 17 F.M.C. 302, 308-309 (1974).

Moreover, sometimes I.C.C. approval of an inland intermodal service is not required. See *IML Sea Transit Ltd. v. U.S.*, 343 F. Supp. 32 (N.D. Cal. 1972), and *Japan Line Ltd. v. U.S.*, 393 F. Supp. 131 (N.D. Cal. 1975).

time had been allowed for the obtaining of facts and for further comments by the parties on the adequacies of the record in relation to the jurisdictional issue in question, Judge Levy issued his ruling on May 25, 1978, granting Proponents' motion to dismiss the proceeding on jurisdictional grounds. (See Motion to Dismiss Granted, May 25, 1978.) In brief, Judge Levy found that the Agreement was essentially one whose purpose was the formation of a corporation. As such, he found that it was not an agreement in the nature of an ongoing relationship but rather one more in the nature of a stock acquisition or merger which would not fall within any of the types of agreements set forth in section 15 of the Act. He furthermore found that the Agreement did not fall under section 15 categories concerning rate-fixing, special privileges or advantages, or pooling of earnings, or that it would stifle competition within the meaning of any of the seven categories enumerated in section 15. In Judge Levy's view, the primary thrust of the Agreement was not that of an ongoing joint venture but rather "[t]he primary thrust and underlying purpose of Agreement 10235 is the corporate formation of CONFICO to operate as an NVOCC." (Ruling cited, p. 9.)

In its Interim Report and Order, cited above, on December 13, 1978, the Commission reversed Judge Levy. The Commission did not agree that the subject Agreement was a simple act of forming a corporation. Rather, for purposes of determining jurisdiction, the Commission found that the Agreement was an ongoing joint venture and that, as such, it was both a "cooperative working arrangement" and an agreement "controlling, regulating or preventing competition." (Interim Report, p. 13.) The Commission found the Agreement indistinguishable for jurisdictional purposes from another agreement among six forwarders who formed a corporation seeking inland forwarding authority from the I.C.C., which agreement the Commission had approved under section 15. (*Freight Forwarder Agreement 71-7*, 17 F.M.C. 302 (1974), known as "*Customs Forwarders, Inc.*") The Commission described certain aspects of the Agreement which they felt would give the shareholders of CONFICO a "competitive advantage," would enable them to control prices they and other customers would pay to CONFICO for consolidation services and the amount they would receive as forwarder compensation from CONFICO ("brokerage"). The Commission found that the Proponents would continue to operate and compete as separate entities but would be "continually obligated to make decisions concerning their joint management of CONFICO--decisions which will also relate to the management of their own businesses." (*Id.*, p. 13). The Commission further observed:

> Proponents' decision to conduct their joint venture through the medium of corporate democracy does not, however, mask the ongoing nature of Agreement No. 10235. A closely held

> corporation cannot be operated without the active participation of its shareholders. . . . The establishment of CONFICO's policies under the Agreement presents a constant need and opportunity for cooperation between Proponents which warrants Commission supervision. (*Id.*, p. 14).

The Commission further stated that CONFICO's Board would "frequently be engaged in detailed discussions, planning sessions and agreements concerning competitively significant matters" and that the "powers delegated to the Board . . . must be attributed to CONFICO's shareholders under the circumstances." (*Id.*, at pp. 15, 16.) (Footnote omitted.)

Although the Commission's interim decision was not intended to determine whether Agreement No. 10235 deserved to be approved on its merits and had commented that "nothing presently indicates that CONFICO or the Proponents will (or will not) prove to be superior competitors by virtue of Agreement No. 10235" (*Id.*, p. 12), the Commission indicated concern over the effects on competition which might flow from CONFICO if the Agreement were ultimately approved. In this regard the Commission stated:

> This sharing of costs is intended to improve Proponents' ability to compete with nonparties, may reduce the likelihood of Proponents individually entering the consolidation business in the same area, and might also have the effect of raising entry barriers to potential competitors. A freight consolidation business could also be employed to unduly prefer or prejudice shippers, carriers, or other persons that deal with Proponents in a Shipping Act capacity. (*Id.*, at pp. 17, 18.) (Footnote omitted.)

Having made the previous statements, the Commission proceeded to find Agreement No. 10235 subject to the requirements of section 15 of the Act and ordered CONFICO to terminate its consolidation services while the question of approvability of the Agreement was pending in the proceeding. The Commission stayed the proceeding for 60 days to permit Proponents to seek judicial review, an action which they did not, however, take. After the expiration of the 60-day period, three further conferences were held, further evidence was sought, and a hearing was held. On February 28, 1980, upon the retirement of Judge Levy, the case was assigned to me. On March 4, 1980, I presided over a final conference, which had been scheduled by Judge Levy, at which time the parties requested that the record be closed without cross-examination of Proponents' two witnesses who had testified earlier. Problems relating to outstanding discovery requests were resolved and provision was made for further evidence to be added to the record including identification of current shareholders of CONFICO and Proponents of the subject Agreement. Although the written Agreement, as

originally submitted, was admittedly not quite consistent with the scope of Proponents' intentions regarding trade areas to be served and names of Proponents and was inadequately drafted in the opinion of some Protestants, I granted Proponents' request that the proceeding not be dismissed so that the Agreement would not have to be redrafted and refiled. Instead, I ruled that the proceeding should go forward to determine whether the Agreement should be approved on its merits and on the basis of the evidence furnished by Proponents' two witnesses and Proponents' answers to discovery requests. (See Notice of Rulings Made, March 6, 1980.)[5] Thereafter, a briefing schedule was established, additional evidence was received, and the case became ripe for decision.

DISCUSSION AND CONCLUSIONS

As noted earlier, the Commission framed three issues for determination in this case, the first relating to the question whether the subject Agreement was true and complete, the second, whether the parties had implemented any agreements without approval by the Commission, and the third, whether the subject Agreement or any other agreements or understandings among the same parties should be approved under section 15 of the Act. The primary issue, however, is the third. Since the Commission has ordered CONFICO to terminate its consolidation services by its interim decision, no one argues that Proponents are carrying out their Agreement without approval by the Commission. Furthermore, although some Protestants argue that Agreement No. 10235, as submitted, does not contain the entire agreement or understanding because it does not contain the earlier charter and by-laws of the predecessor FICO corporation and is furthermore vague and indefinite, these defects could be corrected, if, as a matter of law, they should have been included in the draft Agreement as submitted and if the entire package thereafter became fully understandable. However, if the Agreement, even with these earlier documents incorporated therein, could not be approved on the basis of the evidence presented in its support, there is no point in amending or clarifying a vague and incomplete text. The important question, therefore, is whether an agreement among 39 licensed forwarders essentially to operate an NVO and consolidation service can be approved on the present record. Since I find that the record does not support approval, the problems with draftsmanship, which could be corrected, are not the determining factors in this decision.

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[5] I also ruled that if the subject Agreement were to be approved, such approval would have to be limited to the 39 Proponents whom their counsel identified as being active Proponents, although the original Agreement had shown 51 Proponents.

THE TWO BASIC ISSUES CONCERNING APPROVABILITY

As becomes apparent from a reading of the post-hearing briefs, there are essentially two basic issues, the first a question of applicable law and the second a question of adequacy of the evidence in support of approval. Thus, as to the first issue, Proponents contend that the *Svenska* case, cited previously, does not apply here. In other words, Proponents apparently contend that they do not have to present evidence of need, benefit, or valid regulatory purpose flowing from their Agreement on pain of having it declared contrary to the public interest, as the *Svenska* case would require. Stated in another way, Proponents seem to be arguing that their Agreement is not the type of *per se* violation of the antitrust laws nor is it otherwise violative of those laws so that it is prima facie contrary to the public interest. Presumably this argument means that before the Commission can disapprove the Agreement, Protestants must show how the Agreement would be detrimental to commerce, contrary to the public interest, or otherwise contravene the standards of the Shipping Act, 1916, which Proponents do not believe they have done.

Proponents contend that *Svenska* is inapplicable to their particular Agreement on several grounds. They argue that their Agreement is not *per se* violative of the antitrust laws (as the obnoxious rules in *Svenska* were, at least the "tying" rule in that case). Furthermore, they argue, the Agreement in no way "seriously interferes" with the purposes of the antitrust laws, as did the rules in *Svenska* (390 U.S. at 250). Their Agreement, so they say, does not eliminate or stifle competition nor is it intended to do so. All they seek to do, so they say, is establish one NVO which will act alone and not concertedly with any other person to fix rates or practices. Furthermore, there is no adverse effect on competitors. Four, originally eight, of the Proponent shareholders of CONFICO are NVOs themselves who, say Proponents, will continue operating.[6] No forwarder shareholder is required to patronize CONFICO. Any licensed forwarder can become a shareholder if it chooses. Discussions among forwarder shareholders are usual and harmless and if they lead to anything, they would have to be filed for approval with the Commission. If the shareholders fix CONFICO's rates or broker-

[6] There is a curious confusion as to what Proponents are also offering NVO services themselves. Proponents, as late as August 1980 (Reply Brief, p. 3) state that eight Proponent forwarders are also NVOs, citing witness Feste (Ex. 3, p. 4). But Mr. Feste's testimony was written in April 1979. Counsel for Proponents stated in April 1980 (Ex. 7) that 12 shareholders are no longer Proponents. Included in the list of 12 are four forwarder-NVOs. Therefore, it would seem that only four Proponent-forwarders also offer NVO services. Other parties believe that the number of remaining forwarder-NVOs are three (Hearing Counsel) or eight (NAM group). Hearing Counsel rely on answers to interrogatories whereas DOJ and I have compared Ex. 3 with Ex. 7. Although Ex. 7 shows that one shareholder-forwarder-NVO withdrew from CONFICO as inactive and insolvent, three others simply withdrew, returning their stock to the corporation. Query, does this mean that some NVO Proponents do not really need CONFICO?

age, this is *de minimis* in its competitive impact. Furthermore, the entire operation of CONFICO is minuscule since the percentage of exports handled by CONFICO shareholders is puny, for example, in 1978 amounting to only 2.5 percent of exports to the world. Furthermore, most forwarder-owners of CONFICO have not even patronized CONFICO which is acting as general agent of an NVO known as Unimodal, Inc., as I have noted above. Only 33 percent of the CONFICO members patronized this Unimodal service. In short, Proponents claim that they merely wish to set up an NVO service which will have minimal anticompetitive effect and would in fact be rather puny compared to the totality of cargo being exported. There is therefore no triggering of antitrust concerns and no need to apply the Svenska standards.

The reply by Protestants, as one might expect, presents a vastly different picture. According to them, we are dealing here with a joint venture among 39 forwarders who control much more cargo than Proponents intimate (for example, *not less than* 8.2 percent of exports through New York to Northern Europe and the Mediterranean). These 39 forwarders are engaging in a joint venture, as the Commission held in its interim decision. The courts and commentators have consistently found joint ventures to be replete with anticompetitive dangers, as the Commission itself acknowledged in that decision. Eight of the forwarders themselves are NVOs and, as the courts note, this fact is likely to dampen competition between the parents and their progeny. In other words, it is not likely that these eight NVOs will wish to compete with their offspring NVO, CONFICO. As a joint venture. according to Protestants, the CONFICO arrangement contains all the inherent anticompetitive dangers noted by courts in addition to the dampening of competition between the parent NVO-forwarders and the offspring CONFICO NVO. Any forwarder-owner of CONFICO contemplating establishing its own NVO service will most likely not do so since it would be competing with CONFICO which the forwarder partly owns. Therefore, new NVO services will be discouraged. Even aside from the observations of the courts and other authorities regarding the anticompetitive dangers of joint ventures in this case, argue Protestants, the tendency is obviously present for the forwarder-owners of CONFICO to steer cargo to CONFICO rather than to an outside NVO. Indeed, the primary purpose of the Agreement, as Proponents themselves reiterate, is to establish a so-called "neutral" NVO, i.e., one whom the 39 forwarders can trust will not "wean away" their business. In other words, how can it be argued that the Agreement will have no anticompetitive effects when the primary purpose of the Agreement is to satisfy a supposed need for these 39 forwarders to avoid having to use the services of NVOs whom they do not trust because they fear that such NVOs are likely to "wean away" the underlying shippers for themselves? As Protestants also argue, the forwarder-owner of CON-

FICO would also tend to prefer CONFICO over an outside NVO since the forwarder-owner stands also to share in the profits of CONFICO through dividends.

Additional dangers to joint ventures are pointed out by Protestants. For example, joint venturers who would be fixing CONFICO's rates to shippers and brokerage payments to forwarders through the Board of Directors would also be thrust into "dangerous proximity" to discuss other aspects of their businesses, as the Court noted in *Northern Natural Gas Company, et al. v. Federal Power Commission*, 399 F. 2d 953, 972 (D.C. Cir. 1968). Other anticompetitive dangers flowing from approval of the CONFICO agreement are argued by Protestants. For example, the concentration of traffic handled by the 39 forwarders who would tend to utilize CONFICO would enhance CONFICO's power in its dealing with underlying vessel operating carriers. Non-shareholder NVOs, without the backing of 39 sources of cargo, might be placed at a competitive disadvantage when negotiating with underlying vessel operating carriers or might otherwise have difficulties in competing without such a source of business flowing from 39 owner-forwarders. In the view of another group of Protestants (NEC), furthermore, the entire CONFICO arrangement is both horizontal price fixing which would violate section 1 of the Sherman Act *per se* because shareholder NVOs would be determining prices of another NVO (CONFICO) regardless of the corporate facade and would also constitute a tendency to monopolize on a vertical level by establishing a combination of forwarders, consolidators, and NVO operations in CONFICO which together constitute a sizeable segment of the export industry. Moreover, Agreement No. 10235, in the view of NEC, constitutes a prima facie violation of section 7 of the Clayton Act because of its qualitative and quantitative anticompetitive effects and because of the dangerous incipient trend toward concentration which it demonstrates.

APPLICATION OF THE SVENSKA DOCTRINE

I find Proponents' contentions that their Agreement is somehow exempt from application of the *Svenska* doctrine requiring specific justification for approval to be without merit. Proponents would have the Commission find their Agreement to be a relatively harmless arrangement by which a single NVO would be established which would provide first-class, efficient NVO-consolidation services for shippers and would cause no undue concentration of power or have adverse effects on competition. But, as Protestants have argued above, and as this Commission and the courts have so often recognized, joint ventures are very dangerous things indeed and though the courts have not yet

held them to be *per se* violations of antitrust law,[7] they possess so many inherent anticompetitive characteristics and are so suspect that they must be evaluated most searchingly before they are allowed to pass muster under section 7 of the Clayton Act.

Contrary to Proponents' description of their Agreement as one which is neither *per se* nor otherwise violative of antitrust law, the Commission has already made findings which point out the inherent dangers in joint ventures and specifically, in this particular joint venture which is Agreement No. 10235. In its interim decision, as discussed above, the Commission found this Agreement to be subject to section 15 because it was a "cooperative working arrangement" as well as an agreement "controlling, regulating, or preventing competition," and furthermore described the many ongoing aspects of the CONFICO arrangement which would require careful monitoring by the Commission because of the many anticompetitive aspects of such an arrangement and the "tendency of such agreement to lessen or control competition between the parties." Rather than treat this Agreement as something having minimal impact on competition, the Commission took three pages to describe its serious concerns with the effects of the Agreement. (See Interim Report and Order, pp. 13-16.) Moreover, the Commission paid special attention to the warnings of the Supreme Court in the leading case on joint ventures as they relate to the antitrust laws, namely, *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). The Commission stated that "[c]ourts and commentators have removed all doubts that joint ventures tend to lessen or 'control' competition between the parties" (*Id.*, at pp. 15-16), and cited the following language from the Court's decision in *Penn-Olin*:

> . . . [T]he formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition--indeed foreclose it--as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny. 378 U.S. at 168.

The *Penn-Olin* decision is a good place to begin if one wishes to understand at a glance why joint ventures are so suspect and why they

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[7] In *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 23 (1979), the Supreme Court held that "joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." In *United States Lines, Inc. v. Federal Maritime Commission*, 584 F. 2d 519 (D.C. Cir. 1978), the so-called "Euro-Pacific" case, the court distinguished between market divisions which are *per se* violations of antitrust law and "a joint venture to be considered under a rule of reason. .. ." 584 F. 2d at 530. In *Freight Forwarder Agreement 71-7* ("*Customs Forwarders, Inc.*"), cited above, the Commission refused to hold that a joint venture is a *per se* violation of the Clayton Act or the policies of the antitrust laws. 17 F.M.C. at 310.

are considered to be so intrinsically dangerous to competition. Elsewhere in that decision the Court explained:

> The joint venture, like the "merger" and the "conglomeration," often creates anticompetitive dangers. It is the chosen competitive instrument of two or more corporations previously acting independently and usually competitively with one another. . . . If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market. 378 U.S. at 169.

The inherent dangers of joint ventures have been recognized by other authorities. These authorities acknowledge the danger that the joint venture is likely to prefer its owners, as well as the joint owners preferring to do business with their progeny, as the Supreme Court noted above. Furthermore, because of the proximity of the owners engaged in the same business, there is danger of exchanging price information and engaging in other dangerously anticompetitive activities. Finally, there is a probable effect on limiting entrants to a market and possible price manipulation. See e.g., Pitofsky, *Joint Ventures Under the Antitrust Laws,* 82 Harv. L. Rev. 1007, 1030-1038 (1969), and cases cited therein *Northern Natural Gas Company v. Federal Power Commission,* 399 F. 2d. 953, 972 (D.C. Cir. 1968). In the last case cited, for example, the court commented on the fact that in joint ventures parties are exposed to the risk of engaging in other activities relating to their business merely because of their close relationship as joint venturers. In this regard the court stated:

> The joint venture puts the parents, particularly if they are competitors, in dangerous proximity to discuss and act jointly on aspects of their business apart from the joint venture and creates an aura of cooperative team spirit which is apt to dampen competitive fires between the firms involved. . . . 399 F. 2d at 972. (Footnote omitted.)

The court made special mention of the fact that in the joint venture involved in that case, officers of the joint-venture company would also be officers of the individual owners, a situation which could lead to the cited danger. *Id.* The Commission, in its Interim Report and Order (p. 14) noted that Proponents' elected representatives would comprise CONFICO's Board of Directors, who would "frequently be engaged in detailed discussions, planning sessions and agreements concerning competitively significant matters." As Protestants NEC comment, moreover, the current members of CONFICO's Board are officers or direc-

tors of its shareholders as well as signatories of the Agreement. (NEC, Answering Brief, p. 41.)

Given the preceding context and analysis of joint ventures under the antitrust laws and specifically, section 7 of the Clayton Act, one would be hard pressed to conclude that Proponents of a joint venture subject to section 15 of the Shipping Act need not proffer supporting evidence showing the need, benefit, and purpose of their agreement even if there were no Protestants. We need not ponder the matter further, however, for the Commission and the Courts have now indicated that the *Svenska* test should apply whether or not an agreement is *per se* violative or otherwise violative of antitrust policies. Moreover, the Commission has specifically held that joint-service agreements need supporting evidence in justification regardless of the question whether they are *per se* violative. In *Agreement Nos. 9929-2, et al.*, 19 SRR 415, 419 (1979), the Commission conditionally approved a joint-service agreement between two vessel-operating common carriers by water. The Commission described the Agreement in question (Agreement No. 10266-2) as a "joint service arrangement" which "are viewed as arrangements for dividing markets and are also presumed to reduce potential, if not actual competition between the participants." The Commission then stated that "[t]he Commission will therefore require an appropriate justification without regard to whether their particular proposal constitutes a *per se* violation of the antitrust laws." The Commission noted in its Order Partially Adopting Initial Decision that the "Presiding Officer found the Agreements to be subject to the Commission's *Svenska* doctrine." (Footnote omitted.)[8] Thus, the application of the *Svenska* test was not withdrawn by the Commission merely because one of the agreements in that case was a joint-service arrangement. On the contrary, the Commission imposed limiting conditions on the agreement as prerequisites for approval because of inadequate supporting evidence or vagueness in the agreement's language, specifically found need, benefit, and purpose otherwise relating to the agreement, and moreover, defined those terms. 19 SRR at 420 n. 21.

In another joint-service case, *United States Lines, Inc. v. Federal Maritime Commission* ("Euro-Pacific"), cited above, the court made clear that the Commission was obliged to scrutinize agreements submitted under section 15 to determine their impact upon antitrust laws regardless of whether the agreements were *per se* violative of antitrust laws or merely possibly violative of those laws under the "rule of reason" test. The court implied that a joint-service arrangement might be one that should be viewed under the "rule-of-reason" test rather

[8] The Commission, earlier in its decision, described Agreement No. 10266-2 as a joint-service arrangement between two carriers whereby the carriers would share revenues and expenses from joint operations of ships under a trade name to be selected. 19 SRR at 417.

than as a *per se* violation of antitrust laws but, more importantly, the court did not care under which category of antitrust law such an agreement fell. It held that the Commission must carefully examine antitrust consequences regardless of category and find offsetting benefits consistent with the public interest and the purposes of the Shipping Act. In these respects the court stated:

> Whether the arrangement established . . . is viewed as a division of markets and illegal *per se* under the antitrust laws, or as a joint venture to be considered under a rule of reason, it is clear that serious antitrust issues are posed by its implementation. 584 F. 2d at 530.

Elsewhere the court stated that the Commission's duty extended beyond scrutinizing only *per se* violative agreements in search of justification, stating:

> The responsibility delegated to the Commission by Congress is not simply to guard against *per se* violations of the antitrust laws; it is to protect the public interest which may be adversely affected by all forms of anticompetitive arrangements. 584 F. 2d at 531.

In another portion of the court's opinion the court alluded to its test in an earlier case (*Isbrandtsen v. United States*, 211 F. 2d 51, 57), which was the genesis of the later *Svenska* test, requiring the Commission to make sure that section 15 agreements not invade the policies of antitrust laws any more than necessary to carry out the purposes of the Shipping Act. In so doing the court again announced its view that this requirement did not depend upon a finding that an agreement was *per se* violative of antitrust laws. Indeed, the court made the very sensible observation that an agreement might restrict competition more severely than *per se* type violations depending upon the circumstances. Therefore, the Commission had to be on its guard against all restrictive agreements when seeking to determine what, if any, beneficial purposes they served. Thus, after referring to *Svenska* and noting that *per se* violations of antitrust law certainly required careful scrutiny by the Commission, the court applied the same test to other agreements which were not *per se* violative, stating:

> But the fact that a given practice is considered under a rule of reason, rather than as a *per se* violation, does not mean that the dangers to competition in any particular circumstance are necessarily lower; clearly certain practices which are not *per se* violations may, depending upon the facts of the particular case, restrict competition more severely than would *per se* restraints. As a result, any determinative line drawn at per se violations cannot adequately serve to fulfill the Commission's responsibility to protect the public interest, and to ensure that the agreements entered into by carriers do not restrict compe-

tition any more than is necessary to serve the public consistent with the purposes of the Shipping Act. 584 F. 2d at 529 n. 31. See also the court's opinion at p. 531 where it stated:

> But the fact remains that the agreement in this case on its face raised serious antitrust questions and presented the potential nowhere denied by the Commission, that competition would be unduly restrained. If the Commission chooses not to determine whether competition will in fact be restrained substantially, then it must at least demonstrate that it has considered the antitrust implications and has found that the public interest supports approval notwithstanding the possible anticompetitive effects.

Obviously Proponents' Agreement, a joint venture among persons in the same line of business, as described above, cannot be exempted from application of the *Svenska* requirement and must be scrutinized carefully by the Commission. Perhaps there is an innocuous agreement which cannot reasonably be considered to have any significant effects on competition in fact or in theory, but Agreement No. 10235 among 39 freight forwarders to establish an NVO-consolidation operation, when four or so of the forwarders themselves are also NVOs, is certainly not that innocuous agreement. The point is not that the respondents have no obligation to provide evidence of need, benefit, or purpose. They obviously do. The question really is how deep and probative should their evidence be to offset the invasion of our national philosophy favoring free and open competition embodied in the antitrust laws. (The Commission has recognized that the quantum and quality of proof required to justify an anticompetitive agreement may vary depending upon the extent to which the agreement invades the prohibitions of the antitrust laws. See *Agreement No. 8760-5*, 17 F.M.C. 61, 62 (1973); *Agreement No. 57-96*, 20 F.M.C. 289, 300 (1975).)

I conclude therefore that the so-called *Svenska* test is fully applicable to determine the approvability of the subject Agreement. That test, as created by the Commission and as approved by the Supreme Court, is stated by the Court as follows:

> The Commission has formulated a rule that conference restraints which interfere with the policies of antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." See 10 F.M.C. at 45. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243 (1968). [9]

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[9] There is no need to discuss in detail the origins of the so-called *Svenska* test or to engage in a long discussion concerning whether someone must first find that an agreement is in fact or in law violative

It would also be well to consider the Commission's original statements which ultimately led to enunciation of the doctrine. *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290 (1966), the Commission formulated this balancing test:

> [T]he question of approval under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act and (2) a consideration of the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent. The weighing of these two factors determines whether the agreement is to be approved.

I must therefore weigh the evidence proffered by Proponents in favor of approval of their Agreement to determine if it offsets the anticompetitive effects inherent in their joint venture and consider the particular circumstances and conditions which their Agreement seeks to remedy or prevent. It is furthermore important to consider the quantum and quality of the evidence submitted by Proponents, as I have noted. Moreover, as the court in *United States Lines, Inc. v. Federal Maritime Commission*, cited above, observed (584 F. 2d at 530 n. 35), it is important that the evidence not be merely general and "conclusory" or that it be "unsupported by any facts included in the record" if an anticompetitive effect appears likely, as it does in this case. As these cases and other decisions of the Commission clearly demonstrate, furthermore, Proponents are obliged to submit probative evidence showing clear factual connections between the asserted problem which the Agreement purports to remedy and the means by which the Agreement will correct such problem. Without such evidence the Commission has disapproved or modified agreements, for example, by removing one

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of the antitrust laws rather than simply being contrary to the policies of the antitrust laws which preserve and promote free and open competition to trigger *Svenska*. A study of the genesis of the so-called *Svenska* doctrine shows that its roots go back to the *Isbrandtsen* case (211 F. 2d 51, 57) and to the Commission's decision in *Mediterranean Pools Investigation*, 9 F.M.C. 264, 288-290 (1966), and *Investigation of Passenger Travel Agents*, 10 F.M.C. 27 (1966). All of these cases are concerned with invasions of anti-trust policies and the prohibitions of those laws. These as well as later decisions of the Commission continually require a balancing of evidence showing needs, benefits, or valid purposes to offset invasion of the national philosophy favoring free and open competition. See, e.g., *Agreement Nos. 9847 and 9848*, 14 F.M.C. 149, 155-156 (1970); *Inter-American Freight Conference*, 14 F.M.C. 58, 61 (1970); *Agreement No. 9835*, 14 F.M.C. 203, 207 (1971); *Agreements Nos. 9718-3 and 9731-5*, 19 F.M.C. 351 (1976). Although usually considered *per se* violative of antitrust laws, not all of the agreements in these cases were clearly such. However, as I have discussed, it does not matter whether they were *per se* violative of antitrust laws or merely significantly restrictive or anticompetitive. In either event the Commission is obliged to balance evidence of justification for approval of the agreements against their invasion of antitrust policies. As the court stated in *United States Lines, Inc. v. F.M.C.*, cited above, furthermore, the Commission must balance the evidence in support of approval against "antitrust implications" even if "the Commission chooses not to determine whether competition will in fact be restrained substantially. . . ."

party from a three party joint service,[10] refusing to allow a dual-rate contract to be applied to shippers desiring to use different modes,[11] limiting joint-service vessel capacity,[12] disallowing an unduly broad geographic scope,[13] or denying approval because the evidence in support of an agreement is merely conjectural or theoretical.[14]

THE INADEQUACIES OF THE EVIDENCE SUBMITTED BY PROPONENTS

Notwithstanding their argument that the *Svenska* test does not apply, Proponents have submitted evidence in support of approval. However, as measured by the various tests described above, the type of evidence submitted by Proponents I find to be seriously deficient. It is generally long on argument and self-serving puffing but rather short on facts. Furthermore, it is continually contradictory. Considering the fact that Proponents wish approval of a joint venture among 39 forwarders to establish a "super-NVO," as one group of Protestants calls it, which originally sought authority to operate in every export trade in the world, I find such evidence terribly inadequate in view of its anticompetitive implications. I find furthermore that underlying this Agreement there is a sound idea. However, this particular Agreement has not been shown to be necessary to carry out the idea without serious anticompetitive consequences. I conclude that this Agreement is simply not approvable even with limiting amendments proposed by Proponents' counsel but that another, more limited and better justified agreement seeking to preserve small forwarders who may truly need to join forces to offer an NVO service, if fully supported by probative evidence, may well deserve favorable consideration. I now explain.

The evidentiary record in this proceeding is actually quite small. It consists merely of affidavits of two witnesses, Messrs. Bowen and Feste, Chairman of the Board and former President of CONFICO, respectively, together with requests for information submitted by other parties and CONFICO's responses. Other than this evidence, the record contains a copy of the Agreement itself (Exhibit 4) and a statistical analysis prepared by the Commission's staff showing certain traffic aspects, and a clarifying statement of Proponents' counsel explaining who are now to be considered Proponents of the Agreement as compared to shareholders of CONFICO and the original signatories to the Agreement. The evidence and arguments proffered by Proponents can

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[10] *Agreement Nos. 9902-3, et al.*, 21 F.M.C. 911 (1979).

[11] *Agreement Nos. 150 DR-7 and 3103 DR-7*, 22 F.M.C. 378 (1979).

[12] *Agreement No. 9929-3*, 19 SRR 84 (1979).

[13] *New York Freight Bureau Intermodal Agreement*, 22 F.M.C. 319 (1979).

[14] *Agreements Nos. 8200, 8200-1, 8200-2, 8200-3*, 21 F.M.C. 959 (1979); *Agreement No. 17-34*, 21 F.M.C. 750 (1979).

be categorized under following purported benefits (Proponents' Opening Brief, pp. 13-20):

(1) Providing a "neutral service";
(2) Substantial savings to the less-than-carload shippers;
(3) Providing expertise;
(4) Reducing pilferage, congestion and shut-outs;
(5) Providing split delivery service;
(6) Offering single carrier responsibility and one charge from the interior;
(7) Benefitting the small forwarder;
(8) Establishing an international network;
(9) Strengthening the forwarding industry.

Proponents also offer the following as serious transportation needs which the CONFICO arrangement will purportedly meet (Proponents' Opening Brief, p. 21):

(1) Reducing labor costs for steamship lines by consolidating at off-pier warehouses;
(2) Reducing risk of pilferage and congestion and shut-out of cargo by utilizing off-pier consolidation premises;
(3) Reducing multiple bills of lading issued by a steamship line to a single CONFICO bill of lading;
(4) Relieving underlying vessel-operating carrier of responsibility for loss or damage to cargo because CONFICO will assume it;
(5) Saving the vessel-operating carrier from having to process and pay claims of LCL shippers and from the cost of soliciting the LCL market.

Proponents conclude their presentation with additional arguments. Thus, they contend that CONFICO would be unique compared to other NVOs who are not bonded and possibly not financially responsible, unlike CONFICO, which would be backed by 39 licensed forwarders. Furthermore, they contend that there are at least three NVOs who file tariffs who are owned by overseas forwarders. These forwarders did not have to obtain section 15 approval; therefore, why should Proponents? Also, Conferences approved by the Commission are opposing approval of this Agreement but they have "cartel" powers and are "dominated by foreign lines." These facts are "noteworthy," according to Proponents. (Proponents' Opening Brief, p. 24.) CONFICO serves a valid regulatory purpose, argue Proponents, because, being owned by American forwarders, its records would always be available to the Commission, unlike the records of foreign forwarders who own NVOs. Finally, an NVO service operated by an American CONFICO will help restore the American merchant marine and improve our balance of payments. (Proponents' Opening Brief, pp. 24-25.)

As I noted earlier, the evidentiary record is rather thin and is long on argument but short on facts. Furthermore, it is internally contradictory and frequently specious, i.e., apparently valid but not really so. Virtually all Protestants have shown the serious shortcomings in the evidence submitted by Proponents. All of the supposed benefits and needs, on careful analysis, appear either to be unsupported by facts of record, do not show that an Agreement such as CONFICO is necessary to achieve them, or are simply arguments of a conclusory nature. Moreover, the very first "benefit," namely, that the Agreement is necessary to establish a "neutral" or "safe" NVO, is based upon allegations and innuendoes that attack the integrity and character of the entire NVO industry. Other alleged benefits that would flow from approval of the Agreement establishing a CONFICO NVO service merely show that all NVO services are beneficial and helpful to small shippers who do not have enough cargo to fill a full container. Thus, the benefits concerning "substantial savings to LCL shippers," "reducing pilferage, congestion," "providing split delivery," "offering single carrier responsibility," are fine objectives. However, these benefits can and do flow from the operations of any NVO. In other words it is not necessary for 39 forwarders to form a CONFICO NVO to attain these benefits. Any NVO, including the four shareholders of CONFICO who are already operating under NVO tariffs, presumably are providing "substantial savings to LCL shippers," "reducing pilferage," "providing split delivery service," "offering single carrier responsibility," "strengthening their forwarder business," etc., and there is no showing why any individual NVO-forwarder cannot establish an international network if it wishes. In other words, as Protestants correctly note, these benefits are inherent in the operation of any NVO. Even Proponents admit this.[15] What is missing is evidence showing that it is necessary for all 39 forwarders to form a CONFICO to provide NVO services. It is not necessary for Proponents to go outside the evidence of record to cite reports and studies praising the services of the NVO industry, as Proponents have done. No one is disputing the fact that NVOs provide fine services and fulfill needs for small LCL shippers. Indeed, this Commission itself has specifically lauded NVOs and found their operations to be in the public interest to such an extent that the Commission forbade a number of conferences from discontinuing so-called consolidation allowances paid to NVOs under their existing conference agreements. See *Cancellation of Consolidation Rules Published in the Freight*

[15] Thus, Proponents state:
"While other NVOs provide the same basic services as CONFICO . . ." (Proponents' Opening Brief, p. 22). Proponents then try to distinguish CONFICO as unique because of purported expertise, special competency, and financial responsibility accruing to CONFICO because it is owned by 39 active forwarder-signatories.

Tariffs of Conferences, 20 F.M.C. 858, 867-868 (1976); see also the discussion of the advantages and benefits of off-pier NVO-consolidation contained in Docket No. 77-23, *Agreement No. 10294*, 19 SRR 1113, 1135-1136 (I.D. 1979); proceeding discontinued as moot, September 17, 1980, 23 F.M.C. 246.

Perhaps the most disturbing aspect of the evidence proffered by Proponents' witnesses and their arguments is that the first alleged "benefit" which appears to be the main reason for the 39 forwarders to attempt to operate an NVO service is based upon an allegation that NVOs with whom the 39 forwarders deal are not trustworthy and are unethical because the NVOs will attempt to "wean away" business from the forwarders by approaching LCL shippers directly and bypassing forwarders once these NVOs get LCL business via the forwarders. Proponents claim that there is "danger" to the forwarder when he employs non-CONFICO NVOs but "no such danger to the forwarder when he employs CONFICO as the NVO." (Proponents' Opening Brief, p. 14). Proponents even insinuate that these non-CONFICO NVOs are unethical, stating that the CONFICO arrangement is needed so that all forwarders, shareholders or non-shareholders of CONFICO, will feel free to use CONFICO "without fear that their cargo will be unethically solicited." (Proponents' Reply Brief, p. 19). Are Proponents really alleging that the NVO industry is unethical and untrustworthy? If so, where is the evidence supporting this aside from the general accusations of CONFICO's two witnesses? If NVOs are really that bad, moreover, why would forwarders who are not shareholders of CONFICO give CONFICO their business, as Proponents claim they would do?[16] Why wouldn't CONFICO also try to "wean away" the business from non-shareholder forwarders? Furthermore, even if there is some type of unethical jungle out there in the NVO industry, why do the four forwarder signatories to CONFICO who operate their own NVO service need a CONFICO to protect their accounts? Do they fear that their own NVO will "wean away" cargo from themselves as forwarders? This is one of the many contradictions in Proponents' evidence and arguments which destroy the credibility of that evidence and belief in the validity of the arguments.

If we put aside for the moment these allegations about untrustworthy, unethical NVOs whom the 39 forwarders purportedly fear, we can consider the argument on a different basis but again it offers no support for approval of the Agreement. As Protestants have

[16] Proponents state:

> Other NVO services obviously, are available but Confico is unique in one respect--it is the only NVO service owned by forwarders and as such, it will encourage forwarders, shareholders and nonshareholders alike, to obtain the benefits of an NVO service for their exporters without fear that their cargo will be unethically solicited. (Proponents' Reply Brief, p. 19).

pointed out (see especially the NAM group, Answering Brief, p. 22) the argument merely means that the forwarders wish to be insulated from the threat of competition. In other words, by providing a "safe," "neutral" NVO such as CONFICO supposedly would be, the forwarder-owner of CONFICO would feel free to give its business to CONFICO, keep it away from other NVOs, and therefore not live in fear of losing that business to the non-CONFICO NVO. But is protection against competition adequate justification for approval of a 39-party agreement, especially when some of the 39 already operate as NVOs themselves and presumably would have no need for a CONFICO? Does the shipping public benefit because the forwarder-shareholder of CONFICO fears outside NVOs and will be motivated to keep shippers' cargo away from them, if possible, even if such NVOs offered superior service and lower charges? Remember, too, that Proponents had argued earlier that their Agreement does no violence to antitrust laws because it is not anticompetitive and should not be subjected to the *Svenska* test. What, then, do they call this type of restraint of trade, an agreement whose main purpose is to alleviate fears of forwarders by giving them reason to steer business to one NVO and avoid doing business with outside NVOs whose competition they fear? Again, we have a contradiction in Proponents' evidence and arguments which undermines their case.

As in the case of Proponents' arguments that the benefits of an NVO service could be provided by approval of the CONFICO agreement and the argument that approval of CONFICO is necessary to protect the 39 forwarders from unscrupulous NVOs, Proponents' case continues to be undermined by a single, recurring question, i.e., why can't these purported needs or benefits be achieved without concerted action by 39 forwarders? In other words, why can't any forwarder offer an NVO service individually, thus avoiding the need to seek section 15 approval? The record contains confusing answers to this question? First, Proponents themselves reiterate that "anybody with desk space and a telephone can establish an NVO operation even though he has no knowledge of the business nor adequate working capital." (Proponents' Opening Brief, p. 16.) But then Proponents argue that some forwarders need CONFICO because they are too small to offer a frequent and regular container service? (Proponents' Opening Brief, p. 19.) Proponents thus argue than CONFICO will be a reliable, trustworthy, financially sound NVO, unlike those outside NVOs with their desks and telephones but then imply that maybe those NVOs are really not so weak and unattractive since they must be attracting enough business to offer a frequent and regular NVO container service which some of the 39 Proponents apparently cannot do by themselves.

Of course, there is another question that should be asked, namely, does the record show a serious transportation need for the establish-

ment of another NVO, especially a "super-NVO" fed by 39 forwarders. No shippers testified, or as far as I can tell from the record, were even asked if they wanted or needed another NVO. The fact that 39 forwarders fear competition from non-CONFICO NVOs does not mean that the shipping public is suffering from inadequate NVO service presently. (On the contrary, Proponents themselves argue that the Commission's records will show "a steady flow of NVO tariffs being filed. . ." (Proponents' Reply Brief, p. 4).) But even if the record showed a shortage of NVO service, it is not clear that the establishment of the joint-venture CONFICO NVO with its inherent tendency, common to all joint ventures, to discourage the forwarder-owners of CONFICO from commencing new NVO services in competition with their offspring, would ultimately ensure that shippers would have a greater selection of competing NVOs from which to choose.

But, argue Proponents, even if any NVO offers essentially the same service as CONFICO, CONFICO would be "unique" because it would be backed by 39 licensed forwarders and would consequently possess "expertise" and would be "financially responsible." Furthermore, they argue, only CONFICO with its forwarder connections could establish an international network of forwarders to handle each others's containers to ensure efficient handling of freight to destination. (Proponents' Opening Brief, pp. 22-23.) Here again the argument is short on facts. undermined by inconsistencies, and based in part on unsupported allegations. Again it is apparently charged that non-CONFICO NVOs are somehow financially unsound, apparently Proponents' "desk and telephone" characterization of NVOs implicitly returning. But does the record contain facts showing the financial condition of the NVO industry? Are they supported by large backers, are they well capitalized corporations? Have they been going bankrupt and causing shippers to suffer financial harm? If so, where is the evidence? I cannot officially notice all of these alleged facts or rely upon some hidden knowledge of which Protestants are unaware and which they have no chance to refute. The courts strongly condemn this type of decisionmaking. See *United States Lines, Inc. v. Federal Maritime Commission*, cited above, 584 F. 2d at 533-535.

Furthermore, as some Protestants have noted (see NAM group, Answering Brief, pp. 24-25), the fact that CONFICO is owned by numerous forwarders does not establish that the corporation CONFICO will necessarily be financially responsible. A prime reason for the information of a corporation in the first place is to limit the liability of its shareholders. But note again another contradiction in Proponents' arguments. Proponents claim that they are merely forming one NVO and are not planning to engage in rate-fixing among several NVOs or to file joint NVO tariffs. In other words, CONFICO is supposed to be a single corporate NVO with one tariff serving shareholders and non-

shareholders alike. But now Proponents argue that the knowledge and skills of the 39 forwarders will be utilized by CONFICO to assure shippers of competency and financial soundness and also enable CONFICO to establish inland services and an international network with other forwarders in destination countries. Does this not tend to confirm the findings of the Commission in it's Interim Report and Order as well as the contentions of Protestants that what we have here is an ongoing cooperative working arrangement among active forwarder participants who will be continually meeting to make joint decisions? Moreover, will the forwarders be providing the skilled labor to operate the NVO service? Are outside non-CONFICO NVOs presently unable to find skilled labor or administrative help to operate their businesses without turning to forwarders to assist them? Are all present NVOs unable to make arrangements with overseas forwarders for efficient movement of containers to inland destinations in foreign countries? Are not some of them corporations or forwarder-owned or affiliated themselves or, even if not, don't foreign forwarders talk to them? I have no reason to doubt that CONFICO could provide a responsible, sound NVO international service. But I also have no record evidence that such NVO services are not already being provided, that they cannot be provided without approving CONFICO's arrangement, or that there is a serious transportation need for CONFICO to commence such services because of a present dearth of them. In short, since there are so many inherently anticompetitive effects to this joint venture, I cannot find probative evidence to offset those considerations or, as the Commission stated in *Mediterranean Pools Investigation*, cited above (9 F.M.C. at 290), find "the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent."

The final category of arguments proffered by Proponents again are deficient in factual support and suffer from more inconsistencies. Thus, Proponents contend that there are at least three NVOs operating in the United States who are owned by foreign forwarders, namely, Scanfreight, Inc., Ecca, and Unimodal, Inc. (The last named, as noted previously, now employs CONFICO as its general agent.) Proponents complain that these foreign forwarders, assuming that they are also engaged in joint ventures, did not have to go through section 15 proceedings to commence operations, so why can't Proponents begin to start their CONFICO service without all this litigation? There are, of course, several answers to this question. First, we are in an American forum and must observe American law until that law is changed. If each of the named NVOs is operated by a consortium of foreign forwarders rather than a single forwarder or holding company, there may be no foreign antitrust laws that hinder those companies from acting concertedly. Furthermore, foreign freight forwarders are not

licensed by this Commission. Does that mean that we should suspend our antitrust laws or the Shipping Act when 39 forwarders in this country enter into a joint venture that is highly suspect under American antitrust law? Should we also suspend the licensing requirements and other regulations applicable to American freight forwarders under section 44 of the Act because foreign forwarders are not so regulated or indeed because American NVOs are not required to be licensed? If American laws are causing some unfairness or are hindering American companies from competing with foreign businesses, the answer is not to stop administering the laws which implement current national policy and congressional will but to seek amendment of them. Moreover, in this case, the record does not even show that the three foreign-owned NVOs are causing competitive harm to American NVOs or forwarders. Indeed, one of them, Unimodal, Inc., is not only an American corporation but also employs CONFICO. All that Proponents complain about is the fact that, being in America and subject to American laws, they have to show that they satisfy the requirements of those laws whereas their foreign counterparts are supposedly free of such restrictions. But, to repeat, neither I nor this Commission is free to ignore the prevailing national policies embodied in our antitrust laws favoring free and open competition, including competition among the 39 forwarders, and strongly suspecting joint ventures such as Agreement No. 10235.[17]

Proponents argue also that approval of CONFICO would assist the American merchant marine and our national balance of payments. These are valid regulatory purposes, according to Proponents. Such arguments are also defective, however. The Agreement does not promise that CONFICO, when it tenders full containerloads to underlying vessel-operating carriers, will always select American carriers. Indeed, Proponents keep telling us that their Agreement is not restrictive of competition, another inconsistency in their arguments. Therefore, there is no assurance that in the real competitive world CONFICO will not select foreign vessel-operating carriers. Indeed, as Proponents themselves have argued, the ocean carrier Conferences are "dominated" by

[17] Proponents also complain that "some 32 steamship conferences dominated by foreign lines and representing every major trade have employed their resources and legal talent in a determined bid to prevent CONFICO from getting off the ground. Why should these conferences be allowed to use their cartel powers to prevent an NVO operation by a firm owned by U. S. forwarders while NVOs owned by overseas forwarders can offer a service practically overnight?" (Proponents' Opening Brief, p. 24.) I do not know how an attack on the motivation or right of these Conferences to protest approval will help determine the merits of approvability of the Agreement in question. The case for approval must rest on the evidence introduced by Proponents in support thereof, not on unarticulated innuendoes about the motives of Protestant Conferences. Moreover, as Proponents must be aware, American law permits groups of people to seek legislative or administrative help concertedly from their Government under their First Amendment rights without fear of antitrust prosecution absent unusual circumstances. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mineworkers v. Pennington*, 381 U.S. 657 (1965); *Calif. Motor Transport v. Trucking Unlimited* 404 U.S. 508 (1972).

foreign carriers. Therefore, isn't it more likely that CONFICO will have to select the best, available ocean carrier service regardless of flag? Yet Proponents argue that"CONFICO, being American owned, will without doubt support our carriers *whenever possible.*" (Proponents' Opening Brief, p. 25.) (Emphasis added.) Why will CONFICO be any more likely to do this than are American exporters? In short, while this objective, aside from antitrust considerations inherent in a policy seeking to avoid doing business with certain carriers, might seem like a valid regulatory purpose, this Agreement is far from a guarantee that assistance to the American merchant marine is probable. Also, the old question returns, namely, why establish a CONFICO for this purpose? Can't individual American-owned NVOs or forwarders try, whenever possible, to use American carriers, without acting in a joint venture?

Proponents' argument that approval of the CONFICO agreement will help our balance of payments is similarly strained. Proponents contend that, unlike foreign-owned NVOs, a large share of revenue earned by CONFICO will remain in this country. But a large portion of any NVO's costs is the ocean freight it pays to the underlying ocean carrier, which, as noted, may well be a foreign carrier. Also, conversely, if a foreign-owned NVO selects an American carrier and pays its rates, that carrier's revenue will also stay in this country. But again, aside from these problems with the argument and the unproven assumptions on which it is based, why must the 39 forwarders form a CONFICO to keep revenue in this country? Do not four of them who are also NVOs already keep revenue derived from their individual NVO operations in this country?

Finally, Proponents argue that CONFICO would serve a valid regulatory purpose because, unlike NVOs owned by overseas forwarders, CONFICO's records would be available to the Commission. Even if one assumes that there will be a need to scrutinize the records of an NVO like CONFICO any more than there is a need to look at any NVO's records, was it a purpose of the Shipping Act to require a single NVO, as Proponents claim CONFICO would be, to set up records? Is this what is supposed to benefit the shipping public? Do shippers care if CONFICO makes its records available to the Commission or are they more interested in a selection of good NVO services in a climate of free and open competition? Accessibility of records, is, of course, important and possibly could be required as a condition of approval. But justification of an anticompetitive agreement requires probative evidence of a specific need, benefit, or purpose which is relevant to specific conditions and problems which the agreement will remedy, as the Commission noted in *Mediterranean Pools Investigation*, cited above. I am not aware from this record that there is currently a problem or harm resulting to the shipping public or competing NVOs because three foreign-owned NVOs, one of which is a corporation chartered in this

country, are owned by foreign companies whose records are located overseas. Again, however, if there is such a problem, do we solve the problem of obtaining overseas records by approving this joint-venture CONFICO arrangement? I fail to see the relevance.

SUMMARY OF WEAKNESSES AND CONTRADICTIONS IN PROPONENTS' CASE

As I have indicated above and discuss more fully below, there seems to be a sound idea underlying the CONFICO arrangement but the subject Agreement is simply too large and inherently anticompetitive to be supported by the type of case which Proponents have introduced. I cannot overlook the many contradictions in the evidence and arguments which undermine the case for approval and have already alluded to a number of them. For example, Proponents argue that anyone can easily become an NVO with "a desk and telephone" but they also say that small forwarders cannot become NVOs because of lack of sufficient cargo. Also, Proponents argue that non-CONFICO NVOs are feared by the 39 forwarders because these NVOs allegedly will "wean away" business from the forwarders. Therefore, they say, the forwarders need a "safe," "neutral" NVO like CONFICO. But they also contend that outside forwarders have and will use CONFICO's NVO service. But why didn't or won't these outside forwarders fear that CONFICO would "wean away" their business and why will CONFICO, unlike all other NVOs who are alleged to be "weaners," behave differently. Then, too, Proponents argue that the 39 forwarders need the "neutral" CONFICO NVO. But they also argue that their Agreement is not anticompetitive because these forwarders do not promise to give all of their business to CONFICO, and, indeed, assert that only 33 percent of these have supported CONFICO. Then what is this alleged need for CONFICO? Apparently 67 percent of the shareholders did not feel it. Also, Proponents argue that an individual forwarder has a great incentive to offer its own NVO service because of the large revenue it derives from such an operation, aided by consolidation allowances and lower FAK containerload rates offered by ocean carriers to NVOs. Indeed, Proponents argue that the Commission's tariff records "will indicate a steady flow of NVO tariffs being filed, many of which are by forwarders or affiliated firms." (Proponents' Reply Brief, p. 4.) But then why argue that CONFICO is necessary to motivate the forwarder to begin an NVO business or that CONFICO will provide an example which other forwarders will wish to emulate, as Proponents also argue? (Proponents' Reply Brief, pp. 4, 5.) Proponents call it "pure conjecture that the shareholders will lose their incentive to become NVOs, if any are so inclined." (Proponents' Reply Brief, p. 3.) In other words, what is the need for a CONFICO if there is so much incentive for forward-

ers to become NVOs individually as indeed four forwarder Proponents have become?

There are more contradictions. For example, Proponents argue that their joint venture will not give the shareholders of CONFICO any competitive advantage, contradicting the Commission's findings in its Interim Report and Order. (Proponents' Opening Brief, pp. 10-11.) If so, then why would any forwarder wish to form CONFICO and why especially would small forwarders, whom Proponents claim cannot form NVO services by themselves, wish to be parties to CONFICO? If there is no advantage to CONFICO, why don't these small forwarders stay out of it? And if the offering of a financially sound, expert NVO service is one of the objectives of CONFICO, why do four forwarders who already offer NVO services have to be parties to the CONFICO arrangement?

In their final brief, Proponents repeat their attempts to persuade that their Agreement is really very beneficial with minimal anticompetitive consequences. They ridicule the idea that the 39 forwarders who constitute perhaps only 6 percent of all New York-located forwarders will constitute any type of monopoly and emphasize that the burdens of proof imposed on Proponents by the *Svenska* doctrine which applies to *per se* violations of antitrust laws should not be applied to this joint venture having such little impact on competition. Again, however, Proponents ignore the problems which courts and other authorities have consistently recognized as characteristic of joint ventures which are inherently anticompetitive and furthermore overlook the fact that during 1978 Proponents handled not less than 8.2 percent of U. S. exports via the Port of New York to Northern Europe and the Mediterranean, as I have earlier noted.[18] As the Court noted in the *Penn-Olin* case, furthermore, section 7 of the Clayton Act was enacted to stop incipient anticompetitive activity, not just monopolies, before harm could develop. As the Court stated:

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[18] Proponents ridicule the idea that their Agreement has any tendency to "monopoly" because of the relatively small number of forwarders involved compared to all forwarders operating in the relevant market areas (perhaps 6 percent of all New York-area forwarders) and what they consider only minimal traffic handled by these 39 forwarders (not less than 8.2 percent of traffic moving out of New York to North Atlantic and Mediterranean destinations). No one is arguing that the Agreement will produce only one NVO and destroy all other NVOs. But the courts and Congress are concerned over anticompetitive tendencies and are much more fearful of joint ventures or mergers under section 7 of the Clayton Act than Proponents indicate. As the NEC group have shown, it is not enough merely to show only 8.2 percent or 6 percent of a market but one must carefully analyze the relevant market both quantitatively and qualitatively. Sometimes, a merger is found unlawful even if there are numerous competitors to a merged company and that company would handle only 7.5 percent of the market. See *United States v. Von's Grocery*, 384 U.S. 270 (1966). Vertical mergers are even more dangerous, i.e., manufacturer acquiring retailer, analogous to the present Agreement whereby the forwarder would acquire the NVO. In *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), a vertical and horizontal merger was found unlawful even though the combined market share of the two merging wholesalers and retailers of shoes was only 4.5 percent and 8 percent respectively.

> The grand design of . . . [section 7] . . . was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach. It follows that actual restraints need not be proved. The requirements of the amendment are satisfied when a "tendency" toward monopoly or the "reasonable likelihood" of a substantial lessening of competition in the relevant market is shown. Congress made it plain that the validity of such arrangements was to be gauged on a broader scale by using the words "may be substantially to lessen competition" which "indicate that its concern was with probabilities, not certainties." 378 U.S. at 170-171.

But Proponents argue that CONFICO is a necessary joint venture because the 39 forwarders fear giving their business to outside NVOs who "wean away" business, as I have noted. Is it not the case, then, that in fact as well as in theory there will be restraints on competition, namely, a tendency for the 39 to steer cargo to CONFICO rather than outside NVOs and conversely that CONFICO will not attempt to obtain a freight forwarder's license? As the Court also noted in the *Penn-Olin* case in a passage I have cited earlier:

> Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market. 378 U.S. at 169.

In their Reply Brief, however, Proponents contend that the various parties opposing approval of their Agreement are relying upon "pure speculation" or "pure conjecture" when these Protestants argue that approval of the Agreement will most likely result in having the 39 forwarders steer cargo to CONFICO and not to outside NVOs and that approval will discourage forwarder-shareholders of CONFICO from beginning their own NVO services. But, to repeat, Proponents themselves feed these contentions by arguing that the 39 need a "safe" NVO and that "small" forwarder-shareholders cannot enter the NVO business by themselves. Proponents also deny that CONFICO would use information from outside, non-shareholder forwarders to assist its forwarder-owners in obtaining the business of these outside forwarders. Yet, as noted previously, Proponents argue that the nature of NVOs is to "wean away" business from unaffiliated forwarders. As discussed, the courts and other authorities on joint ventures continually point out the very dangers that Proponents claim to be supported only by "speculation" or "conjecture" on this record, and their own evidence and arguments often contradict their denials of these anticompetitive tendencies. Moreover, the Supreme Court itself in the *Svenska* decision recognized that the Commission was entitled to draw reasonable inferences from the record as a whole absent positive proof or complete evidence, stating:

> "Conjecture" of this kind, when based on inferences that are reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry, is fully within the competence of this administrative agency and should be respected by the reviewing courts. 390 U.S. at 249.

As Proponents have argued and as I have agreed, all joint ventures are not unlawful or even *per se* violative of antitrust law. Proponents cite the *Penn-Olin* case, among others, to support that contention. But in *Penn-Olin*, the Court did demonstrate that it expected the lower court to consider a number of factors before deciding whether the joint venture violated law, among them, as Proponents themselves state (Proponents' Reply Brief, pp. 12-13): "(1) the reasons and necessities for the existence of the joint venture; 2) the joint venture's line of commerce and the relationship thereof to that of its parents; and 3) such other factors that might indicate potential risk to competition in the relevant market. 378 U.S. at 177." Perhaps, as Proponents state, there is no tendency to monopoly involved in this joint venture. But the tendency to prefer CONFICO whenever possible has been shown by Proponents' own witnesses and arguments. Certainly there should be evidence of the "reasons and necessities" for *all 39 forwarders*, including those who already provide NVO services, to be included in the joint venture. I fail to see such evidence. On the other hand, a smaller agreement limited to those forwarders who really need a CONFICO NVO service to compete effectively but who cannot provide such service on their own may be approvable, as I now discuss.

WHAT TYPE OF ALTERNATIVE AGREEMENT COULD BE APPROVED

I agree with Hearing Counsel that it is not necessarily wrong if a group of freight forwarders wish to offer a joint NVO-consolidation operation, at least under Shipping Act principles. Such an idea apparently has been suggested by a noted authority on freight forwarders, who happens to be Proponents' counsel in this case, Mr. Gerald H. Ullman.[19] The idea apparently was discussed in Mr. Ullman's work, *The Ocean Freight Forwarder the Exporter and the Law*, p. 40 (Cornell Maritime Press, Inc., 1967). (See Answering Brief of the NAM group, p. 12.) In that work, however, Mr. Ullman conceded that "the forwarders may be regulating or controlling competition with respect to the shipments each furnishes to the NVOCC entity in that each will in all likelihood be agreeing to use the NVOCC container service and not an

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[19] After having criticized Proponents' case and arguments, I can at least recognize that Mr. Ullman, the author of a work on the freight forwarder industry and a long time advocate and spokesman for that industry, is, I believe, a recognized authority in this field as well as a respected practitioner before this Commission.

outside competing service." Mr. Ullman replies that the quoted passage was speaking generally and not about this particular Agreement, which, he asserts, contains no agreement by the forwarders to use the CONFICO NVO service exclusively. (Proponents' Reply Brief, p. 14.) Be that as it may, as I have already noted, the likelihood of the 39 forwarders steering their business to CONFICO is strong, notwithstanding the absence of any specific language in the text of the Agreement. However, the underlying idea may not be so bad if it will enhance or preserve competition in the forwarder as well as NVO industry.

The reader may notice that I did not address myself to two of the alleged benefits that would flow from approval of Agreement No. 10235. These are Nos. 7 and 9, namely, "benefitting the small forwarder" and "strengthening the forwarding industry." Of all the alleged benefits, these appear to be the only ones which may not be achievable by separate action on the part of certain individual forwarders. In other words, any forwarder who can establish an NVO service by himself can offer the many inherent benefits of an NVO-consolidation service which Proponents have itemized or can set up his own NVO service if he fears loss of business to outside NVOs. But if there are so-called "small" forwarders whose existence is in jeopardy because they need to offer an NVO service in connection with their forwarding operations in order to remain competitive but cannot do so relying on their own resources, they may need to act jointly. The preservation of competition was certainly one of the objectives of the Shipping Act, 1916, as the Alexander Report illustrates in its discussion of the reasons for recommending section 15 of the Act.[20] It is also beyond argument that the antitrust laws have the same objective. As the Supreme Court stated in the *Penn-Olin* case:

> Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy to preserve and promote a free competitive economy. 378 U.S. at 170.

In *United States v. Brown Shoe Co.*, 370 U.S. 294, 344 (1962), another leading case arising under section 7 of the Clayton Act, the Court stated:

> It is competition, not competitors, which the Act protects. We cannot fail to recognize *Congress's desire to promote competition through the protection of viable small locally owned businesses.* (Emphasis added.)

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[20] See the "Alexander Report," p. 415, quoted in Pike & Fischer, Shipping Regulation, p. 51:31. The Committee expressed a desire to preserve "open competition" and a concern over "elimination of the weak" ocean carriers unless the conference system were permitted, albeit under careful regulation.

In the one previous case involving an agreement among forwarders to establish a corporation for the purpose of offering an added carrier service in a joint venture, the *Customs Forwarders, Inc.* case, cited above, 17 F.M.C. 302, the Commission found that the joint venture would enhance the six forwarders' competitive viability without significant anticompetitive effects, the six needing to add an inland I.C.C. "Part-IV forwarder" (i.e., carrier operation) to their forwarding services to remain competitive. The Commission paid careful attention to the *Penn-Olin* case, however, to make sure that the evidence of need offset the anticompetitive effects inherent in joint ventures.

If a new Agreement is submitted which is not based on fear of competition from "unethical" or unscrupulous NVOs and related allegations and which is shown to be necessary to enable certain small forwarders to remain competitive, it may merit approval as did the agreement among the six forwarders in the *Customs Forwarders, Inc.* case. Such an agreement might preserve competition, not endanger it. The record in this case, however, is not adequate to establish that there is a need for such an Agreement nor, if so, what particular forwarders need to be parties to remain competitive.

As with the rest of the record, the evidence concerning the question whether the subject Agreement would benefit the "small" forwarder or strengthen the financial position of the forwarding industry is threadbare and contradictory. It consists essentially of general statements of Mr. Bowen, Chairman of CONFICO, that some of the forwarder members of CONFICO are too small to offer a regular NVO service because they do not attract enough cargo to consolidate into containers and his further statement that an added NVO service would enhance forwarders' financial positions. There is also some evidence that a number of the original forwarder parties to Agreement No. 10235 are insolvent or inactive (Exhibit 7) and some statistical data offered by Hearing Counsel showing that a few forwarders control a majority of the total business of CONFICO's shareholders and that only six forwarder shareholders out of 38 answering interrogatories tendered full containerload shipments in 1978. (Hearing Counsel's Answering Brief, p. 4.) These statistics do not show by themselves exactly what forwarders need an added NVO service. Nor do they show the financial position of each of the 39 forwarders, nor how much traffic they need to attract to offer an NVO service, whether their history shows them capable or likely of attracting sufficient business on their own to set up their own regular NVO service, nor whether any particular forwarder is in competitive trouble because he cannot offer an NVO service, etc. There is also the problem mentioned above, namely, that Proponents also assert that anyone with a desk and telephone can start an NVO business, an assertion which undermines their argument that some small forwarders need a CONFICO NVO service because they cannot start

one themselves. This particular state of the record concerning small forwarders is understandable since the case did not focus on their particular needs but on many other considerations, as discussed.

If a new Agreement is submitted which is truly needed to preserve a certain number of small forwarders and which will, notwithstanding its nature as a joint venture, on balance, preserve and promote competition rather than destroy it, such an Agreement, if clearly and understandably drafted and supported by specific probative evidence regarding the needs of each forwarder, would deserve favorable consideration under either the Shipping Act or even section 7 of the Clayton Act. As the *Penn-Olin* case shows, the Clayton Act does not forbid joint ventures provided that adequate evidence showing enhancement of competition is shown.[21] Furthermore, since the jurisdictional issue will not delay any subsequent proceeding and since the courts have advised the Commission that it has flexibility to fashion an efficient proceeding which may avoid the need for trial-type hearings,[22] any new proceeding need not consume anywhere near the length of time that the present one has consumed, especially if the Commission advises needy forwarders of the type of evidence required to support approval and the individual proponents furnish that evidence promptly.[23]

ULTIMATE CONCLUSIONS

Proponents seek approval of a joint-venture Agreement by which 39 freight forwarders have formed a corporation which will perform NVO and consolidation services. As a joint venture among parties, some of whom are also NVOs, such an enterprise is considered by authorities in the field of antitrust law to be inherently dangerous to competition,

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[21] On remand from the Supreme Court, the District Court in the *Penn-Olin* case dismissed the Government's complaint against the joint venture there under consideration. The District Court's decision was later affirmed by the Supreme Court. See 246 F. Supp. 917, affirmed, 389 U.S. 308 (1967).

[22] See, e.g., the comments of the court in *United States Lines, Inc. v. Federal Maritime Commission*, cited above, 584 F. 2d at 536-537.

[23] As I noted earlier, Proponents have offered some limiting amendments to their Agreement in an effort to gain approval. They offer to restrict operations to the North Atlantic trade, limit intermodal authority east of the Mississippi, limit the term of the Agreement to 5 years, and delete the authority to carry on discussions with other persons subject to the Act. (Proponents' Reply Brief, p. 20.) These suggestions are helpful but inadequate. The record still does not contain sufficient evidence to justify an Agreement among all 39 forwarders, even with such limitations, since it still depends upon the same allegations and general conclusions and does not specify forwarders who really need to add an NVO service by means of CONFICO rather than by means of their own individual resources.

Another serious problem, which I have not discussed before because the Agreement is otherwise not approvable, is the fact that the Agreement is unclear in certain respects. The NEC group of Protestants correctly point out deficiencies and inconsistencies between Agreement No. 10235 and the previous FICO agreement. The Commission's Interim Report and Order noted some of the problems. Furthermore, it is unclear as to what happens to shareholders of the CONFICO corporation who are not signatories to the Agreement or who are not actively forwarding. In other words, one cannot be sure exactly what the entire Agreement consists of nor how the 39 Proponents will be acting in relation to other shareholders of CONFICO. As the NEC group correctly states, the Commission must know exactly what it is authorizing. (See discussion in the NEC Answering Brief, pp. 14-33.) Any future Agreement should eliminate these ambiguities.

having tendencies to freeze competition by discouraging the parents of the corporation from competing in the same line of business with their offspring and vice versa, encouraging the parents to deal preferentially with the offspring NVO to the detriment of outside NVOs, and exchanging information relating to the forwarders' businesses, among other things. For that reason joint ventures are highly suspect under the Clayton Act and must be carefully scrutinized to ensure that they enhance rather than prevent competition.

In view of the suspicion in which joint ventures are held under antitrust law, this Agreement must be carefully examined under the *Svenska* test to determine if the evidence shows a need, benefit, or valid regulatory purpose which will offset the significant invasion of antitrust policies. The *Svenska* test, which was actually created by the Commission, applies whether or not an agreement is *per se* violative of antitrust law or policies. Furthermore, the courts and the Commission expect not only a careful scrutiny of the antitrust consequences but specific probative evidence showing need, benefit, or purpose. Such evidence is not present in this case.

The evidence proffered by Proponents in support of their Agreement is long on argument but short on facts and is replete with generalities and weakened by contradictions. Most of the purported benefits of the Agreement would be achieved by any NVO without the need for this joint venture. Moreover, the main reason for the establishment of CONFICO, namely, to set up a "neutral" or "safe" NVO, is based upon an allegation that NVOs today cannot be trusted not to "wean away" business from the 39 forwarders. Approval of the Agreement therefore would be tantamount to giving credence to this allegation, thus casting aspersions on an entire NVO industry on the basis of self-serving accusations and, moreover, would merely be insulating Proponents from the fears of competition from an NVO industry which the Commission has previously lauded as serving the public interest.

Proponents' evidence and arguments do not answer the recurring question, namely, why cannot these various, alleged benefits of a CONFICO NVO service be achieved by any individual Proponent-forwarder by such forwarder's merely expanding into the NVO business. Among the many contradictions in their evidence is the dual assertion that CONFICO is necessary to enable these 39 forwarders to commence an NVO service but that anyone with a desk and telephone can become an NVO and that, indeed, the Commission's tariff records will show a plethora of NVO tariffs being filed without the need for section 15 agreements. There is, in short, no persuasive evidence that shows that all 39 forwarders must be parties to CONFICO or that indeed the shipping public even needs another NVO service. In place of evidence, furthermore, Proponents complain about the fact that they are required to seek approval under section 15 of the Shipping Act whereas foreign

forwarders, who have formed a few NVOs, did not have to seek such approval. Proponents also claim that approval of CONFICO would aid the American merchant marine and help our balance of payments and that CONFICO should be approved because its records would be available to this Commission. None of these arguments withstands the slightest critical analysis. There is still no showing of need for a 39-forwarder-owned NVO and there is no persuasive evidence showing that CONFICO would deal exclusively with American-vessel-operating carriers, nor a showing that revenue cannot be kept in this country by any forwarder who establishes an NVO service without entering into a multiple-party joint venture. The solution to the problem of obtaining documents from overseas locations, furthermore, is not solved by approving a 39-party Agreement.

Although the 39-party Agreement under consideration is too large and inherently anticompetitive to be supported by the type of thin evidence and contradictory arguments presented in its support, the basic idea of small forwarders organizing a joint venture to provide an NVO service without which they might not be able to survive in their competive market is not unsound provided that the individual forwarders are unable to provide the NVO service by means of their own resources. If a more limited agreement among truly needy forwarders were submitted, backed by specific probative evidence showing need and enhanced competition, it would deserve favorable consideration. No such agreement or evidence has been submitted in this proceeding, however.

(S) NORMAN D. KLINE
Administrative Law Judge

Washington, D. C.
November 6, 1980

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-74

JAPAN/KOREA ATLANTIC & GULF CONFERENCE INTERMODAL AMENDMENT (AGREEMENT NO. 3103-67)

A steamship conference serving Japan and Korea via U.S. Atlantic and Gulf ports failed to demonstrate a legitimate transportation need, public benefit or regulatory purpose for an agreement authorizing the members to set rates for intermodal traffic moving through such ports. The Proponents particularly failed to justify the agreement's unlimited geographic scope, its indefinite duration, and its 120-day restrictions on member lines wishing to offer intermodal services not offered by the conference.

Charles F. Warren and *George A. Quadrino* for Japan/Korea Atlantic & Gulf Conference.

Neal M. Mayer, Paul D. Coleman and *Peter J. King* for Seatrain Pacific Services, S.A.

J. Robert Ewers, Paul J. Kaller and *C. J. Swedarsky* for the Bureau of Investigation and Enforcement.

REPORT AND ORDER

June 17, 1981

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

On July 20, 1979, the Commission instituted an investigation into the approvability of Agreement No. 3103-67 under section 15 of the Shipping Act, 1916 (46 U.S.C. 814).[1] Agreement No. 3103-67 is a proposal to amend the organic agreement of the Japan/Korea Atlantic & Gulf Conference (JKAG) by permitting its eleven member lines to agree upon rates and practices for through intermodal transportation from ports in Japan and Korea to interior points in the United States via Atlantic and Gulf Coast ports.[2] Approval of the Agreement was pro-

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* Commissioner Daschbach only concurs in the result and will issue a separate opinion.

[1] The Agreement was filed March 22, 1978, followed by the Proponents' justification statement on June 9, 1978. On November 29, 1978, the Commission issued an Order disapproving the Agreement unless JKAG made a timely request for further hearing. Such a request was filed by JKAG in which it also requested that the proceeding be limited to an exchange of affidavits and memoranda on the question of whether its proposed intermodal service would be commercially accepted by shippers. The Commission's July 20, 1979 Order of Investigation and Hearing stated that implementation of a conference intermodal service alone could not justify price fixing and that all aspects of the Agreement and its competitive impact would be examined.

[2] The JKAG member lines are: Barber Blue Sea Line; Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Korea Shipping Corporation; Lykes Bros. Steamship Company, Inc.; Mitsui O.S.K. Lines, Ltd.;

tested by Seatrain Pacific Services, S.A., a nonconference ocean carrier then participating in the trans-Pacific trades via U.S. Pacific Coast ports.[3] Seatrain and the Commission's Bureau of Investigation and Enforcement (Protestants) participated in this proceeding as opponents of approval.

BACKGROUND INFORMATION

JKAG has previously possessed intermodal ratemaking authority. From January 18, 1973 until its fourth short-term extension agreement expired on November 18, 1978, the Conference could lawfully discuss and take action with respect to intermodal service to interior points located anywhere in the United States.[4]

During this period JKAG failed to carry any intermodal cargo and only one of its members established an intermodal service of its own,[5] despite the fact that a September, 1976 JKAG study revealed that 27% of the Conference's cargo ultimately moves to "ascertainable inland destinations" beyond port areas and is susceptible to intermodal carriage.[6] A Conference intermodal tariff was first published effective November 15, 1977 and offered service via Atlantic Coast ports to four interior points -- East St. Louis, Chicago, Louisville and Cleveland -- at rates which simply combined JKAG's all-water rates with railroad Plan II 1/2 rates. This "combination rate" service did not achieve commercial acceptance because shippers could frequently negotiate more favorable inland rates than JKAG's Plan II 1/2 rates and because JKAG's service generally took longer than Pacific Coast routings. The JKAG intermodal tariff was cancelled on November 18, 1978 upon the expiration of Agreement No. 3103-64.

A. P. Moller-Maersk Line; Nippon Yusen Kaisha; Orient Overseas Container Line, Inc.; United States Lines, Inc.; and Yamashita-Shinnihon Steamship Co., Ltd.

[3] Seatrain was purchased in early 1981 by interests controlled by C. Y. Tung and continues to operate as a nonconference carrier in the Far East/U.S. Pacific Coast trades under the name of "SeaPac."

[4] The Commission's approval of Agreement No. 3103-64 was remanded and then reversed in *Seatrain International, S.A. v. Federal Maritime Commission*, 584 F.2d 546 (D.C. Cir. 1978) and 598 F.2d 289 (D.C. Cir. 1979).

[5] Lykes Bros. began offering barge/ocean, rail/ocean and motor/ocean service to a large number of inland points via Gulf Coast Ports in 1976 (Tariff FMC Nos. 95, 99 and 103). It has emphasized the first of these services because of its experience and capabilities for providing LASH-type services on inland waterways.

[6] October 5, 1979 Opening Affidavit of Robert D. Grey at 6-7 and Appendix B. JKAG's study failed to reveal the actual destinations of any of this inland cargo, however. Between 1972 and 1978, JKAG's containerized carryings increased from 32% to 90% of its total cargo. Minilandbridge (MLB) and other intermodal cargo is virtually 100% containerized. In 1978, JKAG offered 90 vessels (70% of which were containerships), 305 sailings, 378,772 twenty-foot equivalent units of container space and 72,336,401 cubic feet of breakbulk space. *Id.* at 4-5.

JKAG's evidence consisted of six affidavits by Conference Chairman Robert D. Grey. These were dated June 9, 1978, July 31, 1978, October 5, 1979 (Opening), October 5, 1979 (Supplemental), October 13, 1979 (Paragraphs 39-41 only) and March 26, 1980, and will hereafter he cited as "Grey Affidavits I-VI."

The JKAG carriers all belong to the larger Trans-Pacific Freight Conference of Japan/Korea (PFC), which competes with JKAG's all-water service through Pacific Coast ports of entry.[7] Until recently, carriers in the PFC trade did not offer intermodal service to U.S. *interior points.*[8] Cargo ultimately destined to the interior was handled under Overland Common Point (OCP) or minilandbridge (MLB) rates and moved inland under separate bills of lading at the shipper's expense.[9] Nonconference carriers in the TPFC trade such as Seatrain, Fesco, Neptune Orient Lines, and, more recently, Sea-Land Service, Inc., have aggressively and successfully competed for MLB cargo by offering attractive Freight All Kinds rates with quantity discount provisions.[10]

JKAG's carryings dropped from 4 million to 2.3 million revenue tons between 1971 and 1979 [11] Although JKAG faced competition from 11 nonconference Atlantic and Gulf Coast carriers when the record closed, this decline in business is attributable more to intermodal competition from Pacific Coast carriers than to local competition.[12] The shorter and frequently faster MLB routings to Atlantic and Gulf ports have grown impressively since they were first instituted by Seatrain in 1972.[13]

Six JKAG lines operate the same vessels in both the TPFC and JKAG trades and do not appear to have favored MLB cargo over JKAG cargo.[14] The five remaining JKAG lines are required by the Japanese government to operate separate ships in each of these trades and therefore have an interest in preserving the viability of both routes.

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[7] TPFC has 18 members. In addition to the JKAG lines, these are American President Lines,; East Asiatic Line; Hapag-Lloyd, A.G.; Knutsen Line; Korea Maritime Transport Company; Phoenix Container Lines; and Showa Line.

[8] *E.g.*, Star Shipping A/S's interior point tariff first took effect on July 4, 1979 and offers service to Denver, Kansas City, St. Louis, Minneapolis and Chicago. TPFC did not begin a conference interior point service until June 25, 1980 (FMC Tariff No. 8).

[9] OCP cargo is rated on a port-to-port basis and is restricted to cargo which subsequently moves to interior points east of the Continental Divide. OCP services have existed for many years. *See Overland/OCP Investigation*, 12 F.M.C. 184 (1969). MLB cargo is intermodal cargo rated on a through route basis to Atlantic or Gulf *port cities*. In 1977, 54% of TPFC's revenue tonnage moved under OCP or MLB rates. Grey Affidavit I at 4. This TPFC non-Pacific Coast traffic totalled 3,454,622 revenue tons and exceeded JKAG's *total* carryings for that year by 128%. *Id.* at 7.

[10] Sea-Land resigned from both the JKAG and TPFC conferences in March, 1980 and operates exclusively through Pacific Coast ports with all-water, OCP, MIB and interior point services. Seatrain has not belonged to either conference since it began intermodal operations.

[11] Grey Affidavits II, III and VI. Conference carryings have fluctuated appreciably in recent years. In 1978, JKAG handled 3.4 million revenue tons compared to 2.7 million in 1977 and 2.3 million in 1979. *Id.*

[12] *Id.* A significant portion of today's MLB cargo previously moved by all-water service in the JKAG trade. Only one nonconference carrier in the JKAG trade (Evergreen Line) is a fully containerized operator, although Yangming Marine Line also possesses significant container capability. Other probable causes for JKAG's decline in tonnage include temporary trade conditions such as United States import quotas, and its members' shift from breakbulk to specialized container vessels.

[13] Grey Affidavit II at 7-8.

[14] Grey Affidavit III at 13-15 and Appendix F, Grey Affidavit V, and Grey Affidavit VI at 5-6.

POSITION OF THE PARTIES

The Proponents

JKAG contends that Agreement No. 3103-67 has been justified under the *Svenska* doctrine because:[15]

1. Competition for cargo moving in intermodal configurations has been intense, especially on the part of nonconference carriers which charge discount rates and have steadily increased their capacity in the TPFC trade. These practices could cause instability in the TKAG trade.
   a. JKAG presently faces interior point competition from four carriers (Lykes Bros., Evergreen Line, United States Lines and Maersk Line) in the JKAG trade. Several other nonconference lines with partial container capacity might easily expand into intermodal operations. Moreover, interior point service via Pacific Coast ports was recently instituted by TPFC and several substantial nonconference lines such as Seatrain.
   b. Sea-Land and Zim Navigation Company have withdrawn from both JKAG and TPFC, increased their carrying capacities and compete as independents. Hanjin Container Line also resigned from TPFC.
   c. The trade is unbalanced in favor of eastbound, which exacerbates the economic effects of JKAG's cargo losses to Pacific Coast carriers.
2. A JKAG interior point service would be a "better quality" service than MLB for cargo ultimately destined to interior points. Even without price inducements, the ability to offer an interior point service would assist JKAG in its fight to retain the cargo it has been losing to the lower priced OCP and MLB services of Pacific gateway carriers.
3. Through intermodal carriage provides many advantages to shippers.
4. JKAG will promptly implement an intermodal service featuring an additional service point (Detroit) and rates reduced by $8.00 a ton from those charged in its 1977-1978 tariff. The intermodal tariff would also contain a relatively low "Cargo, N.O.S." rate which should attract many items now assessed higher commodity rates under JKAG's all-water tariff.
5. JKAG lines are firmly committed to all-water service and none of them "favor" the intermodal cargoes they carry as

[15] *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), affirmed the need for proponents of anticompetitive section 15 agreements to demonstrate the existence of offsetting transportation or other public benefits. Agreement No. 3103-67 provides for price fixing which is anticompetitive *per se*. *United States v. Socony Vacuum Oil Co., Inc.*, 318 U.S. 150 (1940).

TPFC members; they wish to maximize their carryings and preserve a stable environment in both trades.

6. JKAG would extend its self-policing activities to intermodal cargo, thereby increasing the effectiveness of its policing of port-to-port cargo. It is now possible for port-to-port rebates to take the form of concessions on inland transportation arrangements which are beyond the Conference's jurisdiction.
7. JKAG would accept conditions limiting the Agreement's term to a period as short as 18 months.
8. The number of interior points served should increase as JKAG gains experience and shipper acceptance. Present authority is therefore required to set rates for the entire United States so the Conference can respond to customer needs promptly and discourage its members and other competitors from serving points adjacent to those it is authorized to serve. Competition of this sort would be inconsistent with a stable trading environment.
9. At least 120 days' notice of member line services not covered by the Conference tariff is necessary because member lines should share all of their new service plans with the Conference instead of developing them unilaterally. Cooperation is what conference membership is all about.

The Protestants

Seatrain and the Bureau of Investigation and Enforcement oppose approval because:

1. It is not enough that interior point service be generally useful to the shipping public; it must be demonstrated that a *conference* service is necessary to produce the benefits in question. JKAG has not done this.
2. There is no evidence of present rate or service instability in the JKAG trade which requires an extension of the Conference's price-fixing authority.
3. Although JKAG tonnage has declined since Pacific Coast intermodal service began, there is no evidence that the JKAG carriers are operating at a loss or at injurious utilization levels.
   a. All--water cargo losses have been offset by the large cargo gains of the Trans-Pacific Freight Conference to which the JKAG lines also belong. JKAG vessels may also be carrying cargo from Hong Kong, or the Philippines which offsets any loss of Japan/Korea cargo.
   b. There is no significant interior point competition in the trade. The intermodal service offered by Lykes Bros. and Evergreen is restricted to Gulf Coast ports and Evergreen's carryings have been insubstantial. The new intermodal tariffs filed by Sea-Land, Zim, Yangming, U.S.

Lines, Maersk Line and TPFC are not necessarily attracting any cargo.

4. Approval would prevent intermodalism from developing in the JKAG trade. The proponent lines have intentionally favored their TPFC cargo over their JKAG cargo and generally demonstrated a disinterest in developing successful intermodal services through Atlantic and Gulf Coast ports.
   a. JKAG's proposed price reductions will not be large enough to match the better rail divisions and multiple container discounts available from MLB carriers.
   b. No convincing evidence of shipper support has been presented for the limited type of intermodal service proposed by JKAG.
   c. A Conference intermodal service using Plan II 1/2 railroad rates would further discourage railroads from negotiating lower inland rate divisions with nonconference carriers or shippers.
   d. The Agreement contains needlessly restrictive provisions such as the 120-day notice clause.
5. Further evidence must be adduced before the Commission can conclude that a sufficient transportation need public benefit or regulatory purpose is present.[16]

DISCUSSION

Many of JKAG's arguments were considered and found wanting on November 29, 1978 when Agreement No. 3103-67 was conditionally disapproved. The Conference's more recent submissions tend to be repetitious and sparse on substantiating facts, as are Seatrain's assertions. Although the further hearing has produced updated statistics concerning cargo trends, a proposal to reduce JKAG's anticipated intermodal rates by $8.00 per ton, and a description of significant competitive developments in the JKAG and TPFC trades, this information is insufficient to establish the presence of a serious transportation need, important public benefit or valid regulatory purpose justifying control by JKAG of intermodal services in this trade.

[16] Seatrain and the Bureau of Investigation and Enforcement submitted contingent hearing and discovery requests on September 25, 1979 and October 1, 1979, respectively. Although disparaging the quality of evidence JKAG had introduced and claiming that the Agreement was unapprovable under the circumstances, the Protestants nonetheless stated that they wished to further examine current trade conditions in the event the Commission was not inclined to disapprove the Agreement. These requests do not comply with the procedures established in the July 20, 1979 Order of Investigation either in terms of specificity or chronology and will be denied. The burden of going forward in this investigation is on JKAG and, if Protestants believe that particular aspects of JKAG's case are factually incorrect or inadequate, the burden shifts to them to clearly demonstrate these deficiencies to the Commission. Discovery and hearing requests must be unequivocal, specific and immediate. They are not devices by which litigants may establish a hedge position.

Conference control of intermodal rates and practices cannot be justified exclusively on the grounds that through intermodal service generally benefits shippers and the commerce of the United States. Individual conference members and nonconference carriers can also provide this type of transportation service. Some particular need for conference control over interior point service is necessary. *Seatrain International, S.A. v. Federal Maritime Commission*, 598 F.2d 289 (D.C. Cir. 1979). Similarly, the probability that an anticompetitive practice (that is, a conference intermodal tariff) will actually be implemented cannot alone justify the practice. *Seatrain International S.A. v. Federal Maritime Commission*, 584 F.2d 546 (D.C. Cir. 1978). Another circular, and therefore unacceptable, argument advanced by JKAG concerns the advantages of an intermodal service subject to self-policing. Effective self-policing is a statutorily mandated aspect of all conference agreements. The mere fact that approval of Agreement No. 3103-67 would result in the self policing of JKAG's proposed intermodal service is not sufficient to justify approval.[17]

The most meaningful portion of JKAG's case pertains to actual operating conditions in the trade, but even this information does not support the broad authority requested by the Conference.

The fact that the tonnage handled by JKAG lines has declined since 1971 is not itself proof that these lines are economically threatened, needed vessel capacity is being withdrawn from the trade, regular port-to-port service is being disrupted or other benefits inherent in the conference system are likely to become unavailable to the shipping public.[18] Even with the resignation of Sea-Land and Zim Israel from JKAG early in 1980, this record does not support a finding that the continued availability of frequent, dependable service in sufficient quantity and variety to meet the needs of the trade is jeopardized by the absence of conference intermodal authority.[19]

Because OCP and certain MLB cargoes move to inland destinations only under separate inland bills of lading and at the shipper's expense, it is unnecessary for JKAG to obtain additional ratemaking authority to "meet" these types of competition. JKAG's position relative to OCP or MLB services is controlled by the relationship between the Pacific gateway rates and JKAG's all-water rates to Atlantic and Gulf Coast

[17] If port-to-port rebates by JKAG members are going undetected because they involve inland transportation concessions, this suggests that the Conference's current self-policing practices may be inadequate.

[18] JKAG has not revealed its share of the all-water market for containerized cargo, projected its share of the intermodal cargo market, or furnished vessel utilization or revenue information.

[19] The Shipping Act, 1916, is premised on the Congressional finding that steamship conferences typically produce important transportation benefits, but it does not follow that the expansion or even preservation of any particular arrangement will always serve the public interest. This is especially true when a conference complains of pressure from naturally competitive forces arising outside of its own trade area.

ports.[20] Yet JKAG has chosen not to compete by means of rate reductions and it is apparent that JKAG's previous intermodal tariff was designed more to protect the level of the Conference's all-water rates than to attract new intermodal traffic. *See* Grey Affidavit II at 20, III at 18-19. When faced with inflexible pricing decisions by participating railroads, JKAG refused to reduce the ocean portion of its intermodal through rates and limited its intermodal service to points considerably distant from the port communities to which the majority of its cargo has historically been destined [21]

Accordingly, there is no basis for concluding that JKAG's limited and indirect intermodal service -- at prices which would at best equal those of MLB -- can attract sufficient cargo to materially affect the Conference's fortunes. This is especially true when the proposed JKAG rail/water service via Atlantic Coast ports is compared with the newly established interior point services of Pacific Coast carriers. No matter how much JKAG promotes its indirect route to Chicago, it will be hard pressed to compete with the much shorter service available from Pacific gateways.[22]

In short, JKAG has not justified its Agreement. A proposal to provide an intermodal service from the Far East to any inland point in the United States via Atlantic and Gulf Coast ports[23] and to prevent member lines from instituting intermodal service innovations on statutory notice[24] is unduly broad in its potential for anticompetitive results

[20] *See* Grey Affidavit II at 14. A shipper wishing cargo delivered to Cleveland, Ohio via an OCP, MLB or JKAG all-water service must compute its total transportation costs the same way in each case. The ocean carrier's tariff rate is determined and added to an inland carrier's tariff rate for separately arranged transportation from the applicable port terminal to Cleveland.

[21] Carriers which offer competitively priced through rates to interior points within 100-300 miles of Atlantic and Gulf Coast ports are most likely to reap the fruits of intermodalism in the JKAG trade. *See* Grey Affidavit III Appendix G (Marubeni Corporation). However, shorter interior point routings at viable rates could have the effect of enticing port-to-port shippers away from JKAG's all-water service and putting downward pressure on its all-water rates.

[22] This conclusion has a double-edged impact. It discredits the claim that the proposed Agreement will be JKAG's salvation in its struggle with independent lines for containerized cargoes and also indicates that the limited intermodal service JKAG initially proposes may not significantly impair the competitive opportunities of West Coast intermodal carriers.

[23] JKAG does not propose an intermodal service via Gulf ports or a service destined to any community located west of the Mississippi River or east of the Allegheny Mountains. There are no transportation benefits associated with JKAG control over intermodal practices in large areas of the country which the conference does not wish to serve or from which shipper demand will not develop (*e.g.* destination points west of the Continental Divide).

[24] Article 1(b) of Agreement No. 3103-67 allows JKAG members to commence individual interior point services of a type not offered by the Conference only after providing JKAG 120 days advance notice of their decision, whereas section 18(b) of the Shipping Act, 1916 (46 U.S.C. 817(b)) and the Commission's tariff regulations (46 C.F.R. Part 536) allows public tariffs covering new services to become effective 30 days after filling. The Commission has held that any requirement for advance notice to a conference other than customary tariff filing is unreasonable because it hinders the development of intermodal innovations. *American West Africa Freight Conference (Agreement No. 7680-36)*, 18 S.R.R. 339, 342 (1978). The present record includes no information supporting JKAG's assertion that advance notice of member line innovations is necessary to accomplish Agreement No. 3103-67's basic objective of ameliorating excess rate competition. The availability of 120 days advance notice is not

and has insufficient potential for transportation benefits. The public interest in developing intermodal transportation does not extend to services of unjustified anticompetitive scope which would unnecessarily impair the full economic fruition of technological innovations.

Conference control of intermodal ratemaking is most likely to provide public benefits not available from intermodal service provided by individual carriers and can therefore be justified under section 15, when such authority will result in efficient geographical routings; operational economies and improvements (e.g., faster voyages and turnarounds, better utilization of vessels, better cargo handling methods); more regular and reliable service; and commercially attractive rates covering a wide variety of commodities. Such control may also be justified when there is evidence of record concerning cargo availability and service trends which make it clear that to deny the conference its requested intermodal authority will inevitably jeopardize the regular and dependable service currently provided by the conference. Finally, the Commission must be satisfied that there is an absence of predatory intent on the part of the conference or particular anticompetitive effects reaching beyond the generalized prohibition against price-fixing. When reliable *evidence* establishes the presence of these factors, section 15 favors the extension of the regulated, open conference system prescribed by the Shipping Act to include intermodal transportation naturally associated with the port-to-port trade served by an existing conference.

As with other types of joint through traffic, an effective conference intermodal service will ordinarily be priced so as to offer the shipper a discount from otherwise applicable combination rates and provide the carrier with cargo it would not otherwise receive at its port-to-port rates. Based upon the present record, the JKAG trade does not appear suited for the implementation of a broad-based, intermodal service. In any event, JKAG has failed to demonstrate that it would provide such a service.

THEREFORE, IT IS ORDERED, That Agreement No. 3103-67 is disapproved pursuant to section 15 of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

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necessary to permit the JKAG member lines to freely and thoroughly discuss intermodal proposals with each other.

DOCKET NO 79-74

JAPAN/KOREA ATLANTIC AND GULF CONFERENCE (JKAG) INTERMODAL AMENDMENT (AGREEMENT NO. 3103-67)

ORDER OF DISAPPROVAL

Commissioner Richard J. Daschbach, concurring.

I concur only in the result of the Commission s June 17, 1981 Order disapproving JKAG's application for intermodal ratemaking authority (Agreement No. 3103-67). The proponents have offered little probative evidence to support their request for intermodal authority since the Commission conditionally disapproved their proposed agreement on November 29, 1978.

However, I cannot subscribe to the Commission's rationale for disapproval in its June 17 Order, which would establish criteria for the approval of conference intermodal agreements which stifle rather than stimulate the growth of intermodalism in the U.S. foreign commerce, extend beyond the scope of the Commission's statutory authority, and conflict with previous Commission decisions (see, e.g., *Pacific Westbound Conference (Agreement No. 57-96 - Extension of Intermodal Authority)*, 19 F.M.C. 291 (1976)).

My views on the principles which should guide the Commission's evaluation of applications for conference intermodal authority are expressed in greater detail in my dissent to the Commission's June 8, 1981 Order conditionally disapproving the American West African Freight Conference's (AWAFC) extension of intermodal authority (Agreement No. 7680-39). These principles underscore the need for different approaches to AWAFC's request for intermodal authority, which the Commission should have approved, and JKAG's instant application.

My dissent to the AWAFC Order stated that "it is unnecessary for a conference to demonstrate that it is the *best* vehicle for the development of intermodalism in a given trade if it can make the showing that its intermodal authority is more likely to promote than impede intermodal traffic in the trade. Such a showing is made more compelling if the conference demonstrates that intermodal service will be necessary to preserve its continued competitive viability."

JKAG has failed to make any such showing, and its request for intermodal authority is thus clearly distinguishable from the request of the American West African Freight Conference in Agreement 7680-39. JKAG's capacity to develop a viable intermodal service in the trade has been rendered suspect by its failure to use its intermodal authority during the five-year period (1973-1978) of its existence.

Furthermore, the suspicion that JKAG's intermodal authority might impede rather than stimulate the growth of intermodal traffic is height-

ened by its proposed 120-day "notice" restriction on member lines wishing to offer intermodal services not offered by the conference. The Commission has consistently rejected such provisions in the past due to their pre-emptive nature and the potential they create for a conference to "sit" on its intermodal authority an frustrate its member lines' efforts to develop intermodal service in a given trade. AWAFC had no such provision in its proposed agreement.

Further suspicion is cast upon JKAG's ability to foster intermodal growth in the trade due to the membership of all JKAG's carriers in the larger Trans-Pacific Freight Conference (TPFC) and the consequent possibility that they are more deeply committed to TPFC's new intermodal service. Although no single conference must prove that it is the *best* vehicle for developing intermodalism in a given trade, the JKAG carriers' participation in TPFC's active intermodal service clearly distinguishes their request for intermodal authority from that of the American West African Freight Conference, whose member lines have no such divided loyalties.

Finally, there is no evidence that JKAG's competitive viability will be seriously impacted by denial of its request for intermodal authority.

These points alone form a substantial basis for disapproving Agreement No. 3103-67. However, the Commission's June 17 Order incorporates most of the same complex and unrealistic proposed criteria for approval contained in the AWAFC Order of Conditional Disapproval. These criteria are so harsh that, if used as a precedent for future Commission action, they could prevent approval of intermodal ratemaking authority for any conference.

These criteria also exceed the boundaries of the Commission's statutory authority. The proposed requirement that conferences demonstrate that they will offer "commercially attractive rates covering a wide variety of commodities" (see Order at pp. 14-15) would invest the Commission with authority over rates in the U.S. foreign commerce which we statutorily do not possess. The condemnation of the commercial feasibility of JKAG s proposed geographical routings (see Order at pp. 12-14) second-guesses the parties' judgment and implies Commission authority over route selection and licensing, another authority we do not possess.

The Commission's June 17 Order reaches the only reasonable result possible in the instant case - disapproval. However, the Order's cumbersome rationale for arriving at this result shows that the Commission has not yet established fair, reasonable, and relevant criteria for evaluating applications for intermodal authority.

FEDERAL MARITIME COMMISSION

(46 C.F.R. PART 510; DOCKET NO. 80-44)

LICENSING OF INDEPENDENT OCEAN FREIGHT FORWARDERS

PUBLICATION OF APPLICATIONS

June 17, 1981

ACTION: Discontinuance of proposed rulemaking

SUMMARY: On July 7, 1980, the Federal Maritime Commission published a notice of proposed rulemaking (46 F.R. 45599) to eliminate the requirement of publishing in the Federal Register notice of the filing of applications for independent ocean freight forwarder licenses. After full consideration of the issues and comments from interested parties, the Commission has decided not to adopt the proposed rule.

DATE: Effective June 22, 1981

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking, published on July 7, 1980, to eliminate from section 510.6 of the Commission's General Order 4 (46 C.F.R. 510) the requirement of publishing in the *Federal Register* notice of the filing of applications for independent ocean freight forwarder licenses. Section 510.6 currently reads as follows:

> 510.6 Publication of applications.
>
> After application has been filed, the Commission shall cause to be published in the FEDERAL REGISTER a notice of the filing of each application, stating the name and address of the applicant and if the applicant is a corporation, association, or partnership, the names of the officers or members thereof. Parts 1 and 2 of the application shall be public information and available for inspection at the office of the Commission in Washington, D. C.

In its Notice of Proposed Rulemaking, the Commission stated that there is no statutory requirement for such publication in the *Federal Register* and that the rule requiring such publication had been adopted to allow interested parties to comment on the eligibility of applicants for independent ocean freight forwarder licenses. The Commission also stated that, since interested parties seldom commented on such applications and in an effort to eliminate an apparently unnecessary regulation and to improve cost-effectiveness, it was proposed to delete the *Federal Register* notice requirement.

The proposed rulemaking generated four comments. Two individual forwarders and one forwarder association (I.C. Harris & Company, Arthur J. Fritz & Co., and the Customs Brokers and Forwarders Association of Miami, Inc.) oppose deletion of the *Federal Register* notice of applications. In general, those commentators believe that application notices in the *Federal Register* constitute an important source of information which enables the freight forwarder industry to monitor prospective entrants into the industry. Those commentators point out that the notice requirement serves to protect the integrity of the ocean freight forwarder profession by enabling knowledgeable individuals to inform the Commission of facts concerning the eligibility of particular applicants, which facts may not otherwise come to light, but which would be of value to the Commission in processing applications for licenses.

As to the issue that few comments have been received as a result of the notice requirement, one of the commentators explained that most applicants have established themselves through years of experience while in the employ of other freight forwarders and may be worthy of entrance into the profession under their own licenses. Such applicants naturally would not generate comment. It is only in the case of the odd applicant who, perhaps unknown to the Commission, should not be granted a license that the notice requirement serves its intended purpose. The commentator also points out that it is important just to have the opportunity to inform the Commission concerning applicants for licenses.

The fourth and final commentator, the National Customs Brokers & Forwarders Association of America, Inc., did not object to the proposal *per se*. However, it recommended that the same information currently published under the notice requirement be made available to it so that it has an opportunity to furnish information, when available, that may be helpful in the processing of applications.

After thorough consideration of the comments received, it is the Commission's belief that the proposal to eliminate the publication of applicants in the *Federal Register* should not be adopted and that any alternate method of making this information available to the public would place a greater burden upon the staff. Accordingly, this proposed rulemaking proceeding will be discontinued.

THEREFORE, IT IS ORDERED, That the proposed rulemaking in Docket No. 80-44 is hereby discontinued; and

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

By the Commission.*

(S) JOSEPH C. POLKING
Acting Secretary

**Commissioner Daschbach dissents.* I would delete the requirement that filing of applications for independent ocean freight forwarders licenses be published in the *Federal Register* and would instead adopt the proposal of the National Customs Brokers and Forwarders Association of America, Inc. that a monthly list of such applications be furnished to interested parties by the Commission on a subscription basis.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-81
KELCO, DIVISION OF MERCK & COMPANY

v.

JOHNSON LINE

NOTICE

June 25, 1981

Notice is given that no appeal has been taken to the May 20, 1981 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-81
KELCO, DIVISION OF MERCK & COMPANY

v.

JOHNSON LINE

SETTLEMENT APPROVED; COMPLAINT DISMISSED

Finalized June 25, 1981

This is a motion to approve a settlement agreement between the complainant, Kelco, Division of Merck & Company, a shipper, and the respondent, Johnson Line, a common carrier by water between United States Pacific Coast Ports and Ports in the United Kingdom, Ireland, Scandinavia, Continental Europe and the Mediterranean. The motion, filed by respondent on behalf of both parties, also asks that, upon approval of the settlement, the complaint be dismissed.

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

BACKGROUND

On November 26, 1980, Kelco filed a complaint against Johnson Line alleging that the respondent violated section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3),[1] in connection with two shipments, described in the bills of lading as synthetic resin, which Johnson Line was alleged to have carried from Los Angeles, California, to Rotterdam, The Netherlands, on November 8, 1978, and January 8, 1979.[2]

The complaint asks for reparation in the amount of $15,722.67, with interest, pursuant to the provisions of section 22 of the Shipping Act, 1916, 46 U.S.C. 821.[3] The amount sought for the first shipment is

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[1] 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.

[2] There were two crates of wooden office furniture, weighing 200 pounds and measuring 40 cubic feet included in the second shipment. These two crates are not at issue in this proceeding.

[3] Section 22 was not mentioned in the complaint, but it is not necessary to do so explicitly. All complaints are deemed to involve section 22. See *Saipan Shipping Company, Inc. v. Island Navigation Co., Ltd.*, 18 SRR 223, 227 (1978). Section 22 provides, as pertinent:

$7,584.04. The alleged overcharge for the second shipment is $8,138.62.[4]

Each shipment consisted of two forty-foot containers packed with drums of products described on accompanying packing lists as one or another type of Kelzan, Kelcoloid, Dariloid, Keltone, Kelcosol or Kelgin. There were 720 drums weighing 38.565 kilos and measuring 71.557 cubic meters in the first shipment. In the second shipment there were 444 drums weighing 37.771 kilos and measuring 82.233 cubic meters.

The complaint alleges that the various trademark products described in the packing lists are, in fact, natural, and not synthetic, resins. Attached to the memorandum of argument annexed to the complaint are documentary materials in support of the contention that the shipments were improperly rated as synthetic resins.

At the time of both shipments the ocean freight rate on synthetic resins was $292.25 W.[5] At the same time, there was an emergency rate of $111.00 W for natural resins.[6] Also, at the same time, there was a rate of $206.75 W for algins. [7]

In its answer of December 15, 1980, Johnson Line denied that it was the owner or operator of the vessel which carried the first shipment. It also denied that there was any overcharge on the second shipment and therefore no violation of statute and no liability to complainant. Prior to the time the complaint was filed, Johnson Line rejected Kelco's claims because of the Pacific Coast European Conference's tariff rule (Rule 19.1) barring consideration of claims requiring verification of cargo description before the cargo leaves the carrier's possession. In apparent awareness that a tariff rule of this type, which, in effect, infringes on the rights granted by section 22 is invalid insofar as it governs filing of claims before the Commission, *Kraft Foods v. Federal Maritime Commission*, 538 F.2d 445 (D.C. Cir. 1976), Johnson Line does not rely on this rule in its defense of the complaint.

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.

[4] The computation made by complainant incorrectly failed to include a currency adjustment factor of 11.50%, then in effect. Had it been included the amount of reparation sought would have been reduced to $7,596.13.

[5] Pacific Coast European Conference Tariff No. FMC-16, 2nd revised p. 187-A. Item No. 581.1060.

[6] *Id.* Item No. 292.2400.

[7] *Id.* 7th revised p. 89, Item No. 581.990. The trademark items are alginates. The documentary material attached to the argument purports to show that alginates are natural resins.

THE SETTLEMENT AGREEMENT

Confronted with the uncertainty and expense of litigation of at least three complex factual issues some of which would involve the need for cross-examination of expert witnesses,[8] the parties agreed to settle the proceeding. Following the conditions enunciated by the Commission for settlement of section 18(b)(3) complaint proceedings in *Organic Chemicals (Glidden-Durkee) Division of SCM Corporation v. Atlanttrafik Express Service*, 18 SRR 1536a (1979) (*Organic Chemicals*), the parties submitted a signed settlement agreement entitled Agreement of Settlement and Mutual Release[9] and a Joint Affidavit[10] setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

Under the terms of the settlement agreement, Johnson Line will refund to Kelco the difference between freight charges based on the synthetic resin rate and the natural resin rate for the second shipment (giving effect to the currency adjustment factor, see n. 4, *supra*). Thus, Johnson Line agrees to pay $7,596.13 in full settlement of the two claims which comprise the complaint, without admitting liability or admitting to any violation of law. [11]

DISCUSSION AND CONCLUSION

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

1. A signed agreement is submitted to the Commission;
2. The parties file with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that

[8] Those issues are: (1) whether the respondent was the owner or operator of the vessel which carried the first shipment; (2) whether the commodity actually carried was a synthetic or natural resin; and (3) whether the commodity actually carried, if not a synthetic resin, was a natural resin or algin.

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

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

[11] If not approved, the settlement agreement will be null and void and of no effect whatsoever for any purpose.

the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be;

3. The complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable.

The signed agreement and affidavit meet the requirements of *Organic Chemicals*. See also, e.g., *Ellenville Handle Works, Inc. v. Far Eastern Shipping Company*, 23 F.M.C. 707 (1981); *Celanese Corporation, Inc. v. The Prudential Steamship Company*, 23 F.M.C. 1 (1980). I find that the agreement reflects a rational, valid and fair solution of the dispute and obviates the need for further extensive and expensive litigation. The complaint presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable without such further litigation. It appears that the settlement is a *bona fide* attempt by the parties to terminate the controversy and not a device to obtain transportation at other than the applicable rates or charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

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

(S) SEYMOUR GLANZER
Administrative Law Judge

APPENDIX I
BEFORE THE FEDERAL MARITIME COMMISSION

KELCO, DIVISION OF MERCK &
COMPANY

v. Docket No. 80-81

JOHNSON LINE

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned, Kelco, Division of Merck & Company ("Kelco"), Complainant in Commission Docket No. 80-81, and Rederiaktiebolaget Nordstjernan ("Johnson Line"), Respondent in said Docket, that Docket No. 80-81 will be terminated by mutual accord on the terms and conditions hereinafter set forth and for the reasons stated in the accompanying Memorandum in Support of Settlement and Motion to Dismiss:

1. Johnson Line will pay to Kelco the sum of Seven Thousand Five Hundred and Ninety Six dollars and Thirteen cents ($7,596 & 13/100).

2. Kelco will, in consideration of the action of Johnson Line as provided in paragraph "1" above, withdraw its Complaint in Commission Docket No. 80-81, and will refrain from further pursuing its claims in this proceeding.

3. Neither Kelco, Johnson Line, nor any successor or assignee in interest of either such party, will initiate any new claim against the other party arising in connection with the complaint in this proceeding except for enforcement of any provision of this Agreement of Settlement; and Kelco and Johnson Line each hereby releases the other from, without limitation, all sums of money, accounts, actions, suits, proceedings, claims, and demands whatsoever which either of them at any time had or has up to the date of this Agreement of Settlement against the other for or by reason of any act, cause, matter, or thing arising from the transactions giving rise to this proceeding.

4. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all disputed claims in this proceeding, Docket No. 80-81.

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

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

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

8. In the event this Agreement of Settlement and Mutual Release is disapproved by the Commission, or is approved on conditions which are unacceptable to either party, then this Agreement will be null and void *ab initio* and of no effect whatsoever for any purpose.

DATED: April 2, 1981

KELCO, DIVISION OF MERCK & COMPANY

BY

Title: Manager of Distribution and Sales Service

REDERIAKTIEBOLAGET NORDESTJERNAN ("JOHNSON LINE")

BY

Title: Vice President, Axel Johnson Corp.

APPENDIX II
THE FEDERAL MARITIME COMMISSION RECEIVED

KELCO, DIVISION OF MERCK &
COMPANY

v. Docket No. 80-81

JOHNSON LINE

JOINT AFFIDAVIT

The undersigned, A. W. Risch, and William F. Horton, being respectively the Manager of Distribution and Sales Service of Kelco, Division of Merck & Company and Vice President, Axel Johnson Corp., of Rederiaktiebolaget Nordstjernan ("Johnson Line"), depose and state as follows:

1. This affidavit is made in connection with the accompanying Agreement of Settlement and Mutual Release in this proceeding.

2. Said Agreement of Settlement in Commission Docket No. 80-81 is a reasonable commercial settlement of this proceeding.

3. The complaint in this proceeding, on its face, presents a genuine dispute, raising genuine issues, and the facts and information critical to the resolution of the dispute are not reasonably ascertainable without further lengthy and costly litigation.

4. The above-mentioned Agreement of Settlement is a *bona fide* attempt to avoid the time and expense of such litigation and to terminate this controversy; and said Agreement is not a device to obtain transportation at other than the proper rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, as amended.

(S) A.W. RISCH
Name: A. W. Risch

Sworn to before me, a Notary Public, this 2nd day of April, 1981.

(S) LINDA L. WEISHOHN
Notary Public
My Commission Expires: Dec. 16, 1983

[SEAL]

(S) WILLIAM F. HORTON
Name: William F. Horton

Sworn to before me, a Notary Public, this 10th day of April, 1981.

(S) JOHN F. JACOBS
Notary Public
My Commission Expires: October 7, 1982.

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-76

HEIDELBERG EASTERN, INC.

v.

CONTAINER OVERSEAS SERVICE, INC. AND CONTAINER OVERSEAS AGENCY, INC.

ORDER ADOPTING INITIAL DECISION

June 26, 1981

This proceeding was instituted by the filing of a complaint by Heidelberg Eastern, Inc. against Container Overseas Service, Inc. and Container Overseas Agency, Inc. alleging an overcharge on a shipment of "Photographic Equipment" transported from New York to Denmark and seeking reparations in the amount of $9,194.00. On May 7, 1981 Chief Administrative Law Judge John E. Cograve issued an Initial Decision finding for Complainant and awarding reparation in the amount of $9,794.* No exceptions to the Initial Decision have been filed. The Commission, however, has determined to review the Initial Decision pursuant to Rule 227(d) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(d)).

Upon review, the Commission has determined that the Presiding Officer's findings and conclusions are correct. The Initial Decision will accordingly be adopted with the modification discussed below.

The Presiding Officer did not include interest on the reparation awarded. In order to make the Complainant "whole" and compensate it for the loss of the use of freight charges improperly assessed, the Commission believes that interest on the amount of reparations awarded should have been included as an element of damages. *U. S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 470 (1968). The Commission will therefore modify the Presiding Officer's award to include interest at a rate of 12% per annum from November 28, 1978, the date the excess freight charges were paid by Complainant. *Allied Stores Int., Inc. v. United States Lines, Inc.*, 22 F.M.C. 839 (1980).

THEREFORE, IT IS ORDERED, That the Initial Decision served on May 7, 1981 in this proceeding is adopted and made a part hereof.

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* The Presiding Officer inadvertently stated the improperly assessed rate to be "$158.00 per cubic foot." The evidence of record indicates that the rate assessed was $158.00 *per 40 cubic feet.*

FURTHER, IT IS ORDERED, That Respondents pay to the Complainant Heidelberg Eastern, Inc., reparation in the amount of $9,794 plus interest at the rate of 12% per annum from November 28, 1978.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-76
HEIDELBERG EASTERN, INC.

v.

CONTAINER OVERSEAS SERVICE, INC. AND CONTAINER OVERSEAS AGENCY, INC.

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

Albert S. Lefkowitz for complainant.

Janison Foreman for respondents.

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

Adopted June 26, 1981

Complainant, Heidelberg Eastern, Inc., charges respondents, Container Overseas Services, Inc., (COS) and Container Overseas Agency, Inc., with violations of sections 18(b) and 18(b)(3) of the Shipping Act, 1916, which are said to arise out of a shipment of "Photographic Equipment" from New York to Denmark.[2] Respondent Container Overseas Services requested and was granted a thirty-day extension of time within which to answer the complaint. In my notice granting the extension, I directed the parties to consult with each other and attempt to arrive at a stipulation of fact and authenticity of documents which would allow the case to be handled by the shortened procedure provided in Subpart K of the Commission's Rules of Practice and Procedure. (46 C.F.R. 502.181 *et seq.*) The consultations were to be initiated by respondent, and the parties were to notify me by December 15, 1980, of the results of their consultations.

On December 22, 1980, counsel for complainant advised me that he had not heard from respondent but that he saw no reason why the matter could not be submitted on documents alone. In a telephone conversation with Mr. Janison Foreman, the Vice President of COS, I

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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] The shipment in question was in foreign commerce, and thus section 18(a), which applies only to the offshore domestic commerce, is inapplicable here. Complainant appears to have realized the error and has abandoned the 18(a) allegation on brief.

was told that attempts were made to discuss the case with counsel for complainant but they were unsuccessful and that he did not have an attorney. Mr. Foreman also said that he was having difficulty gathering documentary evidence and that he would greatly appreciate being given time to put together his defense because he felt complainant was in error. All of this was confirmed by letter. On February 19, 1981, I issued a procedural notice which provided:

1. By March 16, 1981, complainant shall file a memorandum of facts and of arguments separately in compliance with Rule 182 . . . .
2. By March 27, 1981, respondent shall file its answer to the complainant and its memorandum of facts and of arguments separately stated in compliance with Rule 183 . . . .
3. By April 10, 1981, complainant shall file its reply memorandum in compliance with Rule 184 . . . .

Complainant has complied with my order, but respondent has not. I have heard nothing further from respondent to date. The following facts are established by the documentary evidence submitted by complainant.

On November 24, 1978, Container Overseas[3] accepted two containerized shipments of photographic equipment and issued a bill of lading bearing the heading "Container Overseas Service, Inc." The bill of lading described the shipment as two "40′ containers" of "Photographic Equipment" -- 11500#, measuring 4000 cu. ft. The bill was numbered 0592/0593,[4] but was not freighted. Container Overseas charged complainant $16,194.00 or $158.00 per cubic foot. Complainant paid the total freight.

Attached to the complaint is a page from the Container Overseas Services, Inc., Freight Tariff No. 2, showing that the rate on Photographic Equipment from U.S. Atlantic ports to Scandinavian ports was at the time of the shipment in question $64.00 per 40 cu. ft. At 4000 cubic feet, the total freight should be $6,400, not the $16,194 paid by complainant. Respondents have offered no explanation for their application of the $158.00 rate. They have offered no evidence to show either that the $158.00 was applicable or that the $64.00 rate was inapplicable.

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[3] Complainant uses "Container Overseas" to mean both respondents, Container Overseas Service and Container Overseas Agency.

[4] There also is attached to the complaint a copy of the Shipper's Export Declaration showing the shipment to be "Photographic Equipment."

Accordingly, on the record before me I find that respondents have violated section 18(b)(3) of the Shipping Act. Complainant is hereby awarded reparation of $9,794.[5]

(S) JOHN E. COGRAVE
Administrative Law Judge

Washington, D.C.
May 7, 1981

[5] Complainant actually asks for only $9,194.00, apparently because a sampling of competitive tariffs showed the rates on Photographic Equipment to range from $65.00 to $70.00. However, section 18(b)(3) requires that the proper tariff rate be applied -- in this case the $64.00 rate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-21

BEKAERT STEEL WIRE CORPORATION

v.

SEA-LAND SERVICE, INC.

ORDER ADOPTING INITIAL DECISION

June 26, 1981

This proceeding was instituted by the filing of a complaint by Bekaert Steel Wire Corporation against Sea-Land Service, Inc. alleging an overcharge and seeking reparations on a shipment of empty bobbins (spools) carried by Sea-Land from New Orleans to Tokyo. On May 11, 1981 Chief Administrative Law Judge John E. Cograve issued an Initial Decision finding for Complainant and awarding reparation in the amount of $5,474.93. No exceptions to the Initial Decision have been filed. The Commission, however, has determined to review the Initial Decision pursuant to Rule 227(d) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(d)).

Upon review, the Commission has determined that the Presiding Officer's findings and conclusions are correct. The Initial Decision will accordingly be adopted with the modification discussed below.

The Presiding Officer did not include interest on the reparation awarded. In order to make the Complainant "whole" and compensate it for the loss of the use of freight charges improperly assessed, the Commission believes that interest on the amount of reparations awarded should have been included as an element of damages. *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 470 (1968). The Commission will therefore modify the Presiding Officer's award to include interest at a rate of 12% per annum from August 18, 1980 and August 26, 1980, respectively, the dates the excess freight charqes were paid by Complainant. *Allied Stores Int., Inc. v. United States Lines, Inc.*, 22 F.M.C 839 (1980).

THEREFORE, IT IS ORDERED, That the Initial Decision served on May 11, 1981 in this proceeding is adopted and made a part hereof.

FURTHER, IT IS ORDERED, That Respondent Sea-Land Service, Inc. pay to the Complainant Bekaert Steel Wire Corporation reparation in the amount of $5,474.93 plus interest at the rate of 12% per annum on $697.29 from August 18, 1980, and on $4,477.64 from August 26, 1980.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-21
BEKAERT STEEL WIRE CORPORATION

v.

SEA-LAND SERVICE, INC.

Reparation awarded under section 18(b)(3) of the Shipping Act, 1916.

Russell W. Deitch for Bekaert Steel Wire Corporation.
John M. Ridlon for Sea-Land Service, Inc.

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

Adopted June 26, 1981

The Bekaert Steel Wire Corporation alleges that it was overcharged by Sea-Land Service, Inc., on a shipment of empty bobbins (spools) carried by Sea-Land from New Orleans to Tokyo. Complainant has requested and respondent has consented to the shortened procedure provided for in Subpart K of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.181 *et seq.*).

According to complainant, it was "due to an honest error in classification" that Schedule B number 207.0025 was used on the Shipper's Export Declaration instead of the correct Schedule B number of 657.2180. Number 207.0025 covers *wooden* bobbins while number 657.2180 covers *steel* bobbins. Based upon the Export Declaration classification, Sea-Land rated the shipment under Item No. 207.0025.80 of the Pacific Westbound Conference Tariff PWC-708A applicable to wooden bobbins as follows:

67.961 cu. meters at $144.00/cu. meter	$ 9,786.38
67.961 cu. meters at $ 14.50/cu. meter	985.44
$9,786.38 at 6% (currency surcharge)	587.18
Total	$11,359.00

Complainant argues that what it actually shipped were steel bobbins which should have been rated under Item 657.2180.80 of the Conference's tariff as follows:

67.961 cu. meters at $ 68.00/cu. meter	$ 4,621.35
67.961 cu. meters at $ 14.50/cu. meter	985.44

[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).

$4,621.35 at 6% (currency surcharge)	277.28
Total	$ 4,884.07

Attached to its complaint are Bekaert's specification sheets showing the specifications of steel bobbins and a copy of the export declaration in which, although the bobbins are described as steel, the wrong Schedule B number was used.

In its answering memorandum, Sea-Land agrees that the articles actually shipped were empty steel bobbins. By affidavit, Richard B. Hopkins, a Sea-Land rate audit supervisor, "after being duly sworn," says that he is personally familiar with the claim of Bekaert and he has reviewed "all documentation, billings, tariff provisions and other pertinent information regarding this claim," and he states:

> On the basis of all available documentation, information from the shipper, and information contained in the Complaint and overcharge claim lodged with Sea-Land Service, I have determined the claim of Bekaert is justified and correct.

As the Commission said in *Western Publishing v. Hapag Lloyd, A.G.*, 13 SRR 16 (FMC 1972):

> . . . The description on the bill of lading should not be the single test in 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.

When the cargo has left the custody of the carrier, a complainant must establish the nature of the actual shipment by a preponderance of the evidence. *Pacific Freight Audit, Inc. v. American President Lines*, 22 F.M.C. 207 at 209 (1979); *Pan American Health Organization v. Moore McCormack Lines, Inc.*, 22 F.M.C. 98 (1979). On the basis of the evidence of record, I conclude that complainant has met its burden of proof; that the commodity actually shipped was steel bobbins, and that complainant is entitled to reparation.

Accordingly, Sea-Land Service, Inc., is ordered to pay Bekaert Steel Wire Corporation reparation in the amount of $5,474.93.[2]

(S) JOHN E. COGRAVE
Administrative Law Judge

Washington, D.C.
May 11, 1981

[2] There is a typographical error in paragraph III of the complaint, and reparation should be $5,474.93 instead of $5,473.93.

FEDERAL MARITIME COMMISSION

DOCKET 80-43
BEHRING INTERNATIONAL INC.
INDEPENDENT OCEAN FREIGHT FORWARDER
LICENSE NO. 910

ORDER OF ADOPTION

June 30, 1981

On April 20, 1981, the Commission determined to review the Presiding Administrative Law Judge's Initial Decision in the above-captioned matter. Upon review the Commission determined that the Initial Decision is well reasoned and supportable both in law and in fact.

THEREFORE IT IS ORDERED That the Initial Decision served March 17, 1981 in this proceeding is adopted as the decision of the Commission.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-43
BEHRING INTERNATIONAL, INC.
INDEPENDENT OCEAN FREIGHT FORWARDER
LICENSE NO. 910

An investigation was begun to determine whether past payments of "excess compensation" from certain ocean carriers to respondent freight forwarder showed that respondent had violated sections 15 and 16 of the Shipping Act, 1916, by carrying out unapproved agreements, passing on such compensation to shippers, or otherwise obtaining transportation at less than applicable charges, whether respondent was fit to retain its forwarder's license, and whether civil penalties should be assessed. In large measure because of respondent's cooperation with the Commission's staff, evidence has been developed on which to base a just and reasonable settlement and on which it can be found that respondent is eminently fit to retain its license.

There is evidence, largely developed by respondent itself, that respondent did receive compensation different from that published in a certain few carriers' tariffs from 1976 to 1978; however, respondent voluntarily terminated the practice long before this case began, never passed on such compensation to shippers so as to violate anti-rebating law, and never violated its strict fiduciary duties to its shipper customers.

In lieu of continuing with expensive litigation, respondent and the Commission's Bureau of Investigation and Enforcement have entered into a settlement agreement under which respondent will pay $70,000 in penalties and will, among other things, institute strong measures to prevent recurrence. The settlement meets all applicable criteria of reasonableness and is approved.

The record strongly supports a finding of respondent's fitness to retain its license. Respondent has long enjoyed a fine reputation for first-class service, has fully cooperated with the Commission's staff, has long ago voluntarily terminated the practices in question, which, moreover, have never been definitively held to be unlawful, and has behaved impeccably in this proceeding. Under the circumstances, even suspension of its license would be a gross travesty. Moreover, rejection of the settlement would chill future enforcement efforts by discouraging regulated persons from cooperating with the Commission's staff, and would provoke needless, expensive litigation in this and future Commission proceedings.

Edward Schmeltzer and *George J. Weiner* for respondent Behring International, Inc.

John Robert Ewers, Joseph B. Slunt, Charna J. Swedarsky, and *Charles C. Hunter* for the Bureau of Investigation and Enforcement.

APPROVAL OF PROPOSED SETTLEMENT AND INITIAL DECISION[1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Adopted June 30, 1981

This is an investigation begun by the Commission's Order of Investigation and Hearing, served June 27, 1980. The Commission began this investigation because, as stated in the Order, its staff had developed information which allegedly indicated that respondent Behring International, Inc., an ocean freight forwarder licensed by the Commission since February 7, 1964, or its officers had received sums of money from ocean carriers in excess of the compensation normally paid by carriers to forwarders as published in carriers' tariffs for certain shipments occurring between 1975 and 1977. The Commission questioned whether receipt of such "excess compensation" constituted a number of violations of the Shipping Act, 1916. Specifically, the Commission questioned whether it may have reflected an agreement between Behring and certain carriers which required approval under section 15 of the Act, may have resulted in Behring's receiving transportation for less than applicable rates or charges if Behring passed allegedly "excess compensation" to its shipper principals, in violation of section 16, Initial Paragraph, or even if not passing on such compensation to its shippers, may nevertheless have enabled Behring to obtain transportation for less than applicable charges, also in violation of that provision of law. Finally, the alleged receipt of "excess compensation" from carriers caused the Commission to question whether civil penalties should be assessed against Behring under section 32(a) of the Act and whether Behring's license should be suspended or revoked on a finding of unfitness because of willful violations of the law cited or such other conduct that may show Behring to be unfit.[2]

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

[2] The precise language of the Commission's Order framing the issues described is as follows:

1. Whether Behring violated section 15, Shipping Act, 1916, by entering into and carrying out without Commission approval any agreement subject to the terms of section 15 providing for the receipt of payments from ocean carriers in excess of the amount of ocean freight forwarder compensation specified in the ocean carrier's applicable tariffs;
2. Whether Behring violated section 16, Initial Paragraph, by directly or indirectly passing on any portion of monies received by it or its officers from ocean carriers in excess of authorized ocean freight forwarder compensation to its shipper principals thus obtaining ocean transportation--on behalf of its principals--at less than the applicable rates or charges;
3. Whether Behring violated section 16, Initial Paragraph--even if it did not pass any or all of monies received by it or its officers from ocean carriers in excess of authorized ocean freight forwarder compensation to its shipper principals--by obtaining transportation by water at less than the applicable rates and charges;
4. Whether civil penalties should be assessed against Behring pursuant to section 32(e), Shipping Act, 1916, for violation of the Shipping Act, 1916, and/or the Commission's

Although the formal investigation commenced on June 27, 1980, as noted, the Commission had heard about alleged receipt of "excess compensation" by Behring some time before institution of its formal order. On or about January 18, 1979, the Commission had obtained information concerning similar allegations in connection with a number of freight forwarders. Acting upon such information, on January 18, 1979, the Commission served an order pursuant to section 21 of the Act directing employees of Behring and 15 other forwarders to provide more information concerning alleged "excess compensation." The Commission expressed concern that the alleged practices might be violative of the Shipping Act, as described above, and desired the information to determine whether this was the case and whether further proceedings should be instituted.[3] Behring and several other forwarders asked the Commission to reconsider its section 21 order without success and thereafter four forwarders, including Behring, requested review of the order by the United States Court of Appeals for the District of Columbia Circuit. After the matter had been briefed to that Court but prior to argument, the Commission withdrew the Order and moved for voluntary dismissal of the pending Court proceedings, stating that "[t]he Commission has recently obtained information which makes further responses from certain of these employees no longer necessary." (See Order, November 19, 1979, p. 1.) The Court granted the Commission's motion, as it affected Behring, by order of January 2, 1980. Thereafter the Commission initiated formal investigations against Behring and at least three other forwarders involved in the section 21 proceedings.[4]

Even before the proceeding against Behring was docketed, Behring cooperated with Commission investigators by providing a large amount of information relating to its receipt of "excess compensation." Moreover, Behring was discussing means to furnish even more information to the Commission when the Commission decided to commence this proceeding on June 27, 1980. The Commission's Bureau of Investigation and Enforcement confirms these facts. (See Stipulation, dated February 23, 1981.) The Commission, however, decided to commence

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Rules and Regulations, and, if so, the amount of any such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty;

5. Whether Behring's independent ocean freight forwarder license should be suspended or revoked for:
   a. willful violations of the Shipping Act, 1916, pursuant to section 44(d) of the Shipping Act, 1916;
   b. such conduct as the Commission finds renders Behring unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

[3] See Section 21 Order, *Independent Ocean Freight Forwarders-Payment Received for the Securing or Booking of Cargo in Excess of the Compensation Provided for in the Effective Common Carrier Tariff on File with the Federal Maritime Commission*, January 18, 1979, p. 2.

[4] See, e.g., Docket Nos. 80-20, 80-57, 80-65, investigating Kuehne & Nagel Inc., Cosmos Shipping Co., Inc., and Daniel F. Young, Inc. (Orders served April 3, August 29, and September 19, 1980, respectively).

formal proceedings, stating in its Order that the information already assembled indicated that one carrier had paid a vice-president of Behring about $27,719 in non-tariff compensation from July 16, 1975 through January 19, 1977, in connection with shipments wherein Behring had acted as forwarder.

After the commencement of formal proceedings, Behring continued its policy of cooperating with the Commission's staff. Discussions began forthwith aimed at facilitating discovery requests directed against Behring and at formulating a record for settlement which would avoid costly trial-type hearings. The record fully demonstrates the willingness of Behring to aid the Comsission's staff in ascertaining relevant facts pertaining to the activities of Behring in which certain carriers at certain times in the past had paid Behring compensation above that published in the carriers' tariffs. Because of Behring's cooperative attitude, furthermore, massive amounts of records relating to the years 1975 through 1977 were obtained by Behring and assembled into meaningful form complete with tabular summaries of relevant shipments and payments.

As a result of Behring's cooperation with the Bureau and its willingness to develop evidence from its old records in response to the Bureau's requests, the parties have developed the necessary evidentiary record, have negotiated and submitted a settlement agreement, and have submitted legal memoranda supporting the agreement. The evidentiary record thus compiled has also enabled me to issue an initial decision on the only issue in the case which, because of Commission precedent, requires decision rather than settlement, namely, the issue of Behring's fitness to retain its license.[5] This evidentiary record consists of the following: 1) Behring's letter dated September 16, 1980, setting out the terms it offered for settlement; 2) the Bureau's letter dated November 14, 1980, clarifying or conditioning certain of those terms; 3) a stipulation showing that Behring cooperated with the Commission's staff prior to inauguration of this proceeding; 4) a proposed settlement agreement based upon undertakings by Behring to pay $70,000 to the Commission and not accept non-tariff compensation from any ocean common carriers in the future; and 5) two affidavits from Merrill P. O'Neal, President of Behring, setting forth uncontested facts concerning the disposition of non-tariff compensation which Behring had for a limited time in the past received from four carriers, and attaching tabular summaries and detailed information about Behring's long history and the many services it performs for shippers.

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[5] As noted later in this decision, the Commission, in an interim order in another forwarder case, has stated that issues of fitness, unlike other issues, cannot be settled. See, *Independent Freight Forwarder's License--E. L. Mobley, Inc.*, Order, 21 F.M.C. 845 (1978).

FACTUAL BACKGROUND

Because of the complexities involved in assembling and reconstituting old transactions from Behring's records, it is not possible to establish the precise amount of the "excess compensation" which four carriers had at certain times in the past paid Behring. However, certain facts can be established with reasonable certainty in large measure owing to Behring's efforts to reconstruct these events from various sources in its records and from its employees, in an effort to provide the Commission with as full a record as is humanly possible to assemble after the passage of so much time. In summary, it appears that Behring's records disclose that non-tariff compensation in the aggregate amount of approximately $115,000 was paid by four carriers, Waterman Steamship Company, Lloyd Brasiliero, P & O Strath Services, and Djakarta Lloyd, to Behring during the period January 1976 through February 1978 on approximately 500 shipments transported in various trades between July 1975 and August 1977. It should be noted, however, that this sum reflects payments from a relatively small number of carriers compared to the total number of carriers for whom Behring handled the shipments and that all such payments ceased in early 1978, more than two years prior to the institution of the present investigation. (See Bureau's Memorandum of Proposed Settlement, February 23, 1981, pp. 7, 8.)

The record shows that only these four carriers, out of the many with whom Behring did business, had the habit of paying compensation in excess of that which their tariffs had published. Of the four, Waterman paid $83,764.54 on 312 shipments between June 1976 and February 1978; Djakarta Lloyd paid $16,279.87 on 22 shipments between May 1976 and August 1976; P & O Strath Services paid $4,877.91 on 68 shipments between August 1976 and April 1977; and Lloyd Brasiliero paid $10,301.94 on 86 shipments between January 1976 and October 1977. (See summary tables attached to affidavit of Merrill P. O'Neal, President of Behring, February 23, 1981.)[6] These amounts represented

[6] These data appear to have been put together after considerable effort by Behring and because of the passage of time and difficulties of reconstructing past events from Behring's records, do not purport to be perfect. The Commission's Bureau, however, acknowledges that they are reliable "ball park" figures. However, the Bureau states that based upon information which it has, the nature of which is not shown in the record, the figures relating to Lloyd Brasiliero and Waterman may need to be adjusted upward to some extent. The Bureau and Behring have attempted to resolve the discrepancies in figures but have not been able to do so and the Bureau recognizes that Behring's records may not be able to explain the differences. In other words, it may not be possible to determine final figures more precisely than has been done. The Bureau does not question Behring's good-faith efforts to resolve these discrepancies. On the contrary, the Bureau correctly states that the presence of such difficult factual issues is a factor favoring settlement, *i.e.*, an issue very difficult or costly or impossible to resolve through litigation. See Bureau's Memorandum, p. 7 n. 1. On Behring's part, Behring explains the difficulty it encountered in constructing its tables from old records and memories of employees. In several instances Behring even added figures for compensation in an effort to be complete even though the records were not clear and such additions were against its own interests. See affidavit of Merrill P. O'Neal, February 23, 1981, paragraph 5 n. 1.

two and one-half percent of the freight charges except for a few shipments for Djakarta Lloyd amounting to three and three-quarters percent. (As noted in the above footnote, the Bureau indicates that some of the payments from Lloyd Brasiliero may actually have amounted to five percent and that some payments from Waterman may have exceeded two and one-half percent, contrary to the evidence submitted by Behring, but the Bureau does not question Behring's good-faith beliefs in its data nor recommend continued litigation as the means to resolve this particular difference.)

In view of the Commission's concern that receipt of the "excess compensation" from carriers may have resulted in rebating or other benefits to shipper customers of Behring or may have caused Behring to be influenced in its selection of carriers against the best interests of its shipper customers, further analysis of the above transactions is necessary. As the evidence submitted by Behring, which the Bureau does not essentially challenge except as noted earlier, shows, Behring did not rebate or otherwise pass this compensation through to shippers and did not violate its obligations as a forwarder to select the best carriers available for its shipper customers regardless of the four carriers' past practice of paying "excess compensation."

On the question whether Behring rebated any of this "excess compensation," Mr. O'Neal, President of Behring, explains why this did not happen and why such rebating would have been nonsensical. Behring, a forwarder for many years, follows a policy of not refunding to shippers any compensation received from carriers because this would be a clear violation of FMC requirements. (O'Neal affidavit, February 23, 1981, paragraph 5.) This statement is self-serving but it is corroborated by other facts which show that rebating would not be economical and would not be good business practice. This is because the cost of recording such rebating in Behring's books would outweigh any advantage to such practice because such cost exceeds the amount of compensation in the large majority of shipments, which compensation comprised no more than $100. Thus, for Lloyd Brasiliero, 56 out of the 86 shipments involved non-tariff compensation of $100 or less; for Waterman, 186 out of 312 shipments; for Djakarta Lloyd, 14 out of 22; for P & O Strath, 58 out of 68. (O'Neal affidavit, paragraphs 5 and 6.) Even on larger shipments, when compensation exceeded $100, the amount was not substantial and Behring's President states persuasively that a reputable forwarder like Behring would not insult a substantial shipper customer by attempting to "buy" the customer's patronage by offering minimal reductions in compensation derived from what the carriers were paying. This situation is totally unlike that in which carriers induce large shippers to book cargo by making offers in reductions of freight which could amount to thousands of dollars. (*Id.*, paragraph 7.)

There are even more reasons which demonstrate that Behring did not and would not have passed any carrier compensation through to its shipper customers. One reason is that larger shipments which Behring handled typically involved project cargoes that required specialized forwarding services to ensure that various portions of the shipment were assembled from various points in the United States for subsequent consolidated shipment to destinations overseas. Coordinating such project shipments is a time-consuming, expensive operation on which Behring could not afford to pay back part of its compensation. Another reason is the fact that Behring has 27 offices in various locations throughout the world. Employees at the field offices would quote fees to shippers for forwarding services without always knowing in advance how a particular shipment would be ultimately routed. For example, although a shipment might be booked initially for a Lloyd Brasiliero sailing, the cargo might be delayed and might miss the sailing, requiring that it be booked on another carrier. Behring would not therefore authorize its field employees to offer reduced fees to shippers, even if it were completely proper to do so, when there was no guarantee that the cargo would ultimately move via a carrier paying "excess compensation" to Behring. (*Id.*, paragraphs 8, 9.)

Behring offers convincing evidence that the fact that at one time four carriers paid more compensation to forwarders than that published in their tariffs did not cause Behring to select those carriers when it was not in the best interests of Behring's shipper customers to do so. That is because in many instances the shipper chooses the sailing best suited to the shipper's needs on the basis of objective data provided by Behring relating to sailing and arrival schedules, national flag requirements, reliability of the carrier, and cheapest routing. All of this has nothing to do with the fact that four carriers happened to pay "excess compensation" to forwarders at certain times in the past. Behring's records, moreover, corroborate these statements, showing that the four carriers did not enjoy any particularly outstanding share of carryings in particular trades on shipments handled by Behring. For example, in 1976, the full year encompassing the largest total of non-tariff compensation by the four carriers, in the U.S. East and Gulf Coast/Brazilian trade, the largest single share of shipments handled by Behring went to Delta Line, not Lloyd Brasiliero (42.2 percent for Delta compared to 31.7 percent to Lloyd, with 17.2 percent to Moore McCormack and 8.9 percent to Netumar Lines). (*Id.*, paragraph 11.) Lloyd was unable to attract a greater share than Delta even though Lloyd enjoyed the status of the Brazilian national flag line enjoying benefits of Brazilian cargo preference laws and offered a greater frequency of service than either Moore McCormack or Netumar. Similarly, as for the other three carriers paying "excess compensation," Waterman, P & O Strath, and Djakarta Lloyd, in 1976 in the U.S. East and Culf Coast/Persian Gulf

trade, Waterman and P & O Strath carried only 8.2 and 4.3 percent of total shipments, respectively, while the remaining 87.5 percent were shared by 22 other lines. (*Id.*, paragraph 12). Waterman carried this relatively small percentage even though it was a principal American-flag carrier in the trade and many shipments moving to that area were required to be carried on American vessels under cargo preference laws. In the Singapore, Indonesia and Malaysia trade, finally, Behring booked less than one percent of all 1976 shipments with Djakarta Lloyd, the remaining 99 percent moving via a dozen other lines. All of these facts hardly show that Behring was steering shipments to the four carriers offering "excessive compensation" at that time. (*Id.*) Moreover, Behring's records show that a significant portion of its shipments were booked via conference carriers rather than on nonconference carriers which offered higher compensation to forwarders. (*Id.*) Again, this fact confirms Behring's statements that it did not allow the practices of the four carriers paying "excess compensation" to influence its choice of carriers.

To summarize, there is no evidence that during the period between 1976 and 1978, when four carriers out of the many doing business with Behring paid "excess compensation" to Behring, that Behring passed any of this compensation on to its shipper customers in any way, nor that Behring engaged in any rebating or gave any benefits to its shipper customers because of the practice of the four carriers, nor that Behring in any way departed from its fiduciary duties toward its shipper customers in selecting carriers because of the peculiar practices of these carriers. Furthermore, as the Bureau acknowledges, whatever the legality of the practice of receiving such compensation from the four carriers, Behring voluntarily terminated the practice in early 1978, more than two years prior to the institution of this formal proceeding, about a year before the Commission issued its section 21 orders and, as far as the record shows, without any prompting from the Commission's staff, which, in early 1978, might not have known anything about these practices of the four carriers.

APPROVABILITY OF THE PROPOSED SETTLEMENT

My first task is to determine whether the settlement proposed by the parties should be accepted. Thereafter, I must determine whether Behring should be found to be fit and should retain its license. I find that the settlement should be approved and that Behring is emphatically fit to retain its license without suffering suspension or revocation.

Both parties have submitted well-argued memoranda which cogently demonstrate that the proposed settlement is based upon relevant criteria applicable to such agreements and would be a just and reasonable means to terminate that portion of the litigation to which it pertains. Behring recites principles of settlement law which the Commission has

developed which are consistent with the law of settlement generally. This law encourages settlements in lieu of expensive litigation and engages in presumptions that favor their correctness, fairness, and validity. Behring notes that these principles were codified to some extent by enactment of Public Law 96-25 in 1979 and in the Commission's regulations implementing that law, General Order 30, 46 C.F.R. 505. Behring argues that the proposed settlement meets the standards governing settlements generally based upon the weighing of costs of litigation against costs of settlement but more particularly follows certain specific criteria set forth in the Commission's regulations concerning litigative probabilities, cost of collecting claims, effects on enforcement policy, and settlements for a combination of reasons. In these respects, Behring points out that the questions of law involved in this proceeding have not been decided previously and accordingly that there is real doubt that the Bureau's position would ultimately prevail. Furthermore, the amount of penalty to which Behring agrees, $70,000, is substantial compared to the amount of non-tariffed compensation received in the past, thus giving the Commission considerable money notwithstanding the real doubts that exist as to whether the Bureau could ever establish that violations of the several sections of law enunciated in the Commission's Order did occur as a matter of fact and of law. Behring argues, furthermore, that the settlement would avoid substantial costs of collecting the claims, *i.e.*, of pursuing this litigation to ultimate conclusion both from Behring's point of view and from that of the Commission's staff. (Further litigation would entail development of evidence at painstaking trial-type hearings at considerable cost to both sides, not to mention subsequent stages after the Initial Decision.) As for the effect of the settlement on enforcement policy, Behring shows not only that it will pay a penalty of $70,000, which effectively eliminates any profit from Behring's receipt of non-tariff compensation, but will undertake strict measures to prevent recurrence of the practices under investigation. Furthermore, by its policy of cooperation and assistance in developing critical evidence and in formulating a careful settlement agreement, Behring states that it has assisted the Commission by providing a model by which future cases involving forwarders can be resolved without the expense of protracted litigation. Thus, Behring contends that there are a "combination of reasons" fully supporting approval of the proposed agreement, a standard which the Commission's regulations specifically invoke for evaluation of such agreements.

The Commission's Bureau of Investigation and Enforcement strongly supports approval of the settlement for a number of carefully stated reasons. In a thoroughly researched memorandum of law supporting the settlement, the Bureau cites countless decisions of the Commission encouraging settlements rather than expensive litigation as a satisfactory means of terminating formal proceedings. The Bureau demonstrates,

furthermore, that it has given careful consideration to numerous criteria applicable to evaluation of the reasonableness of settlements and believes it has served both the public interest in deterring future violations as well as in being fair to Behring. The Bureau also recites certain factors discussed by Behring and generally agrees, for example, that there is a lack of case law establishing clear precedent that Behring's past activities constituted violations of law and agrees that Behring's cooperation in developing evidence saved the Bureau considerable expense that would otherwise have been consumed in lengthy discovery processes. The Bureau contends that Behring's receipt of "excess compensation" was willful and suggest that if litigation were to continue, the Bureau would attempt to establish that receipt of such compensation did violate law in some fashion. However, the Bureau suggests numerous mitigating factors that convince the Bureau that further litigation is not sensible and that the settlement agreement should be approved. For example, the Bureau acknowledges that Behring did not pass any excess compensation on to shippers, did not engage in rebating, and did not allow receipt of such compensation to affect its duties to its shipper customers to serve their best interests. Moreover, the Bureau states that Behring cooperated fully with the Commission's staff, that Behring voluntarily terminated the practices in question long ago, that its agreement to pay $70,000 as a penalty represents more than 60 percent of the amount which had been received years ago, that it has agreed to institute strong preventive internal measures to prevent recurrence, and that Behring, by observing a reasonable attitude toward the Commission and its staff, has enabled the Commission to resolve this proceeding rapidly and inexpensively so that the Commission's limited resources can be better allocated in contested cases. The Bureau, quite correctly in my opinion, contends that Behring's cooperative conduct is something that should be encouraged in future cases and that approval of the settlement, in recognition of Behring's helpfulness, will serve that purpose.

The memoranda of law which both parties have submitted to me in support of their proposed settlement are thorough and persuasive that the settlement meets all standards of approvability and should be approved promptly. Both parties have taken great pains to study applicable case law and the Commission's regulations and have cogently shown how the law and regulations apply specifically to the facts in this case. Briefly, the governing principles are as follows.

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, 511 (1978) (Adopted by the Commission, December 29, 1978); *Organic Chemicals v. Atlantrafik Express Service,* 18 S.R.R. 1536a, 1539 (1979). This principle is especially

important in administrative proceedings and has been codified in both the Administrative Procedure Act (APA) and in the Commission's Rules of Practice and Procedure. See Rules 91 and 94, 46 C.F.R. 502.91 and 502.94, and the APA on which Rule 91 is patterned, 5 U.S.C. 554(c)(1).[7] The courts view this principle and its legislative history as it applies to administrative agencies "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). As the legislative history to the APA shows, furthermore, 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 part through conferences, agreements, or stipulations. Senate Judiciary Committee, APA-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at 24. The general policy favoring settlements is summmarized in the following passage 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 laws or public policy . . . . The courts have considered in 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. 365, 368-369 (1979). As those cases show, it is possible to settle cases without admissions of violations

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[7] Section 554 of the APA provides:

(c) The agency shall give all interested parties opportunity for-

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

of law and for amounts of reparation less than those originally sought in the complaint.

As explained in *Old Ben,* 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 tariff law embodied in section 18(b)(3) of the Shipping Act, 1916, and that if it fails under section 15, the settlement be filed for approval under that law and pertinent regulations. *Old Ben,* 21 F.M.C. at 513.

In considering settlements which parties submit with requests that their cases before the Commission be dismissed, the Commission has followed the traditional view that the settlement deserves approval if it avoids wasteful litigation and if it appears that the parties have correctly made an economical judgment that continued litigation would cost more to each side regardless of who ultimately prevailed on the merits than the amount of money which complainant had agreed to accept and respondent had agreed to pay in exchange for a release. *Old Ben,* 21 F.M.C. at 514.

The principle of encouraging settlements was furthered by the enactment in 1979 of Public Law 96-25, 93 Stat. 71, which, among other things, amended section 32 of the Shipping Act, 1916 (46 U.S.C. 831) to authorize the Commission to assess civil penalties. Following enactment of that law, the Commission issued regulations governing the compromise, assessment, settlement and collection of civil penalties. See General Order No. 30, 46 C.F.R. 505, entitled *Compromise, Assessment, Settlement and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933,* Docket No. 79-66, 22 F.M.C. 238 (1979). The Commission explained that in formal proceedings, its Bureau "shall have full authority to enter into stipulations and settlements," provided, among other things, that such proposed settlements "be submitted to the presiding officer for approval. . . ." 46 C.F.R. 505.3. The Commission did not intend to frustrate settlements in its formal proceedings but wished to formalize the settlement in the body of the Initial Decision in lieu of making findings of violations and determining assessments of penalties when settlements were not possible. Thus, in the preamble adopting the regulations cited, the Commission stated that it "intends no extraordinary impediment to settlements . . ." and that its Bureau, "as a party to the stipulation of settlement will not be approving agreements but rather will be joining with respondents in submitting agreements for approval." Moreover, the Commission stated that "[t]he inclusion of the settlement agreement in the Initial Decision and final decision replaces findings of violations and assessment of penalties . . ." Docket No. 79-66, 22 F.M.C. 238, 240-241

(1979). The regulations set forth particular criteria by which settlements were to be formulated and evaluated. These criteria were those formulated by the Comptroller General and the Attorney General under the Federal Claims Collection Act of 1966 (31 U.S.C. 952) and are published in 4 C.F.R. 103. These criteria were not intended to be all-inclusive. The Commission specifically stated that "the criteria for compromise, settlement, or assessment may include, but need not be limited to, those which are set forth in 4 C.F.R. Part 101-105." 46 C.F.R. 505.1. Moreover, they had been followed by the Commission for some time when the Commission's General Counsel had settled claims prior to the enactment of P.L. 96-25. See *Eastern Forwarding International, Inc., Independent Ocean Freight Forwarder Application,* 23 F.M.C. 206, 213 (1980). Among the criteria that are set forth in 4 C.F.R. Part 103 are those relating to a respondent's ability to pay (103.2), litigative probabilities (103.3), cost of collecting the claim (103.4), effect on enforcement policy, *i.e.*, deterrent effect (103.5), and settlement for a combination of these stated reasons (103.7). See also *Eastern Forwarding International, Inc.*, 23 F.M.C. at 213.

The Commission does not rigidly adhere to fixed standards in evaluating reasonableness of penalty settlements. Rather it specifically recognizes the need to consider mitigating factors and has recognized that, as it develops experience in settlement cases, even more factors may enter into considerations in particular cases. Thus, in promulgating the settlement regulations, the Commission specifically refused to box itself forever into fixed standards or guidelines. See Docket No. 79-66, cited above, 22 F.M.C at 267. As experience has developed, moreover, the Commission has been careful to consider mitigating factors when passing upon penalty settlements, for example, considering a respondent's history of good behavior, its cooperation with the Commission's staff, and its prompt remedial action. See *Continental Forwarding, Inc.-Independent Ocean Freight Forwarder Application and Possible Statutory Violations, Docket No. 80-3, 23 F.M.C. 623, 630; H.K. International Forwarding, Inc., Independent Ocean Freight Forwarder License Application,* 22 F.M.C. 623, 627 (1980) (cooperating with Commission staff, agreement to terminate activities in question, absence of fraud, deceit, financial misappropriations, or violations of position of trust or responsibility with respect to shipments under investigation). See also *Eastern Forwarding International, Inc.*, 23 F.M.C at 212, (no deliberate attempt to defeat regulation, no effort to conceal activities or to defraud anyone, cooperation with the Commission's staff, full restitution of compensation received after license had been revoked). Finally, it bears noting that in this very proceeding the Commission directed the parties, when considering the issue of the amount of penalty, to take "into consideration factors in possible mitigation of such a penalty." Order of Investigation and Hearing, paragraph 4, p. 3.

THE PROPOSED SERTLEMENT AGREEMENT MEETS ALL STANDARDS OF REASONABLENES AND SHOULD BE APPROVED

As I have mentioned, the parties have given careful thought to the various standards applicable to the formulation of settlements and have shown with persuasive evidence and analysis that their proposed settlement meets these standards and emphatically merits approval.

THE SUBSTANCE OF THE PROPROSED SETTLEMENT

A copy of the text of the proposed settlement and promissory note is attached to this Initial Decision as an Appendix. In summary it comprises the following provisions.

Behring does not admit that the past activities in which certain carriers had paid compensation to Behring other than that published in the carriers' tariffs constituted violations of law. However, it admits that it did receive such compensation in the past. However, in order to bring litigation to a conclusion and to assist the Commission in its efforts to enforce the Shipping Act, Behring promises to cooperate with the Commission in connection with other investigations, to pay a penalty in the amount of $70,000, to implement strict measures to ensure that the old practices do not recur, to submit annual reports under oath to the Commission, to conduct periodic audits, and to waive certain defenses to subsequent actions against it if it breaches the agreement. If the agreement is approved, moreover, Behring promises to furnish copies of it or otherwise notify all of its directors, officers, and field office managers within 30 days. Both the settlement agreement and promissory note establishing method of payment appear to conform generally to the models set forth in the Commission's regulations. See 46 C.F.R. 505.7 and model agreement and promissory note attached as appendices, S.R.R. Current Service, §144:7.

HOW THE PROPOSED SETTLEMENT MEETS APPLICABLE STANDARDS

I have summarized above the contentions of both Behring and the Bureau, in which they show that criteria applicable to settlements have been carefully considered. I find that their contentions are sound and accurate. The amount of the settlement ($70,000) reflects the fact that "the parties, after lengthy negotiations, have determined that whatever they could have achieved to vindicate their respective positions by means of continued litigation would be outweighed by the costs of litigation and . . . the amount of settlement to which both have agreed represents a satisfactory compromise and succeeds in terminating a seemingly interminable proceeding." *Perry's Crane Service v. Port of Houston Authority,* 22 F.M.C. 31, 33 (1979) (footnote omitted).

It is apparent that the amount agreed upon is well within a zone of reasonableness and constitutes neither an attempt to extract an exorbitant amount of money from a respondent without necessary basis in facts nor a "giveaway" in which the government's case is clearly shown to be worth much more than it has agreed to receive. As both parties acknowllege, the law relevant to the transactions in question is open to dispute and lacks a clear, definitive decision from the Commission or the courts.[8] Furthermore, the amount is sufficient to act as a deterrent to other forwarders and thus aids the Commission's enforcement policies. By paying $70,000, Behring has reaped no profit from the compensation in question. The compensation only amounted to $115,000. If we assume that to have been sheer profit above related expenses, Behring would have remitted about 50 percent in federal and state taxes. The remainder (about $58,000) has undoubtedly been consumed by legal fees and other expenses of litigation in both the section 21 Order proceedings and the instant case. Moreover, Behring is agreeing to pay more than 60 percent of the original amount ($70,000 out of about $115,000) in penalties. Finally, by settling on this amount and terminating litigation, Behring has saved the Commission and the Government from expending considerable funds, such factor, i.e., costs of collecting the claim (4 C.F.R. 103.4), being one of the criteria employed by the Commission in evaluating amounts of penalties. The fact that Behring undertakes to institute strict measures to ensure against recurrence and promises to cooperate in other cases of similar nature further demonstrates that the settlement agreement serves the Commission's enforcement purposes. As both parties point out, furthermore, especially the Bureau, there are numerous mitigating factors which apply in the instant case, among which are Behring's voluntary termination of the practices in question long before this case began, the total absence of any evidence of dishonesty on Behring's part in its relations with its shipper customers and in the carrying out of its duties to its customers, the high level of cooperation with the Commission's staff both before and after the case began, and, as mentioned, the fact that legal precedent is unclear and that Behring promises to institute strict controls promptly.

I conclude, therefore, that the proposed settlement agreement meets relevant standards and emphatically deserves approval. Such approval, moreover, will have the added benefits of providing a model for future cases and will serve the very desirable purpose of encouraging forward-

[8] This observation applies not only to the status of the "excess compensation" under section 16 but also to the question whether these carriers' practices in relation to Behring showed that a section 15 agreement existed in fact or in law. No case has been cited to me nor am I aware of any in which this sort of happening between a carrier and forwarder has been held to constitute a section 15 agreement. Furthermore, if the matter were to continue into litigation, it would be necessary to develop evidence demonstrating an understanding or agreement between the two entities.

ers and other respondents in future Commission cases to cooperate with the Commission's staff rather than to engulf the Commission in protracted litigation.

THE QUESTION OF FITNESS

There now remains the issue of Behring's fitness to continue to operate under its license without suspension or revocation. This was the last issue (no. 5) framed by the Commission's Order, and, because of a previous decision of the Commission, this issue cannot be settled by the parties. See *Independent Freight Forwarder's License--E. L. Mobley, Inc.*, Order, 21 F.M.C. 845 (1978).[9]

The record is more than adequate to enable me to conclude that Behring is eminently fit to continue to operate under its license. Indeed, under the facts of this case including the many mitigating factors discussed above, even a suspension, much less a revocation, would, in my opinion, be a gross travesty of justice. The record amply demonstrates that Behring is a substantial and reputable company which has provided a variety of useful services for many years, that it has never before been investigated by this Commission in its many years as a licensed forwarder, and that its behavior in this proceeding has been impeccable. The Commission's Bureau, moreover, strongly, urges that Behring be found fit.

DESCRIPTION AND HISTORY OF BEHRING'S OPERATIONS

Behring has been involved with transportation since 1917. The company was established in that year by Peter Behring and was headquartered in New York City for many years. In 1963 Behring merged with South Ports Forwarding Co. of Houston and operated as Behring-South Ports Shipping Co. until 1970. In the intervening years, the company grew steadily, adding offices in New Orleans and Los Angeles. In 1970 Behring acquired Leslie B. Canion Customs Brokers, Inc. with offices in several cities, and a year later changed the company name to the present Behring International, Inc. Another New York office was opened that year and by 1973 Behring had added other new offices in Beaumont, Texas, Lake Charles, La., Dallas, and Chicago. Beginning in 1974, Behring opened six overseas offices in Singapore, Paris, Saudi Arabia, Dubai, Manila, and London. More recently Behring opened new domestic branches in Baltimore, Edison, N.J., Tulsa, Boston, San Francisco, Seattle, Cleveland, and Camden, Del., and pres-

[9] Although the Commission enunciated the doctrine that a question of fitness cannot be settled, a reading of the Order cited indicates that the Commission was concerned about the forwarder's fitness because of serious allegations that the forwarder had forged documents and believed that it had to pursue the case to conclusion to assure itself and the public that the forwarder was trustworthy. See 21 F.M.C. at 847. The present case bears no resemblance whatever to the *Mobley* case, there being no allegations nor evidence that Behring engaged in any fraudulent or similarly reprehensible conduct.

ently has 27 offices and more than 800 employees worldwide. Behring expects to employ more than 1,500 people by 1983.

In its six decades of forwarding operations and especially in its recent growth, Behring has developed a full range of services facilitating the movement of U. S. export shipments. For example, in addition to the usual preparation of shipping documents, Behring's export packing division in Houston operates a 74,000 square foot enclosed structure and 28 additional acres of paved and fenced marshalling yards capable of packing items ranging from 20-ton heavy-lift pieces to specialized vacuum packaging of perishable or moisture-sensitive goods. Behring has also created a Management Information Services division, utilizing an IBM system to develop a computerized tracing system to allow monitoring of shipments and Behring has been innovative in the use of computer software for that purpose. Behring believes itself to be unique in that it arranges forwarding of complete projects (e.g., 6,500-ton oil drilling rigs) on which it arranges component assembly in the U.S., ocean transportation, and in some cases, through its overseas offices, delivery to inland destinations.

Behring has worked to stimulate exports directly through participation in export groups for various countries (the People's Republic of China being a recent example) and has made direct approaches to foreign buyers to encourage their purchase of U.S. goods. Behring believes with apparent justification that it enjoys a reputation as one of the largest, most knowledgeable and proficient full-service forwarders in the world. In support of this statement, Behring has submitted an informational package showing its many years of service in many transportation areas, including not only ocean forwarding, which is historically the largest part of its business, but air freight services, import, customhouse services, export packing, air chartering, and even most recently, a non-vessel operating carrier service.

Behring received its present ocean freight forwarder license (No. 910) on February 7, 1964, and prior to that time had received a registration certificate (No. 566) on July 13, 1951. Up to the time of the present litigation, Behring had not been involved in proceedings questioning its fitness. There is, furthermore, no indication on this record that shippers have ever complained about any aspect of Behring's services.

BEHRING IS FIT TO RETAIN ITS LICENSE

The preceding description of Behring's operation demonstrates clearly that it is a first-class professional organization and that it enjoys a fine reputation. Nothing in this record detracts from that statement and the Bureau does not challenge Behring's fitness. From the inception of this proceeding and even before, Behring cooperated fully with the Commission's staff, even to the extent of developing evidence from its

own records which identified old transactions in which four carriers had paid "excess compensation." As has been made clear, the types of activities with which this investigation is concerned are not related to fraud or dishonesty or violation of a forwarder's high fiduciary duties. What happened is that for reasons not explained in the record, four carriers, out of the many with which Behring did business, had the practice of paying compensation to Behring during 1976 through early 1978 in amounts different from those published in the carriers' tariffs. There is no indication that Behring suggested this practice to the carriers but, in any event, Behring terminated the receiving of such compensation voluntarily long before this case began and even long before the Commission served its section 21 Order. No shipper was ever harmed by this practice nor was Behring ever diverted from its strict fiduciary duties towards its shipper customers because of the peculiar practice of the four carriers.

Although the Bureau states that Behring's receipt of the compensation in the past was "willful," even the Bureau concedes that the uncertainty as to whether the practice violated law at the time "tends to weaken the allegation that Behring acted in wanton disregard of statutory authority." (Bureau's Memorandum, p. 6.) Moreover, as Behring points out, the Commission defines "willfulness" as something which "equates with a wanton disregard from which an inference can be drawn that the conduct was in fact purposeful; a standard somewhat analogous to the tort concept of 'gross negligence.' " *Equality Plastics, Inc.,* 17 F.M.C. 217, 226 (1973). Previously, the Commission had explained with respect to the words "knowingly and willfully" that:

> [T]he phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. *Misclassification of Tissue Paper as Newsprint Paper,* 4 F.M.B. 483. 486 (1954).

In view of the fact that, as even the Bureau concedes, the Commission had never decided or indicated that payments of compensation from carriers to *forwarders* different from that published in carrier tariffs were to be treated as unlawful (as would be payments by carriers to *shippers* which effectively reduce rates published in the tariffs) it is difficult to argue that Behring was "plainly indifferent" or showed "wanton disregard" of regulatory principles. It could be argued that to hold such a thing now may even result in retroactive policy making, which American principles of fairness and this Commission so justly condemn. For example, in *Mediterranean Pools Investigation,* 9 F.M.C.

264, 304 (1966), the Commission refused to penalize parties who had relied upon current case law which was later changed, stating:

> The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the Act, and who was unable to know when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing the law abhors. *NLRB v. Guy F. Atkinson Co.,* 195 F.2d 141 (9th Cir. 1952).[10]

If Behring's conduct was not "willful" when it received compensation more than two years before the case began, there could be no question of revocation or suspension of Behring's license. The law simply forbids such a drastic sanction unless Behring "has been given . . . opportunity to demonstrate or achieve compliance with all lawful requirements" and if such opportunity had been given "before the institution of agency proceedings." Administrative Procedure Act, 5 U.S.C. 558(c). See discussion of this principle in *E. Allen Brown,* 22 F.M.C. at 596-597. This is the so-called "second chance" doctrine enjoyed by persons holding licenses and it is not clear to me whether Behring had been given such an opportunity before this case commenced. However, it is not necessary to decide the question whether Behring's activities were "willful" or not. Even if they were "willful" the record strongly supports a finding of Behring's fitness and Behring's cooperative attitude, including its promise to institute strict measures to ensure non-recurrence of the questionable practices, satisfies any reasonable compliance effort. Moreover, the Commission has continually considered mitigating factors when fashioning sanctions and has attempted to tailor just and reasonable solutions to the facts in each case in the belief that section 44 (the Freight Forwarder Law) and its regulations are based on remedial, not punitive purposes, avoiding the drastic sanction of revocation or harmful suspension of licenses when possible to achieve regulatory purposes short of such action. In two recent cases the Commission explained its policy in this regard: *E. L. Mobley, Inc.,* cited above, 21 F.M.C. 845, 847 (1979); and *E. Allen Brown,* 22 F.M.C. 585, 586 (1979), stating:

> * * * 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 sanctions to the facts of the specific case. Section

[10] The Securities and Exchange Commission has only recently issued a decision in which it also followed the principle that licensees should not be penalized when, at the time they acted, the agency had not clearly enunciated the legal principles which governed their conduct. In the case, the S.E.C. reversed its judge and refused to discipline two attorneys practicing before the agency. See, *In the Matter of William R. Carter and Charles J. Johnson, Jr.,* SEA Release No. 17597, Februrary 28, 1981, 1981 CCH SEA, p.____.

> 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and not be punitive in character. 21 F.M.C. at 847.
>
> * * *
>
> In making the above statements the Commission was following sound precedent. Thus, the courts as well as the Commission have recognized that evidence of mitigation should be considered when determining whether a license applicant should be found to be fit although implicated in violations of the Act in the past. . . . Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as a remedial statute in order to correct abuses in the forwarding industry. . . .
>
> *The principle that the Commission should not rush to extreme sanctions without considering all factors of mitigation in an effort to fashion a just and reasonable remedy is well supported by the courts.* Although agencies are not required to impose sanctions in a perfectly even manner because of the wide latitude they are given by the courts as the expert bodies most skilled in devising means to carry out specific legislative purposes, the agencies are nevertheless expected to consider less drastic alternative remedies and to base whatever remedy they select on facts and reasonable interpretations of law. (Emphasis added.) 22 F.M.C. at 598.

As should be clear from a reading of this decision, there is considerable "evidence of mitigation," and, as the Bureau states, the Commission measures the impact of past violations upon a person's fitness by exploring the "context in which the violations occurred." *Cargo Systems International (CSI)--Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916,* 22 F.M.C. 56, 71 (1979). I have cited numerous mitigating factors, e.g., the unclear state of the law at the time of the practices in question, Behring's early, voluntary termination of the practices, the lack of any showing that the practices affected Behring's strict duties toward its shipper customers, the high level of cooperation which Behring showed toward the Commission's staff both before and after this proceeding began, the agreement to institute strict measures of control promptly, the considerable savings in Commission funds caused by a termination of protracted litigation, Behring's long history without blemish. Furthermore, the context in which the old practices occurred was one in which four carriers appear to have conducted their business in a peculiar way for their own reasons with no showing that Behring instigated these practices, which, in any event, the Commission had not declared to be unlawful in any reported decision at the time.

The Bureau argues that the extreme sanction of revocation could be invoked in a case in which the future conduct of the forwarder could not be trusted. In other words, if, by the nature of the violations committed and the circumstances surrounding that conduct, it could be anticipated that a licensee would continue to engage in violative conduct, that licensee could be found to be unfit to continue to hold its license. See *Independent Ocean Freight Forwarder Application--Alvarez Shipping Co., Inc.,* 16 F.M.C. 78 (1978); *G. R. Minon--Freight Forwarder License,* 12 F.M.C. 75 (1968). In such a situation, revocation would constitute the only effective sanction. This position is consistent with the Commission's holding that "it is crucial to his 'fitness' that it appear that the applicant intends to and will in good faith adhere to such 'high standard' of conduct and that he intends to and will obey the Commission's rules and policies for the conduct of licensed freight forwarders." *Harry Kaufman D/B/A International Shipper Co. of N.Y., etc.,* 16 F.M.C. 256, 271 (1973). In the instant case, however, the evidence is overwhelming that Behring fully intends to comply with law and Commission regulations and, indeed, intends to institute strict measures to ensure that the old activities in question will not recur. There is, therefore, absolutely no showing that any sanctions are necessary outside of the amount of penalty which Behring agrees to remit. The facts that Behring has provided a variety of first-class services to shippers for many years, that it is an innovator in the industry, and has operated without complaints for many years, certainly provide even more evidence of its fitness.

ULTIMATE CONCLUSIONS

I conclude, therefore, that this record shows persuasively that Behring is fit to continue operating under its license and that implementation of the terms of the settlement agreement will amply satisfy all regulatory purposes. Rejection of the settlement, however, would be extremely imprudent, would thrust the proceeding back into protracted litigation, and would chill any future efforts of the Commission's staff to encourage forwarders and other regulated persons to cooperate with the Commission, thereby fomenting unnecessary antagonism and laying the foundation for needless, expensive litigation in the future.

(S) NORMAN D. KLINE
Administrative Law Judge

Washington, D. C.
March 17, 1981

APPENDIX
BEFORE THE FEDERAL MARITIME COMMISSION

BEHRING INTERNATIONAL, INC.
INDEPENDENT OCEAN FREIGHT
FORWARDER FORWARDER LICENSE
NO. 910

DOCKET NO. 80-43

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Investigation and Enforcement (Bureau) and Respondent Behring International, Inc. (Behring). It is submitted to the Presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, and section 502.3 of the Commission 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 June 27, 1980, the Commission instituted the present proceeding to determine whether Behring had violated sections 15 and 16, Intitial Paragraph, of the Shipping Act, 1916, 46 U.S.C. §§814 & 815, and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of section 15 and 16, Initial Paragraph, of the Shipping Act, 1916, so found;

WHEREAS, the Order of Investigation alleges that Behring may have violated sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916;

WHEREAS, Behring has admitted that it has engaged in specified conduct which may be violative of sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916, but denies that such conduct violated that Act;

WHEREAS, Behring has indicated its willingness to cooperate with the Commission in other investigations involving the payment of compensation by oceangoing common carriers in excess of the rate specified in the carriers' tariffs ("non-tariff compensation") (see Appendix I & II attached hereto), and whereas, Behring's failure to so cooperate will constitute a breach of this Agreement;

WHEREAS, Behring has terminated its receipt of "non-tariff compensation," and has instituted and has indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent future receipt of "non-tariff compensation";

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 settling expeditiously the issue of the appropriate amount to be paid by Behring in accordance with the terms and conditions of this Agreement; and

WHEREAS, section 32(e) of the Shipping Act, 1916, U.S.C. §831(e), authorizes the Commission to assess or compromise all civil penalties claims under the Shipping Act, 1916;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the factual record submitted in the present proceeding, Behring agrees as a condition of this settlement to comply with all requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Behring hereby agrees, as a condition of the settlement agreement, to pay a monetary amount of Seventy Thousand Dollars ($70,000) of which Ten Thousand Dollars ($10,000) shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement and Sixty Thousand Dollars ($60,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix III in the following installments:

> Fifteen Thousand Dollars ($15,000), plus interest, shall be paid on or before six (6) months following approval by the Commission of this Proposed Settlement;
>
> Fifteen Thousand Dollars ($15,000), plus interest, shall be paid on or before twelve (12) months following approval by the Commission of this Proposed Settlement;
>
> Fifteen Thousand Dollars ($15,000), plus interest, shall be paid on or before eighteen (18) months following approval by the Commission of this Proposed Settlement; and
>
> Fifteen Thousand Dollars ($15,000), plus interest, shall be paid on or before twenty-four (24) months following approval by the Commission of this Proposed Settlement.

2. Except as provided in paragraph six (6) below, this Agreement shall forever bar the commencement or institution of any civil action or other claim for recovery of civil penalties from Behring arising from the conduct set forth and described in the factual record submitted in the present proceeding. It is understood by Behring that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or defense to any other department or agency of the United States Government for conduct engaged in by Behring, other than that reflected in the factual record submitted in the present proceeding.

3. Behring agrees to preserve and maintain at the offices of Schmeltzer, Aptaker & Sheppard, P.C., 1800 Massachusetts Avenue, N.W., Washington, D.C., through April 1, 1984, copies of all underlying oceangoing common carrier bills of lading applicable to the shipments listed in the factual record submitted in this proceeding, and upon reasonable notice, to allow appropriate Commission representatives unimpeded access to such bills of lading and to allow the removal of such bills of lading specifically requested by such Commission representatives.

4. Behring agrees to take all reasonable measures designed to discourage, prevent, and eliminate the receipt by it of "non-tariff compensation" unless the Commission, the courts or Congress find that it is lawful. These measures shall include, but need not be limited to, the following:

i. Behring's Chief Executive Officer will submit annually to the Commission a statement made under oath certifying that, to the best of his knowledge based upon inquiry, Behring had not received "non-tariff compensation" during the preceding year.

ii. Behring will review its administration and procedures and modify both to the extent necessary to safeguard, through periodic audits or other methods of control, against the occurrence of practices by Behring, its officers, employees, and agents which would result in the receipt of "non-tariff compensation."

5. Behring agrees that within thirty (30) days following the approval of this Proposed Settlement, it will either furnish copies of this Agreement, or will give affirmative notice of the terms and provisions thereof, to all of its directors, officers, and field office managers.

6. Behring hereby agrees as a condition of this Agreement that, if it breaches this Agreement, it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to April 1, 1986, by or on behalf of the Commission, to recover civil penalties for violations of the Shipping Act, 1916, which apply to the receipt of "non-tariff compensation," arising out of the conduct set forth in the factual record submitted in the present proceeding. In the event of such a breach by Behring, if such noncompliance shall not have been explained to the Commission's satisfaction within thirty (30) days after written notice to Behring by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that Behring's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any

monies paid to the Commission shall remain the property of the United States, and Behring will not interpose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

7. In the event changes in law or other circumstances occur during the term of this Agreement which believes warrant modification or mitigation of the Agreement, Behring may petition for this purpose.

8. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Behring of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

9. The undersigned counsel for Behring represents that he is properly authorized and empowered to execute this Agreement on behalf of Behring and to fully bind Behring to all of the terms and conditions herein.

Edward Schmeltzer

PAUL J. KALLER,
Deputy Director
Bureau of Investigation and Enforcement

George J. Weiner
Counsel for Behring

JOSEPH B. SLUNT
Attorney

CHARNA J. SWEDARSKY
Attorney

CHARLES C. HUNTER
Attorney

February , 1981

PROMISSORY NOTE

For value received, Behring International, Inc., (Behring) promises to pay to the Federal Maritime Commission (Commission) the principal sum of Seventy Thousand Dollars ($70,000) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

> Ten Thousand Dollars ($10,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;
>
> Fifteen Thousand Dollars ($15,000) on or before six (6) months lowing the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;
>
> Fifteen Thousand Dollars ($15,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;
>
> Fifteen Thousand Dollars ($15,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;
>
> Fifteen Thousand Dollars ($15,000) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-43;

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date upon which the Commission approves the Proposed Settlement in FMC Docket No. 80-43 and be computed at the rate of twelve percent (12%) per annum on the unpaid balance.

If any payment of principal or interest shall remain unpaid for a period of thirty (30) days after becoming due and payable, the entire unpaid principal amount of the Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand, or notice, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under this Promissory Note, Behring does hereby authorize and empower any U.S. attorney, any of his/her assistants or any attorney of any court of record, Federal or State, to appear for them, and to enter and confess judgment against Behring for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State; to waive the issuance and service of process upon Behring in any suit on this Promissory Note; to waive any venue requirement in such suit; to release all errors which may intervene in entering up such judgment or in issuing any execution thereon; and to consent to imme-

diate execution on said judgment. Behring hereby ratifies and confirms all that said attorney may do by virtue thereof.

This Promissory Note may be prepaid in whole or in part by Behring by bank cashier's or certified check at anytime, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

BEHRING INTERNATIONAL, INC.

By:
Date:

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-46

BELCO PETROLEUM CORP.

v.

LYKES BROS. STEAMSHIP CO., INC. & PERUVIAN STATE LINE

ORDER ADOPTING INITIAL DECISION

June 30, 1981

This proceeding was instituted by the filing of a complaint by Belco Petroleum Corp. against Lykes Bros. Steamship Co., Inc. (Lykes) and Compania Peruana de Vapores seeking reparation for freight overcharges on seven shipments of oil well drilling supplies and equipment from Houston, Texas to Talara, Peru.

On May 13, 1981, Chief Administrative Law Judge John E. Cograve issued an Initial Decision finding for Complainant and awarded reparation in the aggregate amount of $11,387.22. No exceptions to the Initial Decision have been filed. The Commission, however, has determined to review the Initial Decision pursuant to Rule 227(d) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(d)).

Upon review, the Commission has determined that the Presiding Officer's ultimate findings and conclusions are correct. The Initial Decision will accordingly be adopted with the modification discussed below.

The Presiding Officer did not include interest on the reparation awarded. In order to make the Complainant "whole" and compensate it for the loss of the use of freight charges improperly assessed, the Commission believes that interest on the amount of reparations awarded should have been included as an element of damages. *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 470 (1968). The Commission will therefore modify the Presiding Officer's award to include interest at a rate of 12% per annum payable by Lykes on the amount of $3,343.87 awarded as reparation on two shipments covered by prepaid bills of lading Nos. 4 and 5 dated June 30, 1978, and on the amount of $3,238.62, awarded on the shipment covered by prepaid bills of lading No. 2 dated July 14, 1978. With respect to the shipments carried by Compania Peruana de Vapores, award of reparation is modified to include interest of 12% per annum, payable from July 18, 1978, on the amount of $3,811.24 on three shipments covered by prepaid bills

of lading Nos. C-2, 11 and 12, and from July 31, 1978, on $993.49 on the shipment covered by prepaid bill of lading No. 17.

THEREFORE, IT IS ORDERED, That the Initial Decision served on May 13, 1981 in this proceeding is adopted and made a part hereof.

FURTHER, IT IS ORDERED, That Respondent Lykes Bros. Steamship Co., Inc. pay to the complainant Belco Petroleum Corp. reparation in the amount of $3,343.87 plus interest at the rate of 12% per annum from June 30, 1978, and the amount of $3,238.62 plus interest of 12% per annum from July 14, 1978.

FINALLY, IT IS ORDERED, That Respondent Compania Peruana de Vapores pay to Complainant Belco Petroleum Corp. reparation in the amounts of $3,811.24 plus interest at the rate of 12% per annum from July 18, 1978, and $993.49 plus interest of 12% per annum from July 31, 1978.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-46

BELCO PETROLEUM CORP.

v.

LYKES BROS. STEAMSHIP CO., INC. &
PERUVIAN STATE LINE

Reparation granted.

Bruce Leventhal for Belco Petroleum Corporation.

R. J. Finnan appeared for Lykes Bros. Steamship Co., Inc.

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

Adopted June 30, 1981

By complaint Belco Petroleum Corporation, an organization engaged in the exploration for and the production of crude petroleum, natural gas and coal, alleges that charges in excess of those lawfully applicable for transportation, in violation of section 18(b)(3) of the Shipping Act, 1916, were assessed on seven shipments of oil well drilling supplies and equipment from Houston, Texas, to Talara, Peru, from June 30, 1978, through July 31, 1978. Total reparation in the amount of $11,387.22 is sought. Disposition under shortened procedure is requested.

The respondent, Lykes Bros. Steamship Co., Inc., and Compania Peruana de Vapores, common carriers by water in the foreign commerce of the United States, were also members of the Atlantic and Gulf/West Coast of South America Conference at the time of the alleged violations. Both have agreed to the requested shortened procedure.

Complainant, an industrial contract shipper with the conference since 1965, (Contract no. 10361), alleges it traditionally made its shipments of oil well supplies and equipment under item 1050 [2] which provided an Industrial Contract Rate Schedule covering cargo of a proprietary

[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] Atlantic & Gulf/West Coast of South America Conference, S. B. SA-13, Freight Tariff No. 2 FROM: U. S. Atlantic and U. S. Gulf Ports via the Panama Canal TO: West Coast Ports in Colombia and Ports in Ecuador, Peru and Chile, Page 218, Effective Date.

nature. In order to qualify for that rate schedule the complainant's bills of lading were "generally claused as follows":

> The above described cargo is proprietary not for resale, and in all other respects forwarded in conformity with the provisions of conference Tariff Item 1050.

In 1978, however, the conference tariff was amended by adding a "project rate" for cargo of a proprietary nature under item 1036A, Special and Charitable Rates.[3] Nevertheless complainant continued to annotate its bills of lading according to the terms of item 1050 instead of item 1036A because:

> [Complainant] does not employ transportation personnel nor does it have personnel familiar with freight tariffs. Accordingly, complainant and its freight forwarder were not aware of the existence of item 1036A [nor] that item 1036A often produces substantially lower freight charges than item 1050. Complainant was advised of the application of Item 1036A rates versus Item 1050 rates by its freight Auditor.

Item 1036A provides as follows:

> *Talara Oilwell and Production Project*
> Shipments of proprietary material and equipment to Talara or Paita will be assessed base rate of $118.00 W/M plus all additional charges. Heavy lift charges as per tariff scale will be applicable as per tariff scale W/M as cargo is freighted. Bills of lading shall be claused as set forth in Item 1001.

Item 1001 required bills of lading covering shipments to Talara or Paita under Item 1036A to be claused as follows:

> The shipper shown on this bill of lading certifies that the cargo described hereon is forwarded pursuant to the terms and conditions of tariff item No. [1036A] and that he is aware that the Shipping Act, 1916, declared it to be a violation of law punishable by a penalty for a shipper to utilize an unfair device or means to obtain transportation at less than the applicable rates.

Complainant admits that the bills of lading were improperly claused to qualify for item 1036A rates, but argues that in addition to qualifying for industrial contract rates in item 1050, it also qualifies for the lower project rate in item 1036A because it has petroleum production facilities at Talara, Peru. Moreover complainant also argues that since what is shipped determines the applicable rate rather than "an erroneous bill of lading description" as long as complainant satisfies a "reasonable burden of proof" in support of its allegation.

[3] Same tariff of rates as noted in fn. 2, 10th Revised Page No. 207-A, Effective Date June 26, 1978, Republished July 31, 1978.

Lykes replies that the shipments were properly treated as industrial contract rate materials under item 1050 and denies the contention that the shipments also qualified for the project rate under item 1036A. Peruana did not answer the complaint.

Briefly, shortened procedure requires, among other things, an answering memorandum to be filed within twenty-five days after the date of service of the complaint. Thereafter, within fifteen days after the date of service of the answering memorandum the complainant's memorandum in reply may be filed. However the times for the various filings under that schedule have expired without compliance by any of the parties. Through a procedural notice served January 14, last, the times for filing respondents' answering memoranda and complainant's memorandum in reply were advanced to January 30 and February 11, respectively.

The sole issue presented here is whether the absence from the bill of ladings of the specific clause required by item 1036A precludes complainant from obtaining the lower rates provided for in that item. Respondents do not dispute the fact that the shipments in question were proprietary and the bills of lading show that the shipments were to Talara.[4]

In *Durite Corp. Ltd. v. Sea-Land*, 20 F.M.C. 674 (1978), the Commission found that the claimant was entitled to the lower project rate even though the claimant failed to include on the bill of lading the required statement that the cargo was proprietary. The Commission specifically noted that "there is nothing to distinguish this case from the long line of cases wherein we held what actually is shipped governs the rate to be applied. See also *Cities Service International Inc. v. Sea-Land*, 19 F.M.C. 129 (1976); *Sun Co. Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. 67 (1977).

Since the essential facts are clear and undisputed, i.e. the cargo was proprietary and was destined for Talara, the complainant has been overcharged in violation of section 18(b)(3). Accordingly, reparation is awarded in the amount of $11,387.22.[5]

(S) JOHN E. COGRAVE
Administrative Law Judge

Washington, D. C.
May 13, 1981

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[4] Neither respondent could of course deny that the cargo was proprietary since they freighted the bills under 1050. Lykes in its answer states that 1050 was and is the correct item. But Lykes argument is based on the absence of the 1036A certification. Complainant goes to some length to show that the part of the certification requiring knowledge of the Shipping Act is unlawful. It is unnecessary to deal with that here since the requirement is at least redundant of an axiom of law and probably shouldn't be a part of the certification at all.

[5] See appendix for calculation underlying award of reparation.

APPENDIX

PROPERLY APPLICABLE FREIGHT ON SHIPMENTS VIA LYKES BROS. STEAMSHIP CO., INC.

B/L No. 2	Freight	147,893 lbs.	$118.00/W		$ 8,725.69
		1,293 cft	$118.00/M		$ 3,814.35
	Congestion	15%			$ 1,881.01
				Total	$14,421.05
B/L No. 4	Freight	2,518 cft	$118.00/M		$ 7,428.10
	Congestion	15%			$ 1,114.22
				Total	$ 8,542.32
B/L No. 5	Freight	1,871 cft	$118.00/M		$ 5,519.45
	Congestion	15%			$ 827.92
				Total	$ 6,347.37
	Grand Total				$29,310.74

PROPERLY APPLICABLE FREIGHT ON SHIPMENTS VIA COMPANIA PERUANA DE VAPORES

B/L No. C-2	Freight	1,113 cft	$118.00/M		$ 3,283.35
		39,962 lbs	$118.00/M		$ 2,357.76
	Congestion	15%			$ 846.17
				Total	$ 6,487.28
B/L No. 11	Freight	36,310 lbs.	$118.00/W		$ 2,142.29
	Congestion	15%			$ 321.34
				Total	$ 2,463.63
B/L No. 12	Freight	1,284 cft	$118.00/M		$ 3,787.80
		3,021 lbs.	$118.00/W		$ 178.24
	Congestion	15%			$ 593.86
				Total	$ 4,522.90
B/L No. 17	Freight	1,304 cft	$118.00/M		$ 3,846.80
	Congestion	15%			$ 577.02
				Total	$ 4,423.82
	Grand Total				$17,927.63
	Total As Billed				$58,625.59
	Total Properly Applicable Freight				$47,238.37
	Overcharge				$11,387.22

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-32

AGREEMENT NO. 10267-5

CONTAINER CARRIERS DISCUSSION AGREEMENT

ORDER OF DISCONTINUANCE

June 30, 1981

A motion to discontinue this proceeding has been filed by proponents of Agreement 10267-5, based on their formal withdrawal of that agreement from Commission consideration. The proceeding is rendered moot by withdrawal of the agreement. Therefore, the motion to discontinue is granted.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 998(I)

IDEAL TOY CORP.

v.

EVERGREEN LINE

ORDER ON REVIEW

June 30, 1981

The Commission determined to review the decision of Settlement Officer Donald F. Norris in which he denied the claim of Ideal Toy Corp. (Ideal) for freight overcharges collected by Evergreen Line (Evergreen) on a shipment of "pool liners" from Busan, Korea, to New York, and ordered Ideal to reimburse the $366.28 it had received from Evergreen in settlement of the claim.

Evergreen rated the shipment as "Plastic Inflatable Pools" under Item 5920-00* of its tariff, FMC-29 at $86 per cubic meter. Ideal contends that the shipment should have been rated under Item 5920-20 as "Swimming Pools, Collapsible (Vinyl with Steel Wall)" at $77 per cubic meter. Following the filing of the complaint the carrier apparently settled the matter by paying the claimed amount in full.

The Settlement Officer, however, reviewed the merits of the claim and noted that the tariff contained no provision on how to rate "parts" of specific commodities when shipped separately. Because Item 5920-00 includes "Swimming pools, collapsible" among the sports and games listed in that Item and also covers "requisites" of such sports and games, he concluded that the shipment had been properly rated and ordered Ideal to reimburse to Evergreen the amount received as settlement together with interest. For reasons stated below, the Commission finds that the Settlement Officer's decision is in error and must be reversed.

Section 22 of the Shipping Act, 1916, provides that the Commission may award reparation for injury caused by a violation of the Act "by a common carrier by water or other person subject to this Act." The definition of "other person" in section 1 of the Act does not include shippers or consignees. Therefore, section 22 confers no jurisdiction on the Commission to order the payment of reparation, in any form, by a

* *The Settlement Officer erroneously referred to No. 9520-00.*

shipper or consignee.* As a result, the Settlement Officer had no authority to direct Ideal, a shipper, to pay to Evergreen any amount.

Further, the Commission finds that not only was Ideal improperly directed to reimburse Evergreen, but also that no amount was due Evergreen in the first instance. The determination that Ideal should make reimbursement to Evergreen was based on the Settlement Officer's theory that the omission of any provision in the tariff on how "parts" of listed commodities are to be rated when shipped separately, "is remedied to some extent" by the language of Item 5920-00, which, as mentioned, covers "*requisites* for indoor and outdoor sports and games" (emphasis added), while Item 5920-20, in his opinion, contains no such language. However, Item 5920-20 appears in the tariff as a subheading of Item 5920-00 and it is unclear whether the provision on "requisites" applies to all subheadings listed in Item 5920-00, including Item 5920-20.

Moreover, it is uncertain whether the term "requisites" in this instance must be read as a generic reference to the components not specifically described in the tariff of the games and sports listed in the Item, rather than an indication on how such "requisites" are to be shipped, i.e. whether separately, or together with the main components. The absence of specific language to that effect creates an ambiguity in the tariff which in accordance with established principles of tariff construction must be construed against the carrier which prepared the tariff. *See Coca-Cola, Inc. v. Atchison, T. & S.F. Ry.*, 608 F.2d 213 (5th Cir. 1979). Moreover, and in any event, the description in Item 5920-20 "Swimming Pools, Collapsible (Vinyl with Steel Wall)" of which the shipped pool liners are a component, is more specific than "Swimming Pools, Collapsible" in Item 5920-00.

Consequently, the shipment should have been rated under Item 5920-20 at $77 per cubic meter and Evergreen's assessment and collection of freight charges on the basis of the $86 per cubic meter rate violated section 18(b)(3) of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That the decision of the Settlement Officer served in this proceeding is reversed and the settlement by which Evergreen Line delivered to Ideal a check in the sum of $366.28 in full payment of the claimed overcharges is approved.

By the Commission.*

(S) JOSEPH C. POLKING
Acting Secretary

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* *See Maritime Service Corp. v. Plaza Provision Company & Maritime Service Corp. v. Pueblo Supermarkets, Inc.*, 13 S.R.R. 524 (1973).

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

Commissioner Richard J. Daschbach's separate opinion.

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

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

GENERAL ORDER 38, AMENDMENT NO. 3

GENERAL ORDER 13, AMENDMENT NO. 9

DOCKET NO. 80-37

PART 531 - PUBLISHING, FILING AND POSTING OF TARIFFS IN DOMESTIC OFFSHORE COMMERCE

PART 536 - PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

June 30, 1981

ACTION: Final Rule

SUMMARY: Filing of tariff material covering the movement of used military household goods and personal effects by non-vessel operating common carriers in the domestic and foreign commerce of the United States is exempted from the requirements of Part 531 and Part 536 of Title 46, C.F.R.. Such filings no longer serve any regulatory purpose. The exemptions will lessen the regulatory burden on non-vessel operating common carriers.

DATE: Effective July 7, 1981

SUPPLEMENTAL INFORMATION:

The Commission instituted a rulemaking proceeding in Docket No. 80-37, on June 17, 1980 (45 FR 41024) for the purpose of considering (1) the exemption of movements of used household goods and personal effects by non-vessel operation common carriers (NVOCCs) in both the domestic offshore and foreign commerce of the United States from the Commission's tariff filing requirements; and (2) to require that rates for used household goods and personal effects established by vessel operating common carriers be stated on a weight or per container basis only and that the weight of such shipments be substantiated by a public weigher's certificate furnished by the shipper.

NVOCCs undertaking ocean transportation are subject to Federal Maritime Commission regulation in both foreign and domestic com-

merce.[1] Several NVOCCs also operate as motor carriers under the Interstate Commerce Act (ICA) and as inland freight forwarders exempt from regulation under other provisions of the ICA. These carriers frequently specialize in the carriage of used household goods and personal effects and maintain FMC tariffs providing for the port-to-port segments of through ocean/inland transportation services. These tariffs reflect only part of the total transportation costs incurred by the shipper.[2]

Since July 6, 1976, all NVOCCs providing ocean transportation for used *military* household goods and personal effects for which there was also an inland movement in the United States have been granted continuing special permission to file tariff supplements and/or revised pages for such transportation on less than the statutory 30-day notice requirement.[3] A waiver of the general tariff format requirements stipulated in 46 C.F.R. Parts 531 and 536 has also been granted. This action was intended to facilitate the intermodal movement of used household goods and personal effects for the Department of Defense (DOD).

The Commission has now determined to exempt *all* filing requirements for such movements, as they relate to used military household goods and personal effects. In promulgating this exemption, the Commission considered, *inter alia*, the comments of DOD which had requested the modification of existing regulations to permit it to require NVOCCs to submit their through intermodal rate quotations to DOD's Military Traffic Management Command (MTMC) and to require that these quotations be approved by MTMC before they were to be filed with the Commission, but not later than their proposed effective date. The Household Goods Forwarders Association of America, Inc., objected to DOD's petition and stated that such a proposed modification in the Commission's regulations was unwarranted.

The Commission has examined the impact of existing tariff filing regulations applicable to NVOCCs naming through intermodal rates on used military household goods and personal effects and believes these procedures are no longer serving any regulatory purpose. Since the present rules took effect in 1976, only one NVOCC conference has filed tariffs under the waiver provisions granted in Docket No. 73-4. Although this tariff contains rates covering the entire through movement, this information does not provide the Commission with any greater ability to judge the lawfulness of the port-to-port segment than

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[1] See *Common Carriers by Water - Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245 (1961) and *Bernard Ulmann Co. v. Porto Rican Express Co.* 3 F.M.B. 771 (1952) construing the applicable provisions of the Shipping Act, 1916 (46 U.S.C. 801 et seq).

[2] This transportation originates or terminates at interior United States points and moves in intermodal services under through bills of lading.

[3] Report and Order in Docket No. 73-4, 19 F.M.C. 203 (1976). See 46 C.F.R. 536.1(c)(2), previously 536.1(b)(2).

it would have if the information were obtained after the cargo had actually moved.

Section 35 of the Shipping Act, 1916 (46 U.S.C. 834) authorizes the Commission to exempt operations of water carriers or other persons or activities from statutory requirements, where it finds that such exemption would not substantially impair effective regulation, be unjustly discriminatory or be detrimental to commerce. The Commission is satisfied that the transportation of used military household goods and personal effects by NVOCCs fall within the category of operations which can be exempted from tariff filing requirements without detrimental effects on any affected interest, particularly because MTMC, the involved shipper, has its own competitive bidding regulations.

While the instant proceeding originally considered the proposed exemption of all used household goods and personal effects, opposition to the exemption of used *non-military* household goods and personal effects, has prompted the Commission to exempt only used *military* household goods and personal effects at the present time.

The issue of revising the tariff filing regulations on used *non-military* household goods and personal effects will be deferred for possible consideration in a future proceeding. In addition, the Commission has decided not to require at this time that rates for used household goods and personal effects established by vessel operating common carriers be stated on a weight or per container basis or that the weight of each shipment be substantiated by a public weigher's certificate furnished by the shipper.

Therefore, pursuant to 5 U.S.C. 533, section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) and sections 18(a) and (b), 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 817(a), 817(b), 833a and 841(a)), it is ordered, that effective upon publication in the *Federal Register*, Title 46 Code of Federal Regulations §§ 531.1 and 536.1 are amended as follows:

1. Add a new section 536.1(f) which reads as follows:

    The following services are exempt from the tariff filing requirements of the Act and the rules of this part:

    * * *

    (f) Transportation of used military household goods and personal effects by non-vessel operating common carriers.

2. Section 536.1(c)(2) is deleted.

3. Add a new section 536.1(b)(7) which reads as follows:

    The following services are exempt from the tariff filing requirements of the Act and the rules of this part:

* * *

(7) Transportation of used military household goods and personal effects by non-vessel operating common carriers.

By the Commission.

(S) JOSEPH C. POLKING
Acting Secretary

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

GENERAL ORDER 13, AMENDMENT NO. 10

DOCKET NO. 80-56

PART 536 - PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

June 30, 1981

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: The practice of filing temporary amendments to tariffs published by carriers and conferences of carriers in the foreign ocean commerce of the United States is hereby prohibited. The convenience of such filings is outweighed by the benefits accruing from their discontinuance which will eliminate an unreasonable paperwork burden for the Commission and simplify the use of foreign commerce tariffs by shippers, carriers, and other interested persons.

DATE: Effective September 8, 1981

SUPPLEMENTAL INFORMATION:

The Commission's present regulations provide that changes, additions and deletions to existing tariffs shall be known as "amendments" and shall be made in permanent form, 46 C.F.R. 536.10(a)(1). However, the current regulations also allow carriers the privilege of facilitating rate changes in their tariffs through the use of temporary tariff filing methods such as telegrams, cables, or mail (in the form of letters and rate circulars) under certain conditions, 46 C.F.R. 536.10(c).[1]

The current proceeding was initiated in response to petitions seeking modifications to the Commission's regulations which would have fur-

[1] These regulations were promulgated pursuant to a rulemaking proceeding in Docket No. 964, *General Order No. 13*, 30 F.R. 7138 (1965). Minor modifications to these rules were implemented on January 1, 1979 (see Report and Order in Docket No. 72-19, *General Order No. 13, Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States*, 42 F.R. 59265).

ther broadened the circumstances under which temporary filings could be made. On September 5, 1980, the Commission denied these petitions and commenced a separate inquiry into whether the practice of amending foreign commerce tariffs by using a temporary filing method should be continued at all, and, if so, whether the present regulations governing this practice should be tightened.[2] Upon consideration of the comments submitted, and for the reasons set forth herein, the Commission has decided to eliminate the privilege of amending tariffs by any means other than a permanent filing.

Comments were sought on two specific proposals: (1) elimination of temporary tariff filings, or (2) restriction of the privilege of filing temporary amendments. The elimination of the temporary filings would prohibit this form of amendment except pursuant to special permission authority as provided in 46 C.F.R. 536.15. The second option would have forbidden temporary filings intended: (a) to amend tariffs of controlled carriers as defined in section 18(c) of the Shipping Act, 1916; (b) to increase the rates in any tariff; (c) to change tariff commodity descriptions or add new commodity descriptions; (d) to change the basis of assessing freight charges; or (e) to publish temporary amendments with an expiration date. Additionally, the second alternative clarified that portion of the existing rule which prohibits one temporary amendment from amending another temporary filing.

Comments were submitted by several ocean carriers and conferences, all of which opposed the proposed rule. The National Industrial Traffic League (League), an organization of shippers and trade associations, stated that only temporary reductions should be permitted to be filed.[3] The League did not support total discontinuance of temporary amendments.

Commentators on the proposed rule addressed the following issues.

Mail Service - Without the means of telegraphing amendments to the Commission, tariff filers would have to rely upon the U.S. Postal

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[2] During the past several years, the Commission has observed that temporary tariff filings were being used to amend many publishing carriers' rules and regulations rather than their rates. A Foreign Tariff Advisory Notice was mailed to all carriers and conferences with tariffs on file which reminded them of the filing requirements of section 536.10(c), stating that the Commission would strictly enforce this rule. The petitions for amendment of the temporary tariff filing rules were the result of these enforcement activities.

The rulemaking petitions generally maintained that the existing rules are harsh, burdensome, and not sufficiently streamlined to permit immediate implementation of certain tariff material. The use of the permanent method of amending tariffs was claimed to be unresponsive. The Petitioners, therefore, requested an expansion of the use of temporary tariff filings. The Commission did not accept this position because the rationale, purpose and justification for temporary tariff filings did not support the filing of temporary tariff amendments except to reduce the level of a specific commodity rate or the level of a class rate when filed under section 18(b) of the Shipping Act, 1916, (46 U.S.C. 817(b)).

[3] The League's position was that any means of amending a tariff which would result in a reduction should be encouraged, including temporaries amending temporaries and new commodity descriptions filed by temporary amendments.

Service or commercial courier services. It was contended by several conferences[4] that the U.S. mail service is unreliable and that first class service is too slow. They claimed that the cost of express mail or courier service was disproportionately greater than the average cost of a TELEX, stating that these added costs will ultimately be passed on to shippers in the form of increased freight rates whenever competitive conditions permit. They further contended that the delay and related problems associated with filing permanent tariff pages create inconvenience and economic harm.

Special Permission Requests - The proposed rulemaking mentions that special permission relief for waiver from the tariff filing rules is available to facilitate an amendment which is critical to the operations of either carriers or shippers.

Commenting conferences[5] asserted that the alternative of continually requesting special permission to file by TELEX is cumbersome and uncertain. They claimed that there is no rational apparent basis for distinguishing between amendments in rate levels, which are permitted to be filed by TELEX and amendments relating to charges, surcharges, and rules, which are not.

Emergency, Special and Project Rates - Commentators also asserted that the discontinuance of the temporary filing procedure, as it relates to special, emergency and project rates, would place added burdens on carriers as well as shippers. Carriers would lose the opportunity to receive and carry cargo on short notice, such as emergency supplies moving to developing countries. The carriers state[6] that special, emergency and project rates necessitate a TELEX filing with an expiration date. They claimed that prohibiting the filing of expiration dates in connection with special rates, which are temporary responses to immediate market problems, would penalize shippers who have urgent needs for such rate reductions.

Financial Impact - Certain commentators[7] contended that the proposed changes would place substantial financial burdens upon them.

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[4] Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Associated Latin American Conference, et al.; Far East Conference; Atlantic and Gulf-Indonesia Conference, et al.; Pacific Coast European Conference; North Europe/U.S. Pacific Coast Freight Conference; Latin America/Pacific Coast Conference; and Pacific Coast/River Plate Brazil Conference.

[5] Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference.

[6] Waterman Steamship Corp.; Pacific Coast European Conference; North Europe/U.S. Pacific Freight Conference; Latin America/Pacific Coast Conference; Pacific Coast/River Plate Brazil Conference; and Pacific Westbound Conference.

[7] Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Associated Latin American Conference; Australia-Eastern U.S.A. Conference, et al.; Pacific Coast European Conference; North Europe/U.S. Pacific Freight Conference; Pacific Coast/River Plate Brazil Conference; and Pacific Westbound Conference.

These carriers alleged that the temporary filing restrictions would force them to hire and pay local tariff agencies on a continuing basis to prepare and file tariff amendments. They argued that, even with correct technology, the process of preparation, reproduction, dissemination and filing of permanent tariff pages still requires a minimum of fifteen to twenty days. The proposed rule would therefore reimpose delays and paperwork burdens which the Commission had successfully eliminated some fifteen years ago.

Increases and Surcharges - Commentators to the rulemaking[8] questioned the Commission's rationale in proposing to allow rate reductions to be filed by TELEX but not increases or surcharges. They alleged that the fifteen to twenty days' delay required between the date of the decision to amend a tariff and the day the amendment is finally filed with the Commission unnecessarily delays the effective date of surcharges and rate increases. It is also contended that surcharges are subject to frequent and abrupt changes and are directly related to the cost of providing freight service. Unless carriers are able to react to these cost changes quickly, by appropriately adjusting a surcharge, either the carrier or its shippers will experience financial losses, they claimed.

DISCUSSION AND CONCLUSIONS

Prior to 1961, common carriers were only required to file their export rates with the Federal Maritime Board within a period of thirty days after they had become effective. The enactment of section 18(b) of the Shipping Act, 1916, required ocean common carriers[9] to file both import and export rates, adhere to the level of rates lawfully on file, give notice of changes to the filed rates and charge rates only in effect.

The temporary method of amending tariffs involves the double examination of each amendment. The filings are received as TELEX's, letters, rate advices and circulars. Upon receipt, the temporary amendment is date stamped, hole punched and sorted. Since a single temporary amendment may involve many pages or several tariffs, it commonly must be reproduced. The temporary amendment is next examined for conformity to the statute and is then compared to the superseded or amended material. If accepted, the temporary amendment is placed in a tariff binder until it is replaced by a permanent tariff filing (twenty or thirty days, depending upon whether the temporary amendment came from an overseas source). Upon receipt of the permanent filing to replace the temporary amendment, the examiner must typically sort

[8] Far East Conference; Australia-Eastern U.S.A. Shipping Conference; Trans-Pacific Freight Conference of Japan/Korea; and Japan/Korea Atlantic and Gulf Freight Conference.

[9] Surface land carriers and air carriers had long before been required to publish and adhere to filed rates by the Interstate Commerce Act and Civil Aeronautics Act.

through many seemingly identical messages to locate the referenced temporary filing. The content of the permanent page is then compared with the temporary amendment to ensure that the two comport (*i.e.*, same effective date, rate level, etc.). If the permanent page is accepted, the temporary amendment is removed and destroyed. In cases where the permanent page is deficient, the temporary filing remains in the binder until it is properly replaced.

The Commission did not have a TELEX terminal for temporary tariff filing purposes until the late 1960's. The installation of a TELEX terminal for tariff filings was, in part, premised on the arguments that: (1) temporary filings constituted a very small portion of all tariff filings; (2) temporary filings were almost always reductions and therefore, in the shippers' benefit; (3) temporary filings would not impose unmanageable burdens on the Commission's staff; and (4) the carrier industry was very desirous of the opportunity to fully utilize this method of amending tariffs.

The carrier industry initially utilized temporary filings via TELEX in the same manner they had used the more expensive telegrams/cables, *i.e.*, for extraordinary conditions dictating immediate rate relief in the form of a reduction. Soon, however, the industry realized that the temporary TELEX tariff amendment could also be used to provide thirty or ninety days' statutory notice for an increase in rates, as well as the immediate notice of a reduction.

When the Commission permitted temporary tariff filings in the initial tariff filing rules, the volume of tariff amendments was small compared to their current extensive magnitude. In a four-month period in 1965, for instance, there were but thirty-two hand-delivered messages. Today the Commission averages 115 messages per day, affecting 244 individual tariff pages. Well in excess of 100,000 temporary rate changes are now filed annually. Single TELEX messages over ten feet in length are not rare. Moreover, whereas the staff examined a total of 83,776 tariff pages in 1965, 384,992 pages were filed with the Commission in 1979. A five to sixfold increase in workload has been experienced.

Tariff examination is a labor intensive operation. The burden imposed upon Commission staff by temporary methods of amending tariffs is magnified when these temporary filings are characterized by inferior quality. During the period September, 1980, through January, 1981, twenty-eight percent of all tariff rejections involved a temporary amendment while these filings represented less than ten percent of the total number of tariff amendments.

The elimination of temporary filings via TELEX may prove inconvenient to some overseas domiciled carriers pending further development of electronic data processing technology, which enables carriers to make their permanent filings expeditiously and cost-effectively. However, it is anticipated that the basic needs of these carriers can be

satisfied by vendors of tariff filing services, data processing services, sufficient prior planning involving lead times in tariff production, courier services or Express Mail Service. Such methods may be more costly than TELEX, but it is more reasonable that carriers wishing to accomplish rapid tariff amendments bear this cost directly. Moreover, in cases where good cause can be shown, the Commission is empowered to waive its tariff rules, including the specific prohibition against temporary tariff filings adopted herein (see 46 C.F.R. 536.15 and 46 U.S.C. 817(b)(3)).

Accordingly, Part 536 of the Rules will be amended to eliminate the acceptance of any type of temporary tariff filing. Thus, all amendments to tariffs filed by carriers and conferences of such carriers in the foreign commerce of the United States must, unless special permission is otherwise granted, be made in accordance with the remaining provisions of the Commission's General Order No. 13, 46 C.F.R. Part 536.

Therefore, it is ordered, that pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 18(b), 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 817(b), 821 and 841(a)), effective sixty (60) days from the date this notice is published in the *Federal Register*, Title 46 Code of Federal Regulations § 536.10(c) is deleted.

By the Commission.*

(S) JOSEPH C. POLKING
Acting Secretary

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* Commissioner Peter N. Teige's dissenting opinion is attached.

Commissioner Peter N. Teige dissenting.

The law requires ocean carriers to file their tariffs with the Commission before they can be effective. The Government, having placed this obligation on the ocean carriers, has a duty to make this procedure as speedy and efficient as possible. In today's fast-moving commercial world, rate changes or new commodity rates must be filed and put into effect quickly. The Commission has been accommodating this need for many years by permitting telex filings, followed by the receipt by mail of the actual tariff pages. This process has become burdensome for the Commission, particularly as available personnel shrinks due to budget cuts.

Nevertheless, I would keep this function in place until we have explored all other in-house alternatives to its abandonment, including efforts to improve productivity in the Bureau of Tariffs through reallocation of personnel, firmer supervision and job reorganization of a time and motion nature.

I recognize that the whole tariff system is in need of simplification and technological improvement. But these changes will take time. With proper leadership the changes will come without punishing the industry by terminating the present telex filing system.

The Commission's action is a step backwards that will materially inconvenience carriers and the shipping public, particularly where foreign-based conferences are involved.