FEDERAL MARITIME COMMISSION

DOCKET NO. 81-33

LOUISVILLE SCRAP MATERIAL COMPANY, INC.

v.

YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD.
AND TTT SHIP AGENCIES, INC.

NOTICE

September 28, 1981

Notice is given that no appeal has been taken to the August 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
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-33

LOUISVILLE SCRAP MATERIAL COMPANY, INC.

v.

YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD.
AND TTT SHIP AGENCIES, INC.

Francis J. Gorman of Semmes, Bowen & Semmes for Complainant.

Elmer C. Maddy of Kirlin, Campbell & Keating for Respondents.

DISMISSAL OF SATISFIED COMPLAINT UNDER RULE 93 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE, 46 C.F.R. 502.93 [1]

Finalized September 28, 1981

The complaint in this proceeding was served April 30, 1981, and notice of the filing of the complaint and its Assignment to the Administrative Law Judge was published in the *Federal Register*, Vol. 46 No. 86, Tuesday, May 5, 1981, page 25143. The complainant Louisville Scrap Material Company, Inc., alleges that respondents Yamashita-Shinnihon Steamship Company, Ltd., and TTT Ship Agencies, Inc., failed to ship timely containers tendered for shipment and such failure is alleged to have resulted in violations of sections 14 and 16 of the Shipping Act, 1916.

Complainant alleges it was forced to sell the aluminum scrap on the open market, resulting in actual losses of $33,708.89 and in addition expended in excess of $5,000.00 in long distance telephone calls, transportation fees and other expenses in an attempt to resolve the problems. The complainant alleges its business reputation has been severely damaged because of the failure to make shipment on time, resulting in complainant's nearly total loss of its Far Eastern market, causing economic losses in excess of $250,000.00.

[1] Satisfaction of complaint.

If a respondent satisfies a complaint either before its answer thereto is due or after answering, a statement to that effect, setting forth when and how the complaint has been satisfied and signed and verified by the opposing parties shall be filed with the Commission and served upon all parties of record. Such a statement, which may be by letter, shall show the amount of reparation agreed upon; shall contain the data called for by Appendix 1(4), insofar as such form is applicable; and shall state that a like adjustment has been made or will be made by respondent with other persons similarly situated. Satisfied complaints will be dismissed in the discretion of the Commission.

The respondent TTT served its Answer to the Complaint May 19, 1981 (received in the Commission May 20, 1981).

The respondent Yamashita-Shinnihon Steamship Co., Ltd. served its Answer to the Complaint May 29, 1981 (received in the Commission June 1, 1981).

Notice was served June 3, 1981 of Prehearing Conference in this proceeding to be held on June 23, 1981. This was cancelled June 22, 1981 in response to telephone message that parties had settled the matter. See Notice to Submit Status Report, served July 16, 1981. In a letter dated July 23, 1981 (received July 27, 1981) counsel for complainant saying among other things that a notice of satisfaction of complaint had been prepared and was in the process of being executed by all parties.

Under date of August 12, 1981 covering letter the following notice of satisfaction of complaint was submitted:

> Pursuant to 46 C.F.R. § 502.93, and the Commission's July 15, 1981, Notice to Submit Status Report, Complainant, Louisville Scrap Material Company, Inc., (the "Complainant") hereby gives notice that all claims, disagreements and misunderstandings between the Complainant and Respondents Yamashita-Shinnihon Shipping Company, Ltd. ("Y-S Line") and TTT Ship Agencies, Inc., ("TTT") have been satisfied and resolved. Specifically, Y-S Line has agreed to satisfy the complaint upon payment of FORTY-THOUSAND DOLLARS ($40,000), which amount is currently being held in escrow by counsel for the Complainant.
>
> The Complainant agrees to accept said amount in full satisfaction of, and as reparation for the claims against the Respondents as set forth in its complaint dated April 21, 1981, and further agrees to execute a release in the form attached hereto as Exhibit "A". A reparation statement, as required by 46 C.F.R. § 502.93, is attached hereto as Exhibit "B".
>
> The parties wish to resolve this matter in suitable fashion in order to avoid the expense of litigation before both the Commission and that United States District Court for the District of Maryland. The parties believe that there are disputed issues of fact, particularly as to knowledge of respondents in connection with the contracts for the purchase of this cargo and as to the required delivery date as stated by Complainant's freight forwarder.
>
> Respondent Y-S Line agrees to make a like adjustment for any other shippers similarly situated.

WHEREFORE, the Commission is urged to dismiss the complaint in this action.

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(301) 539-5040

Attorneys for Complainant

(S) ELMER C. MADDY
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Attorneys for Respondents

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* that the parties have conformed with the provisions of Rule 93 of the Commission's Rules of Practice and Procedure; that under the circumstances presented herein the satisfaction of the complaint appears to be reasonable and just. Further that upon execution of the terms of satisfaction, complaint should be dismissed.

Wherefore, it is ordered:

(A) The Notice of Satisfaction of Complaint is Approved.

(B) The parties shall serve notice and any necessary proof of execution and conformance by all with the terms of the Notice of Satisfaction of Complaint.

(C) The complaint is dismissed.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-34

CALIFORNIA FREIGHT SPECIALISTS, INC.

WEST COAST/PUERTO RICO TARIFF FMC-F NO. 2

Domestic offshore commerce tariff is cancelled because it is either inactive or limited to transportation regulated by the ICC.

John Robert Ewers, Joseph B. Slunt and *Janet F. Katz* for the Bureau of Hearings and Field Operations.

REPORT AND ORDER

September 30, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

On May 19, 1981, the Commission ordered California Freight Specialists, Inc. (CFS), to show cause why its Tariff FMC-F No. 2 should not be cancelled. This tariff offers non-vessel operating common carrier service from Los Angeles, California to San Juan, Puerto Rico, a trade in domestic offshore commerce.[1] The Show Cause Order alleged that CFS's operation is not subject to FMC jurisdiction because CFS uses an underlying means of transport subject to ICC regulation. This allegation was based upon the fact that: (1) no all-water common carrier service is presently available from Los Angeles to San Juan; and (2) intermodal service to Puerto Rico is subject to exclusive Interstate Commerce Commission regulation under the decisions in *Trailer Marine Transportation Corporation v. Federal Maritime Commission*, 602 F.2d 379 (D.C. Cir. 1979), governing rail/water transportation, and *Puerto Rico Maritime Shipping Authority v. Interstate Commerce Commission*, 645 F.2d 1102 (D.C. Cir. 1981) governing motor/water transportation.[2]

[1] A non-vessel operating common carrier (NVOCC) issues a through bill of lading and otherwise holds itself out to perform ocean transportation subject to the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*). *See Capital Transportation, Inc. v. United States*, 621 F.2d 1312 (1st Cir. 1979); *Common Carriers by Water - Status of Express Componies, Truck Lines and Other Nonvessel Carriers*, 6 F.M.C. 245 (1961); *Bernard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771 (1952). *Cf. New York Foreign Freight Forwarders & Brokers Ass'n v. Interstate Commerce Commission*, 589 F.2d 69 (D.C. Cir. 1978).

[2] A nonequipment operating carrier which employs an underlying means of transportation subject to ICC regulation requires certification as a freight forwarder under former Part IV of the Interstate Commerce Act. 49 U.S.C. 10102(8). Section 33 of the Shipping Act, 1916 (46 U.S.C. 832) precludes the Commission from concurrently regulating activities regulated by the ICC.

CFS did not contest the Commission's assertion that its tariff represents an offering of through intermodal service via Atlantic and Gulf ports and not all-water service from the Port of Los Angeles. Instead, a letter dated June 26, 1981 was submitted by CFS's President, Mr. James H. Heater, stating that: CFS lacks the funds to pursue this matter "within the Federal Courts;" the means by which a vessel operating carrier moves cargo should not concern a non-vessel operating carrier; and that operations under Tariff FMC-F No. 2 will cease on August 31, 1981, in any event. This letter contains no reference to any all-water vessel service from Los Angeles to Puerto Rico, and the Commission's tariff records continue to show that no such common carrier service exists.[3]

The Commission's Bureau of Hearings and Field Operations argues that CFS failed to rebut the allegations made in the Show Cause Order and that the CFS tariff should be cancelled. Cancellation is claimed to be appropriate for the reasons stated in the Show Cause Order and because Tariff No. FMC-F No. 2 would be inactive after August 31, 1981.

It is concluded that CFS has depended upon ICC-regulated intermodal transportation to move cargoes from Los Angeles to San Juan and that no other type of service is presently available. The Commission lacks jurisdiction to accept nonvessel operating carrier tariffs in this trade because the maintenance of such tariffs would constitute the type of concurrent regulation forbidden by section 33 of the Shipping Act, 1916.

The CFS tariff is also defective because it is inactive and is therefore not a *bona fide* holding out of common carrier services insofar as *all-water FMC regulated carriage* is concerned. Moreover, CFS has expressed an intention to cease all of its activities in the Pacific Coast/Puerto Rico trade on August 31, 1981, so that both the FMC and ICC aspects of the tariff have become inactive. Section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844), has been interpreted as prohibiting tariffs which do not describe a current common carrier service intended to attract cargo on an ongoing (or soon to be ongoing) basis, from being filed with the Commission. *Publication of Inactive Tariffs by Nonvessel Operating Common Carriers in Domestic Offshore Commerce*, 20 F.M.C. 371 (1978).[4] It is concluded that CFS has been unable to

[3] This does not mean a non-vessel operating carrier must always employ a common carrier subject to the Shipping Act to perform the actual ocean transportation provided to the shipper. In the case of domestic offshore commerce, however, vessel service not regulated by the FMC may be subject to the exclusive jurisdiction of the ICC. This situation does not occur in foreign commerce.

[4] *See also Publication of Inactive Tariffs by Carriers in Foreign Commerce*, 20 F.M.C. 433 (1978); and *Publication of Inactive Tariffs*, 19 F.M.C. 774 (1977).

provide all-water service to Puerto Rico for over one year and will be unavailable to do so in the commercially reasonable future.[5]

Accordingly, CFS's Tariff FMC-F No. 2 will be cancelled for either being inactive or describing transportation exclusively within the jurisdiction of the ICC.

THEREFORE, IT IS ORDERED, That California Freight Specialists, Inc., Tariff FMC-F No. 2, is cancelled.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

[5] The Commission's records show that no vessel operating tariff has been on file on the Pacific Coast/Puerto Rico trade since at least July 1, 1980.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENTS NOS. 9929-6, 10266-3 AND 10374

ORDER ON REMAND

October 9, 1981

On April 14, 1981, the United States Court of Appeals for the District of Columbia Circuit partially vacated and remanded an order of the Federal Maritime Commission which had conditionally approved certain agreements among ocean carriers operating in the United States Atlantic & Gulf/Europe trades.[1] *Sea-Land Service, Inc. v. FMC*, 653 F.2d 544 (D.C. Cir. 1981). The purpose of this order on remand is to structure further proceedings consistent with the Court's decision.

BACKGROUND

The agreements under investigation in this proceeding trace their origins to Agreement No. 9929, a joint service arrangement between Hapag-Lloyd and Intercontinental Transport (ICT), B.V. (formerly Holland-American Line), to operate lighter-aboard-ship (LASH), container and breakbulk services under the trade name "Combi Line." This Agreement was approved on May 6, 1971, and, *inter alia*, provided that Hapag and ICT would share one vote in any conference or rate agreement to which the joint service became a party.

The LASH vessel portion of the Agreement was approved until December 31, 1986, but the container and breakbulk portions were approved for only a three-year term. Agreement No. 9929-1 extended the non-LASH services until April 8, 1977. On October 1, 1976, a further extension was proposed, coupled with significant modifications in the nature of the Combi Line operation (Agreement Nos. 9929-2, 9929-3, 9929-4, 10266 and 10266-1). Agreement No. 9929-2 authorized separate votes for Hapag, ICT, a new partner called Compagnie General Transatlantique (CGT) [2], and the joint LASH service as a whole in any conferences or rate agreements in which they participated. These Agreements were protested by United States Lines, Sea-Land Service, Inc. and Seatrain International, S.A., and were set down for hearing on April 8, 1977 as F.M.C. Docket No. 77-7.

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[1] The Commission's order was served on June 5, 1979 (21 F.M.C. 1030). Petitions for reconsideration were denied on October 16, 1979 (22 F.M.C. 146).

[2] CGT was later succeeded in interest by Compagnie Generale Maritime (CGM), which is a party to Agreements Nos. 10374 and 10266-3, two of the three agreements presently under investigation in this proceeding.

Agreements Nos. 9929-2, 9929-4, 10266 and 10266-1 were withdrawn during the proceedings in Docket No. 77-7 and replaced by Agreements Nos. 9929-5 and 10266-2, respectively.[3] Agreement No. 9929-5 had two separate and distinct parts. Part I called for the *joint operation* of a LASH and conventional vessel service by Hapag-Lloyd, ICT and CGM. This service was to be known as "Combi Line." CGM's contribution would be limited to one or more feeder vessels for the LASH service, if and when the joint service commenced a feeder operation at European ports.

Part II of Agreement No. 9929-5, as ultimately presented to the Commission, would have authorized the three proponents to cross-charter container space from one another on any and all vessels *separately operated* by them in the trades. Proponents could employ whatever vessels they wished, but would limit their containerized cargo carryings on these vessels to a combined total of 800 twenty-foot equivalent container units (TEU's) per week in each direction (averaged quarterly).[4] No pooling of revenues or expenses would be allowed.

Agreement No. 10266-2 was titled a "Joint Marketing Agreement" between ICT and CGM, and dealt mainly with provisions concerning joint marketing and cargo solicitation. However, the Agreement also authorized ICT and CGM to share all revenues and expenses incurred by the parties collectively in offering container, breakbulk or combination breakbulk/container service in the trade (i.e., all non-LASH service). The two carriers would instruct their joint agent to solicit cargo for their mutual benefit, and could issue a joint bill of lading for any cargo booked. As long as ICT and CGM remained parties to Part II of Agreement No. 9929-5, the containerized cargo carried by them would be subject to the TEU ceiling imposed by that agreement.

In addition, these Agreements dispensed with their predecessors' multiple voting provisions, providing instead that, as parties to a conference, the proponents could not exercise collectively a greater number of votes than that accorded a single member of such conference.

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[3] Agreement No. 9929-3 proposed a two-year extension of the container and breakbulk services until 1979 and was approved by the Commission pending resolution of the administrative hearings in Docket No. 77-7. This *pendente lite* approval was vacated and remanded by the Court or Appeals because antitrust implications were not adequately considered. *United States Lines, Inc. v. FMC*, 584 F.2d 543 (D.C. Cir. 1978). After further deliberations, the Commission again approved Agreement No. 9929-3 on an interim basis for a term commencing April 9, 1977 and expiring 60 days following service of the Commission's final decision in Docket No. 77-7. 19 S.R.R. 84 (March 15, 1979).

[4] Of these 800 TEU's, no more than 100 eastbound and 225 westbound (averaged monthly) could be carried to or from U.S. South Atlantic ports and none could be loaded or discharged north of Charleston, South Carolina. Moreover, no more than 30 TEU's of refrigerated cargo could be carried eastbound and no more than 10 such TEU's could be carried westbound. After the first year of operation the westbound limit could be increased to 15 TEU's and after the second year to 20 TEU's.

On January 30, 1979, the presiding Administrative Law Judge (ALJ) issued an Initial Decision conditionally approving both agreements.[5] One of the conditions was that Agreement No. 9929-5 be modified to delete CGM as a party to the Combi Line LASH service, because the evidence showed that CGM would not participate in that service in the foreseeable future.[6] The ALJ also expressly found that Agreement No. 10266-2 had an independent existence of its own and should not be tied to the continued approval of the cross-charter provisions of Part II of Agreement No. 9929-5.[7] No exceptions to the Initial Decision were filed.

THE COMMISSION'S DECISION

On June 5, 1979, the Commission served an Order Partially Adopting Initial Decision and concluded that certain modifications, beyond those ordered by the Administrative Law Judge, were required before the agreements could be approved. Because the two proposed agreements did not "adequately reflect the three distinct section 15 activities proposed by proponents," [8] the Commission divided Agreement No. 9929-5 into two separate agreements: No. 9929-6, the "Combi Line" joint LASH service between Hapag-Lloyd and ICT; [9] and a new Agreement, subsequently designated as No. 10374, which authorized the cross-charter container arrangement among Hapag, ICT and CGM.

The Commission also required that authority for Hapag and ICT to operate a joint conventional vessel service be deleted from new Agreement No. 9929-6; that new Agreement No. 10374 be modified to either delete authority for rate-fixing under certain circumstances, or to add language ensuring that such activity would be carried out in compliance with the Commission's self-policing rules; that the ICT/CGM agreement (redesignated as Agreement No. 10266-3) be amended to change its title from "Joint Marketing Agreement" to "Joint Service Agreement" and to place limitations on the parties' authority to offer conventional vessel service; and that both Agreement No. 9929-6 and No. 10266-3 be amended to include more detailed reporting requirements. (21 F.M.C. at 1032-1034).

Neither the Commission's restructuring of the agreements nor the substantive amendments described above were the subject of the subse-

[5] 21 F.M.C. 1039.

[6] The Initial Decision also required that the two remaining parties to the LASH service not concertedly offer LASH service between Mexican and U.S. ports. Agreement No. 10266-2 was also approved on the condition that the parties not offer joint container/breakbulk service between Mexican and United States ports. Reporting requirements were imposed to assure compliance with the limitation on total carryings established by Article 2.2 of Agreement No. 9929-5.

[7] 21 F.M.C. at 1048-1049, 1055.

[8] 21 F.M.C. at 1032.

[9] As noted above, the ALJ had disapproved the proponents' proposal to add CGM as a partner to this service.

quent litigation in the U.S. Court of Appeals, and consequently are not affected by the Court's remand. As the Court itself noted, these actions by the Commission either do not alter the substance of the agreements or serve only to restrict the authority of the parties to the agreements. *Sea-Land Service, Inc. v. FMC, supra*, slip opinion at 15.

The further amendments required by the Commission which were the subject of the Court's decision concerned two separate matters.

One of the major benefits of the new container cross-chartering provisions proposed in Agreement No. 9929-5 was the replacement of the old Combi Line joint container service between Hapag and ICT by an arrangement whereby Hapag would compete with the ICT/CGM joint service authorized by Agreement No. 10266 for container cargo. However, as it had been approved by the ALJ, Agreement No. 9929-5 also limited the three carriers to essentially one vote among them in any conferences or rate agreements. Thus, even though Hapag would now be competing with ICT/CGM for container cargo, it would still be voting with its joint service competitor on conference decisions concerning such cargo, including rates, sailing schedules and related rules and regulations. This would require the three carriers to confer among themselves in order to arrive at a consensus position before a particular matter came before a conference for voting by the members.

In the Commission's opinion, such an arrangement would have been seriously inconsistent with the increased competition for container cargo promised by the new cross-chartering provisions and might thus have undercut the public interest basis for the Commission's approval of those provisions. Accordingly, in restructuring Agreement No. 9929-5 into Agreements Nos. 9929-6 and 10374, the Commission required that the voting provisions be revised so that only the Hapag/ICT joint LASH service be restricted to a single vote. In addition, in view of their convergence of interests under Agreement No. 10266-3 with regard to all non-LASH cargo, the Commission required that that Agreement include a provision limiting ICT and CGM to one vote between them on all container and conventional vessel services. (*See* 21 F.M.C. at 1033). Thus, the amendments to the conference voting provisions ordered by the Commission were consistent with the structure of the three separate services approved by the Commission. The Commission required that the parties to the Hapag/ICT joint LASH service cast one vote between them, the parties to the ICT/CGM joint service also be limited to one vote and that Hapag, to the extent that it participates in conferences as an individual container carrier, also have one vote.

The second matter which became the subject of controversy in the Court of Appeals concerned Agreement No. 10266-3. The Commission found that the Agreement actually created a joint service, not merely a joint marketing arrangement, because the Agreement provided for reve-

nue sharing between ICT and CGM, as well as several other characteristics of a joint service [10] Although it was considered unlikely that ICT and CGM would, with respect to their carriage of containerized cargo, operate outside Agreement No. 10374 and the cargo limitations contained therein, the record indicated and the ALJ found that the approval of Agreement No. 10266-3 should not be tied to the continued existence of Agreement No. 10374.[11] In light of this finding, the Commission was faced with the problem of whether some control should be placed over the amount of cargo that could be carried by the ICT/CGM joint service if the controls operative under Agreement No. 10374 should cease. The Commission was also mindful of the fact that Agreement No. 10374 did not restrict the parties in any way as to the type or size of vessels they could deploy in the trades.

The solution arrived at by the Commission was to place an 800 TEU per week (averaged quarterly) cargo limitation upon the ICT/CGM service, similar (though not as detailed) to that placed upon the parties to Agreement No. 10374. Thus, so long as ICT and CGM remain parties (with Hapag) to Agreement No. 10374, they will be subject to the ceiling on containerized cargo imposed by that Agreement. In the event the Agreement should terminate, Hapag would become an independent carrier and of course would carry whatever containerized cargo it could obtain for itself. The ICT/CGM joint service, on the other hand, would remain in operation, with whatever vessels it may have deployed. The Commission therefore deemed it appropriate that some control be maintained over the joint service, and the Commission's modification was designed to provide such control by ensuring that a ceiling remained on the container cargo which can be carried by the service. The Commission recognized in its Order Denying Further Reconsideration that more detailed limitations on the cargo which can be carried by the service may be necessary if the service should begin to operate outside of Agreement No. 10374.[12]

Sea Land, Seatrain and United States Lines, the three carriers which had protested the original Agreements, objected to the Commission's modifications pertaining to voting and cargo limitations, and petitioned for clarification and reconsideration. The Commission denied the petitions and Sea-Land, joined by Seatrain, petitioned for review of the Commission's final order of conditional approval.

THE COURT'S DECISION

The Court's opinion focused on "whether the procedural aspects of section 15 were scrupulously observed by the Commission in arriving at

[10] 21 F.M.C. at 1032, n. 8 and accompanying text.
[11] *See* note 7, *supra*, and accompanying text.
[12] 22 F.M.C. at 146, n.1.

its decision." *Sea-Land Service, Inc. v. FMC, supra,* slip opinion at 11 (footnote by Court omitted). While recognizing the necessity of the Commission's authority to impose modifications to proposed agreements as conditions of approval, the Court held that modifications to a particular agreement which *expand* the anticompetitive authority contemplated by the agreement's proponents must be preceded by notice and hearing "through which interested parties can air their views as to the competitive implications of . . . [the modifications] and the Commission can gain sufficient information to make a reasoned decision as to the competitive impact of. . .[the modifications.]" *Id.,* slip opinion at 15-16.

With respect to the modifications challenged by Sea-Land, the Court stated that:

> The practical implications of these agreements are not readily apparent to the untrained eye, and the Commission must be credited with some expertise in understanding the pro- and anti-competitive aspects of private carrier agreements. Nevertheless, we think that both modifications appear to have expanded the proponents' authority and, as such, should have been the subject of prior notice and opportunity for comment. Any confusion as to the reach and impact of these modifications stems precisely from the fact that they were never addressed by the ALJ in the context of an adversary inquiry eliciting relevant facts and contentions. (Slip opinion at 19-20).

The Court examined the voting provisions imposed in Agreement No. 10374 [13] by the Commission, and concluded that the factual record of the proceeding did not adequately support the Commission's contention that the provisions restricted rather than expanded the scope of the Agreement. The Court noted that:

> The anti- or pro-competitive impact of a multiple voting provision will always turn on the facts of the individual case, such as the particular parties involved, their relative strength or weakness within the industry, and, most important, whether the carriers involved in the agreement are so closely allied in interest as to make bloc voting likely. In such a situation, it is particularly inappropriate for the Commission to dispense with any notice and opportunity for comment by interested parties on the grounds that the Commission already understands the facts of the case. (Slip opinion at 22).

The Court then proceeded to discuss the imposition of capacity limitations in Agreement No. 10266-3, and concluded that the state of

[13] As noted, the Commission also required that Agreement No. 10266-3 provide that ICT and CGM were limited to one vote between them with respect to their joint services under that Agreement. That action by the Commission was not challenged by Sea-Land and consequently was not addressed in the Court's decision.

the record required that a remand was again necessary to allow opportunity for comment by interested parties. (Slip Opinion at 26-27).

FURTHER PROCEEDINGS ON REMAND

One of the tasks confronting the Commission in light of the Court's remand order was determining whether the Court intended to vacate the Commission's approval of those agreements, or portions of agreements, which were not the subject of the petition for review or discussion by the Court [14] After careful study of the Court's decision, the Commission concludes that the Court intended these remand proceedings to be confined to the multiple voting provision in Agreement No. 10374 and the capacity limitation provision in Agreement No. 10266-3. We do not understand the Court to have vacated the Commission's order with respect to provisions not at issue before the Court.

As the discussion in this Order has indicated, the Commission continues to believe that, on the basis of the information presently at hand, the disputed voting provisions in Agreement No. 10374 and cargo limitation provisions in Agreement No. 10266-3 are desirable as a matter of regulatory policy. However, pursuant to the Court's instructions, further opportunity for comment on the impact of these provisions must be allowed in order to correct the deficiencies perceived by the Court. In view of what we believe to be the limited nature of the Court's remand and the narrowness of the issues addressed therein, these further hearings will initially be limited to the submissions of affidavits of fact and memoranda of law. The Commission expects any submissions to include more detailed and current information than was made available to the Commission when it acted on reconsideration requests following our 1979 order. The Commission will carefully consider all points of view set forth in these affidavits and memoranda. Furthermore, following the submission of these affidavits and memoranda, the parties will be given an opportunity to submit recommendations as to whether further proceedings are necessary and, if so, the form they should take. After consideration of these recommendations, the Commission will then issue an appropriate order.[15]

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[14] For example, as discussed *infra,* Agreement No. 9929-6 was not at all involved in the litigation before the Court and is not mentioned in the Court's decision.

[15] ICT and CGM, the parties to Agreement No. 10266-3, have filed for approval by the Commission an amendment to the Agreement which would authorize the two carriers to provide intermodal service via ports within the scope of the Agreement. The proposed amendment is designated Agreement No. 10266-4 and notice of its filing was published in the *Federal Register* on June 23, 1980. Protests and requests for hearing were filed by Sea-Land and Seatrain. The Commission has determined to briefly defer action on this Agreement pending an initial assessment of the nature and scope of further proceedings on Agreement No. 10266-3, particularly since the disputed cargo limitation provisions of Agreement No. 10266-3 are again a subject of contention between the proponents and protestants of Agreement No. 10266-4. If evidentiary hearings become necessary on Agreement No. 10266-3, the Commission will at that time consider the inclusion of Agreement No. 10266-4 in such proceedings.

Although Sea-Land's petition for review and the Court's subsequent decision focus only on certain provisions of Agreements Nos. 10374 and 10266-3, it may be necessary to alter the corresponding provisions of Agreement No. 9929-6 (as well as Agreement No. 10266-3) if adjustments to the voting provisions of Agreement No. 10374 are deemed necessary. Therefore, Agreement No. 9929-6 is included within the scope of this proceeding.

Finally, there are indications that ICT and Hapag Lloyd may have ceased or substantially limited their joint LASH service under Agreement No. 9929-6. If this is the case, the need for the Commission's original modifications of the voting provisions of the other Agreements may have been altered or eliminated. Those two carriers are hereby directed, pursuant to section 21 of the Shipping Act, 1916 (46 U.S.C. 820(a)) to describe in their submissions the current status of that service, including service levels in 1980 and through the third quarter of 1981.

THEREFORE, IT IS ORDERED, That Docket No. 77-7 is hereby reopened; and

IT IS FURTHER ORDERED, That the scope of these proceedings shall be limited to the following issues:

(1) Whether, in light of its own structure and the structure of Agreements Nos. 9929-6 and 10266-3, Agreement No. 10374 should provide that Hapag Lloyd, on the one hand, and ICT/CGM, on the other hand, shall exercise separate votes in conferences or rate agreements with respect to their respective container services, and the impact on competition in the trades of such a provision. Submissions by the parties on this issue should include, if possible, a discussion as to how Hapag and ICT/CGM have voted on conference and rate agreement decisions regarding container services since Agreement No. 10374 was given final approval by the Commission on December 28, 1979; and

(2) (a) Whether Agreement No. 10266-3 should include a provision limiting the amount of containerized cargo which may be carried by ICT and CGM under the Agreement and, if so, the proper level of such a limitation;

(b) Whether any such limitation should be imposed, and at what level, if Agreement No. 10374 is terminated; and

IT IS FURTHER ORDERED That, pursuant to section 21 of the Shipping Act, Hapag Lloyd and ICT are hereby directed to include in their opening submissions a detailed description of the current status of their joint LASH service under Agreement No. 9929-6, including ports served and frequency of service at each port in 1980 and through the third quarter of 1981; and

IT IS FURTHER ORDERED, That these proceedings shall initially be limited to the submission of affidavits of fact and memoranda of law to the Commission; and

IT IS FURTHER ORDERED, That the following schedule be adhered to:

> Affidavits of Fact and Memoranda of Law from all parties, including the Commission's Bureau of Hearings and Field Operations and any intervenors, shall be filed no later than the close of business November 9, 1981;
>
> Reply Affidavits of Fact and Memoranda of Law from all parties, including the Commission's Bureau of Hearings and Field Operations and any intervenors, shall be filed no later than close of business December 9, 1981; and

IT IS FURTHER ORDERED, That within 15 days following the submission of the Reply Affidavits and Memoranda, the parties submit written statements identifying the unresolved issues of fact and specifying the procedures they believe are best suited to resolve those issues. Any requests by a party for a further hearing shall be accompanied by a detailed recital of the facts the party intends to prove at the hearing and a description of evidence intended to be used to prove those facts. After consideration of these submissions, the Commission will issue an appropriate order; and

IT IS FURTHER ORDERED, That any person, other than the parties, having an interest and desiring to participate in these proceedings may file a petition for leave to intervene pursuant to Rule 72 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.72); and

IT IS FURTHER ORDERED, That this Order be published in the *Federal Register* and a copy thereof be served upon all parties of record; and

IT IS FURTHER ORDERED, That all documents submitted by any party of record in this proceeding be filed in accordance with Rule 118 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.118) as well as being served directly on all other parties of record.

By the Commission.*

(S) JOSEPH C. POLKING
Assistant Secretary

* Commissioner Richard J. Daschbach's dissenting opinion is attached.

DOCKET NO. 77-7

AGREEMENTS NOS. 9929-6, 10266-3 AND 10374

ORDER ON REMAND

Commissioner Richard J. Daschbach, dissenting.

In my June 13, 1979 separate opinion to the Commission's Order Partially Adopting the Initial Decision in the above-captioned proceeding, I stated that the Commission should have fully adopted the ALJ's January 30, 1979 decision. The U.S. Court of Appeals' April 14, 1981 decision remanding the Commission's order and vacating two of the modifications which the Commission imposed upon the ALJ's decision re-enforces my view that adoption of the Initial Decision remains the Commission's most feasible and prudent option.

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 520]

[GENERAL ORDER 46, REVISED: DOCKET 81-16]

EXEMPTION OF CERTAIN AGENCY AGREEMENTS FROM THE REQUIREMENTS OF SECTION 15, SHIPPING ACT, 1916

October 9, 1981

ACTION: Final Rule

SUMMARY: This exempts agency agreements which provide for an agent's solicitation and booking of cargoes, and signing contracts of affreightment and bills of lading, on behalf of a common carrier by water from the filing and approval requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814). The Commission has determined that this exemption will not substantially impair effective regulation of common carrier practices, result in unjust discrimination or be detrimental to commerce.

DATE: Effective November 18, 1981.

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (the Act) (46 U.S.C. 833a) provides that the Commission, upon application or on its own motion, may by order or rule exempt any class of agreements between persons subject to the Act from any requirement of the Act, where it finds that such exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce. Under this authority the Commission previously announced (46 F.R. 12524) that it proposed to amend 46 C.F.R. 520 (Commission General Order 46) to exempt agreements which provide for an agent's solicitation and booking of cargoes, and signing contracts of affreightment and bills of lading, on behalf of a common carrier by water from the filing and approval requirements of section 15 of the Act.

Comments on the proposed rule were received from (1) Crowley Maritime Corporation (Crowley), (2) Matson Agencies, Inc. and Matson Agencies, (Matson), (3) eleven conference and rate agreements (Group of Eleven) and (4) TTT Ship Agencies, Inc. (TTT).

Crowley supports the rule as proposed. Matson and the Group of Eleven support the rule with various suggested modifications. TTT objects to the rule to the extent that it excludes from its coverage those

ship agents' agreements which are between carriers competing in the same trade, or under which agents represent different carriers in the same trade.

Matson suggests that the scope of the proposed exemption be clarified to include certain "incidental functions" performed by agents. Specifically, Matson proposes that the definition of exempted agency agreements be expanded to include:

> ". . . other functions incidental to the performance of duties by agents including, but not limited to, processing of claims, container equipment control, collection and remittance of freight and reporting functions."

Matson's suggested definitional revision has merit and will be adopted except for the phrase "but not limited to," which the Commission finds to be too indefinite and uncertain. Also, in order to make it clear that the exempted agency functions do not include the actual control over the use of container equipment, the incidental function of "container equipment control" will be modified to read "maintenance of a container equipment inventory control system."

The Group of Eleven requests clarification of the scope of the exception under Item (2) of section 520.12. Specifically, it suggests that the term "carriers" be substituted for the term "principals" to make it consistent with Item (1) of that section. This is an appropriate suggestion and will be adopted. The Group of Eleven also proposes that the term "which is otherwise subject to the Shipping Act" be added after the word "agent" in Item (2) to make it clear that the agent is, in fact, a person subject to the Act. This revision is unnecessary and will be rejected since the introductory statement of section 520.12 addresses this point.

TTT objects to the requirement that agency agreements falling within the scope of Items (1) and (2) of section 520.12 must be submitted for approval pursuant to section 15. TTT believes that the required filing and approval of agreements which contain terms of an economic and financial nature and the subsequent possible public disclosure of those sensitive terms poses a serious threat to the confidential nature of the relationship between a carrier and its agent. If agency agreements like those named in Items (1) and (2) must be approved under section 15, TTT seeks Commission assurance that all agency agreements filed with it will not be subject to disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552). Alternatively, it believes ship agents subject to the Act should be allowed to file agency agreements which have terms of a sensitive economic nature deleted but which are provided to the Commission upon request and on a privileged and confidential basis.

We are not persuaded by TTT's suggestion that the scope of the exemption should be expanded to cover the two exceptions to the

exemption set out in section 520.12 of the rule. These two exceptions involve potential conflicts of interest as well as possible market sharing, and therefore, we believe that they should continue to be subject to section 15. In addition, we cannot guarantee TTT's alternate request for confidential treatment of certain sections of agreements filed with the Commission. Such agreements are required to be available for inspection and copying by the public. 46 C.F.R. § 503.32. While 46 C.F.R. § 503.35 does provide that commercially or financially sensitive information submitted to the Commission will generally not be made available, that limitation is subject to the requirements of the FOIA. Because determinations as to whether particular information can be withheld under FOIA can only be made on an *ad hoc* basis, no blanket assurances of the type sought by TTT may be given.

One final matter, not raised by the comments, needs to be discussed. As presently worded, Item (2) of section 520.12 could be misinterpreted to apply only where an agent has established an agency relationship with two carriers in one document. Because Item (2) is intended to include any and all arrangements between an agent and an individual carrier which would permit that agent to enter into similar agency agreements with other competing carriers in the trade, it has been clarified accordingly.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*), the Commission certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. The exemption will not impose any reporting or record keeping requirements which might result in a compliance or reporting burden on small entities. The exemption will primarily benefit carriers. The shipping public, some of whom undoubtedly are small entities may enjoy a secondary benefit from this exemption but it is not foreseen that this benefit will amount to a "significant economic impact," within the meaning of 5 U.S.C. 605(b).

Accordingly, under section 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a and 841a) and 5 U.S.C. 553, the Federal Maritime Commission amends 16 C.F.R. Part 520 as follows:

1. Change the Part title to read "Exemption of Husbanding and Agency Agreements."
2. Designate existing Part 520 as "Subpart A - Husbanding Agreements."
3. Add a new "Subpart B - Agency Agreements" reading as follows:

Sec.

520.10 Purpose and Scope

520.11 Definition

520.12 Exemption

520.13 Termination of Approved Agency Agreements
520.11 Optional Section 15 Approval

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

520.10 *Purpose and Scope.*

Section 15 of the Shipping Act, 1916 requires that certain agreements between common carriers by water and other persons subject to the Act be filed with and approved by the Commission prior to implementation. Section 35 of the Act provides that the Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to the Act, or any specified activity of such persons from any requirement of the Act, where it finds that such exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or detrimental to commerce.

In the interests of minimizing unnecessary expense and delay in the implementation of agency agreements between persons subject to the Act, this part provides for the exemption of certain agency agreements from the filing and approval requirements of section 15.

The exemption does not apply to agency agreements: (1) where a common carrier is to be an agent for a competing carrier in the same trade, or (2) which permit an agent to enter into similar agreements with more than one carrier in a trade.

520.11 *Definitions.*

As used in this part, agency agreements are agreements between persons subject to the Shipping Act, 1916, which provide for the agent's solicitation and booking of cargoes, and signing contracts of affreightment and bills of lading, on behalf of a common carrier by water. Such agreements may or may not also include husbanding service functions and other functions incidental to the performance of duties by agents including processing of claims, maintenance of a container equipment inventory control system, collection and remittance of freight and reporting functions.

520.12 *Exemption.*

Agency agreements between persons subject to the Act except those: (1) where a common carrier is to be an agent for a competing carrier in the same trade, or (2) which permit an agent to enter into similar agreements with more than one carrier in a trade, are exempted from the filing and approval requirements of section 15. Exempted agreements shall be kept on file by the parties and shall be available for inspection by the Commission during the term of the agreement and two years thereafter.

520.13 *Termination of Approved Agency Agreements.*

Agency agreements which have received section 15 approval shall continue to be approved for the duration of their term or until terminat-

ed by the parties. When such approved agreements are terminated by the parties, such parties shall immediately notify the Commission.

520.14 *Optional Section 15 Approval.*

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

By the Commission

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-41

ATLANTIS LINE, LTD.

v.

FARRELL LINES, INC.

NOTICE

October 9, 1981

Notice is given that no exceptions have been filed to the September 4, 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
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-41

ATLANTIS LINE, LTD.

v.

FARRELL LINES, INC.

Volumes of the Sesame Street Library improperly classified as "Books, N.O.S." Proper classification found to be "Books, Toy viz: coloring, cut-out picture and story, not school books." Reparation awarded.

Steven B. Chamides for complainant.

Richard H. Bowen for respondent.

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

Finalized October 9, 1981

The complainant Atlantis Line, Ltd. alleges that respondent Farrell Lines, Inc., overcharged it in the amount of $41,904.24 in freight charges on three shipments of "certain books." The controversy arises over the proper description of the books for rate purposes.

The books in question are part of a series entitled "The Sesame Street Library" which according to the complainant "contain stories and illustrations designed to entertain pre-schoolers while introducing them to the alphabet and numbers."

The bills of lading issued for each of the shipments described the shipments as "comic books." The bills of lading were prepared by Atlantis. Farrell rated the books under Item 1815 "Magazines and Comic Books." [2] Subsequently, Farrell received a sample of the books being shipped and concluded that the books were not "comic books" but hard cover children's educational books. Taking the position that the Tariff had no entry covering the books, Farrell rebilled Atlantis under Item 361 "Books N.O.S."

Farrell told Atlantis of the reclassification and the additional charges due. Atlantis at that time insisted that the books were "comic books." Unable to agree upon a classification, Atlantis then filed the present complaint abandoning, however, its insistence that the books were

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

[2] U.S. Atlantic and Gulf/Australian-New Zealand Conference, Freight Tariff No. 4, FMC No. 13 (hereinafter the Tariff).

comic books. Instead the complaint alleges that what was actually shipped were "story books," and should have been classified under Item 365 of the Tariff as "Books, Toy viz: coloring, cut-out picture and story, not school books." Farrell in its answer points out that as it appears in the complaint Item 365 reads "Books, Toy viz: coloring, cut-out, picture, and story, not school books." As it actually appears in the tariff there is no comma between the words "cut-out" and "picture." The absence of that comma leads Farrell and the Conference [3] to construe the item as including only "toy coloring or *toy cut-out picture and story books*." (Emphasis theirs.) Presumably, since the books in question have pictures and tell a story, it is the absence of "cut-out pictures" which excludes them from the coverage of Item 365.

Atlantis considers Farrell's interpretation to be "strained and unnatural." [4] It contends that the term "cut out picture and story" books describes three different possibilities: "(1) cut-out picture books; (2) story books; and (3) cut-out picture books together with story books." Atlantis, citing Follett, Modern American Usage, p. 64 (1966) says that the three possibilities stem from the common use of the word "and" as having both the conjunctive and disjunctive meanings. In other words says Atlantis "and" is the equivalent of "and/or." Atlantis goes on to cite several instances in the Tariff where it is clear, at least to Atlantis, that "and" is used to mean "and/or." For example Item 1810 reads:

> Machinery and Machine Parts, Viz: Foundry and Metal Milling.

To Atlantis it is obvious that this means "(1) foundry machine/parts *or* metal milling machines/parts, since there would not be a single machine for 'foundry and metal milling'." [5] Again, Atlantis offers Item 1325 which applies to:

> Glass Fiber, Viz: Including Reinforcing, Resin or Asphalt Coated Roving, Chopped Strand and Mats.

Atlantis argues that this item plainly covers "chopped strand as well as mats because "strand is often chopped for use" but "mat is not chopped." [6] The remaining examples of Atlantis where "and" is used to mean "and/or" are:

> Item 2113: Paper, Printing, Viz: Cover Text, Offset and Writing.

[3] Farrell consulted with the Conference as to the proper interpretation of Item 365.

[4] Atlantis, without mentioning the added comma in the complaint has omitted the comma when discussing Item 365 in its reply memorandum.

[5] According to Atlantis, "foundry machines are for casting or forming metals while milling machines are for cutting and shaping." No authority is given for this proposition however.

[6] Again no authority is cited for this proposition, although the reason offered for it is: "Strand is glass fiber thread; mat is a flat piece of woven, reived or pressed or otherwise formed glass fibers." I suppose logic and good business would dictate that once having gone to the trouble to weave, reive, press, or otherwise form glass fibers into a mat it would make little sense to then *chop* it up.

> Item 70 Agricultural Implements, machinery and parts . . . Viz: Corn binders, Cleaners, Graders, Huskers, Mills, Pickers, Shellers, Shredders and Sorters.[7]
>
> Item 987 Disposable Hospital Supplies, Viz: . . . Surgical Supplies, Paper: Disposable Masks, Gowns, Bedding, Drapes and Underpads.

From these examples, and some other authorities Atlantis arrives at the conclusion that the "and" in Item 365 means "or" and argues that the books in question are within the coverage of the item. In urging their respective interpretations of Item 365 Atlantis relies upon grammar and the proper or common usage of the word "and" while Farrell relies upon punctuation and the absence of a comma between the words "cut-out" and "picture."

In discussing the use of the term and/or Follett says:

> *And/or.* Whether a lawyer can or cannot make out a case for the use of this ungraceful expression in legal documents only a lawyer is competent to say; but anyone else is entitled to the view that it has no right to intrude in ordinary prose.[8]

Whatever the case lawyers may make for the use of and/or it is clear that in this day "and" is the equivalent of "and/or" and that "and" is used in the disjunctive as well as the conjunctive. An example offered by Follett is: "A majority of the tourists come here with camping and/or fishing on their minds." According to Follett "any sensible reader" would if the stroke and the word *or* were left out still read the sentence as meaning that some camp without fishing, some fish with camping, and some do both.[9] So were it not for the missing comma, upon which Farrell relies, this case would present little difficulty and the term "cut out picture and story books" would clearly include the tales of Big Bird, the Cookie Monster, Ernie and the other Muppets which are found in the Sesame Street Library of "story books." However, there seems to me to be an inconsistency if not a contradiction among the "authorities" when you attempt to reconcile "and" as meaning "and/

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[7] No explanation is given as to why a single machine can't both "shred" and "sort." I can only guess that counsel are relying on the order in which the various kinds of machines are listed in the item or rather the order of the functions of the last two. For if you shred the corn or whatever it is that's shredded there would appear little need to sort the shreddings. However, this may be a misplaced reliance because it would seem necessary to "pick" the corn before you "husk" or "clean" it.

[8] Follett, Modern American Usage, paperback, Warner Books, New York, 1974, pp. 88-89 (hereinafter Follett).

[9] Follett, p. 89. For further evidence of the common use of and in both the conjunctive and disjunctive meaning see Strunk & White, Elements of Style, (2d Ed. 1972), p. 35; Sutherland, Statutory Construction, § 21.14 (4th Ed. 1972); and *U.S. v. Del Rio Springs, Inc.* 392 F. Supp. 226, 228 (D. Ariz. 1975).

or" and the presence or absence of a comma between the last two members of an enumerative series.[10] Concerning the latter Follett says:

> How to punctuate . . . enumerations is argued with more heat than is called forth by any other rhetorical problem except the split infinitive. Leaving aside a few poets and a handful of crotcheteers who want to abolish all punctuation, everybody favors the use of commas between all members up to the last two; but that is where the shooting begins. To insist that the first perform the duty of the second is rather like prescribing sand in the bearings.[11]

Follett is four-square for the use of a comma between the last two members of an enumerative series. He rejects the "dictum" that if you have the conjunction ["and" or "or"] you don't need the comma because that is bad reasoning. He argues that, "A conjunction is a connective device, as its name announces; whereas a mark of punctuation is nothing if not separative. And this in the face of his advocacy of the use of "and," a conjunction, as meaning "and/or" both conjunctive and disjunctive.[12] If I may be permitted a rather long quote, I feel certain that Follett can best demonstrate the need for the missing comma:

> Whatever is to be said for punctuating *a, b and c* (i.e. without a comma before *and*), it is not the *and* which replaces the missing mark. The comma, when present, separates *b* from *c*; the *and* joins *c* and *b* and (just as much) *a*—a material point commonly overlooked. It is implicit in the standard for of a series that when you write *red, white, and blue* you mean *red and white and blue*—three equal terms. The form itself is a convention for making the conjunction work between *a* and *b* though it is present only between *b* and *c*, one conjunction at the end serves for all the intervals.[13]

The danger which arises from the absent comma is the question: how many members of the series are there meant to be? According to Follett if there are four members of the series the omission of the comma will confuse the reader as to how many members of the series are intended, e.g., does the term "cut-out picture and story" mean that only books that have both cutouts and tell a story are included within the phrase? Apparently it does at least if you are not a newspaper editor or a "crotcheteer." But what if we apply "common usage" and allow *and* to mean *and/or*? Item 365 would read: Books, Toy, Viz:

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[10] I am assuming that the term "cut-out picture" represents to Farrell a single member of the enumerative series comprising in their view at least (1) coloring books and (2) cut-out picture and story books.

[11] Follett, page 486.

[12] At this point, I should admit that in no sense of the word am I a grammarian; and as for proper punctuation I rely with embarrassing regularity upon the secretaries.

[13] Follett, p. 486-487.

Coloring, Cut-out Picture and/or Story. If written this way, story books are clearly included whether they have cut-out pictures or not; and the absence of the comma between *Picture* and the word *and* is meaningless. As one whose every effort to grapple with the maze-like intricacies of grammar and punctuation always resulted in meeting himself coming the other way, I have probably missed one of Mr. Follett's fine or subtle distinctions which would call both for the use of *and* as *and/or* and the inclusion of a comma between the last two members of a series when the final member is preceded by *and*.

One way of reconciling the seeming contradiction could be to note that when Follett uses *and* to mean *and/or* he restricts its use to simple pairs, e.g.,"camping or fishing." [14] But when he talks about an enumerated series and the use of a comma the series has at least three members.[15] At this point everyone, except the parties to the case, for they led us into the labyrinth, is justified in asking: Just what does all this have to do with the proper construction of a common carrier's tariff? And this suggests that it is time to turn to the principles of tariff construction to see if therein may lie a release from the horns of this seeming dilemma.

To begin with the obvious, tariffs are "but forms of words." *Intercoastal Investigation 1935*, 1 U.S.S.B. 400. In construing these forms of words, a "fair and reasonable construction is required." *Nat. Cable & Metal Co. v. Amer. Hawaiian S.S. Co.*, 2 U.S.M.C. 470-473 (1941). However, if there is an ambiguity in the tariff it must be construed against the one making and issuing the tariff. *Sacramento-Yolo Port Dist. v. Fred V. Noon Co., Inc.*, 9 F.M.C. 551 (1966). Citations could be multiplied and "principles" could be elaborated; but they mostly deal with the construction of phrases or the meaning of technical words with virtually no exposition of the effect of punctuation upon the words as they are used in tariffs.[16]

Here there is no dispute as to the nature of the articles shipped. They are "story books." So we need not concern ourselves with those principles governing the use of "technical" words. *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602 (1959). And since no one has offered any evidence that the term *story book* has by custom and usage in the trade acquired a special meaning, there is no need to accept story book in

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[14] However he does not say that *and* cannot mean *and/or* when used in an enumerative series of three or more members.

[15] See Fowler, pp. 88-89, 485-489. Lest it be thought that I view Fowler as some sort of holy writ, I should say that I consulted Fowler's Modern English Usage, Oxford, 1966. This effort only brought to mind what someone, his name escapes me now, once said: "Americans and Englishmen are a people separated only by a common language."

[16] I have been referred to no Commission decision dealing with the word *and* and while I have not exhaustively searched the Commission's decisions, a review of the digests failed to uncover any examples of the Commission's position on the use of *and* to mean *and/or*.

any way but its generally understood meaning. *C.S.C. Intl. v. Lykes Bros.*, 20 F.M.C. 551, 555 (1978). From all of this it would seem that we have come back to square one and found ourselves still without a way out of the maze. However, one of the hoariest principles of tariff lore may light a small lamp at the end of the tunnel.[17]

Farrell's case for the exclusion of "story books" without cut-outs is based upon the absence of a comma. While Farrell cites no authority for its position that the absent comma results in the exclusion of story books such as those which comprise the Sesame Street Library, it nevertheless must have relied upon a particular theory of punctuation. This is clear from Farrell's response to the complaint which concentrates on the absence of the comma:

> In their complaint they state Tariff Item 365 reads "Books, Toy Viz coloring, cutout, picture and story, not school books." Tariff Item 365 actually states "Books, Toy, viz: coloring, cut-out picture and story, not school books." The tariff item does not separate cut-out books from picture and story. It applies to toy coloring or *toy cut-out picture and story books* only.

Farrell obviously feels that the absence of the comma after the word "picture" irrevocably commits the *and* as used in Item 365 to the conjunctive.[18] The trouble with this proposition is that the average shipper, traffic manager, freight forwarder or person who reads the tariff should not need so intimate a familiarity with the subtler "rules" governing the use of commas in an "enumerative series"; nor should they have to concern themselves with words that can be used in both the *disjunctive* and *conjunctive* sense. In short, the potential user of the tariff is confronted with an ambiguity, i.e., is *and* used only in the conjunctive or in both the conjunctive and disjunctive? This ambiguity must be resolved in favor of the shipper, Atlantis. *Sacramento Yolo, supra.* Therefore, Item 365 is to be read as including story books whether or not they contain "cut-outs."

I suppose one final point needs to be discussed.[19] Item 365 reads in part "Books, Toy viz. . . ." Thus it would seem that only *books* which are also *toys* are to be within the coverage of Item 365. But is there not something a bit unusual about the term *toy books*?

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[17] According to both Fowler and Follett cliches and time-worn phrases are to be avoided at all costs. However, there are some temptations that can't be resisted.

[18] I have no way of knowing whether any or all of the people participating in the interpretation of Item 365 are "puntuationalists," or grammarians, or whether any of them are aware of the usage of *and* as the equivalent of *and/or*. What is clear however is that Farrell has chosen to rest its case upon a theory of punctuation, and Atlantis upon a principle of grammar.

[19] *See European Trade Specialists*, Order on Remand where a third tariff description was injected into the case by the Commission.

If there is no specific commercial meaning of a term, that term must be given its ordinary meaning and one can turn to dictionary definitions as an aid. *Webster's Third International Dictionary* defines a toy as:

> Something designed for amusement or diversion rather than practical use; an article for the playtime use of a child either representational . . . and intended esp. to stimulate imagination mimetic activity or manipulative skill or nonrepresentational . . . and intended esp. to encourage manual and muscular dexterity and group integration; something diminutive esp. in comparison with others in the same general class (the toy was a toy beside the ship that it guided).

A "toy" should not have "a more practical use than one chiefly for amusement." *Equality Plastics Inc., et al.* 17 F.M.C. 217, 228 (1973).[20]

Whatever, one chooses to make of the word "practical," books do not seem to fit the definition of toys, at least as most people think of toys.[21] *Webster* defines a book as:

> 1. a number of sheets of paper . . . with writing or printing on them, fastened together along one edge, usually between protective covers; literary or scientific work, anthology, etc., distinguished in length and form from a magazine, tract, etc.

Whether the volumes of the Sesame Street Library are literature would, I am sure, depend upon the particular "scholar" consulted.[22] It is clear, at least to me, that as commonly used the words toys and books are not synonymous. However, the question remains whether the word "Toy" was included in Item 365 to restrict the books covered only to those containing cut-out pictures. But here again, assuming such an intention, I find an ambiguity inherent in the description. While a "book" containing "cut-out pictures" only could perhaps be called a toy, a "story book" can more readily be called "literature" and thus a "book" in commonly understood non-toy sense. What to make of a book containing both cut-out pictures and a story only further compounds the ambiguity. Since, as already noted, ambiguities in a tariff must be resolved in favor of the user or shipper, I conclude that the presence of "Toy" in Item 365 does not preclude the inclusion of the books in question in that item.

Based upon the record before me, it is my conclusion that the three shipments of books here in question were improperly classified under Item 361 "Books N.O.S." and should have been classified as "Books,

[20] *See also, Mego Corp. v. U.S.*, 405 F. Supp. 1088 (Cust. Ct. 1915); *New York Merchandise Co. v. U.S.*, 294 F. Supp. 971 (Cust. Ct. 1969); *U.S. v. Topp Chewing Gum, Inc.*, 440 F. 2d 1384 (CCPA 1971); and *Henry A. Wess, Inc. v. U.S.*, 434 F. Supp. 650 (Cust. Ct. 1977).

[21] Of course, some books are written "chiefly for amusement," e.g., "comic books." But even comic books serve the "practical purpose of advancing reading skills."

[22] *Webster* says literature can be "all writings in prose or verse, especially those of an imaginative or critical character without regard to their excellence. . . ."

Toy viz: coloring, cut-out picture and story, not school books" under Item 365 of the U.S. Atlantic and Gulf/Australian-New Zealand Conference Freight Tariff No. 4 F.M.C. No. 13. As a result of this improper classification, Farrell Lines, Inc., is hereby ordered to pay to Atlantis Line, Ltd., reparation in the amount of $41,904.24 with interest at 12% from the date of payment of the overcharge.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-20

KUEHNE & NAGEL, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1162

NOTICE

October 13, 1981

Notice is given that no exceptions have been filed to the September 4, 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
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-20

KUEHNE & NAGEL, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1162

An investigation was begun to determine whether respondent, Kuehne & Nagel, Inc., a licensed ocean freight forwarder, had violated various provisions of the Commission's regulations and sections 15 and 16, Initial Paragraph, Shipping Act, 1916, during the five-year period from 1975 through 1980. The conduct in question concerned alleged misconduct in various billing, paying, and recordkeeping activities, as well as possible receipt of compensation from some carriers in excess of amounts specified in the carriers' tariffs, possible obtaining of transportation for less than applicable charges, and possible unfiled agreements with the carriers in question. After many months of painstaking inspection and discovery which were not near completion, respondent and the Commission's Office of Hearing Counsel began discussions which culminated in a settlement agreement. On the basis of the record developed and applicable principles of law, it is found that:

(1) The settlement agreement, which calls for payment of $350,000 in lieu of penalties, plus numerous strict internal controls, audits, reports, and personnel reassignments, instituted and financed by respondent, is fair and reasonable and comports with Commission case law and regulations establishing criteria for determining the approvability of settlements.

(2) The settlement agreement, although unprecedented in scope, size of payment, and imposition of internal controls, is commensurate with the scope and seriousness of the charges contained in the Commission's Order of Investigation and is therefore neither excessive nor too lenient. It would obtain for the Commission immediate beneficial results in place of expensive, risky litigation which would have tied up the Commission's scarce resources for many months and even possibly years. The settlement also gives due regard to respondent's financial situation, the Commission's enforcement policies, and considers factors in mitigation.

(3) The record developed on the question of respondent's fitness to retain its license shows that respondent should be allowed to continue its operations without revocation or suspension of its license, the latter sanctions being excessive and drastic under the circumstances. Respondent has done virtually everything possible to ensure that its employees will follow applicable laws and regulations scrupulously and that it can be trusted to act responsibly. Revocation or suspension of respondent's license would jeopardize its business, the jobs of 450 employees, and the full range of services it provides for American shippers. Such drastic sanctions, under the facts of this case, would be unduly vindictive and punitive rather than remedial and would therefore depart from Commission precedent.

John P. Meade and *Eliot J. Halperin* for respondent Kuehne & Nagel, Inc.

John Robert Ewers, *Joseph B. Slunt*, *Charles C. Hunter*, and *Janet F. Katz* for the Bureau of Hearings and Field Operations, Office of Hearing Counsel.

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

Finalized October 13, 1981

This is an investigation begun by the Commission's Order of Investigation and Hearing, served April 3, 1980. According to that Order, the Commission began the proceeding because information which had been obtained from two of the offices of the corporate respondent, Kuehne & Nagel, Inc., allegedly indicated possible violations of various provisions of the Commission's regulations governing the conduct of licensed freight forwarders (General Order 4, 46 C.F.R. 510) as well as possible violations of sections 15 and 16, Initial Paragraph, Shipping Act, 1916 (46 U.S.C. 814, 815). More specifically, on the basis of the initial information obtained from two of respondent's offices, the Commission expressed concern that the corporate respondent and its officers at various periods of time from 1975 through 1978 may have failed to exercise due diligence or may have imparted false information to or withheld certain information from its shipper customers in regard to certain charges, may have failed to promptly account to its shipper customers for overpayments or failed to use proper billing forms itemizing various charges, may have failed to make payments to certain persons of sums advanced by shippers, or to pay over such sums to carriers on time, may have failed to maintain records and files as required by Commission regulations, and may have failed to make books and records available to authorized Commission representatives. If any of these events in fact occurred and could be proven, they could constitute violations of six different provisions of the Commission's General Order 4, namely, sections 510.23(d), 510.23(e), 510.23(f), 510.23(j), 510.23(k), and 510.23(l).

In addition to the above possible violations of the Commission's regulations, the Commission's Order alleged that the corporate respondent and its officers may have received sums of money from ocean carriers in excess of freight forwarder compensation specified in the carriers' tariffs and if so, may have violated sections 15 and 16, Initial Paragraph, Shipping Act, 1916, if these alleged excessive payments evidenced an unfiled agreement between the corporate respondent and the carriers involved, and if these payments were passed through to shippers, thereby permitting shippers to obtain ocean transportation at less than the applicable rates and charges, or even if not passed through, still resulting in the movement of shipments at less than applicable rates and charges. Because the initial information obtained by the Commission's staff indicated possible conduct in violation of regula-

[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).

tions and statutory provisions, the Commission was concerned that the same activities might have been widespread throughout the corporate respondent's many offices so that respondent could be found to be unfit to retain its license. Accordingly, the Commission wanted the investigation to determine whether the various violations had occurred during the last five years and, if so, whether civil penalties should be assessed after consideration of possible mitigating factors, and whether the respondent's license should be suspended or revoked because of lack of fitness.

After the proceeding commenced on April 3, 1980, it entered into a lengthy phase of prehearing discovery and inspection consisting not only of various subpoenas, depositions, requests and rulings, but of a variety of pleadings relating to the myriad discovery and inspection efforts conducted by or sought to be conducted both by the Commission's Bureau of Hearings and Field Operations, Office of Hearing Counsel (formerly entitled Bureau of Investigation and Enforcement) and by respondent Kuehne & Nagel, Inc. (K & N). This discovery and inspection phase began to assume rather massive dimensions because of the mammoth scope of the Commission's Order, the number of issues, the five-year time period framed therein, and the size of the corporate respondent which has many offices throughout the country. Finally, after the parties had been engaged in approximately eight months' discovery efforts with no end in sight to the prehearing phase and with numerous discovery motions pending, the parties advised that they had begun to discuss the possibility of settlement in lieu of what promised to be months and even years of continued discovery and litigation. (See Discovery Proceedings Stayed to Permit Settlement Discussions, December 23, 1980.) [2] Because of the strong policy followed by courts

[2] The following brief discussion should indicate how comprehensive these discovery efforts were. Immediately upon service of the Commission's Order on April 3, 1980, Hearing Counsel served subpoenas duces tecum on seven offices of K & N throughout the country, asking for production of what Hearing Counsel characterize as "tens of thousands" of so-called "blue cards." K & N requested permission for adequate time to gather these materials and make them available during the month of April, which was done. These materials were inspected and analyzed by Commission investigators. Thereafter, both Hearing Counsel and K & N served additional lengthy and detailed discovery requests. Pursuant to my rulings, K & N's discovery was held in abeyance to permit Hearing Counsel to conclude their discovery, although Hearing Counsel did produce a large quantity of material in response to K & N's initial discovery requests. Subsequently K & N produced at a number of locations throughout the country in excess of one thousand shipping files in addition to a variety of other operational and financial materials. Furthermore, eight officers and employees of K & N were deposed, although six of them declined to respond to certain questions as individuals asserting their constitutional rights under the Fifth Amendment. Thereafter, Hearing Counsel served a second round of interrogatories and requests for production of documents. In response, K & N produced thousands of additional "blue cards" together with a quantity of other requested materials. Hearing Counsel also deposed two additional employees of K & N whom K & N furnished as spokespersons for the corporation. Although K & N produced a large volume of material in response to discovery requests, K & N also raised a variety of objections to a significant percentage of other requests, leading to the filing of a number of motions by Hearing Counsel seeking compulsory orders. At that stage the parties decided to explore the possibility of settlement.

and this Commission which favors settlement in lieu of costly and lengthy formal hearings, I stayed further discovery efforts to permit the parties to begin their settlement negotiations, ordering them to furnish me with periodic status reports of their progress. Despite diligence on both sides to complete negotiations and compile the necessary record and documents on which a just and reasonable settlement could be supported, the size of the case and of respondent's operations and the need to analyze additional materials exchanged by the parties during the negotiations consumed several months' time. Finally, on June 4, 1981, the parties submitted their preliminary draft of a settlement, and on July 14, 1981, the parties were able to submit their completed product consisting of a proposed settlement together with numerous supporting materials consisting of legal memoranda and affidavits of various Commission investigators and of several officers of respondent corporation, and miscellaneous exhibits. It is this package which is before me now. My task is to determine first, whether the proposed settlement should be approved under applicable standards of law and second, whether the record shows that respondent is unfit to retain its license. Both Hearing Counsel and respondent urge approval of the proposed settlement. Moreover, on the basis of the record developed showing certain reforms and internal controls which respondent has and will implement to ensure complete compliance with the Commission's regulations and other applicable provisions of law, Hearing Counsel as well as respondent urge me to find that respondent is fit to continue to be licensed as an independent ocean freight forwarder. As I will show, I am convinced by the record developed and by the persuasive arguments of both parties, that the settlement is just and reasonable and that respondent is fit to retain its license.

DESCRIPTION OF THE TERMS OF THE SETTLEMENT

The proposed settlement consists of a substantial payment of money ($350,000) in lieu of assessment of civil penalties together with a series of detailed undertakings by K & N to prevent recurrence of the type of practices questioned by the Commission's Order. The scope and depth of K & N's undertakings designed to ensure against recurrence of questionable practices and to demonstrate that K & N seriously intends to enforce rigid compliance with all Commission regulations and statutory standards governing the conduct of licensed freight forwarders may well be unprecedented. In brief, the settlement and the related promissory note and implementing documents, which are all attached as an appendix to this decision, provide for the following: [3]

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[3] The brief description of the settlement agreement which follows is only an outline and is not all-inclusive. For a description of the entire agreement and its implementing provisions and documents, the reader should consult the complete text shown in the appendix.

1. K & N will pay the sum of $350,000 in settlement of claims for civil penalties in installments over a period of four years.

2. K & N has terminated the practices in question and has informed all its owners, officers, and employees of itself and its affiliated companies in great detail of the strict company policy to follow the Commission's regulations scrupulously. Such notices will be sent in writing and require an acknowledgment by the various persons receiving them.

3. K & N has required each of its officers and the qualifying officer of each of its branch offices to execute a statement under oath that he has read and understood the settlement agreement and will abide by all of its terms and conditions. For a period of three years following approval of the settlement agreement, all new owners, officers and qualifying branch officers shall submit similar statements.

4. For a period of three years following approval of the agreement, K & N will, at its own expense, permit an independent audit of all its books and records located in the United States. This audit will be performed by Mr. Charles Clow, formerly Chief of the Commission's Office of Freight Forwarders. Mr. Clow will be authorized to audit K & N's books and records for the purpose of detecting violations of the Commission's regulations and relevant laws and will conduct the audit whenever Mr. Clow chooses but no less than once every twelve months with or without prior notice to K & N. In case of violations, K & N will pay any injured shipper or other person twice any improperly retained monies. Mr. Clow will report the results of all audits to the Commission. Any findings by Mr. Clow or monetary payments made pursuant to this agreement will not be in derogation of any Commission authority or obligations under the relevant regulations and law.

5. K & N will keep relevant documents relating to the practices questioned in the Commission's Order available to the Commission on request at its New York office and each of its branch offices for a period of three years following approval of the agreement.

6. K & N will prohibit certain individuals from acting as officers or directors or in any other policy or managerial capacity for the corporation for one year.

APPROVABILITY OF THE PROPOSED SETTLEMENT

Both respondent and Hearing Counsel strongly urge me to find that the proposed settlement is just and reasonable and should be approved, as I have noted earlier. Respondent points out that continuance of litigation would entail enormous expenditures of time and money as seen by the lengthy history of discovery which had not been near conclusion after eight months when the parties began to discuss the possibility of settlement. Respondent also points out the many unique features of the settlement agreement which will ensure the Commission and the public that K & N, whatever might have happened in the past,

is firmly committed to rigid enforcement of all pertinent Commission regulations and provisions of law governing the conduct of licensed ocean freight forwarders. Particularly significant is respondent's willingness to undertake an independent continuing audit of its books and records, an undertaking which respondent proposed during settlement negotiations with Hearing Counsel. This, argues respondent, demonstrates respondent's good faith in trying to cooperate with the Commission not only in bringing expensive litigation to a conclusion but in showing the seriousness with which respondent views the matters under investigation and its firm conviction that no such practices will recur. Respondent notes, furthermore, that the person conducting the audit will be Mr. Charles Clow, a person who has had wide experience in regulating forwarders, who has been Chief of the Commission's Office of Freight Forwarders, and who will enjoy complete independence in auditing respondent's books and records and in making findings and reporting to the Commission. Not only will K & N bear the expenses of Mr. Clow's audits, but it has also obligated itself to pay shippers twice any amount found to have been improperly retained if Mr. Clow should discover any improper withholdings. Thus, K & N has gone beyond previous settlement agreements in devising effective deterrents as well as in terminating all the questionable practices mentioned in the Commission's Order, has done these things at considerable cost to itself, and, by the terms of the agreement, has in no way precluded the Commission from imposing additional penalties if any of the practices do in fact recur notwithstanding K & N's agreement voluntarily to compensate injured shippers or other persons. As K & N states in urging approval of these extensive undertakings:

> One of the major motivating factors for Kuehne & Nagel in settling the case and incorporating into its settlement the elaborate safeguards against any possible future violations was to do everything possible to demonstrate to the Commission the ironclad policy of the present management against any future violations. This is not only because management aims to eliminate possible future violations, but because management wishes to make it abundantly clear that the company is fit to act as an FMC licensed forwarder. (Respondent's Memorandum in Support of Settlement, p. 11.)

After arguing that the various elaborate safeguards erected in the settlement agreement will ensure rigid compliance with law, respondent proceeds to apply the criteria established by the Commission's regulations and case law which, according to respondent, demonstrate the approvability of the settlement. K & N cites ample case law holding that settlements are favored by courts and by this Commission. More specifically, K & N argues that there are four particular criteria established by the Commission's regulations which are especially applicable

in this case to show that the settlement should be approved. These are respondent's ability to pay (4 C.F.R. 103.2); litigative possibilities (4 C.F.R. 103.3); cost of collecting the claim (4 C.F.R. 103.4); and effect on enforcement policy (4 C.F.R. 103.5). In addition, K & N points out a "combination of other reasons" (4 C.F.R. 103.7) and the Commission's direction in its Order of Investigation and Hearing (p. 9) that instructs the parties and myself to determine possible penalties "taking into consideration factors in possible mitigation." Under these various criteria, K & N point out respondent's limited ability to pay based upon its restricted financial situation, extensive areas of factual dispute and legal uncertainties affecting Hearing Counsel's case, additional substantial expense to the Commission that would be involved in developing more evidence and trying the case in a case of this size, the deterrent effects stemming from the size of the settlement payment and the numerous strict procedures instituted by or to be instituted by K & N to ensure against recurrence of the questionable practices. Finally, K & N cites instances of its cooperation with the Commission's staff and with Hearing Counsel in disclosing information, placing limitations on certain employees, and the considerable expense which it has already borne in defending itself, not to mention the harm to its business relationships caused by the publicity of the case, and finally, the innovative deterrent/compliance system which it has proffered, all as evidence of mitigating factors to be considered.

Hearing Counsel urge approval of the settlement agreement for many of the same reasons espoused by K & N. Hearing Counsel have thoroughly researched case law and legislative history to the Administrative Procedure Act (APA), especially section 5, 5 U.S.C. 554, governing offers of settlement. Both this research and the great multitude of Commission decisions approving settlements under virtually every operative section of the Shipping Act, 1916, fully support Hearing Counsel's contention that there is a very strong policy favoring settlements in lieu of needless expensive litigation and that the Commission has been following this policy frequently, especially in most recent years. Hearing Counsel explain that they have developed information which they believe would show that K & N engaged in conduct which the Bureau believes is violative of the various statutory and regulatory provisions cited by the Commission's Order. Hearing Counsel state that certain officers or employees of K & N may have destroyed pertinent shipping documents or attempted to mislead Commission investigators. From certain records obtained from K & N, furthermore, Hearing Counsel state that K & N has "acknowledged that during the period April 1975 through April 1980" at various offices, K & N engaged in numerous instances of inflating, marking up, or otherwise incorrectly computing certain charges, and that these instances were shown in only a sampling of respondent's records. Hearing Counsel believe that these practices

are "clearly violative of the Commission's rules and regulations" and were done with the knowledge of "high level corporate officers and qualifying officers," that the conduct was "willful," and that it showed a breach of respondent's fiduciary duty to its shipper principals. (Hearing Counsel's Memorandum in Support of Proposed Settlement, pp. 16-20.) Hearing Counsel also cite materials that they believe would show that K & N also engaged in conduct violative of sections 15 and 16, Initial Paragraph, Shipping Act, 1916, in connection with so-called "excess compensation" which Hearing Counsel state that K & N admitted receiving from three oceangoing common carriers prior to 1979. Although the question of whether receipt of "excess compensation" (compensation paid by carriers to forwarders in excess of the amounts specified in carriers' tariffs) by licensed forwarders is a violation of law has, as Hearing Counsel concede, not been definitively decided, Hearing Counsel believe such practice to evidence violation not only of section 16 but of section 15 insofar as such transactions may reveal special agreements with the carriers involved. Finally, Hearing Counsel state that the type of evidence being developed shows that K & N has admitted to practices which are also violative of section 16, Initial Paragraph, involving the sharing of revenues with a foreign affiliate of K & N in Bremen, Germany, and some instances of cargo misdescription and misdeclaration of weight.

Having discussed the type of factual materials which Hearing Counsel would be prepared to introduce as evidence if this case had to proceed to trial and the contentions which Hearing Counsel would make as to the legal conclusions to be drawn, Hearing Counsel agree that formal hearing (i.e., trial) with all of its attendant risks and expenses should be avoided because a just and reasonable settlement has been reached which serves salutary purposes. Hearing Counsel specifically acknowledge that respondent has not admitted that any of the preceding practices which occurred constitute violations of law. Hearing Counsel note correctly that I do not have to make findings of violations in order to approve a proffered settlement under the Commission's regulations and relevant case law. (Hearing Counsel's Memorandum, p. 12; p. 7 n. 5.) Hearing Counsel also correctly point out that because the parties have agreed upon a settlement, K & N has not put forth any defenses it might have to the various allegations and charges. Rather K & N has spent its time formulating a settlement and instituting or proposing various internal controls to prevent recurrence of the questioned practices. Should the settlement be rejected by the Commission, however, Hearing Counsel quite properly state that "fundamental notions of fairness and established considerations of due process" require that K & N be given the opportunity of presenting defenses. (Hearing Counsel's Memorandum, p. 7 n. 5). Having said all of this, however, Hearing Counsel explain in some detail why the proposed

settlement meets the various criteria established by the Commission's regulations and previous decisions and should therefore be approved in much the same way as did K & N, as discussed above. Hearing Counsel, in urging approval of the settlement, commence by stating that "[t]he Bureau believes that the offer of settlement submitted by Kuehne & Nagel serves the public interest and is fair to Kuehne & Nagel." (Hearing Counsel's Memorandum, p. 24.) They state that the proposed settlement "is within a zone of reasonableness and is neither an attempt by the Bureau to extract an exorbitant amount of money nor an excessively strict standard of compliance without a strong basis in fact or a 'give-away' in which the government's case is clearly shown to be worth much more than has been agreed to." (Memorandum cited, p. 24.) They cite the fact that the $350,000 which K & N has agreed to pay in settlement is the largest amount ever imposed by the Commission upon a freight forwarder and that the controls developed by K & N and incorporated into the proposed settlement are "unique, thorough, and innovative" and "may serve as a standard for the forwarding industry and prove to be a significant aid to the Commission in its regulation of the industry." (Memorandum cited, p. 24 and n. 12.) Hearing Counsel persuasively explain that the unique provisions in the settlement agreement will serve the Commission's enforcement policy in terms of deterrence and of securing compliance under 4 C.F.R. 103.5; that the settlement saves the Commission considerable money which would otherwise be spent in proceeding with continued discovery, formal hearings, and the usual subsequent phases of litigation in what Hearing Counsel describe as a "potentially immense investigation" (Memorandum cited, p. 29) thus satisfying 4 C.F.R. 103.4; that there are unsettled questions of law regarding the significance of the receipt of excess compensation by forwarders, and that there are obstacles which will severely hamper Hearing Counsel's ability to obtain and develop necessary evidence because of the lack of corporate records and constitutional defenses of certain individual employees who have shown reluctance to testify, thus showing the risks of continued litigation, under 4 C.F.R. 103.3; and that K & N's recent unfavorable financial situation demonstrates that any payment in excess of $350,000 would, in effect, jeopardize the continuation of its business, a consideration set forth in 4 C.F.R. 103.2, as well as in previous Commission decisions. I find that these statements of both K & N and Hearing Counsel fully comport with the principles of law applicable to settlements and support their contentions that the settlement is just and reasonable and ought to be approved. A brief explanation of the law of settlements will demonstrate the validity of this finding.

HOW THE PROPOSED SETTLEMENT AGREEMENT IS SUPPORTED BY GOVERNING PRINCIPLES OF LAW

There is so much case law as well as statutory law which emphasizes that settlements are to be encouraged and that every effort should be made to find them correct and fair that it is difficult to know where to begin any discussion on this point. Perhaps to emphasize how old this particular doctrine is and how it has found support throughout the decades, I can quote Abraham Lincoln on the subject. He is often quoted in his advice to lawyers as follows:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.[4]

Both Hearing Counsel and respondent, in their memoranda urging approval of the proposed settlement agreement, cite a vast multitude of Commission and other cases which reiterate the same theme, that settlements are invaluable tools which save time and money of litigants as well as of courts and administrative agencies, that they are salutary and beneficial, and that they are especially important to administrative agencies. In this last regard, the courts have urged agencies to follow the provisions of the Administrative Procedure Act (5 U.S.C. 554(c)) by making full use of the settlement technique which the Congress expected them to utilize when enacting the APA. In *Cities of Lexington, Georgetown, Winchester, Kentucky v. Federal Power Commission*, 295 F.2d 109, 121 (4th Cir. 1961), a case cited by Hearing Counsel, the court emphatically advised the agency in question that it was not necessary to continue with hearings and litigation merely because the agency had commenced a formal proceeding if the parties had reached a settlement. In this regard, the court stated:

> No court of law would tolerate for a moment the idea that it would be obliged to try a case that had been assigned for hearing notwithstanding the fact that the parties had reached a settlement of the controversy. Much less should such a contention be considered . . . with reference to the ruling of an administrative tribunal where liberality of procedure is essential in the interest of the dispatch of business.

In other cases courts have given similar advice to agencies. For example, in *Pennsylvania Gas and Water Co. v. Federal Power Commis-*

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[4] This passage was quoted in *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860, 863 (7th Cir. 1974) (footnote citation omitted). That court also stated:

> Compromises of disputed claims are favored by the courts. . . . Former Canon 8 of the Canons of Professional Ethics provided that "[w]henever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation." *Id.* (footnote citation omitted).

sion, 463 F.2d 1242, 1247 (D.C. Cir. 1972), the court affirmed the right of an agency to approve a settlement and terminate its proceeding even though some parties did not agree. The court provided this advice:

> The whole purpose of the informal settlement provisions is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.

See also *Placid Oil Company v. Federal Power Commission*, 483 F.2d 880, 893 (5th Cir. 1973), affirmed, 417 U.S. 283 (1974).

Recently, in another case involving approvability of a settlement in a freight forwarder case, *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973, the Commission approved the proposed settlement, found the licensee fit to retain its license, and described the principles and policies favoring settlements in some detail with reference to Commission regulations which had implemented both the APA and Public Law 96-25, which, among other things, amended section 32 of the Shipping Act, 1916, to authorize the Commission to assess civil penalties. In its discussion in *Behring*, 23 F.M.C. at 981-986, the Commission quoted the basic principle favoring settlements and presuming them to be fair, correct, and valid. It cited the relevant provisions of the APA cited above and the Commission's implementing regulations, Rules 91 and 94, 46 C.F.R. 502.91 and 502.94, as well as the *Pennsylvania Gas and Water Co.* case, cited above, and its own decisions, including, among others, *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 511-515 (1978), and *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 365, 368-369 (1979). These latter two cases were cited to show how advantageous to litigants, to the courts and to judicial administration were settlements and how the Commission has approved and endorsed settlements in virtually every type of case arising under the Shipping Act, 1916, without the need to proceed to full hearings and decisions or to make findings of violations of law.[5] The Commission described the limited function which its judges and itself would perform when passing on the reasonableness of proposed settlements, making sure that they were freely entered into and that they did not contravene any policy or provision of law. However, the Commission indicated that it

[5] The discussion in *Old Ben Coal Co. v. Sea-Land Service, Inc.*, cited above, is enlightening on the point that "[i]t is not necessary for respondents to admit to violations of law for purposes of offering settlements" and in many Commission decisions approving settlements cited in that decision there were no such admissions. The decision emphasized the fact that to require respondents to admit to violations as conditions to accepting their offers of settlement or to use their factual admissions made in seeking settlement against them by finding violations is an objectionable practice forbidden by the Commission's rules of procedure as well as case law. See 21 F.M.C. at 514, n. 7. See also Federal Rule of Evidence, 408, 28 U.S.C.A.

would follow the traditional view that it would approve settlements to avoid wasteful litigation if the parties had appeared to make a sound economical judgment to the effect that the settlement would be less costly and more beneficial than continued litigation, even if one side or the other were to prevail completely after full litigation.

Since the present proceeding is governed by Public Law 96-25 and its implementing regulations, General Order No. 30, 46 C.F.R. 505, concerning compromise and settlement of penalties, the Commission's statements in *Behring* are especially relevant to this case. In regard to that new law and the regulation cited, the Commission remarked that it "did not intend to frustrate settlements in its formal proceedings" when it enacted General Order No. 30 and that it intended that if a settlement were approved, it would be placed in the initial and final decisions "in lieu of making findings of violations." The Commission discussed the criteria to be employed when determining reasonableness of settlements, among which are those cited above which are set forth in 4 C.F.R. 101-105, namely, respondent's ability to pay (4 C.F.R. 103.2); litigative possibilities (4 C.F.R. 103.3); cost of collecting the claim (4 C.F.R. 103.4); effect on enforcement policy, i.e., deterrent effect (4 C.F.R. 103.5); and settlement for a combination of these stated reasons (4 C.F.R. 103.7). This was not intended to be an exclusive list of criteria. For example, the Commission also stated that it would consider specific mitigating factors when passing upon penalty settlements, such as a respondent's history of good behavior, its cooperation with the Commission's staff, and its prompt remedial action. Of course, in this very case, the Commission's Order of Investigation and Hearing directed the parties and myself to consider "factors in possible mitigation. . . ." (Order, p. 9.)

In the present case my first task is to determine whether, as Hearing Counsel and respondent both argue, the settlement meets the various criteria enumerated above. More specifically, I must also determine whether the particular provisions of the settlement fall within a zone of reasonableness, i.e., whether requiring payment of $350,000 and imposing strict auditing and other controls is too lenient judging by the apparent probable worth of the government's case or whether it is too onerous judging by the same standard. This was one of the considerations which led the Commission to conclude that the settlement in *Behring* was just and reasonable. *See Behring*, cited above, 23 F.M.C. 988 ("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"). The idea that a presiding judge, the Commission, or a court will exercise certain functions when reviewing settlements under established criteria, however

limited by the strong policy favoring settlements, has been established in case law. See discussion in *Old Ben*, cited above, 21 F.M.C. at 513-514. A very important consideration in determining the reasonableness of a settlement, as both case law and the Commission's regulations cited above show, is the factor of weighing the value of the government's or complainant's case with due regard to litigative risks. Thus, as one court stated:

> Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically. The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *State of West Virginia v. Chas. Pfizer Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971), cited in *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. at 513.

To similar effect see the recent decision of the Supreme Court in *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, 67 L.Ed.2d 59, 67 (1981). In that case the Supreme Court reversed lower courts which had refused to approve a settlement, allowing an unusual interlocutory appeal because rejection of the settlement by the lower courts caused the parties irreparable harm by forcing them to forego their agreement and give up the immediate benefits that they had obtained from the settlement agreement in favor of costly litigation. The Court stated, among other things, that "Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." 67 L.Ed.2d at 67 n. 14. (The Court also stated that the courts, in reviewing settlements, "do not decide the merits of the case or resolve unsettled legal questions." *Id.*)

WHY THIS PARTICULAR SETTLEMENT WARRANTS APPROVAL

When the proposed settlement is considered in light of the above factors, it is readily apparent that both Hearing Counsel and respondent are correct in urging its approval. In brief, Hearing Counsel, on behalf of the Commission, has obtained immediate concrete results by means of the settlement which are justified by the scope of the case and the efforts already exerted by Hearing Counsel and the staff, and are

avoiding the risks and great expense of continued lengthy litigation. Respondent has also avoided the great costs which it would have had to absorb if it were required to mount its defense in formal trial-type hearings added to the huge costs already borne in attorney's and other litigation fees and costs. Under the terms of the agreement, as described above, Hearing Counsel have obtained agreement that respondents will ultimately pay the Commission an unprecedented sum of $350,000 in settlement of penalty claims, will institute unprecedented audits and internal controls, and will even reassign certain key personnel to ensure strict compliance with the law. All these things will happen if the Commission approves the proffered settlement agreement. If the Commission chooses to reject the settlement, however, these immediate benefits are lost and in their place the Commission must face up to the fact that its limited resources will be tied up in lengthy formal litigation which, judging from the scope of the case (a five-year investigation of 15 offices of K & N) will consume at least another year's time before the formal evidentiary record can be compiled. Three attorneys in the Office of Hearing Counsel have already been working on this case together with at least seven Commission investigators. Massive amounts of documents have already been obtained from respondent's offices throughout the country and many more would have to be procured, assuming they were still in existence. A half dozen or so discovery motions are still pending before me. If the case were to continue into litigation, these and probably more motions would have to be decided and District Court intervention for enforcement purposes is quite possible. Although thousands of documents have already been scrutinized and ten employees of respondent have been deposed, the Commission's Order of Investigation and Hearing frames 15 or more issues covering five years' time involving the many offices of K & N scattered throughout the country. Here, continued litigation would tie up the present Commission personnel assigned to the case and perhaps many more people for at least another year. Although discovery began immediately with the issuance of the Commission's Order in April 1980, eight months later, when settlement discussions had begun and thousands of materials had been assembled, it was obvious that Hearing Counsel were still far from being ready to proceed into formal hearings with all of their evidence. (See Hearing Counsel's Memorandum, p. 30.) In short, although much has been done to gather evidence through the efforts of many members of the Commission's legal and investigatory staff, much more remains to be done if the literal commandment of the Commission's Order to conduct such a massive investigation must be followed despite the fact that a fair and reasonable settlement has been achieved. It indeed seems foolhardy to commit the limited resources of the Commission to such lengthy litigation with ensuing costs and uncertain results when immediate benefits can be achieved by approving the

proffered settlement. As the court said in *Cities of Lexington, Georgetown, Winchester, Kentucky v. Federal Power Commission*, 295 F.2d at 121, in a quotation I repeat:

> No court of law would tolerate for a moment the idea that it would be obliged to try a case that had been assigned for hearing notwithstanding the fact that the parties had reached a settlement of the controversy. Much less should such a contention be considered . . . with reference to the ruling of an administrative tribunal where liberality of procedure is essential in the interest of the dispatch of business.

True, this is a Commission investigation and the Commission obviously has the last word on the question of whether it wishes to continue with its investigations and commit its resources to develop the necessary lengthy records in massive investigations. In a recent ruling in Docket No. 80-12, *Dart Containerline Company, Ltd. Possible Violations of Section 16 Second Paragraph and 18(b)(3), Shipping Act, 1916*, Order of Remand, August 18, 1981, 24 F.M.C. 102, the Commission stated that it was unwilling to discontinue the investigation, indicating that additional evidence was readily available. However, the present case is vastly different. In this case Hearing Counsel and staff investigators have already expended much time and effort to develop an evidentiary record and have amassed considerable materials in their endeavors. But much more evidence would have to be uncovered and developed because of the enormous scope of the Commission's Order and it is not clear that such evidence is readily available or that it even still exists among the corporate records. There are, furthermore, constitutional problems concerning certain individual witnesses in this case. In brief, Hearing Counsel have utilized discovery techniques and other staff resources to uncover evidence and have developed a sufficient body of evidentiary materials which support the conclusion that it is indeed economically prudent to terminate litigation at this stage of the proceeding and to accept the benefits of a carefully negotiated settlement agreement. However, rejection of the settlement agreement would, as Hearing Counsel state, "consume vast amounts of the Commission's resources," tying up Commission attorneys and "investigators from all of the Commission's field offices." (Hearing Counsel's Memorandum, p. 30.) I therefore agree with the statements of Hearing Counsel as follows:

> The Bureau submits that the adoption of the proposed settlement would serve to conserve the vast amount of time and expense that would otherwise be expended by the Commission in litigating this case. In that the Commission's resources, both in terms of funds and staff, are limited, they should be allocated so as to produce the optimum public benefit. The Bureau believes that due to the measures Kuehne & Nagel has agreed

> to implement as part of its offer of settlement, the public interest would be well served by the proposed settlement. Therefore, it is the Bureau's position that the resources that would otherwise be consumed in litigating this case would be better utilized in other regulatory matters. (Hearing Counsel's Memorandum, pp. 30-31.)

As indicated above, I am convinced that it is sound and most prudent for the Commission to approve the proffered settlement agreement under the simple proposition that the Commission would save considerable time and money and would achieve immediate results which are consistent with its own budgetary interests as well as protective of the public interest. In so doing, the Commission would be neither surrendering a good case for a pittance nor exacting an exorbitant penalty from respondent. That is because the evidentiary materials already assembled by Hearing Counsel indicate a good possibility that the variety of violations of law specified in the Commission's Order can be proved. As I discussed above, Hearing Counsel have assembled evidentiary materials from respondent's own records and from other sources which appear to show that K & N engaged in numerous instances of inflating and otherwise incorrectly billing their clients and of receiving "excess compensation" from three carriers, and believe these materials show that K & N was acting pursuant to an unfiled section 15 agreement with certain carriers and was obtaining transportation in some instances for less than applicable rates and charges in violation of section 16. Hearing Counsel also apparently are prepared to prove that these various objectionable activities occurred at various offices of respondent at various times during the period April 1975 through April 1980 and that they occurred with the knowledge of highlevel corporate officers of respondent. Hearing Counsel also believe they have evidence of certain obstructive behavior of certain employees of respondent concerning the present investigation. There are, of course, possible defenses which K & N would assert if the case proceeded to trial at some time far in the future after Hearing Counsel and respondent had fully utilized all of their discovery rights. For example, the question of whether receipt of "excess compensation" by a licensed forwarder was unlawful has not been definitively decided nor has it ever been found, as far as I am aware, that a section 15 agreement existed when forwarders received "excess compensation" from carriers. My point, of course, is that Hearing Counsel seem able ultimately to put on a strong case, that fact shows that the payment of $350,000 and strict internal controls required by the settlement agreement are not unduly exorbitant or onerous, and Hearing Counsel are not throwing away a good case. On the other hand, if full-blown trial is had and K & N presents its various legal and factual defenses, there is certainly a risk that Hearing Counsel will not be able to prove any or all of the violations and may not be

able to justify the assessment of $350,000 in penalties or the imposition of the strict controls and audits which respondent will voluntarily institute upon approval of the settlement agreement. Finally, it should be noted that it is hard to conceive of what more the Commission could accomplish by continuing formal hearings looking to penalties and remedial orders than would already be accomplished by approval of the settlement agreement. The many stringent internal controls, audits, and reporting requirements, and even reassignment of certain key personnel which respondent will implement if the settlement agreement is approved are already unprecedented in scope. One could hardly expect a formal order after a lengthy trial to go beyond these measures. As to the payment of $350,000 in settlement of penalty claims which K & N will make under the terms of the settlement agreement, the evidence of record shows that this amount is already at the limit of what the corporation can afford to expend without throwing its financial situation into precariousness. Therefore, a formal assessment order following lengthy proceedings cannot reasonably be expected to exceed what has already been agreed to by respondent in the settlement package. This discussion again illustrates the imprudence of rejecting such a settlement in favor of committing the Commission's resources to many more months of staff investigation and formal trial-type hearings with attendant costs of and risks of such litigation.

The above discussion demonstrates that the settlement agreement comports with at least three of the criteria set forth in the Commission's regulations (General Order 30 revised, 46 C.F.R. 505.1, incorporating 4 C.F.R. 103). *See Behring International, Inc.*, cited above, 23 F.M.C. at 986. These are litigative possibilities (4 C.F.R. 103.3); cost of collecting the claim (4 C.F.R. 103.4); and respondent's inability to pay (4 C.F.R. 103.2).[6] Although Hearing Counsel's case appears to be potentially strong, there are possible legal and factual defenses, the cost of committing the Commission's limited resources to full litigation in

[6] In pertinent part the regulations describing the criteria of litigative possibilities, cost of collecting the claim, and respondent's inability to pay are as follows respectively:

> A claim may be compromised pursuant to this part if there is a real doubt concerning the Government's ability to prove its case in court for the full amount claimed either because of the legal issues involved or a bona fide dispute as to the facts. The amount accepted in compromise in such cases should fairly reflect the probability of prevailing on the legal question involved, the probabilities with respect to full or partial recovery of a judgment having due regard to the availability of witnesses and other evidentiary support for the Government claim, and related pragmatic considerations. . . . (4 C.F.R. 103.3.)
>
> A claim may be compromised pursuant to this part if the cost of collecting the claim does not justify the enforced collection of the full amount. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time which it will take to effect collection. . . . (4 C.F.R. 103.4.)
>
> A claim may be compromised pursuant to this part if the Government cannot collect the full amount because of (a) the debtor's inability to pay the full amount within a reasonable time. . . . (4 C.F.R. 103.2.)

this one huge case ought to be saved if possible by accepting respondent's agreement to pay substantial sums of money and to institute strict controls, and respondent's marginally profitable or recently unprofitable history illustrates that penalty payments in excess of the $350,000 agreed to in the settlement are not very realistic. Hearing Counsel quite properly point out that pursuit of additional sums of money beyond the agreed-upon amount to something approaching the statutory maximum would be "draconian," not remedial, and would probably serve to drive respondent out of business. (Hearing Counsel's Memorandum, p. 34.) Moreover, such a vindictive, punitive expedition without regard to respondent's inability to pay would depart from Commission precedent in previous forwarder cases when respondents' precarious financial situations and inability to pay were given due consideration. *See, e.g., Emmett I. Sindik - Freight Forwarder License Application*, 23 F.M.C. 731; *Billie Ione Crtalic et al. - Possible Violations of Section 44(a)*, 23 F.M.C. 565.

Another important criterion set forth in the Commission's regulations which the proposed settlement agreement satisfies is that relating to the Commission's enforcement policy, i.e., aid to this policy because of the deterrent effect and ensurance of compliance with law which the settlement offers. In pertinent part this regulation states:

> Statutory penalties . . . established as an aid to enforcement and to compel compliance may be compromised . . . if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon. (4 C.F.R. 103.5.)

It is clear that the proposed settlement will have a deterrent effect and will ensure compliance both by K & N and generally by the forwarding industry as well. The settlement payment is the largest amount to be collected from a forwarder, respondent has terminated the questionable practices, and the measures to be instituted by K & N to prevent recurrence are innovative and unprecedented. Under the terms of the settlement, K & N will do much more than merely notify its employees of proper conduct and modify its procedures. It will undertake at its own expense to have all its books and records audited at least annually for three years by an independent expert in Commission freight forwarder regulation, imposes fines on itself in case the auditor uncovers irregularities, requires reports to be made to the Commission in case the Commission wishes to take further action, and it will require all of its officers to submit sworn affidavits attesting to their business conduct during the preceding year under criminal penalties for false statements. It will even bar certain officers from policy-making and management positions for a period of one year. All of this will be done under the proposed agreement apart from K & N's own

program begun in 1977 to identify and eliminate possible violations of law. Again, it is hard to imagine more stringent controls and devices which could be imposed upon K & N as a result of formal orders emanating from the conclusion of a lengthy formal hearing process, even assuming that all of the alleged violations of law could be proven and that there were no valid defenses to any of them. As far as the specific amount of payment in settlement of the claims is concerned ($350,000), not only is it apparently the highest ever to be collected from a forwarder, but there is evidence showing that it will eradicate any possibility that K & N has reaped any financial benefit from its alleged misconduct. Whatever the amount of income derived by K & N from the practices in question was, the $350,000 payment plus the already expended $200,000 in legal fees in this case, plus the payment of corporate income taxes on such income would appear to remove any economic benefit from the practices in question. Added to these expenses are the additional costs to K & N stemming from publicity of this investigation, which evidence of record shows to have occurred in the form of loss of business and competitive harm.[7] These factors indicate that K & N has absorbed costs and suffered substantial harm which, added to the payment of $350,000, will act as a deterrent and ensure compliance with law in the future.

Finally, the proposed settlement seems approvable in consideration of mitigating factors and a combination of the reasons set forth under the various criteria described above. Both the regulations (4 C.F.R. 103.7) which authorize a compromise of a claim "for one or more than one of the reasons authorized in this part" and the Commission's Order (p. 9) requiring consideration of "factors in possible mitigation" justify consideration of these matters. Relevant to these factors are not only the substantial harm to K & N's business and its difficult financial situation which has become aggravated by the investigation, as discussed above, but the fact that K & N has cooperated in furnishing evidence and in proposing innovative controls to ensure full compliance with law, has terminated the practices in question, and had itself begun to investigate irregularities before this proceeding commenced. As discussed below, furthermore, there is some evidence that part of the trouble stemmed from the fact that certain employees were more familiar with European

[7] According to the confidential affidavit of Mr. Stoppenbrink, Vice-Chairman and Treasurer of respondent, K & N's future earning capacity has been impaired by the adverse publicity from this case and the suspension of key officers, causing a loss of clientele and requiring a fresh start in building customer relations and employing new officers. (Affidavit, para. 7.) Mr. Stoppenbrink actually identifies 12 important corporate clients who ceased doing business with K & N or, in some instances, delayed signing contracts with K & N because of this proceeding. (See Attachment "B" to the Stoppenbrink affidavit.) He also states that K & N's competitors have used the publicity of this investigation to disparage K & N in the mind of clients and that this adverse situation is especially harmful in view of K & N's financial results. (Affidavit, paragraphs 7-10.)

methods of forwarder conduct rather than those required by American law and that certain practices may have been instigated not as company policy but on the personal initiative of some employees unbeknownst to the corporate owners.

THE QUESTION OF FITNESS

The question of fitness of K & N to continue to operate under its license without suspension or revocation now remains for determination. This is the last issue (no. 15) framed in the Commission's Order (p. 9), and it is also mentioned in issue No. 13 in the Order. As decided in previous Commission cases, the issues of fitness in freight forwarder cases cannot be settled by the parties. *See Behring International, Inc.*, 23 F.M.C. 989; *Independent Freight Forwarder's License—E. L. Mobley, Inc.*, Order, 21 F.M.C. 845. Consequently, both parties have developed an evidentiary record and have taken positions so as to enable me to determine the question.

Respondent argues that the drastic sanction of revocation or suspension should not be invoked because the regulatory purposes of the freight forwarder law will be fully served as a result of K & N's undertakings in the settlement agreement and other facts. Respondent cites Commission and court cases which emphasize that the Commission does not view the freight forwarder statute as a vindictive, punitive tool designed to wipe out ongoing businesses but rather as a remedial device enacted to correct abuses in the forwarding industry. Moreover, the Commission has followed the principle of fashioning sanctions only after considering mitigating factors and has employed less drastic alternative measures suitable to the facts of record. Respondent points out its cooperation in furnishing evidence, its readiness to institute strict controls, its previous clean record before the Commission, its demonstrated eagerness to correct and prevent abuses, and its 14-year old business employing over 450 persons in many cities who would be out of work to show that revocation or suspension would be an unduly drastic sanction to employ.

Hearing Counsel also do not believe that revocation or suspension is warranted under the facts in this case. Hearing Counsel recognize that revocation is an "extreme sanction" and that it is justified in cases in which the forwarder does not demonstrate its good-faith intention to adhere to the high standards of conduct mandated by law and the Commission's regulations or if the forwarder shows by its conduct that it is unable to maintain the high standards of professional conduct, responsibility, and integrity which a licensee must demonstrate to merit serving the public in a fiduciary capacity. However, Hearing Counsel also cite previous Commission decisions in which the Commission has shown that it does not view the freight forwarder law as vindictive but as remedial and in which the Commission will fashion appropriate

remedies after considering all mitigating factors. Moreover, these decisions of the Commission also illustrate the principle that the Commission will look at respondent's present behavior, not just its past, to determine if the respondent can be trusted to comply with law in its future operations. Hearing Counsel do not condone K & N's past conduct which, had the case proceeded to trial, Hearing Counsel believe would show to have constituted serious violations of law. However, Hearing Counsel, following Commission precedent, view K & N's circumstances "as they presently exist" and these circumstances show that K & N has demonstrated its commitment to terminate all questionable conduct. Thus, as Hearing Counsel state:

> It has made a disclosure as to its past course of conduct and has agreed to pay a substantial civil penalty arising out of that course of action. It has developed and proposed to implement a detailed and innovative system of controls and reports, both within and without the corporate structure, that is designed to prevent a reoccurrence of past practices. Further, significant personnel changes have been undertaken to assure that future conduct will be in compliance with the Shipping Act, 1916, and the Commission's General Order 4. (Hearing Counsel's Memorandum, p. 40.)

The above facts convince Hearing Counsel that K & N "has demonstrated a willingness to modify its future conduct to assure future compliance with pertinent authority" (Hearing Counsel's Memorandum, p. 40) and that it should therefore be found fit to continue to be licensed. I agree with both parties that revocation or suspension is an unnecessary and excessive sanction in view of the unprecedented undertakings to which K & N has committed itself to ensure strict compliance with law and the various other mitigating factors mentioned above and discussed below. In view of K & N's present financial setback, in some measure caused by the adverse publicity of this case, moreover, even suspension would be unwarranted as it may well jeopardize the continuance of an ongoing business and the jobs of hundreds of employees. Finally, the record indicates that to some extent the corporate respondent might have become involved in the questionable practices because of the reliance of certain employees on European standards of forwarding, which are inconsistent from American, and unawareness of corporate owners that proscribed conduct was occurring.

There is no question but that the Commission has exercised care in fashioning remedial orders in freight forwarder cases to ensure compliance with law and protect the public against unfit forwarders and that the Commission has not merely hurled draconian decrees wiping out businesses by revoking or suspending licenses when there have been mitigating circumstances. In *Behring International, Inc.*, the Commission again confirmed this reasonable doctrine, relying upon earlier decisions.

The Commission, by adopting the Initial Decision, stated (23 F.M.C. 992):

> ***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 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.
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> * * * * *
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> 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. 22 F.M.C. at 598.(Emphasis in original.)

These quotations illustrate that the Commission is primarily interested in fashioning reasonable sanctions to ensure compliance with law, not in hurling vindictive decrees nor in destroying ongoing businesses if the forwarders involved demonstrate that they will comply with law and be trustworthy in their future operations. Even when found to have violated law, furthermore, the quotation shows that this alone does not necessarily require revocation or suspension provided there are mitigating factors. Evidence of past violations, as Hearing Counsel point out, "although they do constitute a major factor in the Commission's determination as to whether a license should be denied or revoked, are not dispositive of an individual's fitness to be licensed." (Hearing Counsel's Memorandum, p. 38, citing *Cargo Systems International (CSI) - Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916,* 22 F.M.C. 57, 71-72 (I.D., administratively finalized, August 10, 1979). The doctrine that past violations do not

forever poison a person's chance to obtain a license or permit and that evidence of such violations is only one factor to be weighed in determining fitness, I might add, is supported in the courts. *See, e.g., Florida-Texas Freight, Inc. v. United States,* 373 F. Supp. 479, 483 (S.D. Fla. 1973), affirmed, 416 U.S. 976 (I.C.C. granted permit to forwarder even though forwarder had operated without a license contrary to law). This Commission has similarly granted authority to parties wishing to operate under section 15 approval even though the parties had violated that law by operating without necessary approval. *See Agreements Nos. T-1685, T-1685-6 & T-3130,* 19 F.M.C. 440, 454 (1977), and the four cases cited therein. *See also Ikeda International Corp.*, 22 F.M.C. 799 (1980) (no revocation or suspension despite past violations).

In the present case, of course, although Hearing Counsel believe they could prove that K & N's admitted past conduct was violative of law if the case had to proceed to formal trial and decision on all these questions and although, as I have discussed above, they appear to have a good chance of proving many or all of their allegations, there is no finding of violation. However, even assuming that all of the past violations were proven, this, as I have said, is only one factor to be weighed and what is possibly more important, as Hearing Counsel have argued, is to consider what is K & N's present attitude and what are the prospects that K & N will be completely trustworthy. As noted in *Independent Ocean Freight Forwarder License Application Guy G. Sorrentino,* 15 F.M.C. 127, 136 (1972):

> In making a determination as to applicant's "fitness," i.e., whether he can be relied upon and trusted to carry on the profession of freight forwarder in an honorable and responsible fashion, *we should look at all the circumstances of the applicant's case as they presently exist* and not only at that part of his overall conduct and business operation which failed to meet the required standards. (Emphasis added.)

Under this realistic and reasonable standard, Hearing Counsel correctly point out that the unprecedented controls and reforms which K & N has and will institute quite amply demonstrate its present and future trustworthiness and, consequently, its fitness as defined by the Commission in such cases as *Harry Kaufman D/B/A International Shippers Co. of N.Y., etc.*, 16 F.M.C. 256, 271 (1973); *Guy G. Sorrentino*, 15 F.M.C. at 134; *Application for Freight Forwarding License: Dixie Forwarding Co., Inc.*, 8 F.M.C. 109, 118, reversed on other grounds, 8 F.M.C. 167 (1964); *Independent Ocean Freight Forwarder Application—Alvarez Shipping Co., Inc.*, 16 F.M.C. 78 (1973); *G.R. Minon-Freight Forwarder License*, 12 F.M.C. 75 (1968). These cases emphasize not only the need for high standards of professional and moral conduct as befitting a fiduciary but also the need to determine whether the forwarder can be deemed fit by considering evidence as to whether the

forwarder will truly conduct itself in full compliance with law and with such high standards, in other words, whether the Commission and the public can trust the forwarder in dealing with it on the basis of present evidence after considering a past history of misconduct. Given the elaborate reforms instituted or to be instituted by respondent which demonstrate its commitment to future unimpeachable conduct, it is difficult to argue that respondent should be found to be unfit, i.e., untrustworthy, now and for the future because of past errors, even if such errors were all found to be violations of law.

In finding that respondent is fit to retain its license and to continue serving its clients, I have also considered a variety of mitigating factors in addition to the fact that respondent will institute many strict internal controls and audits pursuant to the settlement agreement and has terminated the practices in question. Some of these factors in mitigation have been discussed above relating to the fact that respondent has cooperated in furnishing evidence, even of transactions which were of doubtful legality but which were not specified in the Commission's Order and as to which the documentary evidence is sparse or no longer exists (the so-called "Bremen transactions" in which an affiliate of K & N in Bremen had in the past shared money from carriers with respondent). Moreover, respondent has terminated the practices questioned in the Commission's Order and, long before this investigation formally commenced, had itself instituted internal investigations to rid itself of irregularities.

K & N has been a licensed forwarder for 14 years offering a complete forwarding service to its clients. It has valuable worldwide connections and can therefore help develop new markets for American exporters. Prior to this formal investigation, K & N's record had been generally clean, as far as the record before me shows. Upon commencing forwarding operations in the United States, K & N apparently had to rely upon personnel brought over from Germany who were not familiar with the different standards of law applicable to forwarders in this country which varied from the standards observed in Europe. When K & N's operations expanded, they appear to have outstripped its staff's ability to maintain strict controls in accordance with U.S. practices.

In June 1976, K & N, through its Chairman, Mr. K. M. Kuehne, issued a Statement of Business Principles, stressing the necessity of adhering to applicable laws and regulations. In August 1976, K & N's Board of Directors took steps to correct certain irregularities which had occurred at its Houston office, not only rectifying errors to its customers but taking certain disciplinary actions against the Houston Branch Manager. In 1977 K & N began an internal audit, bringing in people from its Canadian operation to help, later expanding the audit by augmenting the auditors with a team from Switzerland. Still later a

permanent auditor was appointed to conduct an ongoing audit beginning in late 1979. As a result of these audits, K & N discovered improprieties and corrected them. The results of the audits led to the appointment of a new management team and corrective personnel action including reassignment and in one case apparently even termination of employment. To some extent it appears that the corporate respondent's business was adversely affected because of conduct initiated by certain employees and not by company policy. (These facts are discussed in greater detail in Mr. Kuehne's Confidential Affidavit, in the Confidential Affidavit of Mr. Stoppenbrink, K & N's Vice-Chairman/Treasurer, and in the latter's "Confidential Affidavit of Disclosure.")

ULTIMATE CONCLUSIONS

I find that the proposed settlement agreement which Hearing Counsel and respondent have negotiated is fair and reasonable and ought to be approved by the Commission. The agreement would produce immediate concrete results in the form of strict internal controls, independent audits and reports, payments of claims to shippers if necessary, reassignment of certain employees, and payment of an unprecedented amount of money in lieu of penalties (payments to be made in installments over a period of time). It is difficult to argue persuasively that the Commission should throw away all of these tangible results in favor of resumption of formal hearings and the multiple phases of litigation which promise to consume many months and even years of time, tying up scarce Commission resources in personnel and funds on this one case with uncertain prospects. Based upon respondent's current financial posture, the amount of payment to be made already appears to be at the maximum limit which K & N can bear and the many controls, audits, and reports should prevent recurrence of any objectionable practices and ensure that K & N will comply strictly with all applicable laws and regulations. Approval of the settlement, therefore, seems eminently prudent both from the view of allocation of Commission resources and of the public interest in ensuring respondent's strict compliance with law. The settlement agreement also follows the various criteria set forth in the Commission's regulations relating to respondent's ability to pay, litigative possibilities, cost of collecting the claim, effect on the Commission's enforcement policies, and considers factors in mitigation. Although the settlement appears to be substantial in terms of payment of money and the various audits and controls to be imposed, the evidentiary record which Hearing Counsel have developed is correspondingly substantial in scope and seriousness and the probabilities that Hearing Counsel could prove many or all violations charged in the Commission's Order were the case to complete the discovery phase and proceed into formal, trial-type hearings seem fairly good although not

without risks and, of course, not without considerable costs to the Commission and its staff. In short, the settlement neither throws away a good Government case for nothing nor extracts an exorbitant penalty from respondent considering the type of evidence which Hearing Counsel would have developed and would proffer into evidence if trial were to be had. Every relevant statement of courts, the Commission, and even of Abraham Lincoln strongly favors settlement over expensive and risky litigation and this case illustrates why.

The question of respondent's fitness to retain its license, according to Commission precedent, cannot be settled. On this issue the parties have submitted evidence and separate arguments, both urging me not to find respondent unfit. The Commission has frequently shown that it will act with reason and moderation when fashioning sanctions in forwarder cases and will not resort to drastic revocations and suspensions of licenses except in extreme cases when nothing less will suffice to protect the public. In this case the record supports moderation. Although the various charges brought against K & N are many and serious, K & N has itself taken corrective action and will, under the settlement, pay for stringent controls and audits to ensure against recurrence of any objectionable practices. K & N has also cooperated in obtaining and furnishing evidence, has a previous clean history before the Commission, has provided full services for its American clients for 14 years, employs 450 people, has suffered financially and competitively from adverse publicity stemming from this case, and has done virtually everything that one could ask in fashioning measures to guarantee to the Commission and to the public that it will follow all the requirements of freight forwarder law scrupulously. To some extent, furthermore, K & N, which is a corporation, appears to have suffered adversely from the questionable conduct of certain employees who were not acting in pursuance of company policy and who were schooled in European standards of forwarding rather than American. Further sanctions against K & N in the form of revocation or even suspension of its license would not only jeopardize a worthwhile business helpful to American exporters but would mark a departure from the Commission's previous decisions to fashion reasonable remedies, not vindictive punishments, in forwarder cases.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX

BEFORE THE FEDERAL MARITIME COMMISSION

KUEHNE & NAGEL, INC.
INDEPENDENT OCEAN FREIGHT
FORWARDER LICENSE NO. 1162

DOCKET NO. 80-20

PROPOSED SETTLEMENT

This Proposed Settlement is entered into between the Bureau of Investigation and Enforcement ("Bureau") and Respondent Kuehne & Nagel, Inc. ("Respondent"), the only parties ("the Parties") to this proceeding. This Agreement is submitted to the Presiding Administrative Law Judge pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.162) and section 505.3 of the Commission's General Order 30 (46 C.F.R. 505.3) and is to be included in the Final Order in the proceeding if so approved.

WHEREAS, by Order of Investigation and Hearing served April 3, 1980, the Commission instituted a formal investigation of Respondent's activities, including a determination of whether civil penalties should be assessed for possible violations of the Shipping Act, 1916, and/or the Commission's Rules and Regulations;

WHEREAS, the April 3, 1980 Order of Investigation and Hearing recites that Respondent may have engaged in violations of sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. §§ 814 & 815) and sections 510.23 (d), (e), (f), (j),(k), and (l) of the Commission's General Order 4 (46 C.F.R. 510.23 (d), (e), (f), (j), (k) & (l));

WHEREAS, Respondent has admitted that it has engaged in specified conduct that may be violative of sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916, and sections 510.23 (d), (e), (f), (j), (k) and (l) of the Commission's General Order 4;

WHEREAS, Respondent has terminated the allegedly violative conduct and has instituted and has indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent such conduct in the future;

WHEREAS, the Parties are desirous of expeditiously settling this matter according to the terms and conditions of this Agreement and wish to avoid the delays and expense to both the Parties that would accompany further agency litigation concerning the activities set forth in the April 3, 1980 Order of Investigation and Hearing;

WHEREAS, Public Law Nos. 92-416 and 96-25 authorize the Commission to collect and compromise civil penalties arising under the Shipping Act, 1916, including the civil penalties that might arise from the alleged violations set forth and described herein;

NOW, THEREFORE, in consideration of the premises set forth herein, and the compromise of all civil penalties under the Shipping Act, 1916, arising from violations of the Act and the Commission's General Order 4, as set forth and described herein, that the Commission believes may have been committed during the period April, 1975 through May, 1980, Respondent agrees as a condition of this Agreement to comply with all requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

(1) Respondent hereby agrees, as a condition of this Agreement, to pay to the Federal Maritime Commission the sum of Three Hundred and Fifty Thousand Dollars ($350,000) in full settlement of all claims for civil penalties arising under the Shipping Act, 1916, and the Commission's General Order 4 from violations that the Commission believes may have been occasioned by the activities of Respondent that are referred to in the Commission's April 3, 1980 Order of Investigation and Hearing and by the "Bremen" transactions that are set forth and described in the factual record submitted in the present proceeding and that occurred during the period April, 1975 through May, 1980.

(2) Payment of said Three Hundred and Fifty Thousand Dollars ($350,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix "1".

(3) Respondent has terminated all practices such as those described in the Commission's April 3, 1980 Order of Investigation and Hearing, and has informed all of its owners, officers and employees and the owners, officers and employees of all of its parents, subsidiaries and affiliates in writing, that such practices, and all practices not in accordance with the provisions of the Shipping Act, 1916, and the Commission's Rules and Regulations now in force or that may be adopted, are contrary to Respondent's company policy, must be terminated immediately and must not be engaged in at any time. A copy of such notice is attached hereto as Exhibit "A".

(4) Respondent will, within thirty (30) days following final approval of this Proposed Settlement, furnish a copy of Exhibit "A" hereof to all its owners, officers and employees, and to all the owners, officers and employees of its parents, subsidiaries and affiliates; and Respondent will furnish a copy hereof to all future such owners, officers and employees.

(5) Respondent will institute and has indicated its willingness to maintain all reasonable measures designed to eliminate, discourage and prevent the practices that are referred to in the Commission's April 3, 1980 Order of Investigation and Hearing and the practices that are herein referred to as "Bremen" transactions, and to review Respondent's administration, accounting and procedures and modify them to the extent necessary to safeguard against reoccurrence of such practices by Respondent, its owners, officers, employees, Respondent's parents, subsidiaries and affiliates and the owners, officers and employees thereof.

A statement describing those measures is attached hereto as Exhibit "B". Any failure on the part of Respondent to adhere to the measures set forth in Exhibit "B" will be considered a breach of this Settlement Agreement.

(6) Each of Respondent's officers and the qualifying officer of each of its branch offices has executed a statement under oath that he has read and understood this Agreement, and that he will abide by all of its terms and conditions with respect to the termination of the practices set forth and described in the factual record submitted in the present proceeding. These statements are attached hereto as Exhibit "C". For a period of three (3) years following such final approval, all new owners, officers and qualifying branch officers shall submit similar statements. Every officer and qualifying branch officer will submit a new statement annually for a period of three (3) years following such final approval, a form of which is attached hereto as Exhibit "D".

(7) Respondent will, for a period of three (3) years following final approval of this Proposed Settlement, submit annual reports, and such other reports as the Commission may require, to the Commission concerning Respondent's compliance with the terms of this Agreement and with the Shipping Act, 1916, and the Commission's Rules and Regulations, such reports to be submitted in the form the Commission may require and signed under oath by the chief executive officer of Respondent.

(8) Upon final Commission approval of this Proposed Settlement, certain individuals will not act as officers or directors of or in any other policy or managerial capacity for Respondent for one year.

(9) Respondent will, for a period of three (3) years following final approval of this Proposed Settlement, maintain at its offices in New York and each of its branch offices, and make available to the Commission on request, all of the documents which reveal or relate to the practices referred to in the Commission's April 3, 1980 Order of Investigation and Hearing and those practices disclosed to the Bureau.

(10) Except as provided in paragraph eleven (11) below, upon payment of the amount specified in paragraph one (1) above following final approval of this Proposed Settlement by the Commission, this instrument will forever bar the commencement or institution of any civil action or other claim for recovery of civil penalties from Respondent arising from the practices that are referred to in the Commission's April 3, 1980 Order of Investigation and Hearing or the practices that are herein referred to as "Bremen" transactions that occurred during the period April, 1975 through May, 1980 and that the Commission believes constitute violations of the Shipping Act, 1916, and the Commission's Rules and Regulations. It is understood by Respondent that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or any other department or

agency of the United States Government for conduct engaged in by Respondent.

(11) Respondent 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 January 1, 1985, by or on behalf of the Commission, to recover civil penalties for violations of the Shipping Act, 1916, or the Commission's General Order 4 arising out of the conduct that is referred to in the April 3, 1980 Order of Investigation and Hearing and the practices that are herein referred to as "Bremen" transactions. In the event of such a breach by Respondent, if such noncompliance shall not have been explained to the Commission's satisfaction within thirty (30) days after written notice to Respondent by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of the Agreement, or to declare this Agreement null and void; provided, however, that Respondent'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, any monies paid to the Commission shall remain the property of the United States, and Respondent 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.

(12) It is expressly understood and agreed that this Agreement and final approval hereof is not to be construed as an admission by Respondent or its owners, officers, employees, parents, affiliates or subsidiaries to any violations of law, of the Shipping Act, 1916, or of the Commission's Rules and Regulations.

(13) In the event of any changes of law or other circumstances at any time during a period of three (3) years following final approval of the Agreement that Respondent believes warrant modification or mitigation of any of the requirements imposed on Respondent by this Agreement, the Bureau recognizes Respondent's right to petition the Commission to this end.

(14) The undersigned represents that he is properly authorized and empowered to execute this Agreement on behalf of Respondent and to fully bind Respondent to all of the terms and conditions herein.
Kuehne & Nagel, Inc.

____

JOHN ROBERT EWERS, DIRECTOR
Bureau of Investigation and Enforcement

By:____________________

____

JOSEPH B. SLUNT
Attorney

Dated:____________________

____

CHARLES C. HUNTER
Attorney

____

JANET F. KATZ
Attorney

DATED:____________________

APPENDIX I

PROMISSORY NOTE

For value received, Kuehne and Nagel, Inc. (Kuehne and Nagel) promises to pay to the Federal Maritime Commission (the Commission) the principal sum of Three Hundred and Fifty Thousand Dollars ($350,000) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

> Seventy Thousand Dollars ($70,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;
>
> Thirty-Five Thousand Dollars ($35,000) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;
>
> Thirty-Five Thousand Dollars ($35,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;
>
> Thirty-Five Thousand Dollars ($35,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;
>
> Thirty-Five Thousand Dollars ($35,000) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;
>
> Thirty-Five Thousand Dollars ($35,000) on or before thirty (30) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;
>
> Thirty-Five Thousand Dollars ($35,000) on or before thirty six (36) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;
>
> Thirty-Five Thousand Dollars ($35,000) on or before forty-two (42) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;
>
> Thirty-Five Thousand Dollars ($35,000) on or before forty-eight (48) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20.

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. 80-20 and be computed at the rate of twelve percent (12%) per annum.

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, Kuehne and Nagel 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 Kuehne and Nagel 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 Kuehne and Nagel 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 immediate execution on said judgment. Kuehne and Nagel 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 Kuehne and Nagel by bank cashier's or certified check at any time, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

KUEHNE AND NAGEL, INC.

BY:____________________

DATE:____________________

EXHIBIT "A" TO PROPOSED
SETTLEMENT AGREEMENT IN
DOCKET NO. 80-20

KUEHNE & NAGEL, INC.

NOTICE

This is to notify you that it is the policy of this company to strictly adhere to the duties and obligations of a licensed freight forwarder as prescribed by the U.S. Federal Maritime Commission.

This means that this company, its owners, officers and employees will familiarize themselves with applicable provisions of the U.S. Shipping Act, 1916, and Federal Maritime Commission General Order 4, and will abide completely by the provisions contained in these documents. Your attention is directed to the following particular provisions to which strict adherence is required:

(1) Take proper care to give correct information to our shipper clients regarding the charges we incur for them and the charge we make to them for wharfage, insurance, ocean freight, inland freight and other services.

(2) Give correct information to ocean carriers regarding the weight and measurement of shipments.

(3) Do not withhold any information from shipper clients regarding the actual charges for ocean freight, inland freight, and other services.

(4) Promptly pay over monies to ocean carriers within any time limit permitted.

(5) Do not fail to pay to persons other than ocean carriers, e.g., inland carriers, all monies advanced by our shipper clients.

(6) Promptly account and reimburse to our shipper clients for their overpayments to us for all services.

(7) On all invoices and billings to shipper clients state separately the actual amount of ocean freight charges, insured value, insurance rates, insurance premiums, terminal charges, mark-ups, and all other fees and charges for accessorial services; except that with respect to special contracts with clients whereby the client agrees in advance to a lump sum charge, only the ocean and inland freight need be separately stated, and a copy or memorandum of such special agreement is to be maintained.

(8) Maintain currently and correctly all records and books of account in an orderly, systematic and convenient manner.

(9) Keep records so as to enable authorized Federal Maritime Commission personnel to check our cash position, accounts receivable and accounts payable.

(10) Maintain a current running account of overall cash receipts, disbursements, and daily balance, supported by bank deposit slips, paid checks and monthly reconciliation of bank statements.

(11) Maintain a separate file for each shipment, including in each file a copy, or notation of, all documents pertaining to each shipment.

(12) Maintain records showing the date and amount for payments received, and disbursements, for services rendered and reimbursements for out-of-pocket expenses.

(13) Make all books and records promptly available to authorized Federal Maritime Commission personnel upon request.

(14) Do not accept and do not agree to accept, compensation from ocean carriers in excess of the amount provided in the carriers' tariffs on file with the Federal Maritime Commission.

(15) Do not pass to shippers any portion of the compensation received from ocean carriers, give shippers any benefit on account of such compensation, or obtain transportation at other than applicable rates.

The foregoing list of freight forwarder duties and obligations is for example only, and you are directed to adhere to all other obligations by the Shipping Act, 1916, and General Order 4.

If you become aware that any ocean carrier is offering excess compensation or that any other forwarding company may be engaging in any unfair practices or in apparent violations of the Shipping Act or of General Order 4, report this immediately to your supervisor.

Please sign the attached copy of this notice in the space provided, and return it within two days to G.H. Stoppenbrink, Kuehne & Nagel, Inc., One World Trade Center, New York, New York.

I, ________________________________, hereby acknowledge that I have read the foregoing notice and agree to adhere to it completely.

____

TITLE:
OFFICE:

____

DATE

EXHIBIT "B" TO PROPOSED
SETTLEMENT AGREEMENT IN
DOCKET NO. 80-20

Kuehne. & Nagel, Inc. has adopted and will maintain the measures set forth below in order to eliminate, discourage and prevent all practices which violate the U.S. Shipping Act, 1916, and U.S. Federal Maritime Commission General Order 4:

For a period of three years following final Commission approval of the Settlement in Docket No. 80-20, Kuehne & Nagel, Inc. will permit an independent audit of all its books and records located in the United States, as described below.

(1) The audit will be conducted by Mr. Charles Clow, or such other independent auditor as may be named, who will have complete authority to examine any and all records, located in the United States, of Kuehne & Nagel, Inc. or any of its branch offices (see Attachment "1" hereto); and upon the issuance of a written statement by Mr. Clow that he has been denied access or reasonable cooperation in any investigation of any of Kuehne & Nagel, Inc.'s records, he will so certify to the Federal Maritime Commission, and said action by Kuehne & Nagel, Inc. will be conclusively considered to be a breach of its Settlement Agreement of even date with the Commission.

(2) Mr. Clow will be authorized to audit Kuehne & Nagel, Inc.'s books and records for the purpose of detecting violations of Federal Maritime Commission freight forwarder regulations and/or Sections 16, Initial Paragraph, and 44 of the Shipping Act, 1916, as amended; and all findings of violations of said regulations or Act will be conclusive and binding upon Kuehne & Nagel, Inc.

(3) The audits will take place no less frequently than once every twelve months for each Kuehne & Nagel, Inc. office, and at such other times as Mr. Clow determines in his sole discretion with or without prior notice to Kuehne & Nagel, Inc.

(4) Mr. Clow will notify Kuehne & Nagel, Inc. in writing of all findings of violations of said regulations or Act; and in the case of intentional violations or a continuing pattern of negligent violations by Kuehne & Nagel, Inc. as determined in Mr. Clow's sole discretion, Kuehne & Nagel, Inc. will, within sixty days of the date of such notification, pay an amount equal to twice any improperly retained monies to the shipper, consignee, carrier or other person involved as the case may be. Proof of any such payments will be provided by Kuehne & Nagel, Inc. to the Federal Maritime Commission with supporting documentation. Mr. Clow will report the results of all audits to the Federal Maritime Commission, and any failure of Kuehne & Nagel, Inc. to make the payments as herein provided will be considered a breach of its Settlement Agreement of even date with the Commission.

(5) Any such findings of violations and monetary payments will not be in derogation of any Federal Maritime Commission authority or obligations under said regulations or Act.

____

[NAME]
[TITLE]

ATTACHMENT "1" TO
EXHIBIT "B" TO
PROPOSED SETTLEMENT AGREEMENT
IN DOCKET NO. 80-20

[K&N LETTERHEAD]

Mr. Charles Clow
815 - 15th Street, N.W.
Suite 525A
Washington, D.C. 20005

Re: *Audit of Kuehne & Nagel, Inc.*

Dear Mr. Clow:

This is to set forth the terms of our agreement that you provide the necessary services to audit the ocean freight forwarding practices of Kuehne & Nagel, Inc.

Pursuant to a Settlement Agreement in Federal Maritime Commission Docket No. 80-20, Kuehne & Nagel, Inc. has undertaken to adopt measures to eliminate and prevent practices by Kuehne & Nagel, Inc. which violate the U.S. Shipping Act, 1916 and Federal Maritime Commission freight forwarder regulations.

To accomplish this, Kuehne & Nagel, Inc. has authorized you to conduct an independent audit of all the books and records of Kuehne & Nagel, Inc. and all its branch offices. This auditing is to continue for a period of three years following final Federal Maritime Commission approval of the Settlement Agreement. The audits will take place at least once every twelve months for each Kuehne & Nagel, Inc. office and at such other times as you may determine with or without notice to Kuehne Nagel, Inc. The complete terms of the audit procedures and of Kuehne & Nagel, Inc.'s obligations thereunder are contained in Exhibit "B" to the Settlement, which is attached hereto.

It is agreed that you will be compensated for your audit services at $__________________________________. Your statements for services rendered, to be submitted quarterly, will be paid within 15 days of presentment by you to our attorneys, Graham & James, 1050 17th Street, N.W., Washington, D.C. 20036.

It is also agreed that all information and documents which you obtain by virtue of this audit will be maintained by you in strict confidence, except to the extent the Settlement Agreement requires you to make reports to the Federal Maritime Commission.

If the foregoing comports with your understanding of our agreement, please sign the enclosed copy of this letter, and return it to our attorneys mentioned above.

YOURS TRULY,

[NAME]

[TITLE]

Attachment

EXHIBIT "C" TO PROPOSED
SETTLEMENT AGREEMENT IN
DOCKET NO. 80-20

AFFIDAVIT

I, ______________________, hereby depose and state as follows:

(1) I am the ________________________ of Kuehne & Nagel, Inc. with offices at ____.

(2) I have read and understood the settlement agreement entered into between Kuehne & Nagel, Inc. and Federal Maritime Commission Bureau of Investigation and Enforcement in Commission Docket No. 80-20.

(3) I will not engage in, and will instruct those under my supervision to not engage in any practices which would violate the U.S. Shipping Act, 1916, and Federal Maritime Commission General Order 4, both of which I have read and with which I have become familiar.

(4) I will strictly abide by all provisions of the Shipping Act, 1916, and General Order 4, and will instruct those under my supervision to do the same.

(5) I understand that I am signing this affidavit under oath, and that any false statement herein could subject me to possible criminal penalties.

Sworn to before me, a Notary Public, this _____day of ______________, 19____.

____
NOTARY PUBLIC
My Commission Expires:

[SEAL]

EXHIBIT "D" TO PROPOSED
SETTLEMENT AGREEMENT IN
DOCKET NO. 80-20

AFFIDAVIT

I, ______________________, hereby depose and state as follows:

(1) I am the ______________________ of Kuehne & Nagel, Inc. with offices at ____________________________________.

(2) During the past twelve months I have not knowingly engaged in any practice which would violate any provision of the U.S. Shipping Act, 1916, or of Federal Maritime Commission General Order 4, and I have conducted my work so as to avoid any such violations.

(3) During the past twelve months I have/have not become aware that any person under my supervision engaged, intentionally or not, in any practice as described in paragraph "(2)" above, and if and when I became aware of such activity, I immediately issued instructions to the responsible person or his supervisor as to the proper course of conduct, and to promptly correct the improper activity.

(4) I have/have not been informed by any other employee of Kuehne & Nagel, Inc. that I engaged in any practice as described in paragraph "(2)" above, and if and when so informed I immediately adjusted the performance of my work to avoid repetition of such practice.

(5) If the statement in paragraph "(3)" above is completed in the affirmative, following are the circumstances of the practices and a description of what was done to correct them:

____

(6) If the statement in paragraph "(4)" above is completed in the affirmative, following are the circumstances of the practices and a description of what was done to correct them:

____

(7) I understand that I am signing this affidavit under oath, and that any false statement herein could subject me to possible criminal penalties.

____

Sworn to before me, a Notary Public, this ______day of __________, 19_____.

____

NOTARY PUBLIC
My Commission Expires:

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 606

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

ORDER ON REMAND

October 13, 1981

On August 6, 1981, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the Federal Maritime Commission's Report and Order Adopting Initial Decision in this proceeding, served August 8, 1979. *Nepera Chemical, Inc. v. FMC*, 662 F.2d 18 (D.C. Cir. 1981). The Commission's order denied an application by Sea-Land Service, Inc., pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817), for permission to waive $42,569.90 and refund $280.00 in freight charges to Nepera Chemical, Inc. in order to give effect to a rate negotiated between Sea-Land and Nepera but not filed in the appropriate tariff prior to shipment. The Commission based its decision on the fact that the corrective tariff filed by Sea-Land subsequent to shipment resulted in a charge to Nepera of $18.25 per container more than the rate negotiated prior to shipment because the new tariff employed a different weight measure. The Commission agreed with the conclusion of the presiding Administrative Law Judge that this variance between the negotiated rate and the rate appearing in the corrective tariff represented a jurisdictional defect in Sea Land's application, due to the requirement imposed by section 18(b)(3) that the carrier must, prior to applying to the Commission for permission to refund or waive collection of freight charges, have filed a new tariff "which sets forth the rate on which such refund or waiver would be based." 46 U.S.C. § 17(b). In the Commission's view, Sea-Land's new tariff failed to meet this standard.

However, in acting upon Nepera's petition for review of the Commission's order, the Court of Appeals held that section 18(b)(3) does not impose a requirement of "mathematical exactitude" (slip opinion at 10) between the negotiated rate and the rate subsequently filed by the carrier, and agreed with Nepera's contention that the rate filed by Sea-Land accurately reflected the parties' original agreement. The Court concluded that the "FMC must accept the Sea-Land application." (*Id.*)

THEREFORE, IT IS ORDERED, That the application by Sea-Land Service, Inc. for permission to waive a total of $42,569.90 and refund $280 in freight charges, in connection with two shipments of a

liquid chemical called "beta picoline" transported by Sea-Land for Nepera Chemical, Inc. from Port Elizabeth, New Jersey, to Barcelona, Spain, on June 10, 1978, is hereby granted; *

IT IS FURTHER ORDERED, That Sea-Land shall publish and file the following notice in an appropriate place in its tariff:

> Notice is hereby given as required by the Federal Maritime Commission's decision in Special Docket No. 606, That effective December 31, 1977, and continuing through June 21, 1978, the rate on Beta Picoline, in tanks, is $162.25 per WT, minimum 17 WT per tank container, such rate being subject to all other applicable rules, regulations, terms and conditions of this tariff.

IT IS FURTHER ORDERED, That Sea-Land shall determine whether an adjustment in freight forwarder compensation is required in light of this decision and, if so, shall take such measures as are necessary to make such adjustment;

IT IS FURTHER ORDERED, That the waiver or refund shall be effectuated by Sea-Land within thirty (30) days of the date of service of this order, and Sea-Land shall within five (5) days thereafter notify the Commission of the date and manner of effectuation of the refund or waiver and file with the Commission an affidavit of compliance with the second and third ordering paragraphs above.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

* If Sea-Land has collected all or part of the $42,569.90 in freight charges it sought to waive, it is hereby granted permission to refund those monies.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-62

EUROTROPIC CORPORATION - VIOLATIONS OF SECTION 16 INITIAL PARAGRAPH, SHIPPING ACT, 1916

NOTICE

October 16, 1981

Notice is given that no exceptions have been filed to the September 11, 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 initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-62

EUROTROPIC CORPORATION - VIOLATIONS OF SECTION 16 INITIAL PARAGRAPH, SHIPPING ACT, 1916

Held:

(1) Where a close-held company operated by an uninformed grower and shipper, on the advice of its freight forwarder, sought out a carrier who could provide refrigerated containers, and where the carrier agreed to transport ferns from Jacksonville to Rotterdam at the same rates the company was then paying another carrier; the company did not "knowingly and wilfully" violate section 16, first, Shipping Act, 1916, where the cargo was actually shipped from Baltimore instead of Jacksonville under different tariff rates. The company's president was completely unaware of any wrongdoing and relied on a freight forwarder who himself believed there was no impropriety and consequently failed to so notify the company.

(2) The phrase, "knowingly and wilfully," as used in the Shipping Act, means purposely and obstinately and is meant to describe a person who *intentionally* disregards the statute or is *plainly indifferent* to its requirements. *Plainly indifferent* means something more than casual indifference or ordinary negligence, and equates with a wanton disregard from which an inference can be drawn that the conduct involved was in fact purposeful. The evidence in this proceeding not only fails to establish such purposefulness, but rather indicates that in light of its lack of expertise, the Respondent acted reasonably and responsibly in employing and relying upon its freight forwarder.

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

Finalized October 16, 1981

This proceeding began with the Commission's Order of Investigation and Hearing, which was served on September 16, 1980. The Order states that:

> * * * this proceeding is hereby instituted to determine: (1) Whether or not Respondent violated section 16, initial paragraph, by obtaining or attempting to obtain transportation by water, for property at less than the rates and charges which would otherwise be applicable by any unjust or unfair device or means; and (2) Whether penalties should be assessed against Respondent if found to have violated section 16, initial paragraph, and, if so, the amount of such penalties;

[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).

FINDINGS OF FACT

1. Eurotropic Corporation (Eurotropic) is engaged in the growing and shipping of ferns for the florist trade. Gunther F. Natvey is the President and sole stockholder of Eurotropic. (Tr. 71, 72)

2. In 1975 Eurotropic operated out of Mr. Natvey's apartment in Miami. Eurotropic bought products from various producers and marketed them in Europe. (Tr. 72, 73)

3. Initially, Eurotropic used air and water carriers for its shipments, but by 1975, because of high air costs, it was shipping almost all of its products by water from Jacksonville, Florida, via Sea-Land Service, Inc. (Sea-Land). (Tr. 30, 73, 74)

4. Sea-Land provided Eurotropic with refrigerated containers and trucked the cargo from Miami to Jacksonville. (Tr. 30, 74)

5. In the summer of 1975, Eurotropic began having difficulty with its shipments because Sea-Land was unable to provide the needed refrigerated containers. (Tr. 30, 31, 75, 76)

6. At that time Mr. Natvey inquired within the industry, and with his (Eurotropic's) freight forwarder, as to whether or not other services were available. (Tr. 31, 76)

7. Eurotropic's freight forwarder had worked for it since 1973 and informed Mr. Natvey that Polish Ocean Lines (POL) had refrigerated containers. (Tr. 24, 30, 103)

8. As a result, Mr. Natvey went to New York City to speak with Mr. Harold Holden, who represented Gdynia America Line (Gdynia), which in turn was an agent for POL. (Stip., paras. 2, 3; Tr. 77)

9. Initially, Mr. Holden told Mr. Natvey that POL shipped to Europe from Baltimore and quoted a figure that was much higher than what Eurotropic was paying Sea-Land. Mr. Natvey then stated that Eurotropic could not ship with POL because the rate was too high. (Tr. 79, 83, 97, 98)

10. Later, Mr. Holden proposed that Gdynia would charge Eurotropic the same rate it had been paying Sea-Land, but that the cargo would have to be trucked from Florida to Baltimore. At the beginning Mr. Holden agreed that Gdynia would pay for the truck and would provide a trucker who would come from Baltimore to Florida. (Tr. 79, 80, 83, 84, 98)

11. Eurotropic (Mr. Natvey) agreed to Gdynia's proposal and pursuant to it Eurotropic made seven (7) shipments on POL vessels. Five of the shipments were ferns which originated in Florida and two (2) were citrus fruit originating in Philadelphia. (Ex. 24)

12. In the shipments made by Eurotropic, Gdynia did not provide a trucker from Florida and Philadelphia to Baltimore. Instead, Eurotropic was asked by Gdynia to make arrangements for the truck movement of the cargo, and Gdynia would reimburse it. (Tr. 80, 81)

13. Pursuant to their agreement Eurotropic submitted a total of ten invoices to Gdynia for overland transportation costs and incidental expenses incurred by Eurotropic for moving cargo from Jacksonville and Philadelphia to Baltimore, and was paid a total of $7,362.32 by Gdynia. (Exs. 1-15, 23; [2] Tr. 54, 55, 81, 82)

14. With respect to the shipments referred to in paragraph 13, Eurotropic was told that Gdynia would issue a Jacksonville bill of lading, and, based upon this, Mr. Natvey so informed Eurotropic's freight forwarder who prepared the bills of lading. (Tr. 27, 28, 32, 93, 94, 95, 98)

15. The applicable tariff for Jacksonville-Rotterdam shipments was Polish Ocean Lines North Atlantic/Continental and South Atlantic/ French Atlantic Tariff No. 22 (FMC No. 42). The applicable freight rate for cut ferns shipped from Jacksonville was $84.50 per 40 cubic feet or ton of 2,240 pounds, whichever produced the greater revenue. (Tr. 47-49, Ex. 16)

16. The applicable tariff for Baltimore-Rotterdam shipments was Polish Ocean Lines North Atlantic Continental Tariff No. 26 (FMC-52). The applicable freight rate for cut ferns (NES) was $195 per 40 cubic feet or ton. (Tr. 49, 50, 51; Ex. 16)

17. The actual freight charges assessed by POL on four shipments of cut ferns made by Eurotropic were based on rates applicable from Jacksonville, rather than the rates applicable from Baltimore, the actual port of loading. The total freight actually paid by Eurotropic was $14,772.72 whereas the amount which would have been due under the Baltimore-Rotterdam rate was $34,285.88. (Stip., para. 10; Tr. 57, 58; Ex. 24) [3]

18. Eurotropic experienced difficulties with the shipments it made on POL, and Mr. Natvey went to the Department of Agriculture for relief. He was referred to the Federal Maritime Commission and contacted the Commission in November of 1977. That contact gave rise to an investigation which led to the proceeding here. Meanwhile, Eurotropic had sued POL, beginning in 1976, but lost the case because it was barred by limitations. (Tr. 60, 63, 85-91)

19. During the period of time Mr. Natvey was negotiating with Gdynia and POL, he was not aware that those negotiations or the ultimate agreement involved anything improper or illegal. He was primarily interested in the availability of refrigerated containers, and was willing to pay the same rate he had been paying to Sea-Land. He did not have any particular desire to ship out of Baltimore. (Tr. 31, 34, 36, 75, 76, 83, 84, 89, 92-95, 99, 104)

[2] Paragraph 8 of the stipulation submitted by the parties is incomplete and incorrect.

[3] The first item shown on Exhibit 24 should be deleted since the parties agree it is barred by the statute of limitations.

20. Eurotropic's freight forwarder acted as its foreign freight forwarder representative on its ocean shipments through the port of Jacksonville. He prepared the bills of lading, the shipper's export declaration and the phytosantiary certificate for the U. S. Department of Agriculture. (Tr. 24, 32)

21. Eurotropic's freight forwarder did not believe it unusual practice for shipping lines to ship from one port and show another on the bill of lading. (Tr. 26, 27, 28, 32, 33, 37, 38)

22. Eurotropic's freight forwarder did not question the difference in rates on cut ferns between Jacksonville-Rotterdam and Baltimore-Rotterdam. (Tr. 34-36)

23. Eurotropic's forwarding agent never at any time informed Mr. Natvey that there might be improprieties in listing Jacksonville as the port of loading instead of Baltimore and never believed Mr. Natvey was doing anything illegitimate or fraudulent. (Tr. 36)

24. Mr. Natvey was not well informed of the pertinent provisions of the Shipping Act of 1916 or other shipping laws and relied heavily on Eurotropic's freight forwarder for advice and direction. (Tr. 94, 95, 98, 101, 103)

ULTIMATE FINDING OF FACT

25. The respondent, Eurotropic, did not knowingly and wilfully obtain or attempt to obtain transportation by water at less than the rates or charges which would otherwise be applicable. (Entire record)

DISCUSSION AND CONCLUSIONS

The Commission's Order of Investigation and Hearing, served on September 16, 1980, asks that a determination be made as to two basic questions. The first is whether or not the Respondent violated section 16, initial paragraph of the Shipping Act, 1916, and the second is if there was such a violation, whether or not any penalties should be assessed against the Respondent.

Section 16 provides in pertinent part:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, *knowingly and wilfully*, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. (Emphasis supplied.)

In this case the real question is whether or not there was "knowing and wilful" conduct within the meaning of section 16. The record is clear, and both parties agree, that the shipments of ferns involved here moved from the port of Baltimore to Rotterdam and not from the port

of Jacksonville to Rotterdam. They agree that the rates published in the tariffs differed and that the Respondent paid the lower of the two rates and was reimbursed for the trucking charges from Jacksonville to Baltimore. In view of the agreement of the parties there is no need to dwell further on these factual aspects of the case. Where the parties do disagree is in interpreting the Respondent's acts in terms of knowing and wilful conduct.

In its original brief Hearing Counsel admits that the Respondent did not accept Gdynia's proposal with "a determination with a bad intent" (page 6); that the Respondent's failure to be concerned about the propriety of Gdynia's proposal was merely the result of negligence or inadvertence and not a determination to circumvent or violate the Shipping Act (page 7); that the Respondent was totally unaware that its agreement with Gdynia might be illegal; that the Respondent relied upon its forwarding agent for such advice (page 7); that the Respondent did not benefit financially from the agreement with Gdynia since it paid exactly the same for the shipments on POL as it had been paying for its shipments on SeaLand vessels (page 8); that the Respondent was initially responsible for the investigation which disclosed the facts and precipitated this proceeding (page 8); and that "the culpability in this situation is clearly not that of Eurotropic," citing the fact that POL and the freight forwarder have paid penalties to the Commission, "for their complicity in the events underlying this proceeding."

Despite the above admissions, which Hearing Counsel states constitute "sufficient mitigating factors so as to preclude the assessment of any penalty against Eurotropic," it asserts that Eurotropic violated section 16, First, knowingly and wilfully. In doing so it relies on *Equality Plastics, Inc., et al.*, 17 F.M.C. 217 (1973), 19 S.R.R. 324, which it states reaffirmed the Federal Maritime Board's decision in *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954), that:

> We agree that a persistent failure to inform or even 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.

Hearing Counsel then proceeds to "paraphrase" the Commission's definition of the issue in *Equality Plastics, supra,* as "whether Eurotropic was in possession of sufficient facts to raise a doubt as to whether it was obtaining transportation by water at less than the rates or charges which should have been paid." It concludes that Eurotropic was in possession of sufficient facts to raise such a doubt.

Before commenting on the conclusions Hearing Counsel has made based on the facts of record it is necessary to discuss the case law which it cites in support of its argument. In the *Misclassification of Tissue Paper, supra*, the Commission had before it a shipper who conceded that it knowingly and wilfully misclassified napkin tissue as

newsprint. The Commission decision actually applied to the freight forwarder who was also accused of knowingly and wilfully violating section 16. The forwarder defended by establishing that he came upon information that the cartons which were shipped were marked as containing napkins tissues, not newsprint and that he so informed the shipper on two occasions. When the shipper replied that regardless of the markings, newsprint was being shipped, the forwarder accepted the shipper's description of the cargo. The Public Counsel argued that the forwarder's conduct "* * * do not reveal that Tidewater (the forwarder), in the situation before us, has measured up to the standards imposed on forwarders by section 16 of the Act" (parenthesis supplied). In its holding the Board stated:

> We believe, following the authority cited by Public Counsel, that the 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. Diligent inquiry must be exercised by shippers and by forwarders in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.
>
> We are unable to find in this case, however, that Tidewater's action was purposeful, obstinate, indifferent, or lacking in diligence. A freight forwarder, in our judgment, is not required to be an expert on the uses to which the cargo he is handling may be put. Tidewater appears, on the basis of the record in this case, to have used reasonable means in the exercise of ordinary diligence to determine the proper classification for the paper involved in this case. * * *

In *Equality, supra*, once again a misdescription of cargo was involved. Various items were erroneously classified as "toys." In *Equality* both a consignee and freight forwarder/broker were held out as knowingly and wilfully violating section 16, first. The facts indicated that both parties "for a considerable length of time * * * had no concern for the accuracy of descriptions or billings under the appropriate tariff." Even though the forwarder/broker filled out Bureau of Customs Consumption Entry forms with the proper commodity description, the Commission reversed the Administrative Law Judge who had held the forwarder/broker's conduct to be knowing and wilful. It stated:

> All parties agree, and we concur, that the Administrative Law Judge applied the proper standard for determining whether a party has "knowingly and willfully" violated section 16. He relied primarily on *Misclassification of Tissue Paper*

as Newsprint Paper, 4 F.M.B. 483, 486 (1954), where it was stated:

> [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. [Emphasis added.]
>
> To the Administrative Law Judge, Leading's failure to make "diligent inquiry" to insure that the bill of lading accurately described the goods shipped constituted "plain indifference" such as to constitute a knowing and willful violation of section 16.
>
> We think the term "plainly indifferent," as used by our predecessors in *Misclassification of Tissue Paper, supra* [footnote omitted], means something more than casual indifference, and 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." For this reason, we must disagree, in part * * * that the facts of the record demonstrate an intentional disregard of or plain indifference by respondents comparable to what our predecessors have described as "willful conduct tantamount to an outright violation." [Emphasis supplied.]

The Commission did find the consignee's conduct to be knowing and wilful stating:

> * * * That a long-time importer of such low-priced merchandise in a highly competitive market would, without protest, pay additional charges implies to us a recognition that the shipments were improperly rated. * * *

Finally, in *Viking Importrade Inc. et al.*, 18 F.M.C. 1 (1974), a case which Hearing Counsel fails to mention, the Commission had before it a freight forwarder/broker and a consignee. Once again various items were misclassified as, "toys," and once again customs documents properly described the items while the bills of lading did not. In discussing the standard to be applied, the Commission cited the language quoted above in *Equality*. It held that the freight forwarder/broker had not acted knowingly and wilfully stating:

> Under the test laid down by the Commission in its most recent pronouncement on the subject it does not appear that Lang can be found to have violated section 16 of the Act in the transactions here involved. Lang can only be charged with failure to make diligent inquiry into the correctness of the freight rates which it says it had no reason to make and indeed could not properly make under the regulations of the Customs

> Bureau. However that may be, the evidence in any event falls short of establishing *gross negligence* on Lang's part.

As to the consignee it said:

> It may be readily conceded that Viking's handling of these shipments was somewhat lax, casual and negligent. However, if we are to apply the same standard of accountability to Viking as we do to Lang—and it seems equitable that we should—in all the circumstances of this case [including the fact that some of the misclassifications carried a higher rate to be charged and paid than a more accurate classification would have required], it appears that inadvertent error, loose procedures and other types of ordinary negligence—as opposed to gross negligence—may account for the classification "errors" involved. This may be particularly true as it has not been shown that such misclassification was "persistent" or was involved in more than a minimal number of the large amount of commodity shipments handled by Viking. Nor does payment by Viking of a small amount of additional freight with regard to three of the seven misclassified shipments alter the result. There is no dispute that some of the items involved were misclassified. In some instances the freight charged for a particular item was too high, in some too low. *The fact that when the deficiencies were brought to its attention Viking paid additional freight in those cases where it acknowledged that additional freight was due does not establish that it wilfully and knowingly violated the Act.* [Emphasis supplied.]

In effect then, the two cases cited by the Respondent, and a third arising from them stand for the proposition that the term, "knowingly and wilfully" as used in section 16, means more than casual indifference or inadvertence. Instead it requires a finding of wanton disregard and of purposefulness which the Commission equates with "gross negligence" in tort cases. Further, in the three cases the Commission ultimately refused to make a finding of wilfulness where freight forwarders filed proper descriptions on custom's documents but failed to take any action regarding bills of lading containing misdescriptions which led to lower freight charges. Likewise, it also failed to hold consignees or shippers liable.[4]

As to the facts in this case they are clear and not in dispute. Eurotropic was a small business operated out of Mr. Natvey's apartment and he was devoid of any knowledge of the Shipping Act. He relied completely on his freight forwarder.[5] At page 9 of its original brief Hearing

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[4] In *Equality, supra*, it did hold that the shipper acted "knowingly and wilfully" because it later paid the higher freight rates. In *Viking, supra*, it rejected that reasoning.

[5] He testified:

> We are not freight forwarders . . . I had never heard of the Shipping Act of 1916 . . . I assume that when I have a, a broker, such as Mr. Wilk . . . licensed by, by your agency . . . that we should have been informed. (Tr. 101)

Counsel states that, "he was essentially a farmer unsophisticated with respect to shipping laws, who trustingly relied upon his freight forwarder in the shipment of his agricultural products." The record establishes that the freight forwarder knew exactly what was transpiring but that he did not consider it wrong. Indeed, in commenting on the bill of lading that showed Jacksonville rather than Baltimore as the port of loading, he testified:

> I would like to say this is not an unusual practice as far as steamship lines are concerned, as far as bills of lading. (Tr. 26)

And further, after stating that he knew POL did not offer a service out of Jacksonville:

> Q Why weren't you concerned about including this information, as Jacksonville being the port of loading, when as a matter of fact, it wasn't?
>
> A Common practice in the steamship business. Back in those years—well, and continuing on to this time—the steamship lines will not actually call, for instance, the port of Jacksonville, but will issue Jacksonville bills of lading, take receipt of the cargo at this port, and move particular cargo from this port to the port of loading, whether it be Savannah, Charleston, or wherever. (Tr. 32, 33)

As to the difference in rates from Jacksonville and from Baltimore, the freight forwarder testified:

> Q Did you ever question the rates or have reason to?
>
> A No, sir. It's my fault that I didn't do so.
>
> Q How long have you been in the forwarding business?
>
> A Myself, personally involved, since 1967.
>
> Q Would you have been familiar with the rates from Jacksonville for cut ferns in 1974 and 1975?
>
> A Yes, sir. With Sea Land Services because they were the carrier at that time that moved cut ferns from this port to Europe.
>
> Q Would the rate of $84.60 per 40 cubic feet, which is indicated on the bill of lading as the freight rate, applicable to Mr. Natvey's ferns, would that rate have been comparable to Sea Land's rates out of Jacksonville at the same time?
>
> A Yes, sir.
>
> Q Almost identical?
>
> A I don't know if it was almost identical—I would have to look back at the records—but it was a competitive rate, I'm sure.
>
> Q Is that possibly why you were not particularly concerned about the freight rate?
>
> A I would not question that freight rate, no, sir. And I still would not today.

Finally, as to his informing Mr. Natvey of any wrongdoing, the freight forwarder stated:

> Q I take it when you say you had no reason to question the freight rates being charged to Mr. Natvey for the type product he was shipping overseas, that you didn't actually check and see if the rates to Baltimore was the same?
>
> A No, sir. No. I—but I would assume—usually the North Atlantic and South Atlantic rates are very close on some items. Other items there's a great disparity. But I had no reason to question that particular rate on those commodities.
>
> Q Did you ever at any time as Mr. Natvey's forwarding agent alarm him that there might be improprieties insofar as listing Jacksonville as the port of loading - - -
>
> A No, sir.
>
> Q Did you have any reason at all to believe that he was doing anything illegitimate or fraudulent?
>
> A No, sir.
>
> Q In preparing these documents?
>
> A No, sir.

As to Mr. Natvey's motives and intent, his testimony on these points was clear, straightforward, unequivocal and truthful. He testified as to why and how he came to talk with Gdynia, the negotiations between them, and why and how the cargo was shipped—all of which has been found as fact. On the crucial question of whether he knew of any wrongdoing he stated:

> Q Now, during the period of time that you were actually dealing with Polish Overseas Lines and while you and Mr. Holden were negotiating your eventual agreement, did you ever think there was anything wrong with the proposal they were making you?
>
> A No.
>
> Q Did he ever tell you anything to the effect, now, this is sort of under the table, hush-hush - - -
>
> A No.
>
> Q - - - we are not supposed to be doing it but I will - - -
>
> A It wasn't under the table, because we billed them very openly, you know. The invoices were available. If it were under the table I don't think we would have gone ahead and billed them on paper.
>
> Q What was the primary desire or consideration in doing business or wanting to do business with Polish Overseas Lines?
>
> A The only, the only reason why we even considered going through all the trouble of shipping with a non-American carrier and to, and through a port which was not close to the

> producing area, was the unavailability of equipment in Jacksonville. That's the only reason.

(Tr. 92); and further:

> Q All right, sir. I may have asked this question, but, at any time during your association with Polish Overseas Lines, did you ever knowingly, willfully, do anything wrong? Did you think there was anything improper about your relationship to them all?
>
> A Not to my knowledge.

(Tr. 96)

Finally, in its original brief at page 9, Hearing Counsel states:

> The demeanor of Mr. Natvey as a witness, as observed by Bureau Counsel and the Commission's investigator, emphatically dispelled any feeling or suspicion that Mr. Natvey was remotely aware of any wrongdoing.

Despite the above and the many admissions made by Hearing Counsel that have been previously noted, he still argues that Eurotropic knowingly and wilfully violated section 16, first. The argument must be rejected. It is based on a series of unwarranted, subjective conclusions as to the facts and a failure to properly apply the pertinent case law. As to the facts, Hearing Counsel avers that Mr. Natvey did not act reasonably in "persistently failing to inform himself by means of normal business resources." Such an averment ignores completely Mr. Natvey's employment of a freight forwarder, licensed by the Commission, and his reliance on that freight forwarder. What businessman lacking a knowledge of shipping laws would not follow the same course? To expect Mr. Natvey to abandon trust in his freight forwarder, seek independent counsel and inform himself of the technicalities of the Shipping Act of 1916, over a period of time encompassing thirty-five days and only seven shipments, is itself unreasonable and his conduct in choosing to pay an expert to do so can hardly be considered a "persistent failure to inform himself of the law."

Further, Hearing Counsel states that "Natvey had to know there was something unusual or irregular with the arrangement, especially when his total costs to ship out of Baltimore were the same as he had been paying for shipments out of Jacksonville." We submit that if every businessman undertook personally to analyze legally and critically every "unusual" or "irregular" transaction in which he was involved, business might never be transacted. Instead, as Mr. Natvey did here, any normal, reasonable, small businessman would hire an expert to counsel and advise him.

In applying the case law to the facts, even as he finds the facts to be, Hearing Counsel misinterprets, and in some cases misstates, that law. For example, in making the case that in *Equality, supra*, the consignee "was only a passive participant" he completely ignores the factual

determination that the consignee "for a considerable length of time * * * had no concern for the accuracy of descriptions or billings under the appropriate tariff." Also, Hearing Counsel asserts that:

> The only thing Equality overtly did was to pay additional charges to the carriers when the misdescriptions were discovered. This action, said the Commission, "implies to us a recognition that the shipments were improperly rated." (Answering Brief, p. 6)

Yet, it fails to point out that in *Viking, supra,* the Commission rejected the idea that later payment connoted prior knowledge and wilfulness.

On a broader scale, Hearing Counsel fails to correctly describe the holdings in the prior cases by quoting portions of the decisions out of context. For example, it cites *Misclassification of Tissue Paper, supra,* as establishing the "knowing and wilfull" standard in the statement:

> We agree that a persistent failure to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and wilfully in violation of the Act.

In citing the above statement Hearing Counsel fails to note first, that it was made while the Commission was finding that a freight forwarder/broker *was not* acting knowingly and wilfully. Secondly, Hearing Counsel neglected to quote the entire holding, previously quoted at page 7 of this decision, where the sentence immediately preceding the above quoted sentence sets forth the basic premise that "knowingly and wilfully" means purposely or obstinately, or is designed to describe someone who intentionally disregards the statute or is plainly indifferent to it. In its treatment of *Equality, supra,* Hearing Counsel never discusses the basic tenet of the case, set forth in the citation at page 8 of this decision. There the term "plainly indifferent" is defined to mean something more than casual indifference, something that is in wanton disregard and purposeful.

Given all of the above, it is almost inconceivable that anyone could seriously assert that Eurotropic knowingly and wilfully violated section 16, first of the Shipping Act, 1916. The factual record clearly presents the picture of a small, uninformed shipper seeking a reputable carrier who would furnish refrigerated containers and ship his products at the same rate he had been paying another carrier. Relying on his freight forwarder he entered into an arrangement openly with a carrier with the knowledge of the forwarder, not knowing or suspecting any wrongdoing or impropriety. Hearing Counsel agrees to these facts and points out that Eurotropic did not benefit financially from the arrangement, and even was responsible for the investigation which eventually disclosed the arrangement. It concluded with a statement with which we wholeheartedly agree:

> The culpability in this situation is clearly not that of Eurotropic.

So here, we hold that Eurotropic did not violate section 16, first, Shipping Act, 1916, and therefore that no penalties are due and owing. In so holding we note that both the carrier and the freight forwarder have paid penalties for violations of section 16, first—which is exactly the right result. To ascribe "wilfulness" to Eurotropic's actions under the facts here would be error. It would operate to negate the effect of the Commission's holdings in the prior cases and would destroy the meaning of the term "knowingly and wilfully" as used in the statute and as intended by Congress.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

46 C.F.R. PARTS 511 AND 512

[GENERAL ORDER 11, REVISED; AMENDMENT 1; GENERAL ORDER 5 (REMOVED);

DOCKET NO. 81-46]

FINANCIAL REPORTS OF COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE TRADES

October 22, 1981

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission hereby amends its rules governing the financial reporting requirements imposed on common carriers by water serving the domestic offshore trades of the United States. Part 511 of Title 46, C.F.R. has been eliminated and Part 512 of Title 46, C.F.R. has been amended to reduce the frequency and complexity of reporting requirements. This amendment will reduce the reporting burden on domestic offshore common carriers.

DATE: Effective October 28, 1981.

SUPPLEMENTARY INFORMATION:

In a proposed rule published in the *Federal Register* on July 22, 1981 (46 F.R. 37739), the Commission advised of its intent to eliminate Part 511 (General Order 5) and amend Part 512 (General Order 11, Revised), Title 46, Code of Federal Regulations. General Orders 5 and 11, Revised, comprise the Commission's regulations governing the financial reporting requirements applicable to vessel operating common carriers serving the domestic offshore trades of the United States.

General Order 11, Revised, was published in order to establish methodologies that the Commission would apply in evaluating the justness and reasonableness of rates filed by vessel operating common carriers serving the domestic offshore trades as well as to provide for the orderly acquisition of data necessary to such an evaluation. General Order 5 requires the submission by such vessel operating common carriers of reports containing company-wide financial and operational data. In its Notice of Proposed Rulemaking, the Commission indicated that it had reviewed the operation of General Orders 5 and 11, Revised, and that it believed that some relief from the regulatory burden imposed thereby was warranted. However, the Commission also emphasized therein the importance of the subject financial reporting require-

ments to the effective regulation of domestic rates. The final rules, therefore, lessen, to a reasonable degree, the regulatory burden imposed by General Orders 5 and 11, while maintaining the ability of the Commission to discharge its regulatory responsibilities.

Comments on the proposed rule were received from Puerto Rico Maritime Shipping Authority (PRMSA), Sea-Land Service, Inc. (Sea-Land), Matson Navigation Company, Inc. (Matson), Crowley Maritime Corporation (Crowley), United States Lines, Inc. (USL), Foss Alaska Line (Foss), American President Lines, Ltd. (APL), Tropical Shipping and Construction Co., Ltd. (Tropical), the Transportation Institute (TI) and the Joint Maritime Congress (JMC). These comments and the revisions that they have prompted will be discussed hereinafter. Although all comments were carefully reviewed and considered in formulating the final rule, not all of the minor comments, especially those which did not deal with substantive matters, are mentioned herein.

Section 512.2(b)

The Commission proposed to eliminate all General Order 5 reporting requirements. In their place, the Commission will now require that annual statements filed in accordance with General Order 11 be accompanied by a company-wide balance sheet and income statement having a time period coinciding with that of the General Order 11 report.

Crowley requests clarification of the proposed modification, inquiring whether the Commission will prescribe a specific format for the specified balance sheet and income statement. Crowley believes that it would be appropriate for the Commission to authorize the use of the same financial statements that are filed with the Maritime Administration.

The Commission will not prescribe such a specific format. This section is designed to allow a filing carrier the greatest possible degree of flexibility in compiling its reports. While it is mandatory that the requisite balance sheet and income statement be company wide, it will be permissible for a carrier to utilize any such report that it has available, irrespective of the form of that report. In order to lessen the regulatory burden imposed by this section, the Commission will not require the conversion of an existing balance sheet or income statement to a particular format. Reports submitted to other regulatory agencies, as well as those constructed for corporate purposes, will be acceptable.

Section 512.2(f)

This section previously mandated that in those instances in which a carrier files with the Commission an increase or decrease in rates that would affect not less than 50 percent of its tariff items in a particular Trade or that would result in an increase or decrease of not less than 3 percent in its gross revenues in that particular Trade, it must simultaneously file financial data in support of its proposed rate adjustment.

The Commission proposed to eliminate the reference to 50 percent of a carrier's tariff items, thus ensuring that a carrier will not be required to submit financial data in support of any rate adjustment that would occasion less than a 3 percent change in its gross Trade revenues.

Sea-Land, Crowley and Tropical suggest that this section be further refined by limiting its application to rate increases, as opposed to both rate increases and rate reductions. Both Sea-Land and Crowley point out that only competing carriers, not the shipping public, would be likely to object to a rate reduction and that if such an objection were received, the Commission would have authority under section 18(a) of the Shipping Act, 1916, and section 3(a) of the Intercoastal Shipping Act, 1933, to require the submission of financial data to determine whether the resulting rates were reasonable.

The Commission finds this argument to be persuasive. In this instance, the regulatory benefit to be derived by requiring the submission of financial data in support of rate reductions is outweighed by the burden that would thereby be imposed on a filing carrier. The Commission will exercise its statutory authority to require justification of decreases in rates in those instances in which it appears that such adjustments are unwarranted, but will not impose a general filing requirement applicable to all rate reductions. Therefore, the word "decrease" has been eliminated from this section.

PRMSA suggests certain modifications in the wording of this section that it believes will serve to further clarify the reporting requirement set forth therein. Specifically, PRMSA advocates revising this section so as to conform to the Commission's proposed amendment of section 512.2(h). Section 512.2(h) contains the certification that a carrier must submit if it does not file financial data in conjunction with a proposed rate adjustment. In its Notice of Proposed Rulemaking, the Commission advised of its intent to modify this certification so as to limit the number of rate adjustments that could be filed without supporting financial data. It proposed to do so by imposing a ceiling of a 9 percent change over a 12 month period in a carrier's gross Trade revenues that could result from such adjustments. PRMSA believes that this limitation should also be incorporated into section 512.2(f).

The Commission believes that there is merit in PRMSA's suggestion. Although the Commission intended only to limit the number of rate adjustments that could be filed annually without the submission of supporting data, not the number of rate adjustments that would occasion less than a 3 percent change in a carrier's gross Trade revenues, that intent was not clearly reflected in the proposed rules. Therefore, in order to clarify section 512.2(f), the Commission has incorporated therein language relating to the 9 percent ceiling.

Sea-Land suggests a further modification of the proposed amendment of this section. It is Sea-Land's position that section 512.2(f) should

reflect the governing statutory language (i.e., the Intercoastal Shipping Act, 1933's definition of a general increase in rates). In other words, Sea-Land advocates limiting the rate adjustments that must be accompanied by supporting financial data to those which would affect 50 percent or more of a carrier's rate items in a particular Trade *and* (1) which would occasion an increase in that carrier's gross Trade revenues of 3 percent or more or (2) which would occasion an increase in that carrier's gross Trade revenues of less than 3 percent but when aggregated with other like adjustments filed during the preceding 12 months would result in an increase in that carrier's gross Trade revenues of 9 percent or more.

Sea-Land's suggestion is well taken. In effect what Sea-Land is suggesting is that the 50 percent requirement contained in the existing rule be retained but that that requirement be applied conjunctively with the 3 percent limitation. Given the Commission's determination to impose a 9 percent ceiling on the across-the-board rate adjustments that can be filed without financial justification, adoption of Sea-Land's proposal is imperative. Absent such a modification of this section, it is conceivable that a carrier could file three across-the-board rate increases each of which would result in a 2.9 percent increase in its gross Trade revenues without being compelled to file supporting financial data, but would be required to file such data in conjunction with a subsequent individual commodity increase that occasioned only a .5 percent increase in its gross Trade revenues (i.e., 2.9% + 2.9% + 2.9% + 0.5% = 9.2%).

The Commission did not intend to require carriers to file extensive financial data in support of increases in individual tariff items. The Commission was concerned with across-the-board rate adjustments (i.e., adjustments affecting 50 percent or more of a carrier's tariff items). It was anticipated that a carrier would be compelled, for example, to justify the fourth rate adjustment of 2.9 percent that it filed within a twelve month period. Therefore, to eliminate the onerous possibility of a carrier being required to submit financial data in support of a rate adjustment impacting an insignificant number of tariff items, the Commission has modified this section to bring it into conformity with the statutory definition of a general rate increase. The final rule, therefore, also conforms to the filing requirements contained in Rule 67 of the Commission's Rules of Practice and Procedure, the procedural rule applicable to rate filings under the Intercoastal Shipping Act, 1933.

Section 512.2(g).

The Commission proposed to amend this section to allow a carrier to furnish its annual General Order 11 report for the fiscal year, in lieu of the schedules of actual data that otherwise would have to accompany a rate filing, if the subject rate adjustment were filed within 6 months of the end of that fiscal year. The existing rule limits such a substitution of

data to instances in which rate adjustments are filed within 150 days of the end of the preceding fiscal year.

Sea-Land suggests that the Commission rely solely upon the annual General Order 11 reports and dispense entirely with the requirement that schedules of actual data accompany general rate filings in some instances. It is pointed out by Sea-Land that often the requisite schedules of actual data overlap the period reflected in the General Order 11 report. Foss advocates, in the alternative, that the substitution of an annual General Order 11 report be allowed if a rate adjustment is filed within 12 months, as opposed to 6 months, of the end of the carrier's preceding fiscal year.

Sea-Land raised the same point it has raised herein in Docket No. 78-46, the rulemaking proceeding in which General Order 11 was previously revised. The Commission rejected Sea-Land's suggestion in that instance and does not endorse it in the present proceeding. It is the Commission's belief that the submission of actual data is necessary in specified instances to provide the Commission with a relatively current perspective from which to assess the justness and reasonableness of a carrier's rates. In this instance, the Commission believes that its need for current information in order to discharge its regulatory responsibilities outweighs the regulatory burden imposed upon a filing carrier.

Likewise, the Commission has not accepted Foss' alternative proposal. Extension of the time period in which substitute data may be relied upon to the extent advocated by Foss would deprive the Commission of the requisite current perspective.

Section 512.2(h)

As was noted previously, it was proposed by the Commission that the certification set forth in this section be amended to impose a ceiling of a 9 percent change over a 12 month period in a carrier's gross Trade revenues that could result from rate adjustments filed by that carrier without supporting financial data. Foss suggests that due to current high inflation rates and competitive pressures, a 12 percent ceiling would be more realistic.

The Commission has expanded to a considerable degree, the range of rate adjustments that may be filed without supporting financial data. However, the Commission is responsible for regulating rates in the domestic offshore trades of the United States and must, if it is to discharge this responsibility in an effective and efficient fashion, have access to financial data relating to such rates. The Commission believes that if it were to accept Foss' proposal, it would undermine its ability to fulfill its duties and responsibilities as a regulator. Therefore, Foss' suggested modification has not been incorporated into the final rules.

In order to simplify the certification process, the wording of this section has been amended to refer to section 512.2(f) rather than repeating the detailed limitations described therein.

Section 512.6(b)(1)

The Commission proposed to amend this section to remove from rate base vessels withdrawn from a service for the entire period for renovation or conversion. The existing rule did not expressly provide for such an exclusion.

PRMSA, Matson, Tropical, APL and JMC oppose the proposed modification. These commentators emphasize that this amendment could act as a deterrent to the renovation and conversion of vessels deployed in the domestic offshore trades and thereby serve as an obstacle to increased efficiency of service. Although acknowledging that the ratepayer should not be compelled to pay a return on assets not dedicated to the Service, these parties suggest that a vessel that has been employed in a given Service and that will return to that Service should be included in rate base even during a period of renovation or conversion. It is suggested that vessels that have been employed in a Service and that are withdrawn from that Service for renovation or conversion should be treated in the same manner as vessels temporarily out of service for drydocking and repairs.

The Commission finds some merit in these arguments. The Commission seeks to encourage, not discourage, efficiency of service in the domestic offshore trades. Clearly, a regulation that might discourage the necessary renovation or conversion of vessels operating in these trades would not encourage efficiency of service and, therefore, would not serve the public interest. However, the Commission does not believe that it is fair to burden the ratepayer by including in rate base those vessels, or any portion of the value thereof, that are withdrawn from the Service for renovation or conversion and that have not been and will not be dedicated exclusively to that Service. Therefore, the Commission will permit the inclusion in rate base of a vessel withdrawn from a Service for renovation or conversion for the entire period or any portion thereof if a carrier certifies that such a vessel *has been* employed exclusively in the Service for the twelve months immediately preceding withdrawal and *will be* so employed for at least twelve months immediately after the completion of the renovation or conversion. It is believed that such a rule is equitable to both the carrier and the shipping public. The exclusive employment of a vessel in a Service for the twelve month periods prior to and following the renovation or conversion of that vessel strongly suggests the requisite intent to dedicate that vessel to the Service and, therefore, justifies its continued inclusion in rate base.

PRMSA suggests that section 512.6(b)(1) be clarified in two respects. PRMSA believes that this provision is ambiguous in regard to the treatment of vessels that are employed in the Service for less than the entire period but that are not employed during that same period in Other Services. The Commission agrees that the existing regulation does not clearly distinguish between those vessels that are and those that are not dedicated to a single Service. Therefore, additional descriptive language has been included in the final version of section 512.6(b)(1)(i)(B) establishing its applicability to vessels employed in two or more Services. Section 512.6(b)(1)(i)(A) applies to vessels employed in only one Service.

PRMSA further asserts that section 512.6(b)(1)(i)(A) does not clearly allow the total Adjusted Cost of a vessel dedicated to a Service but laid-up for part of the period because of seasonal cargo fluctuations to be included in the assets that may be allocated to the Trade. The Commission does not believe that the wording of the cited provision need be clarified. Lay-ups due to seasonal cargo fluctuations fall within the category of "normal periodic lay-ups." Normal periodic lay-ups do not necessitate an exclusion on a pro-rata basis of the Adjusted Cost of a vessel dedicated to the Service. Therefore, the total Adjusted Cost of a vessel dedicated exclusively to the Service can be included in Trade rate base even though that vessel is laid-up for part of the period due to seasonal cargo fluctuations.

Finally, PRMSA advocates amending section 512.6(b)(1)(i)(A) to allow the assignment to the Service of 60 days of the period during which a vessel that had been employed in the Service is laid up pending disposition. It is submitted that the allowance of such an assignment would constitute a recognition that a carrier cannot dispose of a vessel instantly and ought to be provided a reasonable amount of time to effectuate the disposition of a vessel that has been employed in the Service.

The Commission agrees in part with PRMSA's suggestion. Assignment to the Service of 60 days of the period during which a vessel that has been employed exclusively in the Service is laid-up pending disposition would not impose an unfair burden on the ratepayers who have been served by that vessel. Further, as PRMSA notes, allowance of such an assignment would constitute a recognition that disposal of such a vessel is an aspect of the Service and hence properly assignable to the Trade. However, the Commission believes that allowance of a specified period for the disposition of a vessel is only warranted in those instances in which the vessel has been dedicated to the Service. Therefore, section 512.6(b)(1)(i)(A) has been amended to permit the assignment of 60 days of the period during which a vessel that has been employed exclusively in the Service for the preceding 12 months is

permanently withdrawn from the Service and laid-up pending disposition.

Section 512.6(c)(2)

This section was amended in the proposed rules to provide for the exclusion of depreciation and profit included in related company transactions from vessel operating expense. No such exclusion had been previously mandated.

Matson has expressed concern that the proposed modification creates certain ambiguities. Specifically, Matson believes that as drafted the proposed rules did not clearly sanction the like treatment of the depreciation expense of related companies and the depreciation expense of the carrier. Further, Matson submits that the amended language appears to require that the profits arising from related company transactions must be charged to the carrier as income, as well as a reduction in expense.

In order to remedy any possible ambiguity, the Commission has revised its proposed amendment in the final rules. The object of the proposed amendment was to eliminate depreciation and profit included in related company transactions from the calculation of Working Capital. In order to more clearly accomplish this aim, the Commission has eliminated the proposed additional language that had been incorporated into this section. In addition, the Commission has eliminated the reference to related company transactions in section 512.5(s) and amended section 512.6(c)(11), the provision governing the reporting of related company transactions, to assure that profits arising from related company transactions will not be included in a carrier's income. A new provision, section 512.2(p), has also been added. Section 512.2(p) mandates that related company assets and owned assets are to be reported in the same manner, and that other intercompany transactions are to be shown net of intercompany profit and reported on the appropriate schedules. The Commission believes that these modifications eliminate the ambiguities complained of by Matson.

No objections were received to the remaining modifications detailed in the Notice of Proposed Rulemaking. All commentators expressed their approval of these amendments and the attempt implicit therein to lessen the regulatory burden imposed on vessel operating common carriers serving the domestic offshore trades.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq*), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rulemaking will affect only vessel operating common carriers which are not generally small entities within the meaning of 5 U.S.C. § 601(6).

In accordance with the Paperwork Reduction Act (44 U.S.C. § 3501 *et seq*), the amendments contained herein have been approved by the

Office of Management and Budget for use through March 31, 1983 and assigned OMB No. 3072-0008.

Therefore, pursuant to 5 U.S.C. § 553, sections 18, 21 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 817, 820 & 841(a)) and sections 1, 2, 3(a), 4 and 7 of the Intercoastal Shipping Act, 1933 (46 U.S.C. §§ 843, 844, 845, 845(a) & 847), Parts 511 and 512, Title 46, Code of Federal Regulations, are amended by the Federal Maritime Commission as set forth hereinafter.

I. *Part 512, Section 512.2 - General Requirements:*

The filing address shown in paragraph (a) is revised to read:

Federal Maritime Commission
Bureau of Tariffs
1100 L Street, N.W.
Washington, D.C. 20573

Paragraph (b) is revised to read:

(b) Annual statements under this part shall be filed within 150 days after the close of the carrier's fiscal year and be accompanied by a company-wide balance sheet and income statement having a time period coinciding with that of the annual statements. A specific format is not prescribed for the company-wide statements.

Paragraph (d) is amended to eliminate the Federal Register notice of alternative data applications by removing the final sentence.

Paragraph (e) is amended to increase the waiver amount from $5,000,000 to $10,000,000.

The introductory text of paragraph (f) is amended to read:

(f) Whenever a carrier files with the Commission an increase in rates which would affect 50 percent or more of the rate items listed in all of its tariffs in a particular Trade and (1) which would result in an increase of not less than 3 percent in the carrier's gross revenues in that Trade or (2) which would result in an increase of less than 3 percent in the carrier's gross revenues in that Trade, but, when aggregated with other rate changes filed during the preceding twelve months which have also resulted in increases of less than 3 percent in the carrier's gross revenues in that Trade would result in an increase of 9 percent or more in the carrier's gross revenues in that Trade, it shall simultaneously file in duplicate:

Paragraph (f)(1)(i) is amended to change "fourteen (14) months" to "fifteen (15) months".

Paragraph (g) is amended to change "150 days" to "six (6) months".

Paragraph (h) is amended to change the certification to read:

CERTIFICATION

I, [type or print name of officer] of [name of reporting company], certify, under penalty of 18 U.S.C. § 1001, that the proposed rate increase submitted herewith is not required by section 512.2(f) of this part to be accompanied by the financial and operating data described therein.

Signature: ____________________

Title: ____________________

Date: ____________________

Paragraph (l) is revised to read:

(l) With respect to the annual statements required by this part, all data shown must conform or be reconciled to the figures listed in the balance sheet and income statement filed therewith.

Paragraph (p) is added to read:

(p) Related company assets employed in the Service shall be reported in the same manner as owned assets. Other intercompany transactions shall be shown net of Intercompany profit and reported on the appropriate schedule. Any calculations involving intercompany accounts shall be included in the working papers.

II. *Part 512, Section 512.3 - Certification:*

In the introductory text, the phrase "books, accounts and financial records" is amended to read "books of account and financial records".

In paragraph (a), the phrase "books and accounts" is amended to read "books of account".

III. *Part 512, Section 512.5 - Definitions:*

Paragraph (f)(2)(ii) is amended to change "Commonwealth of the Northern Marianas" to "Northern Marianas".

Paragraph (f)(2)(vii) is amended to change "State of Alaska" to "Alaska".

Paragraph (f)(2)(viii) is amended to change "State of Hawaii" to "Hawaii".

Paragraph (o) is revised to read:

(o) *Vessel Operating Expense:*

(1) For carriers required to file Form FMC-378: the total of Direct Vessel, Port, Terminal and Container/Barge Expenses, less Other Revenue.

(2) For carriers required to file Form FMC-377: the total of Direct Vessel and Other Shipping Operations Expenses, less Other Revenue.

Paragraphs (s), (t) and (u) are revised to read:

(s) *Trade Operating Expense* - The total of all expenses shown on Exhibit B (Income Account), including Federal income taxes.

(t) *Company Operating Expense* - The total of all expenses shown on the company-wide income statement, including Federal income taxes.

(u) *Operating Expense Relationship* - The ratio of Trade Operating Expense to Company Operating Expense.

IV. *Part 512, Section 512.6 Forms:*

Paragraph (a)(1), introductory text, is revised to read:

(1) The submission required by this Part shall be in the prescribed format and shall include General Information regarding carrier ownership and stockholders, as well as the following schedules as applicable:

Paragraph (a)(2) is revised to read:

(2) Statements containing the required exhibits and schedules are described in paragraphs (b), (c), (d), (e) and (f) of this section and are available upon request from the Commission. The required General Information, schedules and exhibits are contained in forms FMC-377 and FMC-378. For carriers required to file Form FMC-378, the statements are based on the Uniform System of Accounts for Maritime Carriers prescribed by the Maritime Administration and the Interstate Commerce Commission. For carriers required to file Form FMC-377, the statements are based on the accounts prescribed by the Interstate Commerce Commission for Carriers by Inland and Coastal Waterways. The schedules contained in these statements are distinguished from those contained in the Form FMC-378 statements by the suffix "A" (e.g., Schedule A-IV(A)).

Paragraph (b)(1) is amended to eliminate the reference to Forms FMC-63 and FMC-64 by removing the final sentence.

Paragraph (b)(1)(i)(A) is revised to read:

(A) For those cargo vessels employed exclusively in the Service for the entire period, inclusive of normal periodic lay-ups, the Adjusted Cost shall be included in the total to be allocated to the Trade. If a vessel is permanently withdrawn from the Service during the period and laid-up pending disposition and that vessel has been employed exclusively in the Service for the preceding 12 months, sixty days of the lay-up period may be assigned to the Service. If a vessel is withdrawn from the Service for renovation or conversion, and if the carrier certifies that that vessel has been employed exclusively in the

Service for the twelve month period immediately prior to withdrawal and will be employed exclusively in the Service for a period of at least 12 months after the renovation or conversion is completed, the Adjusted Cost shall be included in the total to be allocated to the Trade.

Paragraph (b)(1)(i)(B) is revised to read:

(B) For those cargo vessels employed in the Service for less than the entire period and in Other Services for any portion of the period, the Adjusted Cost shall be prorated between voyages in the Service and voyages in Other Services. The total number of days of service excludes lay-up days and is therefore likely to be less than the number of days in the reporting period. Lay-up days of vessels in this category will normally be allocated to the respective Services on the same basis used in allocating the Adjusted Cost of such vessels, i. e., active days. However, if one or more of the vessels normally employed in the Service has been diverted temporarily to Other Services in lieu of incurring lay-up expense, no assignment of lay-up time to Other Services is required. That portion of the Adjusted Cost of the vessels not allocated to Other Services shall be included in the total to be allocated to the Trade.

Paragraph (b)(2)(i) is amended to eliminate the reference to Forms FMC-63 and FMC-64.

Paragraph (b)(4)(i) is amended to eliminate the reference to Forms FMC-63 and FMC-64.

Paragraph (b)(4)(iii) is removed.

Paragraphs (b)(5) and (6) are revised to read:

(5) *Working Capital (Schedule A-VI):*

Working Capital for vessel operators shall be determined as average voyage expense. Average voyage expense shall be calculated on the basis of the actual expenses of operating and maintaining the vessel(s) employed in the Service (excluding lay-up expenses) for a period represented by the average length of time of all voyages (excluding lay-up periods) during the period in which any cargo was carried in the Trade. Expenses for operating and maintaining the vessels employed in the Trade shall include: Direct Vessel Expense, Port Expense, Terminal Expense, Container/Barge Expense, Administrative and General Expense and Interest Expense allocated to the Trade as provided in section 512.6(c)(2), (4) and (5). For this purpose, if the average voyage, as determined above, is of less than 90 days duration, the expense of hull and machinery insurance and protection and indemnity insurance (accounts 730 and 732, respectively) shall be determined to be 90 days, provided that such allowance for insurance expense shall not, in the aggregate, exceed the total actual insurance expense for the period.

(6) *Working Capital (Schedule A-VI(A)):*

Working Capital for tug and barge operators shall be determined as the average monthly expense. Average monthly expense shall be equal to one-twelfth of the expense of the carrier during the relevant 12-month period, computed by adding gross Vessel Operating Expense, Administrative and General Expense-Net, Interest Expense and Inactive Vessel Expense, each as allocated to the Trade, and dividing the total by 12.

Paragraph (b)(7) is amended to eliminate the reference to Forms FMC-63 and FMC-64.

Paragraph (c)(3) is revised to read:

(3) *Vessel Operating Expense (Schedule B-II(A)):*

This schedule shall be submitted by tug and barge operators. Where multiple barge units are towed by a single tug, vessel expense shall be allocated on the basis of the cargo-cube relationship.

Paragraph (c)(9)(i) is amended to eliminate the reference to Forms FMC-63 and FMC-64.

Paragraph (c)(11) is amended to read:

(11) *Related Company Transactions*

Income account transactions with related companies shall be shown net of intercompany profit on the appropriate schedule and allocated to the Trade on the same basis as other items in that schedule.

Paragraphs (e)(2) and (f)(2) are amended to change "books, accounts and financial records," to "books of account and financial records".

V. *Part 511*

Part 511 is removed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-65

DANIEL F. YOUNG, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 656

NOTICE

October 29, 1981

Notice is given that no exceptions have been filed to the September 22, 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 initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-65

DANIEL F. YOUNG, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 656

An investigation was begun to determine whether past payment of "excess compensation" from two ocean carriers to respondent freight forwarder shows that respondent had violated sections 15 and 16 of the Shipping Act, 1916, regarding the possible existence of unapproved agreements or the obtaining of transportation at less than applicable charges, whether, as a result, respondent is fit to retain its license, and whether civil penalties should be assessed. With the cooperation of respondent, a record was developed which supports approvability of a negotiated settlement and which demonstrates that respondent is eminently fit to retain its license.

There is evidence that respondent did receive compensation different from that published in two carriers' tariffs; however, this practice terminated in early 1977, respondent never passed such compensation on to shippers in violation of anti-rebating law and never allowed the practice to interfere with its strict fiduciary duties to its shipper customers.

In lieu of continuing with expensive litigation, respondent and the Commission's Hearing Counsel have negotiated a settlement agreement by which respondent will pay $100,000 in lieu of assessment of penalties and will institute strong internal measures to ensure strict compliance with law. The settlement meets all applicable standards of reasonableness as developed by the Commission and is approved.

The record strongly supports a finding that respondent is fit to retain its license. The record shows that respondent has long enjoyed a fine, unblemished record for excellence in its field and has earned numerous commendations for its unique services which have saved the U.S. Government and other shippers considerable money. Respondent has behaved impeccably in this proceeding and has shown convincingly that it will scrupulously adhere to applicable laws and regulations. Under the circumstances, revocation or suspension of its license would be a gross travesty of justice. Moreover, rejection of the settlement would adversely affect future enforcement efforts by discouraging cooperation with the Commission's staff and provoking needless, expensive litigation instead of the prompt, efficient resolution of regulatory problems which the present settlement has achieved.

Elias Rosenzweig for respondent Daniel F. Young, Inc.

John Robert Ewers, Joseph B. Slunt, and *William D. Weiswasser* for The Bureau of Hearings and Field Operations, Office of Hearing Counsel.

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

Finalized October 29, 1981

This is an investigation begun by the Commission's Order of Investigation and Hearing, served September 19, 1980. The Commission began this investigation because, as stated in the Order, its staff had developed information which allegedly indicated that respondent Daniel F. Young, Inc., an ocean freight forwarder licensed by the Commission, or its officers had received sums of money from two unnamed ocean carriers in excess of the compensation normally paid by such carriers to forwarders as published in the carriers' tariffs for certain shipments occurring between 1975 and 1977. The Commission questioned whether receipt of such "excess compensation" constituted action which violated the Shipping Act, 1916 (the Act). Specifically, the Commission questioned whether it may have reflected an agreement between Young and certain carriers which required approval under section 15 of the Act, may have resulted in Young's receiving transportation for less than applicable rates or charges if Young passed the alleged "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 Young 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 Young under section 32(e) of the Act and whether Young's license should be suspended or revoked on a finding of unfitness because of wilful violations of the law cited or even because the alleged conduct occurred without regard to whether it violated law.[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 DFY violated section 15 of the Shipping Act, 1916, by entering into and carrying out without Commission approval any agreement providing for the receipt of payments from ocean carriers in excess of the amount of ocean freight forwarder compensation specified in the ocean carriers' applicable tariffs;
2. Whether DFY violated section 16, Initial Paragraph, of the Shipping Act, 1916, 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 transportation - on behalf of its principals - at less than the applicable rates or charges;
3. Whether DFY violated section 16, Initial Paragraph of the Shipping Act, 1916 - 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 DFY pursuant to section 32(e) of the Shipping Act, 1916, for violations of the Shipping Act, 1916, and/or the Commission's

Continued

As in the case of several other forwarder investigations, all involving alleged receipt of "excess compensation" from certain carriers, the background of this investigation stems from information the Commission had received some time before January 18, 1979, which indicated that certain carriers may have paid such compensation to several forwarders. On the basis of this information, the Commission issued an order under section 21 of the Act directing employees of Young and some 15 other forwarders to provide more information concerning this "excess compensation." Young and several other forwarders asked the Commission to reconsider this order on various procedural and substantive grounds without success and thereafter four forwarders including Young requested review of the order by the United States Court of Appeals for the District of Columbia Circuit. After the matter had been briefed but prior to argument, however, the Commission withdrew its order and moved for voluntary dismissal of the pending Court proceedings, stating that the Commission had obtained information which made further responses unnecessary. The Court granted the Commission's motion on January 2, 1980. Thereafter the Commission initiated formal investigations against Young and at least three other forwarders involved in the section 21 proceedings. (See discussion in *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973). As noted above, this investigation of Young began formally on September 19, 1980.

Shortly after commencement of the formal investigation, both Hearing Counsel [3] and respondent Young began prehearing discovery under the Commission's rules. In response to Hearing Counsel's discovery requests, Young offered to make all of its records available for inspection and copying. Hearing Counsel and the Commission's investigators availed themselves of Young's offer. Because of the volume of materials to be inspected at respondent's office, some time elapsed before the process could be completed. Meanwhile the parties began to enter into discussions concerning a possible settlement. To facilitate settlement, Young conceded that it would accept as true, for the purposes of this

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Rules and Regulations, and, if so, the amount of any such penalty which should be imposed;

5. Whether DFY's independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916:
   (a) if the investigation shows that DFY engaged in wilful violations of sections 15 and 16 of the Shipping Act, 1916; or
   (b) if the Commission finds that the conduct described in Paragraphs 1-3 hereof has occurred and, though not violative of sections 15 and 16 of the Act, is conduct which renders DFY unfit to carry on the business of forwarding in accordance with section 510.9(a) of General Order 4.

[3] The complete title of this office of the Commission is now the Bureau of Hearings and Field Operations, Office of Hearing Counsel. Previously the office was designated as the Bureau of Investigation and Enforcement. In the Commission's Order of Investigation and Hearing it was designated as the Bureau of Hearing Counsel.

proceeding only, the factual allegations set forth in the Commission's Order of Investigation and the specifications of instances of payment of "excess compensation" by Young detailed by the Commission's sources without conceding that they constituted violations of law. With the cooperation of Young, Hearing Counsel was able to build a record sufficient to determine the reasonableness of the proposed settlement which was finally formulated and to determine the question of respondent's fitness to retain its license. This record contains not only the text of the settlement and related promissory note but supporting documents and exhibits consisting of detailed tabulations of 278 shipments on which "excess compensation" was paid, a 22-page affidavit of Mr. Joseph G. Kearns, respondent's President, with 11 attachments containing laudatory letters and commendations from shippers, carriers, and other persons, and other relevant documents supporting the statements contained in the affidavit. Finally, the record contains a stipulation between Hearing Counsel and respondent establishing other facts concerning respondent's cooperation with Hearing Counsel and its past clean record before the Commission. It is this package which is now before me. My task is to determine, first, whether the proposed settlement should be approved under applicable standards of law, and, second, whether the record shows that respondent is unfit to retain its license. Both Hearing Counsel and respondent urge approval of the proposed settlement on the basis of the record developed. They cite, among other things, respondent's implementation of measures designed to prevent recurrence of the past activities in question and to ensure compliance with law, termination of the practices a long time ago, and payment of a significant amount of money in lieu of assessment of penalties as a further deterrent against recurrence. Both parties similarly urge me to find that respondent is fit to retain its license without suffering suspension or revocation because of many facts and considerations, among which are the voluntary termination of the practices, respondent's cooperation with the Commission's staff, and respondent's unblemished record and evidence that it has acted as one of the most respected, innovative, and helpful forwarders in the industry whose services have continually benefited the commerce and economy of the United States in unique ways. As I discuss below, I find that the record developed shows that the proposed settlement is worthy of acceptance by the Commission and furthermore shows that respondent is eminently fit to retain its license without suspension or revocation. A brief description of the settlement agreement would be helpful before I explain my reasoning.

DESCRIPTION OF THE PROPOSED SETTLEMENT

Very briefly, the essential terms of the proposed settlement are as follows: [4] Respondent will pay the sum of $100,000 in full settlement of claims for civil penalties, such sum to be paid in five installments of $20,000 each over a period of 24 months following Commission approval of the proposed settlement. In addition to this payment, respondent agrees to preserve and maintain through June 30, 1984, bills of lading relating to all instances of the payment of excess compensation shown in the record and to allow unimpeded access to these materials to Commission representatives. Furthermore, respondent agrees to take all reasonable measures designed to prevent receipt of non-tariff compensation from carriers in the future, including the submission by respondent's Chief Executive Officer of an annual statement to the Commission made under oath certifying that Young had not received non-tariff compensation during the preceding year, the institution of reviews of procedures and periodic audits, and the furnishing of notices to all of Young's directors, officers, and field managers of the settlement agreement. Respondent agrees to bind itself to the settlement agreement and not to interpose any defenses relating to the statute of limitations in case of breach of the agreement and commencement of Commission action prior to July 1, 1986, concerning receipt of non-tariff compensation.

APPROVABILITY OF THE PROPOSED SETTLEMENT

Both respondent and Hearing Counsel urge me to find that the proposed settlement is fair and reasonable and comports with applicable standards of law which the Commission has followed in its previous decisions and in its relevant regulations. Respondent traces the development of settlement law in recent years before the Commission showing that the Commission has made clear that settlements can and should be approved unless they violate some statutory provision, that they are approvable under all provisions of the Shipping Act, and that, consistent with the general body of settlement law, there is no need to make findings of violations of law if a fair and reasonable settlement can be approved. Respondent cites the Commission's regulations implementing Public Law 96-25, the law which gave the Commission authority to compromise or assess civil penalties, which regulations were not intended to impede settlements nor to require findings of violations of law. Respondent then cites applicable criteria by which the Commission has evaluated the reasonableness of settlements namely, litigative possibili-

[4] The brief description of the proposed settlement agreement which follows is an outline and is not all-inclusive. For a description of the entire agreement and its implementing provisions, the reader should consult the complete text shown in the appendix.

ties, cost of collecting the claim, and effect on the Commission's enforcement policies, and in each instance shows how the proposed settlement comports with the particular criterion. Young points out that the question as to the legal significance of non-tariff or "excess compensation" paid by carriers to forwarders is novel and without clear decision from the Commission, that there is no evidence that Young passed through any such compensation to shippers, and that the previous instances in which "excess compensation" was paid by two carriers do not necessarily show that there was an unapproved section 15 agreement in existence at the time. Respondent also contends that continuation of the investigation by means of formal discovery, hearing, initial decision, exceptions, etc., would merely cause the Commission greater expense, not to mention the costs imposed on Young which would have been far more than the sums of money originally received by way of "excess compensation." Finally, Young explains that the settlement package which calls for payment of $100,000 and institution of internal controls to prevent recurrence of the conduct in question has removed any element of profit from this past conduct, will prevent recurrence, and will act as a deterrent both to Young and other forwarders, thereby aiding the Commission's enforcement policies. As to the question of fitness, Young points out a number of considerations which demonstrate that it has acted as a responsible, respected member of the forwarding industry for many years, has many achievements to its credit, employs almost 400 people and expects to double in size in the next few years, has provided unique services to American exporters which have benefited the commerce and economy of the United States, has cooperated fully with the Commission's staff, has long ago terminated the practices in question which have never been decided to be violative of law in the first place, and has a long, unblemished history of honesty, so that revocation or suspension would be drastic punishment far out of proportion to the factual situation. Young submits "that the factual record in this proceeding, assessed in terms of the legal criteria governing license revocation, establishes that Young continues to be fit to serve as a licensed independent ocean freight forwarder." (Respondent's Memorandum in Support of Settlement, p. 22.)

Hearing Counsel similarly urge approval of the proposed settlement agreement, stating that it follows the decisions in forwarding cases in which similar settlements were approved as well as the Commission's regulations governing settlements. Hearing Counsel cite numerous decisions of the Commission in which the Commission has approved settlements arising under virtually every provision of the Shipping Act, 1916, in which, furthermore, it was not necessary that findings of violations of law be made. Hearing Counsel have likewise applied the various criteria applicable to approvability of settlements and have considered a number of mitigating factors such as the nature of the violations al-

leged, the lack of clear precedent which would hold that the conduct in question was contrary to law, the time in which the conduct occurred, its extent, its cessation by respondent, the amount of income generated by the questionable practices, how the money was distributed, the impact of the conduct in question on Young's performance as a forwarder, and Young's cooperation with Hearing Counsel and the Commission's staff. (See Hearing Counsel's Memorandum in Support of Proposed Settlement, p. 6.) Hearing Counsel have considered, furthermore, that the amount of the payment by Young in lieu of assessment of penalties ($100,000) removes any profit from the transactions, acts as a deterrent, and is reasonable compared to the net amount of revenue derived from the "excess compensation" after taxes and legal fees had been expended by Young. The internal controls to be instituted by Young, according to Hearing Counsel, will further ensure that there will be no recurrence of the questionable practices which terminated years before the investigation began anyway. In brief, considering the whole context of Young's past behavior and its present complete cooperation and the considerable savings to the Commission resulting from termination of lengthy, costly formal litigation in favor of the proposed settlement, Hearing Counsel believe there is sound reason to accept the proposed settlement and, in addition, to find that Young is fit to retain its license without suffering suspension or revocation.

I find that both respondent's and Hearing Counsel's statements in support of the proposed settlement are convincing and that the record they have developed fully supports a finding that the proposed settlement is fair and reasonable and ought to be approved. A brief explanation of the law of settlements and recent Commission decisions in this area will demonstrate the validity of this finding.

HOW THE PROPOSED SETTLEMENT IS SUPPORTED BY GOVERNING PRINCIPLES OF LAW AND BY RELEVANT COMMISSION DECISIONS

There have been a great multitude of Commission decisions approving various settlements in freight forwarder as well as other cases under the Act especially in the last few years and under the new legislation, P.L. 96-25, authorizing the Commission to compromise or assess civil penalties. The development of this body of law, which corresponds with the general policy in American jurisprudence strongly favoring settlements over expensive litigation, has been discussed in some detail in two recent decisions, *Behring International, Inc.*, 23 F.M.C. 973, 975 and in Docket No. 80-20, *Kuehne & Nagel, Inc. - Independent Ocean Freight Forwarder License No. 1162*, 24 F.M.C. 315 (1981) 325-328. *See also Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 511-515 (1978) 1091-1095. As the discussion in these cases and the cases cited in

these decisions demonstrate, both the Commission and the courts strongly encourage settlements and follow the policy that they are presumed to be fair, correct, and valid. This policy has, furthermore, been embodied in the Administrative Procedure Act (APA) which intended settlements to be an important part of the administrative process. Indeed, even before enactment of P.L. 96-25 and the issuance of the Commission's implementing regulations, General Order No. 30, 46 C.F.R. 505, the Commission had incorporated the language of the APA pertaining to offers of settlement in its own Rule 91, 46 C.F.R. 502.91.

The discussion in *Kuehne & Nagel, Inc.* and *Behring*, cited above, refer to other guiding principles which the Commission and courts have employed in evaluating proffered settlements. Thus, the amount of payment in settlement of claims is viewed to be reasonable if it falls within a zone that represents neither an attempt to extract excessive sums of money from respondents not justified by the strength of the case that the government is likely to prove nor an obvious "throw-away" of a good case for a pittance. Moreover, presiding judges are not supposed to rubberstamp proffered settlements but are expected to evaluate them in consideration of the criteria enumerated in the Commission's regulations as well as other criteria which might be relevant under the circumstances. For example, the judge is supposed to be mindful of the cost-savings advantages to settlement which conserve scarce resources of the litigating parties and obtain for these parties concessions which are more economical to accept than to continue to expend time and money in continued litigation in the hopes of winning complete vindication. An important consideration which a judge should weigh is the strength of the case which a plaintiff or the government is likely to present balanced against the amount offered in settlement or, in other words, the prudence in accepting a particular amount of money and other concessions in settlement after consideration of the risks which the plaintiff or government would experience in trying to prove its case in formal trials or hearings subject to further appeals and judicial review. In penalty settlement cases and cases involving the question of whether a forwarder's license should be suspended or revoked, furthermore, the Commission, as the cases cited show, has given careful consideration to mitigating factors.

In the present case, the record clearly shows that both parties have paid attention to relevant criteria established by the Commission in its previous decisions and relevant regulations as well as case law generally. Thus, consider the factors enumerated in the Commission's regulations (4 C.F.R. 103, incorporated by 46 C.F.R. 505.1, General Order No. 30 revised). The three factors cited by respondent are litigative possibilities (i.e., risk of litigation), cost of collecting the claim, and effect on enforcement policy, 4 C.F.R. 103.3, 103.4, and 103.5, respectively. The first factor refers to the presence of bona fide factual and

legal disputes, difficulty of proof, availability of witnesses and "related pragmatic considerations." As respondents and Hearing Counsel acknowledge, there are bona fide disputes concerning the legal significance to be attached to the receipt of "excess compensation" by a forwarder from carriers as far as section 15 or section 16, Initial Paragraph, are concerned. As was noted in *Behring*, 23 F.M.C. at 988, "the law relevant to the transactions in question is open to dispute and lacks a clear, definitive decision from the Commission or the courts." [5] There is, moreover, no evidence developed by Hearing Counsel showing that any "excess compensation" was passed through to shipper clients of Young nor is there any decision of which I am aware which holds that even without a pass-through of such compensation, a forwarder can be found to have violated section 16, Initial Paragraph, of the Act. Indeed, the evidence developed, which Hearing Counsel do not refute, indicates persuasively that Young did not pass any of this compensation through to shippers and that receipt of such compensation from the two carriers did not influence Young in any way to depart from the best interests of its shipper clients.

As to cost of collecting the claim, as respondent points out, continuance of formal discovery and hearings and the rest of the stages of formal litigation would entail considerable time and money for both sides, a cost to Young far out of proportion to the amount of non-tariff compensation which Young had received. As Hearing Counsel point out, furthermore, acceptance of the approval of the settlement agreement would terminate needless litigation expense, save scarce Commission resources, and allow the Commission to allocate such resources to proceedings which are being contested and need attention, and would, moreover, obtain for the Commission a settlement which has tangible public benefits in terms of deterrence and the Commission's enforcement policies. As both parties point out, the amount of the settlement payment ($100,000) represents approximately 60 percent of the amount of so-called "excess compensation" which Young received, which amount, after deducting income taxes and legal fees from the $173,000 received, removes any profit and acts as an effective deterrent against any possible recurrence of the practice, which in any event terminated in early 1977. Of course, as part of the settlement, Young also agrees to institute internal controls which will provide further assurance against recurrence.

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[5] The relevant freight forwarder regulation, General Order No. 4, 46 C.F.R. 510.24(f), seems to require oceangoing common carriers to pay compensation in accordance with their published tariffs but does not specifically state that receipt of non-tariff compensation by the licensed forwarder is prohibited. The new freight forwarder regulations to be effective on October 1, 1981, however, clearly specify that licensees cannot accept compensation different from that provided in the carriers' tariffs. See 46 C.F.R. 510.33(f), General Order No. 4, Revised, Docket No. 80-13, slip opinion, p. 49. *See also Independent Ocean Freight Forwarders*, 19 S.R.R. 353, 357-358 (1979).

I have given consideration to two additional factors in finding the proffered settlement to be fair and reasonable. The first relates to the fact that, as Hearing Counsel acknowledge, this settlement is modeled after that approved by the Commission in *Behring*, a very similar case. The second relates to a number of factors in mitigation which are also relevant in determining the question of Young's fitness to retain its license. As to the first consideration, it is readily apparent that this case bears striking similarities to *Behring*. In both cases a forwarder having a long and respected reputation in the industry had received so-called "excess compensation" from only a very few carriers several years ago and in both cases the practices were discontinued long before the Commission's investigations commenced. In both cases, similarly, the forwarders cooperated with Hearing Counsel and the Commission's staff, making records available and helping to develop evidence. Also in both cases the entire case hinged upon the question of legality of receipt of this "excess compensation" from carriers under section 15 and section 16, Initial Paragraph, and in both cases there was no evidence that the forwarder had passed any portion of such compensation through to its shipper clients or that it had acted against the best interests of its shipper clients because a few carriers chose to pay "excess compensation." The settlement agreements in both cases are virtually identical and appear to conform to the models set forth in the Commission's regulations. (See 46 C.F.R. 505.7 and model agreement and promissory note, S.R.R. Current Service, § 144:7.) The only difference between the settlement agreements in the two cases appears to be in the amount of payment in lieu of assessment of penalties. In this case, Young agrees to pay the sum of $100,000 in installments over a period of two years. In *Behring*, the amount was $70,000 over the same period of time. However, in *Behring* the amount of "excess compensation" received by Behring totalled something like $115,000 whereas in this case the amount received by Young approximated $173,000 from only two carriers for shipments occurring during the period from September 1975 through January 1977, after which time such practices were terminated.

As to the second factor, I have considered a variety of facts such as the nature of the practices, their voluntary discontinuance, the amount of income generated, the uncertainty as to applicable law, and the effect on Young's duties to its shipper clients. Although these factors are perhaps more relevant to the issue of fitness, they also justify the limitation of the amount of payment to be made by Young to $100,000 rather than imposition of unrealistic statutory maxima ($25,000 for each violation of section 16, Initial Paragraph; $1,000 per day for violation of section 15, which penalties, if applied liberally, would amount to several millions of dollars, probably enough to bankrupt Young). In brief, even if the conduct, which Young has admitted for purposes of this

proceeding, could ultimately be found to have been violative of the cited provisions of law, Young terminated the practices some time ago (in early 1977) and at the time that the two carriers made such payments of "excess compensation" there was no clear legal decision of the Commission holding that forwarders' receipt of such compensation was unlawful. Therefore, tailoring the amount of payment in settlement of claims for penalties in terms of deterrence and removal of any possible profit seems a sound approach and, indeed, was the approach taken in the *Behring* settlement. (See 20 S.R.R. at 1035.)

I conclude, therefore, that the proposed settlement agreement meets governing standards and, as was the case in *Behring*, deserves approval. Such approval, moreover, will continue the pattern begun in *Behring* which provided a model for future cases and has already apparently encouraged forwarders to cooperate with the Commission's staff rather than to engulf the Commission in protracted litigation.

THE QUESTION OF FITNESS

The question of fitness of Young to continue to operate under its license without suspension or revocation now remains for determination. This is the last issue (No. 5) framed in the Commission's order (p. 3). As decided in previous Commission cases, the issue of fitness in freight forwarder cases cannot be settled by the parties. *See Behring*, 23 F.M.C. 989; *Independent Freight Forwarder's License—E. L. Mobley, Inc.*, Order, 18 S.R.R. 451 (1978); Docket No. 80-20, *Kuehne & Nagel, Inc.*, 24 F.M.C. at 341. Consequently, both parties have developed an evidentiary record and have taken positions so as to enable me to determine the question.

Both parties urge me to find that Young is fit to retain its license without suffering revocation or suspension and find considerable support in the record for their positions. Young cites the fact that it has been in business since the early 1900's, has offices in seven cities, employs almost 400 people and expects to double its size in the next few years. Young also points to evidence showing the unique services it has provided, its unblemished record, and its cooperation with the Commission's staff. It contends that the activities in question which gave rise to this proceeding relate solely to receipt of so-called "excess compensation" which at the time had not been found to be unlawful by the Commission and indeed which the Commission's regulations even now do not clearly prohibit. (As noted above, the revised regulations will change this situation, effective October 1, 1981.) Under these circumstances Young argues that it can hardly be found to have "wilfully" violated law. Young cites previous Commission decisions in which the Commission has made clear that it will fashion reasonable remedies in consideration of all mitigating factors and will not merely impose drastic sanctions of revocation or suspension when they are

unnecessarily punitive. Young concludes by arguing that revocation of its license would destroy a business that has been in operation for decades and has become a significant factor in the industry, harm its many employees, and deprive the shipping public of its valuable services.

Hearing Counsel also urge me to find Young fit and argue against imposition of the drastic sanctions of revocation or suspension of its license. Hearing Counsel recognize that the Commission is careful to impose sanctions only after considering the context in which the questioned conduct occurred and after considering all mitigating factors. Hearing Counsel also recognize that in this case there are numerous mitigating factors and legitimate questions as to whether the conduct in question was violative of law and in view of the uncertain status of the particular question of law, even whether the past conduct could be characterized as having been "wilful." Hearing Counsel give full credit to Young's cooperation with the Commission's staff in this proceeding and to its manifest willingness to prevent recurrence of the practices in question and, after considering the entire record, express their belief that Young can be trusted to abide by applicable law. Hence, Hearing Counsel contend that the record will not support revocation of Young's license.

As in *Behring*, I find that the record amply demonstrates that Young is a substantial and reputable company which has provided and will continue to provide a variety of useful services, that it has behaved commendably in this proceeding, has enjoyed an unblemished record in the past, and that in view of these and other considerations, even a suspension, much less a revocation of Young's license, would, in my opinion, constitute a gross travesty of justice. I now explain.

The similarities between this case and *Behring* are striking, as I have noted above. In *Behring*, the record demonstrated clearly that the forwarder was eminently fit to continue operating its forwarding business without suffering suspension or revocation of its license. The similarities both in fact and law between *Behring* and Young are so remarkable that the discussion in *Behring* explaining why revocation would be grossly unwarranted considering the nature of the past conduct under investigation and the convincing evidence of fitness bears re-reading. *See Behring*, 23 F.M.C. at 990-994. As in *Behring*, Young has enjoyed a long history of providing excellent service to American exporters and has made unique contributions to American commerce. Also, as in *Behring*, the only conduct of Young's which has been questioned involves the fact that during 1975 to early 1977 two carriers saw fit to pay Young compensation different from that specified in their tariffs. There is no indication that Young suggested this practice to the carriers but in any event Young ceased receiving such compensation in early 1977, long before this investigation commenced. As the evidence

in this case shows, moreover, and as was shown in *Behring,* Young never passed any of the compensation in question through to its shipper clients nor departed from its strict fiduciary duties towards its shipper customers because of the peculiar practice of the two carriers. In view of the uncertainty of applicable law at the time of the practices in question, moreover, it is difficult to argue that Young "wilfully" violated law when it received the compensation. *See Behring,* 23 F.M.C. at 990-994. If so, revocation or suspension would be of doubtful legality under the Administrative Procedure Act and its "second-chance" doctrine. *Behring,* 23 F.M.C. at 992-993. But regardless of whether the past conduct of Young was "wilful," the record in this case, as in *Behring,* strongly supports a finding of Young's fitness. Indeed, there is even more evidence here than in *Behring* that Young has been a credit to the forwarding industry. The affidavit of Mr. Joseph G. Kearns, President of Daniel F. Young, Inc., is extremely enlightening. It shows a long history of exemplary service to American shippers and unique benefits which Young has provided the American economy. Mr. Kearns explains Young's long history going back to the early 1900's and its excellent reputation. He discusses Young's involvement in the use of modern computer technology and shows how it has aided shipments of huge projects on behalf of the U.S. Army Corps of Engineers and other shippers. On a different level, Young has assisted in the shipment of priceless art treasures such as the movement of Michelangelo's *PIETA* from the Vatican to the New York World's Fair in 1964, for which Young received letters of commendation from no less than Francis Cardinal Spellman and Bishop McEntegart of Brooklyn. The evidence is convincing that Young never allowed receipt of "excess compensation" from the two carriers to influence it in the selection of carriers for its shipper clients nor in any way to cause Young to act in other than in the shippers' best interests. Moreover, Young has shown that because of its own efforts, certain procedures involving shipments out of the Great Lakes to India have been changed so as to save the U.S. Government over one hundred million dollars. This was done by arranging for U.S. Department of Agriculture relief shipments to move via Indian-flag vessels which could be paid out of U.S.-held rupees rather than in dollars. Moreover, while saving the U.S. Government considerable dollars on these shipments, Young suffered a loss of brokerage since the Indian carriers paid less brokerage to forwarders than third-flag carriers operating out of the Great Lakes. Mr. Kearns recites an impressive list of accomplishments in which Young has negotiated lower rates for relief and charitable cargoes even though, once again, such negotiations resulted in lower brokerage paid to Young. Attached to Mr. Kearns' affidavit, furthermore, are letters of commendation from various government and private shippers as well as from the aforementioned Cardinal and Bishop. These letters were written at various times in the past

without regard to the present investigation and were mostly if not all unsolicited. They are impressive and give proof of the high character, integrity, and magnificent service which Young has continually provided to the American shipper.

As noted, both Hearing Counsel and Young cite previous Commission decisions in freight forwarder cases in which the Commission has stated its belief that the freight forwarder law is essentially remedial, not punitive, and that the Commission will refrain from extreme sanctions such as revocation or suspension when the circumstances demonstrate that much less drastic action can serve valid regulatory purposes. In *Behring*, 23 F.M.C. at 993, the Commission stated:

> 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.

The Commission proceeded to cite supporting language in two previous cases (*E. L. Mobley, Inc.*, 21 F.M.C. 845, 846-847, (1979), and *E. Allen Brown*, 22 F.M.C. 583, 597 (1980)). For a similar discussion of this doctrine of fashioning reasonable remedies which the Commission has continually followed, *see also Docket No. 80-20, Kuehne & Nagel, Inc.*, 24 F.M.C. 315.

In the instant case, as in *Behring*, there is considerable evidence of mitigating circumstances and of Young's fitness to continue serving shippers without revocation or suspension of its license. Not only has there been a long history of unblemished service by Young as well as a voluntary termination of the questionable practices some time ago, complete cooperation with the Commission's staff, etc., but, as shown by the settlement agreement, Young intends to take measures to ensure that no such practices recur. In view of Young's splendid history and reputation and its demonstrated commitment to prevent any deviation from applicable law, this record shows that Young easily meets the standards of fitness established in previous Commission decisions especially with regard to its demonstration that it will abide by all applicable Commission rules and policies. If the totality of circumstances show that a forwarder can be trusted to comply fully with Commission regulations and the high standards expected of all forwarders, the Commission has found the forwarder to be fit and has refrained from revoking or suspending licenses even in some cases when the forwarder has been found to have violated law in the past. See discussion in Docket No. 80-20, *Kuehne & Nagel, Inc.*, 24 F.M.C. 315.

ULTIMATE CONCLUSIONS

I conclude, therefore, that this record shows persuasively that Young is not only fit to continue providing its fine forwarding services to the shipping public but, as in *Behring*, it persuasively shows that revocation or suspension of its license would be grossly unwarranted sanctions. As in *Behring*, furthermore, I find that the proposed settlement agreement deserves approval and that implementation of the terms of that agreement will amply satisfy all regulatory purposes. Rejection of the settlement, however, would, as noted in *Behring*, thrust the proceeding back into uncertain litigation, chill future efforts of the Commission's staff to encourage forwarders and other regulated persons to cooperate with the Commission, and substitute needless, expensive litigation and unnecessary antagonism for prompt, effective resolution of regulatory problems such as that achieved by the present settlement.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX

BEFORE THE FEDERAL MARITIME COMMISSION

DANIEL F. YOUNG, INC.,
INDEPENDENT OCEAN FREIGHT
FORWARDER LICENSE NO. 656

DOCKET NO. 80-65

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Investigation and Enforcement ("Bureau") of the Federal Maritime Commission ("Commission") and Respondent Daniel F. Young, Inc. ("Young"). It is submitted to the Presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commissions's Rules of Practice and Procedure, 46 C.F.R. 502.162, and Section 505.3 of the Commission's General Order 30, 46 C.F.R. 505.3, and is to be incorporated into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served September 19, 1980 ("Order") the Commission instituted the present proceeding to determine whether Young had violated Sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916, 46 U.S.C. §§ 814 and 815), and whereas the Order includes the issue of whether civil penalties should be assessed for any violations of Sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916., so found; and

WHEREAS, the Order alleges that Young may have violated Sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916; and

WHEREAS, Young, without admitting that there is any validity in the claims asserted by the Commission in the Order or any illegality or impropriety in any of the past practices or acts of Young, its officers and employees or any of them, is entering into this stipulation in order to avoid the uncertainty, inconvenience and expenses that would be incurred in the protracted litigation of this proceeding and, to that end, consents and agrees that for the purposes of this proceeding alone, and for no other purpose, the allegations of the Order that Young received from oceangoing common carriers compensation in excess of the rates specified in the carriers' tariffs ("non-tariff compensation") and the specifications of such allegations contained in Appendices I and II hereto, such non-tariff compensation having allegedly been paid in the form of cash, shall be taken to be true and treated as facts for the purposes of the factual record in this proceeding; and

WHEREAS, Young has indicated its willingness to cooperate with the Commission in other investigations involving the payment of non-tariff compensation by oceangoing common carriers, and whereas Young's failure to so cooperate will constitute a breach of this Agreement; and

WHEREAS, Young, since long prior to the Order, has not received any non-tariff compensation and has instituted and has indicated its willingness and commitment to maintain measures designed to eliminate, discourage and prevent the future receipt of non-tariff compensation; and

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, are desirous of settling expeditiously the issue of the appropriate amount to be paid by Young 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 penalty 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, Young 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. Young hereby agrees, as a condition of the settlement agreement, to pay a monetary amount of One Hundred Thousand ($100,000) Dollars, of which Twenty Thousand ($20,000) Dollars shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement, and Eighty Thousand ($80,000) Dollars shall be payable according to the terms of the Promissory Note attached hereto as Appendix III in the following installments:

> Twenty Thousand ($20,000) Dollars, plus interest, shall be paid on or before six (6) months following approval by the Commission of this Proposed Settlement;
>
> Twenty Thousand ($20,000) Dollars, plus interest, shall be paid on or before twelve (12) months following approval by the Commission of this Proposed Settlement;
>
> Twenty Thousand ($20,000) Dollars, plus interest, shall be paid on or before eighteen (18) months following approval by the Commission of this Proposed Settlement; and
>
> Twenty Thousand ($20,000) Dollars, 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 "7" below, this Agreement shall forever bar the commencement or institution of any civil action or

other claim for recovery of civil penalties from Young arising from or related to the subject matter of this proceeding or any facts set forth and described in Appendices I and II hereto, or elsewhere in the record in this proceeding. It is understood by Young that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or any other department or agency of the United States Government for any conduct engaged in by Young which is not comprehended within or fairly to be inferred from the factual record submitted in this proceeding.

3. Young agrees to preserve and maintain, through June 30, 1984, copies of all underlying oceangoing common carrier bills of lading applicable to the shipments listed in Appendices I and II 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. Young agrees to take all reasonable measures designed to discourage, prevent and eliminate the receipt by it of non-tariff compensation unless the Commission or the courts find, or Congress establishes, that it is lawful. These measures shall include, but need not be limited to, the following:

(i) Young'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, Young had not received non-tariff compensation during the preceding year.

(ii) Young 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 Young, its officers, employees and agents, which would result in the receipt of non-tariff compensation.

5. Young agrees that it will not wilfully violate any provision of the Shipping Act, 1916, as amended, or regulation of the Commission thereunder applicable to the conduct of Young's business as an ocean freight forwarder.

6. Young 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 managers.

7. Young 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 July 1, 1986, by or on behalf of the Commission, to recover civil penalties for violations of the Shipping Act, 1916, arising from and applicable to

the receipt of non-tariff compensation, as disclosed in Appendices I and II or elsewhere in the factual record submitted in the present proceeding. In the event of such a breach by Young, if such noncompliance shall not have been explained to the Commission's satisfaction within thirty (30) days after written notice to Young 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 in either case Young'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 Young 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.

8. In the event changes in law or other circumstances occur during the term of this Agreement which Young believes warrant modification or mitigation of the Agreement, Young may petition for this purpose.

9. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Young of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

10. The undersigned counsel for Young represents that he is properly authorized and empowered to execute this Agreement on behalf of Young and to fully bind Young to all of the terms and conditions herein.

(S) JOHN ROBERT EWERS, DIRECTOR
Bureau of Investigation and Enforcement

(S) JOSEPH B. SLUNT,
Attorney

(S) WILLIAM D. WEISWASSER,
Attorney

(S) Elias Rosenzweig,
Attorney for DANIEL F. YOUNG, INC.

PROMISSORY NOTE

For value received, Daniel F. Young, Inc. (Young) promises to pay to the Federal Maritime Commission (Commission) the principal sum of One Hundred Thousand Dollars ($100,000), to be paid at the offices of the Commission in Washington, D.C., by bank cashier's check in the following installments:

Twenty Thousand Dollars ($20,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65;

Twenty Thousand Dollars ($20,000) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65;

Twenty Thousand Dollars ($20,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65;

Twenty Thousand Dollars ($20,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65;

Twenty Thousand Dollars ($20,000) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65.

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. 80-65 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, Young 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 Young 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 Young 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 immediate execution on said judgment. Young 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 Young by bank cashier's check at anytime, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

DANIEL F. YOUNG, INC.

BY______________
President

DATE:______________

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 771

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE BENEFIT OF TEXAS TURBO JET, INC.

Permission to refund a portion of the freight charges collected from the shipper must be denied where the carrier did not perform the service contemplated by the tariff upon which the refund would be based.

REPORT AND ORDER

October 30, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*) *

The proceeding is before the Commission upon its determination to review the Supplemental Decision of Administrative Law Judge William Beasley Harris granting Lykes Bros. Steamship Co., Inc. (Lykes) permission to refund to Texas Turbo Jet, Inc. (TTJ) the amount of $21,950.53 with interest.

The relevant facts as developed from Lykes' application 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 [1] from Mediterranean and Black Sea ports to United States Railroad Destination Terminals in several states, including Texas.

Lykes' Dallas sales office entered negotiations with TTJ for the transportation of aircraft engines from Leghorn, Italy, to Dallas, Texas, in two 40-foot containers at the rate of $3,600 per container plus a $320 per container energy surcharge. Subsequently, the following internal telex was sent to Lykes' New Orleans personnel:

> 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

* Commissioner James J. Carey did not participate.

[1] Lykes Bros. Steamship Co., Inc. Import Joint Freight Tariff No. LYKU - ICC #310, FMC No. 99.

> Our agents in Leghorn are Coe & Clerici SPA . . .
> Pls advise us of next shipment as these rates will
> only be filed upon receiving a firm booking.

Although Lykes alleges, by subsequent affidavit, that "a formal commitment was extended to TTJ," Lykes' Sales Department and Mediterranean Traffic Department failed to communicate any details of the arrangement to Lykes' Mediterranean representative in Genoa.

On or before July 9, 1980 the shipment was delivered to the carrier in Leghorn, as evidenced by the bill of lading. The shipper's agent in Leghorn booked the shipment and Lykes accepted 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, subject to a Port and Terminal Service Charge, Open Top Container Charge, Bunker Adjustment Factor and Congestion Surcharge. Moreover, in lieu of two 40-foot containers, Lykes placed the cargo in four 20-foot containers which resulted in a total cost of transportation of $29,760.53.[2] Upon notification of the cargo's arrival in Houston, TTJ accepted the cargo, paid the charges in full and filed a complaint with Lykes requesting an explanation for the overcharge. Subsequently, Lykes filed the present application, asking permission to refund a portion of the freight charges on the ground that the failure to file the agreed upon rate was due to inadvertent administrative error.

In his first Initial Decision the Presiding Officer recognized that certain questions remained unanswered, but nevertheless concluded that the application met the requirements of section 18(b)(3) of the Shipping Act, 1916,[3] and granted Lykes permission to refund the requested amount of $21,950.53 to TTJ.

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[2] Lykes' invoice to TTJ shows charges in the amount of $29,818.07, or a difference of $57.54 attributed to wharfage.

[3] Section 18(b)(3) reads in part:

> No common carrier by water in foreign commerce . . . 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: *Provided, however,* that the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will

Continued

On review of the Initial Decision, the Commission, by Order served May 27, 1981, determined to remand the proceeding to the Presiding Officer for the purpose of further developing the record on the following points:

(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.

On remand, the Presiding Officer found that:

(1) the parties had an agreement on the rate to be charged by Lykes for the transportation from Leghorn, Italy, to Dallas, Texas;

(2) due to Lykes' failure to file an amendment to its intermodal tariff reflecting the agreement, the shipment moved from Leghorn to Houston under the port-to-port tariff of the Med-Gulf Conference of which Lykes is a member;

(3) after taking delivery of the shipment at Houston, TTJ arranged for its transportation to Dallas by motor carrier and paid $2,455.84 for such transportation;

(4) the motor carrier employed by TTJ was not a participant in Lykes' intermodal tariff;

(5) the use of four 20-foot containers instead of the promised two 40-foot containers was caused by an error of the type contemplated in section 18(b)(3) of the Shipping Act, 1916. The Presiding Officer reasoned that the loading of the "wrong" containers in this instance was the carrier's fault just as the overloading of a container was found to be the carrier's error in *Old Ben Coal, Inc. v. Sea-Land Service, Inc.*, 21 F.M.C. 506 (1978). Accordingly, he concluded that the wrongful substi-

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be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further*, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. 46 U.S.C. 817(b)(3).

tution of 20-foot containers for the promised 40-foot containers was a "further result of Lykes' inadvertent failure to file the agreed rate"; and (6) the refund, if granted, will not have any effect on the land portion of the through rate.

Based on the foregoing, the Presiding Officer concluded that Lykes' failure to file the rate agreed upon in its tariff was due to inadvertence within the meaning of section 18(b)(3) of the Act and granted Lykes permission to refund $21,950.53 of the $29,650.53 collected from TTJ.

DISCUSSION

A threshold question in considering a request for relief under section 18(b)(3) is whether the carrier performed the service for which it seeks permission to apply a rate not on file in its tariff at the time of shipment.

In this instance, while Lykes had apparently agreed to move the shipment from Leghorn to Dallas, its failure to perform that service is fatal to the instant application. Lykes' port-to-port bill of lading issued under the Conference tariff provided for delivery of the cargo to the shipper at Houston to the exclusion of any further land transportation. TTJ, and not Lykes, arranged and paid for the carriage by motor carrier to Dallas. Consequently, Lykes did not perform the transportation service contemplated in its agreement with TTJ and for which it now asks permission to apply a special rate.

Furthermore, the tariff which Lykes seeks to apply is a joint ICC/FMC tariff in which certain rail and motor carriers have agreed to participate, at rates or "divisions" which are set forth in the tariff. None of those rail or motor carriers participated in this movement. Thus, the conclusion reached by the Presiding Officer, that a refund here will not affect the land portion of through rate, has no meaning in this case. The rail and motor divisions of the through rate have not and cannot be paid because the service was not performed.

As a remedial statute section 18(b)(3) needs to be liberally construed.[4] The Commission, however, may exercise its discretionary powers only within the limits permitted by statute. In this instance, Lykes filed a tariff [5] covering a service it had not performed and then applied for permission to refund a portion of the charges collected not under its own tariff, but under the Conference's tariff. Moreover, the tariff sought to be applied to this shipment reflects a service that would clearly contradict the terms of the bill of lading under which this cargo moved.

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[4] *Nepera Chemical, Inc. v. Sea-Land Service, Inc.*, 662 F.2d 18 (D.C. Cir. 1981).

[5] The tariff upon which the refund would be based is required by section 18(b)(3). 46 U.S.C. 817(b)(3).

There are at least two other obstacles to granting this application which were not recognized by the Initial Decision. First, the substitution of four 20-foot containers for two 40-foot containers, while permissible under the conference tariff which was applied to this shipment, is not permitted under Lykes' intermodal tariff, which is sought to be applied. The reason for this distinction is that the rail and motor divisions in the intermodal tariff vary depending upon the size of container carried. Thus, even if Lykes had properly filed the agreed upon rate in its intermodal tariff, that rate could not have been applied to the instant shipment.

Second, the "agreement" between Lykes and TTJ indicated that the "rates will only be filed upon receiving a firm booking." Since there was no applicable rate in Lykes intermodal tariff previous to the shipment, the agreed upon rate would be a new or initial rate which, under the terms of section 18(b)(2) of the Shipping Act (46 U.S.C. 817(b)(2)), would have to be filed at least thirty days prior to its effectiveness. It is apparent from the record in this case that the booking was not made at least thirty days prior to shipment. Thus, once again, even if Lykes had filed the agreed upon rate, it could not have been applied to the instant shipment.[6]

Therefore, the decision of the Presiding Officer granting Lykes Bros. Steamship Co., Inc. permission to refund $21,950.53 of the freight charges collected from Texas Turbo Jet, Inc. is reversed. The application of Lykes Steamship Co., Inc. is denied and the proceeding is discontinued.

It is so ordered.

(S) FRANCIS C. HURNEY
Secretary

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[6] There is a mechanism under section 18(b)(2) under which the Commission may, "in its discretion, and for good cause," allow new or initial rates to become effective upon less than thirty days' notice. Since no such application was filed by Lykes, we can only speculate on whether it would have been granted. However, it would certainly stretch the meaning of words to find that Lykes' apparent desire not to publicize its arrangement with TTJ until the cargo was booked constituted "good cause" to waive the statutory notice requirement.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-76
HEIDELBERG EASTERN, INC.

v.

CONTAINER OVERSEAS SERVICES, INC. AND
CONTAINER OVERSEAS AGENCY, INC.

ORDER REOPENING AND REMANDING PROCEEDING

November 5, 1981

On June 26, 1981, Chief Administrative Law Judge John E. Cograve's Initial Decision in this proceeding was adopted by the Commission. That decision awarded Complainant $9,794.00 in reparations from Respondents Container Overseas Agency, Inc. (Agency) and Container Overseas Services, Inc. (Services) for a freight overcharge which violated section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).[1] This proceeding is now before the Commission upon Agency's Petition for Reconsideration, requesting that the complaint against it be dismissed on the ground that Agency should not have been made a party to the proceeding.

Agency argues that the Commission lacks jurisdiction over it in a section 18(b)(3) proceeding. Agency asserts that it and Services were separate and distinct corporations, that only Services was a carrier, and that Agency "was merely a terminal, at best." Agency's President had previously failed to respond to the notice of this litigation, Agency explains, "because he knew that he was not a carrier." [2]

In its Reply to the Petition, Complainant argues that Agency should have raised the jurisdictional question during the course of the litigation, and has not provided new information not available at the time of the initial determination. Complainant also alleges that, contrary to Agency's contention, Agency was not a separate entity from Services, and cites correspondence suggesting substantial participation by Agency in the carrier business.[3] Complainant additionally requests that

[1] The Commission reviewed the Initial Decision for the purpose of awarding interest on the grant of reparations.

[2] Agency did not participate in the proceeding. Services requested an extension for filing an answer, but failed to participate in the proceeding beyond that. Both Respondents ignored the Presiding Officer's procedural notice requesting memoranda.

[3] Complainant cites a letter from Services' Vice President explaining that Services "ceased business September 19, 1980 and gave the entire business over" to Agency. That letter further states:

Continued

the Commission "impose appropriate fines and sanctions against Agency for its conduct" and that Complainant be awarded $2,400.00 in attorney's fees.

DISCUSSION

Agency's Petition was not timely filed, and it has therefore requested a waiver of the Commission's Rule 261 (46 C.F.R. 502.261) requiring that petitions for reconsideration be filed within 30 days of a final decision. Because the subject of Agency's belated Petition is jurisdiction, a challenge to which cannot be dismissed as untimely,[4] the Commission will waive its rule and entertain the Petition.

The present record is insufficient to permit the Commission to make any determination on the jurisdictional issue raised. Nor are there tariffs on file or other information of which the Commission could take official notice, which would aid in such a determination.

The Commission has determined, therefore, to reopen the proceeding and remand it to the Presiding Officer to take additional evidence on the matter, and to determine whether Agency is indeed subject to the Shipping Act, 1916 in the context of this proceeding. This will afford all parties the fullest opportunity to address the jurisdictional issue raised in Agency's Petition.

THEREFORE, IT IS ORDERED, That this proceeding is reopened and remanded to the Presiding Officer for further action consistent with this Order.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

> [A]ll sales and marketing, stuffing, receiving, trucking and rate making negotiations in the U.S. were handled by the Agency company. Container Overseas Services, Inc. was the financing part of the NVOCC business since it had credit with steamship lines and borrowing power to advance monies which "Agency" did not have.
>
> * * * *
>
> Your clients (sic) claim against "Services" was unfortunably (sic) out of my control as we have little or no defense because it was the employees of "Agency" in New Jersey who did all the negotiations and reaped the benefit.

Agency's reply to Complainant's submission was rejected by the Commission's Secretary, as constituting a reply to a reply not permitted by the Commission's Rules of Practice and Procedure. 46 C.F.R. 502.74(a).

[4] *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 474 (D.C. Cir. 1976), *cert. den.* 434 U.S. 1086 (1978).

* Commissioner James J. Carey did not participate in this matter.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-44

VIRGINIA PORT AUTHORITY

(PETITION FOR DECLARATORY ORDER)

Agreement No. T-3896 does not authorize the parties to adjust rental payments for occupancy which occurred prior to Commission approval.

J. Stanley Payne, Jr., for Virginia Port Authority.

Robert L. McGeorge and *Richard D. Gluck*, for Portsmouth Terminals, Inc.

REPORT AND ORDER

November 6, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH, AND JAMES V. DAY, *Commissioners*)

The Commission has before it the Petition for Declaratory Order of the Virginia Port Authority (VPA) and the Reply of Portsmouth Terminals, Inc. (PTI), arguing for different interpretations of a lease arrangement between VPA and PTI for the operation of marine terminal facilities in Portsmouth, Virginia.

BACKGROUND

Two section 15 agreements are at issue. The second of these agreements, Agreement No. T-3896, was approved on November 14, 1980 for a further term expiring April 30, 1985. Prior to November 14, 1980, the parties had leased the same facilities under Agreement No. T-2558.[1] Agreement No. T-2558 had a ten-year term which expired December 31, 1979, but permitted PTI to hold over on a month-to-month basis at the previous rental amount.[2] Because negotiation of the second lease was not completed until February 26, 1980, PTI occupied the premises and paid rent under the holdover provisions of the first agreement until FMC approval could be obtained.

[1] Agreement No. T-2558 was originally between PTI and the Portsmouth Port and Industrial Commission and dates back to January 1, 1970—although occupation of the premises was not lawful under the Shipping Act until Commission approval was obtained on October 26, 1971. VPA succeeded to the interests of the Portsmouth Port and Industrial Commission on April 1, 1971.

[2] PTI also had an option of first refusal to negotiate with VPA for an additional ten-year term at a newly agreed upon rental amount.

The instant dispute concerns the amount of rent due VPA for the first ten and one-half months of 1980. Agreement No. T-3896 provides for a lower rental than did Agreement No. T-2558 for the volume of cargo actually handled by PTI during 1980. VPA states that the T-3896 formula is inapplicable to any cargo handled before November 14, 1980—the date of Commission approval—whereas PTI believes the reduced amount applies retroactively to cover all of its 1980 cargo, in part because of language in Agreement No. T-3896 stating that its term would run for 64 months beginning on January 1, 1980. Approximately $104,000 seems to be involved, an amount withheld by PTI from its December, 1980 rental payment.[3]

POSITION OF THE PARTIES

VPA alleges that: (1) the parties intended that T-3896 rental payments would begin at the time of Commission approval and not on January 1, 1980; (2) the January 1, 1980 date appears in section 2.1 of Agreement No. T-3896 in order to establish a definite termination date of May 1, 1985 and not a retroactive commencement date; [4] (3) section 2.1.5 of Agreement No. T-3896 and Exhibit C thereto, when read together, clearly indicate that rent shall commence upon approval by the Commission; [5] (4) the Commission's Order approving Agreement No. T-3896 states, at page 3, that: "the rental formula contained in Exhibit C reflects [the parties'] understanding that the agreement will not become effective prior to Commission approval;" (5) Agreement No. T-3896 changes several of the parties' obligations in addition to the rental amount and there is no basis for construing the rental formula differently from the Agreement's other provisions; and (6) the courts and the Commission have construed section 15 as forbidding the retroactive approval of agreements.[6]

PTI argues that the Commission should either dismiss or deny the Petition because: (1) declaratory order procedures are unavailable in

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[3] *See* PTI Reply at 15-16, 27; Petition at 2. The parties have not disclosed their accounts to the Commission.

[4] Section 2.1 provides that:

> The term of this Lease shall be for a period of five (5) years and four (4) months commencing at midnight, January 1, 1980 and ending at midnight, April 30, 1985.

[5] Section 2.1.5 provides that:

> This Lease shall be submitted for approval by the Federal Maritime Commission and the parties will cooperate in their efforts to have it approved at an early date. The parties agree that the date of approval shall not be considered as an act which will extend the initial term of this Lease beyond May 1, 1985.

Exhibit C provides, in pertinent part, that:

> Rent for the period January 1, 1980, or upon such date as this lease is approved by the Federal Maritime Commission through December 31, 1982, shall be as follows. . . .

[6] *River Plate & Brazil Conference v. Pressed Steel Car Co.*, 227 F.2d 60 (2d Cir. 1955); *Pacific Coast European Conference v. Federal Maritime Commission*, 439 F.2d 514 (D.C. Cir. 1970); *Agreement No. T-2138*, 12 F.M.C. 126 (1968); *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966).

this instance because VPA is not seeking an interpretation of the leases which would allow it to "act without peril;" [7] (2) VPA refused to participate in good faith negotiations regarding 1980 rents as required by Section 13.1 of Agreement No. T-3896; [8] (3) the Petition is procedurally defective because all relevant provisions of the lease are not attached and because it does not include a plain statement of exactly how the annual rental formula would be applied to tonnages handled during periods of less than one year; (4) the rental charges established by Agreement No. T-3896 are mere "landlord/tenant" transactions, not subject to Commission regulation; (5) Section 3.1 expressly refers to a "total annual rent" [9] and thus reflects the parties' intention that all 1980 rents were to be calculated under the new formula if Agreement No. T-3896 were approved any time during calendar year 1980; (6) the Commission has allowed adjustments in revenue pools to cover past voyages when it could find that such adjustments would have only a prospective effect upon the parties' operations; [10] (7) application of the new formula to all 1980 cargo would not have a retroactive effect because both the new and the old formulae are based upon the total annual tonnage and the parties could not have altered their behavior prior to approval; (8) because the parties could submit an appropriate amendment to Agreement No. T-3896 which would accomplish the result sought by PTI, it would not violate section 15 to construe the new rental formula as applying to all 1980 cargo; (9) Agreement No. T-3896 is ambiguous, was drafted by VPA, and reflects VPA's superior bargaining power, and, because of these circumstances, Virginia law requires that it be construed against VPA; [11] (10) public policy favors

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[7] PTI claims that VPA's objective is to coerce PTI into paying additional rent and that the Petition therefore does not comply with section 502.68(b) of the Commission's Rules which states, in pertinent part, that:

> The procedures of this section shall be invoked solely for the purposes of obtaining declaratory rulings which will allow persons to act without peril upon their own view. Controversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease and desist orders are sought, are not proper subjects of petitions under this section. 46 C.F.R. 502.68(b).

[8] Section 13.1 provides that:

> Should a dispute arise between the parties as to the interpretation of any of the provisions or the performance of either party of any of the obligations undertaken by this Lease Agreement, the matter in question shall be settled by the parties which shall meet and confer within five (5) days after receipt of written notice from one to the other of an issue that is in dispute. The foregoing language shall not deprive either party of their legal rights under the terms and conditions of this Lease.

[9] Section 3.1 provides that:

> PTI covenants and agrees to pay for the demised premises the total annual rent to VPA in accordance with the formula set forth in Exhibit C, attached hereto and made a party hereof. The annual rent consists of (a) the minimum guarantee (hereinafter referred to as the "basic rent"), and (b) the additional rent for tonnage handled in excess of 400,000 tons per year.

[10] *E.g., Agreement No. 9847-3*, unreported, November 29, 1977.

[11] PTI claims that it developed a successful terminal business under the first lease where none previously existed and that VPA has unfairly attempted to appropriate certain aspects of this business by

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adjustments in terminal lease rentals because they provide little opportunity for anticompetitive results.

Finally, PTI claims that if the Commission declines to rule in PTI's favor it must institute an evidentiary hearing to allow PTI to prove disputed facts and develop supplementary facts now in VPA's possession.

DISCUSSION

PTI's technical defenses to VPA's Petition must fail. The question raised by VPA concerns whether the rental provisions of T-3896 can apply to the 10 1/2 month period which preceded the Commission's approval of that agreement. VPA has asked the Commission to construe a section 15 agreement subject to federal, and not state, jurisdiction under the Shipping Act, 1916. *See California v. United States*, 320 U.S. 577 (1944), *rehearing denied*, 321 U.S. 802 (1944). Even if VPA wished to excuse PTI from the disputed rental payments, it could not lawfully do so unless such an action were contemplated by Agreement No. T-3896.[12] Consequently, the question before the Commission is "what was the Commission's understanding regarding the application of Agreement No. 3896's rental formula to cargo handled by PTI prior to November 14, 1980?" This question is a proper subject for a declaratory order and the Petition describes the controversy with sufficient clarity to permit the submission of meaningful reply comments and reasoned evaluation by the Commission.[13] There is no authority for separating the rental provisions of a terminal lease from other provisions expressly found to govern Shipping Act conduct as a means of removing the former from Commission jurisdiction.[14]

Although the rental provisions of Agreement No. T-3986 are not free from ambiguity, the question of the Agreement's effective date was addressed by the Commission in its Order of Approval. The Commission noted that section 2.1 provided for a January 1, 1980 commencement date and stated that:

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delaying renewal of the lease while a Virginia Legislative Study Commission prepared a report. This report recommended that a five—rather than ten—year renewal lease be negotiated and that PTI sell certain real property it owns within Portsmouth Marine Terminal to VPA. The State of Virginia has recently enacted legislation requiring VPA operation of all Virginia terminals upon the expiration of any outstanding leases with private operators.

[12] The Shipping Act, 1916, provides for civil penalty of not more than $1,000 per day for engaged in concerted activities subject to section 15 which have not been approved by the Commission. 46 U.S.C. 814.

[13] Complete copies of the documents being construed were considered by the Commission in approving Agreement No. T-3896 and are lodged in its public files.

[14] *See Pouch Terminal, Inc. v. Port Authority of New York and New Jersey*, 20 F.M.C. 753 (1978). The November 14, 1980 "Order of Approval" held that Agreement No. T-3986 was not exempt from section 15 as a "mere lease of realty" because it obligated PTI to join the Terminal Operator Conference of Hampton Roads and to establish rates and practices comparable to those of other Virginia marine terminals.

> . . . the Commission . . . cannot effect a retroactive approval under section 15. The proponents have advised that they recognized that this is the case, and submit that Section 2.1.5 and the rental formula set forth in Exhibit C on page 28 of the agreement clearly reflect their understanding that the agreement will not become effective prior to Commission approval.

The statement from the Proponents to which the Commission referred is a letter dated September 22, 1980 from Robert L. McGeorge, counsel for PTI, to Edward Hawkins of the Office of Agreements.[15] This letter states that:

> . . . the agreement, as it stands, implicitly and explicitly provides that the agreement cannot become effective prior to Commission approval. [Section 2.1.5 and Exhibit C] clearly reflect [this intent]. You can rest assured that there is no incentive for the parties to claim that Commission approval would legitimize activities undertaken prior to the approval date.
>
> At all times PTI has lawfully operated the Portsmouth Marine Terminal—first pursuant to the original Commission-approved lease between the parties and then from January 1, 1980, to the present pursuant to the month-to-month holdover tenancy clause of that agreement.

There was no reason to believe that this representation was intended to exclude the amount of rent paid for PTI's occupancy prior to approval. Accordingly, the rental formula of Agreement No. T-3896 is construed as applying only to cargo handled on or after November 14, 1980.[16]

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of the Virginia Port Authority is granted to the extent indicated above.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[15] This letter is especially significant in light of PTI's assertion that VPA drafted Agreement No. T-3896 and forced its terms upon PTI.

[16] PTI asserts that the Agreement does not specify an exact method for implementing the new formula on a "partial month" basis given the requirement that progress payments be made on the first of each month in advance (1/12th of the basic rent described in Sections 3.1-3.4). The parties may use any reasonable method of prorating the November, 1980 rent, as may be determined by good faith negotiation. December rent would be based entirely upon the T-3896 formula.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 493(I)

ORGANIC CHEMICALS (GLIDDEN-DURKEE)
DIVISION OF SCM CORPORATION

v.

"K" LINE (KAWASAKI KISEN KAISHA, LTD.)

INFORMAL DOCKET NO. 718(I)

THE STOP & SHOP COMPANY, INC.,
BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND BARBER
STEAMSHIP LINES, INC.

PARTIAL ADOPTION OF DECISIONS OF SETTLEMENT OFFICER

November 9, 1981

On August 17, 1981, Settlement Officer Roland C. Murphy awarded $480.34 reparation at 6.4 percent interest [1] to Organic Chemicals (Glidden-Durkee) Division of SCM Corporation for violation by "K" Line (Kawasaki Kisen Kaisha, Ltd.) of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)). On August 27, 1981, he awarded $176.00 reparation at 8.44 percent interest [2] to The Stop & Shop Company, Inc., Bradlees Division for violation by Barber Blue Sea Line and Barber Steamship Lines, Inc. of section 18(b)(3).

In regulations recently promulgated,[3] the Commission has declared that in cases involving the misrating of cargo arising under section

[1] The Settlement Officer derived the 6.4% figure from the average monthly rates quoted in the secondary market for U.S. Treasury notes for 1978. The accrual period used for the calculation of interest was the period between the dates of the shipments and December, 1979, "since the case was resolved at that point."

[2] The Settlement Officer derived the 8.44% figure from the average monthly rates quoted in the secondary market for U.S. Treasury notes for its six-month bills for the period between September, 1977, when the overcharge was paid, to December, 1979, "since the case was resolved at that point." The accrual period was also from September, 1977 to December, 1979.

[3] 46 C.F.R. 502.253; Docket No. 81-22, *Interest in Reparations Proceedings*, 24 F.M.C. 145 (1981).

18(b)(3), except in certain situations: (1) simple interest will be included as part of any award of reparations; (2) the interest will accrue from the date of payment of freight charges to the date reparations are paid; and (3) the rate of that interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid to the latest available monthly Treasury bill rate at the time reparations are awarded. This regulation mandates the award of interest in this proceeding in the amount therein provided.

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

IT IS FURTHER ORDERED, That, in Informal Docket No. 493(I), Organic Chemicals (Glidden-Durkee) Division of SCM Corporation is awarded $353.62 plus 8.9 percent simple interest per annum on the April 27, 1976 shipment and $126.72 plus 9.5 percent simple interest per annum on the February 7, 1977 shipment. On both such shipments, the interest shall accumulate from the month in which freight charges were paid through the month in which reparation is made; and

IT IS FURTHER ORDERED, That, in Informal Docket No. 718(I), the Stop & Shop Company, Inc., Bradlees Division is awarded $176.00 plus 10.3 percent simple interest per annum, accruable from the month in which freight charges were paid through the month in which reparation is made; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

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.

* Commissioner Richard J. Daschbach did not participate and issues the attached statement.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 493(I)

ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIV OF SCM CORPORATION

v.

"K" LINE (KAWASAKI KISEN KAISHA, LTD.)

DECISION OF ROLAND C. MURPHY, SETTLEMENT OFFICER [1]

Partially Adopted November 9, 1981

Reparation Awarded

Organic Chemicals Glidden-Durkee, Division of SCM Corporation (Complainant), claims $480.34 from "K" Line (Carrier) for alleged freight overcharges on two shipments of industrial chemicals from Savannah, Georgia and Jacksonville, Florida, to Tokyo, Japan.

The first shipment consisted of 29 drums of Myrcene-85, 65 drums of Intermediate Linalool-95, and 25 drums of Intermediate-750. This shipment moved from Savannah, Georgia to Tokyo, Japan on April 27, 1976, via the *New Jersey Maru.* The second shipment consisted of 6 drums of Hydroxycitronellal Pure and 37 drums of Intermediate-750; shipped February 7, 1977, from Jacksonville, Florida to Tokyo, Japan via the *Verrazano Bridge.*

The transportation charges assessed by the carrier, on the two shipments, was based upon a total measurement of 1842 cubic feet declared by the complainant and shown on the applicable bills of lading. The total cubic measurement of the shipments was based upon a measurement of 11.66 cubic feet per drum. Complainant asserts that the correct total cubic measurement of the shipments should have been 1680 cubic feet based on a measurement of 10.715 cubic feet per drum.

The complainant contends that the declared cubic measurements were unintentionally incorrectly assessed and resulted from an erroneous application by complainant of Rule No. 2(b) of the governing tariff [2] which provides in part as follows:

(b) Measurement Cargo:

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[1] Both parties having consented to the informal procedure as 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.

[2] Far East Conference Tariff No. 27, FMC No. 10.

Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages when the cargo is delivered to the carrier, and shall be computed in accordance with 'Tweed's Accurate Tables,' except as may be otherwise provided in paragraphs (c), (d), (e), (f) of this rule, subject to the following rule with respect to disposition of fractions of inches:

All fractions UNDER one-half inch are dropped.

All fractions OVER one-half inch are extended to the next full inch.

Where there is a fraction of one-half inch on ONE dimension, it is extended to the next full inch.

Where there are fractions of one-half inch on TWO dimensions, the one on the small dimension is extended to the next full inch and the other dropped. If these dimensions are equal, drop one and increase the other to the next full inch.

Where there are fractions of one-half inch on THREE dimensions, those on the largest and smallest dimensions are extended to the next full inch and the other dropped.

The complainant computed the cubic measurement of a drum by increasing all three dimensional fractions to the next full inch instead of dropping the two fractions of less than one-half inch and increasing only the one remaining fraction of over one-half inch to the next full inch. A drum measures 23 15/32" x 23 15/32" x 34". Complainant computed the cube of a drum by multiplying 24" x 24" x 35" for a total of 20,160 cubic inches or 11.66 cubic feet per drum (1,728 cubic inches equal one cubic foot), instead of multiplying 23" x 23" x 35" which equals 18,515 cubic inches or 10,715 cubic feet per drum.

Complainant in support of his claim submitted the following:

1. An affidavit signed by complainant's Director of Purchasing. This document declares that all 55-gallon drums used by complainant conform to the United States Department of Transportation Specification 17 E (DOT-17E) published in 49 C.F.R. 178.116; and that the drums are procured from one or the other of the following three sources: Florida Steel Drum Company, Inc. (Florida Drum), Pensacola, Florida; Inland Steel Container-Division of Inland Steel Company (Inland Steel), New Orleans, Louisiana; and Rheem Manufacturing Company (Rheem), Savannah, Georgia.
2. *A copy of American National Standard Specifications for 55-Gallon Tight-Head Drums (DOT-17E)* (ANSI). In pertinent part, this publication reveals that the ocean shipping cube of

the drums covered thereby is 10.715 cubic feet. The figure contained in the standard shows the drums to measure 23 15/32" in diameter over rolling hoops and 34 3/4" in overall height. Based upon these dimensions, the resultant ocean shipping cube of a drum is 10.715 cubic feet. (23 15/32" x 23 15/32" x 34 3/4" or in conformity with Rule 12(a) of the conference tariffs 23" x 23" x 35" equals 18,515 cubic inches, divided by 1,728 cubic inches per cubic foot, equals 10.715 cubic feet.)

3. A copy of the specification sheet of Florida Drum, Inland Steel and Rheem. These specification sheets indicate that the ocean shipping cube of the drums manufactured and sold by these companies is, respectively, 10.72 cubic feet; "conform to ANSI Standards", and "10/9—meaning 10 9/12, or 10.75 cubic feet."
4. A brief prepared by attorneys for complainant.

The Commission in considering claims involving disputes as to the nature of cargo, if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, has traditionally imposed a heavy burden of proof on complainant. In Informal Docket 283(I), *Western Publishing Company, Inc. v. Hapag Lloyd A.D.*, Order served May 4, 1972, the Commission stated:

> . . . the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's mis-description appearing on the bill of lading. *Likewise, claimant is not bound at least where the misdescription results from shipper's unintentional mistake or inadvertence.* But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim. (emphasis added)

It is readily apparent there could have been no intent, purpose or motivation of ultimate gain or advantage in the claimant/shipper's perpetration of the error underlying the claims. Since the shipper's error was an unintentional mistake, he is not bound by his erroneous declaration of cubic measurement.

On the shipment of 29 drums of Myrcene-85, 65 drums of Intermediate Linalool-95, and 25 drums of Intermediate-750, complainant was assessed:

1388/40 cu.ft. = 34.7 cu.ft. x Rate of $123.00 M = $4268.10

Correct Assessment

1273/40 cu.ft. = 31.825 cu.ft. x Rate of $123.00 M = $3914.48

OVERCHARGE IS $353.62

On the shipment of 6 drums of Hydroxycitronellal Pure and 37 drums of Intermediate-750, complainant was assessed:

$^{454}/_{40}$ cu.ft. = 11.35 cu.ft. x Rate of $137.00 M = $1554.95

Correct Assessment

$^{417}/_{40}$ cu.ft. = 10.425 cu.ft. x Rate of $137.00 M = $1428.23

OVERCHARGE IS $126.72

TOTAL OVERCHARGE $480.34

Complainant seeks an adjustment in freight charges which were assessed by the carrier based on an unintentional and erroneous declaration by complainant of the cubic measurement of the cargo. Therefore, the heavy burden of proof requirement applies. It is believed complainant has met this requirement.

In Docket No. 78-2, decided on June 11, 1979, the Commission found that Organic Chemicals had sustained its burden of proving freight overcharges against different carriers but involving the same facts and issues that are set forth in the instant Informal Docket. It was found that the freight overcharges by the carriers resulted from erroneous statements on the measurements of the cargo in the bills of lading by Complainant.

Complainant has supplied detailed specifications and data sufficient to establish the dimensions of the 55-gallon drums it utilizes and the correct ocean shipping cube of 10.715 cubic feet. It was also determined that the declared excess cubic measurement was erroneous and unintentional. Complainant is therefore awarded reparation in the amount of $480.34.

Consistent with the Commission's present practice, the Settlement Officer will award Organic Chemicals (Glidden-Durkee), Division of SCM Corporation interest in the amount of 6.4 percent per annum, from August, 1976 through December 1979 on the first shipment, and March, 1977 through December, 1979 for the second shipment. The year 1978 was used to obtain the rate of 6.4 percent since it is the only period that is readily available reflecting the average monthly rates quoted in the secondary market for U.S. Treasury notes. The month of December, 1979, was used as the cut-off date for the calculation of the interest since the case was resolved at that point. It is considered reasonable in the circumstances. So ordered.

(S) ROLAND C. MURPHY
Settlement Officer

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 718(I)

THE STOP & SHOP COMPANY, INC., BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND BARBER STEAMSHIP LINES, INC.

DECISION OF ROLAND C. MURPHY, SETTLEMENT OFFICER [1]

Partially Adopted November 9, 1981

Reparation Awarded

On July 23, 1979, the Stop and Shop Company, Inc., Bradlees Division, (Complainant) [2] filed a complaint which alleges that Barber Blue Sea Line and Barber Steamship Lines, Inc. (Respondent), applied an incorrect rate to a shipment consigned to the Complainant, which resulted in a $176.00 overcharge. The Complainant also alleges that the Respondent's action constitutes a violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).

The shipment, which consisted of 137 cartons of Paper Mache Bank, moved on the Respondent's vessel *Tamara* under bill of lading C-23, dated August 19, 1977, from Keelung, Taiwan to Boston, Massachusetts. The shipment moved on a freight collect basis.

The complainant alleges that the applicable tariff for the shipment in question is Barber Blue Sea Freight Tariff FMC-44, and that the carrier's basis for rating the shipment was Item No. 2000. Claimant alleges that the Respondent erred by assessing a rate effective January 1, 1978, whereas the shipment in question moved on August 19, 1977. The rates and charges were billed as follows:

	Measurement		Rate	Amount
OCEAN FREIGHT	11.00 M3	x	$80.00 M3	$880.00
CFSDC	11.00 M3	x	$ 4.00	$ 44.00
TOTAL				$924.00

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

[2] The complaint was filed on behalf of the Stop and Shop Company, Inc., Bradlees Division, by Agent Jerome B. Silverman.

Claimant contends that the shipment should have been rated on the basis of tariff Item No. 2000 applicable to the rate in effect on August 19, 1977, and states that the rates and charges should have been billed as follows:

	Measure-ment		Rate	Amount
OCEAN FREIGHT	11.00 M3	x	$64.00	$704.00
CFSDC	11.00 M3	x	$ 4.00	$ 44.00
TOTAL				$748.00

The alleged overcharge was in the amount of $176.00. Claimant, through its agent, filed an overcharge claim but the Respondent declined the claim on the basis of tariff Rule No. 50, which limits the time in which overcharges may be filed, to not less than six months after date of shipment. It is well settled that such a tariff rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases with the Commission pursuant to section 22, Shipping Act, 1916.[3]

In support of the claim, claimant has submitted a bill of lading, overcharge claim No. 450784, appropriate tariff pages and a paid freight bill with cancelled check indicating that freight charges were paid in the amount of $924.00.

The basic question at issue then is what was the applicable rate to be assessed on the subject shipment at the *time* it was transported from Keelung to Boston. This Settlement Officer's review of Barber Blue Sea Freight Tariff FMC-44 indicates that on August 19, 1977, the date that the shipment moved, the published effective rate on Paper Mache Bank was $64.00 per M3, with a CFSDC charge of $4.00 per M3. Thus, the correct freight charge for the shipment should have been $748.00.

Therefore, reparation of $176.00 is awarded to the Complainant based on the computation as aforementioned.

Consistent with the Commission's present practice, Claimant shall also receive a per annum interest rate of 8.44 percent accruing as from September 1977, the month in which the overcharge was paid, through December 1979. This rate reflects the average monthly rates quoted in

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

the secondary market for U.S. Treasury notes for its six months' bills for the period September 1977 through December 1979. December 1979 was used as the cutoff date for the calculation of the interest since the case was resolved at that point. It is considered reasonable in the circumstances. So ordered.

(S) ROLAND C. MURPHY
Settlement Officer

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-8

ROHM & HAAS COMPANY

v.

ITALIAN LINE

ORDER

November 13, 1981

The proceeding is before the Commission on appeal by Respondent Italian Line to a Ruling [1] of Administrative Law Judge Norman D. Kline, served June 10, 1981, allowing Complainant Rohm & Haas Company (Rohm & Haas) to amend its complaint filed January 26, 1981 to indicate that the action is being brought on behalf of its foreign subsidiary, Rohm & Haas Italia S.p.A. - Milan (RHI).[2] The amendment, which would be filed beyond the two-year period of limitation provided in section 22 of the Shipping Act, 1916, would relate back to the date of filing of the original complaint.

BACKGROUND

The complaint filed by Rohm & Haas, a Delaware corporation, alleges that Respondent Italian Line collected freight charges in excess of those provided in its tariff on two shipments described in the bills of lading as "Drums Flammable Solid N.O.S. (contains toluene solvent)." Because freight was paid not by the Complainant but by its wholly-owned subsidiary, RHI, the Presiding Officer, before proceeding into the merits of the claim, directed the parties by Order served March 31, 1981 to brief separately the following jurisdictional issues:

1. Whether Complainant had standing to claim reparation in view of the fact that freight was paid by its foreign subsidiary; and

2. If not, whether an amendment to the complaint filed now could relate back to the date of its original filing.[3]

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[1] Because the Ruling is said to depart from established Commission precedent and to raise a question of policy, the Presiding Officer allowed an immediate appeal pursuant to Rule 153 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.153.

[2] Complainant moved to amend the complaint to note participation on its own behalf and on behalf of Rohm & Haas Italia S.p.A. - Milan.

[3] The additional question of whether the complaint had been filed within the two-year statutory period was answered by Complainant to the satisfaction of the Presiding Officer.

In his March 31 Order, the Presiding Officer called the attention of the parties to current Commission case law holding that: (1) a complainant seeking reparation for freight overcharges must show that it either paid the freight charges or has validly succeeded to the claim,[4] and (2) the filing of an assignment of the claim or of an amendment to the complaint to add or substitute a new party has been held to be a *new* complaint effective as of the date of filing.

Addressing the issues raised in the March 31 Order, Rohm & Haas maintained that it has standing to bring the complaint as a party to the contract of carriage and as the American representative of its foreign subsidiary in actions litigated before United States agencies, just as RHI would have standing in a proceeding brought in Italy on behalf of its United States parent. Complainant pointed out that it derives benefits from the profits and ultimately bears the losses of its subsidiary. Referring to the Commission decisions in *C.S. Greene & Co. v. Sea-Land Service, Inc.*, 20 S.R.R. 374 (1980) and *Gladish & Associates v. Sea-Land Service, Inc.*, 23 F.M.C. 280 (1980), Complainant argued that it would be incongruous for the Commission to entertain reparation claims by freight forwarders merely because they paid the freight for their shippers and deny similar standing to the consignor or consignee who actually bore the ultimate financial burden of the overcharge.[5] Finally, Complainant submitted that the Commission's Rules permit an amendment to the complaint to reflect Rohm & Haas' representation of its foreign subsidiary.[6]

Italian Line disagreed with Complainant, maintaining that the complaint is jurisdictionally defective and should be dismissed as a matter of law. Respondent contended that Commission precedent mandates that result because a complainant who has not paid the freight charges has no standing to claim reparation unless it obtains a valid assignment of the claim within the two-year limitation period provided in section 22

[4] *Sanrio, Inc. v. Maersk Line*, 19 S.R.R. 907 (1979), and *3M v. Hapag Lloyd*, 23 F.M.C. 533 (1981).

[5] Complainant distinguishes the holdings in *Ocean Freight Consultant v. Bank Line, Ltd.*, 9 F.M.C. 211 (1966); *Carton - Print, Inc. v. The Austasia Container Express Steamship Co.*, 20 F.M.C. 30 (1977); *Trane Company v. South African Marine Corp., (N.Y.)*, 19 F.M.C. 374 (1976); *Mine Safety Appliances Co. v. South African Marine Corp.*, 21 F.M.C. 619 (1978), on the basis that none of these proceedings involved both the parent of the company that originally paid the freight charges and the consignor of the shipment. Complainant also relies on *Spiller v. Atchison, T. & S.F. Ry. Co.*, 253 U.S. 117 (1920), where the Supreme Court stated:

> The provisions of the act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through the violation of public duty by the carrier, must receive a reasonably liberal, and not a narrow, interpretation. (at 253 U.S. 135).

[6] Complainant refers to Rule 43 (46 C.F.R. 502.43) which permits the Commission or the Presiding Officer to "order an appropriate substitution of parties"; to Rule 70 which permits amendments to any pleadings; and to Rule 1 which directs that rules be "construed to secure the just, speedy, and inexpensive determination of every proceeding." Also cited is *Chr. Salvesen & Co., Ltd. v. West Michigan Docket & Market Corp.*, 12 F.M.C. 135 (1968), where because no new cause of action was created and the same relief was requested, joinder of the injured entity was permitted with the amendment relating back to the date of the filing of the complaint.

of the Shipping Act or, within such time, amends the complaint to bring in the proper party.[7] Respondent also noted that under Rule 26 of the Commission's Rules (46 C.F.R. 502.26), corporations may not appear before the Commission on behalf of other corporations.

The Presiding Officer's June 10 Ruling granted Complainant's motion to amend the complaint and permitted the amendment to relate back to the date of filing of the original complaint.[8]

The Presiding Officer explained that the failure to file an assignment or the denial of permission to amend the complaint is too technical and narrow a ground for dismissing a complaint and preventing a claim to be decided on its merits.[9] In reaching this conclusion, he relies on earlier Commission statements[10] and on the decision in *Interconex, Inc. v. Federal Maritime Commission*, 572 F.2d 27 (2d Cir. 1977), where the Second Circuit characterized the Commission's dismissal of the complaint with prejudice on procedural grounds as a "drastic remedy which should be applied only in extreme circumstances."

Finally, the Presiding Officer could find no sound basis for permitting forwarders to recover under an agency theory, as was the case in *C.S. Greene & Co. v. Sea-Land Service, Inc.*, and *Gladish & Associates v. Sea-Land Service, Inc.*, while denying a complainant the same relief when it attempts to recover on behalf of its foreign subsidiary.

On appeal from the Presiding Officer's Ruling, Respondent reargues essentially the same contentions advanced before the Presiding Officer

[7] In addition to the cases mentioned in note 4, *supra*, finding complainants to lack standing to claim reparation when the freight charges were paid by someone else, Respondent cites: *Colgate-Palmolive Co. v. Grace Line, Inc.*, 11 S.R.R. 982 (1970); *E.S.B. Inc. v. Springbok Line, Ltd.*, 19 S.R.R. 1342 (1980); *FMC Corp v. Argentine Line*, 22 F.M.C. 814 (1980). Respondent also relies on *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), where the Court held that the initial rather than the ultimate payor has standing to seek reparation.

Respondent points out that in those instances where the Commission allowed freight forwarders to claim reparation in their own name, they had initially paid the charges, had preexisting authority to recover reparation, and were directed to reimburse their principals the amounts so recovered. Respondent further contends that those few instances in which the courts have permitted the tolling of the statute of limitations are narrow exceptions warranted by legislative intent, and that the Federal rules permitting liberal amendments to pleadings, such as Rules 15(c) and 17(a) of the Federal Rules of Civil Procedure apply only to proceedings in federal courts and have not been adopted by the Commission.

[8] The Presiding Officer noted that although it has not adopted the federal rules, the Commission refers to those rules in instances where its own rules do not provide specific guidance. Docket No. 78-51, *Agreement No. 10349 - A Cargo Pooling and Sailing Agreement - Argentina/United States Atlantic Trade*, Order served April 19, 1979. He finds further support for his action in an early Supreme Court case, *Missouri, K. & T. R. Co. v. Wulf*, 226 U.S. 570 (1913), where the Court allowed an amendment changing a plaintiff's status from that of one suing as an individual to one suing in a representative capacity, although the statute of limitations had run.

[9] The Presiding Officer also stated that "to deny a simple amendment and to hold that such amendment is something brand-new and outside the two-year period, is similarly exceedingly technical and out of step with modern views of justice."

[10] *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934) and *City of Portland v. Pacific Westbound Conference*, 5 F.M.B. 118, 129 (1956), where it was stated that a regulatory body ought not to be hampered by the strict rules of pleading which govern courts of law.

in response to the March 31 Order, concluding that the complaint should be dismissed as a matter of law because Complainant could not show that *it* suffered injury.

DISCUSSION

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

> That *any* person may file with the board [Commission] a sworn complaint setting forth any violation of this Act by a common carrier by water . . . and asking reparation for the injury . . . caused thereby. . . . The board, *if the complaint is filed within two years after the cause of action accrued, may direct the payment . . . of full reparation to the complainant for the injury caused by such violation.* 46 U.S.C. 821(a). (Emphasis added.)

That section therefore clearly gives "any" person standing to file a complaint alleging a violation of the Shipping Act, and asking reparation for the injury caused thereby.[11] The sole jurisdictional requirement for awarding reparation is that the complaint be filed within two years after the cause of action accrued.[12]

In order to recover reparations under section 22, however, a complainant must have suffered injury. The proof of injury, like any other element of the Complainant's case on the merits, is a matter of evidence which has no relation to the issue of standing or to the time limitation for filing the complaint.[13] Whatever action the complainant may have to take in the course of the proceeding to prove its right to recovery, including the perfecting of its claim, relates to the burden of proof a complainant must sustain in order to prevail, and is not, therefore, subject to the two-year period of limitations.

That the complaint in this case was filed within the two year statutory period is not disputed. Consequently, in order to bring the proceeding to a decision on the merits, Complainant Rohm & Haas must demonstrate that it has been injured as a result of Respondent's alleged overcharge. In order to provide Rohm & Haas an opportunity to accomplish this, it will be allowed 60 days from the date of this Order to obtain an assignment of the claim from its subsidiary Rohm & Haas

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[11] "The language of a statute controls when sufficiently clear in its context." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

[12] The filing of the complaint gives the respondent notice of the charges raised against it and of the remedy requested. In this instance, RHI had requested from Respondent an adjustment of the freight charges paid on the two shipments even before the filing of a formal complaint. When the complaint was later filed, Respondent was well aware that it raised the same claim, related to the same occurrence, and asked the same relief which had been the subject of negotiations between RHI, Respondent and subsequently the Complainant.

[13] Statutes of limitations are directed against the claims sought to be asserted, not to the parties seeking to assert them. *McCloskey & Company v. Wright*, 363 F. Supp. 223 (E.D. Va. 1973).

Italia S.p.A.[14] Should it fail to do so within the time specified, the complaint will be dismissed for failure to prosecute.

In view of the broad language of section 22,[15] and in light of the Second Circuit decision in *Interconex, Inc., supra,* a dismissal of the complaint on procedural grounds would appear to be unwarranted. Although Respondent has not inaccurately characterized the Commission's past decisions, these precedents must be viewed in light of the particular circumstances of each case. To the extent past Commission decisions conflict with the Commission's action here, they are hereby overruled.[16]

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for further action consistent with this Order.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

[14] Such an assignment renders unnecessary the amendment of the complaint.

[15] The Shipping Act, 1916 is a remedial statute and as such must be liberally construed. One of the purposes of section 22 of that Act is to provide a procedure for granting relief to shippers who have been assessed freight rates higher than those otherwise legally permissible. The decision reached here furthers this purpose. *See Tcherepin v. Knight,* 389 U.S. 332 (1967).

[16] Policies may and must be adjusted where the regulatory purpose of the statute so requires. *American Trucking Assns. v. Atchison Topeka & S.F. Ry. Co.,* 387 U.S. 397, 416 (1967); *Consolidated Gas Supply Corporation v. F.P.C.,* 520 F.2d 1176, 1187 (D.C. Cir. 1975).

* Commissioner Carey did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-10

SEA-LAND SERVICE, INC., TRAILER MARINE TRANSPORT CORPORATION, GULF CARIBBEAN MARINE LINES, INC., PUERTO RICO MARITIME SHIPPING AUTHORITY

PROPOSED GENERAL RATE INCREASES IN THE PUERTO RICO AND VIRGIN ISLANDS TRADES

ORDER DENYING PETITIONS FOR RECONSIDERATION

November 13, 1981

Sea-Land Service, Inc. (Sea-Land) and Trailer Marine Transport Corporation (TMT) have petitioned the Commission to reconsider its decision served September 25, 1981 in the above-captioned proceeding. Sea-Land seeks reconsideration on the basis that: a) the Commission failed to consider the impact of its order directing Puerto Rico Maritime Shipping Authority (PRMSA) to reduce its rate increases on the other carriers in the proceeding; b) the Commission erred in accepting the estimated 7% average interest cost for the reference group of corporations used to derive a benchmark rate of return for the carriers, and; c) the Commission erred in utilizing PRMSA's last known fuel cost in projecting its fuel cost in the test year.* TMT also seeks reconsideration on the basis of the impact of PRMSA's reduced rate increases on the other carriers in the proceeding and further alleges that the Commission erred in excluding from its cost projections management commissions representing an allocation of the home office expenses of its parent corporation. PRMSA has filed a reply supporting the petitions. The Government of the Virgin Islands, Puerto Rico Manufacturers Association, the Drug and Toilet Preparation Traffic Conference, Inc. and the Commission's Bureau of Hearings and Field Operations have filed in opposition to the petitions.

The Commission finds that the petitions fail to raise matters which warrant reconsideration of its Order of September 25, 1981. First, while Commission regulations permit the consideration of the effect which disapproval of a carrier's rates will have on other carriers in the trade, they do not *require* such consideration. 46 C.F.R. 512.1(c). Moreover, the effect which disapproval of a carrier's rates will have on other carriers in the trade was not included as an issue in the Order of Investigation and, accordingly, cannot be considered at this stage of the

* Sea-Land also requests oral argument on its petition.

proceeding. Docket No. 79-48 - *TMT - Proposed General Increases in Rates*, 22 F.M.C. 178–179 (1979), *aff'd per curiam sub nom., Government of the Virgin Islands v. F.M.C.*, No. 80-1027 (D.C. Cir., Jan. 30, 1981).

Second, the balance of the contentions advanced in the petitions, "merely elaborate upon or repeat arguments made prior to the decision" and therefore are not proper subjects of a petition for reconsideration under the Commission's Rules of Practice and Procedure. 46 C.F.R. 502.261(a). Further, these arguments were fully considered and disposed of by the Commission in its September 25 decision and the Commission sees no reason to alter that decision. Petitioners' request for reconsideration and for oral argument will therefore be denied.

THEREFORE, IT IS ORDERED, That the request for oral argument on the Petition for Reconsideration filed by Sea-Land Services, Inc. is denied, and,

IT IS FURTHER ORDERED, That the Petitions for Reconsideration filed by Sea-Land Service, Inc. and Trailer Marine Transport Corporation are denied.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

** Commissioner Carey did not participate. Commissioner Daschbach will issue a separate dissenting opinion.

DOCKET NO. 81-10

SEA-LAND SERVICE, INC., TRAILER MARINE TRANSPORT CORPORATION, GULF CARIBBEAN MARINE LINES, INC., PUERTO RICO MARITIME SHIPPING AUTHORITY

PROPOSED GENERAL RATE INCREASES IN THE PUERTO RICO AND VIRGIN ISLANDS TRADES

ORDER DENYING PETITIONS FOR RECONSIDERATION

Commissioner Richard J. Daschbach, dissenting.

The Commission should grant Sea-Land Service, Inc. (Sea-Land) and Trailer Marine Transport Corporation's (TMT) petitions for reconsideration in the above-captioned proceeding and use these petitions as a vehicle for re-examining the logic and propriety of its entire September 25, 1980 decision in Docket No. 81-10.

The most glaring error in that decision was the Commission's finding that the rates of the Puerto Rico Maritime Shipping Authority (PRMSA) were unjust and unreasonable, a determination contrary to Administrative Law Judge Kline's July 20, 1981 finding that PRMSA's rates *were* just and reasonable.

The September 25 determination that PRMSA's general rate increase was unreasonable and should be "rolled back" was based on a series of conclusions on a wide range of disparate issues, including both specific projections and abstract methodological matters. The cumulative effect of these findings resulted in a determination that PRMSA's rate of return was unacceptably high, a classic case of losing sight of the forest for the trees.

It is baffling that the Commission could conclude that a corporation which lost over $4 million in its most recent fiscal year ending June 28, 1981, earned an excessive return on its rate base. However, that is precisely the finding that the Commission made regarding PRMSA.

The Commission has ordered that PRMSA, the government shipping line of Puerto Rico, plunge deeper into debt by refunding nearly $3 million, with interest, to its customers. The growing insolvency of PRMSA, which exists to serve the people of Puerto Rico, can only hurt these same residents of Puerto Rico, including shippers, who we are allegedly attempting to protect.

The Commission's decision in Docket No. 81-10 may be forcing the FMC to suspend proposed rate filings which it might otherwise have approved, as occurred in the Commission's open meeting of November 12, 1981.

The Commission is also ignoring the fact that rate parity in the domestic trades is a commercial reality. The Commission's finding in Docket No. 81-10 that PRMSA's rate increase was unjust and unrea-

sonable not only has adverse consequences for the citizens of Puerto Rico, but also for PRMSA's competitors in the U.S./Puerto Rico trades. This is the point being stressed in the Sea-Land and TMT petitions for reconsideration, and one of the major reasons why they should be granted.

Where the FMC is statutorily mandated to exercise broad regulation, such as the domestic trades, it is essential that it exercise fundamental fairness, sound judgment, and good business sense. It is therefore incumbent upon the Commission to utilize the opportunity afforded by the instant petitions to reconsider a decision in which it stated that a company which is losing money is at the same time earning too much.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

ORDER

November 18, 1981

On May 4, 1981, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's April 19, 1979 Report and Order in the above-captioned proceeding in which the Commission found that the charge levied against stevedores by Cargill, Incorporated for services and facilities at Cargill's grain terminal at the Port of Baton Rouge had not been shown to be unjust or unreasonable. Because the Court could not itself determine the question of the reasonableness of a charge in the first instance (*see e.g., Indiana Port Comm'n v. FMC*, 521 F.2d 281, 287 (D.C. Cir. 1975); and generally, *SEC v. Chenery Corp.*, 332 U.S. 194, 196-197 (1947); *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092-1093 (D.C. Cir. 1979)), it remanded the case to the Commission for further proceedings consistent with its opinion.

The Court found that the Commission's Report and Order was not supported by substantial evidence justifying the charge. The allocation of terminal costs imposed upon stevedores for benefits provided to them by the shipping gallery and other Cargill facilities was rejected in light of the "sharp disproportion to costs allocated to others [*i.e.*, the vessel and cargo interests] who may reap equal or greater benefit . . ." (slip opinion, page 16). This finding was based upon the standard articulated in *Volkswagenwerk v. FMC*, 390 U.S. 261, 281-282 (1968) that there must be a reasonable correlation of benefits to the charge that is imposed. On the other hand, the Court noted that the Commission could depart from the *Volkswagenwerk* comparative benefit standard if it adequately set forth the reasons why "a departure is justified under the statutory scheme and is consistent with the public interest" (slip opinion page 16).

Because this is a complaint proceeding, rather than a Commission-instituted investigation, it is the responsibility of the complainant, Baton Rouge Marine Contractors, Inc. (BARMA) to determine if and how it wishes to proceed. Once BARMA's choice is made, Cargill will be given an opportunity to respond and indicate what it wishes to present

by way of argument and/or evidence in this proceeding. In making these determinations, the parties should bear in mind that as the Court explained, if support for the charge against stevedores is sought in "prevailing practices at unregulated elevators," the record must permit the Commission to determine, from substantial evidence, "whether free market forces are operative," and to give an "exposition of the similarities in costs and benefits between Cargill's elevator and those compared with it." (Slip opinion, page 16). After receipt of statements from the parties the Commission will be in a position to structure such further proceedings as may be necessary.

THEREFORE, IT IS ORDERED, That within 30 days from date of service of this order, Complainant, Baton Rouge Marine Contractors, Inc. (BARMA) shall file with the Commission and serve upon Cargill a statement indicating if it wishes to proceed with its complaint and, if so, what issues of fact or law it wishes to pursue and what procedures it feels are appropriate to such course of action; and

IT IS FURTHER ORDERED, That within 30 days after service of the statement of Complainant, Cargill shall file with the Commission and serve upon Complainant a response indicating, if appropriate, what issues of fact or law they wish to pursue and what procedures they feel are appropriate to such course of action; and

IT IS FURTHER ORDERED, That any request by any party for further evidentiary hearings shall be accompanied by a detailed recital of the facts the party intends to prove at the hearing and a description of evidence intended to be used to prove those facts; and

IT IS FURTHER ORDERED, That this order be published in the *Federal Register* and a copy thereof be served on all parties of record; and

IT IS FURTHER ORDERED, That all documents submitted by any party of record in this proceeding be filed in accordance with Rule 118 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.118) as well as being served directly on all other parties of record.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-24

I.T.O. CORPORATION OF NEW ENGLAND

v.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION AND MASSACHUSETTS PORT AUTHORITY

NOTICE

November 17, 1981

Notice is given that no appeal has been taken to the October 22, 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. 81-24

I.T.O. CORPORATION OF NEW ENGLAND

v.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION AND MASSACHUSETTS PORT AUTHORITY

DISMISSAL OF PROCEEDING

Finalized November 27, 1981

This case brings into question a provision of the tariff of the Massachusetts Port Authority which requires that users of the facilities covered by the tariff indemnify the terminal for all losses, claims, etc., arising out of the users' operation except those which stem solely from the gross negligence or wilful and wanton act of the terminal.

By stipulation signed by all the parties, Complainant has asked for dismissal of the complaint with prejudice. In view of the Complainant's position there is no alternative but dismissal. Of course the Commission itself should it deem it necessary could investigate the tariff provision in issue.

The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-72

CARGILL, INC.

v.

WATERMAN STEAMSHIP CORPORATION

ORDER PARTIALLY ADOPTING INITIAL DECISION

November 30, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY AND RICHARD J. DASCHBACH, *Commissioners*) *

This proceeding was instituted by the July 16, 1979 complaint of Cargill, Inc., a processor and seller of bulgur and other grain products in domestic and international markets.[1] Cargill's processing plant is located in Dallas, Texas, closer to some U.S. Gulf ports than to some Mississippi River ports. Cargill has historically sold bulgur to the U.S. Agricultural Stabilization and Conservation Service (ASCS) for foreign distribution under the Food for Peace Program (P.L. 480 program). In ASCS transactions, title to the grain passes upon delivery at designated U.S. ports. Government relief agencies selected by ASCS, not Cargill, are the ocean shippers in this controversy.

The complaint alleges that Waterman Steamship Corporation was and is violating sections 16 First and 17 of the Shipping Act, 1916 (46 U.S.C. 815 First and 816) by charging lesser amounts for the transportation of bulgur from U.S. Mississippi River ports to India than it charges from U.S. Gulf Coast ports to India.[2] Full reparations for the damage allegedly suffered by Cargill was initially requested, as was injunctive relief, but Cargill later withdrew its claim for monetary damages [Tr. at 734]. The complaint emphasizes the preferential effect of the lower river rate. There is no allegation that the higher Gulf rates are unreasonably high within the meaning of section 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 817(b)(5)).

* Commissioner James Joseph Carey did not participate.

[1] Bulgur is roasted and dehulled whole grain wheat. It may also be fortified by the addition of soy grits. Cargill sells both soy fortified and regular bulgur to the U.S. Agricultural Stabilization and Conservation Service and the term "bulgur" is used to refer to either or both varieties unless otherwise indicated.

[2] Only that portion of section 17 which prohibits "unjust discrimination" against ports is at issue.

Intervention rights limited to the section 17 "port discrimination" issue were granted to the Lake Providence Port Commission, Helena Port Terminal, and Mid-South Terminals Corporation (December 28, 1979) and the Greater Baton Rouge Port Commission (March 10, 1980).[3]

On September 21, 1979 Waterman moved to dismiss the complaint for failure to state a cause of action cognizable under section 16 or 17. This motion stressed the fact that Cargill was not itself a bulgur shipper. It was denied on November 5, 1979 by Chief Administrative Law Judge John E. Cograve. In denying the Motion to Dismiss, the Presiding Officer held that: (1) Cargill could prosecute an action on *behalf of* shippers, localities or types of traffic protected under sections 16, or ports protected under section 17;[4] and (2) section 16 protects "persons" as well as "localities" and "descriptions of cargo" against undue prejudice, and Cargill is a person.

The record before the Commission consists of 1058 pages of oral testimony gathered during April, 1980 and 38 Hearing Exhibits which exceed 1000 pages in total length.[5]

An Initial Decision was issued on December 23, 1980 denying the complaint on the ground that Cargill had not proven that Waterman's rate differential was causing it to lose ASCS business. The Presiding Officer also concluded that: (1) Cargill was not a person "protected" by section 16 First;[6] (2) Cargill had not made out a *prima facie* case of undue prejudice; (3) Waterman's rate differential is justified on the basis of costs and competitive factors; and (4) Baton Rouge had not demonstrated that Waterman's rates had diverted bulgur shipments from its port.

Exceptions were taken from that decision by Cargill and by the Greater Baton Rouge Port Commission (Complainants). Replies to Exceptions were submitted by Waterman and by Helena Port Terminal, Inc., and Mid-South Terminals Corp. (Respondents). A "Motion to Strike" pages 7 through 19 of the joint Helena/Mid-South Reply was

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[3] The Intervenors operate terminals on the Mississippi River at Lake Providence, Louisiana; Helena, Arkansas; Memphis, Tennessee; and Baton Rouge, Louisiana, respectively. Despite its location 200 miles upriver from the Gulf of Mexico, Baton Rouge has traditionally been treated as a "Gulf" port by Waterman and other ocean carriers. Baton Rouge is further from Dallas than the River port of Lake Providence. *See* Appendix "A" for a map of the area involved.

[4] 46 U.S.C. 821 states, *inter alia*, that:

> . . . any person may file . . . 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.

[5] Cargill introduced Exhibits C-1 through 17 and C-17A through 22 and presented four witnesses. Waterman introduced Exhibits WS-1A (confidential) and WS-1 through 11 and presented three witnesses. Intervenors introduced Exhibits I-1 through 3, but presented no witnesses. Lake Providence did not participate in the hearing or file a brief.

[6] The Presiding Officer did not hold that Cargill lacked "standing" to bring this action, but only that Cargill itself, as a nonshipper, was not entitled to relief under section 16 First.

filed by Cargill alleging that this material relates to section 16 prejudice against shippers and not to the section 17 port discrimination issue.[7]

BACKGROUND INFORMATION

ASCS issues monthly bid invitations for bulgur purchases. Waterman began a nonconference LASH barge service to the River ports of St. Louis and Memphis in July, 1977, at the time of ASCS Invitation No. 55.[8] Waterman serves Gulf ports as a member of the India, Pakistan, Bangladesh, Ceylon, and Burma Outward Freight Conference (FMC No. 7690) and also uses LASH barges to call at outports in that range, although breakbulk vessels have been employed to carry bulgur as well.[9] Barges from Waterman's River and Gulf services are both loaded aboard the same mother ship at New Orleans—or occasionally Houston. Except for the six and one-half month period between February 1 and August 15, 1978, Waterman's River rates were lower than its Gulf rates. During February to August, 1978, Waterman's River rates to the Indian baseports of Bombay and Calcutta were higher than its Gulf rates, but its River rates to Indian outports such as Madras were lower. In 1979, Waterman also began serving the River ports of Helena and Lake Providence. *In September, 1979 service to St. Louis was dropped because that port lost its ASCS designation.* Lake Providence is the dominant River bulgur port and handles over 50% of ASCS's India bulgur shipments.

ASCS seeks bulgur bids on a Free Along Side (FAS) basis which means that persons selling bulgur to ASCS must pay all inland transportation costs and handling charges to the port of embarkation designated by ASCS. ASCS makes its own arrangements for ocean transportation and its bulgur purchases are made on a "lowest landed cost" basis which factors the estimated cost of ocean transportation into the purchasing decision. The objective is to minimize the cost of the entire amount of bulgur procured in each bid cycle for all destinations and not necessarily the cost of each individual quantity for which bids are sought. Suppliers do not submit bids for particular shipments or destinations although bids are described in terms of specific quantities to specific locations.

[7] Helena/Mid-South were allowed to intervene only with regard to the latter issue. Those portions of the Reply relating to Cargill's ability to market bulgur will be stricken as beyond the scope of the Presiding Officer's Intervention Order.

[8] The first 30 months of Waterman's River service cover ASCS's bid Invitation Nos. 55-85.

[9] The Conference serves U.S. Atlantic and Gulf ports and has four member lines: Farrell Lines, Inc.; Scindia Steam Navigation, Ltd.; Shipping Corp. of India; and Waterman. Waterman is the only LASH operator in the Conference. Farrell Lines operates an intermodal container service via U.S. South Atlantic ports and does not call at U.S. Gulf ports. A fifth carrier, Central Gulf Lines, participated in the Conference until July 21, 1980.

The plants of Cargill's principal competitors are located in Seattle, Los Angeles, Crete (Nebraska) and Abiline (Kansas); [10] all are located further from the three lower River ports than is Cargill's Dallas plant. However, the River ports of Helena, Memphis and St. Louis are further from Dallas than the West Gulf ports usually bid by Cargill (Lake Charles and Corpus Christi). During the 30-month period from July, 1977 through December, 1979, the Nebraska and Kansas operators (Lauhoff and ADM) were more successful than Cargill in attracting ASCS business for India bulgur delivered to River and Gulf ports, but Cargill was also the least successful bidder during the 30 months prior to July, 1977 [Ex. WS-11, C-22, C-10]. Cargill did not begin bidding at the River until April, 1979 and had reasonable success there during the rest of that year.

The cost of wheat and the cost of inland transportation are major factors in marketing bulgur. There are thousands of wheat shipping points and wheat prices change hourly. Rail rates are complex and change frequently. The large number of variables makes exact comparison of marketing costs impossible.[11] Only general trends can be ascertained.

Wheat is generally more expensive at markets closer to the Gulf (e.g., Texas and Oklahoma markets). A variety of rail transportation rates are available, with the most common being "flat" export rates from mill to port and "transit" rates from grain purchase point to mill and then from mill to port. Flat rates from Crete and Dallas to Lake Providence favor Cargill over Lauhoff by about $0.031/cwt. The flat rate to St. Louis favors Lauhoff by almost $1.00/cwt. Flat rates to Helena and Memphis are about the same for Cargill and Lauhoff. Lauhoff prefers to use flat rates, but Cargill prefers to use transit rates.[12] Cargill cannot always make these preferred arrangements on River shipments.[13] When it cannot, it believes it faces a competitive disadvantage in bidding against Lauhoff and ADM.

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[10] These are the plants of Fisher Mills, Inc.; California Milling Company; Lauhoff Grain Company; and Archer-Daniels-Midland (ADM), respectively.

[11] A Cargill Vice President testified that "anything can be done" in terms of reaching certain markets, depending upon the price of wheat, its origin, destination and available transportation arrangements [Tr. at 223-224]. See also testimony of Mr. Tucker to the effect that an intelligent shipper has to be in a flexible position and use whatever rate structure that produces the maximum profit margin at the point where the sale is going to be made [Tr. at 1002].

[12] Lauhoff has had difficulty establishing transit rates to the River via Crete, but can obtain comparable rate arrangements to St. Louis and Memphis. [*See* Tr. at 675-677]. Lauhoff typically ships bulgur on a truck-in/flat rate out basis and uses transit rates for less than 20% of its River shipments [Tr. 601-603]. All but one of Lauhoff's transit shipments were delivered to St. Louis. [Id.] Cargill can more readily obtain transit rates to the River and uses them for the majority of its shipments [Ex. C-1 at 14-15, Tr. at 1003-1015].

[13] The record does not permit accurate measurement of the tonnage Cargill can move to River ports under transit rates or a finding that Cargill purchases any particular percentage of its bulgur wheat in any particular locality. The Commission does not rely upon the Presiding Officer's finding that Cargill purchases 80% of the wheat it ships to River ports at points in Oklahoma.

POSITION OF THE PARTIES

Cargill contends that the Initial Decision inaccurately and unfairly treats the law and the facts and "violates virtually every mandate of the Administrative Procedure Act," especially that requiring a statement of the reason or basis for all material findings and conclusions made by the Presiding Officer.[14] 5 U.S.C. 557(c)(A). The following specific exemptions have been taken:

Exception No. 1 - It was incorrectly held that Cargill lacks standing under sections 16 First and 17 because it is not a shipper.

(A) *Arguments advanced by Cargill and Baton Rouge*

(1) Shipping Act section 22 allows "any person" to file a complaint alleging violations of any section of the Shipping Act. *E.g., Anglo-Canadian Shipping Co. v. Mitsui S.S. Co.,* 4 F.M.B. 535, 543 (1954), where the Commission stated that: "Although a complaint need not be filed by an injured party, it must allege facts amounting to discrimination against or prejudice to a person whom the statute, in terms, purports to protect."

(2) Section 16 First plainly applies to "persons" and not just shippers. The statute is not limited to complainants "directly affected" by the alleged violations and also authorizes the Commission to act on its own motion to prevent injury to the public. *Isthmian S.S. Co. v. United States,* 53 F.2d 251, 253-254 (S.D.N.Y. 1931).

(3) A person need not be in privity of contract with an ocean carrier to be damaged under sections 16 First or 17, provided that the person is closely connected with the discriminatory transportation. *Merchants Warehouse Co. v. United States,* 283 U.S. 501, 508-509 (1931); *Southern Ry. Co. v. United States,* 186 F.Supp. 29, 42 (N.D. Ala. 1960).

(4) The Government of Puerto Rico pursued section 16 and 17 allegations based upon terminal charges assessed against Puerto Rican trade cargo. *Agreement No. T-2336,* 15 F.M.C. 259 (1972).

(B) *Arguments advanced by Waterman*

(1) Cargill may file and prosecute the instant complaint on behalf of others, but it is not a person protected under section 16 First or section 17. The Initial Decision was correct in its handling of this point. Cargill is merely a person which does business with a shipper and has no relationship at all with the complained of ocean transportation. The cases cited by Cargill are all distinguishable.

[14] Cargill also notes that the Initial Decision includes no citations to the record.

Exception No. 2 - It was incorrectly held that Cargill did not make a *prima facie* showing of undue preference.

(A) *Arguments advanced by Cargill and Baton Rouge*

(1) Once a *prima facie* section 16 First or section 17 port discrimination case is presented, the burden of justifying different rates or charges shifts to the respondent. *See Commodity Credit Corporation v American Export Isbandtsen Lines, Inc.* 15 F.M.C. 173, 191 (1972); *North Atlantic Mediterranean Freight Conference - Rates on Household Goods,* 11 F.M.C. 202, 219, n.29.

(2) It is not the Complainant's responsibility to prove that transportation circumstances are identical, but merely to show the absence of "obvious differences." *Rates Affecting High-Pressure Boilers,* 19 F.M.C. 441, 457 (1966). This is particularly true in light of the fact that the Respondent generally possesses the relevant evidence regarding transportation circumstances.

(B) *Arguments advanced by Waterman*

(1) Cargill must show more than a mere difference in rates. To the extent the *High-Pressure Boilers* decision, *supra,* depends upon a presumption of similar transportation factors," it is inapplicable to the instant section 16 First/section 17 port discrimination proceeding. *High-Pressure Boilers* arose under Shipping Act section 18(b)(5).

(2) Similarity of transportation conditions is a necessary element of any section 16 First or 17 violation and is not an affirmative defense for the carrier. *Intercoastal Cancellations,* 2 U.S.M.C. 397, 401 (1940); *Philadelphia Ocean Traffic Bureau v Export S.S. Co.,* 1 U.S.S.B. 538, 541-542 (1938); *Atlantic Refining Co. v. Ellerman & Bucknall S.S. Co.,* 1 U.S.S.B. 242, 249-250 (1932), citing *United States v. Illinois Central R.R.,* 263 U.S. 515, 524 (1924).

Exception No. 3 - The Presiding Officer failed to find that transportation conditions favor lower bulgur rates for Gulf ports.

(A) *Arguments advanced by Cargill and Baton Rouge*

(1) Waterman carries the same cargo on the same LASH mother ship from New Orleans to India under identical circumstances at different rates. This alone establishes a *prima facie* violation of sections 16 First and 17. *Rates, Etc. of General Atlantic Steamship Corporation,* 2 U.S.M.C. 681, 686 (1943). The River and Gulf barges are an integral part of a single LASH system and Waterman seeks the same minimum revenue for barges on the River and the Gulf (WS-1, p. 6; Tr., pp. 803-810). The distance between River ports and India is greater than the distance between

Gulf ports and India, and costs increase with distance traveled.

(2) The Presiding Officer placed too much emphasis on costs. Costs alone cannot justify a rate differential. *Port Differential Investigation*, 1 U.S.S.B. 61, 69 (1925). All transportation factors must be considered, including competition, volume of traffic and distance. *Rates from Jacksonville*, 10 F.M.C. 376, 386 (1967); *American Great Lakes - Mediterranean Eastbound Freight Conference*, 7 F.M.C. 458, 461-462 (1962).

(3) The Presiding Officer's finding that Waterman has higher costs on the Gulf is not supported by substantial evidence. Average total cost is the only pertinent inquiry, but Waterman has provided only selected cost comparisons. This failure to explore its entire cost picture warrants a presumption that the Gulf service has a cost advantage. *International Union (UAW) v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).

The cost of tows varies considerably. There are no towage charges at those Gulf ports where mother ships call and the cost of a two-way tow between Baton Rouge and New Orleans is less than for any River port. (Compare WS-1A with Tr. at 870). Costs at Baton Rouge are closely akin to those at River ports.

There is also no showing that stevedoring and port services are similar at River and Gulf ports. Certain cleaning, preparation and Customs charges are assessed at River ports in addition to stevedoring and fleeting costs.

The Presiding Officer was mistaken to find that some barges are not cleaned and that, to the extent cleaning is necessary, separate cleaning charges would be applicable at Gulf as well as River ports. Testimony from Memphis and Helena officials indicated that all barges were cleaned (Tr. 538-540; 576-578)) and this testimony is entitled to more weight than the self-serving statements of Waterman's employee. There was no evidence regarding cleaning charges at the Gulf.

Fleeting expenses may be lower per day on the River, but the length of holding time may be greater there—an average of 10 days (Tr., 861 864). In Baton Rouge, barges need not wait for even a day.

(4) Costs of service are higher on the River because bulgur is virtually the only traffic moving and about 80% of Waterman's barges move upstream empty (Tr. at 826, 827). Thus, bulgur alone must defray the capital costs of the barges acquired especially for the River services (WS-1 at 7-8). Gulf barges carry primarily commercial cargoes of

greater value than bulgur which reduce the per ton cost of carrying bulgur (Tr. at 916-918 and 951-952). It was inappropriate for the Presiding Officer to compare the cost of two-way tows on the River and on the Gulf because the presence of inbound Gulf traffic means that the Gulf rate for bulgur only needs to recoup the cost of a one-way tow. Waterman has a 1,000 ton minimum on its River service and not on its Gulf service because its costs of carrying bulgur are higher on the River.

(5) The FMC should take official notice of Waterman's advertised mother ship calls at Houston during the winter of 1980-1981. Vessel calls at Houston mean that towing charges are less from Texas ports. Inadequate attention was given to Houston calls in examining transportation conditions (*e.g.*, distances and towing costs).

(6) Waterman's towing costs generally increased in proportion to distance from New Orleans. Previous section 4 of the Interstate Commerce Act (now 49 U.S.C. 10726), prohibits lower rates from long hauls which subsume a shorter one because such conduct is a *per se* violation of sections 2 and 3. *United States v. AT&SF R. Co.*, 234 U.S. 476 (1941); *Reconstruction Finance Corp. v. Akron C. & Y. Ry. Co.*, 287 I.C.C. 353, 381 (1952).

(7) Sections 16 First and 17 require a reasonable relationship between benefits and charges. *Volkswagen Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 282 (1968). Waterman has inequitably allocated mother ship operating expenses such as fuel surcharges and port congestion surcharges to the Gulf rather than River service. Fuel increases have occurred in the Conference tariff since 1977 (Tr. at 936-946). It is irrelevant to compare Waterman's River service to the Conference breakbulk operation because Waterman is the only carrier which transports bulgur under both rates.

(8) The Presiding Officer failed to understand that the issue is one of favoritism and not the development of LASH services. His concern that LASH service be stifled is equally applicable to the Gulf Coast which is being deprived of the full benefits of this system—at least as to bulgur shipment. Moreover, even if the River and Gulf rates were equal, in some instances Lauhoff and ADM might bid low enough to receive bulgur awards at the River, as happened in the February - August, 1978 period when the River rates were slightly higher for Bombay and Calcutta (Ex. C-1 at 7-8; Ex. C-9; C-10 at 5-6). The use of LASH to move bulgur from River ports requires Cargill to backhaul its product from Dallas to the River (Tr. 299-301) and is thus the type of unreasonable cargo

diversion prohibited in *North Carolina State Ports Authority v. Dart Container Line*, 21 F.M.C. 1129–1130 (1979), *aff.d Dart Container Line v. Federal Maritime Commission*, 639 F.2d 808 (D.C. Cir. 1980).

(B) *Arguments advanced by Waterman*

(1) The Presiding Officer correctly found that Gulf-origin bulgur travels further than River-origin bulgur under Waterman's itinerary and that all relevant transportation factors in the Gulf and River services militate in favor of higher Gulf rates. Cargill ignores the fact that vessel types, cargo volume, competition, stevedoring costs, and towing costs are different in the two services. The *Jacksonville* and *American Great Lakes* cases, *supra*, were section 18(a) proceedings where the burden of proof was on the carrier.

(2) No bulgur originates at New Orleans so towing and other costs at that port are irrelevant. Corpus Christi is one of Cargill's base ports on the Gulf and it is further from New Orleans than are Lake Providence, Helena or Memphis. Only St. Louis is further than Corpus Christi and it is no longer approved by ASCS. Moreover, the distance from Dallas to the River ports is no greater than from Dallas to the Gulf so that the *North Carolina State Ports Authority* decision, *supra*, is inapplicable.

(3) Whatever Waterman's exact costs for serving each River and Gulf port, the record shows that there is relatively little variance in the stevedoring and fleeting expenses incurred at the three currently used River ports (less than $2.00 per long ton). There are much greater differences between the Gulf ports. The Conference must set its bulgur rate at a uniform level which covers even small loads at relatively high cost ports.[15] There is no inbound traffic at Corpus Christi [Tr. at 868] and neither Corpus Christi nor Lake Charles are regular Waterman ports of call [Tr. at 909]. More barges can be towed on the River at one time, thereby reducing per barge costs [Tr. at 895]. The cost difference between a call to Corpus Christi and Lake Providence can be as great as $10.32 per long ton in favor of the latter [Ex. WS-IA at 2-3 and Appendix D; Tr. at 860]. Waterman would use a breakbulk vessel to pick up less than 1,000 tons of bulgur at a Gulf port because of the three barge tow requirement [Tr. at 913-914]. Breakbulk vessels are costlier to operate per ton. Waterman operates five breakbulk vessels in the Gulf/India trade and the Conference bulgur rate is designed for service by

[15] There is no volume minimum in the Conference tariff.

such vessels. The Conference also sets its fuel and port surcharges on a breakbulk basis and LASH may not involve comparable cost increases. LASH isn't usually affected by port congestion because the mother ships can unload without alongside berths. In addition to cost savings, Waterman's LASH service has also been more successful in attracting inbound shipments than has Waterman's breakbulk service, thereby reducing revenue requirements on the outbound leg. The difference between the River rate and the Conference rate was $62.01 in late 1979 and this amount is more than justified on a breakbulk/LASH comparison basis [WS-1 at 3]. More LASH barges are not required to serve more distant points on the River or the Gulf provided there is a proper scheduling of mother ship calls [Tr. at 871-874]. It is only necessary to get the barge to and from the inland point in time to catch a Waterman mother ship which calls at New Orleans every 30 days. Waterman's River barges have never missed a sailing [Tr. at 510, 832].

Not every barge has to be fully cleaned [Tr. at 814-816], but even if Waterman had to pay the maximum $300-500 cleaning cost for every River barge and had no comparable costs on the Gulf, the difference would only be about $1.00 a long ton, far less than the differences in stevedoring ($11/LT) and towing ($10.32/LT).

(4) Waterman can generally predict the volume of Title II traffic available at River ports when it sets its rates and can therefore construct high volume voyages for such cargo (Ex. WS-1 at 14). Stable and predictable volumes of India bulgur are not and never have been available at any Gulf port (*Id.* at 19). Differences in port conditions and traffic volume can justify the use of volume incentive rates at a particular port. *Agreement No. 9955-1,* 18 F.M.C. 426, 430 (1975); *Great Lakes Japan Trade,* 8 F.M.C. 270, 275 (1964). Waterman sets its rates low enough to get the business ASCS is offering and updates these rates monthly (WS-2 at 4-7). An average of 10,000 LT is required per month. If rates were higher, some or all of this 10,000 ton minimum would have gone to the West Coast or Great Lakes (Ex. WS 3 at 26-40). It is permissible for an ocean carrier to charge preferential rates if it does so for the purpose of meeting competition. *Dant & Russell, Inc. v. American & Hawaiian S.S. Co.,* 1 U.S.M.C. 781, 783 (1938). This competition may come from another port range. *Overland/OCP Investigation,* 19 F.M.C. 184 (1969), *aff'd Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971).

(5) Waterman's LASH ships do not call at Houston directly despite advertisements in the trade press saying they do. The Commission should take official notice of Marad voyage reports which show no Houston calls during the winter of 1980-1981.

(6) ICA section 4 is inapplicable to ocean shipping. Moreover, it can be waived by the ICC whenever necessary to meet competition or when justified by other special transportation conditions.

Exception No. 4 - The Presiding Officer erroneously concluded that the Conference was a necessary party to this proceeding.

(A) *Arguments advanced by Cargill and Baton Rouge*

Waterman is the only person engaged in the complained of discrimination and the fact that its Gulf rate is set by the Conference and is in that sense outside of its control does not excuse conduct violative of the Shipping Act. *Surcharge on Cargo to Manila*, 8 F.M.C. 395 (1965); *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202 (1967), reversed on other grounds; *American Export-Isbrandtsen Line v. Federal Maritime Commission*, 409 F.2d 1258, 1260, n. 4 (2d Cir. 1969). In any event, Waterman has not raised a lack of control defense. Cargill merely wants a cease and desist order against Waterman and would leave Waterman free to implement it as it sees fit. One such option would be for Waterman to resign from the Conference. Waterman did resign from the West Coast of India & Pakistan-U.S.A. Conference (FMC No. 8040) on January 1, 1981.

(B) *Arguments advanced by Waterman*

It is necessary for the ocean carrier to control both rates in order to violate section 16 First. *Gulf Intercoastal Rates*, 1 U.S.S.B.B. 516, 518 (1935). *Accord, Surcharge at Searsport*, 9 F.M.C. 129 (1965); *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 409 F.2d 1258 (2d Cir. 1969). Waterman has no control over Conference charges and was unsuccessful in obtaining an open rate for bulgur from the Conference. ASCS has not sought a different Gulf rate and Cargill has not brought an action or even requested lower Conference rates [Tr. 200-201]. The Supreme Court has stated that a carrier must "effectively participate in both rates" before it is guilty of undue preference. *Texas & Pacific Ry. Co. v. United States*, 289 U.S. 627, 650 (1933).

Exception No. 5 - The Presiding Officer failed to find that a substantial amount of bulgur is diverted from Gulf ports and

that these ports have suffered substantial economic harm from Waterman's preferential practices.

(A) *Arguments advanced by Cargill and Baton Rouge*

(1) Waterman's own expert witness (Mr. Tucker) indicates that 15 million pounds of bulgur would have moved through Gulf ports if the River rates were raised to the level of the Gulf rates. Even more would have moved via the Gulf if the Gulf rates were lowered to the level of the River rates, however. This is illustrated by the increase in Gulf bulgur as a percentage of total ASCS shipments between February and August, 1978, when River rates were high, and the subsequent decline as River rates were lowered. Waterman also began serving two River ports in 1979 (Helena and Lake Providence) which were not served during 1978, thereby increasing the amount of bulgur which could be diverted from the Gulf. The River share of India bulgur increased from 22% in 1978 to 34% in 1979 and the Gulf share decreased from 16% to 7% [Ex. C-10].

(2) Mr. Tucker failed to consider three ASCS bid cycles (Nos. 74, 75 and 79) which included another 28 million pounds of bulgur which could have gone through the Gulf under Cargill's analysis. [Cycle No. 74—Tr. at 1162-1164; Ex. C-8 at 41; Ex. WS-3, App. C. at 1-74-9. Cycle No. 75—Tr. 1165; Ex. C-8 at 42; WS-3, App. C. at 1-75-21. Cycle No. 79—Tr. at 1095-1102, 1209-1210.] There is no reason why Cargill's analysis of these three cycles should not be accepted.

(3) Cargo loss directly and indirectly harms a port community. Many Gulf ports regularly seek ASCS business and Baton Rouge testified that it is willing and able to handle India bulgur. The Presiding Officer ignored the clear harm suffered by Gulf ports generally and required evidence of specific harm to particular ports. Section 17 can be violated without a showing of commercial injury, however. *Council of North Atlantic Shipping Associations v. American Mail Line*, 17 S.R.R. 781, 841 (1978); *Household Goods Forwarders Association v. American Export Lines, Inc.*, Order on Reconsideration, 20 F.M.C. 496 (1978). It is unnecessary to show a "monetary loss" (unless reparations are sought), but only a competitive disadvantage or "adverse effect" upon the affected parties. *North Carolina State Ports, supra*, at 526; *City of Mobile v Baltimore Insular Line*, 2 U.S.M.C. 474, 480 (1941). *See also Agreement No. T-1768 - Terminal Lease Agreement*, 9 F.M.C. 202, 207

(1966), *aff'd sub nom. City of Los Angeles v. Federal Maritime Commission*, 385 F.2d 678 (D.C. Cir. 1967).[16]

(4) Baton Rouge was allocated a shipment of 4,523 tons in July, 1978 when River rates were slightly higher than Gulf rates [Ex. C-8 at 140; Ex. WS-3, App. C at 1-64-15]. Therefore, Baton Rouge was entitled to expect similar bulgur shipments for the rest of 1978 and 1979 if Waterman's differential were not imposed.

(B) *Arguments advanced by Waterman*

(1) The only evidence of cargo losses at Gulf ports is the fact that Gulf bulgur traffic increased between February and August, 1978 when River rates to the baseports of Bombay and Calcutta were approximately equal to the Conference rates. However, the River rates to Indian *outports* were lower during this period and it was to these outports that ASCS bulgur moved. The baseport rates were merely "paper rates." [Ex. WS 3 at 52; Ex. WS-6 at 3-5; Ex. C-9 at 1-2, 4; Tr. 1139-1148, 1203-1204]. Thus, the River/Gulf rate relationship is not the cause of ASCS bulgur allocations to the Gulf ports. River traffic moved at approximately the same amount each month throughout 1978 and 1979. [Ex. WS-6 at 4; Ex. C-10 at 7-8]. The true reason for the increase in Gulf traffic between February and August, 1978 is because Gulf rates were lower than the Great Lakes from February through May [Ex. WS-3 at 50-53; WS-6 at 3-5]. The Great Lakes rates then began to decline from May through August.

(2) The River traffic grew at the expense of the West Coast and Great Lakes, not the Gulf. The Gulf ports increased their share of the India bulgur market from 6.7% (1.953 million pounds per month) to 11.6% (6.737 million pounds per month) in the 30 months before July, 1977 and the 30 months following it. This is a 75% increase during a period when ASCS's total purchases increased only 50% [Ex. WS-3 at 44]. The Gulf ports received 8.2 million pounds in 1976, 36.8 million in 1977 (all in the second half), 105.8 in 1978 and 48.7 in 1979. Even after August, 1978, the Gulf's market share remained at 8%, double the four percent it enjoyed in 1976. The volume of traffic moving was six times greater in 1979 than in 1976. The combined market shares of the West Coast and Great Lakes were 96% and 86% in 1976 and 1977, respectively. These shares declined to 62% and 52% in 1978 and 1979. The lack of injury to Gulf ports is reflected in the fact

[16] The *T-1768* decision involved a lease between the City of Oakland and an ocean carrier and did not concern discrimination between ports under section 17, although such an allegation was apparently made by various protestants.

that only one port, Baton Rouge, was interested in intervening in support of Cargill's position.

(3) The capacity of the River terminals authorized by ASCS to handle bulgur actually declined from 21,000 tons in 1978 to 13,000 tons in late 1979 [Ex. WS-3 App. C at 1-70-1 and 1-86-1].

(4) The probable loss of the 15 million pounds (6,696 long tons) identified by Mr. Tucker over a two and a half year period represents less than one percent of all India bulgur moving at that time [Ex. WS-3 at 34, 36-39 and WS-11 at 1] and represents about one percent of Baton Rouge's total tonnage for either 1978 or 1979. The loss of this tonnage to the entire Gulf range or even to the single port of Baton Rouge cannot constitute substantial harm of the type required by the Commission's *CONASA* decision. 17 S.R.R. at 838. Moreover, Baton Rouge is not competitive for India bulgur. It handled no Title II commodities. This is because its costs are higher than many other Gulf ports [C-18 at 4-5, 12]. ADM does not appear to have ever bid there and Lauhoff and Cargill bids are excluded by ASCS without computer analysis because they are clearly noncompetitive [Ex. WS-6, 5-6; Tr. 1084-7]. Baton Rouge's own witness did not know of any Baton Rouge bids awarded on a lowest landed cost basis [Tr. 478-483]. The two shipments it did handle were reallocated there when transportation became unavailable at other ranges (*e.g.*, May, 1978, following the freezing of Mississippi River ports the previous winter). Moreover, Baton Rouge was unable to substantiate its claim of direct financial losses in the amount of $30.00 per ton and indirect losses in the amount of $90.00 per ton [*See* Tr. at 467-470].

Exception No. 6 - The Presiding Officer failed to find that Cargill is subjected to a substantial disadvantage in marketing its bulgur.

(A) *Arguments advanced by Cargill and Baton Rouge*

(1) Cargill enjoys a natural advantage in selling bulgur at Gulf ports because its Dallas mill is located near such ports. Cargill has been injured because it can no longer use these closer Gulf ports, while these ports have been deprived of Cargill's business. Shippers are entitled to all the natural benefits of their location. *North Atlantic Mediterranean Freight Conference, supra,* at 210.

The record requires a finding that the combination of wheat prices and inland transportation costs give Cargill a marketing disadvantage at the River ports and that this disadvantage is a proper basis for section 16 First and section 17 relief. *Johnson Pickett Robe Co. v. Dollar Steam-*

ship Lines, Inc., 1 U.S.S.B. 585 (1936); *Surcharge at Manila*, 8 F.M.C. 395 (1965); *Agreement No. T-1768*, 9 F.M.C. 202 (1966).

(2) Because of Waterman's discriminatory rate structure, Cargill had to expend an additional $178,339 to move its product to River ports over what it would have cost to move them to Gulf ports and has not been able to recoup fully these costs from the sales that it made. Lost profits to shippers are relevant to show the extent of harm to shippers. *Intercoastal Cancellations*, 2 U.S.M.C. 397, 400 (1940).

(3) Cargill cannot obtain flat rate rail transportation to three of the River ports, and especially to St. Louis, on as favorable a basis as Lauhoff [Ex. C-12; Ex. WS-11 at 3; Tr. at 192]. Moreover, the use of flat rates requires Cargill to buy southern wheat which is normally more expensive than northern wheat [Ex. C-1 at 18; Tr. at 609]. Cargill also has to pay more than Lauhoff for rail transportation at transit rates in most instances [Ex. I-1; WS-11 at 1-3].

(4) There is no evidence to support the Presiding Officer's finding (I.D. at 10) that Cargill buys 80% of its bulgur wheat from Oklahoma where there is a lower rail differential between Gulf and River ports or that Lauhoff generally pays a premium for "truck wheat" as compared to "rail wheat." The Presiding Officer ignored Lauhoff's costs of trucking wheat to its mill prior to its use of flat rail rates and the fact that Oklahoma wheat costs more than Nebraska wheat in concluding that Lauhoff does not have a marketing advantage at River ports. It is invalid to compare Cargill's transit rail rate to Lauhoff's flat rail rate because one cannot separate out the mill-to-port leg of the transit rate. Lauhoff could use transit rates in many instances [Tr. at 215-216] and the fact that it does not do so implies that its total cost is lower via flat rates. Cargill has a lower total wheat/rail cost via transit than via flat rates and is not helped by the fact that flat rates between Dallas and Lake Providence are lower than from Crete to Lake Providence. It is preposterous for the ALJ to claim that the Gulf is not the "natural outlet" for Cargill's bulgur (I.D. at 40-41) because two-thirds of U.S. grain is exported and the price of grain is set in relation to the Gulf. This is a natural movement, not an artificial inducement.

(5) Cargill has been forced to reduce the amount it bids at *Gulf* ports on all bulgur (including non-India bulgur) in order to compete with Lauhoff and ADM's River bids.

(B) *Arguments advanced by Waterman*

(1) Cargill never attempted to demonstrate lost sales. When pressed on cross-examination, it admitted that it had sold the maximum quantity of bulgur its Dallas mill could produce during 1978 and 1979 [Tr. at 285] and that sales were up 50% over the 30 month period prior to July, 1977. Cargill did not begin selling regularly at River ports until April, 1979 and sold 51.9 million pounds by December, 1979 [Ex. WS-3 at 35-41 and Table I]. It claims injury because its profits were reduced on these 1979 sales by some $178,000. Even with higher River rates, Cargill would not have increased its sales prior to April, 1979. Cargill's relative position vis-a-vis ADM and Lauhoff increased from 8.1% in 1976 to 20.1% in 1979. This fact pattern does not amount to "undue" prejudice. *See Port of New York Authority v. Federal Maritime Commission*, 429 F.2d 663, 669 (5th Cir. 1970); *Thatcher Glass Mfg. Co. v. Sea-Land Service, Inc.*, 8 F.M.C. 645, 650 (1965). The *National Association of Recycling Industries* decision is inapplicable here because Cargill's share has grown faster than total market growth and Cargill has not shown that it could have increased its share any more than it actually did. These facts do not support a finding of present or prospective injury.

(2) It is unlikely that any additional railroad costs paid by Cargill to reach River ports actually caused it to lose profits. ASCS data shows that Cargill always bid and received at least $0.50/cwt higher on each incremental quantity of bulgur offered at the River than the same incremental quantity offered at the Gulf. This difference more than compensated for the alleged $0.3436/cwt disadvantage in rail costs.

(3) Lauhoff, as well as Cargill, pays more to get to the River rather than the Gulf and does not have an overall transportation cost advantage at River ports. Flat rates to Lake Providence favor Cargill by $0.315/cwt. When both firms purchase wheat in the same location, transit rates can be about the same [Tr. at 221-224]. The relevant comparison, however, is between Lauhoff's truck-in/flat rate-out transportation costs and Cargill's transit rail costs since Lauhoff uses truck-in wheat [Tr. at 602] and Cargill uses transit rates from northern points in 90% of its movements [Ex. C-1 at 14-15; Tr. at 191-192]. This arrangement leaves Cargill with an overall transportation cost advantage to southern River ports [Tr. at 1016-1027], at least when Lauhoff's truck-in costs are included.

(4) Cargill's claim that it was forced to lower its Gulf bids on all bulgur (including non-India bulgur) to be competitive

with ADM and Lauhoff's bids is speculative and unquantified. The bid reductions were made as a result of broader competitive circumstances, not Waterman's River rates on India bulgur [Tr. at 333-335]. In any event, the alleged Gulf reductions were only a few cents, whereas the Conference all-water rate was $1.50 higher than the River rate. Thus, the reductions were futile and ill-advised.

(5) Cargill has no "natural advantage" to the Gulf—only a preferred business pattern. Dallas is closer to the River ports than to the Gulf and is also closer to the River than are Abilene and Crete. Cargill's real disadvantage is in the higher wheat prices it must pay at Texas and Oklahoma points when railcar shortages or other considerations prevent it from purchasing less expensive rail transit wheat in Nebraska and Colorado. This fact is not related to Waterman's River service at all, affects shipments to the Gulf as well, and could not be rectified by a Commission Order. It is caused by the geographic location of Cargill's plant. Section 16 relief is not available in such circumstances. *Sharp Paper & Speciality Co. v. Dollar S.S. Lines, Ltd.*, 2 U.S.M.C. 91, 92 (1939); *Intercoastal Cancellations, supra*, at 2 U.S.M.C. 399. Cargill admits that its real competitive problem is combating the advantages other suppliers enjoy from West Coast and Great Lakes suppliers [Ex. WS-7].

Exception No. 7 - The Presiding Officer erroneously found that the aggregate capacity of the River ports decreased during 1979.

(A) *Arguments advanced by Cargill and Baton Rouge*

St. Louis was the only River port until September, 1978 and was handling about 10,000 tons a month. Memphis, Helena and Lake Providence came on in September, 1978. After St. Louis was decertified, these three ports were handling an average of about 13,000 tons a month.

(B) *Arguments advanced by Waterman*

The capacity of the River ports actually declined in 1979 because St. Louis had a potential capacity of 21,000 tons [Ex. WS-3, App. C, 1-70-1, 1-86-1].

Exception No. 8 - The Presiding Officer erred in accepting Mr. Tucker's evidence that higher River rates did not significantly impair Cargill's sales.

(A) *Arguments advanced by Cargill and Baton Rouge*

Mr. Tucker's methodology is defective because he could not ascertain the quantity of other bagged commodities awarded by ASCS during each bid cycle which might offset vessel and port capacity available for bulgur shifted from River ports to the Great Lakes or West Coast [Tr. at 1070-1071], and did not

analyze the possibility that U.S. Cargo Preference laws might require the use of particular ports.

(B) *Arguments advanced by Waterman*

An ASCS employee verified the approach taken by Mr. Tucker [Tr. 1030, 1198-1199; Ex. C-5 at 108, 111-113, 130-132, 140-143, 177].

Exception No. 9 - Cargill's February 8, 1980 "Motion to Compel Production" should have been granted.

(A) *Arguments advanced by Cargill and Baton Rouge*

Cargill was not allowed to see portions of the notes used by Mr. Boyle, a Waterman Vice-President, during his deposition. At the deposition, Waterman would only show Cargill which was actually used in Mr. Boyle's testimony pertaining to towing costs, although it was admitted that the other material did refer to the "case" generally. The original copy of the notes which were produced was later destroyed. Under these circumstances, the Presiding Officer should have invoked section 502.210(b) of the Rules which allows "adverse inference" sanctions and found that Waterman's LASH costs were higher for the River service.

(B) *Arguments advanced by Waterman*

The scrap of paper in question contained only a few words which did not concern towing costs or any other topic raised at the deposition. This paper was "lost" following the deposition and was not purposely "destroyed." Cargill did not seek discovery of this document, but if it had it would have been privileged as notes of a privileged attorney/client communication. Sanctions can only be imposed for the failure to obey an "Order to Produce" and no such order was issued. Waterman offered to furnish the information on the scrap of paper in response to such an order.

DISCUSSION AND CONCLUSION

Only two Shipping Act sections are seriously at issue in this proceeding: (1) undue preference against Cargill as a "person" under section 16 First; and (2) unjust discrimination against Gulf ports generally and the Port of Baton Rouge in particular under the first paragraph of section 17. Although other portions of these statutes are cited—perhaps inadvertently—by both sides to this controversy, they are either irrelevant or superfluous to the ultimate outcome.[17] Because the elements of port discrimination conceptually resemble those of "undue preference" rather than "unjust discrimination," *see Council of North American Shipping Associations v. American Mail Line*, 17 S.R.R. 781, 841-842 (I.D.),

[17] *See* I.D. at note 22 for a discussion of the parties' confusion over the various provisions of section 16 First and section 17.

aff'd 21 F.M.C. 91 (FMC, 1978), the entire case is best viewed as a section 16 First matter.[18]

The evidence presented is lengthy, incomplete, and confusingly arranged. Much of it consists of statistics which require supplementary information to be used meaningfully in this proceeding. Although considerable detail concerning the purchasing, processing and inland transportation of wheat was introduced, not enough data is available to support precise findings regarding the impact of these factors on the relative success or failure of Cargill, Lauhoff and ADM in selling bulgur to ASCS between 1977 and 1979. Moreover, the available evidence does not support a finding that Waterman's rate structure has caused significant injury to Cargill, Baton Rouge or Gulf ports generally. Cargill's failure to establish this critical fact constitutes the basis of the Presiding Officer's decision and necessarily defeats Cargill's claim for section 16/17 relief. Accordingly, the Initial Decision will be adopted except to the extent it may be inconsistent with the following discussion.

The Initial Decision has generated some confusion concerning Cargill's "standing" in this proceeding. Cargill clearly has standing to prosecute a complaint under section 22 of the Shipping Act even if it were not alleging injuries to itself. *See, e.g., Anglo-Canadian Shipping Co. v. Mitsui S.S. Co.*, 4 F.M.B. 535, 543 (1954), and the Initial Decision does not hold to the contrary. Rather, the question addressed by the Presiding Officer is whether section 16 First creates a cause of action for injury to persons which are not "shippers."

The statute prohibits undue prejudice to "any particular person, locality or description of traffic." Although Cargill is a "person" and therefore included in the literal language of section 16 First, the Presiding Officer recognized that the statute was not intended to subject ocean carriers to liability for all economic consequences factually con-

[18] It is impossible to consider unjust discrimination against *ports* under the standards applicable to unjust discrimination against *shippers* because port discrimination necessarily involves different points of cargo origin or destination. Sections 16 First and 17 were modeled after sections 3 and 2 of the Interstate Commerce Act, respectively, as they read in 1916. Section 2 applied only to unjust discrimination against shippers, however, and Congress offered no explanation as to why port discrimination was included in section 17, particularly since section 3 already protected "localities" against "undue preference." H. Rep. No. 659, 64th Cong., 1st Sess. (1916), SR 51:51. Perhaps this reflected an intention not to include "ports" within the term "localities." When, however, a narrowly divided Supreme Court interpreted the term "localities" in section 3 as not including ports in the sense of cargo "gateways," *Texas & Pacific Ry. Co. v. United States*, 289 U.S. 627 (1933), Congress promptly responded to this decision by amending section 3 to add the words "port, port district, gateway and transit point" after the word "locality," and indicated that the Court had erroneously altered the longstanding interpretation of that statute as protecting ports and port regions. P.L. 74-261, 49 Stat. 607 (August 12, 1935); Sen. Rep. No. 885, 74th Cong., 1st Sess. (1935) at 2; 79 *Cong. Rec.* 10476, 10616 (views of Senators Moore and Clark during discussion of S. 1633, the bill enacted as P.L. 74-261). The Commission has ruled that *Texas & Pacific Ry. Co.* did not apply to section 16 First because ports are necessarily "origin points" in the context of ocean shipping. *Proportional Rates on Cigarettes*, 6 F.M.B. 48, 54-55 (1960) *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474, 478 (1941).

nected to their ratemaking practices (I.D. at 25). Liability must end at some sensible, reasonably foreseeable point. In cases arising under former section 3 of the Interstate Commerce Act (now 49 U.S.C. 10741), only persons which otherwise deal directly with common carriers in their capacity as such have been entitled to protection. *Compare Southwestern Produce Distributors v. Wabash R.R. Co.*, 20 I.C.C. 458 (1911) with *Merchants Warehouse Co. v. United States*, 283 U.S. 501, 508-509 (1931). *See also American Union Transport, Inc. v. Italian Line*, 2 U.S.M.C. 553 (1941). "Privity of contract" is not required, but it is necessary that the use of regulated transportation be the direct or proximate cause of the prejudice. *See Coastwise Rates Between Gulf Ports and Texas*, 234 I.C.C. 557 (1930) and *Cosby v. Richmond Transfer Co.*, 38 I.C.C. 636 (1916).

The Presiding Officer held that Cargill was not entitled to protection under section 16 First because Cargill is not a shipper. The Commission declines to adopt this conclusion. The unusual, and possibly unique, grain purchasing system employed by ASCS, appears to place the five bulgur suppliers in the same position relative to Waterman's ocean rates in which they would be if they sold grain on a fully delivered basis at Indian ports (*e.g.*, on C.I.F. terms). Waterman also considers the competitive capabilities of the bulgur suppliers in establishing its River rates [*E.g.*, WS-1 at 8-11, 21-22; WS-2 at 3-9]. Under the total circumstances of this case, therefore, the purposes of section 16 First are best served by treating Cargill's alleged injuries as actionable under section 16 First.

Cargill's objections to the Presiding Officer's suggestion that Cargill failed to make a *prima facie* showing of undue preference are of little significance given the fact that the case was not decided upon a motion to dismiss, Waterman presented a full defense, and Cargill lost because of its failure to prove injury, not because it failed to prove that transportation circumstances in the River/India trade were undistinguishable from those in the Gulf/India trade. Nonetheless, the Initial Decision seemingly overemphasizes the burden of proof placed upon section 16 First complainants concerning the similarity of transportation circumstances (I.D. at 16-17).[19] Cargill's second exception will therefore be granted.

The elements of undue preference and the burden of proof thereon were described in a 1979 judicial decision arising under the Interstate Commerce Act, as follows:

> (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that

[19] The Presiding Officer more accurately describes the burden of proof in cases of unjust discrimination under section 17, initial paragraph, but even there, the complainant is not required to prove such matters as the cost of providing service which can be accurately known only to the respondent.

> the carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor. *Harborlite Corporation v. Interstate Commerce Commission*, 613 F.2d 1088, 1091 (D.C. Cir. 1979), quoting *Chicago & Eastern Illinois Railroad v. United States*, 384 F. Supp. 298, 300-301 (N.D. Ill. 1974), *aff'd mem.* 421 U.S. 956 (1975).

As can be seen, the complainant is not obligated to prove that the transportation circumstances surrounding the two movements are identical. This evidence is primarily in the possession of the respondent. It is sufficient that the complainant demonstrate that there are no obvious differences between the trades. At that point, the burden is upon the respondent to demonstrate that there are legitimate transportation differences.

Cargill's third exception was adequately resolved by the Presiding Officer and warrants no further discussion here. There is no substantial evidence to support the proposition that LASH rates to India must be higher from U.S. River ports than from U.S. Gulf ports.

Cargill also takes exception to the Presiding Officer's suggestion that the India, Pakistan, Bangladesh, Ceylon and Burma Outward Freight Conference was a necessary party to this proceeding (I.D. at 34). This exception will be granted, although once again the matter at issue does not affect the ultimate outcome of Cargill's case. A section 16 First action will lie against a carrier which operates within a conference or other ratemaking body whose decisions it cannot unilaterally control. *See American Export-Isbrandtsen Line v. Federal Maritime Commission*, 409 F.2d 1258, 1260, n. 4 (2d Cir. 1969); *Surcharge by the Far East Conference*, 9 F.M.C. 129, 130-132 (1965). Conference membership may ultimately restrict the remedy available for section 16 violations, but it does not restrict the carrier's ability to "effectively participate" in both rates so as to create a defense for the respondent carrier. *See Texas & Pacific R. Co.*, 289 U.S. 627, 650 (1933). In the instant case, the India, Pakistan Conference was a necessary party only to the extent Cargill sought a Commission order directed at the Conference's Gulf Coast rate for bulgur.

Cargill's fifth exception concerns the diversion of bulgur from Gulf Coast ports as a whole. It is true that as much as 43 million (but probably less than 15 million) pounds of bulgur *might have* moved through Gulf ports if River and Gulf rates were equal, more favorable arrangements were unavailable at Pacific Coast or Great Lakes ports, ASCS found all Gulf bids responsive and adequate shoreside and ocean carrier accommodations were available at the Gulf for each proposed

ASCS shipment. This evidence does not, however, constitute a legitimate claim to an ascertainable portion of ASCS bulgur shipments within the meaning of the cargo diversion standards established by the Commission in *Council of North Atlantic Shipping Associations v. American Mail Line*, 17 S.R.R. 781, 841 (1978).[20] The ASCS market depends upon several variables other than ocean rates and there is no necessary relationship between a decline in River rates and an increase in Gulf port shipments.[21] Cargill also offered no evidence relating to the volume and dollar value of the allegedly "lost cargo" to the overall operations of U.S. Gulf ports, ports which are among the nation's largest.[22] In short, Cargill's evidence is far too speculative to support a finding of unjust diversion of cargo from Gulf Coast ports as a whole.

Baton Rouge's sole claim of injury to its particular port is based upon the premise that because it received one shipment (4,523 long tons) during July, 1978, it would necessarily have received similar shipments at least once every six months thereafter. This argument fails because lower River rates cannot be said to have "caused" the July, 1978 shipment [*see* note 22, *supra*], and because Baton Rouge is a relatively high cost Gulf port, not usually bid by Cargill, Lauhoff or ADM [Ex. WS-3 at 53-56, Tr. at 326-328, Ex. WS-6 at 5-6, Ex. C-18].[23] No Baton Rouge bids were in fact submitted in Bid Cycle No. 64 [Ex. WS-3 at 55-56] and although Cargill initially received the award at Baton Rouge, this allocation was probably made because of changed circumstances at some other port [Ex. C-5 at 45-50, 80-84, 125].

Cargill's sixth exception goes to the heart of its undue prejudice case—that Waterman's rate structure subjects Cargill to a substantial disadvantage in marketing bulgur. This assertion is not supported by the record. Cargill sold the maximum quantity of bulgur it could produce during 1978 and 1979 [Tr. at 285], and increased its market share (400%) faster than total market growth (50%), if the 30 months before Waterman began its River service are compared to the 30 months after that date [*see* note 21, *supra*. Cargill's Gulf bids were also higher than Lauhoff's on some occasions [Ex. WS-3 at 28]. Most impor-

[20] Cargill does not claim the Gulf ports lost specific cargoes traditionally handled by them. Rather, it insists that these ports should have enjoyed an increase in India bulgur traffic during 1977-1979 because ASCS's overall purchases increased during this time period. However, the volume of bulgur moving through the Gulf ports during 1977-1979 grew at a greater rate (75%) than did India bulgur market as a whole (50%) [Ex. C-2, Ex. C-10, Ex. WS-3 at 2-3, 42-45, 49-50 and Ex. WS-11 at 1].

[21] During February and August, 1978, Gulf bulgur shipments increased despite the fact that River rates to the Indian outports actually involved were slightly lower than the Gulf rates. [Ex. WS-3 at 50-53; Ex. WS-6 at 3-5; Ex. C-9 at 1-4; Ex. C-10; Tr. 1139-1148, 1203-1204]. This increase is attributable to higher rates at the Great Lakes [Ex. WS-3, App. C., Cycles 64-70].

[22] The only evidence of bulgur's economic value to Gulf ports was Baton Rouge's discredited attempt to establish a $50.00 per ton direct value for bulgur. The actual value at Baton Rouge was closer to $3.00 [Ex. C-18 at 10; Tr. at 464-470].

[23] Cargill uses Corpus Christi and Lake Charles as its "base points" for bidding at Gulf ports. ADM and Lauhoff use Pensacola.

tantly, Cargill has successfully marketed bulgur at River ports since it began making such bids in April, 1979 [Ex. WS-3 at 35-41 and Table I].[24] These bids have generally been higher (about $0.50 per cwt) than Cargill's Gulf bids and therefore capable of recouping the additional inland transportation costs ($178,339 or $0.34 per cwt) allegedly incurred in reaching the River ports.[25] Although Cargill suggests that it faces other, more subtle, handicaps as a result of Waterman's service, it has not proven that such handicaps exist [see Tr. at 328-335].

The record does not show a regular, predictable combination of wheat prices and railroad rates which give Cargill a "natural advantage" over northern bulgur producers at Gulf ports that is unobtainable at River ports. Instead, there is clear evidence that the critical limitation on Cargill's marketing efforts is the advantage enjoyed by West Coast and Great Lakes suppliers, not Waterman's River rates. Moreover, the railroad rate structure applicable to midwestern wheat is highly complex, result oriented (*i.e.*, charges are frequently "equalized"), and subject to Interstate Commerce Act regulation. If Cargill continues to believe it is disadvantaged by rail rates to the River ports, the appropriate remedy would be to lodge a complaint with the ICC.

Exception number seven is a matter of doubtful relevance. The "capacity" of the River ports during 1979 must be judged in terms of ability to handle potential ASCS bulgur shipments and not in terms of bulgur actually handled or vacant warehouse space. Consequently, although the River service grew during 1978 and 1979, it also appears that the Presiding Officer correctly concluded that the withdrawal of St. Louis from the ASCS program in September, 1979 reduced total bulgur handling capacity at the River ports (I.D. at 7, note 5). In any event, Cargill has failed to establish why a different finding regarding River port capacity would materially affect the outcome of this case.

Cargill's eighth exception claims that witness Douglas Tucker's analysis of the effect of Waterman's River rates on ASCS sales was defective because it did not consider potential limitations on the volume of bulgur that could be handled at West Coast or Great Lakes ports. This exception will also be denied. Mr. Tucker's model may not a perfect one, but it is based upon the same data used in ASCS's computers and was corroborated by other evidence [*e.g.*, Ex. C-5, Ex. WS-7]. There is little doubt that the "lowest landed cost" factors employed by ASCS

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[24] Although Cargill's Gulf shipments decreased from 50,260,000 pounds during February through August, 1978 to 32,600,000 pounds from September, 1978 through December, 1978, this decline was more than offset by the 72,600,000 pounds sold at River ports in 1979 [Ex. C-10].

[25] Ex. WS-3, App. C, Bid Nos. 78-81 as set forth in Appendix B to Waterman's Reply to Exceptions. Cargill's ability to compete at River ports is further supported by the fact that Cargill enjoys an inland transportation edge over Lauhoff ($0.315 per cwt) to Lake Providence [Ex. WS-4 at 5-6], and that St. Louis, the River port furthest from Cargill's mill and closest to the mills of Lauhoff and ADM, lost its ASCS certification in September, 1979.

generally favor West Coast and Great Lakes ports, Waterman's River service is priced to compete with West Coast and Great Lakes services, and Waterman has not diverted significant amounts of bulgur from Gulf Coast ports or unduly prejudiced Cargill's marketing efforts.

Exception number nine is based upon Cargill's claim that it was entitled to view a portion of the notes used by Mr. Boyle during his deposition and that the scrap of paper in question was deliberately destroyed by Waterman's counsel so as to defeat future attempts to compel production. Waterman later offered to reconstruct the 12 words which had been written on the scrap of paper and further claimed that they constituted a privileged attorney/client communication. The Commission cannot presently determine whether the information was or was not discoverable, but concurs fully in the Presiding Officer's evaluation that access to this information could not have hindered Cargill in presenting its case and that no sanctions could reasonably be imposed against Waterman for its counsel's actions.

THEREFORE, IT IS ORDERED, That those portions of the "Reply to Exceptions" jointly filed by Helena Port Terminal, Inc., and Mid-South Terminals Corporation which refer to injury or disadvantage suffered by Cargill, Inc., as a result of Waterman Steamship Company's ratemaking practices are stricken from the record as being beyond the scope of the Presiding Officer's December 28, 1979 "Order Granting Intervention"; and

IT IS FURTHER ORDERED, That the Exceptions of Cargill, Inc., and the Greater Baton Rouge Port Commission, are granted to the extent indicated above, and denied in all other respects; and

IT IS FURTHER ORDERED, That the Initial Decision issued December 23, 1980 in this matter, as modified by the foregoing findings and conclusions, is adopted by the Commission, and expressly made a part of this Report and Order; and

IT IS FURTHER ORDERED, That the complaint of Cargill, Inc., is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-72

CARGILL, INCORPORATED

v.

WATERMAN STEAMSHIP CORPORATION

The disparity between respondent's rates on bulgur from Gulf ports to India as compared to bulgur from ports on the Mississippi River to India do not subject complainant to any undue prejudice or unfair disadvantage in violation of section 16 First of the Shipping Act, 1916.

Respondent's rates on bulgur to India found not unjustly discriminatory as between shippers or ports in violation of section 17 of the Shipping Act, 1916.

Edward J. Sheppard and *April C. Lucas* for complainant.

John P. Meade, Eliot J. Halperin, and *J. Michael Cavanaugh* for respondent.

Henry W. Gregory, Jr., and *Bob C. Worley* for intervenors Helena Port Terminal, Inc., and Mid-South Terminals Corp.

T. M. Hogg for intervenor Greater Baton Rouge Port Commission.

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

Partially Adopted November 30, 1981

Complainant, Cargill, Incorporated, charges respondent, Waterman Steamship Corporation, with violations of sections 16 First and 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816), which are said to result from the difference between Waterman's bulgur rates from ports on the Mississippi River to ports in India and its bulgur rates from ports in the Gulf of Mexico to India.[2] Cargill does not seek reparation. It does seek an order requiring Waterman to cease and desist from the violations which are said to flow from Waterman's rates on bulgur to India.

Helena Port Terminal, Inc., the Mid-South Terminals Corporation, and Lake Providence Port Commission were allowed to intervene for the purpose of presenting evidence on Cargill's charge that Waterman's rates were discriminatory as between ports. The Greater Baton Rouge Port Commission was allowed to intervene for the limited purpose of filing briefs.

[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] Bulgur is a grain product which is manufactured by roasting and then cracking and dehulling whole grains of wheat. Soy-fortified bulgur is made by adding soy grits to regular bulgur to increase the protein content. Unless otherwise specified. "bulgur" includes soy-fortified bulgur.

FINDINGS OF FACT

The Agricultural Stabilization and Conservation Service, a part of the Department of Agriculture, is the agency responsible for the purchase and distribution to relief agencies of the bulgur products which are exported to India under the P.L. 480 program. The amounts to be purchased and the ultimate Indian destination points are established by the relief agencies in conjunction with the Agency for International Development and an inter-agency coordinating committee. The grain used to make the bulgur is purchased on a monthly basis through ASCS's office in Shawnee Mission, Kansas. The procurement policy followed by ASCS requires it to obtain and transport the bulgur to Indian ports at the lowest possible landed cost, i.e.. the lowest total cost to ASCS of the commodity landed in India, including the cost of the basic commodity, inland transportation rates, port handling charges, and ocean transportation rates and charges.

The procurement process begins when ASCS issues an invitation for bids to each of the several grain vendors with bulgur producing capacity. The invitations state the approximate quantities of bulgur needed and a request that the seller quote prices on a FAS (free alongside) basis at various port ranges offering regular ocean service to India and the other countries specified by the relief agencies.

In setting its price, the seller is concerned with price of the wheat, the cost of inland transportation both from the point of origin of the grain to the seller's mill and from the mill to the U.S. port of origin, the cost of processing the wheat and overhead, and unloading or handling costs at the port of origin. The seller does not include the cost of ocean transportation in his bid since under FAS the purchaser (ASCS) pays the ocean transportation charges. The seller's bid states how much bulgur it is willing to supply at the prices quoted. ASCS also obtains data from its field office on port capacity for bagged grain products.

After all the data are collected, ASCS feeds them into its computer which is programmed to analyze the data and produce the lowest landed cost to all destinations.

Bulgur is one of the predominate commodities shipped by ASCS under the P.L. 480 program, and India has traditionally been the recipient of the great preponderance of the bulgur exported. For example, in fiscal 1978 the government shipped 613,114,000 pounds of bulgur to India, compared to 762,515,000 pounds shipped to all destinations. In 1979 it was 644,472,000 pounds to India and 817,380,000 pounds to all destinations. Bulgur shipments to India in 1978 and 1979 are nearly double the average of 1973-1977 shipments.

Cargill and its competitors are not told by ASCS the particular foreign country to which the bulgur is destined prior to the submission of each month's bid; however, since the only country of destination

served by River ports is India, the sellers know that all the bulgur ASCS allocates to River ports is destined to that country.

The government's demand for bulgur varies widely from month to month, ranging from as little as 3,200,000 pounds to as much as 112,300,000 pounds. Similarly, India bulgur has ranged from 2,070,000 pounds to 87,600,000 pounds. The quantities offered by each bulgur producer vary widely each month. There are five grain companies competing for this business.

Cargill, with its bulgur plant in Dallas, Texas, competes with four other companies: Fisher Mills, Inc., in Seattle, Washington; California Milling Company located in Los Angeles; Lauhoff Grain Company with its plant in Crete, Nebraska; and Archer-Daniels-Mid-land which has its bulgur plant in Abilene, Kansas.

Because of their location, the two West Coast bulgur producers, Fisher and California Milling, designate West Coast ports exclusively in their bids for bulgur contracts. The Midwest producers, ADM and Lauhoff, have bid successfully for deliveries to the Great Lakes and Gulf ports; and on certain occasions Lauhoff's bids at West Coast ports have also had the lowest landed cost under ASCS's formula. Prior to the institution of Waterman's River service, Cargill bid exclusively at Gulf ports.

Waterman began providing regular River service to India in 1977. Waterman's rates on bulgur have been published in two of its Freight Tariffs, Nos. 55 and 69 (FMC Nos. 83 and 148). Under these tariffs, Waterman published bulgur rates for St. Louis, Missouri; Memphis, Tennessee; Helena, Arkansas; Osceola, Arkansas; and Fort Smith, Arkansas. Waterman began lifting bulgur at River ports in July 1977, and since that time has carried all of the India-bound bulgur allocated by ASCS to those ports. Waterman loads River-port bulgur in shallow draft barges, which are then towed to New Orleans for loading aboard the LASH mothership.[3] The mothership takes the barges to India.

Waterman also provides service to India from ports in the Gulf of Mexico as a member of the India, Pakistan, Bangladesh, Ceylon and Burma Outward Freight Conference. Waterman has transported minimal amounts of bulgur from Gulf ports to India both before and after the inauguration of its River service. As in the River barge service, barges from Gulf ports are loaded aboard the mothership at New Orleans. On occasion the mothership will call at Houston.

Helena Port Terminal, Inc., operates warehouse and port facilities on the Mississippi River at Helena, Arkansas. Helena Port Terminal is a partially owned subsidiary of Pine Bluff Warehouse Company, which also owns terminal facilities at several River ports covered by Water-

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[3] LASH, of course, stands for "lighter aboard ship."

man's Tariff No. 69 (FMC 148), including Fort Smith, the Arkansas River Terminal at Pine Bluff, and the Osceola Port Terminal. Helena handled 21,428 net tons of bulgur shipments to India, on which it earned $307,058 or 28 percent of its gross revenue. Helena is beginning to handle other P.L. 480 products and is soliciting non-government cargo. The Waterman River service has created between 25 and 30 new jobs at Helena. ASCS has approved the facilities at Pine Bluff and Fort Smith for handling Title II commodities, and these ports plan to compete for the bulgur business. Cargill points out that Helena is located 491.5 nautical miles above Canal Street in New Orleans and 10,031.5 nautical miles from Bombay, India.

The Mid-South Terminal Corporation operates warehouse and terminal facilities on the river at Memphis. Mid-South handled 26,697 net tons of P.L. 480 products, including 20,291 net tons of bulgur shipments to India, all carried by Waterman. This tonnage produced 10 percent of Mid-South's gross revenues. As at Helena, Waterman's service created between 25 and 30 new jobs. Memphis is located 558 nautical miles above Canal Street and 10,098 nautical miles from Bombay.

The Lake Providence Port Commission's facilities are located adjacent to a channel leading to the Mississippi at Lake Providence, Louisiana. A $250,000 bond issue of the Port Commission, with matching government funds, was used to construct a new general cargo facility at Lake Providence. The Port Commission's income is derived principally from the lease of properties which it owns, including rent received from the Lake Providence Terminal Company, Inc., which operates the "Lake Providence Port." ASCS has regularly shipped India bulgur through the Lake Providence Port, and in 1979 it handled 63,615 net tons and shipped 62,005 tons to India. This bulgur accounted for 94 percent of the total tons received and shipped at the new general cargo facility. Lake Providence is located 341.5 nautical miles above Canal Street and 9,881.5 nautical miles from Bombay.

The Greater Baton Rouge Port Commission is an executive department of the State of Louisiana, and it has the responsibility for the operation of all public port facilities in the parishes of East Baton Rouge, West Baton Rouge, Ascension, and Iberville. Baton Rouge has expended more than $40 million on the construction of terminal facilities. Baton Rouge is a deep draft port and can handle ocean-going ships as well as LASH barges. Baton Rouge competes for India bulgur. There were no bulgur shipments through Baton Rouge in 1977 or 1979 and only one shipment of 4,523 short tons in 1978. Baton Rouge is located 115 nautical miles above Canal Street and 9,655 nautical miles from Bombay.

After the institution of Waterman's River service, ASCS began to award substantial amounts of India-bound bulgur to ADM and Lauhoff for delivery at River ports. In some instances, the quantities and FAS

prices offered by Cargill were sufficient to have enabled Cargill to obtain at least a portion of the bulgur awarded. It is Cargill's position that all the bulgur was awarded to River ports because Waterman's River rates were lower than its Gulf rates. Mr. Douglas C. Tucker, an expert witness offered by Waterman, is a transportation economist with specialization in the maritime and intermodal fields.[4] Mr. Tucker, taking the set of data used by ASCS to make procurements from July 1977 (when ASCS made its first purchases at River ports) through December 1979 and altered the transportation environment over that period. He altered the lower rate to equal the Gulf charges as reported in the ASCS data sets and then recalculated the ASCS procurement awards as it would have done under the altered circumstances. Mr. Tucker then compared his revised awards list with the actual awards list of ASCS to determine the impact of Waterman's River service on Cargill. Except for altering the River rates, Mr. Tucker left all the other procurement factors constant.

As can be expected, Mr. Tucker's view of the impact of Waterman's River service is quite different than that of Cargill. To put it simply, Mr. Tucker finds very little harm to Cargill from Waterman's rates, while Cargill attributes virtually all its bulgur woes to those rates. Almost two days of cross-examination of Mr. Tucker by Cargill failed to discredit or even alter Mr. Tucker's findings in any significant way. Cargill offered no "expert" witness, but through corporate officials or employees attempted to show the "harm" suffered by Cargill at the hands of Waterman. Of the two, Mr. Tucker's evidence, while by virtue of its being an economic model is somewhat inexact, is the more competent.

Mr. Tucker, in response to Cargill's assertion that all of the bulgur awarded to River ports was due to Waterman's lower rates, demonstrated that there was no instance in which any of Cargill's unsold bulgur would have yielded a lower landed cost than bulgur ADM, Lauhoff or the West Coast Mills would have had available. Between February 3, 1978, and August 15, 1978, total charges under the Conference's tariff for transportation of bulgur from Gulf ports to the major India ports of Bombay and Calcutta were $117.92. Waterman's River rates to Bombay and Calcutta were $118 to $121 during this period.

[4] Mr. Tucker has over the past 16 years conducted many studies in maritime and intermodal transportation fields. These include a study for the New York Port Authority on the potential of expanding containerization in international trade; the potential of the Great Lakes/St. Lawrence Seaway System under a series of proposed physical improvement alternatives; and a follow-up study for the Secretary of Transportation which examined competitive relationships of transportation services available to shippers in the Great Lakes/Seaway hinterland. Most recently Mr. Tucker directed research programs producing short-term forecasts of maritime trade between the United States and Japan, Korea, and the Far East; domestic intercoastal and intracoastal general cargo traffic; the U.S. export coal trade with both Japan and Europe; and the market for U.S. and Canadian grain exports.

However, Waterman's River rates to Indian outposts such as Madras remained lower than the Conference rates. During this same period, rates from Great Lakes ports to India increased. During this six-month period, ASCS purchased approximately 69,860,000 pounds of India-destined bulgur for delivery at Gulf ports. Cargill supplied about 50,260,000 pounds of this bulgur. During the entire 17-month period between August 1978 and the end of 1979, when Gulf rates increased, the government purchased only 70,000,000 pounds, of which Cargill supplied some 32,600,000 at Gulf ports.[5] The record does not establish that this bulgur would have gone through River ports had it not been for Waterman's River rates. The reason for this increase in Gulf tonnage was the momentary increase in Gulf Lakes' rates.

Beginning August 16, 1978, Waterman's charges under the Conference tariff increased because of increases in port surcharges for Bombay and other major Indian ports and bunker fuel surcharges. The bunker fuel surcharge alone went from $25.50 to $50.50 between August 1978 and late 1979. Conference rates have increased by some 58 percent since August 1978. Waterman's River rate went from $121 to as low as $112.25 in August 1979. Waterman's River rate was $97.50 L/T in 1977 and is now $116.25 L/T. Fluctuations can be attributed to changes in competitor's rates.

Cargill insists that "at least" 43.4 million pounds of bulgur would have been awarded to ADM, Lauhoff or Cargill had it not been for Waterman's River service. However, Waterman has shown that only some 15 million pounds or 6,696 long tons could have moved through the Gulf in the 30 months following July 1977, when the River service was instituted. Cargill's assertions of lost tonnage are based upon its assumption that Mr. Tucker in making his findings did not take into account the number of vessels available for Great Lakes service or their capacity for any particular bid cycle, or the amount of other bagged commodities which might have limited their ability to load bulgur. The record shows, however, that the Indian carriers serving the Great Lakes allocate calls on the basis of cargo bookings and that in only one case would the added bulgur tonnage which, hypothetically, would have been shifted to the Lakes under Mr. Tucker's model, have exceeded the capacity of the available vessels.[6] The same can be said of Cargill's assertion that no account was taken of the U.S. flag-preference laws, citing the fact that for all practical purposes, no U.S. flag carriers

[5] Cargill also points to the "dramatic" expansion of capacity at River ports. However, River port capacity actually decreased with the withdrawal of St. Louis.

[6] Great Lakes capacity was insufficient to carry added bulgur only once, in late 1979, when by government edict the Great Lakes calls were canceled so that the ships could pick up cargoes of paper necessary to print fresh Indian currency.

operate in the Great Lakes-India trade and foreign flag lines handle most of the bulgur out of the West Coast.[7]

With the advent of Waterman's River service, Cargill began bidding for deliveries at River ports. Cargill's total costs for deliveries at River ports are higher than its total costs for deliveries at some Gulf ports. In seven months of bidding at River ports, Cargill estimates it incurred $178,300 in additional costs.

Cargill ships its bulgur products under two types of rail rates, generally described as "flat" rates and "transit" rates. A flat rate is applicable to movements between the plant in Dallas and the port of delivery. Under a transit rate, the rail carrier assesses a single through rate from the point of origin of the wheat to Cargill's plant to the specified point of delivery after the wheat has been converted to bulgur at the plant. The advantage of the transit rate is that it enables Cargill to ship its bulgur to the port of delivery at the same rate as it shipped the wheat from its point of origin to the plant despite any increase in rail rates during the period between the purchase and shipment of the wheat and the shipment of bulgur to the point of delivery. Generally, export transit rail rates available at the Gulf Coast ports tend to be equalized among all Gulf ports, particularly for traffic which originates a substantial distance away from the Gulf. If bulgur producers purchase their wheat from the same point of origin, they are able to take advantage of the same export transit rates for delivery to Gulf ports, regardless of the location of their mills. ADM and Lauhoff are able to take advantage of the same transit rates as Cargill on wheat purchased in markets in southern Nebraska, Kansas, and Missouri for delivery at Gulf ports. However, because of the rail rate structures, Cargill cannot "reach" Pensacola where terminal charges are substantially lower, and this allows ADM and Lauhoff to offer lower Gulf bids than Cargill.

Although 90 percent of Cargill's bulgur moved under transit rates in past years, the percentage dropped to 70-75 percent from time to time during the last year or two because of rail car shortages in Kansas, Missouri, Nebraska, and Oklahoma, the markets from which transit rates are available to Cargill. Lauhoff was unable to get transit rates established to the River ports and uses non-transit or flat rates almost exclusively to the active River ports of Helena, Lake Providence and Memphis. Lauhoff purchases approximately 99 percent of the wheat it uses to manufacture bulgur in Nebraska markets. The balance comes from markets in Colorado and Kansas. Since many wheat origin points for Lauhoff are located close to its bulgur plant in Crete, Nebraska, in

[7] Cargill seems to have created a dilemma for itself. From the above, it seems to say that U.S. flag carriage is valid consideration, yet on brief it says: "No citation is required to establish the proposition that national flag preference has no role in sections 16 and 17 of the Act, the sections under which this case has proceeded." More on this will be said later.

many instances the flat rates on Lauhoff's shipments to Gulf ports are the same as the transit rates on those shipments. During most of the period since Waterman instituted its River service, Lauhoff's flat rates to Gulf ports have been identical to the flat rate to Lake Providence, Memphis, and Helena; and the rates from Crete to those River ports have been the same as the export transit rates from Crete to Gulf ports. Currently, Lauhoff's rail rates to Ft. Smith are 12½ cents lower than its rates to Helena, Memphis, and Lake Providence; and the port handling charges are the same as at Helena.[8]

In flat rates, Lauhoff has the advantage at Helena and Memphis, while Cargill has the advantage at Lake Providence.[9] Cargill would utilize flat rates only when it is necessary to truck wheat in from local Texas markets where the cost of wheat is normally higher than in Nebraska, where Lauhoff buys its wheat. Cargill points out that it is similarly disadvantaged compared to ADM when rail car shortages force Cargill to truck wheat to its Dallas plant from higher cost markets close to the Gulf ports and ship its bulgur out of the plant at flat rates, since ADM can continue to purchase wheat in the lower cost markets tn Nebraska, Kansas, and Missouri. If Cargill purchases wheat in northern markets, its overall rail costs to river ports under rail rates would be higher than Lauhoff's flat rates. However, this overlooks those times when Lauhoff has to truck the wheat to its plants.

Eighty percent of the inbound shipments of wheat to Cargill's Dallas plant for shipment to River ports under transit rates originated at points in Oklahoma; the other 20 percent came from Nebraska and Colorado. From the Oklahoma markets the rail transit rates on bulgur from Dallas to the River ports ranged from 21½ to 41½ cents per 100 pounds. The flat or nontransit rates from Lauhoff's mill in Crete, Nebraska, to the same River ports under transit (wheat in, bulgur out) to the same River ports on the same dates ranged from $1.37 to $1.60½ per 100 pounds. The total transit cost to Cargill of getting the bulgur to River ports under transit (wheat in, bulgur out) is from 3 cents less to only 18½ cents per 100 pounds, more than just the flat rate on bulgur from Crete to the same River ports. The rail rates on wheat from Oklahoma origins to Dallas ranged from $1.14½ to $1.23 per hundred pounds. The truck rates on wheat to Crete are not of record, but Crete pays a premium for truck wheat except when there is a rail car shortage.

To the extent, if any, Cargill is unable to recover its higher inland transportation costs when it bids at River ports, it is only to the extent of some "negative impact upon Cargill's profit margins," i.e., its com-

[8] These rail rates are "paper" rates in the sense that the record contains no evidence of bulgur moving through Ft. Smith. As noted, Ft. Smith "intends" to compete for bulgur.

[9] As already noted, St. Louis no longer handles bulgur.

petitors "ADM and Lauhoff are unable to realize greater profits on similar transactions."

All of the India-bound bulgur loaded on barges at river ports is placed aboard the same LASH mothership which carries bulgur in barges loaded at Gulf ports. Waterman's River barge service and its Gulf barge service are integral parts of the same LASH system. Although Waterman now serves the Gulf with conventional breakbulk vessels, its plans are to replace those ships with LASH vessels.

Each of the River ports served by Waterman is farther from India ports of destination than any of the Gulf ports served by Waterman. Cargill asserts as a "general matter of transport economics, greater distance entails additional expense in actually moving traffic and the additional length of time for which valuable equipment is tied-up." However, in a LASH operation, distance from the port of destination to the port of origin may or may not increase cost. For example, as a general proposition River towing is cheaper than Gulf towing because a greater number of barges may be incorporated in a River tow than in a Gulf tow. Contrary to Cargill's assertion, River towing costs do not increase in direct proportion to the distance from New Orleans, e.g., the cost of towing to and from Helena is more than to and from Memphis even though Memphis is closer to New Orleans. Provided a barge can be towed to the loading port and back to New Orleans in time for the next sailing of the mothership, the "time cost" of its barges does not increase with distance. Since the advent of the River service, Waterman has acquired additional barges to its fleet.

Waterman's turn-around time for barges at Memphis, the most distant River port, is 21 days. Waterman on occasions has held barges at River ports until it has enough to tow. While this involves additional fleeting charges, the record does not establish that this significantly increases Waterman's overall River costs viz-a-viz Gulf costs. Per diem fleeting costs are substantially higher at Gulf ports, up to four times higher at Lake Charles which is Cargill's base port on the Gulf. Therefore, a barge waiting at Gulf ports several days would incur higher fleeting costs than a River barge waiting ten days.

At Memphis, Waterman pays $250 per barge for cleaning and $37.50 for customs clearance. At Helena it is $93.23 for cleaning and $88.27 for customs clearance. However, the cleaning costs are not incurred by every one, depending upon its condition. The record contains no figures which can be used for a meaningful comparison of Waterman's costs at Gulf ports.

Since 1977 the Conference has found it necessary to increase its total charges because of increases in fuel costs and problems with congestion at some Indian ports. LASH uses only about half the fuel per cargo ton as breakbulk ships and does not face the congestion problems breakbulks do. Waterman's River rates were $97.50 a long ton in 1977 and

have increased to the present levels of $114.75 and $116.25 per long ton, and have been as high as $126 during this period.

DISCUSSION AND CONCLUSION

From its inception, this case has provoked argument on a number of issues ranging from the purely procedural to the jurisdictional. Strictly speaking, none of them goes to the "merits" of the case, although each could dictate or significantly affect its outcome. The resolution of these issues is a sort of condition precedent to any meaningful discussion of the main question presented, i.e., do Waterman's rates on bulgur to India violate sections 16 First and 17 of the Shipping Act?

THE BURDEN OF PROOF

Cargill has devoted a good deal of time and effort to the question of whether it or Waterman has all or a part of the "burden of proof" in this case. While it is unnecessary to deal with the burden of proof question since the evidence of record is sufficient to decide the case on its merits, leaving Cargill's argument untreated could lead to the idea of argument by silence, and a part of Cargill's theory could work a basic change in the way future cases are presented.

Cargill's complaint is that the disparity between Waterman's Gulf rates and River rates on bulgur to India violates sections 16 First and 17 of the Shipping Act, 1916.[10] It is Cargill's position that it has sustained its burden of proving the violations once it has shown that (1) there is a significantly higher rate in another trade (Gulf ports to India), and (2) that the movement of goods under the higher rate has been impaired. According to Cargill, once it has done this the "burden of proof" shifts to Waterman, which then must prove that the rate disparity (high Gulf rates - low River rates) is justified by "costs or other transportation circumstances," because "the financial data relating to operations and the reasons which underlie the disputed rates are in the [Waterman's] sole possession." Moreover, failing this justification by Waterman, it is Cargill's contention that "the higher rate must be *presumed* to be unjust." (Emphasis added.) Cargill cites only two cases, *Outbound Rates Affecting Export High Pressure Boilers,* 9 FMC 441 (1966); and *Iron and Steel Rates, Export-Import,* 9 FMC 180 (1965).

On the other hand, Waterman places the burden of proof on all issues including whether or not the rate differential is justified by differing transportation factors on Cargill. In doing so, Waterman draws a dis-

[10] Section 16 First makes it unlawful for a common carrier by water "to make or give any undue or unreasonable preference or advantage to any person, locality or description of traffic in any manner whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 17 makes it unlawful for any common carrier by water in foreign commerce "to demand, charge or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports. . . ."

tinction between proceedings instituted by the Commission and complaints filed under section 22 of the Act. See, e.g., *Dept. of Defense v. Matson Navigation Co.*, 20 FMC 24 (1977).

Cargill, as the proponent of an order declaring Waterman's rates to be in violation of sections 16 First and 17 of the Act, has the burden of proof in this case.[11] The burden of proof remains on complainant throughout and does not shift to respondent at any point in the proceeding. *U.S. v. American Export Lines, et al.*, 8 FMC 280, 290 (1964). Cargill's real argument deals with the "burden of going forward" with the evidence and a "presumption" which it says can arise in cases like this under certain circumstances.

Cargill summarizes the factual issues raised by an allegation of violations of sections 16 and 17 as similarity of traffic, disparity in rates on that traffic, and an adverse affect due to the disparity in rates.[12] Once it has established these facts, Cargill considers its task completed because a presumption is thereby created that the two trades involved are substantially similar.

Citing the *High Pressure Boilers* and *Iron and Steel Cases, supra*, Cargill says that:

> . . . the Commission has indicated that it will *presume* that two trades possess similar conditions in cases like the instant proceeding where carriers publish noticeably different rates on the same item *and no obvious differences in transportation conditions appear.* (Emphasis mine.)

Leaving aside the problems in meaning resulting from the use of terms like "noticeably different rates" and "obvious differences," what Cargill is insisting on is the existence of "a presumption" in cases of prejudice or discrimination under sections 16 First and 17 of the Act.

Iron and Steel Rates, Export-Import, 9 FMC 180 (1965), a case that arose under section 18(b)(5) of the Act,[13] presented the issue of "whether the outward and inward rates on iron and steel items published by Respondent Conferences . . ." violated that section. Hearing Counsel argued that "the existence of a rate disparity along with a showing that tonnage will not move because [the outbound] rate is so high, where the rate in a reciprocal [inbound] trade is lower, should constitute the former rate as *prima facie* unreasonably high." The respondents argued the disparities (inbound-outbound) were neither *per se*

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[11] 5 U.S.C. 556(d). See also Rule 155 of the Commission Rules of Practice and Procedure (46 C.F.R. 502.155).

[12] *In the case of a violation of section 16 First*, Cargill recognizes the additional requirement that there be a competitive relation between the allegedly preferred shipper and the shipper allegedly prejudiced.

[13] Section 18(b)(5) directs the Commission to disapprove rates or charges filed by a common carrier by water in foreign commerce which the Commission finds to be "so unreasonably high or low as to be detrimental to the commerce of the United States."

nor *prima facie* unlawful primarily because Congress failed to explicitly create the kind of presumption Hearing Counsel was asking the Commission to create.

Although stating that questions of what "presumptions" might exist were of more academic than practical importance, the Commission went on to say:

> When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of the goods under the higher rate has been impaired, the carrier quoting the rate must demonstrate that the disparate rates are reasonable.

Thus, whether by design or inadvertence, and while never referring to it by name, the Commission created a presumption, i.e., once it has been established that a disparity in rates exists in reciprocal trades and that the movement of the goods under the higher rate has impaired, the presumption arises that the higher rate is unreasonable. The presumption thus created shifts the burden of going forward with the evidence to the carrier quoting the rate, and it must then demonstrate that the higher rate was in fact reasonable. The presumption created in *Iron and Steel* was that of the *unreasonableness* of a rate under section 18(b)(5).

In *Outbound Rates Affecting Export High Pressure Boilers*, 9 FMC 441 (1966), the Commission had before it that provision of section 17 which makes it unlawful for a common carrier by water in foreign commerce to charge a rate which is "unjustly prejudicial to exporters of the United States as compared to their foreign competitors." Cargill argues that the Commission in that case followed *Iron and Steel* and used the presumption established in that case to presume that shipments in the two trades under comparison moved under similar transportation circumstances. What the Commission actually said was:

> Assuming that the rate offered to the American exporter is significantly higher than rates offered to a foreign competitor and the American exporter is shown to be harmed in some way, the rate still must be found to be unjust. If the rate is significantly higher than a rate on a similar product in another trade *under comparable transportation circumstances*, and some harm is shown to the American exporter, we believe the rate may be presumed to be unjust subject to refutation of one of these elements or to proof by the carrier that the rate is justified on the basis of cost or other transportation factors. (9 FMC 457.) (Emphasis mine.)

A careful reading of the above language shows that it is not the similarity of the transportation conditions which is the subject of the presumption. What is presumed is the unjustness of the rate after the other elements of the violation have been shown, i.e., a higher rate to an American exporter than his foreign counterpart, harm to the American exporter, and comparable transportation circumstances. As in *Iron*

and Steel, the presumption shifted the burden of going forward to the carrier quoting the rate. The carrier did not have to establish dissimilarity in the trades under comparison because it had already been done, at least after a fashion, by the Commission. So when Cargill cites *High Pressure Boilers* for the proposition that the Commission "has indicated that it will presume that two trades possess similar conditions" when "no obvious differences between the transportation circumstances appear," Cargill has just misread the case. Earlier in its opinion the Commission stated:

> The record discloses that in some instances rates on utility boilers exported from this country are higher than rates in the foreign-to-foreign trades. *And it appears that the United States-to-foreign trades and foreign-to-foreign trades under study here are comparable in material respects.** (Emphasis added.)

The Commission has not created a presumption that where "no obvious differences" appear between two trades they will, absent rebuttal evidence, be treated as if they were comparable in transportation conditions or circumstances, and Cargill has offered nothing which would support the creation of such a presumption in this case. Since Cargill is the proponent of an order declaring Waterman's rates unlawful under sections 16 First and 17 of the Act, and since a similarity in transportation conditions is an element in any finding of a violation of those sections, the burden of establishing the necessary similarity is on Cargill. In *Phila. Ocean Traffic Bureau v. Export S.S. Corp.*, 1 U.S.S.B. 538, 541 (1936), a predecessor of the Commission said: "It is well settled that the existence of unjust discrimination and undue preference and prejudice as a question of fact must be clearly demonstrated by [a preponderance of the evidence]" and that "[t]o justify an order compelling the exact equality of rates a complainant must show a substantial similarity in the conditions surrounding the transportation under the rates sought to be equalized." See also *North Atlantic Mediterranean Freight Conference - Rates on Household Goods,* 11 FMC 202 (1967).

THE PERSONS PROTECTED BY SECTIONS 16 FIRST AND 17

Another threshold issue is raised by Waterman which argues that the injury or harm alleged by Cargill cannot be redressed under either sections 16 First or 17 of the Act. Characterizing Cargill's requested relief as a demand that "the Commission interfere in U.S. Government bulgur market by manipulating the ocean rates of common carriers in foreign commerce," Waterman then asks:

* Section 17 requires that such differentials as have been shown to exist between United States rates and foreign-to-foreign rates be shown to exist in trades which are fairly comparable in material respects.

> . . . whether a supplier who sells to a shipper can press a "rate discrimination" case based on its complaint that the "discrimination" is harming its competitive position in bidding for the shipper's business for delivery at U.S. ports, raising no issue of the effect of the rates on any movement in foreign commerce[?]

It is Waterman's reading of sections 16 First and 17 that they are limited to discrimination involving the movement of cargo in the foreign trade and may not be used to alter the competitive situation in the domestic market for bulgur merely because the domestic buyer ships the bulgur overseas by ocean carrier after it purchased from the seller. Thus, Waterman concludes where, as here, the shipper (the U.S. government) benefits from the rate under attack, no allegation of harm to the supplier (Cargill) in his battle with other U.S. bulgur suppliers for the "captive" U.S. government bulgur market can support a complaint under a statutory provision which is limited to redressing discrimination in the foreign commerce.

Cargill is content to argue that I have already disposed of this contention in an early ruling in the case, Denial of Motion to Dismiss. Docket No. 79-72, served November 6, 1979. Waterman itself admits that its argument on brief might "seem on the surface to overlap" the one made in its earlier motion to dismiss, but contends that it really does not. Whatever its relation to the earlier contentions, Waterman's present argument raises serious questions about the reach of sections 16 First and 17.

The protection against unjust discrimination afforded by section 17 is by its express language restricted to "ports" or "shippers." Whether Cargill is protected by section 17 against unjustly discriminatory rates depends upon Cargill's relationship as a "shipper" of goods with a "common carrier by water in the foreign commerce of the United States." By its own admission, Cargill is not such a shipper, and cannot invoke the provisions of section 17 against the rates in issue here. *See, e.g., HGFAA v. American Export Lines,* 19 FMC 787 (1977), in which the Commission distinguished between the shipper and its agents in determining the "real party in interest."

Waterman would also deny Cargill the protection of section 16 First, arguing that in order to sustain an allegation of a violation of that section, a complainant must show harm in the form of an "impact on the movement of cargo *in the foreign commerce.*" Waterman says that where, as here, "the shipper obviously benefits from the rate under attack [the River rate], and the movement of the commodity in foreign commerce is actually furthered by the rate," no amount of harm to Cargill's competitive position in the domestic or "captive government market" can sustain its complaint. In *Tri-State Wheat Transportation Council v. Alameda Transportation Co.,* 1 USMC 784 (1935), the single

authority cited by Waterman, some flour interests contended that rates on wheat and flour should be on an exact parity because a lower wheat rate would enable southeastern mills to secure northwestern wheat and market their flour at an advantage over flour from the northwest. In disposing of this argument, the Commission laid down the principle relied upon by Waterman that it had no authority to adjust rates primarily to protect an industry from domestic competition. Waterman says that *Tri-State* is analogous to this case and that the parallel is clear.

Aside from involving wheat, the parallel between this case and *Tri-State* is not that clear. Any attempt to understand *Tri-State* necessarily involves consideration of the earlier decision in Gulf *Westbound Intercoastal Soya Bean Oil Rates,* 1 U.S.S.B. 554 (1936), a case arising under the Intercoastal Act of 1933. In arguing against a proposed increase in the rate on soya bean oil meal, the protestants claimed that it would prevent them from meeting West Coast competition. The Commission said:

> The competition met by protestants in the sale of soya bean oil meal on the Pacific Coast may be considered only so far as it is a factor affecting the value of the service to the shipper. The [Commission] has no authority to reduce a rate primarily to protect an industry from foreign or domestic competition.

The full quote in *Tri-State* case from which Waterman's principle was drawn was: "But as stated in *Gulf-Westbound Intercoastal Rates Soya Bean Oil Meal* . . . we have no authority to adjust rates primarily to protect an industry from domestic competition." At first blush, it would seem that the quoted rule would apply only to cases where the *reasonableness* of a rate was at issue. However, in *Tri-State*, there were three sections of the Shipping Act involved, sections 16, 17 and what is now 18(a). The Report does not make it clear that the rule in question was applied solely to the issue of reasonableness under section 18(a). It can also be read as applying to section 16, depending on how one interprets the context in which the quoted statement appears. However, this is a fragile premise upon which to construct a theory as far-reaching as that proffered by Waterman, and no other precedent has been cited to me by any of the parties.

The real question presented by Waterman's argument is where does that "foreign commerce" subject to regulation under the Shipping Act begin. It seems to me the answer depends upon the nature of the activity involved and the particular entity being regulated. For example, if the issue is preference or prejudice between shippers by a terminal in the application of its storage charges, the physical location of the activity to be regulated would be quite different than if the issue was preference or prejudice as between shippers by a carrier's application of its rates. The former would or could be some miles inland,

while the latter would begin at "the water's edge," so to speak. Yet another point could be involved if the shipments were intermodal.

I have neither been cited to nor have I found any Commission or court precedents delineating or fixing the boundaries of "foreign commerce" as used in the Shipping Act. The term itself is only defined by indirection in the Act. For example, the protection afforded by section 16 First is from prejudice or disadvantage by "common carriers by water," a term which is defined in section 1 of the Act. The term "common carrier by water" means or includes the term "a common carrier by water in foreign commerce"; and a "common carrier by water in foreign commerce" is:

> . . . a common carrier engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

As can be readily seen, the definitions do not help; but they do point the way. The Shipping Act regulated the rates, charges and practices of the carriers subject to its provisions and further declared unlawful certain activities of those carriers. At the risk of stating the obvious, the Act concerns itself only with those activities of the common carrier which it engages in by virtue of its being a common carrier; and, it would seem to follow, that the Act's protection from the practices proscribed therein extends only to those persons who deal with the common carrier in its capacity as a common carrier. If this proposition is correct, then the more fruitful approach is to examine the relationship between the person claiming harm under the Act and the common carrier alleged to have caused that harm, i.e., is a specific or special relationship necessary before a person can claim the protection of the Shipping Act against the rate practices of a common carrier by water in foreign commerce?

As already noted, this relationship became an issue when Waterman earlier moved to dismiss this case primarily on the grounds that Cargill could not bring the action and could not state a cause of action upon which relief could be granted because it was not a "shipper." [14] I denied the motion first because under section 22 of the Act "any person" may file a complaint whether or not it has suffered the harm alleged; [15] and, second, because none of the cases then cited to me by

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[14] Although it is not defined in the Shipping Act, the term shipper is commonly understood to mean "the owner or person for whose account the carriage of the goods is undertaken." *Norman G. Jensen v. FMC*, 497 F.2d 1058 (8th Cir. 1974), citing *Compagnie Transatlantique v. American Tobacco Co.*, 31 F.2d 663 (2d Cir.), *cert. denied*, 280 U.S. 555 (1929).

[15] *See Anglo Canadian Shipping Co., Ltd. v. Mitsui Steamship Co., Ltd.*, 4 FMB 535, 539 (1955); *Isthmian S.S. Co. v. United States*, 53 F.2d 251 (SDNY 1931).

Waterman stood for the proposition that only shippers were protected by section 16 First. Both the constraints of the motion and lack of time for independent research prompted my conclusion that at least impliedly persons other than shippers were protected by section 16 First. Additional research and reconsideration has led me to alter that conclusion.

In *American Union Transport, Inc. v. Italian Line,* 2 U.S.M.C. 553 (1941), the complainant was a steamship broker and a freight forwarder. The complaint alleged violations of sections 14 and 16 First because of respondent's refusal to accept and book five shipments which complainant as a broker had offered to the respondent carrier. The Commission found that the complainant's interest was in its lost earnings and the damage to its reputation and stature as a broker, and went on to say:

> We are not convinced that the duties imposed upon defendant by sections 14, 16 and 17 of the Shipping Act, 1916, were owed to complainant broker whose only interest in the transportation involved was the compensation it expected to receive from defendant in return for supplying cargo for defendant's vessels. Complainant's cause of action, if any, is not cognizable under the provisions of the Shipping Act, 1916, alleged to have been violated. Similar interpretations by the Interstate Commerce Commission involving the principle concerned are *Southwestern Produce Distributors v. Wabash R.R. Co.*, 20 ICC 458 (1911); *Cosby v. Richmond Transfer Co., et al.*, 23 ICC 72 (1912); and *C.S. Emory and Company v. B&M R.R.*, 38 ICC (1916).

In the *Southwestern* case, cited by the Commission, the respondent railroad allowed a fruit auctioneer to use its station premises free of charge to hold auctions of produce. Complainant demanded that the railroad extend to it the same privilege. The ICC found no violation of the Interstate Commerce Act saying:

> While a common carrier must serve the traveling or shipping public on equal terms and without discriminations or preferences, we have not understood that in undertaking to perform certain duties for those who travel or ship their merchandise over its lines, it assumes any obligations to those who do neither one nor the other. Our authority under the Act in a broad or general sense extends only to the relations between carriers and those who travel or ship merchandise over their lines.

In *Cosby v. Richmond Transfer Co.*, the second case relied on by the Commission, complainant had a baggage transfer business in Richmond. A rival named Garber, together with a group of the defendant railroad's officials, formed a competing baggage transfer business, the Richmond Transfer Company, and the railroad then granted Richmond the exclusive right to the baggage transfer business on the trains. Cosby

argued that this violated section 3(1) of the Interstate Commerce Act.[16] The ICC found no violation of section 3(1) saying:

> It is so much beyond our power to order a railroad to give Cosby Transfer an opportunity to bid against the Richmond Transfer Company for the privilege of soliciting on trains as it is beyond our power to compel a railroad to place its fruit vender's business at auction, for neither is *transportation* under the act and over neither one have we jurisdiction. (Emphasis the ICC's.)

In contrast, the *Emory* case, also cited by the Commission, involved a customshouse brokerage business which sought to have the railroad grant it certain privileges which had been granted to the railroad's agent who was also a customshouse broker. There the ICC found a violation because the brokers were also consignees of the shipments involved and forwarded the shipments on to their ultimate destinations. They, therefore, occupied the status of consignees/shippers and were protected by section 3(1). Still other and later cases involving the Interstate Commerce Act clarify and extend the principle that in order to be protected by the provisions against discrimination, prejudice, or disadvantage, the relationship with the carrier must be that of "shipper," including among others a consignor or consignee.

In *Okla-Ark. Teleph. Co. v. Southwestern Bell Teleph. Co.*, 183 I.C.C. 771 (1932), the complainant telephone company argued that respondent, also a telephone company, was discriminating as between common carriers by rail within the meaning of section 3(1). In dismissing the complaint, the ICC concluded that section 3(1) was restricted to cases of preference or prejudice between shippers and could not in view of the specific provisions of section 3(3) [17] be used to prevent instances of prejudice or preference between carriers. The ICC followed this interpretation in *Coastwise Rates Between Gulf Ports and Texas*, 234 I.C.C. 557 (1939), where some railroads wanted to cancel certain of their rates from inland points in Texas, Louisiana and Arkansas to Gulf ports in Texas and Louisiana. The cancellation was protested by common carriers by water in the coastwise trade on the ground that the cancellation

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[16] Section 16 First was drawn directly from the original section 3(1) of the Interstate Commerce Act and the Commission has relied upon the ICC's interpretation of section 3(1) to determine the intended meaning of section 16 First. *See North Atlantic Mediterranean Freight Conference - Rates on Household Goods*, 11 FMC 202 (1967) and cases cited therein. At the time section 16 First was drafted, section 3(1) read:

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic whatsoever or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[17] Section 3(3) specifically prohibited discrimination as between carriers.

would prejudice their coastwise carriage while preferring the carriage of their competitors from areas where the lower rates would remain in effect. The ICC said:

> Under section 3(1) of the Act it is unlawful for a common carrier subject thereto to make or give any undue or unreasonable prejudice or disadvantage to any particular description of traffic whatsoever. Although this section is couched in broad general terms, the wrong which it prohibits has been found to be prejudice and preference between shippers. *Okla-Ark. Teleph. Co. v. Southwestern Bell Teleph. Co.*, 183 I.C.C. 771; *Delaware, L&W R.R. Co. v. Kulter*, 147 Fed. 51, *cert. denied*, 203 U.S. 558.

Finally, in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954), the ICC answered twelve questions "concerning the legal relations, limitations, and obligations incident to the transportation of highway trailers on railroad flatcars." The questions were posed in a petition for declaratory order, and one of the questions was:

> May a railroad engaged in performing trailer-on-flatcar service under joint-rate arrangements with motor common carriers refuse to publish and file appropriate tariffs and to transport the freight laden trailers of (a) contract carriers by motor vehicle; (b) private carriers by motor vehicle; (c) freight forwarders?

The "shipper interests" (the private motor carriers and freight forwarders) contended that the provisions of sections 2 and 3(1) prohibiting unjust discrimination and undue or unreasonable preference or prejudice precluded the railroads from confining this service to common carriers. The common carriers by motor vehicle with their joint-rate arrangements with the rail carriers were not shippers on those rail carriers. In rejecting this argument, the ICC said: "In our view, however, these provisions are applicable only to those who stand as to the railroad in the relation of shippers." In short, there were not two shippers receiving dissimilar treatment and sections 2 and 3(1) were not applicable. Thus, it would appear that the ICC has consistently restricted the application of section 3(1) to cases of preference or prejudice between shippers.

Other than the *American Union Transport* case, discussed above, I can find no other Commission case in which the specific question arose. All of the other cases which time has permitted me to examine involved shippers or consignees or at least persons having that status by assignment or otherwise. The clear result dictated by the *American Union Transport* case is that Cargill, since it is not the shipper of the bulgur, cannot claim injury under section 16 First. Although it is not discussed, the rationale behind limiting the section to shippers would appear obvious.

If the protections of section 16 First and other sections of the Shipping Act, 1916, are extended beyond those who deal as shippers with the carrier for transportation of the cargo, the problem becomes one of where to draw the line. For instance, if "any particular person" is broadened to include the seller of the finished product (bulgur), no reason in logic would prevent its extension to the seller of the raw material (the wheat) which is converted into the finished product. If this is done, such nice questions as the identity of the commodity arise; i.e., is the wheat sold to Cargill the same commodity for transportation purposes as the bulgur Cargill sells to ASCS? Or, what part of the wheat vendor's inability to sell to the bulgur producer does the ocean rate play? Can a bulgur shipper's inability to reach a foreign market because of allegedly prejudicial ocean rates support the wheat vendor's claim that he cannot sell wheat? Suppose we insert a middleman; does it then become necessary to consider the reasonableness of his commissions? Limiting the carrier's liability to shippers might seem to work a hardship on some persons but the burden placed upon the carrier by an extension of that liability is entitled to at least equal weight. If they must look beyond the shipper, carriers would never be able to set their rates with any reasonable assurance that they had properly considered all the factors necessary to protect themselves from litigation by persons far removed from the actual act of transportation performed by the carrier.

Finally, the satisfaction of the complaint by someone other than the shipper might well do that shipper an injury equal to or greater than the alleged injury to the complainant. An example is the situation presented here. One of the possible forms of relief in this case, given the right set of circumstances, would be to raise Waterman's River rates. While this might possibly help Cargill to some degree, it would most certainly deprive ASCS of the low rate it now enjoys and would cause a potentially unsupportable loss of traffic to the River ports. It seems clear that the principle of the *American Union Transport* case is proper and grounded upon a realistic view of the practical limitations of regulation. Cargill, under that principle, cannot claim the protection of section 16 First.

PREJUDICE OR DISADVANTAGE TO CARGILL UNDER SECTION 16 FIRST

Generally, the prohibition in section 16 First against undue or unreasonable preference or prejudice is intended to deal with two or more shippers receiving different treatment which is not warranted by differences in competitive or transportation conditions. *North Atlantic Mediterranean Freight Conference - Rates on Household Goods*, 11 F.M.C. 202 (1967). The shippers involved must be shipping their cargoes from different points or ports of origin to a common destination or market,

and they must be in competition with each other in that common market.[18] Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. *Philadelphia Ocean Traffic Bureau v. The Export S.S. Co.*, 1 USSB 538 (1936). The competitive relationship required between the shippers is necessary to show the extent to which the complaining shipper was harmed by the alleged preference, prejudice or disadvantage. *Boston Wool Trade Association v. M.& M.T. Co.*, 1 USSB 24 (1921).

Cargill's basic case is based upon its "demonstration" that Waterman assesses substantially lower charges for India-bound bulgur at River ports than it does at Gulf ports and that these charges have resulted in diversion of significant amounts of traffic from Gulf ports, which in turn has jeopardized Cargill's ability to compete with ADM and Lauhoff for sales of bulgur to ASCS. As already mentioned, Cargill relies upon the presumption, rejected above, that the River-to-India trade and the Gulf-to-India trade are substantially similar; and it is Cargill's position that each of the differences in transportation conditions which do exist between the two services favors lower rates from the Gulf ports.[19] However, a close reading of Cargill's argument shows that these differences are all contained in the statement that, "Waterman's River service is in effect an 1100 mile extension of its basic Gulf-to-India service." Cargill points to the fact that Waterman must carry River bulgur shipments first to Gulf ports [20] and then to India on the same mothership and argues that this "circumstance is sufficient of itself to establish violations of section 16 First and 17." At this point, it is necessary to say a word or two on Cargill's penchant for confusing the criteria of discrimination with those of preference or prejudice. Thus, in support of the statement just quoted, Cargill cites *Rates, Charges and Practices of General Atlantic Steamship Corp.*, 2 U.S.M.C. 681 (1943) at page 686, and the *Household Goods* case, *supra*, at page 218. In the *General Atlantic* case, the specific finding on the page cited was that "in numerous instances respondent charged different rates for transportation of the same descriptions of commodities on the same vessel and voyage"; and in the *Household Goods* case, the specific finding, again on the page cited, was that the respondents "by charging different rates to the Department of State and the military departments for transporting household goods of each over their lines between the same ports under substantially identical circumstances and conditions have unjustly dis-

[18] The requirement of competition in the common market highlights another anomaly present when the coverage of section 16 First is extended beyond shippers. Cargill's "market" is the ASCS, not India, the destination of the common carriage by water. Cargill's position is at least as much due to ASCS's purchasing practices as it is to Waterman's allegedly unlawful rates.

[19] As discussed later, Cargill is decidedly ambivalent about the relief it thinks it needs.

[20] The River barges are not carried to Gulf "ports"; they are taken to New Orleans, which is a "fleeting area" for the mothership.

criminated as between them in violation of section 17." In both cases, the conduct of the carrier resulted in discrimination prohibited by section 17, which as already noted is restricted in its application to shippers.[21] Cargill cannot have it both ways. It cannot use the criteria of discrimination to establish preference or prejudice.

The decision in *Household Goods* distinguished between discrimination under section 17 and preference and prejudice under section 16 First. Discrimination occurs when a carrier charges two shippers different rates for transporting the same or a similar commodity over its line from the *same point of origin* to the same point of destination. Prejudice is the result of a carrier charging two shippers different rates for carrying the same or similar cargo from *different points of origin* to the same point of destination. If the charge against Waterman is discrimination, then the point of origin for the shipments must be New Orleans where the bulgur is loaded aboard the LASH mothership. However, since Cargill is not a shipper, it cannot plead the protection of section 17 against discrimination. Thus, Cargill's reliance on the specifically cited portions of the *General Atlantic* and *Household Goods* cases is misplaced. Cargill's cause of action, if it has one, lies under section 16 First; and in order to meet the criteria of section 16 First, Cargill must take as the points of origin of the bulgur shipments the ports where the bulgur is loaded in the barges. It is here that the operational differences between LASH and breakbulk or container services are ignored by Cargill.

In a breakbulk operation, the ship itself must call at every port it loads cargo unless there is some form of substituted service employed by the carrier. The same is true for the containership although the use of substituted service is likely to be more frequent and there is the ever-increasing use of intermodal service. In contrast, the LASH service is composed of the mothership, which normally calls at a single port in the range, and the barges, which are then dispatched to the other ports within the range as the cargo demands. This basic operational difference casts the issue of distance and its role in adjudging rates unduly prejudicial in quite a different light.

So far as I have been able to determine, this is a case of first impression. The LASH concept is a relatively recent innovation and this case seems a particularly appropriate one in which to apply the considerations announced by the Commission in *Disposition of Container Marine Lines,* 11 F.M.C. 476 (1968), at page 489:

> . . . the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlight-

[21] In the *General Atlantic* case, the Commission actually found that the respondent had violated section 16 First as well as section 17. However, the *Household Goods* decision rendered the finding of a section 16 First violation improper.

> ened regulation is the key to effective regulation; no regulatory agency can permit regulation to be outstripped by new techniques in the industry. Progressive regulation is required in the interest of encouraging the modernization of shipping services. Outmoded principles and rules will surely stifle advances in all fields and especially transportation where developments have followed so quickly upon each other.

The Commission concluded that it must "assume a flexible posture and must view broadly, when necessary, its regulatory purpose and governing laws and rules." (11 F.M.C. at 489.)

Cargill's ultimate standard of distance is the number of nautical miles from the port at which the barge is loaded to the "major ports of destination in India." [22] While it is true that the straight-line, over-the-water distance from several of the River ports to India is shorter from any port in the Gulf, that distance is not the same as the actual distance traveled by the bulgur. As already noted, Waterman tows all bulgur barges to New Orleans for loading aboard the mothership; and several Gulf ports are farther from New Orleans than are the River bulgur ports. Thus, bulgur loaded at Cargill's Western baseport of Corpus Christi, which is 548 miles from New Orleans, travels 165 miles farther than bulgur loaded at Lake Providence, which is only 383 miles from New Orleans.

In its attempt to use the distance factor as the basis for a conclusion that Waterman's River rates are prejudicial to it, Cargill would test Waterman's unique LASH operation by principles peculiarly adapted to the traditional break-bulk operator. Whether LASH is the innovation for the future is not a question to be answered here. However, one question clearly presented here is whether LASH is to be stillborn, denied an opportunity to test its potential by an inflexible and narrow construction of the Shipping Act and the case law developed under it. The only answer is as clear as the question itself. Enlightened regulation must encourage modernization and innovation. A carrier's efforts to provide innovative and improved service must not be hampered by the arbitrary application of regulatory principles developed in another age for an operation different in kind. Unless Waterman's LASH operation is itself somehow improper, then the old criteria must be adjusted to reflect the difference between it and the old or traditional operations of breakbulk carriers. Thus, the proper distance criteria here is that

[22] Whether intentionally or not, Cargill has presented its arguments in a manner which renders them confusing, obscure and in some instances misleading. It continually fails to separate the allegations under 16 First from those under section 17; it makes several arguments by analogy but fails to state that it is doing so, and often confuses its own position with that of the ports which it alleges have lost cargo because of Waterman's rates. All of this makes it difficult, without extending this opinion to unwarranted lengths, to restate Cargill's arguments, which in turn accounts for the perhaps excessive resort to quotations.

actually traveled by the bulgur as a result of Waterman's LASH itinerary. It is the distance traveled by (1) the barge to the mothership and (2) the distance the mothership travels to the port of destination.

Cargill attempts to draw an analogy from section 4 of the Interstate Commerce Act (46 USC 10726), which prohibits a rail carrier "from charging lower rates for a longer haul where, as is the case here, the shorter route is subsumed by the longer." Absent special approval by the ICC, such charges are deemed per se violative of sections 2 and 3 of the Commerce Act which are, as noted, counterparts to sections 16 and 17 of the Shipping Act. Waterman does not challenge this dubious analogy on the obvious differences between its LASH operation and the normal long-haul, short-haul rail service, but rather points to the fact that under section 4, the ICC can permit such charges in special cases and that the "principal" special case is where the rail carrier adopts the proscribed rate to meet competition. *Sewage, Sludge and Tankage from Wisconsin*, 218 I.C.C. 184 (1938); *Anthracite Coal to New England*, 277 I.C.C. 569 (1950). But Cargill counters that Waterman's reliance on competition from carriers operating out of the Great Lakes and West Coast is misplaced because Waterman's need to compete with these carriers "is identical to Waterman at both River and Gulf ports," i.e., Waterman is said by Cargill to be facing "exactly the same competitive factors . . . whether it is pricing River bulgur or Gulf bulgur." The question of Waterman's ability to "price Gulf bulgur" aside, the record establishes that the competitive factors are not the same. For the two and one-half years prior to Waterman's River service, 825.3 million pounds of India-bound bulgur moved over ports on the Great Lakes and the West Coast. Neither Cargill nor Waterman had an opportunity to participate in this business; it went to their competitors. Cargill and Waterman did have an opportunity to participate in the 58.6 million pounds that moved over Gulf ports during this period, but this represented only 7 percent of the total purchases for India. Thus, before Waterman's River service, Cargill's competitive position was such that it did not even place bids on 93 percent of the government purchases of bulgur for India. During the 30 months prior to Waterman's River service, Cargill received only 3 percent of the total purchases for India; and during the 18-month period preceding the River service, Cargill's share was only 1.5 percent.

The institution of Waterman's River service actually gave Cargill an opportunity to compete for bulgur which had historically gone to its competitors. During the two and one-half years following the commencement of the River service, the quantity of bulgur for which Cargill could compete went from 7 percent (Gulf bulgur) to 36 Percent (Gulf and River bulgur). For reasons not apparent from the record, Cargill did not begin to bid for delivery at River ports until almost two years after the service commenced; but when it did, its share of the

purchases increased to 12.3 percent—all of which demonstrates that it was only through the River service that Waterman and Cargill have been able to actually compete for bulgur traditionally going to the Great Lakes and the West Coast. However, Cargill says that had Waterman's rates in the Gulf been competitive, it could have competed at least as successfully through the Gulf and in doing so would have saved some $178,000 in "excess" rail charges. This leads directly to the question of Waterman's "control" over the Conference's rates on bulgur at Gulf ports. Cargill's rather ambivalent approach to just what is proper in Waterman's rate practice is demonstrated by the following statement made by Cargill in its closing brief.

> We believe it is important at the conclusion of briefing this case that the record be clear as to what remedy Cargill is seeking from the Commission. Perhaps it is best to discuss as well what Cargill is not seeking. Cargill is not seeking the Commission to order (1) Waterman to increase its River rate, or (2) the Conference to decrease its Gulf rate.
>
> What Cargill has asked of the Commission is that it order Waterman to adjust its rates so that Cargill is not disadvantaged and prevented from selling its bulgur for delivery at Gulf ports. We believe that Waterman is in the best position to determine how such an adjustment can best be made and that Waterman should be given the freedom to select how the adjustment should be made from among the infinite number of possibilities available.

Should the "remedy" sought be ordered and Waterman be given the "freedom" to select from the "infinite number of possibilities available," one could readily wish that Waterman's freedom be accompanied by a healthy dose of Solomon's wisdom, for all the alternatives are fraught with potential "disadvantage" to interests other than Cargill's. Stripped of its concern for Waterman's chance to exercise its prudent discretion, Cargill's remedy reduces itself to three basic possibilities which it recognizes. The River rate can be raised to the Gulf level, or the Gulf rate can be reduced to the River level, or finally both rates can be adjusted somehow. It is Cargill's position that all or any of the possibilities "can be granted without the participation of the Conference," because "Waterman is the party responsible for transporting bulgur at unreasonably prejudicial rates and discriminatory rates and Waterman has the ability to change those rates without any conference action—by withdrawing from the conference if necessary." Cargill also notes that Waterman could also use its "good offices" and petition the Conference to open its rates on bulgur and could "enlist the assistance of the Commission in this regard." As for the latter, it would seem clear that if the Commission's assistance is required to make the Conference act in some way, that the complainant Cargill should have sought that assistance in this proceeding. Indeed, Cargill's whole approach to the question of the

appropriate remedy appears to be the result of an inability to decide which of the two rates is improper and its failure to join the Conference as a party to this proceeding.

That the carrier accused of undue preference or prejudice must control both the rates in question is well established. *American Peanut Corp. v. M&MT Co.*, 1 USSB 78 (1925); *Gulf Intercoastal Rates*, 1 USSB 516 (1935). However, does the carrier's "voluntary" membership in a conference, which by its agreement fixes the rates, in any way alter the requirement of common control over the allegedly prejudicial and preferential rates. Cargill, of course, says it does and relies on two Commission decisions, *Surcharge on Cargo to Manila*, 8 F.M.C. 395 (1965), and *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129 (1965).

In the *Manila* case, the Far East Conference imposed a surcharge on cargo moving from U.S. North Atlantic ports to Manila. Maersk Line, a member of the Far East Conference, served Canadian ports as an independent and did not impose a surcharge on newsprint moving to Manila from Canadian ports. While the Commission found the Conference surcharge lawful, it also found that Maersk Line had violated section 17 by assessing the surcharge at Searsport, Maine, but not at nearby Canadian ports. The Commission ordered Maersk to stop imposing the surcharge on newsprint moving from Searsport to Manila. In *F.M.C. v. Maersk Line*, 4 S.R.R. 20,833, the Commission sought to enjoin Maersk Line from imposing the surcharge at Searsport. The court refused to issue the injunction noting that if the Commission now believed the Conference surcharge to be unreasonable, it could reopen its proceeding and direct the Conference to remove the surcharge. Until that was done, however, and a new order issued, the Court concluded that Maersk was bound by section 18(b)(3) to charge the rates in the Conference tariff and that:

> It would hardly seem equitable to enter an injunction requiring Maersk to obey an order of the Commission where by doing so it would be violating another section of the Act. (4 S.R.R. 20,835.)

Upon the Court's refusal to issue the injunction, the Commission instituted a second proceeding, *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129 (1965), in which it required the Conference to show cause why its agreement should not be amended to remove the Port of Searsport from the trading range of the Conference. The Commission found that by assessing the surcharge at Searsport, Maine, the Conference had operated in a manner which was unjustly discriminatory and unfair as between ports and between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States and contrary to the public interest, all in

violation of section 15. The Conference was then ordered to open the rate on newsprint at Searsport.

Cargill cites the *Manila* case for the proposition that "Waterman's claim of conference control over one of the questioned rates is totally irrelevant" to the question of whether Waterman has violated sections 16 First and 17. On the other hand, Cargill cites the *Far East Conference* case for the seemingly contradictory proposition that Waterman can petition the Conference to open its bulgur rates and, should the Conference fail to do so, Waterman could seek the Commission's aid, presumably by petitioning for the institution of a proceeding against the Conference. From Cargill's own argument, it is clear that the Conference's control over the Gulf rate is far from irrelevant. Close examination reveals that Cargill recognizes the obvious limitations on Waterman's ability to act unilaterally. The only rate action which Waterman in its present posture is free to take is to raise its River rate. The only other options open to Waterman are to (1) resign from the Conference, (2) petition the Conference to open the rate, and (3) if the Conference refuses to open the rate, petition the Commission to force the Conference to open the rate on bulgur. The latter two options would place Waterman in somewhat the same position as that in which the Court found Maersk.

Cargill has throughout the proceeding refused to take a stand on which of the two rates is the improper one. This refusal highlights the dilemma Waterman would be facing if Cargill were given its "remedy." There has been no demonstration by Cargill that the Gulf rate is itself too high or otherwise unlawful. Why then should Waterman give up the advantages of Conference membership by withdrawing from the Conference? Cargill's argument that each difference in transportation conditions "militates in favor of lower Gulf rates" is really founded on the single idea of distance. However, as already concluded, Cargill's concept of distance is not applicable to Waterman's LASH operation. Cargill has simply not made a case for requiring Waterman to withdraw from the Conference and operate as an independent out of the Gulf. Moreover, Waterman did request the Conference for relief in the Gulf bulgur rate and was turned down. Cargill, on the other hand, has never approached the Conference about a reduction in the Gulf rate. Finally, if it is indeed Cargill's position that some action should be taken on the Gulf rate, it could quite easily have made the Conference and its members respondents to its complaint in the case. Cargill has not shown that the Gulf rate should be lowered.

To return to the question of competition, Cargill's position would seem to be that Waterman is obliged to compete out of the Gulf with the Great Lakes and West Coast under the identical terms and conditions that it competes out of the River ports. This ignores any differences existing between the River range and the Gulf range.

The U.S. Gulf-India Conference assesses rates uniformly for the carriage of bulgur to India from each of many hundreds of ports over some 4,000 miles of coastline from Maine to Texas. This charge takes into consideration a multitude of varying conditions and costs confronting the Conference members at each port. On the other hand, Waterman publishes rates for a half dozen River ports, only three of which handle bulgur, at which significant carrier cost items are nearly uniform. Thus, the Conference's charges necessarily include leeway for a wide variation in costs and conditions, depending upon the ports served on any given voyage, whereas Waterman's River rates can be tailored to fit the predictable regular costs at Helena, Memphis, and Lake Providence. The Conference charges include no volume minimum; therefore its charges must allow for the handling of the occasional small volume shipper with its correspondingly higher unit cost, for example, if Waterman normally issues breakbulk ships for small offerings at Gulf ports. In the River, however, Waterman has imposed a 1,000 ton minimum per port call, avoiding the problems attendant to low-volume shipments.

In its LASH service, Waterman faces higher costs in serving Gulf ports than in its River service. The stevedoring charges at Corpus Christi, Lake Charles, and Pensacola, the predominate gateways for India-bound bulgur, are considerably higher than charges at Memphis, Helena, and Lake Providence. Lake Providence is currently the principal bulgur port on the River with over 50 percent of the capacity; and the difference between stevedoring costs there and Corpus Christi and Lake Charles, which are Cargill's Gulf baseports, are up to $11 per ton.

Waterman's LASH vessels call only at New Orleans on Gulf/India voyages. The LASH was designed to minimize costs by having the mothership call the fewest possible ports in each range, and Waterman has found that its most economical method of operation in the Gulf is to have the mothership call at New Orleans with the barges towed to and from the other ports. Based on current expenses, the per-barge towing cost for moving a LASH barge to and from the predominant ports of Corpus Christi, Lake Charles, and Pensacola are substantially higher than the costs to and from Memphis, Helena, and Lake Providence. This difference is as great as $10.32/LT as between Cargill's baseport of Corpus Christi and the predominate River bulgur port of Lake Providence. Per-diem fleeting costs at Gulf ports range up to $75 per barge higher than at River ports. This difference amounts to about 21 cents a long ton per day and would total $2.10 per ton on a movement where a LASH barge is at River port for ten days.

Cargill concentrates its efforts at demonstrating that operating costs at River ports are higher on the topics of the capital costs of barges needed to operate the River service, the time Waterman's barges spend in transit to and from River ports, the cost of cleaning barges to handle

P.L. 480 cargoes, and that Waterman also uses costlier breakbulk vessels in the Gulf. The evidence of record, however, falls considerably short of establishing the alleged higher River service costs.

As for the capital costs of the barges needed for the River service and other costs, Cargill argues that "Waterman has distributed the expenses attendant to the operation of its LASH motherships inequitably between bulgur shipments in its River and Gulf services in contravention of the principles established in the *Volkswagenwerk* line of decisions." This "line of decisions" [23] is said by Cargill to establish the proposition that there must be a "reasonable relationship between benefits and charges." Moreover, argues Cargill, "where rates are too low to recover costs section 17 has been breached and where the burden of defraying that cost has been shifted to non-users of the service section 16 First has been violated." The cases relied upon are precisely those which do not deal with ocean transportation rates and where the charges in question are not dependent upon transportation conditions and circumstances. But aside from the dubiousness of the analogy, Cargill has failed to show that Waterman has inequitably distributed its operational expenses as between the Gulf and the River. Cargill's whole case is based upon the assumption that since bulgur constitutes virtually all of Waterman's River traffic in contrast to the commercial traffic carried by Waterman from the Gulf, Waterman must depend upon bulgur alone to defray all the expenses of the River service. From this, Cargill presumes that Waterman depends upon higher rated Gulf cargoes to contribute towards expenses of the River service. No figures, cost or otherwise, are offered by Cargill in support of its presumption.

Beginning in 1974, Waterman provided some service to the River, and when it obtained its full complement of 1,000 barges, it expanded this to regular River service. However, the record does not show how many of these barges were needed because of the regular River service or how many could be eliminated if the River service was abandoned. Consequently, there is no way to tell what costs are involved. As for the cleaning costs, not every barge needs to be cleaned; and the charge would apply when needed whether the barge was at a Gulf port or a River port. A Waterman mothership calls at New Orleans every thirty days, thus the prime concern for service at the River ports is that the barge call at the River port, load and return in time to be lifted aboard the mothership. Waterman's barges move up river to the current ports of Helena, Memphis, and Lake Providence, load bulgur and return to New Orleans on an average of 21 days. There is no indication in the record that transit time to River ports creates unusual expenses which

[23] *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968); *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525 (1966); *WINAC v. New York Shipping Assoc. Inc.*, 12 S.R.R. 1096 (I.D. 1972).

are then defrayed by Gulf revenues. In short, Cargill has failed to show that the bulgur shipments in question move under substantially similar clrcumstances and conditions, while Waterman has shown that differing transportation conditions justify the difference in its rates on bulgur.

One final argument needs to be dealt with before taking up the question of the alleged discrimination between ports. Cargill takes the position that since it is not asking for reparation, it does not have to show "injury" in the "sense of monetary loss." Indeed, calling Waterman's arguments on the question of harm "no more than quibbles," Cargill says "it is not useful to argue over the amount of damage involved." Waterman, on the other hand, quite emphatically argues "no harm, no violation."

In order for a rate differential to violate section 16 First, there must generally be a preliminary showing that a particular person, locality or description of traffic must have been subjected to a competitive disadvantage that results in actual injury, *Matson Navigation Co. - Rate Increases*, Docket No. 75-57, 18 S.R.R. 1446 (FMC served December 12, 1978). The injury suffered must be substantial, *CONASA v. American Mail Line, et al.*, Docket No. 73-38, 17 S.R.R. 781 (Initial Decision served July 1, 1977), *aff'd* 21 F.M.C. 91 (FMC served August 8, 1978); *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 U.S.M.C. 699, 703 (1943).

Although in its complaint Cargill alleged a loss of sales due to Waterman's rates, it failed to actually show any such loss and indeed admitted at the hearing that its Dallas plant had operated at virtually full capacity during 1978-79.[24] Now its allegation of harm is that it must pay higher inland transportation costs to deliver bulgur at River ports than it pays to Gulf ports. According to Cargill, it has been forced to pay "some $178,000 in excess rail charges, after taking into account savings in port charges." This results in a reduced profit to Cargill, although it nowhere says how much its profit was reduced. Simple loss of an unspecified part of profits is not ground to alter a rate, *Intercoastal Cancellations*, 2 U.S.M.C. 397, 400 (1940). Moreover, the alleged inland rate advantage allegedly enjoyed by Lauhoff and ADM, Cargill's Midwest competitors, is far from established by the record.

The record clearly shows that, except from time to time during rail car shortages, Cargill uses transit rates to the River ports 90 percent of the time, whereas Lauhoff mostly uses non-transit. There are substantial economic advantages to the user of transit privileges and a supplier's total transportation cost under transit rates is lower than the combina-

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[24] There is on brief a simple assertion of "disruption in Cargill sales" because of the asserted deprivation of Cargill's right to use Gulf ports. Just what this "disruption" is and what it has done to Cargill is not explained.

tion of flat rates on the wheat to the mill and for the outbound movement of bulgur. This is confirmed by a comparison of the rail rates of record on representative transit shipments by Cargill to River ports with the flat or non-transit rates of record applicable from Lauhoff's mill at Crete.

The rail rates on bulgur from Dallas to the River ports under the predominantly Oklahoma wheat origin transit rates reflect transportation costs to Cargill of from $1.15½ to $1.19 per 100 pounds less than from Lauhoff's mill at Crete. Even the total transportation cost to Cargill of wheat in and bulgur out is from 3 cents per 100 pounds less to only 18½ cents more than just the flat rate on bulgur from Crete. As the truck rates on wheat to Crete are not of record, an exact comparison cannot be made of Cargill's total in-and-out transit costs with Lauhoff's in-and-out non-transit costs. However, the record does show the rail rates from the Oklahoma origins to Dallas ranged from $1.14½ to $1.23 per 100 pounds and that Lauhoff pays a premium for truck wheat except when there is a rail car shortage. With respect to the other two transit wheat origins in Colorado and Nebraska used by Cargill, as the transit rates from the northern origins to the River ports are the same for Cargill, ADM and Lauhoff, Cargill cannot support a claim of higher cost from any of the transit origins.

Even during the 10 percent of the time that Cargill uses flat or non-transit rates, its transportation costs to Lake Providence, the port with the largest capacity for handling bulgur, is 31½ cents per 100 pounds less than the flat rate that Lauhoff must always use. To the other two active ports of Helena and Memphis, the flat rates favor Lauhoff in the amount of 3½ cents per 100 pounds, but only because Cargill rejected the offer of the railroad to reduce its flat rate by the same amount that it actually reduced the rate from Crete.

Thus, the weight of the evidence indicates that Cargill's transportation costs to the River ports are certainly no higher than those of Lauhoff; indeed, there is every indication that Cargill's transportation costs are lower. Even if the record showed that the rail rates of Cargill to the River ports were on a relatively higher basis than the rates of ADM and Lauhoff, or just higher per se, the lawfulness of railroad rates is not at issue here, nor should a change in ocean rates be ordered as necessary to adjust those differences, lawful or otherwise, between the bulgur producers and any port.

Cargill says that the rail transportation and port costs on its shipments to River ports during 1979 exceeded what the costs would have been had the shipments been made to Gulf ports in the amount of $178,339, and that it cannot recover the additional costs. Even if Cargill's calculations are correct, the figures fall far short of proving harm for several reasons. The charges to the River ports are partly based on the flat rates from Dallas, and Cargill refused a reduction in the rates to

the River. Cargill cannot refuse lower transportation charges on the one hand and then successfully claim harm because of higher charges. Moreover, the Gulf port handling charges reflect those applicable at Lakes Charles, Louisiana, whereas the flat rates used in calculating the charges to the Gulf ports apply only to Texas ports. Thus, the higher transportation charges claimed by Cargill are not valid and are overstated.

Additionally, even using the figure of $178,339, it relates to only 34.46 cents per 100 pounds additional cost to River ports on the 51,900,000 pounds of bulgur that Cargill shipped during this 1979 period. On the other hand, the bids of Cargill to the River ports were at least 50 cents per 100 pounds higher than its lowest bids to the Gulf. Thus, as the price that Cargill received for bulgur at the River vis-a-vis the Gulf ports exceeded the amount of the claimed additional transportation costs, its alleged harm is really a reduction in profits.

Finally, Cargill argues that the Gulf ports in Louisiana and Texas are the natural outlets for its bulgur products and that Waterman's River rates have "deprived it of the natural advantages of its proximity to Gulf ports." However, the record is clear that Cargill does not have a "natural" advantage in reaching the Gulf ports and that its so-called natural flow stems largely from the fact that the Gulf ports historically have been Cargill's only outlet for bulgur. First, as a whole, the distances from Dallas to the active and developing River ports are no greater than from Dallas to the Gulf ports. Too, the distances from Dallas to the River ports are less than from Abilene, Kansas, and Crete, Nebraska, to the River ports. Secondly, the domestic rates applicable on wheat to Dallas are higher than the export rates to the more distant Gulf ports. Lastly, there is an artificial tariff rebate provision uniquely applicable among the bulgur producers only to the mill at Dallas that gives Cargill a rebate or refund from the higher domestic rates on wheat to Dallas down to the lower (export) rates applicable to the Gulf ports. Thus, any equality that Cargill holds with the other producers to the Gulf ports flows from a man-made rebate rule, without which its "natural" geographical location would result in it being at a decided disadvantage with the other producers.

For the reasons set forth above, Cargill has failed to establish that Waterman's rates on bulgur violate section 16 First. The rates are not for the transportation of bulgur under similar circumstances and conditions, and the differences in those circumstances and conditions justify the disparity in the rates.

DISCRIMINATION AS BETWEEN PORTS IN VIOLATION OF SECTION 17

It is alleged that the disparity in Waterman's rates on bulgur discriminates against Gulf ports. Although Cargill casts its charge in broad

terms, only intervenor Baton Rouge is dealt with in any detail at all. Cargill argues that Waterman's River rates "have diverted large quantities of bulgur away from Gulf ports." The record demonstrates, however, that historically Gulf ports have not been competitive on India-bound shipments of bulgur largely because the ocean rates of the Conference are substantially higher than the rates of foreign flag carriers serving ports on the West Coast and the Great Lakes. For example, for the two and one-half years prior to the inauguration of Waterman's River service, the Gulf Coast ports handled only 7 percent of the bulgur that the government shipped to India. The other 93 percent was transported from ports on the Great Lakes and West Coast. However, during the 30 months following the initial lifting of bulgur in Waterman's River service, the India-bound bulgur from the Great Lakes and West Coast dropped from 93 to 64 percent of the government purchases. Of this 36 percent, the River ports got 24 percent and the Gulf ports got 12 percent. In addition, the analysis performed by Waterman's expert witness, Mr. Tucker, shows that had the River rates been raised to the level of the Gulf rates, an additional 15 million pounds of bulgur would have moved through the entire Gulf range.

Cargill has failed to show the specific injury to any particular which is necessary to sustain a violation of section 17. *Council of No. Atl. Shipping Associations v. AML,* 21 F.M.C. 91 (1978) (CONASA).

Although Baton Rouge argues that it has suffered substantial harm through diverted bulgur caused by Waterman's River rates, the record fails to disclose a single pound of bulgur handled by Baton Rouge prior to 1978. The only loss specifically alleged by Baton Rouge is of 4,523 and 9,000 net tons of bulgur in 1978 and 1979, respectively.

As for the 4,523 tons allegedly lost in 1978, this claim is predicated on the fact that Baton Rouge handled that much bulgur in the *first half* of that year. From this, Baton Rouge concludes it should have handled at least that much in the second half of 1978. However, the 4,523 tons of bulgur handled by Baton Rouge in the first half of 1978 were not awarded as the result of competitive bidding. This tonnage was first shipped to St. Louis and later diverted to Baton Rouge because the Mississippi was frozen. Additionally, both the 4,523 tons and 9,000 tons actually were handled by Baton Rouge after the institution of Waterman's River service, and during a period when Gulf rates were lower than rates of the Great Lakes and the River ports had handled their maximum capacity. Finally, the transportation circumstances referred to above in the discussion of the alleged section 16 violation are equally applicable here in dealing with the alleged discrimination against Baton Rouge and the other Gulf ports. *CONASA, supra.* Baton Rouge has failed to establish that Waterman's River service unjustly discriminates against the Port of Baton Rouge in violation of section 17 of the Shipping Act, 1916.

Complainant Cargill, Incorporated, has failed to show that respondent Waterman Steamship Corporation has violated sections 16 First or 17 of the Shipping Act, 1916, and the complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-47

LEASE AGREEMENT NO. T-3753 BETWEEN MARYLAND PORT ADMINISTRATION AND ATLANTIC & GULF STEVEDORES, INC.

ORDER

December 2, 1981

The Maryland Port Administration (MPA) has filed a Petition for Declaratory Order regarding a dispute over the interpretation of the term "cargo" in Lease Agreement No. T-3753 between MPA and Atlantic & Gulf Stevedores, Inc. (A&G.) [1] Under the terms of the lease, A&G pays MPA a flat annual rental fee, plus an additional charge "for each ton of cargo in excess of 500,000 tons loaded or unloaded" at the premises during the year.

MPA claims that the term "cargo" includes the weight of containers, and A&G contends that the term excludes the weight of containers.[2] A&G also contests the Commission's jurisdiction to decide MPA's claim. A&G argues that what is in issue is a lease, not a tariff, and notes that MPA has alleged no violations of the Shipping Act. Finally, A&G submits that even if the Commission determines that it has jurisdiction over the instant dispute, it should exercise its discretion to defer jurisdiction to the Circuit Court of Baltimore City, a state equity court, where a Bill of Complaint for Declaratory Judgment and Injunctive Relief is now pending.

The Commission clearly has jurisdiction to decide a dispute over the interpretation of a Commission-approved lease agreement, and thus could decide to exercise that jurisdiction and entertain the instant Petition. There is no indication, however, that the instant case requires the unique technical expertise of this agency any more than the judgment of the court in which the matter is currently pending litigation. It is not alleged that the interpretation of the lease raises any direct questions regarding the statutes this agency is mandated to enforce. In fact, in view of MPA's failure to rely upon any specific section of the Shipping Act as a cause of action, this dispute does not appear to be a matter

[1] The five-year lease to A&G of the Locust Point-South Marine Terminal was approved by the Commission under section 15 of the Shipping Act, 1916 (46 U.S.C. 814) on February 9, 1979.

[2] Sea-Land Service, Inc. has petitioned to intervene in the proceeding, stating that its purpose is to ensure that the Commission decide only the precise controversy between MPA and A&G, and that it not go beyond a limited ruling "through inadvertently broad language."

most properly resolved within the context of a Declaratory Order under Rule 68 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.68).

Furthermore, review of this matter by the Commission does not appear to be the shortest route to a solution which will bring satisfaction to the parties in question. Although the Commission can exercise jurisdiction with respect to the disputed lease, it would appear that only a court of law can enforce a judgment and award damages, if appropriate, in a matter of this nature. Since the parties will ultimately have to rely on the Circuit Court of Baltimore City for final resolution of their dispute, any intermediate administrative deliberations by this agency could hinder rather than help ensure a prompt resolution of the litigation in question.

The Commission has determined, therefore, not to exercise its jurisdiction in this proceeding, and MPA's Petition will be denied. The judicial proceeding already instituted in the Maryland state court appears to be the more appropriate forum to resolve this particular controversy.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order of the Maryland Port Administration and the Petition to Intervene of Sea-Land Service, Inc. are denied; [3] and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[3] The Commission's disposition of MPA's Petition in the manner indicated renders moot Sea-Land's request to intervene.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-15
UNITED STATES-EUROPEAN TRADE CARRIERS COOPERATIVE STUDY AGREEMENT NO. 10318

Proposed amendments to discussion agreement found to meet the standards of section 15 of the Shipping Act, 1916. Agreement is therefore approved on condition that it be refiled, amended as proposed, within 30 days.

Howard A. Levy and *Patricia E. Byrne* for Proponents.

Roland Ronshausen for Intervenor Outboard Marine Corporation.

Elliott M. Seiden, James R. Weiss, Paul A. Mapes and *Cristy W. Passman* for Intervenor Department of Justice.

John Robert Ewers and *Deana E. Rose* for the Bureau of Hearings and Field Operations.

REPORT AND ORDER

December 17, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

This proceeding was instituted by Order served February 10, 1981, directing the parties to Agreement No. 10318 (Agreement) to show cause why the Agreement should not be disapproved pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814) for vagueness and failure of justification.[1] The Department of Justice (DOJ) and Outboard Marine Corporation (OMC) intervened in the proceeding. Proponents of Agreement No. 10318 filed an Affidavit of Fact and Memorandum of Law in support of the Agreement. Replies were filed by the Commission's Bureau of Hearings and Field Operations (Hearing Counsel) and DOJ. OMC filed a reply adopting the position and arguments of DOJ. Proponents were allowed to file rebuttal comments to which Hearing Counsel filed a surrebuttal. No party has requested an evidentiary hearing.

The Commission's Order to Show Cause indicated that the Agreement was vague with regard to its general scope, methods of procedure

[1] The parties to Agreement No. 10318, as stated in the Commission's Order to Show Cause, are: American Export Lines, Inc. (Farrell Lines); Atlantic Container Line, GIE; Baltic Shipping Company; Black Sea Shipping Company; Combi Line; Dart Containerline Co., Ltd.; Euro-Pacific; HapagLloyd AG; Johnson Scanstar; Lykes Bros. Steamship Co., Inc.; Norwegian America Line; Sea-Land Service, Inc.; Thos. and Jas. Harrison, Ltd.; and United States Lines, Inc.

and specific objects of study.[2] It also noted that its parties belong to a variety of conference, rate, rationalization, and joint service agreements which authorize them to deal, in specific trades, with the matters seemingly covered by the Agreement. A specific objection was raised regarding language in the Agreement which suggests that other agreements may be "transacted" under its terms and only subsequently reported to the Commission.

On the basis of the foregoing, the Order concluded that Agreement No. 10318 would be disapproved, as contrary to the public interest within the meaning of section 15, unless Proponents could demonstrate otherwise.

POSITION OF THE PARTIES

Proponents' Response to Show Cause Order

Proponents initially submitted revisions to the Agreement which they alleged satisfy all of the objections raised in the Commission's Show Cause Order.[3] Moreover, they contended that they had submitted evidence of justification for the Agreement which met all section 15 requirements.[4]

Proponents argued that because this Agreement does not on its face involve activity which would be a *per se* violation of the antitrust laws or otherwise restrict competition, they need only justify the degree of anticompetitive impact of the Agreement established on the record by

[2] Agreement No. 10318 would have allowed its member lines to exchange information and cooperate in developing information relating to cargo movements, including seasonal and other traffic fluctuations, and data bearing on the level, type and frequency of liner services required by shippers; costs of service; practices connected with the receipt and delivery of cargo; relations with trade and similar shipper associations; relations with the business community and shipping; relations with the state-owned and controlled liner shipping services; relevant legislative matters and inter-governmental activities; self-policing systems and their evolution; and studies and reports concerning legal and economic aspects of the liner shipping industry and the conference system. Under the Agreement, the parties could also collectively study problems associated with overtonnaging, intermodal transport, the formation of shippers' councils in the United States, self-policing, state-owned and controlled carriers, and relations with the business community, the shipping public and the general public, for the purposes of producing information which will help solve these problems.

[3] The revised version of Agreement No. 10318 is presented as Annex A to the Supplemental Affidavit of Donald F. Wierda. The specific modifications made are delineated and explained at pages 2-7 in the Supplemental Affidavit of Donald F. Wierda and can be summarized as follows: (a) the parties to the Agreement are specified as vessel operating common carriers providing liner shipping services between various ports in Europe and ports in the U.S.; (b) "fuel conservation" has been added as a category of subject matter for discussion; (c) the statement of purpose has been modified to include determining specific serious transportation needs; (d) the word "agreements" has been deleted from the minute filing provisions; (e) the disclaimer as to any limitation on the practices of the parties has been expanded to read "in any respect whatsoever"; (f) provision is made for applications for renewal of the Agreement to be filed four months prior to the Agreement's expiration; (g) the provision extending the term of the Agreement pending Commission action on renewal application has been deleted; and (h) the list of the Agreement's parties has been revised to include only Farrell Lines, Dart Containerline, Hapag-Lloyd, Johnson Scanstar, Lykes Bros., and Sea-Land Service.

[4] The justification submitted by Proponents consists of the Supplemental Affidavits of Donald F. Wierda, President of U.S. Navigation Company, Inc., which is the general agent in the United States for the North Atlantic services of Hapag-Lloyd A.G.

its opponents. Proponents alleged that in any event a substantial transportation need for the Agreement had been established.[5] It was therefore argued that a *prima facie* case of justification had been established and that the lack of any substantial evidence of anticompetitive impact or other indication that section 15 requirements had not been met required approval of the Agreement.

Proponents conclude that the Agreement, as revised, was sufficiently clear and precise to remove any potential ambiguity which would otherwise preclude approval by the Commission.

Reply of DOJ

DOJ argued that even with the revisions to the Agreement offered by Proponents, there continued to exist ambiguities in the documents which could permit serious anticompetitive conduct. The revisions offered by Proponents were characterized as trivial and as not adding any precision to the scope of the Agreement, the objects of study, or the applicable procedures.

Specifically, DOJ objected to the fact that under the Agreement: (1) any carrier in the U.S./European trades may join the Agreement; (2) cross-conference and controlled carrier coordination is possible; (3) the scope of the Agreement is broad and amorphous; (4) no specific transportation needs are addressed; (5) no procedures for meetings are specified; (6) the objects of study may include meeting with outside groups to discuss rates; (7) the discussion of cargo movements, costs of service and intermodal transportation could allow rate and service coordination; and (8) the discussion of charges associated with intermodal movements could be beyond the approval jurisdiction of the Commission.

[5] The essential matters of justification stated in the affidavit can be summarized as follows: (a) the remaining parties to the Agreement are not common parties to any other agreement containing this authority in the covered trades; (b) the conduct of business under the Agreement is not limited to negotiating section 15 agreements; (c) the specific subjects of discussion are alleged to be "the major liner shipping issues of our times"; (d) former Commissioner Kanuk publicly expressed a need to study possible effects of the UNCTAD Code; (e) overtonnaging in the affected trades was the subject of a recent Manalytics, Inc. study undertaken for the Commission; (f) intermodalism has raised serious issues regarding tariff filing requirements and the Commission's jurisdiction leading to serious confusion in the liner industry; (g) the problem of instituting effective and lawful self-policing systems has been recognized by the Commission's recent promulgation of G.O. 7 and ensuing litigation; (h) the problem of maintaining proper relations with shipper organizations was recently emphasized by the Commission's decision in Docket No. 80-74 (NAWFA Wines and Spirits Dual Rate Contract), and the entire field of legally permissible relations between carrier associations and shipper associations is uncertain and in a state of flux; (i) the problems facing the liner industry due to the growth of state-owned and controlled carriers and the statutory/regulatory responses to that problem justify the exchange of information necessary to formulate and initiate proposals with respect thereto; (j) relations with the public to enhance awareness of maritime industry is necessary to encourage solutions to public policy issues which will ultimately affect the economies of all nations; and (k) fuel conservation is essential to the continuing viability of oceanborne commerce, and all current information concerning rationalization methods to conserve fuel should be exchanged to determine if further concerted action is warranted.

To cure the alleged ambiguities and narrow the scope of authority sufficiently to justify approval, DOJ suggested the following changes to the Agreement: (1) discussions of cargo movements, costs of service and intermodal transportation be excluded; (2) provisions prohibiting meeting with outside groups and excluding any discussion of costs, rates and pricing be included; (3) consultations with importers and exporters abroad be prohibited, as well as any exchange of data regarding the costs of service and rates; (4) a reporting requirement, including verbatim transcripts, and a requirement for ten-day notice of all meetings, identifying the specific agenda of matters to be discussed at a meeting, be added; (5) discussions be strictly limited to matters noted on agenda notices; and (6) minutes of meetings specifying the time and place of the meeting and the names of all participants be filed with the Commission together with a verbatim transcript of the proceeding and copies of all documents created for or reviewed at meetings.

Reply of Hearing Counsel

Hearing Counsel is of the opinion that the Agreement is not unduly vague under prior Commission standards but that it has not been justified by a showing of transportation need. Hearing Counsel contends that Proponents have failed to submit probative evidence of specific transportation problems which would be addressed by the authority granted under the Agreement.

Proponent's Rebuttal

In response to the objections and suggested modifications of DOJ, Proponents further revised their proposed Agreement and now state that they are willing to adopt all of the proposed modifications except the one that would require the filing of verbatim transcripts of all meetings.[6] This modification allegedly is unnecessary and would stifle open and frank discussion by the parties to the Agreement. Proponents

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[6] Attached to Proponents' Rebuttal Memorandum is a Second Supplemental Affidavit of Donald F. Wierda and a Second Revised Agreement No. 10318 delineating the specific changes made to the Agreement in response to the comments of DOJ. These modifications can be summarized as follows: (a) an addition to Paragraph A.4. specifically disclaiming authority to discuss or exchange information concerning cost of service, rates or charges; (b) elimination of "exporters and importers" as entities for which consultation procedures may be established in Paragraph B.; (c) an addition to Paragraph A.1. disclaiming authority for discussions, meetings or agreements with shippers, the business community, public at large and state-owned and controlled lines; (d) an amendment to Paragraph B. to make the establishment of consultation procedures with port authorities discretionary; (e) the addition of procedural safeguards to Paragraph C. requiring ten days advanced notice of agenda meetings to be forwarded to the Commission, and prohibiting the discussion of matters not noted on such agenda notices, except with reference to scheduling matters for the next agenda meeting; (f) an addition to Paragraph D.4. requiring the report of the time, date and place of meetings, names and affiliations of those in attendance in the minutes of meetings to be filed with the Commission; and (g) the addition to Paragraph D.5. requiring the identification and filing of all documents considered at meetings on any substantive matter with minutes filed with the Commission, except that attorney client privileged documents and documents available to the public need not be filed.

reassert that a sufficient transportation need has been shown to justify the minimal potential anticompetitive impact of the Agreement.

Hearing Counsel Surrebuttal

Hearing Counsel submit that while Proponents have satisfied all of the objections of DOJ except one and have remedied the Agreement's vagueness, Proponents still have not established a transportation need for the discussion authority sought.

DISCUSSION

The proposed revised Agreement offered by Proponents' counsel in this proceeding substantially cures the vagueness and ambiguities which originally prompted the Commission to initiate this proceeding. While Proponents are unwilling to file verbatim transcripts of meetings, the balance of the procedural safeguards adopted go beyond those required in prior approved discussion agreements and appear to render the transcripts of marginal oversight value. Although the revised objects of study and the general scope of the Agreement remain rather broad, this is consistent with the basic purpose of the Agreement and does reflect the types of discussion authority previously approved by the Commission.

Section 15 of the Shipping Act requires that the Commission approve an agreement unless it is shown to be inconsistent with its standards.[7] The Agreement, if modified as suggested by DOJ and agreed to by Proponents, does not authorize conduct which amounts to a *per se* violation of the antitrust laws or is otherwise anticompetitive and accordingly contrary to the public interest. Therefore, the *Svenska* standard does not apply to the Agreement, as so modified, and the burden of establishing that the Agreement contravenes the standards of section 15 of the Act rests on those opposing the Agreement and the Commission itself, through Hearing Counsel. There is nothing in the record in this proceeding to indicate that Agreement No. 10318, as proposed to be modified, is inconsistent with any of those standards.

Therefore, the Commission will approve Agreement No. 10318, as revised in accordance with Proponents' latest proposals. The revised Agreement must be refiled within thirty days. At such time as the amended Agreement is filed this proceeding will be discontinued.

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[7] Section 15 provides, in relevant part, that:

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 agreements*, modifications or cancellations.

THEREFORE, IT IS ORDERED, That Agreement No. 10318 is approved pursuant to section 15 of the Shipping Act, 1916, on the condition that the Commission receives within 30 days of the date of this Order a complete and accurate copy of Agreement No. 10318 modified in accordance with Annex I to the Second Supplemental Affidavit of Donald F. Wierda, dated August 18, 1981, and signed by all parties thereto; and

IT IS FURTHER ORDERED, That the approval contained herein shall be effective on the date the Commission receives a complete copy of the Agreement which meets the above conditions; and

IT IS FURTHER ORDERED, That upon receipt of the Agreement modified in accordance with the above, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1063(I)

BRISTOL MEYERS COMPANY

v.

UNITED STATES LINES, INC.

ORDER ON REVIEW

December 21, 1981

The proceeding is before the Commission on its determination to review the decision of Settlement Officer D. Michael O'Rear.

By complaint filed March 16, 1981, Bristol Meyers Company (Bristol Meyers) seeks reparation from United States Lines for alleged freight overcharges on a shipment of two containers of "nutritional products" transported from Los Angeles, California to Tokyo, Japan. The bill of lading indicates that freight was prepaid.

In reviewing the complaint the Settlement Officer found that the shipper was Mead Johnson Co., the consignee was Bristol Laboratories (Japan) Ltd., and Complainant Bristol Meyers appeared to have no connection with the shipment apart from its corporate relationship with both the shipper and the consignee.[1]

On March 19, 1981, the Settlement Officer requested Bristol Meyers to furnish some proof that it had paid the freight charges. A reply was submitted by Ocean Freight Consultant, which sent a copy of a cancelled check indicating that the freight charges had been paid by Almac Shipping Co., Inc. (Almac), the ocean freight forwarder named on the bill of lading. After suggesting that the proper claimant appeared to be Mead Johnson Co., the shipper, the Settlement Officer nevertheless requested that Bristol Meyers submit: (1) proof of payment of the freight charges by Bristol Laboratories (Japan) Ltd.; and (2) an affidavit attesting to the fact that in bringing this claim Bristol Meyers was acting as agent for Bristol Laboratories (Japan) Ltd., as consignee. The Settlement Officer also advised that reparation, if any, would be awarded directly to Bristol Laboratories (Japan) Ltd. Finally, the Settlement Officer noted that the reference to the U.S. export classification Schedule B number listed in the complaint conflicted with the description in

[1] According to Moody's Industrials (1981), Mead Johnson Co. and Bristol Laboratories (Japan) Ltd. are wholly owned subsidiaries of Bristol Meyers.

the export declaration submitted to U.S. Customs and called upon the parties to clarify the matter.

When no replies were received to his June 3rd letter, the Settlement Officer dismissed the complaint on the ground that Bristol Meyers had not proven that it had standing to claim reparation.

DISCUSSION

Recently, in *Rohm & Haas Company v. Italian Line*, Docket No. 81-8,[2] the Commission allowed a parent corporation an opportunity to obtain subsequent to the period of limitations an assignment of a claim for freight overcharges from a subsidiary, which had paid the charges. Therefore, the fact that Bristol Meyers has not paid the freight charges does not necessarily affect its standing to file a complaint alleging a violation of the Shipping Act and asking reparation for the injury caused thereby.

However, in order to recover reparation, Bristol Meyers must submit evidence that it has either paid freight or has validly succeeded to the claim. There is no indication here on whose behalf the freight forwarder paid those charges and whether and by whom it was reimbursed. Moreover, the record is devoid of any information which would support the Settlement Officer's conclusion that Bristol Laboratories (Japan) Ltd. paid the freight and should, if warranted, be awarded reparation. Finally, there exists, as the Settlement Officer properly noted, a conflict between the description in the export declaration and the complaint.[3] On its face, this would indicate different products.

In summary, this record contains no information on who paid the ocean freight and is entitled to recover should freight overcharges be proven and, apart from conflicting references to Schedule B classification numbers, no evidence on the proper description of the product shipped.

THEREFORE, IT IS ORDERED, That this matter is remanded to the Settlement Officer for further proceedings consistent with this Order.[4]

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

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[2] Order on Appeal served November 13, 1981, 24 F.M.C. 429.

[3] The export declaration refers to Schedule B no. 442.7900, whereas the complaint refers to Schedule B numbers 048.8210 and 118.1200.

[4] In the event Complainant fails to respond once again to the Settlement Officer's inquiries and supply the information necessary to reach a decision on the merits, the complaint should be dismissed for lack of prosecution.

* Commissioner Daschbach's separate opinion 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

DOCKET NO. 81-26

AGREEMENT NO. 10247-3

AUSTRALIAN LOADING EXPENSE AGREEMENT

Agreement among common carriers by water providing a method for compensating a carrier serving Northwest Australian ports found subject to section 15 of the Shipping Act, 1916.

Neal M. Mayer, *Paul D. Coleman*, and *Mary Mitchell Armstrong* for Atlanttrafik Express Service.

Neal M. Mayer for Proponents of Agreement No. 10247-3.

Aaron W. Reese, *Joseph B. Slunt*, and *John Robert Ewers* for Bureau of Hearings and Field Operations.

REPORT AND ORDER

December 23, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH, AND JAMES V. DAY, *Commissioners*)

By Order dated April 13, 1981, the Commission directed the parties to Agreement No. 10247-3 to show cause why their agreement is an "agreement" subject to the provisions of section 15 of the Shipping Act, 1916 (46 U.S.C. 814).[1] AES subsequently filed a Motion to Dismiss, which was denied by the Commission on July 10, 1981. AES then filed a Motion for Reconsideration of the Order Denying its Motion to Dismiss to which The Bureau of Hearings and Field Operations (Hearing Counsel) replied. The Proponents of Agreement No. 10247-3 have filed a reply to the Order to Show Cause and have attached thereto a verification of the president of AES in lieu of an affidavit of fact. Hearing Counsel filed a Reply Memorandum.

BACKGROUND

Agreement No. 10247-3 is the third amendment to the Australian Loading Expense Agreement. The original agreement was approved in 1976 and required carriers serving the East Coast of Australia to allocate funds to defray the excess costs of any carrier serving Northwest Australian ports. The Australian Meat Board (AMB), the predecessor

[1] The parties to the Agreement are: Farrell Lines, Inc.; Hamburg-Sudamerickanische Dampfschifffahrts Gesellschaft, Eggert & Amsinch, trading as Columbus Line; Associated Container Transportation (Australia) Ltd.; Australian Shipping Commission, trading as Australian National Line; and Trader Navigation Company, Ltd., trading as Atlanttrafik Express Service (AES).

of the Australian Meat and Live-stock Corporation (AMLC), mandated this arrangement to ensure service to the remote Northwest ports, something which was doubtful without the agreement because of the AMB's requirement that rates on meat be uniform from all Australian ports. The subsequent two amendments reflected changes in the carrier designated to serve the Northwest ports. The instant Agreement continues the basic concept of subsidizing the carrier which serves Northwest Australia. However, the method of payment of the subsidy has been somewhat altered. Under Agreement No. 10247-3 all carriers of meat from Australia must pay an amount, not in excess of .6 cents per kilogram of meat carried, and from this fund the AMLC, the "administrator" of the Agreement, pays premiums to the Northwest carrier.

Certain statements made in relation to the predecessor agreements indicated that the AMB and AMLC may have dictated a subsidy program as a condition for doing business in the Australian meat trade. It appeared from these assertions that the parties to Agreement No. 10247-3 may have given their assent to its terms solely to avoid governmental exclusion from the trade. If so, the Agreement might not be one over which the Commission could exercise its jurisdiction. This proceeding was therefore instituted.

POSITIONS OF THE PARTIES

A. *Proponents*

Proponents initially contend that their Agreement meets the jurisdictional criteria of section 15,[2] since it results in the taking of revenues from carriers serving certain ports and the giving of a special advantage to a carrier serving another port. They then argue that any involvement of the AMLC does not serve to divest the Commission of jurisdiction, especially because the Commission has assumed jurisdiction over this Agreement on three prior occasions. They note that since 1976, the AMB (and later the AMLC) has: (1) designated which carriers will serve the Australian meat trade; (2) designated one carrier to call at Northwest ports; and (3) established the maximum rates for the carriage of meat from Australian ports. Proponents point out that in the 1976 designation letter to the carriers, the AMB specifically required that the East Coast carriers subsidize the Northwest carrier during 1976 and 1977. It is further noted that this designation letter was approved by the Commission as Agreement No. 10250, and served as the genesis for Agreement No. 10247. However, Proponents aver that, with the desig-

[2] Section 15 requires the filing for approval of any agreement which: fixes or regulates transportation rates or fares; gives or receives special rates, accomodations, or other special privileges or advantages; controls, regulates, prevents, or destroys competition; pools or apportions earnings, losses, or traffic; allots ports or restricts or otherwise regulates the number and character of sailings between ports; limits or regulates in any way the volume or character of freight or passenger traffic to be carried; or in any manner provides for an exclusive, preferential, or cooperative working arrangement.

nation letter of 1978, the AMLC no longer required or provided for such a subsidy. They contend that at this point the designated carriers simply agreed among themselves to subsidize the Northwest carriers and provided the means for doing so in the instant Agreement. Proponents concede that the Australian government's policy of requiring uniform rates from all ports served as an impetus to the Agreement, but claim that the AMLC had not mandated the subsidy program nor dictated its terms.

Proponents also submit that *Inter-American Freight Conference*, 14 F.M.C. 58 (1970), relied upon by the Commission in its Order to Show Cause, only suggests that the Commission might refuse to exercise jurisdiction over an agreement where governmental involvement is so substantial as to remove the mutuality of assent among the parties, and note that the Commission has never followed that suggestion. They further contend that this interpretation does not fit within the letter or the spirit of section 15 and that the Commission in *Inter-American* may have confused "jurisdiction" with its obligation under section 15 to disapprove discriminatory or unfair quotas even if dictated by a foreign government.

Proponents finally argue that Congress did not intend to limit the scope of section 15 merely to contracts enforceable in a court of law, since it defined "agreement" to include "understandings and other arrangements." This allegedly reflects a Congressional intent to police all group activity by persons subject to the Act which fits within the broad parameters of section 15. Proponents conclude, therefore, that notions of mutuality of assent, duress, and adhesion are not relevant to section 15 agreements.[3]

B. *Hearing Counsel*[4]

After reviewing the historical context within which Agreement No. 10247-3 arose, Hearing Counsel concludes that it was not entered into merely to avoid exclusion from the trade. Hearing Counsel contends that the original AMB designation letter, Agreement No. 10250, which directed the formation of the subsidy arrangement, simply implemented an agreement which had been negotiated among the carriers as a

[3] Proponents also argue that the Order to Show Cause is procedurally defective, because it shifts the burden of determining jurisdiction from the Commission to Proponents based upon *dicta* contained in *Inter-American, supra*, an allegedly distinguishable case. Moreover, because the Commission has previously approved the Agreement on three separate occasions, Proponents contend that the Order to Show Cause must explain in detail the reasons for the Commission's departure from prior policy.

[4] Hearing Counsel first notes that none of Proponents has filed affidavits of fact detailing the involvement of the AMLC, as required by the Order to Show Cause. Even though AES' president has verified certain factual statements contained in Proponents' reply, Hearing Counsel contends that the Commission may not know whether carriers other than AES may have been coerced into joining the Agreement. Hearing Counsel thus suggests that the Commission could order Proponents to submit additional affidavits on this point or could direct Hearing Counsel to pursue this matter through discovery. However, in light of its further comments, Hearing Counsel believes neither action is necessary.

settlement of a complaint proceeding which had been initiated against them - Docket No. 75-53. *See Refrigerated Express Lines v. Columbus Lines*, 19 F.M.C. 582 (1977).

Even though it concludes that the instant arrangement was not the result of governmental dictate, Hearing Counsel takes the position that even if it were, it would not be outside the Commission's jurisdiction. Hearing Counsel thus believes that section 15 applies to any agreement between persons subject to the Shipping Act which falls within one of the seven enumerated categories of that section, and that the intent or motive of the parties is therefore irrelevant. If the Commission were to exempt certain arrangements from section 15 review because of governmental involvement, Hearing Counsel fears that carriers could enter into agreements which Congress had intended to control but nonetheless escape regulatory supervision. Hearing Counsel notes that the Commission has approved several agreements which were entered into as a result of governmental directives and has never held that any such agreement is not subject to its jurisdiction.

Hearing Counsel concludes that there is no valid regulatory purpose to be served by refusing to exercise jurisdiction over an agreement which was entered into to avoid exclusion from a trade and that, in fact, there may be a more valid regulatory purpose in exercising jurisdiction over such agreements - the Commission would then be in a position to disapprove or modify them pursuant to section 15 and could also cancel them in the future if warranted. Hearing Counsel thus recommends that the Commission retain jurisdiction over all agreements within the seven enumerated categories of section 15 and then deal with each on a case-by-case basis under the standards of that statute.

DISCUSSION

The primary issue before the Commission concerns the extent of the Australian government's involvement in this particular agreement. Proponents have stated that their agreement was not entered into under threat or duress and that it is merely a consensual commercial arrangement. They claim that the AMLC has not mandated a subsidy program nor dictated the terms of such a program. Proponents explain that if the AMLC was ever involved in dictating the terms of certain port service arrangements, it has ceased to be since the designation letters of 1978. They contend, therefore, that the present arrangement is solely the result of a consensual agreement among themselves, necessitated by the Australian policy of uniform rates from all ports.

There is nothing in the record that contradicts Proponents' assertions or otherwise indicates that the instant agreement was the result of governmental dictate or fiat, and is not, for that or any other reason, an agreement subject to section 15. The Commission therefore finds

Agreement No. 10247-3 subject to the approval requirement of section 15. In light of this decision, AES' Motion for Reconsideration will be dismissed as moot.

THEREFORE, IT IS ORDERED, That the Motion for Reconsideration filed by Atlanttrafik Express Service is dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-68

BRADY-HAMILTON STEVEDORING COMPANY, INC.

v.

PORT OF VANCOUVER

NOTICE

December 29, 1981

Notice is given that no appeal has been taken to the November 19, 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. 81-68

BRADY-HAMILTON STEVEDORING COMPANY, INC.

v.

PORT OF VANCOUVER

DISMISSAL OF PROCEEDING

Finalized December 29, 1981

Complainant, Brady-Hamilton, has withdrawn its complaint against the Port of Vancouver and the proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-63

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS, NORTH ATLANTIC RANGE PORTS CONFERENCE - TARIFF RULE NO. 26

FURTHER ORDER TO SHOW CAUSE

December 30, 1981

On August 21, 1981, the Commission ordered the member lines of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference (WINAC), to cancel what was then Rule 26 in their FMC Tariff No. 3. Cancellation was ordered because, among other things, Rule 26 was found to constitute an unreasonable refusal to deliver cargo within the meaning of section 17, second paragraph of the Shipping Act, 1916 (46 U.S.C. 816, second paragraph). *Tariff Rule No. 26*, 24 F.M.C. 121 (1981).

WINAC has responded to this order by filing an amendment to Tariff No. 3 on September 30, 1981 which deleted Rule 26 and replaced it with a new Rule 27 dealing with the same subject. This new tariff provision does not appear to comply with the Commission's August 21, 1981 Order.[1]

The present deficiency in Rule 27 lies in Paragraphs B and C, which provide, in pertinent part, that:

> B. . . . the *cargo interests* shall be liable to pay:
>
> (2) . . . a [penalty] amount equal to double such difference of freight . . . [Emphasis supplied].
>
> C. . . . the carrier shall have a lien for the amount equal to double the difference of freight if the carrier or the conference verification service:
>
> (1) First seeks to collect such amount from the shipper; and
>
> (2) Has reasonable ground to believe that the consignee is at fault.
>
> In lieu of enforcing any lien by public sale, the carrier shall release the cargo to the consignee if the consignee furnishes a bond or other financial guarantee acceptable to the conference verification service for the total amount claimed by the carrier to be due pursuant to this Rule.

[1] Tariff matter which does not comply with a Commission order is subject to rejection under 536.10(d) of the Rules (46 C.F.R. 536.10(d)). In this instance, however, Rule No. 27 was allowed to take effect to permit full review of WINAC's submission by the Commission.

This procedure for enforcing carrier-imposed penalties by refusing to deliver cargo to the consignee unless the penalty is paid or a bond is posted is inconsistent with the Commission's directive that cargo liens not be used to require payment—either ultimately or in the first instance—from a person not "accurately determined to be the party at fault." 20 S.R.R. at 1497, n. 29. Although the August 21, 1981 Order did not use language which expressly invalidates any possible penalty system employing a cargo lien to collect penalty amounts, the Order clearly indicated there was to be no room for error concerning the consignee's "guilt." [2]

Specifically, Rule 27 is deficient for imposing liability for penalties against the "cargo interests," permitting the carrier to withhold delivery of the cargo whenever the carrier unilaterally believes the consignee is "guilty" of misdescribing cargo, and requiring that penalty payments be sought from the shipper in all cases, including those where the consignee is believed to be the "party at fault." The August 21st Order plainly stated that carrier-imposed penalties may be assessed *only* against the party responsible for the cargo misdescription or misdeclaration.

Accordingly, WINAC will be directed to show cause why Rule 27 of its FMC tariff should not be cancelled for noncompliance with the Commission's Order of August 21, 1981.

THEREFORE, IT IS ORDERED, That pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821), Docket No. 80-63 be reopened and the member lines of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference appear before the Commission and show cause why Rule 27 of their FMC Tariff No. 3 should not be cancelled for noncompliance with the Commission's August 21, 1981 Order in this proceeding insofar as it: (1) makes the "cargo interests" rather than the "party at fault" liable for cargo misdescription penalties (Paragraph B); and (2) attempts to collect penalty amounts by means of a lien against the cargo which could be asserted against a consignee which is not in fact "at fault." (Paragraph C); and

IT IS FURTHER ORDERED, That the Commission's Bureau of Hearings and Field Operations continue to participate in this proceeding; and

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[2] The Commission's intent was that an innocent consignee never be denied delivery of cargo for failing to pay a carrier-imposed penalty. This intention was expressed in relatively flexible language so as to not interfere unduly with the carriers' business judgment in fashioning penalty provisions properly directed against the "party at fault." Practically speaking, however, it is improbable that a carrier could *fairly and accurately* establish that a consignee is the party at fault within the time allotted for the delivery of cargo without the assessment of demurrage charges, a period which customarily does not exceed five working days. *See* WINAC Tariff FMC No. 3, original page 64. The burden is upon WINAC to demonstrate that any tariff rule which uses a cargo lien to collect private penalties cannot possibly deny cargo delivery to a consignee which has not been clearly proven to be the party responsible for the misdescription or misdeclaration.

IT IS FURTHER ORDERED, That this proceeding is limited to the submission of affidavits of fact and memoranda of law and replies thereto. WINAC's affidavits and memorandum shall be filed no later than the close of business January 29, 1982 and served upon all other parties of record. The reply of Hearing Counsel shall be filed and served no later than February 12, 1982. Oral argument may be scheduled if requested by a party prior to February 19, 1982 and deemed necessary by the Commission; and

IT IS FURTHER ORDERED, That a copy of this Order be served upon each of the respondent carriers.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-55

E. I. DU PONT DE NEMOURS AND COMPANY

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

NOTICE

December 30, 1981

Notice is given that no exceptions have been filed to the November 20, 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

DOCKET NO. 81-55

E. I. DU PONT DE NEMOURS AND COMPANY

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

Shipment of "Orlon, Acrylic Staple" improperly rated as "Synthetic Staple, N.O.S.." Reparation awarded.

Don A. Boyd, Raymond Michael Ripple, and *James T. Williamson* for complainant.

Paul Bauman for respondent.

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

Finalized December 30, 1981

Complainant, Du Pont, seeks an order directing Respondent South African Marine Corporation, Ltd. (Safmarine) to pay reparation of $174,510.37 because of overcharges on three shipments of Complainant. Safmarine did not file an answer to the complaint. Instead the parties submitted a "Stipulation and Joint Motion for Decision" in which Complainant and Respondent agree that there is no "genuine issue as to any material fact as set forth in the complaint." The complaint states the following relevant facts.

I. The Complainant, E. I. du Pont de Nemours and Company (Du Pont), is a Delaware corporation with principal offices in Wilmington, Delaware 19898, and is engaged in the manufacture, sale, and distribution of chemicals, paints, plastics, man-made fibers, and related products.

II. The Respondent, South African Marine Corporation, Ltd., (Safmarine), a corporation with principal offices at One Bankers Trust Plaza, New York, New York 10006, is a common carrier engaged in transportation by water from United States Atlantic Coast ports to South Africa, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

III. (A) That the Respondent's tariff, South Bound Freight Tariff No. 6, F.M.C. No. 8, of the United States/South and East Africa Conference, effective July 8, 1980, did contain item 1860, which item provided

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

a rate of $125.00 per cubic meter (CM) for "Synthetic Staple, N.O.S". Item 1860, page 206 of said tariff, also provided a rate of $163.50 per metric ton (MT) for "Acrylic Staple".

(B) That Respondent did on three separate shipments transport Du Pont Orlon, an acrylic staple, for Complainant from the United States to South Africa, in November, 1980. The bills of lading for each of these three shipments misdescribed the material being shipped as "Fiber, Synthetic Staple, N.O.S." rather than the proper description, "Orlon, Acrylic Staple". The Respondent invoiced Complainant and Complainant remitted payment for these shipments rated as "Synthetic Staple, N.O.S." but should have been rated as "Acrylic Staple". The application of the higher rate resulted in overcharges in the amount of $174,510.37. Bills of lading, export invoices, and packing lists for each shipment are attached in Appendix B.

C. That subsequent to the payment of said freight charges Complainant notified Respondent of the billing error. By letter dated July 28, 1981 and letter of August 11, 1981 amending the overcharge figures (Appendix C), Respondent admitted the overcharge error, but requested that refunding be authorized by the Federal Maritime Commission.

IV. A. That on November 18, 1980 Respondent did carry 388,429 lbs. (647.845 CM) of Orlon from Newport News, Virginia to Durban, South Africa per bill of lading No. 7. The commodity was described on the bill of lading as "Fiber, Synthetic Staple, N.O.S." but should have been described as "Orlon, Acrylic Staple". Respondent invoiced Complainant and Complainant paid freight charges of $103,169.33 based on the rate for "Synthetic Staple, N.O.S." Complainant should have been charged $36,074.95 based on the rate for "Acrylic Staple". The overcharge for this shipment amounted to $67,094.38.

B. That on November 26, 1980 Respondent did transport 225,322 lbs. (383.044 CM) of Orlon from Charleston, S.C., to Durban, South Africa, per bill of lading No. 5. The Orlon was again described as "Fiber, Synthetic Staple, N.O.S." Complainant was incorrectly invoiced for $61,574.33 and should have been charged $21,222.93, an overcharge of $40,351.40.

C. That on November 29, 1980 Respondent did transport 388,345 lbs. (642.436 CM) of Orlon from Newport News, VA to Durban, South Africa, per bill of lading No. 4. This bill of lading also contained the commodity misdescription "Fiber, Synthetic Staple, N.O.S." Complainant paid $67,074.59 in overcharges having remitted $103,272.66 to Respondent as opposed to the $36,208.07 which Complainant should have been assessed at the applicable rate.

Attached to the complaint are copies of the bills of lading, export invoices, and packing lists for each of the three shipments. The bills of lading contain the commodity misdescription described in the complaint and the freight charges assessed. The export invoices and the packing

lists demonstrate that the commodity actually shipped was "Orlon, acrylic staple."

On the basis of the foregoing Respondent, South African Marine Corporation, Ltd., is ordered to pay to E. I. Du Pont De Nemours and Company reparation in the amount of $174,510.37.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-79

TUPPERWARE COMPANY

v.

COMPANIA SUD-AMERICANA DE VAPORES (CHILEAN LINE)

NOTICE

January 4, 1982

Notice is given that no exceptions have been filed to the November 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) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-79

TUPPERWARE COMPANY

v.

COMPANIA SUD-AMERICANA DE VAPORES (CHILEAN LINE)

Settlement approved.

Proceeding discontinued with prejudice.

David L. Weiser, Registered FMC Practitioner No. 950, for the complainant.

George E. Dalton and *Elmer C. Maddy* of Kirlin, Campbell & Keating (New York), for the respondent.

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

Finalized January 4, 1982

The Commission determined it would review the May 19, 1981, Order of the Administrative Law Judge which granted the parties' joint motion to dismiss the complaint with prejudice and discontinue the proceeding. In an Order served August 26, 1981, the Commission reversed dismissal of the complaint and remanded the proceeding to the Presiding Officer with instructions to make a specific finding whether the third criterion of *Organic Chemicals (Glidden-Durkee) Division of SCM Corp. v. Atlanttrafik Express Service*, Docket Nos. 78-2, 78-3, 18 SRR 1536(a) (1979), can be met. If it cannot, the Presiding Officer shall disapprove the settlement agreement and proceed with the adjudication (24 F.M.C. 140, 141 (August 26, 1981)).

In a Notice on Order Reversing Dismissal of Complaint served August 27, 1981, the Presiding Administrative Law Judge pointed out the position he took in granting the motion to dismiss the complaint with prejudice and discontinuing the proceeding was that "It certainly is within the province of the complainant to ask for the dismissal of the complaint and for the respondent to join in that request. Wherefore, the motion to dismiss the complaint with prejudice should be granted." It

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

was this position that prompted dismissal of the complaint. There was no approval of the settlement proposal.

The respondent, without objection from the complainant, requested and was granted an extension of time from September 8, 1981, to September 21, 1981, to allow a full and adequate response herein to the remand.

The following affidavit of George H. Houghton, sworn to September 21, 1981, was received September 23, 1981:

AFFIDAVIT

I, George H. Houghton, being first duly sworn on oath deposes and says that:

1. I am Vice President of Tupperware Company.

2. I am familiar with the above-referenced action as well as the terms of the settlement reached therein, as set forth in the April 7, 1981 letter of Chilean Line Inc., previously submitted in this proceeding as Exhibit B to the May 6, 1981 letter of Administrative Law Judge Harris.

3. This settlement is a bona fide effort by the parties to terminate their dispute and it is not a means of obtaining transportation at rates other than those set forth in the tariff of respondent.

4. A genuine dispute exists as to certain facts in connection with the movements of cargo in that the bills of lading prepared by a freight forwarder and the shipper's export declaration, while written in Spanish, generally describe the goods, as plastic articles for domestic use. These goods were, therefore, rated by respondent as plastic goods N.O.S. However, it is the contention of complainant that these goods should have been rated in a less costly category of the tariff.

5. The goods were transported in sealed, house-to-house containers and, therefore, the primary factual dispute is dependent on identification of the exact goods that were transported under each of the eleven bills of lading. This may not be possible in view of the differing descriptions contained in the bills of lading, the shipper's export declaration and the commercial invoices.

6. It is appropriate to settle this factual dispute rather than engage in litigation which is costly both in terms of legal fees and employee man-hours of preparation.

(S) GEORGE H. HOUGHTON

The following affidavit of John M. Dillon, sworn to September 18, 1981, was received September 22, 1981:

AFFIDAVIT

I, John M. Dillon, being first duly sworn on oath deposes and says that:

1. I am Vice-President, Traffic of Chilean Line, Inc.;

2. I am familiar with the above-referenced action as well as terms of the settlement reached therein, as set forth in the April 7, 1981 letter of Chilean Line Inc. as previously submitted in this proceeding as Exhibit B to the May 6, 1981 letter to Administrative Law Judge Harris;

3. The settlement is a bona fide effort by the parties to terminate the instant proceeding thereby avoiding the cost of litigation which would be necessary to unravel the factual dispute involved;

4. The settlement is not a method of providing transportation at rates other than the applicable rates of Respondent's tariff;

5. A genuine factual dispute exists. The shipper's freight forwarder telephoned the Rates Department of Respondent prior to sending the bills of lading. Relying on the description given by the shipper's forwarder, Respondent quoted a rate applicable to Plastic Goods N.O.S. The bills of lading prepared by the shipper's forwarder substantiated the description previously given. The Shipper's Export Declarations also confirmed in its reference to the Schedule B commodity number that the goods were correctly rated as Plastic Goods N.O.S.

After Respondent had applied the rate for Plastic Goods N.O.S., Complainant, through their representative, received a letter of September 10, 1980, which explained that the shipper themselves had confirmed that the goods were plastic articles. The Secretary of the Atlantic and Gulf/West Coast of South America Conference, after reviewing Complainant's claim confirmed that the goods were properly rated in accordance with the tariff.

6. After reviewing the applicable bills of lading, the Shipper's Export Declarations and considering the telephone conversations with Complainant's freight forwarder in which the freight forwarder confirmed and accepted the rating of the goods as Plastic Goods N.O.S., as well as the advice of the Conference Secretary, Respondent believes that the goods were correctly rated. However, since Complainant has asserted that the articles were incorrectly rated and have variously described the goods as "plastic articles," "plastic containers for domestic use," plastic housewares including kitchenware and that "all commodities can be classified as kitchen utensils," we believe there is a significant amount of uncertainty as to the true nature and description of the goods. This is particularly true, since it is unclear whether the commercial invoices relied upon by Complainant actually represents those goods carried by Respondent. These goods were transported in

> sealed, house-to-house containers. Since these movements took place during a period ranging from approximately two to three years ago, it may be impossible to ascertain the exact contents of these containers. Additionally, packing lists were not submitted at the time of shipment making it even more difficult to determine the goods carried. Accordingly, Respondent believes that it is appropriate to settle this factual dispute and urges that the settlement be approved.
>
> (S) JOHN M. DILLON

The affidavit of Mr. Dillon was annexed as Exhibit A to a joint response motion, pursuant to 46 CFR 502.73, requesting that the complaint be dismissed with prejudice based upon the settlement which has been agreed upon by the parties and the response to the notice served August 27, 1981. The parties contend the criteria for settlement contained in *Organic Chemicals, supra,* with which the Commission expressed concern, have been met by the affidavit of Mr. Dillon: i.e., the parties filed with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be; the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable, citing *Organic Chemical.*

The parties say that, at page 3 of the order, the Commission has interpreted Exhibit A, Part II, to the Settlement Agreement dated May 6, 1981, as an admission of overcharge. The parties explain they submitted that exhibit merely as a guide to the Commission and such exhibit simply incorporates the *allegations* of overcharge and the claim of complainant. It should not be construed as an admission by the parties that there have been any freight overcharges.

In an Answer to Notice on Order Reversing Dismissal of Complaint, dated and served September 18, 1981 (received September 21, 1981), the complainant asserts that since the inception of these proceedings, counsel for both complainant and respondent have been attempting to reach an agreement which would be satisfactory to both parties. Then the complainant states, "It has been well settled in the courts and before the Commission that the law and Commission policy encourage settlements that are fair, correct and valid and that every presumption may be indulged in which favors such settlements, *Merck, Sharp & Dohme v. Atlantic Lines,* 17 FMC 244, 247 (1973)." The said case of *Merck, Sharp and Dohme,* Docket No. 73-59, is one in which the

complainant sought reparation, claiming that the respondent overcharged complainant on a shipment of a commodity described on respondent's bill of lading as "Dextrose Anhydrous USP (Glucose)," in violation of section 18(b)(3) of the Act. Respondent classified the shipment as "Cargo N.O.S." Complainant contends the shipment should have been assessed the rate applicable to "Sugar, Corn, not liquid." In support of its contention that the subject commodity was in fact dry corn sugar, complainant cites the bill of lading description, the relevant invoice, a chemical dictionary definition, a Schedule B Classification, a verified statement authorized by itself, and a letter offering to settle. None of this evidence, however, establishes the validity of its claim. 17 FMC 244, 247.

As to the fact that at one time there was made an offer of settlement, it is said, in *Merck supra*, "The offer of settlement . . . merely indicates that the respondent desired to avoid further litigation, not that respondent admitted to a violation of law. The law, of course, encourages settlements and every presumption is indulged which favors their fairness, correctness and validity generally." (*Ibid.*) In *Merck, supra*, the claim for reparation was denied and the complaint dismissed. Thus, *Merck* hardly stands for the proposition cited by complainant that the law encouraged settlements, etc., such is not the holding of *Merck*, the statement is *obiter dictum*.

The complainant argues the Rules of Practice and Procedure of the Commission itself encourage and favor settlement of the claims before the Commission, 46 CFR 502.91 and 502.94. Also, it is argued that all requirements of the *Organic Chemicals* case have now been met.

The respondent served on September 21, 1981, its memorandum of facts and arguments in support of the joint response. Respondent contends the identification of the factual dispute at issue is simple—what goods were carried by respondent under eleven bills of lading. Identification of those goods, on the other hand, is difficult and may be impossible.

The respondent argues that the parties bargained in good faith to reach a fair compromise of a dispute which was uncertain on the merits and as to the ultimate outcome; a dispute, which would undeniably be costly and which would probably adversely affect a long-standing and excellent relationship between Tupperware and Compania Sud-Americana de Vapores.

The respondent asserts that the commercial invoices which claimant hereby relies upon were not viewed by the carrier until the instant dispute was initiated and there is no reference to the bills of lading, shipper's export declaration or the voyage number contained in these invoices. It would be difficult, time consuming and costly in terms of legal fees and man-hours to provide an exact description for goods

shipped nearly two and up to three years ago. In fact, their task may be impossible (p. 4).

Yet, continues the respondent, seemingly, this is what the Commission expects the parties to do. This expectation is directly contrary to the philosophy that settlements should be encouraged. (*Ibid.*) The respondent says it has been long-established that both the Commission and the law encourage fair and equitable compromise; that the parties have settled this case on a good-faith basis and respectfully request the settlement be approved and the complaint dismissed with prejudice.

This instant case is one in which the respondent and complainant continue to join in desiring to have the settlement approved and the complaint dismissed. While there appears to be as much reason to deny as to grant approval, the arguments in favor, bolstered by the law and Commission favoring settlements, tip the balance in favor of approval of the settlement.

Neither the respondent nor the Commission was concerned by the representation of the complainant in this case, pointed out by the Presiding Administrative Law Judge in his January 12, 1981, Notice of Withholding of Approval, that the proceeding be conducted under the shortened procedure.

The complaint in this proceeding was served November 12, 1980; the parties have consistently sought approval of their settlement. The parties agree that there is difficulty of proof but to avoid costly litigation and further time are apparently eager for settlement. At this point, there does not seem to be any regulatory benefit to be served in further consideration of whether this settlement should be approved. The settlement, under the circumstances, should be approved.

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

(A) The settlement is approved.

(B) The proceeding is discontinued, with prejudice.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-69

DAMAR CARGO SERVICES, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

NOTICE

January 11, 1982

Notice is given that no appeal has been taken to the December 4, 1981 Order of Discontinuance 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) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-69

DAMAR CARGO SERVICES, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

DISCONTINUANCE OF PROCEEDING

Finalized January 11, 1982

Damar Cargo Services, Inc., has withdrawn its application for a license as an independent ocean freight forwarder. Damar now asks that the subject proceeding be discontinued. Hearing Counsel support the request for discontinuance.

The only issue in this proceeding is whether Damar is fit, willing and able properly to carry on the business of forwarding in accordance with the provisions of the Shipping Act, 1916. The withdrawal of the application for a license is good cause for discontinuance of the proceeding.

The subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-19

ELI LILLY S.A. PUERTO RICO BRANCH

v.

MITSUI O.S.K. LINES, LTD.

An injured party's assignment of a claim to the Complainant is not barred by the two-year statute of limitations in section 22 of the Shipping Act, 1916.

Respondent violated section 18(b)(3) of the Shipping Act, 1916 when it rated a mixture containing antibiotics as "Antibiotics" instead of "Artificial mixtures containing antibiotics." The Initial Decision is reversed and reparations are awarded subject to Complainant's obtaining a valid assignment of its claim.

Henry B. Blackwell and *James A. Fishback* for Complainant.

Charles Lagrange Coleman III and *Robert B. Yoshitomi* for Respondent.

REPORT AND ORDER

January 12, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

This proceeding was instituted by complaint filed February 20, 1981 by Eli Lilly, International Corporation, claiming that Eli Lilly S.A. Puerto Rico Branch's March 7, 1979 shipment of "Tylan 80 Premix" from Oakland to Kobe was improperly rated by Respondent Mitsui O.S.K. Lines, Ltd. in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817), and requesting reparations in the amount of $8,250.70. Respondent's Motion to Dismiss the Complaint on jurisdictional grounds was denied by Administrative Law Judge William Beasley Harris. He also permitted the amendment of the complaint, substituting Eli Lilly S.A. Puerto Rico Branch as Complainant. The Presiding Officer subsequently issued an Initial Decision which concluded that the commodity was correctly rated by Respondent, and dismissed the complaint. Exceptions to the Initial Decision were filed by Complainant, to which Respondent replied.

POSITION OF THE PARTIES

Complainant lists six numbered exceptions, which basically take issue with the Presiding Officer's general conclusion that Respondent correctly rated the commodity under the following tariff description:

> *Antibiotics (except Erythromycin, penicillins, and tetracycline*-type) including those chiefly used as animal feed additives, antineoplastic agents, or agricultural pesticides, in bulk form not packed for retail sale.

Complainant contends that the shipment should have been rated under the following tariff item:

> Artificial mixtures containing one or more antibiotics which have been mixed or compounded together for therapeutic or prophyletic uses not put up in measured doses nor in forms or packages of a kind sold at retail. Ordinary stowage.

Complainant objects to the Presiding Officer's reference to the Condensed Chemical Dictionary for a definition of "Tylan," which listed it as "trademark for tylosin phosphate, used as an antibiotic in veterinary medicine." Complainant argues that the Presiding Officer erroneously concluded that the shipment was of tylosin phosphate, rather than Tylan 80 Premix, as both parties stipulated. It argues that the Presiding Officer's extra-record use of the dictionary lent erroneous support to his confusion of the Premix with its active ingredient, the antibiotic tylosin phosphate.

Complainant further notes that the product Tylan 80 Premix is a mixture of three ingredients—antibiotic (tylosin phosphate), diluents (soybean mill run and gelatin), and stabilizer (sulfamethazine)—and is not, therefore, a pure antibiotic. Thus, Complainant argues, the tariff item for "artificial mixtures containing one or more antibiotics" is more descriptive of the commodity than "antibiotics."

Respondent replies that the Presiding Officer was correct in concluding that Tylan 80 Premix is essentially tylosin phosphate. Respondent argues that the intended use of the commodity is of critical importance in determining the proper tariff description. Because Tylan 80 Premix is to be used as an antibiotic additive in pig feed, and because the tariff item "antibiotics" by its terms includes "those chiefly used as animal feed additives," Respondent submits that tariff item is the more applicable.

Respondent maintains that the diluents and stabilizer added to the tylosin phosphate in Tylan 80 Premix are "purely subsidiary" in nature to the active ingredient, and do not change the basic identity of the Premix as an antibiotic. Respondent contends that the Commission's ruling in *Merck Sharp & Dohme International v. Kawasaki Kisen Kaisha, Ltd.*, 22 F.M.C. 396 (1979) supports its contention that the addition of diluents to a highly concentrated antibiotic does not change the identity of that antibiotic for tariff purposes.

Respondent also obliquely raises a jurisdictional issue. It notes in a footnote in its Reply to Exceptions that the Presiding Officer permitted an amendment to the complaint substituting the complainant, more than

two years after the cause of action arose. Respondent submits that this raises a "non-waivable jurisdictional question."

DISCUSSION AND CONCLUSION

The May 22, 1981 decision permitting an amendment to the complaint presents a threshold jurisdictional issue which must be addressed prior to discussing the merits of the Exceptions. The amendment occurred beyond the two-year period prescribed in section 22 of the Shipping Act, 1916 (46 U.S.C. 821) for the filing of complaints. The argument raised by Respondent in its unsuccessful Motion to Dismiss and again in its Reply to Exceptions is that the complaint as amended is time-barred under section 22.

A similar issue arose in *Rohm & Haas Co. v. Italian Line*, 24 F.M.C. 429 (1981). That proceeding was brought by a United States corporation although the disputed freight charges were paid by its foreign subsidiary. The Commission allowed the complainant 60 days to obtain an assignment of the claim from its subsidiary. Respondent in the instant proceeding, anticipating the *Rohm & Haas* decision,[1] attempts in its Reply to distinguish it. Respondent claims that the *Rohm & Haas* decision was based on the parent-subsidiary relationship of the former and substituted complainants, and that substitution of parties under other circumstances would be barred by section 22.

The *Rohm & Haas* decision, however, was not based upon the parent-subsidiary relationship of the parties. Moreover, the Commission did not permit an amendment of the complaint, but rather permitted an assignment of the claim, thus obviating the need for an amendment. By obtaining an assignment of the claim, the complainant is adducing proof of injury, which is a matter of evidence unrelated to standing or to the time limitation on filing the complaint. The perfection of a claim is not a matter subject to the two-year statute of limitations.

Although the Presiding Officer departed from Commission precedent in permitting the amendment to the complaint, the Commission concludes that this proceeding should not be dismissed on that ground. The principles of the *Rohm & Haas* decision are applicable here. Therefore, the Commission will reinstate as Complainant the Eli Lilly International Corporation, granting it permission to obtain and file with the Commission a valid assignment of the claim from its affiliated corporation, the shipper of the commodity in issue, Eli Lilly S.A. Puerto Rico Branch. If Complainant can obtain a valid assignment of the claim, it will be

[1] Respondent's Reply to Exceptions in the instant proceeding makes reference to the *Rohm & Haas* decision. The decision in *Rohm & Haas* was reached at an open Commission meeting, prior to the filing of Exceptions in this proceeding, although the Order implementing that decision was not served until after those Exceptions were submitted.

adducing proof of injury and thus perfecting its claim in a manner not subject to the two-year statute of limitations.

On the merits of the claim, it appears that Complainant has partially misinterpreted the Presiding Officer's Initial Decision, wherein he concludes that what was shipped was tylosin phosphate, and that the proper tariff item was applied. Contrary to Complainant's contention, the Presiding Officer did not misunderstand the parties' stipulation, but rather found that Tylan 80 Premix is tantamount to tylosin phosphate, the pure antibiotic, and concluded that the "antibiotics" rate applied. The Commission has concluded, however, that this finding does not comport with the evidence of record or the proper application of law.

It is clear that tylosin phosphate, the active ingredient in Tylan 80 Premix, would be properly rated under the "antibiotics" tariff item if it were the commodity shipped. It appears that the addition of the diluent and stabilizing ingredients, which comprise approximately 91% of Tylan 80 Premix,[2] substantially alters the product such that another tariff item—"artificial mixtures containing one or more antibiotics"—applies.

Respondent's reliance on *Merck* to the contrary is misplaced. In that proceeding, the complainant argued that the presence of diluents in a pharmaceutical preparation intended for use as a chicken feed supplement converted the products from "pharmaceutical preparations" to "animal feed," those being the two tariff items in controversy. The Commission rejected that argument, concluding that the commodity remained essentially a pharmaceutical preparation which was substantially distinguishable from mere animal feed. In the instant proceeding, it is unclear whether the tariff item applied by the carrier, "antibiotics," even covers the Premix, for unlike the governing tariff item in *Merck* applying to "pharmaceutical preparations," "antibiotics" may not include mixtures of ingredients. There is considerable merit to Complainant's argument that "antibiotics" should be read to mean pure antibiotics and not mixtures composed of antibiotics.

Moreover, unlike in *Merck*, in which the "animal feed" tariff description did not accurately define the chicken feed supplement, there is in the instant proceeding a second tariff item which can apply—"artificial mixtures containing one or more antibiotics." Tylan 80 Premix clearly can be described as such, and more accurately than it can be described as "antibiotics." But even assuming *arguendo* that "antibiotics" is the better description, there is more than one reasonably applicable tariff description, and the resulting ambiguity must be resolved by application of the lower-rated item. Where a tariff is ambiguous or doubtful it must be construed against the carrier who prepared it. *United States v. Hel-*

[2] Tylosin phosphate is contained in Tylan 80 Premix at a ratio of 88 gm per kg, or at 8.8% intensity. The Premix also contains sulfamethazine at a ratio of 20 gm per kg, or 2%.

lenic Lines, Ltd., 14 F.M.C. 255, 260 (1971). Application of this principle in the instant proceeding results in a determination contrary to that in the Initial Decision, *i.e.*, the application of the "artificial mixtures" description to the Premix shipment. The Initial Decision will therefore be reversed, and reparations awarded, subject to Complainant's compliance with the Commission's above-mentioned directions to obtain an assignment of the claim from the shipper. If an assignment is not filed with the Commission within the prescribed time, reparations will not be awarded and the complaint will be dismissed.

THEREFORE, IT IS ORDERED, That the Exceptions of Eli Lilly S.A. Puerto Rico Branch are granted to the extent indicated above; and

IT IS FURTHER ORDERED, That the Initial Decision is reversed; and

IT IS FURTHER ORDERED, That Eli Lilly International Corporation is reinstated as the complainant in this proceeding; and

IT IS FURTHER ORDERED, That Eli Lilly International Corporation shall file with the Commission, before February 12, 1982, a valid assignment of the claim in this proceeding from Eli Lilly S.A. Puerto Rico Branch; and

IT IS FURTHER ORDERED, That if the above condition is met, Mitsui O.S.K. Lines, Ltd. shall pay reparations in the amount of $8,250.70 to Eli Lilly International Corporation, with simple interest at 11.93 percent from the date of payment of the freight to the date on which reparations are paid, at which time the proceeding will be discontinued; and

IT IS FURTHER ORDERED, That if such an assignment is not received by the Commission by the prescribed date, no reparations will be awarded and the complaint will be dismissed.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 547]

[DOCKET NO. 81-36, GENERAL ORDER NO. 45, AMDT. 1]

PROCEDURES FOR ENVIRONMENTAL ASSESSMENT

January 20, 1982

ACTION: Final Rule

SUMMARY: This amends section 547.4(a) of the Commission's environmental rules (46 C.F.R. 547) by clarifying certain existing categorical exclusions and adding several new exclusions. Based upon its experience with these rules since their publication in May, 1980, the Commission has concluded that several additional exclusions are warranted to avoid unnecessary environmental assessments for actions having no potential for significantly affecting the environment. This action will reduce paper work and will allow the Commission to more effectively pursue actions before it.

DATE: Effective March 1, 1982.

SUPPLEMENTARY INFORMATION:

This proceeding was initiated by Notice of Proposed Rulemaking published June 10, 1981 (46 FR 30667). The Commission proposed to amend section 547.4(a) of its environmental rules (46 C.F.R. 547) to clarify existing categorical exclusions and to add certain new exclusions. Comments were received from, or on behalf of: (1) the Port of Seattle (Seattle), (2) the Port Authority of New York and New Jersey (N.Y.-N.J.), (3) the Maryland Port Administration (MPA), (4) Sea-Land Service, Inc. (Sea-Land), (5) the Port of Long Beach, (6) the United States Environmental Protection Agency (EPA), (7) the Pacific Westbound Conference, (8) the Pacific/Indonesian Conference and (9) the Pacific Straits Conference. The rule was also submitted to the Council on Environmental Quality [CEQ) for review pursuant to 40 C.F.R. 1507.3(a). CEQ subsequently determined that the proposed amendments are consistent with its regulations.

All comments received were considered during preparation of the final rules. Those raising substantive issues are discussed below.

Seattle questions proposed section 547.4(a)(30)(ii), which excludes from analysis marine terminal agreements involving construction of facilities or structures of less than 50,000 square feet, contending that the exclusion should not be restricted by a 50,000 square foot threshold.

Instead, the Port suggests that the rule simply exempt *all* marine terminal agreements from General Order 45 because (1) most terminal agreements involve nothing more than terms of occupation and use of facilities rather than actual construction, and (2) section 547.4(c) of General Order 45 already gives the Commission the flexibility to assess actions otherwise excluded when it believes such actions offer a reasonable potential of having a significant environmental impact. N.Y.-N.J. and MPA also suggested broader exclusions of marine terminal agreements than were provided by the proposed rule. The Commission agrees, and has therefore excluded all marine terminal agreements from environmental analysis in its final rule [section 547.4(a)(30)]. It has been the Commission's experience that virtually all agreements concerning marine terminal facilities have no significant impact on the quality of the human environment. However, the Commission's Office of Energy and Environmental Impact (OEEI) will continue to review all terminal agreements. When the OEEI identifies an action involving substantial levels of construction, dredging, land-fill, energy usage and other activities which may have significant environmental effects, it will prepare an environmental impact analysis pursuant to section 547.4(c).

Sea-Land also suggested that the scope of the proposed rule be expanded to categorically exclude general rate increases as defined in the Intercoastal Shipping Act, 1933 (46 U.S.C. 843). Since rate increases were not discussed in the proposed rule as published in the *Federal Register*, they cannot be considered in the final rule.

The EPA suggested that section 547.4(a) of the proposed rule be modified to give the Commission authority to complete environmental assessments on unusual actions before it, usually excluded under new section 547.4(a)(30), that could have a significant environmental impact. The change proposed by EPA was not incorporated into the final rule. Section 547.4(c) of the original rule (46 C.F.R. 547) already provides a mechanism for initiating assessments on Commission actions that would routinely be categorically excluded from analysis when the actions appear to have a reasonable potential for significant environmental impact. Expanding the final rule to emphasize this point would be redundant.

Pursuant to 5 U.S.C. 603, the Commission examined the impact the proposed rule might have on small businesses, organizations and/or governmental jurisdictions; *i.e.*, "small entities" as described insection 601 of the Regulatory Flexibility Act, P.L. 96-354, 94 Stat. 1164. This rule will not impose additional reporting or record-keeping requirements which might result in a significant compliance or reporting burden on small entities. On the contrary, it will add six new classes of Commission actions which will be excluded from environmental assessment, thereby reducing reporting requirements of all businesses subject

to it. Accordingly, neither a full regulatory evaluation nor a regulatory impact analysis is required.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 533) and section 43 of the Shipping Act, 1916 [46 U.S.C. 841 (a)], Part 547 Title 46, Code of Federal Regulations, is amended as follows:

1. The last sentence of section 547.4(a) is amended to read, "The following Commission actions, and rulemakings related thereto, are therefore excluded:";

2. Section 547.4(a)(3) is amended to read, "Certification of financial responsibility for water pollution cleanup pursuant to 46 C.F.R. parts 542, 543 and 544";

3. Section 547.4(a)(12) is amended to read, "Consideration of exclusive or non-exclusive equipment interchange or husbanding agreements filed for section 15 approval";

4. Present section 547.4(a)(18) is deleted and replaced with a new section 547.4(a)(18) which reads, "Consideration of actions solely affecting the environment of a foreign country";

5. The following new subparagraphs are added to section 547.4(a):

> (30) Consideration of all agreements involving marine terminal facilities and/or services except those requiring substantial levels of construction, dredging, land-fill, energy usage and other activities which may have a significant environmental effect;
>
> (31) Consideration of agreements regulating employee wages, hours of work, working conditions or labor exchanges;
>
> (32) Consideration of general agency agreements involving ministerial duties of a common carrier such as internal management, cargo solicitation, booking of cargo, or preparation of documents;
>
> (33) Consideration of agreements pertaining to credit rules;
>
> (34) Consideration of agreements involving performance bonds to a conference from a conference member guaranteeing compliance by the member with the rules and regulations of the conference; and
>
> (35) Consideration of agreements between members of two or more conferences or other rate-fixing agreements to discuss and agree upon common self-policing systems or cargo inspection services.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-50

CERTIFIED CORPORATION AND SEAWAY DISTRIBUTION CORPORATION POSSIBLE VIOLATION OF SECTION 16, INITIAL PARAGRAPH

ORDER OF PARTIAL ADOPTION

January 21, 1982

This proceeding was instituted by Order of Investigation and Hearing served August 1, 1980 to determine whether Certified Corporation and Seaway Distribution Corporation (Seaway) violated section 16, initial paragraph, of the Shipping Act, 1916 (46 U.S.C. 815) by knowingly and willfully misdeclaring the contents and/or weight or cube of four shipments and, if so, whether penalties should be assessed for such violations.[1] Administrative Law Judge Paul J. Fitzpatrick issued an Initial Decision in which he found that Seaway had violated section 16, initial paragraph, of the Act, and that penalties in the amount of $20,000 should be assessed. Seaway filed Exceptions to the Initial Decision to which the Commission's Bureau of Hearings and Field Operations (Hearing Counsel) filed a Reply.

DISCUSSION

The issues before the Commission on Exception are whether stipulated violations on the four shipments at issue are time-barred under section 32(e) of the Shipping Act for the purpose of assessing civil penalties,[2] and if not, whether the $20,000 penalty assessed by the Presiding Officer is excessive.

Jurisdiction

The issue of whether the violations in question are time-barred necessarily turns on when those violations are deemed to have occurred.

Seaway maintains that the Presiding Officer erred in finding that the violations of section 16, initial paragraph, occurred upon payment of the freight charges and urges the Commission to reverse the Initial

[1] Although Certified Corporation, which wholly owns Seaway, is named in the style of the case, it was not involved in the subject shipments.

[2] Section 32(e) empowers the Commission to assess civil penalties provided "a formal proceeding under section 22 of this Act shall be commenced within five years from the date the violation occurred." 46 U.S.C. 831(e). This proceeding was instituted on August 1, 1980. According to the joint stipulation, the four shipments were tendered to the carrier on or before July 31, 1975. Freight charges were paid on September 17 and 24, 1975.

Decision. Seaway contends that the payment of freight charges is not an element of a violation of section 16, initial paragraph, and may not therefore serve as the basis for computing the five-year statute of limitations period. The alleged offense is argued to have been completed upon tender of the cargo to the carrier with false documentation. Seaway submits that nothing more was needed to constitute an offense, and that therefore the time of occurrence of the violation for section 32(e) purposes is the time of tender of the cargo for shipment.[3]

Hearing Counsel takes the position that Seaway's violation of section 16, initial paragraph, in its capacity as a consignee, did not occur until the payment of the freight charges.

While the tender of the misdescribed cargo by the terminal managers constitutes a violation of section 16, initial paragraph,[4] the transaction did not end there. By paying charges assessed on the basis of its agents fraudulent misrepresentations, Seaway ultimately obtained transportation at less than the applicable charges. Thus, while Seaway's liability for the acts of its employees arose upon tender of the cargo, the determination of when the violation occurred for purposes of section 32(e) must take into account the last act performed in violation of the statute. The Presiding Officer therefore properly concluded that, in this instance, Seaway's violations of the Act occurred upon payment of the ocean freight at less than the applicable rates.

Penalty

Seaway maintains that in view of the explicit reference in the Initial Decision to 56 misrated shipments, the assessment of the maximum penalty of $20,000 premised on a total of 56 shipments and not on the four shipments described in the Commission Order of Investigation and Hearing is excessive and was intended to penalize Seaway for violations which were not the subject of this proceeding. Such assessment, Seaway contends, amounts to an abuse of discretion and is contrary to the Commission's policy of assessing penalties at some fraction of the maximum assessable penalty.[5]

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[3] The federal court cases cited by the parties in support of their respective positions, *Davis v. United States*, 104 F. 131 (6th Cir. 1900); *In re Belknaps*, 96 F. 614 (D.Ky. 1899) and *United States v. Union Manufacturing Co.*, 240 U.S. 605 (1916), decided under section 10(3) of the Interstate Commerce Act (now 49 U.S.C. 11904(a), a provision similar to section 16, initial paragraph of the Shipping Act) present dissimilar factual situations and do not directly address the issue presented here.

[4] Seaway erroneously states that the Initial Decision is incorrect in finding that the actions of Seaway's terminal managers could not be imputed to Seaway in Hawaii until a reasonable amount of time had passed for Seaway to review the work product of its employees. The Presiding Officer, in fact, found that principle of agency law inapplicable under the factual circumstances of this case. In any event, the determination of when the violation occurred did not rest on agency principles.

[5] Seaway also argues that the Commission should summarily reverse the Presiding Officer's assessment of a civil penalty on the basis that his finding of a lack of "any appreciable contrition" was premised on Seaway's challenge to the Commission's jurisdiction.

Hearing Counsel argues that the assessment of the $20,000 penalty assessed by the Presiding Officer is appropriate under the circumstances and should be affirmed by the Commission particularly because the four shipments were among 56 shipments which Seaway admitted misrating. Hearing Counsel also observes that there is no indication that the penalty would cause financial hardship to Seaway, and points out that the Presiding Officer found no mitigating factor which would support the assessment of less than the maximum penalty.

Only four violations are involved here, the maximum statutory penalty for which is $20,000. In determining the amount of the penalty ultimately assessed, the Commission takes into account the particular circumstances of each case, including any mitigating factor, as well as the policy underlying the assessment of penalties generally.[6] The Commission finds that, in this case, the payment of the freight deficiency on one of the shipments, the relatively small amount of the underpayments,[7] and the fact that Seaway has since ceased its activities as a non-vessel operating common carrier, warrant a reduction of the proposed penalty from $20,000 to $10,000.

All other arguments and contentions not specifically discussed have been carefully considered and found to be without merit.

THEREFORE, IT IS ORDERED, That, except as hereby modified, the Presiding Officer's decision issued in this proceeding is adopted by the Commission and made a part hereof; and

IT IS FURTHER ORDERED, That the Exceptions of Seaway Distribution Corporation are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Seaway Distribution Corporation is assessed penalties in the total amount of $10,000 for four violations of section 16, initial paragraph, of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That Seaway Distribution Corporation shall contact the Bureau of Hearings and Field Operations within 20 days of the service of this Order to discuss the form and manner of payment of the civil penalty imposed by this Order; and

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

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[6] *Independent Ocean Freight Forwarder License No. 1778, Crescent Navigation, Inc.*, 24 F.M.C. 72, 94 (1981).

[7] Underpayments on the four shipments amounted to $1,402.31 of which $309.00 was remitted to the carrier.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-50
CERTIFIED CORPORATION
SEAWAY DISTRIBUTION CORPORATION
POSSIBLE VIOLATIONS OF SECTION 16, INITIAL PARAGRAPH

Claim that proceeding to assess civil penalties should be dismissed since Commission failed to satisfy condition of section 32(e) of the Shipping Act, 1916, in that it did not initiate proceeding within five years from the date of alleged violations of section 16, Initial Paragraph, denied.

Under the circumstances shown in this proceeding, cause of action does not arise solely at the time of tender of shipment and documents which knowingly and willfully misdeclare the contents therein.

Claim for dismissal of proceeding based upon alleged inordinate delay in the institution of the proceeding must fail absent showing of dilatory attitude on part of the Commission or its staff.

Respondents found to have knowingly and willfully violated section 16, Initial Paragraph, on four shipments. Penalty assessed at $20,000.

Jacob P. Billig and *Jeffrey F. Lawrence* for Respondents.

C. D. Miller and *John Robert Ewers* for the Bureau of Investigation and Enforcement.

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

Partially Adopted January 21, 1982

By its Order of Investigation and Hearing (Order) served August 1, 1980, the Commission instituted this proceeding in order to determine whether the Respondents violated section 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. 815) by "knowingly and willfully misdeclaring the contents and/or the weight or cube" of four shipments (listed in the Appendix) "in order to obtain transportation at less than the applicable rate; and (2) whether penalties should be assessed against Respondents if they are found to have violated section 16, Initial Paragraph, and if so, the amount of such penalties; . . ."

The Order named Seaway Distribution Corporation (Seaway), a non-vessel operating common carrier in the trade to Hawaii from the U.S. West Coast, and Certified Corporation (Certified), a wholesale distributor of grocery products in Hawaii, which wholly owns Seaway, as

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

Respondents. Seaway was formerly known as Transway Corporation (Transway), and the change of name in 1978 was accomplished without any variation to the existing ownership or corporate identity.[2] The Order also recites that an investigation conducted by Commission's "Bureau of Enforcement" (Bureau or BIE) indicates that between December 1, 1974, and August 5, 1975, Seaway had tendered a total of sixty-five shipments to itself in Hawaii which appear to have been knowingly misdeclared. Also, between March 4, 1975, and July 15, 1975, Seaway, as an agent for Certified, tendered five shipments to Matson Navigation Company which appear to have been misdeclared. Of the sixty-five shipments, the Order states, "[t]he statute of limitations has run on 61 of these shipments." As to the latter five shipments, the Commission also observes, "[h]owever, the statute of limitations has run on all shipments." Thus, the number of shipments subject to the investigation is four and appear in the Appendix of the Order as follows:

B/L No.	Date
615429	8/4/75
615423	8/4/75
519426	8/2/75
519427	8/2/75

The Bureau and Respondent Seaway entered into a stipulation of facts in order to resolve outstanding factual issues and present the "sole outstanding issue remaining between the parties, namely, whether enforcement action by the Commission regarding the four remaining shipments is also time-barred under the statute of limitations." In addition to the stipulation, the parties filed simultaneous opening and reply briefs principally addressing the statute of limitations issue.

JOINT STIPULATION OF FACTS [3]

A. THE CORPORATE STRUCTURE OF TRANSWAY/SEAWAY

1. Seaway Distribution Corporation (formerly Transway Corporation), which is wholly owned by Certified Corporation, was a non-

[2] During the period relating to the shipments involved in this proceeding, the corporate name was Transway. The present name (Seaway) and Transway are used interchangeably throughout this decision.

[3] According to the terms of the joint stipulation and for the purpose of reaching the statute of limitations issue, the parties did not contest certain factual showings presented in the stipulation. In that respect, the stipulation provides:

> Seaway will not contest BIE's position that available documentation supports a finding that Seaway misdescribed the four subject shipments. Seaway will not contest this position for several reasons: First, Seaway personnel who were directly involved in the subject shipment are no longer employed by Seaway and, because of the passage of over five years since the subject shipments took place, such personnel no longer have any actual recollection of the events surrounding these shipments. Second, virtually all documents that are available existed

Continued

vessel operating common carrier (NVOCC) in the U.S. West Coast/ Hawaii trade. The corporate headquarters of Transway Corporation was located in Honolulu, Hawaii, during the period of the shipments enumerated in the Commission's Order of Investigation and Hearing.

2. The change of name from Transway Corporation to Seaway Distribution Corporation, which occurred in 1978, signifies no change in ownership or identity, but is solely a change in name. In 1980, Seaway's customer lists, goodwill and accounts were sold to a third party not related to Seaway or Certified. Seaway is no longer engaged in activity as an NVOCC. Respondent's present name (Seaway) and its former name (Transway) will hereinafter be used interchangeably.

3. George Madden was employed by Transway from approximately 1971 to November 1977 and was Vice President during the period of the shipments enumerated in the Commission's Order of Investigation and Hearing. Mr. Madden's current business address is 511 Kawailani Street, Hilo, Hawaii.

4. Jerome J. Wolf was employed by Transway from approximately 1974 to November 1976 and was California District Manager during the period of the shipments enumerated in the Commission's Order of Investigation and Hearing. Mr. Wolf's last known address was American Pacific Container Lines, Ampac Corp., Los Angeles, California.

5. David Samson was employed by Transway Corporation as terminal manager at the Oakland facility from January 25, 1975, to October 25, 1975. Mr. Samson's current home address is 1246 Marionda Way, Pinole, California.

6. Phillip Harris was employed by Transway and its successor Seaway from 1973 to 1980. He was Los Angeles terminal manager during the period of the shipments enumerated in the Commission's Order of Investigation and Hearing. Mr. Harris' last known business address is Seaway Dist. Cor., 4423 Hawthorne Avenue, Vernon, California.

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solely within the files of BIE as a result of the 1975-1977 BIE investigation of Seaway. Finally, it would be economically prohibitive for Seaway to defend itself in any oral hearing in this matter. Expenditures of the magnitude which would be required for this purpose would be especially unjustifiable since, as stated below, Seaway has sold its NVOCC operation and is no longer engaged in such activities.

Likewise, for purposes of resolving the factual issues in this proceeding, BIE will not contest Seaway's factual showing reflected herein (see paragraphs 12-14) that available documentation and Matson's policies regarding the timing of tender to it of shipments, support a finding that the subject shipments were all tendered to and received by Matson on or before July 31, 1975. It was Matson's general policy to employ a truck company for Store-Door service and pick up containers during business hours at least twenty-four hours prior to the time the vessel sailed. Applying this policy, all four shipments would have been picked up prior to July 31, 1975. BIE does not possess any documents which would indicate that Matson's general practice was not followed in the case of the four subject shipments.

The parties have also stipulated to the authenticity of the copies of documents attached hereto and have agreed that such documents may be admitted into the record without the formalities of proof and tender of originals.

7. Sharla Buffet was employed by Transway Corporation from October 28, 1975, to June 9, 1978. Ms. Buffet's current business address is CPM & F Express Inc., 285 Sand Island Access Road, Honolulu, Hawaii.

B. TRANSWAY'S METHOD OF OPERATION

8. David Samson's responsibilities as Oakland terminal manager included preparation and supervision of the preparation of profit and loss statements for the Oakland facility and the dock receipts for each container Transway shipped. Mr. Samson was compensated by Seaway solely on a salary basis and not on the basis of the profit/loss statement prepared by him.

9. Phillip Harris' responsibilities as Los Angeles terminal manager included preparation and supervision of the preparation of profit and loss statements for the Los Angeles facility and the dock receipts for each container Transway shipped. Mr. Harris was compensated by Seaway solely on a salary basis and not on the basis of the profit/loss statement prepared by him.

10. It was generally the practice of Transway personnel to prepare the container manifest from the inland bill of lading or shipper's description accompanying the goods received for carriage. The container manifest shows Transway's container number, the shipper and consignee, the goods shipped, their weight and cube and the number of pieces. Transway personnel also prepared a dock receipt. Finally, a profit/loss statement for each shipment was prepared by or under the supervision of the Transway terminal manager using the carrier's tariff. The profit/loss statement shows ocean charges, stuffing charges, gross revenue and the resultant profit/loss. (See Attachments B & C.) [4]

11. After tender of a container to the carrier, the manifest, dock receipt, and profit/loss statement pertaining to that particular shipment were sent by air courier to Transway's main office in Honolulu.

12. The documents were normally sent by the California Transway offices to Honolulu either the same day or the next business day after the container was picked up by the Matson trucker and were received in Honolulu on either the very same day they were sent (due to the time difference between the West Coast and Hawaii) or the next business day after being sent. The documents were never sent prior to the pickup of a container by the carrier.

[4] Throughout the joint stipulation there are numbered paragraph references to the Attachments provided. Since the parties have chosen to present the stipulation in this fashion and rely upon the exact numbered paragraphs in their argument on brief, the stipulation is set forth herein in the form offered by the parties. The joint stipulation and the Attachments A-OO will be received in evidence as Exhibit No. 1.

13. In Honolulu the handwritten Seaway manifest was typed up by office personnel, and the date of receipt of the document in Honolulu was typed in on the upper left-hand corner of the page.

14. It was Transway's normal practice for the date of pickup of the container to be inserted in the space for "Sailing Date" on the typed Seaway manifest.

15. Mr. Madden had personnel who audited the documents sent to him by his managers in California. Mr. Wolf confirmed the existence of an audit system. Neither District Director Nordgren nor the FMC staff visited the Honolulu office of Transway to verify the extent of the auditing system, whether or not the auditing system ever truly functioned, and whether or not the four subject shipments were ever audited.

16. Attachment D is a true copy of a letter dated January 15, 1975, which was sent by Mr. Wolf to Mr. Harris and Mr. Samson regarding a company policy against misdescribing freight.

17. Seaway has a policy of retaining documents for a period of three years after the shipment has moved.

18. Unless a matter is under active consideration by the carrier and/or Seaway, Seaway will not retain shipping documents for the purposes of adjustment of undercharges. The shipping documents are also no longer in the possession of Matson or its truckers.

C. SHIPMENTS 615429, 615423, 519426, 519427

19. Shipments 615429, 615423, 519426, 519427 were transported by Matson Navigation Company. Attachments E through O are portions of Matson's Tariff (F.M.C. - F. No. 153) which are on file with the Commission.

20. For all four shipments Matson provided "store-door" service, that is the containers were picked up and taken to the pier by a Matson trucker.

21. It was Matson's general policy to employ a truck company for store-door service and pick up containers during business hours at least twenty-four hours prior to the time the vessel sailed.

22. Since the typed Transway manifest all indicate pickup of the shipments from Transway's California offices on or before July 31, 1975 (see paragraph 14), and in light of Matson's policy regarding the tender of shipments (see paragraphs 20-21), all four shipments would have been tendered to and received by Matson on or before July 31, 1975.

23. Vessel sailing times and numbers identifying the subject shipments are as follows:

Shipment No.	Container No.	Vessel/ Voyage No.	Port of Loading	Sailing Date	Sailing Time
615429	50025	Queen 162	Oakland	7/30/75	2250 hrs.
615423	17354	Lurline 59	Oakland	8/2/75	0025 hrs.
519426	50018	Progress 109	Los Angeles	8/2/75	0450 hrs.
519427	202326	Progress 109	Los Angeles	8/2/75	0450 hrs.

24. The dock receipts for each shipment were prepared by Seaway personnel who retained the "shippers (carbon) copy" of the dock receipt form. Other copies of the form were tendered to Matson with the shipments.

25. Attachment P is a true copy of the shipper's carbon copy of the dock receipt for shipment No. 519426, which was prepared in the Los Angeles office of Transway.

26. Attachment Q is a true copy of the shipper's carbon copy of the dock receipt for shipment No. 615423, which was prepared in the Oakland office of Transway.

27. Attachment R is a true copy of the shipper's carbon copy of the dock receipt for shipment No. 615429, which was prepared in the Oakland office of Transway.

28. Attachment S is a true copy of the shipper's carbon copy of the dock receipt for shipment No. 519427, which was prepared in the Los Angeles office of Transway Corporation.

Paragraph 29 is intentionally omitted.[5]

30. The Matson Audit File Copy (Form F-208-G) (Attachments H through K) is not prepared by the shipper nor is it tendered to Matson with the shipment. It is prepared by Matson after tender of the shipment on the basis of information appearing on the Dock Receipt which is tendered with the shipment. The date appearing thereon is the date on which the information was processed in the Matson computer and on which the document was produced. Copies of Form F-208-G are sent only to Matson's San Francisco and Honolulu offices for audit purposes, although photocopies are available to shippers upon request.

31. Normally, at the time the Audit File Copy is issued by the Matson computer billing system, separate forms entitled Bill of Lading (Form 208C) and Notice of Arrival (Form F-208-E) are also issued containing essentially the same information as the Audit File Copy. The

[5] See fn. 4. *supra*.

parties have no knowledge of the existence of either Form 208E or Form 208C with respect to the four subject shipments.

32. Attachment T is a true copy of the Matson Audit File Copy for shipment No. 519426, which was prepared by Matson Navigation Company from the dock receipt.

33. Attachment U is a true copy of the Matson Audit File Copy for shipment No. 615423, which was prepared by Matson from the dock receipt.

34. Attachment V is a true copy of the Matson Audit File Copy for shipment No. 519427, which was prepared by Matson from the dock receipt.

35. Attachment W is a true copy of the Matson Audit File Copy for shipment No. 615429, which was prepared by Matson from the dock receipt.

36. Although the dock receipt and Audit File Copy were prepared in multiple copies. the only copies of the Audit File Copy and the dock receipt which were not destroyed are those attached hereto.

37. Attachment X is a true copy of the manifest for shipment No. 615429, which was typed in the Honolulu office of Transway from the container manifest prepared in the Oakland office of Transway.

38. Attachment Y is a true copy of the manifest for shipment No. 519426, which was typed in the Honolulu office of Transway from the container manifest prepared in the Los Angeles office of Transway.

39. Attachment Z is a true copy of the manifest for shipment No. 519427, which was typed in the Honolulu office of Transway from the container manifest prepared in the Los Angeles office of Transway.

40. Attachment AA is a true copy of the manifest for shipment No. 615423, which was typed in the Honolulu office of Transway from the container manifest prepared in the Oakland office of Transway.

41. Phillip Harris was responsible for the preparation of dock receipt 519427 for container UFCU 202326, *Progress* Voyage 109, describing the cargo therein. Comparison of the dock receipt with the container manifest shows the following inconsistency of contents and/or weight and cube:

> The dock receipt declared cleaning compound (Item 495) weight 43,082 but the container manifest showed the commodity as compressed gas and cleaning compound with total weight of 43,082 lbs. and 1,060 cubic feet.

42. Phillip Harris was responsible for the preparation of dock receipt 519426 for container 50018, *Progress* Voyage 109. Comparison of the dock receipt with the container manifest shows the following inconsistencies of contents and/or weight and cube:

> a. "Candy" was described on the dock receipt as being 2,385 lbs. in weight; however, the container manifest showed one

shipment alone from "Empire Terminal" to "A. C. Lyau" as 2,600 lbs.

b. Several other items labeled "candy" were noted on the manifest but were not included on the dock receipt.

43. David Samson was responsible for the preparation of dock receipt 615429 for container 50025, *Queen* Voyage 162, describing the cargo therein. Comparison of the dock receipt with the container manifest shows the following inconsistency of contents and/or weight and cube:

The dock receipt describes the cargo as "FAK Item 3000 weight 43,983." The container manifest shows that the weight of one of the commodities, "liquor" weight 27,118 lbs. 722 CFT, is more than 50% of 43,983 lbs. which disqualifies the container for FAK rate. (A container must consist of five or more commodities with no one commodity weighing more than 50% of the total shipment weight. Note 2 of Item 3000.)

44. David Samson was responsible for the preparation of dock receipt 615423 for container 17354, *Lurline* Voyage 59, describing the cargo therein. Comparison of the dock receipt with the container manifest, which is prepared by Transway, shows the following inconsistencies of contents and/or weight and cube:

a. Champagne was declared on dock receipt as 17,000 lbs. vs. 17,600 shown on the container manifest,

b. Iron pipe (11 CFT and 80 lbs.) was not declared on the dock receipt but was shown on the container manifest,

c. Burned rock (Item 375, 14,000 lbs. and 363 CFT) is shown on dock receipt but the container manifest reflects 14,000 lbs. of stone shipped as Stucco Stone,

d. Cargo NOS Item 5 was declared as 59 CFT on the dock receipt but shown on the container manifest as 223 CFT, furthermore, if stone is added to the list of commodities moving pursuant to cargo NOS, the total cube of cargo should be 586 (223 + 363).

45. The parties have no knowledge of any visual inspection of the goods comprising the shipments enumerated in the Commission's Order of Investigation and Hearing.

46. The ocean freight for the shipments enumerated in the Commission's Order of Investigation and Hearing was paid by Transway's Honolulu office as the consignee.

47. Mr. Madden's office had a copy of all pertinent documents relating to shipments 615429, 615423, 519426, and 519427 at the time Transway made payment to Matson on September 17, 1975, and September 24, 1975.

48. The total freight paid by Transway to Matson on September 17, 1975, for shipment 519426 was $907.69, an amount $464.98 less than the Matson rerated figure. (See Attachments BB and CC.)

49. *The total freight paid by Transway Corporation to Matson on* September 17, 1975, for shipment 519427 was $814.25, an amount $310.72 less than the Matson rerated figure. (See Attachments DD and EE.)

50. The total freight paid Transway to Matson on September 24, 1975, for shipment 615429 was $1,019.00, an amount $300.09 less than the Matson rerated figure. (See Attachments FF and GG.)

51. The total freight paid by Transway to Matson on September 17, 1975, for shipment 615423 was $952.39, an amount $326.52 less than the Matson rerated figure. (See Attachments FF and HH.)

D. FINDINGS OF FEDERAL MARITIME COMMISSION INVESTIGATION

52. On May 28, 1975, the Federal Maritime Commission sent Transway a Notice of Claim for Civil Penalty based on alleged misdescriptions of cargo which were believed to have occurred between June 13, 1973, and May 14, 1974. On October 15, 1975, a $9,000 settlement was reached and approved by the FMC's General Counsel. It was expressly agreed that the settlement was ". . . not to be construed as an admission of guilt by undersigned respondents to the alleged violations."

53. District Director (D. D.) Leonard J. Nordgren would, if on the witness stand in this case, testify under oath to the following facts:

a. David Samson was first contacted in connection with the subject shipments on September 10, 1975. On that date, Mr. Samson admitted that he had been systematically misdeclaring shipments to Matson for the past three to four months. He said this was done without the knowledge of Mr. Wolf or Mr. Madden. He stated it was done to hold expenses down and improve the profit and loss figures he submitted to Mr. Madden.

b. Eleven files pertaining to June shipments were examined. Eight appeared to have misdescribed (five Transway and three Certified shipments). Copies were made of the container load manifest prepared by Transway, Matson's dock receipt and the profit/loss statement on each shipment. From these a handwritten list of the goods in each container was made and presented on September 11, 1975, to Thomas Fitzgerald, Manager, Revenue Accounting, of Matson for rating against the tariff. Copies of pertinent Matson bills of lading were also requested at this time. It was found that all five of the Transways shipments had been misdeclared and two of the three Certified. Samson admitted these misdescriptions when confronted with them on September 15, 1975.

c. On September 15, 1975, a similar review was undertaken of shipment files for January 1975. Forty-two files were examined and eight were copied for further review. Six were found

by Matson to have been misdeclared. Mr. Samson made a similar admission on September 15, 1975.

d. On September 17, 1975, nine files were reviewed on July shipments, and all nine were noted as being suspect. Re-ratings by Matson confirmed the misdescription. Again, Mr. Samson admitted misdescribing these shipments.

e. On September 22, 1975, twenty-six files on shipments moved in April were seen. Ten appeared to be suspect, and it was later confirmed through re-rating that seven had been misdeclared. Two others were misdeclared but caught by Matson and rated correctly. They were not cited in the investigative report.

f. Subsequent to September 30, 1975, and prior to October 6, 1975, Mr. Madden was called by D. D. Nordgren at his Honolulu office and advised that a number of Oakland shipments had been misdeclared to Matson Navigation Co., in apparent violation of the law. He was advised that D. D. Nordgren was prepared to meet in San Francisco or Oakland with him or his General Manager on the matter. On October 8, 1975, the results of the audit were reviewed at Transway's facility in Oakland with Mr. Wolf. Mr. Wolf agreed to review the cited files. He volunteered that he would redeclare them to Matson and pay the underfreightment. (See Attachment II.)

54. In a letter dated September 10, 1976 (see Attachment JJ), Jerome Wolf presented D. D. Leonard J. Nordgren the findings of an audit of Los Angeles containers for the period of 1974/1975. In the letter Mr. Wolf acknowledged $2,202.04 in underfreightments without any indication as to whether the misdescriptions were accidental or intentional.

55. In a letter to Mr. Madden dated June 7, 1977 (see Attachment KK). D. D. Leonard J. Nordgren indicated that the FMC investigation revealed $11,176.28 in underfreightments as compared to the $2,202.04 figure proposed by Mr. Wolf. District Director Nordgren requested documents from Transway which would clarify that discrepancy.

56. In a letter dated June 13, 1977 (see Attachment LL), George Madden stated that if there were misdescriptions, such misdescriptions were errors and not intentional actions on the part of Transway.

57. In a letter dated June 30, 1977 (see Attachment MM), Sharla Buffet indicated that she reaudited the thirty-nine Los Angeles freight bills in question and acknowledged underfreightments of $4,869.92.

58. The documents supporting Ms. Buffet's re-rating of the shipments in containers 50018 and UCFU 202326 are Attachments NN and OO respectively.

59. According to Matson's records, Matson has not received adjustment payments for the shipments enumerated in the Commission's Order of Investigation.

60. *The file resulting from this investigation was referred to the* Commission's Office of General Counsel on June 30, 1976. However, the investigation in Los Angeles was reopened on September 20, 1976, and was concluded on June 7, 1977. Seaway was notified of the Commission's claim for civil penalties on January 22, 1980, the date of the Commission's letter to Seaway giving notice of the claim.

SUMMARY OF THE EVIDENCE

Transway operated as an NVOCC in the trade from the U.S. West Coast to Hawaii with corporate headquarters in Honolulu, Hawaii, and terminal operations in Oakland and Los Angeles. Mr. George Madden, as Vice President in Honolulu, was primarily responsible for the corporate operations. Mr. Jerome Wolf, as the District Manager for California, was the supervisor over Mr. Samson, the Oakland terminal manager, and Mr. Phillip Harris, the Los Angeles manager.

The terminal manager's responsibilities included preparation and supervision of the preparation of shipping documents relating to shipments moving between California and Hawaii. These documents included a dock receipt, a container manifest and a profit and loss statement. The container manifest, a Transway internal document, was not turned over to the ocean carrier, Matson Navigation Company (Matson), in the case of the four shipments involved. The manifest was prepared by Transway from descriptions on the inland bill of lading or shipper description of the goods and discloses the container number, the shipper consignee, the goods shipped, their weight and cube and number of pieces. The four shipments moved under "store-door service," *i.e.*, they were picked up and tendered to Matson at the shipper's place of business as part of the through transportation service being provided. It was Matson's policy to have the containers picked up by its truckers during business hours at least twenty-four hours prior to the time the vessel sailed. At the time of tender, the dock receipt was tendered with a container load movement form or equivalent document. Rule 65 of Matson Tariff No. 14D (FMC-F No. 153) required the documents to contain "sufficient information to enable the carrier to completely prepare, rate and extend a bill of lading." The profit and loss statement, another internal Transway document, was prepared by or under the supervision of the terminal manager using the carrier's tariff and reflects the ocean carrier's charges, charges for stuffing the container, gross revenues and the resulting profit or loss.

Documents prepared by the California Transway offices were usually sent by air courier to its Honolulu office the same day or the next business day after the container was picked up by the Matson trucker. The container manifests show the following dates of receipt by Transway's Honolulu office:

B/L No.	Container No.	Received
615429	50025	August 1, 1975
615423	17354	August 4, 1975
519426	50018	July 31, 1975
519427	UFCU 202326	July 31, 1975

The ocean freight charges were paid by the Transway's Honolulu office, and the dock receipts for the four shipments were marked "Collect—Consignee to pay charges." The consignee was shown as "Transway Corporation, 320 B Waiakamilo, Honolulu," and the Transway California office was shown as shipper.

On June 15, 1975, approximately six months before the shipments, Mr. Wolf sent the following letter to Transway's California terminal managers:

> SUBJECT: Descriptions of containers
>
> It is against company policy and has always been Transway's policy that all Dock Receipt descriptions must meet all requirements of the Steamship Company's Tariff.
>
> There cannot be any deviation. Actual weight, cube, and commodity must be shown.
>
> If there is any questions as to these rules and regulations regarding the rating of the containers, you must contact me directly.
>
> Any deviation from this policy will mean immediate dismissal.

Mr. Madden also had personnel who audited the documents sent to him by his managers in California. In Honolulu, the handwritten Seaway manifest was typed by office personnel, and the date of receipt of the document in Honolulu was typed on the upper left-hand corner of the page. And it was Transway's normal practice for the date of pickup of the container to be inserted in the space for "Sailing Date" on the typed Seaway manifest. The date in the space for "Sailing Date" on each of the manifests is July 31, 1975.

The Matson Audit File Copy (Form F-208-G) is neither prepared by the shipper nor tendered to Matson with the shipment. It is prepared by Matson after tender of the shipment on the basis of information appearing on the dock receipt tendered with the shipment. The date appearing thereon is the date on which the information was processed in the Matson computer and on which the document was produced. Copies are sent only to Matson's San Francisco and Honolulu offices for audit purposes, although photocopies are available to shippers upon request. Normally, at the time the Audit File Copy is issued by the Matson computer billing system, separate forms entitled Bill of Lading (Form 208C) and Notice of Arrival (Form F-208-E), containing essentially the same information as the Audit File Copy, are also issued. However, the

parties have no knowledge of the existence of either Form 208E or Form 208C with respect to the four shipments.

According to Respondents, the "bill of lading date" referred to in the Commission's Order represents the date Matson prepared its Audit File Copy, i.e., after the tender of the shipments, on the basis of information appearing on the dock receipt, thus it is the date upon which the shipping information was processed in the Matson computer and on which the document was produced and does not reflect the date of tender of any shipment.

It is the Bureau's position that available documentation supports a finding that Seaway had knowingly and willfully violated section 16 of the Act as to the four shipments under investigation. On brief, Respondents indicate that "because of the passage of time since the acts here at issue occurred and the financial burden that would have been involved in conducting an oral hearing, Respondents are not contesting the substance of BIE's allegations in this regard."

Since the Bureau recommends an assessment of the maximum penalty of $20,000 here, a discussion—as presented by the Bureau and not contested on brief by Respondents—is warranted regarding the misdescription of the cargo involved in the shipments. Accordingly, the presentation by the Bureau will be set forth next in substantially the same form as presented.

The dock receipts prepared by Transway's California offices for the shipments seemingly contain numerous discrepancies when comparing the dock receipt, profit/loss statement or Audit File Copy with the container manifest.

The Commission's staff investigators compared dock receipt 519426, submitted by Transway (Los Angeles) to Matson as its declaration of cube and weight and a description of the commodities in container 50018 moving on the *Progress*, voyage 109, with the appropriate Transway container manifest and noted several discrepancies.

While "Candy" was described on the dock receipt as 2,385 lbs. in weight, one entry on the container manifest for candy alone, from "Empire Terminal" to "A.C. Lyau" was noted to be 2,600 lbs., heavier than the weight declared. Several other items labeled "Candy" were noted on the manifest which were not included on the dock receipt.

A copy of the manifest was submitted by the investigators to Matson which rerated the shipment. Matson grouped into "Cargo NOS" (Item 5) at a rate of $.98 per CFT the following:

Commodity	Shipper	Consignee	Lbs.	Cube
Foodstuff	York Barbell	Taiyo Inc.	1,000	66
Foodstuff	El Molino Mills	Taiyo Inc.	3,986	229
Foodstuff	Arrowhead Mills	Vim D Vigor	9,978	447
Candy	"Tootsie Rool"(sic)	Certified Corp.	575	26
Candy	Ben Myerson Candy	Certified Corp.	400	16
Iron Fittings	Marden Susco	Wai Utilities	1,816	44
Iron Valves	Marden Susco	Wai Utilities	318	11
Candy	Nabisco	Yick Lung Candy	585	37
Toys	Mattel, Inc.	Sears Roebuck	389	69
TOTAL			19,045	945

Matson grouped into "Candy" (Item 110) at a rate of $3.01 per 100 lbs. (cwt):

Manifest Commodity	Shipper	Consignee	Lbs.	Cube
Candy	Empire Terminal	A.C. Lyau	2,600	52
Candy	Hollywood Brands	Diamond Bakery	800	25
			3,400	77

Matson rated the 12,335 lbs. of "Foodstuff" from "Arrowhead Mills" to "Laiyo Inc." as "canned goods" (Item 115) at a rate of $2.42 per cwt.

Matson rated the drayage on the 19,045 lbs. of cargo NOS with a deficient weight of 5,520 lbs. and gave a "Loading/Unloading allowance" on total weight of 31,380 at a rate of $.05 per cwt.

	Cube	Weight		
Cargo NOS (Item 5)	945	19,045	$.98/cft.	926.10
Drayage		19,045	$.25/cwt.	47.61
Deficient		5,520	$.25/cwt.	13.80
Candy (Item 110)		3,400	3.01/cwt.	102.24
Canned Good (Item 115)		12,335	2.42/cwt.	298.51
				1,388.36
Less Loading/Unloading Allowance: $31,380 X $.05				15.69
				1,372.67
Difference: $1,372.67 − 907.69 =				464.98

Transway has subsequently challenged this rerating and proposed the shipment be rated Freight, All Kinds (FAK) (Item 3000) for a freight deficit of only $57.83. However, a single commodity took up well over 50 percent of the weight of the shipment, thus disqualifying it from the FAK rate.

Dock receipt 615423 prepared by Mr. Samson and submitted by Transway to Matson for rating purposes with container 17354, *Lurline*, Voyage 59, described the cargo contained therein as consisting of:

	Item	Cube (CFT)	Weight
Cargo Nos.	5	59	2,152
Envelopes	295		250
Printed Matter	365		235
Liquor, Nos	55		7,500
Burned Rock	375		14,000
Champange (sic)	60		17,000
TOTAL			41,737

The container manifest executed by Transway lists the cargo loaded into the container. A review of the manifest confirms the envelopes, printed matter, liquor, and champagne; however, champagne is shown as 17,600 lbs., as contrasted to 17,000 lbs. as declared.

Iron pipe (11 CFT and 80 lbs.) shown on the Transway manifest was not shown on the dock receipt. Had it been declared, it would have been rated pursuant to Item 415, which specifies a rate of $2.41 per 100 lbs. for a total of $1.93 for 80 lbs.

One of the remaining items was described by Mr. Samson as burned rock, Item 375, 14,000 lbs. and 363 CFT. The manifest does not show burned rock but reflects 14,000 lbs. of stone shipped as Stucco Stone. Item 375 in Matson's tariff 14-D, FMC-F No. 153, effective April 25, 1975, through date of shipment covers:

> ROCK, bituminous, burned, crushed or ground, in packages.
> LIMESTONE, ground calcium carbonate, in sacks.

Webster's New World Dictionary, College Edition, describes bituminous as being either mineral pitch or any of several hard or semi-solid materials obtained as asphaltic residue in the distillation of coal tar. There is neither a specific rate for stone in the tariff nor a specific rate for stucco or stucco rock, and according to the Bureau, it should be rated as Cargo NOS.

The remaining items shown on the manifest should properly move under cargo NOS:

	WT	CFT
Syringes	1,550	165
Syringes	134	13
Syringes	80	8
Plastic Arts	unknown	13
Display materials	83	23
Cash register	125	1
TOTAL	1,972	223

Of the total of 223 CFT shown on the manifest, only 59 CFT was declared on the dock receipt. If stone is added to this list of commodities moving pursuant to Cargo NOS, the total cube of cargo moving should be 586 (223 + 363).

By describing stone as burned rock, Transway paid a rate of $1.68 per 100 lbs. X 14,000 lbs. or $235.20. The Bureau contends that since there is no specific rate for stone or stucco stone, as Cargo NOS it is properly rated at 98¢ per CFT times 363 CFT, or 355.74, a difference of $120.54. And by omitting 527 CFT of Cargo NOS from the declaration, Transway obtained transportation at less than the applicable rate (527 CFT X 98¢). As a consequence, the total underfreightment amounted to $292.04; however, due to various allowances, the champagne weight difference and the iron pipe, the final difference amounted to $326.52 ($1,278.52 −$952.39).

The third dock receipt 615429, prepared by Mr. Samson and submitted by Transway to Matson for rating purposes with container 50025, *Queen* Voyage 162, described the cargo contained therein as "FAK Item 3000 Weight 43,983." Note 2 of Item 3000 requires that "each shipment of one or more containers must consist of five or more commodities with no one commodity weighing more than 50% of the total shipment weight. . . ."

Transway's manifest on this container reflects the first item listed as "Liquor," weight 27,118 lbs., measure 722 CFT, the shipper as Pearl Brewing, and Bevway Corp. as the consignee. Block 3 reflects another shipment of Liquor, 12,843 lbs., 373 CFT to Bevway from Hiram Walker.

The Bureau argues that even assuming the first shipment was beer (Item 50 in Matson's tariff), and the second Liquor, NOS (Item 55), the shipment still failed to meet the weight requirement for the FAK rate since 27,118 lbs. exceeds 50 percent of 43,983 lbs. And, rating the Transway manifest on shipment under the tariff results in $1,319.09 as opposed to the FAK rate of $1,019, resulting in Transway paying $300.09 less through the misdescription of the cargo.

Finally, dock receipt 519427, submitted to Matson for rating purposes for container UFCU 202326, *Progress* Voyage 109, described the cargo as consisting of: cleaning compound (Item 495), weight 43,082. Transway's manifest reveals that the commodity was written as compressed gas and cleaning compound with total weight of 43,082 lbs. and 1,060 cubic feet. The weight and cube for each commodity was not given.

The Commission's investigators submitted the information to Matson, which rerated the compressed gas and cleaning compound as Cargo NOS for a total charge of $1,124.97 as compared to the original total of $814.25—a difference of $310.72.

By way of summary, on September 17, 1975, Transway paid $907.69 for shipment 519426, an amount $464.98 less than Matson's subsequent

rerating. On the same date, it paid $814.25 for shipment 519427, an amount $310.72 less than the rerated figure. Similarly, it paid $952.39 for shipment 615423, an amount $326.52 less than the rerated figure. And on September 24, the amount paid for shipment 615429 was $1,019.00, an amount $300.09 less than the subsequent rerating by Matson.

DISCUSSION AND CONCLUSIONS

A crucial issue, the one that received the most attention on brief, was stated by Respondents as: Whether a cause of action under section 16, Initial Paragraph, arises at the time of tender of the shipment to the carrier by the consignor with shipping papers which knowingly and willfully misdeclare the contents thereof?

The opening paragraph of section 16 provides:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means *to obtain or attempt to obtain* transportation by water for property at less than the rates or charges which would otherwise be applicable. (Emphasis added.)

The August 1, 1980, Order instituting this investigation seeks to determine whether Respondents violated section 16 by knowingly and willfully misdeclaring the contents and/or weight or cube of four shipments in order to obtain transportation at less than the applicable rate; whether penalties should be assessed; and if so, the amount of such penalties. As to the imposition of any penalties, the Commission is authorized to assess civil penalties only if a formal proceeding instituted under section 22 of the Act is commenced within five years from the date when the violation occurred.[6]

Here the parties have stipulated that each of the four shipments under investigation, with all documents which allegedly misdescribed their contents, were tendered to the carrier (Matson) on or before July 31, 1975. The Respondents argue that since the alleged violations occurred on or prior to the commencement of this proceeding (August 1, 1980), the Commission is precluded from assessing any civil penalties under the five-year statute of limitations contained in section 32. The Bureau takes the position that the cause of action runs from the last act

[6] Section 32(e) provides:

> Notwithstanding any other provision of law, the Commission shall have authority to assess or compromise all civil penalties provided in this Act: *Provided, however*, That, in order to assess such penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred.

necessary to constitute the claimed offense—in this case, the payment of the ocean freight charges in September 1975. Section 16 involves questions of fraudulent conduct and the Commission has not directly determined, as yet, the time when an act embracing a section 16 violation exists.

In order to buttress their contention that any offense under section 16 is committed at the time of tender of the shipment with documents misdeclaring their contents, Respondents rely heavily upon *Davis v. United States*, 104 Fed. Rep. 136 (6th cir. 1900). This case was brought under section 10(3) of the Interstate Commerce Act (March 2, 1889. c. 382, 25 Stat. 855) before its amendment of 1910.[7] Before that amendment, the language of section 10(3) read as follows:

> Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud. . . .

The purpose of section 10(3) was similar to that of section 16 since both were enacted to protect against false billing, classification, weights or contents and fraudulent damage claims. In *Davis*, the government contended that the crime of misrepresenting the property tendered to a carrier was not complete at the time and place of tender in Ohio, but only when the requested transportation of the goods to the destination in Texas had been performed. Rejecting this contention, the *Davis* court held that it was not the transportation of the goods that was prohibited, but the act of obtaining transportation which marks the completion of the crime. In that respect, the court stated:

> It is not the transportation of the goods which is prohibited and punished, but the obtaining of the transportation by means of false and fraudulent conduct which is the gist of the offense.

[7] Public Law 95-473, an Act to "revise, codify and enact without substantive change the Interstate Commerce Act," was signed by President Carter on October 17, 1978. (92 Stat. 1337.) The new law constitutes a substantial revision and reorganization of the laws administered by the Interstate Commerce Commission. It repeals the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*, § 301 *et seq.*, § 901 *et seq.*, and § 1001 *et seq.*) and certain related statutes. These laws have now been replaced by a new subtitle IV of title 49 of the United States Code, 49 U.S.C. § 10101 through § 11916. Section 10(3) is now designated at 49 U.S.C. 11904(a).

* * *

> Ordinarily, a delivery to the carrier is a delivery to the consignee. Every act which the consignor can do about the goods, all representations which he can make concerning them, the weight and classification thereof, are complete, and the goods turned over to the carrier for the consignee. Then the crime has been accomplished which the statute seeks to punish, namely, obtaining by the shipper of transportation at rates which others in a similar business, who pay the regular rates, do not secure. p. 139.

Since the offense by the consignor under section 10(3) was carried out at the time of obtaining transportation, the court held that it was indictable in Ohio where the property had been tendered, and not in Texas where the transportation services had been completed upon delivery of the shipment to the consignee.

The Bureau, on the other hand, while recognizing the similarity between the language and purpose of the two statutes, points to an important variation. Under the earlier language of section 10(3), unlike section 16, the attempt to obtain transportation was not included as a separate offense. The statutory language "or attempt to obtain" was added to section 10(3) by the amended Interstate Commerce Act in 1910 (June 10, 1910, c. 309, 36 Stat. 549) and included in section 16 of the Act. Consequently, the court in *Davis* was not required to differentiate between the factors necessary to establish the "attempt" as opposed to the actual "obtaining" of transportation through fraudulent means. And this is not a distinction without merit. As the Bureau points out:

> [T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute. In *Commonwealth v. Alger* (7 Cush. (Mass.) 53-89), it was said that in putting a construction upon any statute every part must be regarded, and it must be so expounded, if practicable, as to give some effect to every part of it. So, in *People v. Burns* (5 Mich. 114). it was held that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it was reason for rejecting it. To the same effect is *Dearburn and Others v. Inhabitants of Brookline* (97 Mass. 466); and in *Gates v. Salmon* (35 Cal. 576) it was ruled that no words are to be treated as surplusage or as repetition.

Platt v. Union Pacific Railroad, 99 U.S. 48. 58-59 (1878).

In addition to the differences in the statutory language, the circumstances presented to the *Davis* court are dissimilar to those under consideration in this proceeding. The court, in addressing the "time of tender," commented:

> Then the fraudulent conduct of the shipper has borne its fruit, and every act and intent which constitutes the offense is complete. p. 139.

Moreover, the Supreme Court in *United States v. Union Manufacturing Co.*, 240 U.S. 605 (1916), reached an opposite result where the consignee was the wrongdoer. In distinguishing *Davis* and a similar case, *In re Belknap*, 96 Fed. Rep. 614 (D.C. Ky. 1899), the Supreme Court stated:

> These cases are not in point with the present. In each of them the fraud was that of the consignor. Here it is the consignee and its agent against whom fraud is charged. (The fact that the consignee was also the consignor is of no significance, since the fraud alleged was in what it did as consignee.) There the fraud inhered in the making of the contract of carriage; here it had to do with the liquidation of the amount payable for freight at destination. p. 609.

The Court also noted that *Davis* "arose under the [Interstate Commerce] Act as it stood before the amendment of 1910" and did not apply its decision, which was governed by the Act after the 1910 amendment, to the facts in *Davis*:

> We are not called upon to either concede or question the propriety of this decision upon the facts that were there presented. General expressions contained in the opinion are of course to be interpreted in the light of those facts. *supra*.

In this proceeding, while the misrepresentations occurred prior to the transportation of the cargo, these same representations were made on behalf of the consignee—the party responsible for the payment of the ocean freight charges for the four shipments. The dock receipts reflect that the consignee was the party responsible for the payment. The distinction is that the benefit derived from the misdescription was accomplished at the time the consignee rendered payment of the freight charges. The factual presentation here differs from those under consideration by the courts and also relied upon by the Respondents. Those cases—by and large—were either decided prior to the amendment to section 10(3) in 1910 or presented considerations unlike those ultimately controlling the disposition of this proceeding.[8] Clearly, the considered violation of section 16 here relates to the language employed in the statute, i.e., "to obtain transportation" and is not limited to the "attempt to obtain transportation" at rates or charges which would otherwise be applicable. Accordingly, it is found that the five-year statute of limitations contained in section 32 would apply from the date when the

[8] For example, *In Re Belknap, supra; Armour Packing Co. v. United States*, 209 U.S. 56 (1908); *United States v. Saluloff Bros.*, 79 F. 2d 846 (2nd Cir. 1935).

violations occurred or, in this proceeding, it would be at the time of payment of the ocean freight charges in September 1975.

Respondents also presented numerous arguments in support of their position including the language used by the Commission in its Order and the claim that the "inordinate delay in the initiation of this proceeding" merits "dismissal" of the investigation.

As to the former, Respondents consider that the Commission recognized in its Order the date of tender as the controlling date in determining the period for the application of the statute of limitations. Respondents claim that the Order concludes that the statute had run on all but four shipments and cites each shipment by reference to the bill of lading dates—a date generally recognized in the industry as the date of tender of the goods by the shipper. As stated by the Respondents:

> What the Commission apparently did not recognize in its August 1, 1980 Order, but which has now been recognized by the parties and stipulated by them, is that although the bill of lading is normally issued at the time of tender of the shipment, the carrier for the four shipments here involved, consistent with its tariff, relied upon a dock receipt, not a bill of lading, to evidence the tender of the shipments and for the provision to it by the shipper of all necessary information as to the content of the shipments required to prepare its billing documents.
>
> As the parties have further stipulated, the "bill of lading" relied upon by the FMC in its August 1, 1980 Order was issued subsequent to the tender by Seaway to Matson of the shipment and accompanying documentation. Since, as noted, the "bill of lading dates" upon which the Commission relied are merely the dates of processing by the Matson computer of the Audit File Copy and not the date of tender of the shipment, these dates are not evidence of the time of tender of the goods, nor are they evidence of the time the contract for carriage was made. Obviously, they lack any legal significance and are not determinative of whether the Commission has issued its Order with respect to the four shipments in compliance with Section 32(e) of the Act. As shown, it is the date of tender of these shipments which constitutes the act subject to Section 16, rather than another subsequent date including the one capriciously assigned by the carrier's computer system.
>
> Since all four shipments were tendered to Matson with the accompanying dock receipts on or prior to July 31, 1975, the requirement of Section 32(e) that the proceeding be instituted within five years of the date of the alleged violation has obviously not been satisfied. The charges against Seaway must therefore be dismissed and this proceeding discontinued.

Initially, it should be observed that the Order itself does not provide an in-depth explanation as to why the Commission concluded that the

statute had run on certain shipments and not on others. The Order does recite that Seaway tendered "a total of 65 shipments destined to itself in Hawaii" "between December 1, 1974 and August 5, 1975" and that the statute "has run on 61 of these shipments." In short, the Order neither specifies the dates those shipments were tendered nor the Commission's rationale for concluding that the statute had run as to those shipments. Whatever constituted the underlying reasons for the Commission's determination to exclude certain shipments from this investigation, any inquiry here concerning those shipments obviously would be outside the province of this Judge who is guided by the issues set forth in the Order and the record presented by the parties. Furthermore, the Commission in *Unapproved Sect. 15 Agt.—Coal to Japan/Korea,* 7 FMC 295 (1962), has stated:

> If the order [of investigation] was not as exact as it might have been, it is nevertheless to be remembered that it was an order for an administrative investigation and not a statement of charges in a penal action. It constituted adequate notice to the parties of the matters of fact and law under inquiry which is all that is required in this type of proceeding. p. 302.

Here, as the record developed by the parties reflects, the dates on which the ocean freight charges were paid were unknown at the time this proceeding was instituted and were obtained later from Matson. The failure of the Commission to reference the dates of payment as the determining factor in deciding which shipments were barred by the statute should not operate as a prohibition against the use of such a standard in assessing the violations presented here. What appears to be the case is that in instituting this proceeding, the Commission simply utilized the date appearing on the bills of lading and then provided the opportunity to the parties to develop the record and present their arguments for determination based upon that record. As the Bureau points out—"It would be strange indeed for the Commission to simply assume the date on the bill of lading (Audit File copy) was the date of delivery to the carrier. It would be stranger still if the Commission, without any discussion of its rationale contrary to its decision in *Hermann Ludwig* [9] chose to use the date of delivery to the carrier in order to calculate when the statute of limitations began to run."

Respondents claim that the Commission waited until "the last possible moment to initiate this proceeding," thereby precluding any "meaningful opportunity" to factually refute the allegations presented. Respondents point to the discarding of documents in the normal course of

[9] In *Hermann Ludwig, Inc. v. Waterman Steamship Corp.*, 20 F.M.C. 670 (1970), the Commission in deciding a proceeding under section 18(b)(3) stated ". . . either the date of delivery of the cargo to the carrier or the date of the on board bill of lading may properly serve as the start-up date for computing the 180-days statutory period of limitations." p. 671.

business and that employees have left Seaway's employ. They also point to the period of time which elapsed from when the Commission's staff first investigated the involved shipments in September 1975, less than two months after the shipments were made, the referral of the investigative file to Washington on June 30, 1976, and the institution of this proceeding more than four years after that date.

However, Respondents have failed to convincingly demonstrate how the passage of time involved here constitutes an unreasonable delay in a proceeding of this kind. "Absent proof of normal time necessary to dispose of a similar proceeding or of facts tending to show a dilatory attitude on the part of the Commission or its staff . . ." the defense of unreasonable delay is inadequate, *Federal Trade Commission v. Weingarten*, 336 F.2d 687, 691 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965) (where approximately three and one-half years was held not unreasonable).

Here the record reveals that despite repeated notifications that the Commission believed the shipments to have been misrated, Respondents otherwise disposed of records pertaining to these shipments "in the normal course of business." Furthermore, although all of the Transway employees that could be expected to testify are no longer in the employ of Seaway, the joint stipulation discloses that all could be located. The test of the accuracy of memories of these witnesses would be based upon the individuals involved and the refreshing of their recollection, if any, as to the involved shipments. In other words, more is needed than the claim of diminution of memory of witnesses.[10] Under these circumstances, Respondents have not demonstrated how the passage of time has seriously affected the presentation of their defense or resulted in any other specific identifiable harm. In the absence of proof of such injury, a defense of unreasonable delay has been disallowed because petitioner "failed completely to show how the Commission caused him prejudice by waiting [over six years from the time of the institution of the proceedings until issuing an order] to revoke his registration." See, *Irish v. Securities and Exchange Commission*, 367 F.2d 637, 639 (9th Cir., 1966).[11]

Moreover, it bears emphasis that the timing of litigation is matter within the discretion of the Commission. "The matter of time with

[10] See: *United States v. Fitzpatrick*, 437 F.2d 19 (2nd Cir.,1970); *United States v. Avalos*, 541 F.2d 1100, 1108 (5th Cir., 1976); *United States v. Mays*, 549 F.2d 670 (9th cir., 1977); and *United States v. Villano*, 529 F.2d 1046 (10th Cir., 1976), cited by the Bureau.

[11] The Court of Appeals, Third Circuit, has disallowed a defense of unreasonable delay alleged against a federal agency, stating:

> It is important to note that the delay of which [petitioner] complains did not prove prejudicial because of the mere passage of time or the occurrence of some independent circumstance. *Bucks County Cable T.V., Inc. v. United States*, 427 F.2d 438, 446 (1970).

See also Buotte v. United States, 350 F.2d 389, 394 (9th Cir., 1965).

regard to the issuance of a complaint [investigation] by an administrative body must necessarily be one of the matters within the discretion of that body." *Berkshire Employees Ass'n. v. National Labor Relations Board*, 121 F.2d 235, 237 (3d Cir., 1941). *Cf. Petroleum Exploration Commission, Inc. v. Public Service Commission*, 304 U.S. 209, 222 (1938).

Furthermore, the law is clear that the doctrine of laches or estoppel cannot be invoked against the Government acting in a sovereign capacity to protect the public interest.[12]

In addition to these arguments, the parties have devoted considerable discussion to Commission proceedings and court cases involving situations where the cause of action accrues at the time of payment. For instance, the Bureau points to *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U.S. 638 (1918), where the Supreme Court held, in a reparation case for overcharges under the then section 16 of the Interstate Commerce Act (49 U.S.C. 16), a cause of action "not to have accrued until payment has been made of the unreasonable charges." (p. 644.) However, it is recognized in actions involving the seeking of reparations, damages is an essential element and one not necessary to a consideration in a proceeding such as this. The Bureau also seeks support in cases involving conspiracy and common law fraud but again a major consideration in such cases is the showing of damages as contrasted to this proceeding which seeks the possible assessment of a civil penalty based upon an actionable public wrong. This is not to say that any analogy fails to exist in viewing the considerations contained in some Commission proceedings.

The Bureau points out that in proceedings involving 18(b)(3) of the Shipping Act, the statute of limitations begins to run at the time of payment of the freight. Section 18(b)(3) is similar to section 16 since both prohibit the attempt as well as the completed act. In other words, a carrier may violate section 18(b)(3) by charging or demanding or collecting or receiving "greater or less compensation. . . ." And the carrier may demand the compensation and never receive it; however, once having demanded and received the compensation, the date of payment is used for statute of limitations purposes. *Hellenic Lines, Ltd.—Violation of Section 16, (First) and 17*, 7 F.M.C. 673 (1964). Also a carrier may violate section 18(b)(3) when the shipper obtains transportation at less than the applicable rate in violation of section 16. *Pacific Far East Line, Inc. v. Federal Maritime Commission*, 410 F.2d 257 (D.C. Cir., 1969); *Pacific Far East Lines—Alleged Rebates to Foremost Dairies, Inc., Connell Brothers Co., Ltd. and Advance Mill Supply Corp.*, 11 FMC 357 (1968). Moreover, if the carrier pays a rebate, it violates both

[12] *Haight & Company, et al.*, 44 S.E.C. 481, 511 (1971);*Richard N. Cea*, 44 S.E.C. 8, 21 (1969); *Costello v. United States*, 365 U.S. 265, 281-284 (1961); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938).

18(b)(3) and section 16 Second, which prohibits carriers from allowing shippers to obtain transportation at less than the applicable rate by "false billing, false classification, false weighing, false report of weight or by any other unjust or unfair device or means." These principles lend support to the proposition that the time of the running of the statute should be followed in proceedings under either section of the Act.

Next the Bureau argues that Transway's failure to make a simple comparison of the shipping documents before making payment demonstrated that it was "plainly indifferent" to the requirements of section 16. The claim is that it was not the acts of the terminal managers in tendering the shipments to Matson that form the crux of obtaining transportation at less than otherwise applicable rates. Citing *Equality Plastics, Inc. and Leading Forwarders, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916*, 17 FMC 217 (1973); *Denial of Petition for Reconsideration, Equality Plastics*, No. 71-94, served May 16, 1974; and *Viking Importrade, Inc. and Bernard Lang & Co., Inc. Possible Violations of Section 16, First Paragraph, Shipping Act, 1916*, 18 FMC 1 (1974). To the Bureau, Transway was in possession of sufficient facts to raise a doubt as to the accuracy of the bills of lading description. And as the consignee responsible for paying the freight, Transway, unlike the customhouse brokers in *Viking* and *Equality Plastics*, had a duty to compare shipping documents in its possession.

It is true, as Respondents argue, that in neither *Viking* nor *Equality* did the Commission indicate that the Shipping Act is not violated until the occurrence of an act subsequent to the tender of the false bill. But what the Bureau is drawing attention to here is the clear failure on the part of Transway to adequately supervise the acts of its terminal operators, the notice that Transway had from the Commission of problems on alleged misdescriptions of cargo before the involved shipments, and the duty of Transway, under the circumstances, to review the documentation. Those are the acts subsequent to the tender present here and represent the type of transactions covered in the concern of the Commission in both proceedings.

The Bureau has also argued that, under the law of agency, the acts of Seaway's terminal managers would not be imputed to Seaway until it reviews the copies of their work product. The argument is that if the principal is charged with informing himself as to the acts of the agent through corporate records, and the agent must report his acts to the principal, a reasonable period of time must pass for this to occur before knowledge will be "imputed to the principal." Although Respondents and the Bureau present an abundance of citations in support of their respective positions, the issue is really resolved by a review of the factual considerations present here. Moreover, although certain principles of law can be excised from court and agency decisions, a fair

reading of those decisions relied upon ultimately are resolved under factual circumstances unlike those under consideration. In any event, as a starting point, this Commission has stated the principle controlling this proceeding, i.e., the principal is expected to exercise adequate supervision over the activities of the agent. *Hellenic Lines, Ltd.—Violation of Section 16 (First) and 17, supra.*

Transway's California terminal managers were responsible for the furnishing of copies of the container manifest and the profit/loss statement to Transway's corporate headquarters in Hawaii shortly after the shipments were tendered to the carrier. Transway had warned the managers not to misdescribe shipments under a threat of dismissal. By requiring the shipping documents from the managers, the corporate office had the means to insure that shipments were correctly described before paying the ocean freight. In so doing, Transway went beyond the simple warning to its agents which the Commission found ineffective in *Hellenic.*

The system Transway employed for ensuring that the documents were forwarded to the corporate headquarters prior to payment of the freight appeared sound. Thus, the terminal managers provided the corporate headquarters with all of the necessary documents relating to the four shipments. However, despite receiving the documents reflecting the cargo misdescriptions, the headquarters personnel failed to take any corrective action. The eventual payment of freight charges based upon the misdeclaration evidenced an endorsement by the principal of the acts of its agents. The obvious inference is that the corporate personnel condoned the misdescriptions evident on the face of the documents. On the other hand, if the Respondents' view was to prevail, Transway would be held to have violated section 16 only from the moment the managers tendered the shipments to Matson with the resulting effect of the running of the statute of limitations at that time. However, the Bureau correctly observes that "in a far flung industry such as the steamship industry one of the most effective means of policing the activities of agents which may be thousands of miles away, is by reviewing copies of their work product. In some cases it is the only effective means of control. Yet if the principal is guilty of a knowing and willful violation of the Shipping Act from the moment the agent acts, the incentive is removed for reviewing the agent's work. If the principal is already guilty there is no reason whatsoever to take corrective action. To the contrary, the principal has an incentive to conceal the acts of the agent." A review of this record clearly supports the view espoused by the Bureau over that of Respondents.

Section 16 imposes a civil penalty "of not more than $5,000 for each offense." The Bureau urges that Seaway [13] be assessed the maximum penalty on each of the four shipments for a total of $20,000.

Although only four shipments are in issue, the joint stipulation indicates that they are among a total of fifty-six shipments Seaway admitted were misrated. The amounts involve a total of $2,202.04 in underfreightments at Oakland and $4,869.92 at Los Angeles. The record is silent as to whether these amounts were repaid; but, as to the four under investigation, Seaway has paid the corrected freight on only one shipment (#615429). As far as any possible mitigating circumstances, Respondents have indicated that "Seaway has sold its non-vessel operating common carrier operation and is no longer engaged in any such activities. In these circumstances, it would find it economically prohibitive to defend itself in any oral hearing on this matter."

This record fails to reflect a showing of any appreciable contrition or even a display of a good faith effort by Seaway to comply with the requirements of the Act. The record is also silent as to an accurate portrayal of the current financial circumstances of Seaway beyond the intimations of Respondents' counsel. But what does emerge from this record is that Seaway has profited from the activities engaged in for at least three of the four shipments. In my view, the regulatory purposes in assessing penalties here are served by imposing the maximum penalty on each shipment for a total of $20,000.

ULTIMATE FINDINGS

Upon consideration of all the evidence of record, this Administrative Law Judge ultimately finds and concludes:

(1) That Respondent Seaway Distribution Corporation violated section 16, Initial Paragraph, by knowingly and willfully misdeclaring the contents and/or the weight or cube of four shipments in order to obtain transportation at less than the applicable rate; and

(2) Penalties in the amount of $20,000 should be assessed against Respondent Seaway Distribution Corporation for the violations of section 16, Initial Paragraph.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

[13] No shipments by Certified are involved in this proceeding.