FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 844

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF AQUATECH MARKETING, LTD.

A newly filed commodity rate may become immediately effective under 46 C.F.R. 536.10(a)(4), where a preexisting higher-rated "Cargo, N.O.S." rate would be otherwise applicable.

A corrective tariff reflecting an intervening rate increase meets the tariff filing requirements of section 18(b)(3) of the Shipping Act, 1916, where the commodity was transported after the rate increase became effective.

Applicant for a waiver of freight charges has met the requirements of section 18(b)(3).

The Initial Decision is reversed and the waiver application is granted.

Frank A. Fleischer for Applicant.

REPORT AND ORDER

March 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 is before the Commission upon Sea-Land Service, Inc.'s Exceptions to Administrative Law Judge William Beasley Harris' Initial Decision, which denied Sea-Land's application for waiver of freight charges for failure to meet the requirements of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)) [1] and Rule 92 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92).[2]

BACKGROUND

On April 12, 1981, an intermodal shipment of "Whirlpool baths, Jacuzzi Tubs" was transported by Sea-Land from Tampa, Florida to Felixstowe, England and rated at $97.00M as "Sauna Spas, Fiberglass." Sea-Land now seeks to apply the rate for "Baths, Whirlpool or Jacuzzi Tubs", at $50.00M, which was filed April 21, 1981, to become effective the following day. The $50.00 rate reflects an April 1, 1981 7% general

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[1] Section 18(b)(3) provides that the Commission may permit a waiver or refund of freight charges when there has been a clerical or administrative error in the tariff or an inadvertent error in failing to file a new tariff, provided, *inter alia*, that the carrier or conference has, prior to filing its application, filed a new tariff with the Commission setting forth the rate on which the refund or waiver would be based.

[2] Rule 92 generally parallels section 18(b)(3), but specifies that the Commission must have received an "effective tariff" setting forth the corrected rate.

rate increase from a $46.50M rate which, through an inadvertent administrative error, was never published in Sea-Land's tariff.

The Presiding Officer denied Sea-Land's waiver application. Because the $50.00 rate sought to be applied was an increase from the $46.50 rate which had not been filed, he found that section 536.10(a)(2) of the Commission's tariff-filing regulations was applicable.[3] Apparently determining that the $50.00 rate was not effective because the tariff did not provide for 30 days' notice, he concluded that Sea-Land had failed to meet the requirements of Commission Rule 92.

Sea-Land alleges error in the Presiding Officer's conclusion that the $50.00 rate constituted an increase from the previously effective rate. Sea-Land argues that the previous rate was *not* $46.50, as stated by the Presiding Officer, because that rate was never filed. Because the previous effective rate was the higher-rated "Cargo N.O.S." rate, Sea-Land argues that the $50.00 rate constituted a reduction in cost to the shipper,[4] and could take effect immediately pursuant to section 536.10(a)(4). That section provides:

> (4) An amendment containing a rate on a specific commodity not previously named in a tariff which is a reduction or no change in cost to the shipper may become effective upon publication and filing; *Provided, however,* That (i) the tariff contains a "cargo, n.o.s.," or similar general cargo rate which would otherwise be applicable to the specific commodity, and (ii) the specific commodity rate is equal to or lower than the previously applicable general cargo rate.

46 C.F.R. 536.10(a)(4).

Sea-Land concludes that as both conditions (i) and (ii) are met here, the less-than-30-day effective date for the $50.00 rate was appropriate. Sea-Land therefore submits that the denial of its application on the ground that no "effective" tariff was on file within the meaning of Rule 92(a)(2) was erroneous.

DISCUSSION

Upon review of the record, the Commission finds erroneous the Presiding Officer's determination that the $50.00 rate could only become effective 30 days after filing. Because the tariff did contain a higher-rated "Cargo N.O.S." rate, the newly-filed $50.00 rate could have become effective immediately pursuant to section 536.10(a)(4).

[3] 46 C.F.R. 536.10(a)(2) provides that tariff amendments providing for new or increased rates may not, absent special Commission permission, become effective until 30 days after the date of publication and filing.

[4] Sea-Land alleges that it compounded its error by assessing the rate for Sauna Spas, Fiberglass to the shipment, rather than the Cargo, N.O.S. rate which was the properly applicable rate. Sea-Land states that it rated the shipment as Sauna Baths based on the description provided in the bill of lading prepared by the freight forwarder, and that the erroneous rating was not discovered until its present application was prepared.

Moreover, even if the $50.00 rate did need to be on file 30 days prior to becoming effective, it was not necessarily void almost 6 months later, when the special docket application was filed. Inadequate publication time may be ground for rejection of the tariff within the 30-day period, but unless it is actually rejected, the tariff is presumed to be lawful. Thus, the requirement that an "effective" tariff be submitted prior to the filing of the application appears to have been satisfied.

The issue arises, however, whether the $50.00 rate is applicable here, as it reflects an intervening rate increase. A similar situation arose in *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation*, 19 S.R.R. 1407 (1980). There, the carrier filed a corrective tariff incorporating the previously, inadvertently omitted tariff item at a rate which took into account an intervening rate increase. The Commission found that because the commodity was transported *after* the rate increase became effective, the carrier had in fact filed a corrective tariff upon which a refund could be based. The same principle applies in the instant proceeding, as the shipment took place after the general rate increase went into effect.[5]

Upon review of the record, the Commission is satisfied that Sea-Land has established that an inadvertent error as contemplated in section 18(b)(3) had occurred, and that an appropriate corrective tariff has been timely filed. The requirements for a waiver of freight charges have therefore been met.

THEREFORE, IT IS ORDERED, That the Exceptions of Sea-Land Service, Inc. are granted and the Initial Decision is reversed; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. is granted permission to waive for the benefit of Aquatech Marketing Ltd. a portion of freight charges in the amount of $2,818.33; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. publish the following notice in an appropriate place in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 844, that effective April 12, 1981, and continuing through April 22, 1981, inclusive, the rate on "Baths, Whirlpool or Jacuzzi Tubs: Minimum 50 CBM per house/house container" is $50.00M, and subject to all applicable rules, regulations, terms and conditions of this tariff. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the

[5] The Presiding Officer's reliance on the Commission's decision in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981), is misplaced. In the instant proceeding, section 536.10(a)(4) applies because, in addition to the corrective tariff, there is a higher-rated cargo N.O.S. rate which is otherwise applicable. In *Texas Turbo Jet*, there was no otherwise applicable rate, and the 30-day requirement of section 18(b)(2) of the Act and section 536.10(a)(2) therefore applied.

goods described which may have been shipped during the specified time.

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 728(I)

PPG INDUSTRIES, INC.

v.

ATLANTTRAFIK EXPRESS SERVICE

ORDER REFERRING PETITION FOR RECONSIDERATION TO THE OFFICE OF INFORMAL DOCKETS FOR FURTHER CONSIDERATION

March 15, 1982

PPG Industries, Inc. (PPG) initiated this proceeding by filing a complaint which alleges that it was overcharged by Atlanttrafik Express Service (AES) on several shipments of fibre glass yarn, roving and strand in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)). Settlement Officer Edgar T. Cole issued a decision in which he held for PPG and ordered AES to pay reparations in the amount of $2,994.93 plus interest. AES has now filed a Petition with the Commission requesting reconsideration of the Settlement Officer's decision.

Before a Petition for Reconsideration will be considered by the Commission, it must satisfy the requirements of Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.261). Although Rule 261 is unclear as to whether it applies to informal decisions,[1] the Commission believes that such an application would be inconsistent with the informal docket procedure in which the parties waive their right to file exceptions to the Settlement Officer's decision with the Commission. Therefore, the *Commission* will not consider the present petition but instead will refer it to the Office of Informal Dockets for its consideration and disposition.

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[1] Measures are presently being undertaken to clarify this rule.

THEREFORE, IT IS ORDERED, That AES' Petition for Reconsideration of the Initial Decision in Informal Docket No. 728(I) is referred to the Office of Informal Dockets.

By the Commission.[2]

(S) FRANCIS C. HURNEY
Secretary

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 858(I)

MINE SAFETY APPLIANCES COMPANY

v.

UNITED STATES LINES, INC.

ORDER REFERRING PETITION FOR RECONSIDERATION TO THE OFFICE OF INFORMAL DOCKETS FOR FURTHER CONSIDERATION

March 15, 1982

Mine Safety Appliances Company initiated this proceeding by filing a complaint which alleges that it was overcharged by United States Lines (USL) on a shipment of foam concentrate in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)). Settlement Officer Roland C. Murphy issued a decision in which he held for Mine Safety and ordered USL to pay reparations in the amount of $334.00 plus interest. USL has now filed a Petition with the Commission requesting reconsideration of the Settlement Officer's decision.

Before a Petition for Reconsideration will be considered by the Commission, it must satisfy the requirements of Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.261). Although Rule 261 is unclear as to whether it applies to informal decisions,[1] the Commission believes that such an application would be inconsistent with the informal docket procedure in which the parties waive their right to file exceptions to the Settlement Officer's decision with the Commission. Therefore, the *Commission* will not consider the present petition but instead will refer it to the Office of Informal Dockets for its consideration and disposition.

[1] Measures are presently being undertaken to clarify this rule.

THEREFORE, IT IS ORDERED, That USL's Petition for Reconsideration of the Initial Decision in Informal Docket No. 858(I) is referred to the Office of Informal Dockets.

By the Commission.[2]

(S) FRANCIS C. HURNEY
Secretary

[2] Commissioner Daschbach did not participate and issues the following separate opinion:
I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal 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. 71-29

BATON ROUGE MARINE CONTRACTORS, INCORPORATED

v.

CARGILL, INCORPORATED

ORDER REMANDING PROCEEDING

March 18, 1982

This proceeding was instituted as a result of a complaint filed by Baton Rouge Marine Contractors, Inc. (BARMA) against Cargill, Inc. on March 29, 1971, alleging that: (1) Cargill conditioned the use of Cargill's grain elevator terminal facilities at Baton Rouge, La. upon the payment of a per ton usage charge; (2) it was forced to sign an agreement to pay such charges; and (3) Cargill refused to load vessels which utilized stevedores that had not signed such an agreement. BARMA alleged that this practice violated sections 15, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 815, 816). Cargill on the other hand maintained that the charge was lawful and based upon actual use of its services and facilities.

On January 7, 1975, the Commission issued its first decision in this proceeding holding that the charge did not violate sections 15 or 16 of the Act but was unlawful under section 17 of the Act. *Baton Rouge Marine Contractors v. Cargill, Inc.,* 18 F.M.C. 140 (1975) ("Cargill I"). The Commission found that Cargill had failed to establish a reasonable relationship between the benefits obtained by the use of its facilities by stevedores and the level of the charge imposed on them. The proceeding was, accordingly, remanded to the Administrative Law Judge for further hearings and a determination of what would constitute a "proper allocation of services and facilities benefits to stevedores." This decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit as based on a reasonable interpretation of section 17 under the *Volkswagenwerk* standard.[1]

[1] *Volkswagenwerk v. FMC,* 390 U.S. 261 (1968). *Cargill, Inc. v. F.M.C.,* 530 F.2d 1062 (D.C. Cir. 1976). On remand from the Commission in "Cargill I", the Administrative Law Judge held that Cargill had failed to justify the charge and that the proper level of charge could not be determined on the record before him. 17 S.R.R. 1407. On exception, the Commission again remanded the proceeding with instructions to arrive at a proper charge based upon an allocation of relative benefits derived from the use of the facilities by stevedores. *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.,* 20 F.M.C. 570 (1978) ("Cargill II"). On remand from the Commission in "Cargill II", the Administrative

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The "Cargill III" decision was reversed by the United States Court of Appeals for the District of Columbia on May 4, 1981. *Baton Rouge Marine Contractors, Inc. v. F.M.C.*, 655 F.2d 1210 (D.C. Cir. 1981). The Court held that the record failed to support the determination that a reasonable costs/benefits relationship existed. It noted that the Commission had particularly failed to adequately explain the general decline in the profits of stevedores after the advent of automation at the terminal facility. The Court explained that under the *Volkswagenwerk* standards the Commission may not allow a charge on stevedores in disproportion to costs allocated to others who reap equal or greater benefits from such automation. The Court also determined that the so-called "prevailing practices" standard of reasonableness utilized by the Commission departed from the standards of *Volkswagenwerk*, that the Commission had not justified such departure from past standards under the Shipping Act and, that in any event, the Commission had insufficient evidence before it upon which to base a determination of operative free market forces.[2] The proceeding was remanded to the Commission for further proceedings consistent with the Court's opinion.

On November 18, 1981, the Commission issued an Order requesting BARMA and Cargill to submit comments on how they wished to proceed in light of the Court's decision. Both parties have responded.

POSITIONS OF THE PARTIES

BARMA urges the Commission to find that Cargill's charge is an unreasonable practice under section 17 of the Shipping Act, 1916 and to prohibit its collection. It submits that Cargill has repeatedly failed to justify the charge and that the charge cannot be justified by the "prevailing practices" at unregulated elevators.

Cargill believes the matter should be referred to an administrative law judge for further hearings in order to allow it to produce the evidence of record found absent by the Court. Cargill also seeks an opportunity to explain how the Baton Rouge elevator is distinguishable from those addressed in prior Commission cases under the *Volkswagenwerk* standard.

DISCUSSION

In light of the recent decision of the Court of Appeals vacating the Commission's last Order in this proceeding, further hearings on remand

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Law Judge found that Cargill had failed to justify the charge. 18 S.R.R. 435. On exception to that decision, the Commission reversed and concluded that Cargill's charge had been justified under section 17. The Commission found that both a reasonable costs/benefits allocation had been established under *Volkswagenwerk* and that Cargill had shown that the level of the charge was the product of competitive market forces. *Baton Rouge Marine Contractors v. Cargill, Inc.*, 21 F.M.C. 968 (1979) ("Cargill III").

[2] The Commission was also found to have improperly relied upon an offer of proof in concluding that the charge on stevedores was a "prevailing practice" at competing grain elevators.

appear to be necessary. The question before the Commission at this juncture is what standard of reasonableness will be applied to the stevedore charge in question in the proceeding on remand. This determination will also clarify the evidentiary issues that will be the subject of any further hearing.

The traditional test of reasonableness of terminal charges has been whether the charge reflects a fair allocation of terminal costs based on the comparative benefits derived by the charged party's actual use of the terminal facility. *Pacific Northwest Tidewater Elevators Ass'n v. F.M.C.,* 11 F.M.C. 369 (1968). This test has been upheld as a reasonable interpretation of the ultimate standard of reasonableness under section 17, *i.e.,* that the charge levied be reasonably related to the service rendered. *Volkswagenwerk v. F.M.C., supra.* It is the standard which the Commission applied in "Cargill I" but deviated from in "Cargill III" in favor of a "prevailing practices" test. Because of the difficulties the Commission perceives in resolving the Court's requirements with respect to the "prevailing practices" test, the Commission has determined not to utilize that test in this proceeding, but rather to return to the traditional comparative costs/benefits standard of reasonableness enunciated in *Volkswagenwerk* and *Pacific Northwest Tidewater Elevators.*

In "Cargill I" the Commission determined that although some charge on stevedores was justified, Cargill had failed to establish the reasonableness of all the specific costs/benefits elements which it alleged supported the charge. 18 F.M.C. at 161-163. Therefore, in the remand hearing, Cargill must address this deficiency.[3]

The Commission has heretofore found in "Cargill I" that some charge was justified on the basis of certain benefit elements established by Cargill. This finding was not challenged by BARMA nor altered by the Court. The items found to be reasonably assessed against stevedores were the allocations of the costs of various utilities, overhead expenses and trimming machines. 18 F.M.C. at 163.[4] Cargill need not relitigate these benefits and costs, and the burden of disproving the validity of these elements at this time will be on BARMA.

However, the validity of the other benefit items allegedly justifying the charge has not yet been adequately shown. Cargill must establish that stevedores receive some measurable benefit from its automated shipping gallery. Although the Commission recognized that stevedores might benefit from the grain dock and wharf and clean-up and liaison services, albeit not to the extent alleged by Cargill, the benefit derived

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[3] These evidentiary burdens must be borne by Cargill because the effect of the Court of Appeals decision vacating the Commission's "Cargill III" Order was to reinstate the "Cargill I" decision, wherein it was determined that Cargill's charge on stevedores violated section 17. Moreover, because *Volkswagenwerk* requires a cost-based justification of terminal charges, the party in possession of such data should produce such evidence and establish its reliability.

[4] These may be reasonably adjusted for inflation in the remand hearing.

from the automated shipping gallery, if any, has yet to be adequately substantiated.

Cargill must also demonstrate that its allocation of related costs to any benefits established is reasonable. This must be accomplished by allocating the cost of each functional area of the terminal to each user thereof in a reasonable proportion to the relative benefits derived therefrom. This applies not only to the costs of the automated shipping gallery but to the grain dock and wharf, clean-up costs and liaison service costs as well. Cargill's existing evidence of record relating to those latter items is based upon either unreasonable or deficient benefit assessments. Cargill is not precluded from alleging additional cost/benefit elements but, of course, it bears the burden of establishing their existence.

THEREFORE, IT IS ORDERED, That this proceeding is reopened and remanded to the Chief Administrative Law Judge for further hearings consistent with this Order.

IT IS FURTHER ORDERED, That the following issues shall be addressed and resolved in the remanded proceeding:

1. Do stevedores receive a benefit from their use of the automated shipping gallery at the Cargill grain terminal facility at Baton Rouge?
2. If a benefit to stevedores resulting from their use of any functional area of Cargill's grain terminal facility is shown, is Cargill's allocation of the costs of each functional area reasonably related to such benefit, giving due consideration to the relative benefit that other users of such facilities receive?

IT IS FURTHER ORDERED, That the burden of proof as to the reasonableness of the charge on stevedores at the Baton Rouge terminal is upon Cargill in this remand proceeding.

IT IS FURTHER ORDERED, That Cargill shall be permitted to present any form of evidence which reasonably relates to the issues of this remand proceeding and the Administrative Law Judge shall liberally construe such issues so as to permit the maximum development of a record for decision in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-49

AGREEMENT NO. 10387

NOTICE

March 22, 1982

Notice is given that no appeal has been taken to the February 11, 1982 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. 81-49
AGREEMENT NO. 10387

Ralph M. Pais of Graham & James for proponents of Agreement No. 10387.

Alan J. Jacobson, Stuart James, John Robert Ewers, Director, Bureau of Hearings and Field Operations, and *Joseph B. Slunt,* Chief, Office of Hearing Counsel, for Hearing Counsel.

NOTICE OF (1) PROPONENTS WITHDRAWAL OF AGREEMENT
NO. 10387 FROM COMMISSION CONSIDERATION
AND (2) DISCONTINUANCE OF PROCEEDING

Finalized March 22, 1982

On Thursday, February 4, 1982, counsel for proponents of Agreement No. 10387 telephoned the Presiding Administrative Law Judge to find out what ruling had been made of the motion of Hearing Counsel for the Presiding Administrative Law Judge to reconsider his denial on January 13, 1982, of the proponents' motion for modification of the procedural schedule. (The ruling denying the motion had been made February 1, 1982, and sent to the printing plant for duplication. However, inadvertently it was not served until February 8, 1982.) The Judge advised counsel of the ruling.

Hearing Counsel in a letter dated and received February 8, 1982, stated:

> Dear Judge Harris:
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> Re: FMC No. 81-49—Status Report
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> On February 5, 1981, counsel for Proponents in the above referenced proceeding notified Hearing Counsel that Proponents had decided to withdraw Agreement No. 10387 from Commission consideration. In other words, they are no longer seeking Commission approval of Agreement No. 10387. Counsel for Proponents further advised Hearing Counsel that Proponents would seek discontinuance of this proceeding in light of their decision to withdraw the agreement. On February 8, 1982, counsel for Proponents advised Hearing Counsel that Proponents' withdrawal has been mailed to the Commission.
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> Hearing Counsel concur with Proponents that upon withdrawal of Agreement No. 10387, this proceeding should be discontinued. As the only issued [sic] ordered by the Commission to be determined is whether the agreement should be approved,

disapproved or modified, withdrawal of the agreement eliminates the subject matter of this proceeding. Accordingly, Hearing Counsel urge the presiding Administrative Law Judge to discontinue this proceeding.

Respectfully submitted,
JOHN ROBERT EWERS, DIRECTOR
Bureau of Hearings and Field Operations
(S) JOSEPH B. SLUNT, CHIEF
Office of Hearing Counsel
(S) ALAN J. JACOBSON
Hearing Counsel
(S) STUART JAMES
Hearing Counsel

The following letter from counsel for proponents, dated February 5, 1982, was received February 9, 1982:

Dear Judge Harris:

This will advise that the members of the Pacific/Australia-New Zealand Conference at their February 4, 1982 Owners' Meeting determined that they do not wish to proceed further with the referenced matter and have elected to withdraw the subject Agreement from further consideration. We therefore believe it now appropriate to discontinue the formal proceedings in this docket and respectfully request that you enter an appropriate order.

We wish to thank you for your understanding and assistance, especially at the December 9 Prehearing Conference in which you greatly facilitated discussions with the Commission Hearing Counsel.

Respectfully submitted,
(S) RALPH M. PAIS
GRAHAM & JAMES

Upon consideration of the record herein, and the above, it is *ordered,*

(A) Agreement No. 10387, at the election of the proponents thereof, is withdrawn from further consideration.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-58

MAIZENA S.A.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

NOTICE

March 22, 1982

Notice is given that no appeal has been taken to the February 11, 1982 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. 81-58

MAIZENA S.A.

v.

FLOTA MERCANTE GRANCOLOMBIANA S.A.

Complainant alleged that respondent overcharged it on a shipment of food processing machinery with a separate measuring tank, described as a "deodorizer" with various incidental parts on the bill of lading, by assessing a higher Cargo NOS rate. Respondent denied improperly rating the shipment. However, in order to avoid difficult and costly litigation, the parties agreed to settle on the basis of a $4,325.65 payment instead of the original claim of $9,077.55.

The settlement agreement comports with both general principles of law applicable to settlements and to the specific requirements established by the Commission in cases arising under section 18(b)(3) of the Shipping Act, 1916. It represents the considered judgment of the parties as to the value of the claim and the risks and expenses of continued litigation and is shown to be a bona fide attempt to resolve a controversy rather than to evade tariff law in a case in which there is a genuine dispute of fact and critical facts necessary to resolve the dispute are not reasonably ascertainable.

Henry Martin for complainant.

Renato Giallorenzi for respondent.

SETTLEMENT APPROVED; COMPLAINT DISMISSED

Finalized March 22, 1982

NORMAN D. KLINE, *Administrative Law Judge.*

Complainant, Maizena S.A., and respondent, Flota Mercante Grancolombiana S.A., have filed a joint motion requesting approval of a settlement agreement and dismissal of the complaint. In support of their motion, the parties have attached the text of their settlement agreement, a joint affidavit attesting to the *bona fides* of the settlement, a detailed letter from complainant's representative explaining the reasons for the settlement, and a joint memorandum urging approval of the settlement on the basis of Commission precedent and established principles of law applicable to settlements. As more fully described below, I find that the settlement agreement comports with applicable standards of law and accordingly grant the motion.

The case began with the filing of a complaint which was served on September 24, 1981. Complainant, located in Cali, Colombia, is an affiliate of CPC International of Englewood Cliffs, New Jersey. Complainant alleged that respondent overcharged it on a shipment of food processing machinery which included an empty iron or steel tank by assessing the shipment a higher Cargo NOS rate rather than the rates applicable to food processing machinery and to empty tanks, in violation of section 18(b)(3) of the Shipping Act, 1916. Because of this alleged overcharge, complainant sought reparation in the amount of $9,077.55, the difference between total freight as calculated under the Cargo NOS rate and as calculated under the specific machinery and tank rates. The shipment allegedly consisted of three containers of these items which were carried under a bill of lading dated September 30, 1979, from Philadelphia, Pennsylvania, to Buenaventura, Colombia. Payment of the freight calculated under the Cargo NOS rate was made by complainant some time during October of 1979.

Respondent filed an answer denying most of the above allegations set forth in the complaint. However, respondent admitted that on the date specified it had carried a shipment of "1 used-semi-continuous girdler 3-tray deodorizer, including a dowtherm vaporizer, a measuring tank, shell drain tank, filter, aftercooler, charge pump, discharge pump with meters, control panel, instruments and controls, valves and fittings and anti-oxidant addition system." This description is essentially the description which had been entered on the bill of lading. According to complainant, respondent had relied upon that bill of lading description which, in respondent's opinion, required application of the Cargo NOS rate to the shipment.

Shortly after the filing of the answer, I was informed that the parties had decided to settle their controversy. The completion of the settlement and filing of the necessary documents were delayed for a while because of intervening illness. Ultimately, however, all necessary documents were filed on February 1, 1982.

THE NATURE OF THE SETTLEMENT

As described above, very simply, complainant had alleged that its shipment, which had been described on the bill of lading as a "used semi-continuous girdler 3-tray deodorizer" with various tanks, filters, pumps, etc., was in reality food processing machinery and also a steel measuring tank. Therefore, according to complainant, the shipment should have been rated under the specific commodity rates provided for food processing machinery [1] and for the steel measuring tank, which complainant believes should have been rated under the tariff rate

[1] Complainant claimed that the proper rate for the "deodorizer" was the rate shown in respondent's tariff for "Machinery or Machines, viz.: Food Canning or Processing," which takes a class rate amounting to $190 per ton. (See Atlantic & Gulf/West Coast of South America Conference, Freight Tariff F.M.C. No. 2, Original Page 216 and Original Page 76.)

for high pressure cylinders.[2] Since the Cargo NOS rate was $224 per 40 cu. feet as opposed to the machinery and cylinder rates of $190 and $108 per 40 cu. feet respectively, complainant was charged substantially higher freight by respondent, according to complainant, the sum of $9,077.55.

Under the terms of the settlement agreement, complainant agrees to withdraw its complaint in return for a payment of $4,325.65 by respondent.[3] Respondent does not admit that it violated law. If the agreement is disapproved by the Commission or approved on conditions which are unacceptable to either party, the agreement, by its terms, becomes null and void. In addition to the settlement agreement which the parties furnished in support of their joint motion, the parties have sworn in a joint affidavit that theirs is a reasonable commercial settlement and is not a device to obtain transportation at other than proper rates and charges or otherwise circumvent the requirements of law and that it represents a resolution of factual disputes which could not otherwise be resolved without further lengthy and costly litigation. In further support of these statements, complainant has provided more detailed explanation of the basis of the settlement. Thus, complainant explains that originally it had claimed that the shipment ought to have been rated in separate portions, one portion consisting of food processing machinery, the other portion consisting of an iron or steel tank. If these allegations were proven, it would perhaps justify use of two different rates under respondent's tariff, the rate for the machinery and that for the tank. However, complainant concedes that there is a problem of proof regarding the question of whether the tank should be considered as part of the machinery or as a separate commodity. Since the relevant shipping documents do not separate the tank from the remainder of the machinery, and since other documents indicate that the tank was meant for use with the machinery, complainant recognizes that it might not be able to prove that the tank portion of the shipment was entitled to separate rating under the tank or cylinder rate. In order to avoid costly and difficult litigation, complainant and respondent have settled by applying the rate for the food processing machinery ($190 per 40 cu. feet) to the entire shipment, in other words, by regarding the tank as a part of the machinery. On this basis, the amount of overcharge would be $4,325.65. Complainant states furthermore that it con-

[2] Complainant claimed that the proper rate for the alleged separate tank was the rate shown for "Tanks, S.U., viz.: High Pressure, Iron or Steel (as Cylinders)" which is published as the rate for "Cylinders, Empty, Iron or Steel, viz.: High Pressure, empty, loose or packed." The rate for this latter item is published as $108 per ton. (See tariff cited, Original Pages 316, 153, and 76.)

[3] The settlement agreement contains an obvious typographical error, stating that "Flota will pay to Maizena the sum of Four Thousand Three Hundred and Thirty-Five [sic] dollars and Sixty-Five cents ($4,325.65)." All other evidence and statements submitted, however, show that the amount of the settlement is $4,325.65, not $4,335.65.

siders this amount of settlement payment to be fair and reasonable, to be based upon an evaluation of the worth of the claim and a consideration of the risks of litigation. In a final memorandum submitted with their motion, the parties urge approval of their settlement agreement and rely upon the well-established principle of law which favors and encourages settlements that appear to be fair.

EVALUATION OF THE SETTLEMENT UNDER APPLICABLE PRINCIPLES OF LAW

It is well settled that both the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid. See *Old Ben Coal Company v. Sea-Land Service, Inc.,* 21 F.M.C. 505 (1978) (I.D. adopted by the Commission, December 29, 1978), and the many cases cited therein. See also Commission Rules 91 and 94, 46 C.F.R. 502.91 and 502.94, and the Administrative Procedure Act on which Rule 91 is based, 5 U.S.C. 554(c)(1).[4] The general policy favoring settlements is summarized in the following passage drawn from a recognized legal authority, which language was adopted by the Commission in the *Old Ben Coal Company* case, cited above, 21 F.M.C. at 512:

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy . . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims . . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the par-

[4] The APA, 5 U.S.C. 554(c)(1) provides:

> The agency shall give all interested parties opportunity for—
>
> (1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit;

The courts view this provision and its legislative history "as being of the 'greatest importance' to the functioning of the administrative process." *Pennsylvania Gas & Water Co. v. Federal Power Commission,* 463 F.2d 1242, 1247 (D.C. Cir. 1972). Congress encouraged agencies to make use of settlements and wished to advise private parties that "they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations." Senate Judiciary Committee, APA—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at 24.

ties to a controversy. 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976). (Footnote citations omitted.)

Consistent with these policies, the Commission has in recent years approved a wide variety of settlements and discontinued numerous complaint cases under various provisions of the Shipping Act, 1916. See list and description of settled cases recited in *Del Monte Corporation v. Matson Navigation Company,* 22 F.M.C. 365, (1979). As those cases show, it is possible to settle cases without admissions of violations of law and for amounts of reparation less than those originally sought in the complaint. Moreover, although there had been some doubt at one time whether the Commission would permit settlements in cases involving alleged overcharges under section 18(b)(3) absent findings of violations of that law, the Commission has held that settlements in such cases are indeed permissible provided that there is a showing that the settlement is *bona fide* and not a device for rebating. See *Organic Chemicals v. Atlanttrafik Express Service,* 18 SRR 1536a (1979); *Celanese Corporation, Inc. v. The Prudential Steamship Company,* 23 F.M.C. 1 (1980).

As explained in *Old Ben,* cited above, the Commission recognizes the advantages to settlements but exercises some judgment before approving them. Mainly the Commission is concerned that the settlement not contravene any law or public policy, for example, that it not be the result of fraud, duress, or mistake, that it not constitute a discriminatory device or consummate a desire to contravene tariff law embodied in section 18(b)(3) of the Shipping Act, 1916, and that if it falls under section 15, the settlement be filed for approval under that law and pertinent regulations. *Old Ben,* cited above, 21 F.M.C. at 513.

In considering settlements which parties submit with requests that their cases before the Commission be dismissed, the Commission has followed the traditional view that the settlement deserves approval if it avoids wasteful litigation and if it appears that the parties have correctly made an economical judgment that continued litigation would cost more to each side regardless of who ultimately prevailed on the merits than the amount of money which complainant had agreed to accept and respondent had agreed to pay in exchange for a release. *Old Ben,* cited above, 21 F.M.C. at 514. Since this is a settlement fashioned by the parties in a proceeding involving the tariff-adherence requirements of section 18(b)(3) of the Shipping Act, 1916, however, the Commission exercises special care to assure itself that the settlement is a legitimate attempt to avoid unnecessarily costly and wasteful litigation rather than a device to sanction rebating. To be assured of the *bona fides* of such cases, therefore, the Commission requires three things: (1) submission of the signed agreement; (2) an affidavit setting forth the reasons for the settlement and attesting to the fact that it is a *bona fide* attempt by the parties to terminate their controversy and not a device to circumvent tariff law; and (3) a showing that the complaint on its face presents a genuine dispute and that the facts critical to the resolution of the dispute are not reasonably ascertainable. See *Organic Chemicals v. Atlanttrafik Express Service,* cited above, 18 S.R.R. at 1539-1540; *Celanese Corporation, Inc. v. The Prudential Steamship Company,* cited above, 23 F.M.C. 1; *Tupperware Company v. Compania Sud-Americana de Vapores,* 24 F.M.C. 525 (1982). I find that the parties have shown that their settlement complies with both the general standards governing approvability of settlements as well as the particular conditions attached to settlements submitted in section 18(b)(3) cases.

The subject settlement appears to be reasonable and to represent the considered judgment of the parties. Complainant, although originally seeking $9,077.55 in reparation, realizes the difficulty of proving the basis for such an award, since complainant would have to show that the shipment consisted of food processing machinery plus a separate tank rather than an integrated machine and its parts. Evidence submitted with the original complaint suggests that the commodity described as a "deodorizer" on the bill of lading was in fact a food processing machine. However, if the case went to trial, the letter of the shipper which indicates this fact would probably be replaced by oral testimony and cross-examination. Furthermore, as complainant has acknowledged, the shipping documents presently submitted do not indicate that the measuring tank was a separate commodity as complainant had originally alleged rather than part of the machine.[5] It is readily apparent, therefore, that were this case to proceed to formal hearing, complainant would undoubtedly have to proffer oral testimony regarding the nature of the commodity which had been shipped more than two years ago before the date of the hearing and would, furthermore, have to prove whether the shipment did in fact partially consist of a separate tank which would be entitled to a different rate than that applicable to the food processing machinery, assuming complainant could prove that the so-called "deodorizer" with the various parts as described on the bill of lading was in fact a food processing machine. Since the shipping documents and packing list do not appear to show the tank separately from the rest of the alleged machinery, it is also obvious that evidence of the nature of this shipment is not readily available and that continuation of this litigation into trial and beyond would entail considerable expense to both parties. Under such circumstances, the agreement to settle upon $4,325.65 instead of attempting to prove the validity of the original

[5] Moreover, even if the tank were shown to be separate from the machinery, complainant would have to prove that it was a "high pressure" tank entitled to the rate on this type of tank which, under respondent's tariff, is shown as the rate for "Cylinders..." The problem here is that respondent's tariff also publishes rates for other types of "tanks," for example, "Iron or Steel, N.O.S. (other than stainless)...," "Iron or Steel, N.O.S. not Coated...," and "Stainless Steel, N.O.S."

claim of $9,077.55 appears to be a reasoned judgment by the parties that it is more economical to receive and pay this amount than to be vindicated after costly hearings and subsequent phases of litigation. Moreover, since the initial evidence submitted with the complaint shows that the "deodorizer" might well have been food processing machinery, settlement on the basis that the entire shipment consisted of such machinery with parts included does not appear to be unfounded. Accordingly, I find that the settlement agreement passes muster under the general principles of law applicable to settlements described above and in *Old Ben Coal Company v. Sea-Land Service, Inc.*, cited above, 21 F.M.C. at 512-515.

The settlement agreement also appears to comport with the specific requirements established by the Commission in *Organic Chemicals v. Atlanttrafik Express Service*, cited above, 18 SRR at 1539-1540, and such cases as *Celanese Corporation, Inc. v. The Prudential Steamship Company*, cited above, 23 F.M.C. 1; *Tupperware Company v. Compania Sud-Americana de Vapores*, cited above, 24 F.M.C. 525; and *Ellenville Handle Works, Inc. v. Far Eastern Shipping Company*, 23 F.M.C. 707 (1981). Thus, the parties have submitted their signed agreement, have filed an affidavit attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than applicable tariff rates in contravention of law, and have shown that the complaint on its face presents a genuine dispute and that the facts critical to the resolution of the dispute are not reasonably ascertainable. As I have discussed above, the dispute as to the nature of the shipment concerns whether the shipment, described as a "deodorizer" with various pumps, tanks, filters, etc., on the bill of lading, consisted of food processing machinery and furthermore, even if so, whether one of the parts was a so-called "high pressure" tank which was entitled to a separate rate for "cylinders." Resolution of these disputes could not be accomplished without difficult hearings and time-consuming cross-examination especially since it is not presently apparent that relevant shipping documents are probative as to the separate nature of the tank.

Accordingly, the settlement is approved and the complaint is dismissed. Within twenty (20) days after date of service of the Commission's Notice rendering this ruling administratively final, the parties shall effectuate the terms of the settlement agreement and file an affidavit with the Commission attesting to the effectuation of their settlement.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-37

MELAMINE CHEMICALS, INC.

v.

ATLANTIC CARGO SERVICES, ET AL.

NOTICE

March 26, 1982

Notice is given that no appeal has been taken to the February 16, 1982 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. 81-37

MELAMINE CHEMICALS, INC.

v.

ATLANTIC CARGO SERVICES, ET AL.

DISMISSAL OF PROCEEDING

Finalized March 26, 1982

By complaint Melamine Chemicals, Inc. charged respondents with violations of sections 15, 16, 17 and 18 of the Shipping Act because of the allegedly low inbound and high outbound rates on melamine which prevented complainant from competing with other producers of melamine both here and abroad.

Complainant now voluntarily dismisses (withdraws) its complaint against all respondents because of tariff adjustments made by them. Accordingly the proceeding is hereby dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-66

SOVEREIGN INTERNATIONAL CORP.

POSSIBLE VIOLATIONS OF SECTION 16, INITIAL PARAGRAPH, SHIPPING ACT, 1916

NOTICE

March 29, 1982

Notice is given that no exceptions have been filed to the February 19, 1982 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. 80-66
SOVEREIGN INTERNATIONAL CORP.
POSSIBLE VIOLATIONS OF SECTION 16, INITIAL PARAGRAPH, SHIPPING ACT, 1916

Respondent found to have violated section 16, initial paragraph of the Shipping Act, as amended, by obtaining or attempting to obtain, by unjust or unfair device or means, transportation by water for property at less than the rates and charges which would otherwise be applicable.

The record supports a finding that Respondent be assessed a civil penalty in the amount of $3,000.

Joel S. Sankel for Respondent.

John Robert Ewers, Aaron W. Reese and *Janet F. Katz* for the Bureau of Hearings and Field Operations.

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

Finalized March 29, 1982

This proceeding was initiated by the Commission's Order of Investigation and Hearing served September 26, 1980, to determine:

> (1) Whether or not Respondent violated section 16, initial paragraph, by obtaining or attempting to obtain, by unjust or unfair device or means, transportation by water for property at less than the rates and charges which would otherwise be applicable; 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.

Essentially, the Order recites that the Commission's General Counsel asserted a claim against Sovereign International Corp. (Sovereign) for receiving rebates from a common carrier by water in connection with the shipment of synthetic resin from New York to Iran during the period commencing on March 7, 1975, and continuing through December 19, 1975, and that Sovereign rejected the claim.

A prehearing conference was held on November 26, 1980, and various procedural orders were issued by this Judge. A hearing was held in New York City, New York, on April 16, 1981, and the Bureau of Hearings and Field Operations (Hearing Counsel) filed an Opening

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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).

Brief on June 8, Sovereign filed its brief on July 24, and Hearing Counsel filed its Reply Brief on August 10.[2] By way of summary, Hearing Counsel urges that Sovereign be found to have violated section 16, Initial Paragraph of the Shipping Act on eight occasions and that a civil penalty of $40,000 should be assessed. Respondent concludes that "the complaint against [it] has not been sustained as a matter of law." As demonstrated below, this Judge finds that Sovereign violated the applicable provision of the Shipping Act on eight occasions but would reduce the assessment of a civil penalty as urged by Hearing Counsel to $3,000.

FINDINGS OF FACT [3]

1. Sovereign was the exporter on eight shipments transported by Waterman Steamship Company (Waterman) to Iran during the period of November and December 1975. In each instance of these shipments, F.L. Kraemer and Company (F.L. Kraemer) acted as the freight forwarder. (Exs. 1A-1FF and Tr. 22-23.)

2. These shipments involved the transportation of synthetic resins and machinery and all were connected with a particular project. (Tr. 24.)

3. Sovereign needed a lower rate than that contained in the published tariff in order to compete with other suppliers in Europe and Japan. (Tr. 62-63.)

4. Sovereign asked F.L. Kraemer about obtaining these lower rates. (Tr. 62).

5. Mr. Nourollah Elghanayan is the vice president of Sovereign. (Tr. 61.)

6. Mr. Jacob Weisberg handled the Sovereign account at F.L. Kraemer. (Tr. 22.)

7. Both Mr. Weisberg and Mr. Elghanayan testified that sometime prior to 1974, they were present at a meeting at the offices of Sovereign at which Mr. Charles Boyle, a vice president of Waterman, was also present. (Tr. 23-24, 64.)

8. At this meeting, a lower rate was discussed for the items involved in the eight shipments. (Tr. 24, 64.)

9. Mr. Elghanayan and Mr. Boyle later had a discussion on the telephone concerning a lower rate for the movement of Sovereign's commodities. (Tr. 64.)

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[2] The Office of Environmental Analysis has determined that section 547.4(a)(22) of the Commission's "Procedures for Environmental Policy Analysis" applies to this proceeding and that "No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket." See memorandum to Secretary of the Commission dared September 30, 1980. No evidence or argument was raised concerning environmental impact consideration by the parties.

[3] The findings of fact are substantially adopted from the opening brief of Hearing Counsel. Respondent's submissions in this area total 13 in number and are essentially contained in those of Hearing Counsel. The differences lie primarily in the interpretation of these facts and argument which is treated elsewhere in this decision.

10. *Sovereign and Waterman agreed to a lower rate than that in the* tariff and soon after Sovereign began to ship with Waterman. (Tr. 64.)

11. Mr. Weisberg testified that all shipments handled by F.L. Kraemer were documented by a bill of lading. A clerk, whom he supervised, filled out the bill of lading. The bill was then sent to the carrier, Waterman, to be rated. (Tr. 25-26.)

12. Normally, a shipper pays the ocean freight charges within 15 days of receiving the invoice from F.L. Kraemer. (Tr. 55.)

13. The first shipment involved pumps as documented by a Waterman bill of lading dated December 10, 1975. The commodity was rated at $146.75 including the imposition of an additional surcharge of 80 percent. The total ocean freight charges for the shipment was $625.00. (Ex. 1-A, Tr. 26-27.)

14. The tariff rate for "Pumps, Power, N.O.S." is shown as $146.75 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-B, Tr. 27-28.)

15. The invoice dated December 11, 1975 issued by F.L. Kraemer to Sovereign for the shipment shows the ocean freight to be $625.00. (Ex. 1-C, Tr. 28.)

16. Sovereign did not pay when it received the invoice. (Tr. 66.)

17. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as $531.25. (Ex. 1-D, Tr. 28-29.)

18. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 29.)

19. Sovereign paid the amount of this "Corrected Bill" or invoice which reflected the agreed to rate. (Tr. 29.)

20. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of $652.00 and the $531.25 that Sovereign paid. (Tr. 29.)

21. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 29.)

22. The second shipment involved synthetic resin as documented by a Waterman bill of lading dated December 9, 1975. The commodity was rated at $120.75 including an additional surcharge of 80 percent. The total ocean freight charges was $1,744.24. (Ex. 1-E, Tr. 29-30.)

23. The tariff rate for "Resin, Synthetic, to Khorramshahr only" shows $120.75 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-F, Tr. 30-31.)

24. The invoice dated December 11, 1975 issued by F.L. Kraemer to Sovereign for the shipment reflected the ocean freight charges to be $1,482.64. (Ex. 1-G.)

25. Mr. Weisberg testified that this might be a mistake. (Tr. 31-32.)

26. Sovereign neither paid nor questioned this invoice when it was received. (Tr. 32, 66.)

27. F.L. Kraemer issued a "Corrected Bill" dated February 6, 1976 to Sovereign with the ocean freight charges stated as $963.00. (Ex. 1-H, Tr. 31.)

28. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 32.)

29. Sovereign paid the amount of this invoice which reflected the agreed to rate. (Tr. 32.)

30. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of $1,744.24 and the $963.00 that Sovereign paid. (Tr. 32.)

31. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 33.)

32. The third shipment involved synthetic resin as documented by a Waterman bill of lading dated December 9, 1975. The commodity was rated at $120.75 including an additional surcharge of 80 percent. The total ocean freight charges were $1,700.77. (Ex. 1-I, Tr. 33.)

33. The tariff rate for "Resin, Synthetic to Knorramashahr only," shows $120.75 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-J, Tr. 34.)

34. The invoice dated December 10, 1975, issued by F.L. Kraemer to Sovereign for the shipment reflects the ocean freight charges as $1,700.77. (Ex. 1-K.)

35. Sovereign did not pay when it received this invoice. (Tr. 66.)

36. F.L. Kraemer issued a "Corrected Bill" dated February 2, 1976, to Sovereign with ocean freight stated as $939.00. (Ex. 1-L, Tr. 35.)

37. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 35.)

38. Sovereign paid the amount of this invoice which reflected the agreed to rate. (Tr. 35, 69.)

39. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight charges of $1,700.77 and the $939.00 that Sovereign would pay. (Tr. 35.)

40. When F.L. Kraemer received the checks from Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 35.)

41. The fourth shipment involved boxes of transition joints as documented by a Waterman bill of lading dated December 10, 1975. The commodity was rated at $134.00 including an additional surcharge of 80 percent. The total ocean freight charges were assessed at $307.53. (Ex. 1-M.)

42. The tariff rate for "Pipe Fittings, Boxed" shows $134.00 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-N, Tr. 36.)

43. The invoice dated December 11, 1975, issued by F.L. Kraemer to Sovereign for this shipment showed the ocean freight to be $307.53. (Ex. 1-0.)

44. Sovereign did not pay when it received this invoice. (Tr. 66.)

45. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as $261.41. (Ex. 1-P, Tr. 37.)

46. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 37.)

47. Sovereign paid the amount of this invoice which reflected the agreed to rate. (Tr. 37, 69.)

48. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of $307.53 and the $261.41 that Sovereign paid. (Tr. 37.)

49. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 37.)

50. The fifth shipment involved boxed solder wire as documented by a Waterman bill of lading dated December 9, 1975. The commodity was rated at $135.75 including an additional surcharge of 80 percent. The total ocean freight charges assessed were $61.09. (Ex. 1-Q, Tr. 37.)

51. The tariff rate for "Solder" shows $135.75 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-R, Tr. 38.)

52. The invoice dated December 10, 1975, issued by F.L. Kraemer to Sovereign for this shipment showed the ocean freight to be $61.09. (Ex. 1-S.)

53. Sovereign did not pay when it received this invoice. (Tr. 66.)

54. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as $51.24. (Ex. 1-T, Tr. 38.)

55. This was the agreed to rate with Waterman for Sovereign's shipments. (Tr. 38.)

56. Sovereign paid the amount of this invoice which reflected the agreed rate. (Tr. 38, 69.)

57. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of $61.09 and the $51.24 that Sovereign paid. (Tr. 38.)

58. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 38.)

59. The sixth shipment involved cylinders—argon gas documented by a Waterman bill of lading dated November 19, 1975. This commodity was rated at $175.00 with an additional surcharge of 80 percent. The total ocean freight was $1,844.15. (Ex. 1-U, Tr. 39.)

60. The tariff rate for "Cargo, N.O.S.—Non-Hazardous, Item No. 215" shows $175.00 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-V, Tr. 39.)

61. The invoice dated December 16, 1975, issued by F.L. Kraemer to Sovereign for this shipment showed the ocean freight to be $1,844.15. (Ex. 1-W.)

62. Sovereign did not pay when it received this invoice. (Tr. 66.)

63. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as $1,567.55. (Ex. 1-X, Tr. 40.)

64. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 40.)

65. Sovereign paid the amount of this invoice which reflected the agreed rate. (Tr. 69.)

66. Waterman issued a check to F.L. Kreamer for the difference between the correct ocean freight of $1,844.15 and the $1,567.55 that Sovereign paid. (Tr. 40.)

67. When F.L. Kraemer received the checks; from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 40.)

68. The seventh shipment involved boxed machinery parts documented by a Waterman bill of lading dated December 9, 1975. The commodity was rated at $156.25 with an additional surcharge of 80 percent. The total ocean freight was $274.21. (Ex. 1-Y, Tr. 40-41.)

69. The tariff rate for "Machines and Machinery and Parts Thereof, N.O.S." shows $156.25 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-2, Tr. 41.)

70. The invoice dated December 10, 1975, issued by F.L. Kraemer to Sovereign for this shipment shows the ocean freight to be $274.21. (Ex. 1-AA, Tr. 41.)

71. Sovereign did not pay when it received this invoice. (Tr. 66.)

72. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as $233.11. (Ex. 1-BB.)

73. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 42.)

74. Sovereign paid the amount of this invoice which reflected the agreed rate. (Tr. 44, 69.)

75. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of $274.21 and the $233.11 that Sovereign paid. (Tr. 42.)

76. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 42.)

77. The eighth shipment involved boxed condensing units documented by a Waterman bill of lading dated December 19, 1975. The commodity was rated at $156.25 with an additional surcharge of 80 percent. The total ocean freight was $1,083.59. (Ex. 1-CC, Tr. 42-43.)

78. The tariff rate for "Machines and Machinery and Parts Thereof, N.O.S. INDUSTRIAL: Item No. 565" shows $156.25 (Ex. 1-DD, Tr. 43.)

79. The invoice dated January 2, 1976, issued by F.L. Kraemer to Sovereign for this shipment showed the ocean freight to be $1,083.59. (Ex. 1-EE, Tr. 43.)

80. Sovereign did not pay when it received this invoice. (Tr. 66.)

81. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as $627.00 (Ex. 1-FF, Tr. 43.)

82. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 44.)

83. Sovereign paid the amount of this invoice which reflected the agreed rate. (Tr. 44, 69.)

84. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of $1,083.59 and the $627.00 that Sovereign paid.

85. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 44.)

86. Sovereign had used F.L. Kraemer, as represented by Mr. Weisberg, as its forwarder for thirty years. (Tr. 62.)

87. The usual procedure when a shipper used F.L. Kraemer was that the carrier billed the forwarder for the ocean freight. (Tr. 54.)

88. Sovereign never received a bill from the carrier directly when it used F.L. Kraemer as its forwarder. (Tr. 54.)

89. Mr. Weisberg testified that F.L. Kraemer always supplied shippers with a copy of the bill of lading for the shipment with the original freight figures. (Tr. 54.)

90. Sovereign always received a copy of the bill of lading from F.L. Kraemer for all shipments. (Tr. 55, 67.)

91. The secretary at Sovereign would review all the invoices from F.L. Kraemer when they arrived. The secretary knew what the agreed rate was for that shipment because it was noted in the shipment file. (Tr. 69.)

92. When the first bill came, the secretary did not bring it to Mr. Elghanayan if it did not correspond to the agreed rate as noted in the file. (Tr. 68, 69.)

93. When the second bill came and that corresponded with the agreed rate, the secretary prepared the check in payment and Mr. Elghanayan signed it. (Tr. 69.)

94. In no instance did Sovereign pay for a shipment until the invoice was received reflecting the agreement with Waterman as to what the charges should be. (Tr. 69-70.)

95. Sovereign is still in existence. (Tr. 71.)

96. Sovereign's sole business of shipping merchandise to Iran has ceased since the revolution in that country coupled with the existing restrictions imposed by the United States government. (Tr. 71-72.)

97. Given the opportunity, i.e., a counter-revolution and lifting of trade restrictions, Sovereign "hopes" to resume business with Iran. (Tr. 72, 73.)

SUMMARY OF THE EVIDENCE

During the period of November and December 1975, Sovereign exported eight shipments of resin and related machinery to Iran. Prior to this time frame it approached its freight forwarder F.L. Kraemer concerning obtaining lower ocean freight rates for shipments associated with a particular project in Iran. The stated purpose for Sovereign's seeking a rate lower than that contained in the published Conference tariffs was to compete with suppliers located in both Europe and Japan. A meeting was held at Sovereign's office which was attended by Mr. Elghanayan, Vice President of Sovereign, Mr. Weisberg, who handled the Sovereign account at the freight forwarding firm of F.L. Kraemer, and Mr. Charles Boyle, a Vice President of Waterman. The oral evidence in this proceeding was presented through the testimony of Messrs. Elghanayan and Weisberg. What basically emerges from the evidence is that: (1) at the meeting a lower freight rate was discussed; (2) Sovereign had a phone discussion with Waterman at a later date and Waterman agreed to a rate lower than that contained in its tariffs; and (3) soon thereafter Sovereign commenced utilizing Waterman for the shipments involved through F.L. Kraemer. The process used to achieve the underlying arrangements is well documented as to each shipment and further complemented by the testimony of the witnesses.

The shipments were normally documented by a bill of lading completed by a clerk in the office of F.L. Kraemer and then forwarded to Waterman for rating purpose. For the involved shipments the commodity was correctly rated on the bill of lading and Sovereign was sent an invoice for the correct amount and a copy of the bill of lading. Ordinarily a shipper was expected to pay the ocean freight charges incurred within a period of fifteen days after receipt of the invoice. Here, as clearly developed in the record, Sovereign never paid the amount due as reflected on the invoice.

The procedure developed here was simple—a corrected bill would be forwarded to Sovereign by F.L. Kraemer which reflected a lower amount for the charges involved. According to the testimony, this corrected bill (invoice) represented the "secret rate" which was previously agreed to by Waterman. The next steps were that Sovereign forwarded a check to F.L. Kraemer for this amount and Waterman would forward a check to F.L. Kraemer for the difference between the correct amount of ocean freight charges and what Sovereign had paid.

And finally, F.L. Kraemer would then pay the full amount of ocean freight to Waterman.

The record also reflects that it was Sovereign's practice to note the agreed rate with Waterman in its files so that its secretary would know which invoice from F.L Kraemer was to be paid. The secretary would then prepare the check for the invoice that corresponded with the agreed rate for Mr. Elghanayan's signature. Sovereign admitted that it would only pay an invoice for these shipments reflecting the agreed to or lower rate. Moreover, when a shipper utilized the services of F.L. Kraemer as a forwarder, the carrier always billed the forwarder for the ocean freight. And Sovereign had used F.L. Kraemer for thirty years and had never received a bill from the carrier for ocean freight. However, Sovereign would receive a copy of the rated bill of lading from F.L. Kraemer.

POSITION OF THE PARTIES

Hearing Counsel contends that: (1) the evidence reflects a violation by Sovereign of section 16, Initial Paragraph; (2) Sovereign knowingly participated in a scheme to transport its commodities at rates less than Waterman's applicable tariffs; (3) Sovereign acted "knowingly and wilfully"; (4) the "device or means" used was "unjust or unfair"; and, (5) Sovereign should be assessed civil penalties in the maximum amount, i.e., $40,000.

On the other hand, Sovereign's brief largely focuses upon the activities of Waterman and F.L. Kraemer. It contends that the testimony "might establish a rebate arrangement between Waterman and F.L. Kraemer but certainly not between Waterman and Sovereign." It contends that it has not violated section 16. And it also argues that: (1) Hearing Counsel failed to present proof of scienter on its part; (2) there has been no showing of "wilfullness or bad faith" on its part; (3) the proceeding "must be dismissed since it cannot be found to have acted knowingly or wilfully"; (4) there is no evidence "to what degree if any, [that] Sovereign profited"; and (5) it is not "able to pay the penalties requested." As shown below, the last contention is the most troublesome.

DISCUSSION AND CONCLUSIONS

Section 16, initial paragraph, of the Shipping Act, 1916, as amended (46 U.S.C. Sec. 815) 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 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 transpor-

> tation by water for property at less than the rate or charges which would otherwise be applicable. . . .

Basically, the facts establish that for each of the involved shipments Sovereign paid freight charges at less than the rates or charges otherwise applicable under Waterman's tariffs. It has also been demonstrated that although Sovereign was never paid directly by Waterman, this alone does not establish that no rebating situation would be inferred. And although Sovereign relies upon selected portions of the transcript to buttress its argument,[4] the totality of the evidence—both oral and the exhibits—substantiates the "device or means" used as contemplated within the provisions of the statute. What is controlling here—and one that is the necessary element to establish the violation—is that Sovereign, in fact, received transportation at less than the applicable rate. And despite the arguments raised to the contrary, the evidence overwhelmingly establishes that reality.

First, Sovereign repeatedly attempts to disavow any participation in the arrangement between F.L. Kraemer and Waterman concerning the system of invoices utilized. However, Sovereign has not shown that it resisted—questioned—or attempted to take any action other than one of participation in the arrangement. Such inaction commenced from the very first and continued to the last of the invoices involved in the shipments. On this record, Sovereign not only failed to show that it was not a participant in the involved activities, but what emerges is that it actually reaped the benefits flowing therefrom.

Second, while Sovereign contends that its initial meeting with Waterman was "innocent," what remains is that the meeting set in motion the eventual "means" by which it became the beneficiary of lesser freight charges than would otherwise be applicable. And the assertion that Sovereign did not "issue the bills of lading" does not operate as any precedential support to the controlling consideration that it received lesser freight rates.

Third, Sovereign contends that it has no knowledge that the tariff rate received was not the proper and lawful rate. But, on the other hand, a tariff filing constitutes constructive notice to the shipping community of the terms and applicable rates for the carriage of the commodities listed therein. Here, Sovereign received the notice of the proper tariff rate applicable to the shipments from F.L. Kraemer. Nor can Sovereign legitimately claim that it is a mere novice in the field of shipping freight since it utilized the services of F.L. Kraemer as its forwarder for ocean carriers for 30 years. It would strain one's credence to infer that such experience would not impart a knowledge that a shipper was required to pay the applicable rate contained in a pub-

[4] For example, See "Brief of Sovereign International Corporation," pp. 2-6 in particular.

lished tariff. And the actions of not paying the invoice which reflected the correct and applicable rate, but paying instead only the second or "corrected" invoice, belies the contention of Sovereign in this area.

Fourth, Sovereign asserts that there is a lack of evidence that it acted "willfully." Hearing Counsel, on brief, states, "wilfully . . . means purposely or obstinately and is designed to describe the attitude of a [party] who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." Citing: *Sea-Land Service v. Acme Fast Freight,* Docket No. 73-3, served August 14, 1978, 21 F.M.C. 194, *affirmed sub nom., Capital Transportation, Inc. v. United States,* 612 F.2d 1312 (D.C. Cir. 1979), and *St. Louis & S.F.R. Co. v. United States,* 169 Fed. 69 (9th Cir. 1908). It is Hearing Counsel's contention that Sovereign's actions were obviously covered under these definitions. I agree. Here, the established booking procedures set up at Sovereign for the payment of the freight charges was an intentional disregard of the contents of the statute. All other evidentiary factors considered, Sovereign's actions were indeed such as contemplated within section 16.

Fifth, Sovereign argues that it was in the position to have received rates lower than those obtained from Waterman simply by using other carriers. This argument, aside from being irrelevant to a determination here, is hardly persuasive. If lower rates were available from other carriers and if Sovereign was concerned with competition from other suppliers, arrangements to utilize non-conference carriers could have been made by its freight forwarder. Instead, the course chosen by Sovereign to obtain the lower rates is well documented and the determination to utilize Waterman's services is amply demonstrated on this record. Indeed, Sovereign's continual failure to pay the rate stated on the correct invoice evidences a conscious and deliberate practice in avoidance of paying the proper tariff rate.

As noted earlier, Sovereign suggests that: (1) the testimony "might" establish a rebate arrangement between Waterman and F.L. Kraemer; (2) the evidence establishes "only a possible rebate situation between Kraemer and Waterman"; (3) "Mr. Weisberg merely established a scheme which either he or Waterman had concocted between them"; (4) the "guilty parties herein appear to have been the Waterman Line and F.L. Kraemer"; and (5) the "scheme was only between Kraemer and Waterman and there is no evidence whatsoever to involve Sovereign." Obviously, Sovereign points its accusatory finger at the others and argues "[F]or reasons known only to the Bureau, it brought a proceeding against Sovereign and not F.L. Kraemer & Co." and concludes, "[C]onsiderable more deterrents and perhaps penalties and profit could be shown in a proceeding against F.L. Kraemer or Waterman lines but they are not parties to this action." The short answer to Sovereign's position is that the Commission's Order of Investigation is solely directed at its activities. Whatever course of action, if any, is to be instituted against F.L. Kraemer or Waterman is for this Commission to determine. Certainly, Hearing Counsel, as a party participant in this proceeding, has this record before it and is in the position to take such appropriate action as may be necessary. In any event, this Judge is guided by the Commission's Order and will remain within the issues raised therein.

Finally, Hearing Counsel urges that Sovereign be assessed the maximum penalty of $40,000. Hearing Counsel is correct in pointing out that the imposition of such penalties is to discourage the offender from repeating the act and to deter others from doing the same. And it is pointed out that Sovereign has not "presented any meaningful, probative evidence of a lack of assets with which to pay the penalty." On the other hand, while Sovereign remains in existence, it has not carried on any business since the revolution in Iran, since its sole business was with that country. Also, Mr. Elghanayan's brother, Mr. Habib Elghanayan, was executed by a revolutionary court in Iran because of Zionist activities. In addition, at the same time all of the family property and assets were confiscated. It would appear realistic that before Sovereign could resume trade in Iran, "one would have to assume a major change in the political and economic climate" in Iran. Moreover, the present trade restrictions would have to be lifted before its business could resume. In this proceeding—as Sovereign points out—"the total amount of rebates was approximately $2,400." And although Sovereign argues that the amount of rebates was received by F.L. Kraemer and not Sovereign—the record does show that the lower rates that it received would have placed it in a more favorable competitive posture than other shippers. In balancing these factors, this Judge is inclined to impose a civil penalty in the amount of $3,000 under the exceptional circumstances presented in this area.

Upon the evidence of record it is *found*:

(1) That Sovereign International Corp. violated section 16, initial paragraph of the Shipping Act, as amended; and

(2) That it be assessed a civil penalty in the amount of $3,000.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-83

GEMINI INTERNATIONAL COMPANY AND GEMINI TRANSPORTATION INC. - POSSIBLE VIOLATIONS OF SECTION 44(A)/GEMINI INTERNATIONAL CO. INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

DOCKET NO. 81-14

MARQUIS SURFACE CORPORATION - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1573

NOTICE

April 5, 1982

Notice is given that no exceptions have been filed to the February 22, 1982 initial decision in these proceedings 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. 80-83

GEMINI INTERNATIONAL CO. AND GEMINI TRANSPORTATION INC. - POSSIBLE VIOLATIONS OF SECTION 44(A)/GEMINI INTERNATIONAL CO.: INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION

DOCKET NO. 81-14

MARQUIS SURFACE CORPORATION INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1573

Settlement jointly proposed by the Bureau of Hearings and Field Operations and by the respondents, Gemini Transportation, Inc., and Marquis Surface Corporation approved; conditions of settlement include, among others, payment of $2,500 by Gemini and $2,500 by Marquis to compromise all civil penalty claims pursuant to saction 32(e) of the Shipping Act, 1916, 46 U.S.C. section 831(e).

Marquis' alleged violative conduct did not affect Marquis' performance of its duties as an independent ocean freight forwarder; revocation of Marquis' ocean freight forwarder license not warranted.

Carlos Rodriquez for respondents.

John Robert Ewers and *Stuart James* as Hearing Counsel.

REVIEW OF PROPOSED SETTLEMENT AND OF RECOMMENDATION FOR A FINDING OF FITNESS AND INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Finalized April 5, 1982

The present consolidated proceeding was instituted by two separate Orders of Investigation and Hearing. The matters were consolidated because of the similarity of facts and issues as per order served March 11, 1981. The matters under investigation are:

1. Whether Gemini International Co. and/or Gemini Transportation Inc. violated section 44(a) of the Shipping Act, 1916 (the Act), and section 510.3 of the Commission's General Order 4, by carrying on the business of forwarding without a license;

[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. Whether civil penalties should be assessed against Gemini International Co. and/or Gemini Transportation Inc. pursuant to section 32 of the Act for violations of section 44(a) of the Act, and section 510.3 of General Order 4, and, if so, the amount of any such penalty which should be imposed;

3. Whether Marquis Surface Corporation had violated section 510.23(a) of General Order 4 by permitting Gemini Transportation Inc. to use Marquis' name and license number to perform ocean freight forwarding services on two hundred ninety (290) shipments during the period January 3, 1977 to January 28, 1980;

4. Whether Marquis violated section 44(e) of the Act and section 510.24(e) of the General Order 4, by accepting ocean carrier compensation on the above cited shipments for which it did not perform the ocean freight forwarding service;

5. Whether civil penalties should be assessed against Marquis pursuant to section 32(e) of the Act, for violations of section 44(e) of the Act, and/or section 510.23(a) and 510.24(e) of General Order 4, and, if so, the amount of any such penalty which should be assessed; and,

6. Whether Marquis' independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Act for:

(a) willful violations of section 44(e) of the Act and/or sections 510.23(a) and 510.24(e) of General Order 4; or

(b) such conduct as the Commission shall find renders Marquis unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

No longer in issue is whether or not Gemini International Co. should be issued a license as an independent ocean freight forwarder, inasmuch as its application has been withdrawn. There is no evidence of violation of the Act by Gemini International Co., and accordingly, this decision will be concerned only with the other two respondents.

Prior to any hearing in the consolidated proceeding the parties agreed upon a settlement. The formal record herein includes a joint stipulation of the facts, the proposed settlement, and two memoranda, one by Hearing Counsel in support of the proposed settlement and with a recommendation in regard to the issue of the fitness of Marquis Surface Corporation to continue to be licensed as an independent ocean freight forwarder, and a similar memorandum by the respondents.

The parties are in agreement that Marquis should retain its ocean freight forwarder license, and that the proposed settlement should be approved.

The stipulated facts include the following matters.

Gemini Transportation Inc. (GTI) has operated for more than 10 years in Miami, Florida, as a cartage company. Gemini International

Company (GIC) was incorporated in Florida in 1978, and applied for an independent ocean freight forwarder license on November 24, 1973.

Both GTI and GIC are owned equally by Edward Waitz and Michael Zambri. They are president and vice-president of both corporations.

Marquis Surface Corporation is a New York based corporation which operates as an independent ocean freight forwarder pursuant to a license issued on August 5, 1974. Charles Manuelian is president of Marquis.

By a letter dated August 22, 1978, Zambri was warned that no ocean freight forwarding could be performed until a license was issued by the Commission. Zambri was warned again on December 5, 1978, in the letter acknowledging receipt of GIC's forwarder application.

At that time GIC was not involved with forwarding for Marquis, and Zambri and Weitz were under the impression that the forwarding being done on behalf of Marquis by GTI was as a branch office, with the approval of the Commission.

Effective September 1, 1976, Marquis opened a branch office at the Miami airport, and on November 15, 1976, the Commission, through its Office of Freight Forwarders (OFF), approved this branch office. The OFF was aware that the Marquis branch office in Miami would be managed by John S. Lonx, but it was not aware that Mr. Lonx was an employee of GTI and that Marquis intended to use GTI personnel to carry on Marquis' ocean freight forwarding functions in Miami, with the intent of making these GTI personnel simultaneously also employees of Marquis.

At that time Zambri did not know what the requirements were for an ocean freight forwarder branch office.

Mr. Lonx left GTI in the summer of 1977, at which time Joe Marcos performed the ocean freight forwarding for Marquis. When Mr. Marcos left, Zambri personally performed the ocean freight forwarding services on behalf of Marquis.

The Commission's OFF was not made aware of this branch office management change until February, 1980. However, ever since the branch office of Marquis was established at Miami, Zambri and Weitz had supervisory responsibilities over Marquis' forwarding operations in Miami.

Zambri disclosed to OFF in November, 1978, that GTI acted as an agent for Marquis, but stated that neither GIC nor any of its officers were associated with any ocean freight forwarders. Weitz and Zambri did not disclose GIC's indirect relationship with Marquis because Weitz and Zambri did not want Marquis to find out that GIC intended to get an ocean freight forwarder's license.

Zambri and Weitz believed that it was GTI that had the direct relationship with Marquis. Zambri and Weitz considered themselves as employees of Marquis in the operation of Marquis' branch office in Miami. When Zambri was asked by OFF whether GIC was engaged in unlicensed forwarding, Zambri responded that GIC was not.

On January 15, 1980, Zambri told a Commission investigator that there was no relationship between GTI and Marquis except that Marquis was operating a branch office on the premises of GTI.

During the period from January 3, 1977, through January 28, 1980, GTI performed ocean freight forwarding services on 290 ocean shipments. GTI billed Marquis for the documentation fee and for half of the ocean carrier's compensation and ocean forwarding fees for a total of $13,897.48.

The sum of $4,044.50 under "documentation fees" consisted mainly of sums which had been advanced for shippers in obtaining consular documents.

All forwarding functions were carried on by GTI personnel, GTI received the cargo, prepared the shipping documents, booked the space with the ocean carriers, prepared invoices to shippers using Marquis stationery, invoiced the carriers for compensation, and shared with Marquis the charges for freight forwarding and compensation.

GTI performed the ocean forwarding with its own employees, but in Zambri's opinion, these employees were working for Marquis and using Marquis' name.

None of GTI's employees were on Marquis' payroll, but in Zambri's opinion, the GTI personnel were supervised and controlled by Marquis.

On the other hand, Charles Manuelian, president of Marquis, stated that Marquis never had any employees in Miami, that GTI performed the forwarding services attributed to Marquis, that Marquis did not rent facilities in Miami, and that neither Zambri or Weitz were employees of Marquis.

On February 13, 1980, an investigator of the Commission met with Manuelian and Zambri, and advised them that Marquis had an ineffective branch office in Miami, that Marquis had no employees on its payroll in Miami, and that to continue forwarding would constitute unlawful forwarding. The investigator further advised that this matter could be corrected by taking a GTI employee from its payroll and by putting this employee on Marquis' payroll and by charging Marquis for rent at GTI's office in Miami.

On February 27, 1980, Manuelian informed the investigator in writing that arrangements were made on February 21, 1980, for Zambri to be put on Marquis' payroll and for Marquis to rent office space from GTI in Miami.

On February 17, 1981, GIC withdrew its application for a license as an ocean freight forwarder.

The GTI branch operation in Miami was set up and operated exclusively to forward for Marquis' clients. GTI had no ocean freight forwarder clients of its own.

Marquis supervised the branch office and its personnel visited the Miami branch office once a month for periods of three to five days. GTI personnel called Marquis daily to get directions on problems which arose. GTI dealt with Marquis rather than the shippers directly, until such time as GTI got to know a shipper well. GTI gave Marquis periodic reports on each phase of the forwarding.

A separate telephone and listing is maintained by Marquis in Miami, and is used for Marquis' forwarding of shipments. The telephone bill was paid by Marquis of New York. Advertising is carried and paid by Marquis. All billings for forwarding fees to shippers and compensation from carriers originate in New York in Marquis' office.

It was Marquis' intent that the GTI personnel who performed ocean freight forwarding services would be considered also as employees of Marquis.

The proposed settlement entered into between the Bureau of Investigation and Enforcement, now the Bureau of Hearings and Field Operations, and respondents GTI and Marquis requires GTI to pay a total of $2,500, plus interest at 12 percent. The penalty is to be paid in five installments of $500 each, the first installments payable 30 days following Commission approval of the proposed settlement, and the other four installments every six months following approval of the settlement, with the last installment payable two years following approval.

The proposed settlement requires Marquis to pay $2,500 within 30 days following Commission approval of the proposed settlement.

The settlement shall not serve as a bar or defense if there were to be other proceedings for conduct engaged in by GTI or Marquis, other than that reflected in the factual record submitted in the present proceeding. There are other provisions of the proposed settlement, including one that the agreement is not to be construed as an admission by either GTI or Marquis of the violations alleged in the Orders of Investigation and Hearing.

The settlement agreement avoided discovery disputes and the expense of an oral hearing. When Marquis opened its ocean freight forwarder branch office in Miami in 1976, it believed that it could properly do so by using GTI personnel to carry out the forwarding services. When informed that its branch office operation was not in compliance with the law, Marquis promptly corrected the situation by hiring a GTI employee as an employee of Marquis, and by renting office space from GTI to Marquis. There does not appear to have been any willful violation of the Shipping Act. Thus, there is a mitigating factor to be considered in determining any penalties. In addition, respondents fully cooperated with the investigator. In the circumstances *herein, the proposed settlement serves the public interest, and is fair to* the respondents. It is so concluded and found, and the proposed settlement agreement hereby is approved.

Revocation of the existing license of Marquis as an independent ocean freight forwarder would be an extreme sanction. Marquis has not evidenced an intent to engage in conduct violative of the Shipping Act. Rather, Marquis has taken steps to comply with the Act. Furthermore, Marquis' past conduct has not affected its performance of its duties as an independent ocean freight forwarder.

It further is concluded and found that revocation of Marquis' ocean freight forwarder license is not warranted.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-76

HEIDELBERG EASTERN, INC.

v.

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

NOTICE

April 7, 1982

Notice is given that no exceptions have been filed to the March 1, 1982 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. 80-76

HEIDELBERG EASTERN, INC.

v.

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

Container Overseas Agency, Inc. found to be an NVOCC subject to the Commission's jurisdiction.

Albert L. Lefkowitz for complainant.

Stephen L. Cohen for respondent Container Overseas Agency, Inc.

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

Finalized April 7, 1982

In response to a petition for reconsideration from Container Overseas Agency, Inc. (COA), the Commission remanded this proceeding to me for the purpose of determining whether COA was "indeed subject to the Shipping Act, 1916, in the context of this proceeding." [2]

By complaint served October 30, 1980, Heidelberg Eastern, Inc., alleged that respondents Container Oversea's Agency, Inc. (COA) and Container Overseas Services, Inc., had overcharged complainant on a shipment of photographic equipment to Denmark in violation of section 18(b)(3) of the Shipping Act, 1916. A Mr. Janison Foreman, Vice President of COS requested an extension of time to answer the complaint because he was having difficulty gathering the documents necessary for his defense to the complaint. On November 19, 1980, I granted the requested extension and directed respondent to consult with complainant in an effort to arrive at a stipulation of fact or documentary evidence which would allow the case to be handled under the shortened procedure in Subpart K of the Commission's Rules of Practice and Procedure. If either side felt that an evidentiary hearing was necessary, they were to state the specific facts to be proved at the hearing and give reasons why they could not be established by docu-

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

[2] The Commission noted that COA's petition for reconsideration was not timely filed and that in order to consider the arguments on the merits, it was necessary to waive the requirements of Rule 261. I mention this only because it is illustrative of COA's approach to this proceeding from its inception.

ments or affidavits, etc. The parties were to report to me by December 15, 1980, on the results of their efforts.

On December 22, 1980, counsel for complainant advised me that he had not heard from either COA or COS but that he saw no reason why the proceeding could not be submitted on documents alone. Additional telephone conversations were held with COS but to date I had heard nothing from respondent COA. On February 3, 1981, I received from COA a letter signed by a Mr. Peter F. Rondinone, Vice President of COA, which stated:

> Honorable Sir:
>
> Pursuant to the Commission's Order dated November 19, 1980, we would like to advise you that Container Overseas Agency, Inc., was nothing more than a receiving and stuffing agent for Container Overseas Services, Inc.

On February 5, 1981, Mr. Janison Foreman, by letter, advised:

> We have requested an affidavit from Peter Rondinone, an employee of Container Overseas Agency, Inc. who was manager at the time of shipment and he has indicated his willingness to sign it indicating that the rate as billed was agreed upon with the shipper for a house to house move and special tariff was filed covering the item. He indicated that he has shipping invoices listing the contents which we will forward to you upon our receipt.[3]
>
> We ask that we please be given time to defend ourselves because we feel that the complainant is in error.

On February 19, 1981, I issued an order setting up the following procedure for disposing of the case:

1. By March 16, 1981, complainant shall file a memorandum of facts and arguments separately in compliance with Rule 182.
2. By March 27, 1981, respondent shall file its answer to the complainant and its memorandum of facts and of arguments separately in compliance with Rule 183.
3. By April 10, 1981, complainant shall file its reply memorandum in compliance with Rule 184. . . .

On March 13, 1981, complainant filed a Memorandum of Facts and Points of Authority, but nothing further was heard from either of the respondents.

Taking the facts as stated in the complaint and evidenced in the supporting documents I issued an initial decision in which I found that

[3] This statement by Mr. Foreman indicates that COA had considerably more to do with the shipment than "receiving and stuffing." The clear inference to be drawn is that someone at COA, if not Mr. Rondinone, negotiated the rate under which the cargo moved.

COA and COS had violated section 18(b)(3) and awarded complainant reparations in the amount of $9,794.

No exceptions were filed to the decision, but the Commission reviewed it for the purpose of awarding interest. Subsequently, COS petitioned for reconsideration of the Commission's order adopting my initial decision and awarding interest. The Commission found that, "Because the subject of [COA's] petition is jurisdiction a challenge which cannot be dismissed as untimely, the Commission will entertain the petition." (Footnote omitted.) The Commission further concluded that the record before it was insufficient to make any determination on the jurisdictional issue raised and remanded the case to me "to determine whether [COA] is indeed subject to the Shipping Act, 1916, in the context of this proceeding."

Upon receiving the case on remand, I issued an order establishing the procedure for the disposition of the remand. I initially limited the proceeding to the submission of affidavits of fact and memoranda of law unless a party could show that an evidentiary hearing was necessary to "resolve a genuinely disputed issue of fact." The governing schedule was:

1. Container Overseas Agency, Inc. shall file its affidavit of fact and documentary evidence and opening memorandum of law by December 4, 1981.
2. Complainant Heidelberg Eastern Inc. shall file [its] affidavit of fact and reply memorandum of law by January 7, 1982.
3. Any motion for evidentiary hearing shall be filed only after the affidavits of fact have been examined by the parties for disputed issues of fact and shall be by January 22, 1982. *Any such motion must state each fact which is in dispute and the witness to be called at the hearing.* (Emphasis added.) [4]

In response to this order COA was content to submit an affidavit which is a mixture of asserted and unsupported fact and argument. The affiant is one Stephen L. Cohen, Esq., COA's attorney. Attorney Cohen stated that all matters contained in the affidavit are "upon information and belief except where another basis of knowledge is indicated." Attorney Cohen further states, "to date our office has yet to receive any pleadings in this matter other than the decision of the Administrative Law Judge . . . dated May 1, 1981." I am hard pressed to understand what is meant by this statement.[5] Certainly the record shows no complaint

[4] Notwithstanding what I considered to be the clearly established method for requesting an oral hearing, complainant's attorney's letter acknowledging receipt of the order requested an evidentiary hearing in lieu of the "modified procedure." Ostensibly, the request was made so that I could "determine the veracity" of some then unidentified witnesses.

[5] Strangely enough, Attorney Cohen obviously includes orders and decisions of the Commission and myself in his use of "pleadings."

by Attorney Cohen that a party failed to serve him once he became active in the proceeding. In any event it appears to be a gratuitous statement since it plays no further part in Attorney Cohen's "case" for the respondent, his client.

The substantive part of the Cohen affidavit provides:

> 3. Robert Meyers, President of Container Overseas Agency has informed me that any tariff posted at that time [November 24, 1978] was Container Overseas Services, Inc. . . . not Agencies. All rates posted at that time were Services, as is noted in the bill of lading which is the subject of the dispute.
>
> 4. Services did their own billing, Agency could not because it had never filed a tariff nor was it responsible for any rates or rate negotiations.
>
> 5. Robert Meyers has informed me that there was never a mutuality of shareholders or corporate officers between Agency and Services and the representation by Complainant that the two companies were alter egos is entirely spurious. . . .[6]

In response to the above Heidelberg submitted the affidavit of Stewart B. Hauser, President of D. Hauser Inc., which acted as freight forwarder for Heidelberg and arranged for the shipment of the containers in question. Mr. Hauser states that pursuant to instructions from Heidelberg he contacted COA which advised Mr. Hauser that it provided the following services: "(A) NVOCC [non-vessel operating common carrier], (B) Export packing, (C) Warehousing, (D) Trucking, (E) Consolidating container service, (F) LCL pier deliveries, (G) Traffic consultants." Mr. Hauser confirmed the booking with COA and provided it with the necessary documents. Mr. Hauser further states that he ". . . was led to believe by Agency (COA) that it was simply the booking and documentation segment of Services (COS)." Mr. Hauser was under the impression that COA and COS were "the same entity" and COA did nothing to correct that impression.

Attached to Mr. Hauser's affidavit is an advertisement appearing in *Shipping Digest and Transportation Telephone Tickler* published by the *Journal of Commerce*. The ad bears the heading "Container Overseas Agency, Inc." which is described as offering "Complete Export Services." Leading the list of services said to be offered is that of an "NVOCC." Thus by its own admission COA is an NVOCC and Mr. Hauser by affidavit states that he "confirmed the booking with COA" and it was to COA that he gave "the necessary documents."

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[6] Paragraph 5 also contains the following which is argument: "These two organizations were entirely separate and operated in entirely different areas. The rate making, almost by definition, was in the hands of Services, the only company with a filed tariff, the only company over whom the Commission has jurisdiction in an 18(b)(3) proceeding." As for the asserted lack of mutuality of shareholders or corporate officers not a single bit of documentary evidence was offered in support of this assertion.

At this point both sides had recourse to an oral hearing under paragraph 3 of my order of November 16, 1981. Neither side chose to avail itself of the opportunity. Thus, the case is presented to me for decision on the "evidence" presently in the record.[7]

Respondent COA's "evidence" consists of the single affidavit filed by its attorney Stephen L. Cohen. As noted Mr. Cohen's "factual" statements are based on "information and belief except where another basis of knowledge is indicated." The affidavit is an impermissible mixture of hearsay, argument [8] and conclusionary statements. The basis for two of the three relevant "factual" portions of the affidavit is Mr. Robert Meyers who "informed" Attorney Cohen of certain matters. No reason or explanation is offered as to why Mr. Meyers did not supply his own affidavit or why it was thought necessary or better to have the attorney in the case become the affiant. What we have here is a situation where the attorney in the case is testifying as a witness to facts crucial to the disposition of the crucial issue in the case.[9]

Under the federal rules of evidence attorneys are considered competent to testify, however, this practice is viewed with disfavor and is generally considered to be a breach of ethics. Weinstein, *Evidence,* pp. 601-32. The reason for this is that when, as here, the attorney offers testimony he is placed in the untenable position of having to argue his own credibility. Thus, the practice is discouraged. (See American Bar Association, Code of Professional Conduct, EC 5-9 and DR 5-101(B), following Canon 5 of the ABA Canons of Professional Ethics.) Exceptions to the preclusionary rule are sometimes allowed, but only if the attorney's testimony will (1) relate solely to an uncontested matter, or (2) will relate solely to a matter of formality and there is no reason to believe that evidence will be offered in opposition to the testimony. (DR 5-101(B)). Finally, an attorney will sometimes be permitted to give evidence if the evidence can be procured from no other source, *U.S. v. Fiorello,* 376 F2d 180, 185 (2nd Cir. 1967).[10]

The Cohen affidavit fails to meet any of the above criteria. The factual statements do not deal with uncontested matter; they do not concern formalities and no reason is given why Mr. Meyer could not have supplied his own affidavit. The remainder of the affidavit consists of unsupported conclusions and arguments. The affidavit was improperly submitted and is hereby rejected.

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[7] My experience in this case convinces me that it would be fruitless to offer the parties a further opportunity to adduce other evidence.

[8] I am of course aware that generally hearsay evidence is admissible in administrative proceedings but this situation is at least in my experience somewhat unique.

[9] The affidavit is nothing more or less than written testimony.

[10] The Commission's Rules of Practice and Procedure follow these principles and vest considerable discretion in the judge. See Docket No. 74-33, *Amendments to Rules of Practice and Procedure, Order of Discontinuance,* March 13, 1975, p. 3.

From the record before me (admittedly somewhat sparse) it is clear that both Heidelberg and its forwarder, D. Hauser, Inc. dealt with COA under the impression that it was considerably more than a mere receiving and stuffing agent. Mr. Hauser believed that COA and COS were the same entity and it was with COA that Mr. Hauser confirmed the booking of the cargo and it was to COA that Mr. Hauser submitted the documents necessary to the shipment of the cargo. Mr. Hauser, was told by COA that one of the services it performed was that of a non-vessel owning common carrier. Indeed, when Heidelberg questioned the rate applied to the shipment, it did so in three letters addressed to COS but it was COA that finally answered the third letter and rejected the claim.

The three Heidelberg letters questioning the rate on its shipment were addressed to "Container Overseas Services, Inc., 1601 Edgar Road, Building A, Linden, New Jersey." COA's reply had a letterhead reading Container Overseas Agency, Inc., 1601 West Edgar Road, Linden, New Jersey. Additionally, in rejecting the claim of Heidelberg, COA stated:

> According to attached tariff page of Container Overseas Services, Inc., Ocean Tariff No. 2, claims for ocean freight overcharge must be in writing in *this office* no later than six (6) months after date of booking. Therefore *your claim must be denied.* (Emphasis mine.)

From the foregoing one may quite reasonably infer that COA and COS occupied the same offices and that COA in addition to being the receiving and stuffing agent for COS was also empowered to reject claims for overcharge against COS.

The record also establishes that COA held itself out to the public as a non-vessel operating common carrier, first by its statements to Mr. Hauser and second by its advertisement in the *Shipping Digest and Transportation Telephone Tickler* published by the *Journal of Commerce.*[11] Respondent although it was afforded an opportunity to do so, offered nothing to rebut the evidence of complainant. The record further indicates that COA was a good deal more than a "receiving and stuffing agent" for COA on the shipment in question. Accordingly I conclude that Container Overseas Agency, Inc., is subject to the Commission's jurisdiction in the context of this proceeding.

(S) JOHN E. COGRAVE
Administrative Law Judge

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[11] COA attempts to make much of the argument that because it did not have a tariff it cannot be subject to the Commission's jurisdiction. It could well be that COA in fact was itself in violation of the Shipping Act for holding itself out as an NVOCC without a tariff on file.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1120(I)

SINGER PRODUCTS CO., INC.

v.

DELTA STEAMSHIP LINES, INC.

Applicant for a refund of freight charges has not met his burden of proving what was actually shipped. The Initial Decision is reversed and the refund application is denied.

REPORT AND ORDER

April 7, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman;* THOMAS F. MOAKLEY, *Vice Chairman;* JAMES JOSEPH CAREY, *Commissioner. Commissioners* JAMES V. DAY AND RICHARD J. DASCHBACH did not participate.)

This proceeding was instituted as a result of a complaint filed by Singer Products Co., Inc. alleging that it was overcharged by Delta Steamship Lines, Inc. on a shipment of batteries in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)). Settlement Officer D. Michael O'Rear held for Singer and ordered Delta to pay reparation in the amount of $1,014.75 plus interest. This proceeding is now before the Commission on its own motion to review the Settlement Officer's decision.

BACKGROUND

In November of 1979, Delta transported 77 pallets of "Auto Storage Battery Boxes" from New York, New York to Puerto Cabello, Venezuela. There is no dispute concerning how the shipment was rated under the tariff of the United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference - FMC 2 (the Tariff) of which Delta is a member. Singer claims, however, that Delta improperly failed to deduct a pallet allowance, as provided in the Tariff, in calculating the freight due.

Rule No. 40(F) of the Tariff provides that either the actual height of the pallet, but not more than 6 inches, or the actual weight of the pallet, but not more than 10% of the gross weight of the cargo and pallet, will be deducted in assessing freight charges [1] if, at time of

[1] In calculating the allowance on the basis of the height of the pallet, the allowance is in no case to exceed 10% of the over-all height of the entire package.

shipment, a dock receipt is furnished by the shipper which indicates the actual weight and measurements of the pallet. Which deduction is appropriate depends upon whether the freight charges are calculated on the basis of measurement or weight.

The dock receipt for the shipment at issue indicates its gross weight, the number of packages, the number of pallets and the measurements of the loaded pallets. It does not, however, indicate either the measurements or the weight of the pallets themselves.

On June 10, 1981, Singer filed a claim with Delta seeking an adjustment based upon the pallet allowance. Delta denied the claim on the basis of the 6 month time limitation for the filing of such claims which is set out in the Tariff. On July 13, 1981, Singer filed this complaint.

In support of its claim made to Delta and its complaint filed with the Commission, Singer submitted a packing list which, among other things, indicates the weight and measure of the *empty* pallets. Each is alleged to measure 6" X 43" X 45" and weigh 64 pounds.[2] The packing list was signed by the rate analyst who filed the complaint on behalf of Singer and was notarized. In response to a request from the Settlement Officer, Singer also submitted four notarized packing slips signed by the same rate analyst.

In his decision served February 2, 1982, the Settlement Officer concluded that Singer was entitled to the pallet allowance provided in Rule 40 and ordered Delta to pay Singer $1,014.75 plus interest at 12.6% accruing from the date on which the freight bill was paid. The Settlement Officer conceded that Singer had not submitted a dock receipt at the time of shipment indicating the weight and measurement of the empty pallets. Concluding that this requirement is "arbitrary", the Settlement Officer determined, however, that it could not bar recovery of an otherwise legitimate overcharge claim. He felt that Singer should not be penalized because of any negligence which occurred in the preparation of the shipping documents.

DISCUSSION

The Commission has carefully reviewed the Settlement Officer's decision and the record in the case. For reasons discussed below, it concludes that Singer is not entitled to reparation and that its claim must be denied.

In determining whether reparation should be awarded, the appropriate test is what claimant can establish was actually shipped, even if the actual shipment differed from the bill of lading description.[3] Where the

[2] On the basis of these figures, Singer seeks reparation in the amount of $1,086.71.

[3] *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 S.R.R. 16, 17 (1972); *Ocean Freight Consultants Inc. v. Italpacific Line*, 15 F.M.C. 314, 315 (1972); *Merck Sharp & Dohme (I.A.) Corp. v. Flota Mercante Grancolombiana, S.A.*, 18 F.M.C. 384, 387 (1975).

shipment has left the custody of the carrier, a shipper seeking reparation must indicate with reasonable certainty and definiteness the validity of his claim.[4] This has been characterized by the Commission as a heavy burden.[5]

There is no disagreement between Delta and Singer over what commodity was shipped. Delta believes, however, that because Singer failed to comply with Rule 40(F) of the Tariff, it is not entitled to a pallet allowance.

The Commission has generally held that even when a shipper has failed to comply with a tariff provision, it is still entitled to reparation if it proves what was actually shipped and corrects, with evidence introduced after shipment, the non-compliance with the tariff provision.[6] Because the required information was not provided in the dock receipt at the time of shipment, Singer must now prove the weight and measurements of the pallets used if it is to be entitled to reparation. The only proof offered by Singer consists of packing slips signed by the rate analyst who filed this complaint. There is no other corroboration.

An examination of the packing slips indicates that they are dated 1980, the year after the shipment was made, and were notarized in 1981, the year in which the claim was brought. The weight and measurements of the pallets indicated on the packing slips and packing list appear gratuitous [7] and included simply to support the claim. Finally, the packing slips indicate that 78 pallets were involved in the shipment while the packing list indicates that 77 pallets were shipped.

Because the record contains no other evidence as to the weight and measurements of the pallets themselves, and because the evidence presented is not adequate, the Commission concludes that Singer has not met its burden of proving what was actually shipped.

THEREFORE, IT IS ORDERED, That the Initial Decision in Informal Docket No. 1120(I) is reversed; and

IT IS FURTHER ORDERED, That Singer's application for reparation is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY,
Secretary

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[4] *Colgate Palmolive Peet Co. v. United Fruit Co.*, 11 S.R.R. 979, 981 (1970); *Ocean Freight Consultants v. Royal Netherlands Steamship Co.*, 17 F.M.C. 143, 144 (1973).

[5] *Id.* In later cases, the Commission stated that the shipper must prove by the preponderance of the evidence what was actually shipped.

[6] *Sun Co., Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. (1977); *Cities Service International, Inc. v. The Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976); *Union Carbide Corporation v. American and Australian Steamship Line*, 17 F.M.C. 177 (1973); *Abbott Laboratories v. Venezuelan Line*, 19 F.M.C. 426 (1977); *The Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V.*, 19 F.M.C. 431 (1977).

[7] Neither the packing slip nor the packing list calls for this information.

Commissioner Richard J. Daschbach issues the following 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. 81-1

UNIVERSAL TRANSCONTINENTAL CORPORATION AND J. S. STASS CO., DIVISION OF UNIVERSAL TRANSCONTINENTAL CORPORATION - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 394-R

Agreements providing for the payment of civil penalties in settlement of alleged violations of the Shipping Act, 1916 found fair and reasonable and approved by the Commission.

Respondent found fit to carry on the business of ocean freight forwarding.

Paul G. Kirchner for Universal Transcontinental Corporation and J. S. Stass, a Division of Universal Transcontinental Corp.

John Robert Ewers, Joseph B. Slunt and Stewart James for the Bureau of Hearings and Field Operations.

REPORT AND ORDER

April 16, 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 initiated by Order of Investigation and Hearing served January 5, 1981 to determine whether Universal Transcontinental Corporation/J. S. Stass Co., Division of Universal Transcontinental Corporation (UTC or Respondent) [1]: (1) violated sections 15 and 16, Initial Paragraph, Shipping Act, 1916 (46 U.S.C. 814, 815) by receiving non-tariffed freight forwarder compensation; (2) continues to qualify as an independent ocean freight forwarder because of its corporate relationship to an export shipper, Tropigas International Corporation; (3) violated section 16, Initial Paragraph, by collecting freight forwarder compensation on Tropigas' shipments; (4) should have its license suspended or revoked because it is no longer "fit" to carry on the business of forwarding; and (5) should be assessed civil penalties pursuant to section 32(e) of the Shipping Act, 1916 (46 U.S.C. 831(e)) for any violations of the Act found.

[1] The assets of J. S. Stass Co. were purchased by UTC in August of 1972. Stass was operated as a division of UTC until 1975, when it was phased out. Stass was not in existence during the period relevant to this proceeding.

During the course of the proceeding, Respondent and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel) submitted joint stipulations and two proposed settlement agreements under which UTC agreed to pay civil penalties totaling $67,000 for the violations alleged.

On August 19, 1981, Administrative Law Judge William Beasley Harris served his Initial Decision which: (1) approved, in part, the settlement agreements; (2) "terminated" the proceeding as to the fitness issue based on the settlement agreements; (3) found that UTC is shipper-connected by virtue of its corporate relationship with Tropigas and ordered UTC to divest itself of this relationship; [2] and (4) discontinued the proceeding upon UTC's payment of civil penalties and divestiture. The proceeding is now before the Commission on the Exceptions of UTC and Hearing Counsel to the Initial Decision.

BACKGROUND

The record before the Presiding Officer consisted of joint stipulations, uncontested affidavits and two settlement agreements, the essential parts of which are summarized below.

UTC and its predecessor company have been engaged in the business of forwarding since 1925. UTC is, and has always been, a wholly-owned subsidiary of Transway International Corporation. Transway is a holding company with interests in freight forwarding, marine transportation, truck trailer manufacturing, and the marketing and distribution of petroleum gas. Tropigas and Coordinated Caribbean Transport, Inc. (CCT), a Ro/Ro operator, are other Transway holdings.

Between January, 1976 and January, 1977, UTC received $127,640.48 in non-tariffed freight forwarder compensation from seven different carriers. UTC retained all of the non-tariffed compensation and reported it as ordinary income. UTC did not pass on this compensation to any of its shipper clients. UTC discontinued the practice of accepting such compensation on January 1, 1977.

UTC also handled 1721 shipments for Tropigas during the period January, 1976 to May, 1981, for which it was paid $30,494.45 in forwarder compensation. Between 1976 and 1981, UTC received in excess

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[2] The Initial Decision was served six days after section 1 of the Shipping Act, 1916 (46 U.S.C. 801) was amended by the Omnibus Budget Reconciliation Act, P.L. 97-35, 95 Stat. 752 (Budget Act), to remove the prohibition against the licensing of a freight forwarder which is shipper-connected. Prior to its amendment section 1 provided:

> An "independent ocean freight forwarder" is a person carrying on the business of forwarding who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

The Budget Act amended section 1 by deleting the two "nor" clauses. The Commission had construed section 1 as prohibiting a licensed independent freight forwarder from being owned by a company that also owned a shipper or consignee of shipments to foreign countries. *North American Van Lines*, 14 F.M.C. 215 (1971).

of $6.5 million in total brokerage payments on over 219,000 shipments. CCT carried 65% of Tropigas' shipments during this period. Since March of 1978, when an informal investigation of UTC was initiated, UTC has cooperated fully with the Commission's staff.

On May 15, 1981, UTC and Hearing Counsel submitted a settlement agreement disposing of the alleged violations of sections 15 and 16. Under the terms of that document, Respondent agreed to pay a civil penalty of $37,000 to avoid the expenses of litigation. Other pertinent provisions of the May 15 agreement are summarized below:

> (1) UTC agrees to review its operation and to make whatever adjustments are necessary to assure that it does not receive non-tariffed compensation. UTC's chief executive officer will submit an annual report to the Commission certifying that UTC has not received such compensation.
>
> This reporting requirement will terminate on June 1, 1983. UTC will also submit reports to the Commission as it may from time to time require concerning UTC's compliance with the terms of the settlement. (Paragraph 3).
>
> (2) UTC agrees to furnish copies of the settlement agreement and give notice of its terms and provisions to all of its directors, officers, and field managers. (Paragraph 4).
>
> (3) In the event of a change of law or other circumstances UTC may petition the Commission for a modification or mitigation of the agreement. (Paragraph 6).

On July 15, 1981, UTC and Hearing Counsel submitted a second settlement agreement disposing of the allegations regarding the shipper connection and UTC's receipt of forwarder compensation on Tropigas' shipments. In that agreement Respondent agreed to pay a civil penalty of $30,000 to avoid the expenses of litigation. Other pertinent provisions of the June 15 agreement are summarized below:

> (1) UTC agrees to sever, within 90 days of the Commission's approval, its affiliation with Tropigas. UTC may maintain its affiliation with Tropigas if, during the 90-day period, it has taken steps to insure that Tropigas or its foreign affiliates will no longer be a shipper or consignee or seller or purchaser of shipments to foreign countries as those terms are used in the definition of an independent ocean freight forwarder in section 1 of the Shipping Act, 1916. (Paragraph 3).
>
> (2) If section 1 of the Shipping Act, 1916 is amended within the 90-day period to remove the prohibition against "shipper connections," Paragraph 3 will not apply (Paragraph 4).
>
> (3) UTC agrees to take all necessary steps to cease handling shipments on behalf of Tropigas until such time as UTC severs its affiliation or there is a change of law. (Paragraph 5).
>
> (4) UTC's chief executive officer will submit an affidavit to the Commission detailing how UTC has complied with Para-

graphs 3, 4, and 5, above. If the Commission finds that UTC has failed to comply with these paragraphs, the Commission may: (a) require UTC to take such further steps as the Commission deems necessary; (b) revoke or suspend UTC's license; (c) take such other action as the Commission deems appropriate. If UTC fails to submit the required affidavits, its license would be suspended automatically. (Paragraph 6).

(5) UTC agrees to notify its directors and officers of the terms of the settlement agreement within 30 days following approval by the Commission. (Paragraph 8).

(6) UTC may petition the Commission if it believes there has been a change of law or other circumstances which would warrant modification or mitigation of this proposed settlement agreement. (Paragraph 10).

INITIAL DECISION

On the basis of UTC's admission that it was corporately affiliated with Tropigas, the Presiding Officer found that UTC no longer met the section 1 definition of an independent ocean freight forwarder. The Presiding Officer accordingly directed Respondent to divest itself of its shipper connection within 90 days.

With respect to the "fitness" issue, the Presiding Officer noted Hearing Counsel's recommendation "that UTC be found fit" and then approved the settlement agreements and terminated the proceeding as to that issue.

The Presiding Officer did not, however, approve the two settlement agreements in their entirety. He advised that he could not "consent to the inclusion in the record as fact" the following provisions of the May 15th Agreement:

(1) Paragraph 3 because it is ambiguous and does not provide for an immediate "stop and desist" from receiving non-tariffed compensation. The Presiding Officer viewed this provision as suggesting the extension of this litigation until June 1, 1983.

(2) Paragraph 4 because it raises the question whether UTC's directors have given counsel the authority to enter into the settlement.

(3) Paragraph 6 because it is ambiguous and *per se* unfair as it gives UTC a unilateral right of action.

The following provisions of the July 15 agreement were also "disapproved":

(1) Paragraph 3 because it allows UTC to maintain its affiliation with Tropigas for 90 days.

(2) The "change of law" provisions of Paragraphs 4 and 5 because they are "too nebulous".

(3) Paragraph 6 because it appears to allow an "extension of litigation".

(4) Paragraph 8 because it raises the question whether UTC's directors have given counsel the authority to enter into the settlement.

(5) Paragraph 10 because it is *per se* unfair since it gives UTC a unilateral right of action.

POSITIONS OF THE PARTIES

In their Exceptions, UTC and Hearing Counsel challenge the Presiding Officer's disapproval of portions of the settlement agreements. They argue that the Presiding Officer deleted fair, necessary, and unambiguous provisions which, to a large extent, formed the basis upon which the parties agreed to settle. It is noted that the non-tariffed compensation provisions are modeled after the settlement agreement which the Commission approved in *Behring International, Inc.—Independent Ocean Freight Forwarder License No. 910,* 23 F.M.C. 973 (1981). UTC and Hearing Counsel further point out that the reporting requirement provisions are generally standard in Commission settlement agreements and that these provisions would not, as the Presiding Officer found, "extend this litigation." Rather, these provisions are allegedly designed to aid the Commission in monitoring UTC's future activities. Finally, UTC and Hearing Counsel explain that the "change of law provisions," which the Presiding Officer disapproved as "nebulous," were included in anticipation of the enactment of the then-pending legislation removing the prohibition against shipper connections.

UTC also argues that the Presiding Officer erred in finding it to be shipper-connected. UTC contends that it never "admitted" such a connection and that there is no evidence of record to support the Presiding Officer's finding. UTC explains that although it conceded a corporate relationship with Tropigas, it held to the position that this relationship did not preclude it from qualifying as an independent ocean freight forwarder.

Hearing Counsel and UTC urge the Commission to find that UTC is fit to retain its freight forwarder license. They argue that there are sufficient mitigating factors, including UTC's cooperation in this investigation, to warrant such a finding.

DISCUSSION

The Commission will, for the reasons stated below, approve the settlement agreements as filed, vacate the Presiding Officer's finding of a prohibited shipper connection and find that UTC remains "fit" to be licensed as an independent ocean freight forwarder.

In determining whether to approve a proposed settlement agreement, the Commission engages in every presumption "which favors a finding that the agreement is fair, correct, and valid." [3] This does not mean, however, that the Commission will summarily accept a proffered settlement. The Commission has a responsibility to examine every agreement to ensure that the settlement contemplated does not violate any law or public policy and is free of fraud, duress, undue influence, or other defects which might make it unapprovable despite the strong policy of the law encouraging settlement.[4] Given the present record, there is no reason to believe that the two settlement agreements at issue here suffer from any of these deficiencies.

The two agreements are not only designed to aid the Commission's oversight of UTC's future activities, but also include appropriate provisions to ensure that UTC's corporate officers and operating managers are aware of the terms as well as the restrictions provided for in these agreements. In addition, the Commission believes that the agreements' "change of law provisions" are fair and reasonable given the existence of the then pending legislation amending section 1 of the Shipping Act, 1916. The May 15 and July 15 settlement agreements are therefore approved, as submitted, and the Presiding Officer's rulings to the contrary are reversed.

One of the other conclusions reached by the Presiding Officer is that UTC is "shipper-connected" and therefore must "divest itself and make all necessary changes of circumstance in its operations so as to avoid any appearance or possibility of shipper control." The Initial Decision does not clearly explain the basis for this finding. However, whatever the merits for the finding and divestiture order may be, they have been overtaken by the passage of the Budget Act amendment to section 1. That amendment removed shipper connections as a bar to licensing. Accordingly, the Presiding Officer's shipper connection finding and resultant divestiture order will be vacated.

Finally, there is no evidence in the record of this proceeding which would call into question Respondent's continued fitness to be licensed as an ocean freight forwarder. The compensation practices at issue have not, in this case, been held to constitute a violation of the Shipping Act, 1916 or any Commission rule. Moreover, there is no indication that UTC otherwise violated the Act by passing on any compensation received to its shipper-clients or by entering into any unapproved section 15 agreements with the involved carriers. Nor does the record indicate that Respondent engaged in any conduct inconsistent with its fiduciary responsibility to its shipper-clients. On the other hand, Respondent did terminate the practices prior to the institution of this

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[3] *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506 (1978); *Behring International, Inc.—Independent Ocean Freight Forwarder No. 910*, 23 F.M.C. 973 (1981); *Merck Sharp and Dohme International v. Atlantic Line*, 17 F.M.C. 244 (1973).

[4] *Ibid.*

proceeding and agreed to implement certain internal controls to preclude their reoccurrence. Accordingly, the Commission finds that UTC remains fit to be licensed as an independent ocean freight forwarder.

THEREFORE, IT IS ORDERED, That the Exceptions of UTC and Hearing Counsel are granted to the extent indicated above;

IT IS FURTHER ORDERED, That the May 15, 1981 and July 15, 1981 settlement agreements entered into between UTC and Hearing Counsel are approved as filed;

FURTHER, IT IS FURTHER ORDERED, That the Initial Decision served August 19, 1981 is reversed to the extent indicated above; and

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

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-63

ERICH H. TRENDEL - INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

NOTICE

April 19, 1982

Notice is given that no appeal has been taken to the March 12, 1982 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 order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-63

ERICH H. TRENDEL - INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

DISCONTINUANCE OF PROCEEDING

Finalized April 19, 1982

By letter dated February 26, 1982, to the Commission's Office of Freight Forwarders, notice was given of the withdrawal of the application of Erich H. Trendel for a license as an independent ocean freight forwarder. By "Notice of Discontinuance" (construed as a motion to discontinue) also dated February 26, 1982, discontinuance without prejudice was requested by counsel for Trendel.

Hearing Counsel do not object to the issuance of a ruling discontinuing the proceeding.

Accordingly, the subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-73

ARTHUR J. FRITZ & CO., INC.

v.

UNITED STATES ATLANTIC & GULF/ECUADOR FREIGHT CONFERENCE, ET AL.

NOTICE

April 23, 1982

Notice is given that no appeal has been taken to the March 17, 1982 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. 81-73

ARTHUR J. FRITZ & CO., INC.

v.

U.S. ATLANTIC & GULF/ECUADOR FREIGHT CONFERENCE AND U.S. FLORIDA/ECUADOR STEAMSHIP CONFERENCE, ET AL.

DISMISSAL OF PROCEEDING

Finalized April 23, 1982

Arthur J. Fritz & Co., Inc., by complaint, alleged that the respondents here had violated sections 15, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. 814, 815 and 816), by the publication and filing of certain tariff provisions which sought to impose upon Fritz and others certain obligations for the payment of freight charges. Respondents have now made a number of revisions which have removed complainant's objections and it now moves to withdraw its complaint.

Since the complainant no longer desires to pursue any remedy before the Commission and since he cannot be compelled to do so, the motion is hereby granted and the case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1126(I)

SINGER PRODUCTS CO., INC.

v.

DELTA STEAMSHIP LINES, INC.

Applicant for a refund of freight charges has not met his burden of proving what was actually shipped. The Initial Decision is reversed and the refund application is denied.

REPORT AND ORDER

April 27, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman;* THOMAS F. MOAKLEY, *Vice Chairman;* JAMES JOSEPH CAREY AND JAMES V. DAY, *Commissioners.* COMMISSIONER RICHARD J. DASCHBACH did not participate)

This proceeding was instituted as a result of a complaint filed by Singer Products Co., Inc. alleging that it was overcharged by Delta Steamship Lines, Inc. on a shipment of batteries in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)). Settlement Officer D. Michael O'Rear held for Singer and ordered Delta to pay reparation in the amount of $1,439.32 plus interest. This proceeding is now before the Commission on its own motion to review the Settlement Officer's decision.

BACKGROUND

By Bill of Lading dated May 23, 1980, Delta contracted with Singer to ship 78 pallets of Auto Storage Battery Boxes from New York, New York to Valparaiso, Chile. There is no dispute concerning how the shipment was rated under the tariff of the Atlantic & Gulf/West Coast of South America Conference SA-13-F.M.C. No. 2 (the Tariff) of which Delta is a member. Singer claims, however, that Delta improperly failed to deduct a pallet allowance, as provided in the Tariff, in calculating the freight due.

According to rule 40(D) of the Tariff, either the actual height of the pallet, but not more than six inches, or the actual weight of the pallet, but not more than 10% of the gross weight of the cargo and pallet, will be deducted in assessing freight charges [1] if, at the time of shipment,

[1] In calculating the allowance on the basis of the height of the pallet, the allowance is in no case to exceed 10% of the over-all height of the entire package.

the weight and measurement of the pallet are furnished by the shipper on the dock receipt and bill of lading. Which deduction is appropriate depends upon whether the freight charges are calculated on the basis of measurement or weight.

The Bill of Lading for the shipment indicates its gross weight, the number of packages and the number of pallets. The Dock Receipt contains the shipment's gross weight, the number of packages, the number of pallets and the measurements of the loaded pallets. Neither the Bill of Lading nor the Dock Receipt contains the weight and measurements of the pallets themselves.[2]

On June 1, 1981, Singer filed a claim with Delta seeking reparation based upon the pallet allowance. Delta denied the claim on the basis of the six-month time limitation set out in the Tariff and because, according to rule 40(F) of the Tariff, cargo mounted on skids is not eligible for a pallet allowance. On July 15, 1981, Singer filed a complaint with the Commission seeking the same reparation. In support of its complaint, Singer submitted a packing slip which, among other things, indicates the weight and measurements of the *empty* pallets. Each is alleged to weigh 64 pounds and measure 43" x 45" x 6".[3] The packing slip was signed by the rate analyst who filed the complaint and was notarized on July 15, 1981, by a New York Notary Public.

In his decision served February 8, 1982, Settlement Officer D. Michael O'Rear concluded that Singer was entitled to the pallet allowance provided in Rule 40 for 56 pallets used in the shipment. Noting that the Dock Receipt, unlike the Bill of Lading, indicates that 22 skids were involved in the shipment, the Settlement Officer decided that on the basis of Rule 40(F),[4] Singer was not entitled to a pallet allowance for that portion of the shipment described as skids. Delta was ordered to pay $1,439.32 plus interest at 12.5% accruing from the date on which the freight bill was paid.

The Settlement Officer conceded that Singer had not submitted either a Dock Receipt or Bill of Lading at the time of shipment indicating the weight and measurement of the pallets. Concluding that this requirement was "arbitrary," the Settlement Officer determined that it could not bar recovery of an otherwise legitimate overcharge claim. He felt that Singer should not be penalized because of any negligence which occurred in the preparation of the shipping documents.

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[2] The Dock Receipt indicates that the shipment consisted of 22 skids of cargo and 56 pallets, the Bill of Lading indicates that 78 pallets were shipped.

[3] On the basis of these figures, Singer determined that it was entitled to reparation of $1,480.00.

[4] Rule 40(F) says "Cargo mounted on skids shall not be considered to be pre-palletized."

DISCUSSION

The Commission has carefully reviewed the Settlement Officer's decision and the record in the case. For reasons discussed below and in reliance upon the recent disposition of Informal Docket No. 1120(I), *Singer Products Co., Inc. v Delta Steamship Lines, Inc.* (24 F.M.C. 907 (1982)), it concludes that Singer is not entitled to reparation and that its claim must be denied.

In determining whether reparation should be awarded, the appropriate test is what claimant can establish was actually shipped, even if the actual shipment differed from the bill of lading description.[5] Where the shipment has left the custody of the carrier, a shipper seeking reparation must indicate with reasonable certainty and definiteness the validity of his claim.[6] This has been characterized by the Commission as a heavy burden.[7]

There is no disagreement between Delta and Singer over what commodity was shipped. Delta believes, however, that because Singer failed to comply with Rule 40(D) of the Tariff, it is not entitled to a pallet allowance.

The Commission has generally held that even when a shipper has failed to comply with a tariff provision, it is still entitled to reparation if it proves what was actually shipped and corrects, with evidence introduced after shipment, the non-compliance with the tariff provision.[8] Because the required information was not provided in the dock receipt at the time of shipment, Singer must now prove the weight and measurements of the pallets used if it is to be entitled to reparation. The only proof offered by Singer consists of a packing slip signed by the rate analyst who filed this complaint. There is no other corroboration.

An examination of the packing slip indicates that it is dated 1980, the year in which the shipment was made, but that it was not notarized until 1981, the year in which the claim was brought. The weight and measurements of the pallets indicated on the packing slip appear gratuitous [9] and included simply to support the claim. Finally, the packing slip indicates that 56 pallets were involved in the shipment while the bill of lading indicates that 78 pallets were shipped.

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[5] *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 S.R.R. 16, 17 (1972); *Ocean Freight Consultants Inc. v. Italpacific Line*, 15 F.M.C. 314, 315 (1972); *Merck Sharp & Dohme (I.A.) Corp. v. Flota Mercante Grancolombiana, S.A.*, 18 F.M.C. 384, 387 (1975).

[6] *Colgate Palmolive Peet Co. v. United Fruit Co.*, 11 S.R.R. 979, 981 (1970); *Ocean Freight Consultants v. Royal Netherlands Steamship Co.*, 17 F.M.C. 143, 144 (1973).

[7] *Id.* In later cases, the Commission stated that the shipper must prove by the preponderance of the evidence what was actually shipped.

[8] *Sun Co., Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. (1977); *Cities Service International, Inc. v. The Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976); *Union Carbide Corporation v. American and Australian Steamship Line*, 17 F.M.C. 177 (1973); *Abbott Laboratories v. Venezuelan Line*, 19 F.M.C. 426 (1977); *The Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V.*, 19 F.M.C. 431 (1977).

[9] The packing slip does not call for this information.

Because the record contains no other evidence as to the weight and measurements of the pallets themselves, and because the evidence presented is not adequate, the Commission concludes that Singer has not met its burden of proving what was actually shipped.

THEREFORE, IT IS ORDERED, That the Initial Decision in Informal Docket No. 1126(I) is reversed; and

IT IS FURTHER ORDERED, That Singer's application for reparation is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

Commissioner Richard J. Daschbach issues the following 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. 80-72

NORTH RIVER INSURANCE COMPANY AND
NORTHWESTERN NATIONAL INSURANCE COMPANY

v.

FEDERAL COMMERCE AND NAVIGATION COMPANY, LTD.

NOTICE

April 28, 1982

Notice is given that no appeal has been taken to the March 22, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-72

NORTH RIVER INSURANCE COMPANY AND
NORTHWESTERN NATIONAL INSURANCE COMPANY

v.

FEDERAL COMMERCE AND NAVIGATION COMPANY, LTD.

DISMISSAL OF PROCEEDING

Finalized April 28, 1982

Counsel for North River Insurance Company an Northwestern National Insurance Company has by letter informed me that his clients no longer "wish to further this already protracted matter" and request "dismissal with prejudice." Accordingly, the proceeding is hereby dismissed with prejudice.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-66

JOSE TORRENTE D/B/A NETWORK EXPRESS, INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATION OF SECTION 44, SHIPPING ACT, 1916

NOTICE

May 3, 1982

Notice is given that no appeal has been taken to the March 29, 1982 dismissal of the 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. 81-66

JOSE TORRENTE D/B/A NETWORK EXPRESS, INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE VIOLATION OF SECTION 44, SHIPPING ACT, 1916

PROCEEDING DISMISSED

Finalized May 3, 1982

When the Commission instituted this proceeding, it had before it the application of Jose Torrente, a sole proprietor, d/b/a Network Express, to operate as an independent ocean freight forwarder. In its order the Commission posed for issues for determination:

1. Whether Jose Torrente violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities; and if so, the nature and extent of these activities, including the number of any unlicensed shipments handled and the compensation received therefore;
2. Whether Jose Torrente's conduct as qualifying officer of T&T during November 21, 1977 through the voluntary revocation of T&T's license was in conformance with the Shipping Act and applicable regulations;
3. Whether in the light of the issues above the Applicant lacks the degree of fitness required to carry on the business of ocean freight forwarding;
4. Whether civil penalties should be assessed against Jose Torrente pursuant to 46 U.S.C. 831(e) for unlicensed forwarding in violation of the Shipping Act, 1916, and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty.

Hearing Counsel now moves to dismiss the proceeding because (1) Jose Torrente has withdrawn his application, (2) Hearing Counsel does not feel that there is sufficient evidence to prove that Mr. Torrente violated section 44(a) of the Shipping Act, 1916, and (3) any allegations in the Order of Investigation of violations by T&T International Freight Forwarding Inc. could not result in penalties assessed against Mr. Torrente personally, although he was qualifying officer at the time of the violations.[1] In addition to its motion to dismiss Hearing Counsel has submit-

[1] Mr. Torrente was formerly President and 50 percent owner of T&T International Freight Forwarders Inc. and the violations alleged in the Commission's order are against T&T.

ted (1) a stipulation, (2) the deposition of Mr. Torrente, (3) a number of exhibits, and (4) a memorandum in support of the motion to dismiss. The stipulation is set forth below.

STIPULATION

1. T&T International Freight Forwarding, Inc. ("T&T"), incorporated February 22, 1977 in the state of Florida was issued FMC License No. 2010 on November 21, 1977.

2. On 37 occasions between December 13, 1977 and December 21, 1978, T&T collected insurance premiums from Caribbean Group, Inc. of Miami, Florida, without placing such insurance. The shipments originated in Miami and were shipped out of the Miami office of T&T.

3. On about 50 shipments, Jose Torrente, while an officer of T&T, between June 16, 1978 and March 5, 1979, paid $10.00 per shipment to Moses Colon, an employee of R.H. Belam & Co. ("Belam"), the shipper. (Transcript from Deposition of Jose Torrente, December 18, 1981 ("Dep. Tr.") 77-78; Deposition Exhibit ("Dep. Ex.") Nos. 10-16).

4. The payments referred to in Stipulation No. 3 were made because Mr. Colon directed shipments to T&T and because he was very efficient in providing T&T all the information and documentation T&T needed to handle the shipments of Belam.

5. T&T did not pay over to Eller & Co., agent for Manaure Line, ocean freight of $21,028 received in the Miami office for shipments moving out of Miami from the shipper.

6. None of the money referred to in Stipulation No. 5 benefited Mr. Jose Torrente personally.

7. On October 3, 1979, Jose Torrente entered into an agreement with Peerless Insurance Company ("Peerless") in which he agreed to pay to Eller & Co. the amount of $10,000 and $1,000 to Peerless on October 10, 1979. (Exhibit ("Ex.") No. 1.)

8. Peerless held the surety bond required by the Federal Maritime Commission for T&T.

9. Jose Torrente paid the balance of $10,028 T&T owed Eller & Co. at the rate of $1,000.00 a month until September 2, 1980. (Ex. No. 2.)

10. T&T was involuntarily dissolved on August 14, 1979 by an order of a court in Dade County, Florida. (Dep. Tr. 3, Dep. Ex. 3.)

11. On August 30, 1979, the court-appointed receiver surrendered T&T's FMC License No. 2010 for voluntary revocation. (Ex. No. 3.)

12. By order served September 14, 1979, the Commission revoked FMC License No. 2010. (Ex. No. 4.)

13. On seven occasions during the period September 10 through September 28, 1979, Jose Torrente forwarded ship-

ments from New York for the account of and under the FMC license number of Seaflet, Inc. ("Seaflet"). (Ex. No. 5.) Total compensation from ocean carriers on those shipments was $246.54 and total fees received from shippers was $261.00.

14. Seaflet applied for approval from the Federal Maritime Commission for a branch office at 11 Broadway, Suite 1604, New York, New York, on September 15, 1979 and received such approval on October 4, 1979.

15. Jose Torrente applied for approval from the Federal Maritime Commission to be branch manager of Seaflet's New York office on September 15, 1979, and received such approval on October 4, 1979.

16. On October 10, 1979, Jose Torrente submitted an application for an Independent Ocean Freight Forwarder (IOFF) license as an individual d/b/a Network Express. (Dep. Ex. No. 25.)

17. Jose Torrente, in his application to the Commission as an IOFF dated October 10, 1979, did not identify his association with Seaflet.

18. The following documents are stipulated to be part of this record:

a. a letter dated December 14, 1979 from the Commission's Office of Freight Forwarders to Jose Torrente (Ex. No. 6);

b. a letter dated December 21, 1979 from Mr. Jose Torrente to the Commission's Office of Freight Forwarders (Ex. No. 7);

c. a letter dated January 16, 1980 from the Commission's Office of Freight Forwarders to Jose Torrente (Ex. No. 8); and

d. a letter dated January 18, 1980 from Jose Torrente to the Commission's Office of Freight Forwarders. (Ex. No. 9.)

19. Jose Torrente sent copies of all bills of lading and invoices to the shippers to Seaflet in Miami on a continual basis. (Dep. Tr. 57.)

20. An accountant from Seaflet first visited the New York office of Seaflet in March, 1980. (Dep. Tr. 59-60.)

21. The accountant referred to in Stipulation No. 20 visited the New York office approximately every three or four months after his first visit in March, 1980. (Dep. Tr. 60.)

22. The terms of the employment arrangement between Seaflet and Mr. Torrente are set forth in exhibits 5, 6, 7 and 8 to the deposition of December 18, 1981.

23. The transcript and the accompanying exhibits from the deposition taken of Mr. Jose Torrente on December 18, 1981, and all other exhibits submitted herein are the record in this proceeding.

24. Mr. Torrente's signing of the deposition transcript referred to in Stipulation No. 23 is waived.

The withdrawal of Mr. Torrente's application for a license renders the issues raised in paragraphs 1, 2, and 3 of the Commission's Order of Investigation moot and there remains only the issue of whether Mr. Torrente engaged in unlicensed forwarding and if so should civil penalties be assessed.

Although Hearing Counsel has filed a motion to dismiss, the present posture of this case places a rather curious cast to the motion. Although in the motion itself Hearing Counsel grounds dismissal on an insufficiency of evidence to prove a violation, the stipulation admits to seven occasions of forwarding after T&T's license was revoked. However, Hearing Counsel in their memorandum in support of the motion to dismiss argue that the seven shipments in question were handled by Mr. Torrente on behalf of Seaflet, Inc., a Miami based forwarder licensed by the Commission. This, argues Hearing Counsel results in Mr. Torrente acting as manager of an unauthorized branch office of Seaflet, an activity for which Mr. Torrente would not be subject to penalties under section 44(a). Hearing Counsel in their memorandum argue that the operation of an unauthorized branch office would or could result in the imposition of penalties upon Seaflet. However Seaflet is not a respondent here. It would not impose penalties on Mr. Torrente Hearing Counsel argues because "Liability for a penalty cannot be imposed upon one, not within the meaning of the statute imposing the penalty, who, under the directions of another performs the prohibited act. 70 CJS Penalties section 6 (1951) and cases cited therein." The question presented by Hearing Counsel is not so much one of an insufficiency of evidence but rather of the legal consequences of the evidence adduced. This in turn presents two questions, (1) Was Mr. Torrente in fact acting as the manager of a Seaflet branch office during the period in issue, and (2) if he was, is he nevertheless subject to civil penalties for his activities during that time.

The record shows that on August 30, 1979, the Commission revoked T&T's license and on September 4, 1979, Seaflet and Mr. Torrente agreed to request from the Commission permission for approval for a Seaflet branch office in New York. Mr. Torrente was nominated an "incorporated employee and General Manager" of the branch. Between September 10, 1979 and September 28, 1979, Mr. Torrente forwarded seven shipments from New York for the account of and under the FMC license of Seaflet. On October 4, 1979, the Commission approved the New York branch office.

From September 4, 1979, Mr. Torrente was an employee of Seaflet and the shipments forwarded by Mr. Torrente from that point on were handled by him in that capacity, albeit he was the General Manager of an unlicensed or unapproved branch office.

Section 23(a) of the Commission's Regulations for the Licensing of Independent Ocean Freight Forwarders provides in relevant part:

> . . . No licensee may provide freight forwarding services through an unlicensed branch office or other separate establishment without written approval of the Federal Maritime Commission.

This is obviously directed to the licensee, in this case Seaflet, and not to employees of the licensee. Thus the only violation that could have occurred from the record here does not involve respondent. As for the violation alleged, unlicensed forwarding, at the time of the shipments involved the evidence before me indicates that Mr. Torrente was nothing more than an employee of Seaflet and thus did not violate section 44(a). Hearing Counsel's motion to dismiss is granted.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-1

SAIPAN SHIPPING COMPANY, INC.

v.

ISLAND NAVIGATION CO. LTD. AND OCEANIA LINE, INC.

NOTICE

May 5, 1982

Notice is given that no exceptions have been filed to the February 26, 1982 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. 78-1

SAIPAN SHIPPING COMPANY, INC.

v.

ISLAND NAVIGATION CO., LTD. AND OCEANIA LINE, INC.

During the period from April 5, 1977, through July 28, 1977, inclusive, Oceania Line, Inc., and Island Navigation Company jointly conducted a water carrier service between Guam and the Northern Mariana Islands, except for the period between June 21, 1977, through July 2, 1977, inclusive. Inasmuch as Oceania did not have an effective tariff on file with the Commission during the period from April 5, 1977, through July 2, 1977, Oceania was operating as a common carrier in violation of section 18(b)(1) of the Shipping Act, 1916, from April 5, 1977, through June 20, 1977, inclusive.

During the period from April 5, 1977, through July 28, 1977, the relationship between Oceania and Island Navigation constituted an agreement requiring approval under section 15 of the Shipping Act, 1916. This agreement was implemented and continued in effect without prior approval of the Commission in violation of section 15.

The relationship between Oceania and several non-respondent companies, including a common carrier—Asiatic Intermodal Seabridge S.A.—constituted an agreement requiring approval under section 15 of the Shipping Act, 1916. This agreement was implemented and continued in effect without prior approval of the Commission in violation of section 15.

Reparation, in the amount of $267,755.11, awarded. Additional reparation to be determined under Rules 251 and 252 of the Commission's Rules of Practice and Procedure.

R. Frederic Fisher for Saipan Shipping Company, Inc., complainant.

Donald J. Brunner and *John C. Morrison* for Oceania Line, Inc., respondent.

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

Finalized May 5, 1982

This is a complaint proceeding instituted under the provisions of section 22 of the Shipping Act, 1916, 46 U.S.C. 821,[2] whereby Saipan

[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 complaint did not specifically invoke section 22. Although it was probably superfluous to do so, the complaint was deemed amended to include an allegation that the proceeding was commenced under section 22. See Motion for Protective Order Denied and Notice of Prehearing Conference, served March 21, 1978.

Shipping Company, Inc., the complainant, seeks reparation from and a cease and desist order against Island Navigation Company, Ltd., and Oceania Line, Inc., the respondents, for violations of sections 15, 16, 17 and 18(b) of the Shipping Act, 1916, 46 U.S.C. 814, 815, 816 and 817(b) [3] in connection with carriage of cargo by respondents in the Guam/Northern Mariana Islands trade.

One of the respondents, Island Navigation Company, Ltd., defaulted by failing to answer the complaint. The other respondent, Oceania Line, Inc., vigorously contested the complainant's allegations of violations.

After extensive prehearing discovery and inspection and a lengthy prehearing conference, the matter came on for hearing in San Francisco, California, on October 24, 1978. There were eight days of hearing at that session. The hearing resumed in Saipan, Northern Mariana Islands, on January 22, 1979, for nine days and then moved on to the Territory of Guam for another four days. The twenty-one days of hearing produced an evidentiary record consisting of 2,809 pages of transcript (Tr.) and 258 numbered exhibits, many of which are multi-paged documents.

In accordance with a revised briefing schedule,[4] complainant filed an opening brief of 108 pages together with an appendix of 40 pages and, later, a reply brief of 70 pages. The respondent, Oceania Line, Inc., filed an answering brief of 119 pages.

As part of the opening brief, complainant submitted 55 proposed findings of fact. The answering brief dealt seriatim with complainant's proposed findings, accepting some, modifying others and rejecting still others. The answering brief also recommended another 27 proposed findings. The reply brief devoted a section to general and specific comments defending its own proposed findings as well as attacking those proposed by Oceania Line, Inc.

Before proceeding to the facts it will be useful to introduce and provide a brief sketch of some of the individuals and companies that play leading roles in this case. The cast includes those that neither appeared as parties or as witnesses and omits others who did testify. See APPENDIX, a profile to accompany this sketch of the cast.

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[3] The complaint alleged violation of sections 15, 17 and 18(b). An amended complaint, entitled First Amendment to Complaint, alleged that respondents, in addition to those matters alleged in the complaint, charged some shippers rates that were less than or different than those stated in tariffs on file with the Commission. At the conclusion of the hearing complainant stipulated that it would not seek reparation under section 18 for the matters alleged in the amended complaint.

[4] The original briefing schedule could not be met because of unanticipated problems associated with the delivery of the transcript to the parties and to the Commission for the Saipan/Guam portion of the hearing. This portion of the transcript was not received until September, 1979.

Jose C. Tenorio (JOETEN):
A citizen of the Northern Mariana Islands (NMI or Marianas).[5] JOETEN is the dominant individual in Saipan Shipping Company, Inc. and in J.C. Tenorio Enterprises, an organization which imports substantial cargo to the NMI. JOETEN did not testify.

Joseph F. Screen (SCREEN):
An accountant, who serves various JOETEN businesses in a managerial and consulting capacity.

Robert Earl Hahn (HAHN):
General manager of Saipan Shipping Company, Inc., in Guam.
Saipan Shipping Company, Inc. (SAISHIP):
A common carrier by water in the Guam/NMI trade.

Peter R. Gallagher (GALLAGHER):
President of Island Navigation Company, Ltd., until about August 1, 1977. GALLAGHER did not testify.

Ernesto V. Candoleta (CANDOLETA):
An employee of Island Navigation Company, Ltd., who became its president about August 1, 1977.

Island Navigation Company, Ltd. (ISLNAVCO or INCO):
A Guamanian corporation chartered March 14, 1975, as Island Navigation Co., Ltd. Among other things, it is authorized to act as a common carrier and generally to do everything related to the shipping industry. It filed a tariff for the Guam/NMI trade on February 15, 1977, which became effective March 17, 1977, and was later canceled, effective July 29, 1977. While its tariff was in effect it was a party to two approved section 15 agreements—a cooperative working agreement with United States Lines, Agreement No. 10297 and a leasing agreement with Matson Navigation Company, Agreement No. 9926. It was also a party to another agreement dated January 14, 1977, with Oceania Lines, Inc., for which section 15 approval was sought-Agreement No. 10306.

John H. Robinson (ROBINSON):
Executive Consultant to Oceania Line, Inc., and its de facto chief executive and operations officer. He has extensive experi-

[5] Geographically, the Mariana Islands extend from Guam, in the south, to Maug (Guam, spelled backwards) in the north. Politically, Guam is not a part of the NMI; it is a Territory of the United States. The NMI was formerly part of the Trust Territory of the United Nations (TT) and is now a "Commonwealth . . . in Political Union With the United States of America." For a brief discussion of the recent history of the NMI and certain aspects of "Political Union" see Order Vacating Ruling Made at Prehearing Conference, served May 5, 1978. The most important of the islands in the NMI from a political and economic standpoint are Saipan, Tinian and Rota, and among those three, Saipan is the most significant.

ence in marine and shipping matters and among other things he has qualified as a marine average adjustor, a licensed first mate, an insurance assessor and a loss adjustor in various jurisdictions. He partially completed a Bachelor of Law degree at the University of Wellington, New Zealand. At one time he was employed as claims officer by SAISHIP. ROBINSON's wife is the majority shareholder in Oceania Line, Inc. ROBINSON is a British citizen. See Ex. 24; Answering Brief, p. 10 n. 9.

Oceania Lines, Inc. (OCEANIA):
OCEANIA is an NMI corporation incorporated on January 8, 1976. On June 3, 1977, it filed a tariff for the Guam/NMI trade, effective July 3, 1977. It is the charterer of a tug and barge used in the Guam/NMI trade since April 5, 1977. It is uncontroverted that OCEANIA has been a common carrier by water since that date. Since January or February, 1977, it has been Asiatic Intermodal Seabridge S.A.'s agent in Saipan. Exs. 36, 68, 90.

Donald I. Marshall (MARSHALL or DIM):
SAISHIP claims DIM is the mastermind and power behind the alleged violations of the Shipping Act by OCEANIA/ ISLNAVCO and others not named as parties in this case. ROBINSON says DIM's involvement in OCEANIA/ISLNAVCO affairs is just that of a friend interested in ROBINSON's well being. DIM receives mail at C.C.P.O. Box 1914, Makati Commercial Centre, Makati, Rizal, Philippines, whether addressed to him personally or in care of a named company. ROBINSON has written to him as President, Transpac Marine S.A. (Ex. 29) and has described him as "The owner of the vessels we charter." (Ex. 24, p. 21, cross referencing Ex. 24 App. 29) [6]
DIM is a prolific letter/memo/electronic communicator who uses the letterhead and call signs of many companies, e.g., Cabras Marine Corporation (Ex. 253); Asiatic Intermodal Seabridge S.A. (Ex. 76); Malayan Towage & Salvage Corporation (Ex. 70); Asia Pacific Chartering Phil., Inc. (Ex. 64); DIM was president of Luzon Stevedoring Corporation. In Ex. 141, a telex to Atkins Kroll (Guam) Ltd., he calls himself "Attorney-in-Fact" for Asiatic Intermodal Seabridge S.A. DIM did not testify.

[6] ROBINSON made the cited statement in his prepared written direct testimony, but in his oral testimony, which lasted many days, he dissembled, attempting to give the appearance that DIM had no connection with the AFFILIATED/ASSOCIATED COMPANIES described in the text, *infra*, but was merely a charter broker trying to protect his commissions or, as indicated in the text, was a benevolent friend.

Harry A. Patterson (PATTERSON or HAP):
President of Asiatic Intermodal Seabridge, S.A. General Manager of China Pacific Intermodal, Ltd. Consultant and advisor to OCEANIA and ISLNAVCO (See Ex. 56 for OCEANIA and ISLNAVCO references). HAP did not testify.

Jose C. Reyes (REYES, phonetically Rayjis):
An accountant. An officer of Asiatic Intermodal Seabridge S.A. (See Ex. 2 App. 56 App. 3.) ROBINSON believes REYES to be an official (officer or director) of Transpac Marine S.A. and Pacific Logistics S.A. Receives mail at Malayan Towage and Salvage Corporation. Although not OCEANIA's accountant, REYES, directly or indirectly, provided costly, but free accounting or bookkeeping assistance to OCEANIA. REYES did not testify.

Lee R. Katindoy (KATINDOY or LK):
General Manager of Cabras Marine Corporation in Guam. LK is authorized by Transpac Marine S.A. and by Pacific Logistics S.A. to act fully on behalf of each on all matters relating to the Barge TM-644. See Exs. 85 and 86.
At the request of SAISHIP's counsel, I issued a subpena which was duly served on KATINDOY in Guam. After KATINDOY failed to appear at the hearing in Guam on the return day, SAISHIP's counsel made timely application to the United States District Court for enforcement of the subpena pursuant to the Commission's Rules of Practice and Procedure. The United States District Court Judge granted the application and issued an order compelling obedience to the subpena. However, despite diligent effort to effectuate service of that order, KATINDOY could not be located and the order was not served prior to the close of the hearing in Guam. (See 46 U.S.C. 826, 841a; 46 C.F.R. 502.131-136, 502.210(c)).

AFFILIATED/ASSOCIATED COMPANIES

Luzon Stevedoring Corporation (LUSTVECO):
Once, it claimed to be the largest and fastest growing cargo transport organization in the Pacific. Although not entirely clear on this record, LUSTVECO (or some of its assets and operations) appears to have been acquired by the Philippine Government or Philippine private interests.

China Pacific S.A. (CHIPAC S.A.):
May be the owner of the Tug *Terry M* chartered by Pacific Logistics S.A., as operator, to OCEANIA. See Ex. 16B.

Malayan Towage and Salvage Corporation (SALVTUG):
May be the owner of the Tug *Terry M*. See Ex. 97. Received OCEANIA and Asiatic Intermodal Seabridge S.A. voyage

reports from Atkins Kroll (Guam) Ltd. per written instructions from REYES, confirming previous oral instructions from ROBINSON and REYES. See Ex. 241. SALVTUG, which has the same Post Office Box as MARSHALL, serves as MARSHALL's communication center.

Transpac Marine S.A. (TRANSPAC):
Owner of the Barge TM-644, also sometimes known as TPM-644.

China-Pacific Intermodal, Ltd. (CHIPAC):
General Agent for Asiatic Intermodal Seabridge S.A., CHIPAC S.A., Pacific Logistics S.A., TRANSPAC and ISLNAVCO. Received OCEANIA and Asiatic Intermodal Seabridge S.A. freight collections from Atkins Kroll (Guam) Ltd. in its sundry account No. 241 032 at CITIBANK N.A., 8 Queens Road Central Hong Kong. CHIPAC is paying OCEANIA's legal fees for this case. Tr. 1777.

Asiatic Intermodal Seabridge S.A. (AIS):
A common carrier by water which operated the vessel *Endurance* in the trade between various Far Eastern Ports on the one hand and Guam and Saipan on the other. Official notice is taken that AIS ceased to be a common carrier subject to the Shipping Act, 1916, on July 14, 1980, when it canceled its tariffs—FMC Nos. 1 and 2.

Asia-Pacific Chartering Phil., Inc. (APC):
Little is known of this affiliate except that DIM communicates on its letterhead and it, too, has the same mailing address as DIM.

Pacific Logistics S.A. (PACLOG):
In the charter agreement for the Tug *Terry M* and the barge TM-644, PACLOG appears as the Operator and as Owner and is supposed to receive the charter payments but there is no credible evidence to show that it has ever received such payments. See Ex. 24 App. 56 App. 16. KATINDOY executed the charter for PACLOG.

Cabras Marine Corporation (CABTUG):
May own the Tug *Husky* and the Tug *Piti* which were substituted for the Tug *Terry M* to tow the TM-644. After GALLAGHER left Guam at the end of July 1977, CANDOLETA was hired and paid by CABTUG to try to collect freight charges due ISLNAVCO so those monies could be turned over to Atkins Kroll (Guam) Ltd. for remittance to CHIPAC, in accordance with ROBINSON/ REYES instructions.

OTHER COMPANIES

Atkins Kroll (Guam) Ltd. (AK or AKSHIP):
Guam agent for AIS and OCEANIA beginning about August 1, 1977. The manager of its steamship agency department in Guam is Godfrey G. Anderson.

International Tariff Services, Inc. (ITS):
A Washington, D.C., tariff filing and watching service. Under direction of HAP, filed tariffs for AIS, OCEANIA and ISLNAVCO and watched SAISHIP tariff filings. Fees for those services paid by CHIPAC or AIS.

INTRODUCTION

In its answering brief, in a section entitled, NATURE AND BACKGROUND OF THE CASE, OCEANIA pictures this proceeding as "the outgrowth of a competitive struggle between two small common carriers by water in the trade between Guam on the one hand, and the NMI on the other." SAISHIP has a different view of the case. It contends that one of those two small common carriers, OCEANIA, is in the picture only because it provided MARSHALL with access to the NMI under local laws, applicable at the time the competing service commenced and, that, when the picture is placed in focus, it shows MARSHALL, through his control of the AFFILIATED/ASSOCIATED COMPANIES (one of which—AIS—is a water carrier), attempting to crush the other small common carrier, SAISHIP. The facts disclose that SAISHIP's perception of the case to be the more accurate.

FACTS [7]

1. SAISHIP is an NMI corporation wholly owned, financed and controlled by NMI citizens.[8] It has operated as a common carrier by water in the Guam/NMI trade since 1956 when the Commander of U.S. Naval Forces, Marianas, granted SAISHIP an exclusive franchise for carrier service between Guam and the Saipan District. Prior to 1974, the service was performed in SAISHIP's vessels. Since 1974, with the advent of containers SAISHIP has served this trade with a weekly tug and barge service. The vessels utilized are U.S.-built, U.S. flag vessels, chartered on commercial, market terms from a U.S. company.[9]

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[7] The findings of fact will not make reference to the record in each instance. As was the case in providing a sketch of the cast, citations to the record will be made mainly to highlight or to resolve disputed proposed findings of material or major factual issues. The numbered findings will follow the sequence used in the Opening and Answering Briefs. Any proposed findings not adopted under the heading of FACTS (including the preceding presentation of the cast) or in the Discussion which follows, have been rejected for reasons of accuracy, materiality, relevancy, etc.

[8] Financed does not mean debt. SAISHIP owes money to the TT and to Pacific Far East Lines.

[9] SAISHIP was able to reduce its charter hire by about $1,000 per voyage after May 26, 1977, when, following negotiations with the vessel owner, SAISHIP was allowed a credit for bulk oil transported in the deep tank of its barge by the owner (Dilmar).

2. Before April 11, 1976, when the NMI was within the jurisdiction of the TT, the Guam/NMI trade was subject to provisions of the TT Code and to rules and practices of that government in which vessel entry assurances, issued by the TT government, were necessary for vessels to enter NMI and other TT ports.

3. In addition, under the TT Code, restrictions, designed to protect and encourage local enterprises, were placed on non-TT citizens seeking to do business there. Upon the creation of the NMI as a separate governmental structure, laws of the TT continued to apply until modifications were made by the NMI government.

4. TT and NMI controls on foreign investments and doing business resulted in a system of vessel entry assurances or permits. In practice this system involved a public convenience and necessity or franchise-type approach to vessel entry, designed to encourage and protect local enterprises and also designed to assure adequacy and continuity of service in trades with one-way (inbound) cargo movements and paucity of cargoes.

5. The NMI government continued to apply the TT entry assurance permit system for vessel entry to NMI ports, and, as late as July 13, 1978, itself promulgated an administrative order requiring all vessels entering NMI ports to have entry assurances. Regardless of whether the NMI government had power after "eleven o'clock on the morning of January 9, 1978, Northern Marianas local time" [10] to so require, it asserted the power and the parties to this proceeding continued to operate under such entry assurances through at least October 1978. OCEANIA and AIS and its affiliates believed, as late as the autumn of 1978, that entry assurances from the NMI government were required.

6. In the late 1960's, in the hope of assuring adequate service to TT ports, the TT government granted an exclusive franchise to a company ultimately known as Transpacific Lines, Inc. (Transpacific), to serve TT ports. However, SAISHIP's existing service between Guam and Saipan, authorized by the earlier Navy Department franchise, was treated as an exception, and SAISHIP was permitted to continue this operation.

7. Upon the collapse of Transpacific and its service in 1974, SAISHIP, at the TT government's request, commenced a service with chartered vessels from Far East ports to TT ports. At about the same time SAISHIP switched its Guam/NMI service from self-propelled vessels to chartered tugs and barges. SAISHIP advanced monies to the TT government to put a vessel into the Far East/TT service. This service did not prosper, and SAISHIP suffered substantial losses therein with the result that as of the end of 1976, SAISHIP owed the TT

[10] See Order cited in n. 5, *supra*.

government substantial sums of money. This fact was known to OCEANIA and to others familiar with the shipping business in the area.

8. As a result of losses in the Far East trade, SAISHIP's continued existence, in late 1976 and during 1977, was particularly vulnerable to diversion of cargoes and revenues or to any action by the TT government insisting upon immediate repayment of SAISHIP's debt. Accordingly, between late 1976 and the autumn of 1977, to avoid the aspect of this financial vulnerability, SAISHIP engaged in negotiations with the TT government for a long-term payback schedule which would not destroy SAISHIP in the process of repaying this debt. These negotiations resulted in an arrangement for SAISHIP to make interest free payments of its $239,000.00 indebtedness by making a down payment of $20,000.00 and monthly payments of $2,000.00, thereafter.

9. SAISHIP's vulnerable financial situation is explained in a letter of March 8, 1977, from an official of the TT government to SCREEN which, among other things, referred to SAISHIP's debt to the TT and SAISHIP's ability to repay it. By the time this letter was sent, the proposed new service, advertised in the names of ISLNAVCO and OCEANIA, between Guam and the NMI had been announced. In the letter, which predated the payback arrangement referred to in No. 8, above, TT expressed concern that the competition offered by OCEANIA's proposed barge service to Saipan might drain off too much of the revenue needed by SAISHIP to cover the costs of its barge operation because the TT believed that the cargo then moving between Guam and Saipan could not sustain two barges. SAISHIP had had a profit in the trade in 1976 but suffered a loss in 1977.

10. The Guam/NMI trade is largely a one-way trade with about 95% of the cargo moving from Guam to the NMI. Most cargo revenues are received on Guam, and most of this cargo is cargo arriving at Guam from U.S. and foreign ports for transshipment to the NMI. Since the advent of containers and regular arrivals of container ships from the United States, a weekly (2-3 day, turnaround) barge service is required in the trade to meet the needs of NMI consignees. At the same time, only a limited amount of one-way cargo is available. SAISHIP estimated that in 1977, at then prevailing rates, there were less than 1 million dollars per annum in total cargo revenues available in the trade. The NMI have a total population of only about 16,000-17,000. Its economy is essentially subsistence and government supported. (Ex. 2, pp. 9-12.) SAISHIP at all relevant times [11] had capacity to carry all the cargo in

[11] OCEANIA objects to the use of the phrase "at all relevant times" since, it believes, relevant times are an ultimate issue in this proceeding. Answering Brief, p. 8 n. 5. Thus, this constitutes the finding that as relevant to the conclusion and order which follow, SAISHIP had the capacity to carry all the cargo in the trade on a schedule of one trip per week. Given the needs of all shippers to get their goods to market efficiently, there has been no satisfactory showing, including the testimony of Kenneth D. Jones, Jr., a shipper, that a more frequent schedule was essential or even desirable.

the trade, and until April of 1977 had carried nearly all of it. (Ex. 2 pp. 9-12, Tr. 418.) Forty to fifty percent of the total cargo moving in the trade is for companies affiliated with JOETEN.

11. SAISHIP's charter hire obligations to Dilmar and its ratio of fixed to variable costs meant that, at the level of cargo moving in the trade during 1977, a diversion of 50% of the cargo in the trade as a result of a competitive service would throw SAISHIP into a loss position in that trade. SCREEN's testimony shows, by way of example, that based upon an estimated gross annual trade revenue of $895,000 for 1977, SAISHIP's weekly barge service would lose $2,622.97 per voyage if it carried only 50% of the cargo in the trade. (Ex. 2, p. 14.) From June 2, 1977, forward, however, SAISHIP also received $1,000 per voyage from the vessel owners as a credit against charter hire for permitting the owners to bring bulk oil to Saipan in the barges' deep tanks.[12] The charter hire used by SAISHIP in the example was an average of actual per voyage charter hire (including demurrage) for 1977. An analysis based on the months after June 1977 would therefore reduce the per voyage loss shown in SCREEN's example.

12. OCEANIA is a common carrier by water in the Guam/NMI trade and, admittedly, it has been one since at least April 5, 1977. (Ex. 2-24 shows OCEANIA solicited cargo in the trade as early as March 2, 1977.) OCEANIA has few assets, and its share-holders have a capital investment of $13,000 in the company. OCEANIA has not owned vessels and, other than the tug and barge, has not chartered vessels on a time or voyage basis,[13] although it purports to have engaged in oral space chartering on the AIS' vessel *Endurance*, with the amount of space "chartered" varying with the amount of cargo available. Nevertheless, this vessel entered TT and/or NMI ports under OCEANIA's entry assurance which authorizes entry for vessels owned, operated or chartered by OCEANIA.

13. Shortly after its incorporation, on January 12, 1976, OCEANIA proposed to inaugurate a shipping service from Australia and the Solomon Islands to the TT. On January 16, 1976, the TT sent a letter to OCEANIA denying its request for an entry assurance. On an unspecified date thereafter, OCEANIA did obtain the requisite entry assurance and from July 1976 until April 1977 OCEANIA participated in a joint service with DAIWA Line to provide service between Australia and the TT. The agreement called for OCEANIA to have a 5% share in the profits or losses. The bills of lading which they issued were imprint-

[12] The arrangement between SAISHIP and Dilmar for the $1,000 credit was entered into on August 5, 1977, and was made retroactive to June 2, 1977.

[13] Ex. 24 App. 7 is a Master Time Charter between OCEANIA and PACLOG for the tug *Terry M* and the barge TPM-644. This agreement expired on or about April 4, 1978. Therefore, OCEANIA is on a voyage to voyage basis with the owners, or "on severance," since the time of expiry. Tr. 2214.

ed with the DAIWA name and had a typewritten reference to OCEANIA. See Exs. 146, 153. Nevertheless, with the full advance knowledge and approval of ROBINSON, the service's Australian agent published advertisements depicting the service solely as an OCEANIA service to Guam and TT ports, including Saipan. Ex. 63, Tr. 1243-44, 1485-89.

14. ISLNAVCO did not answer the complaint herein and hence has admitted all allegations in the complaint as to it, e.g.—that it operated during 1977 as a common carrier by water under an unapproved section 15 agreement with OCEANIA, which agreement injured complainant.[14] ISLNAVCO was incorporated almost three months after the incorporation on Guam of CABTUG. ISLNAVCO performed steamship agency services at the port of Agana, Guam (Tr. 2606) and was appointed the first Guam agent for AIS. AIS commenced service to Guam at about the time ISLNAVCO was incorporated. There was no evidence of record that ISLNAVCO has ever been dissolved or otherwise terminated as a corporation. (See Tr. 350, 790, 2608.) There is evidence that CANDOLETA, its post-July, 1977 President,[15] while on the payroll of CABTUG, solely for the purpose of collecting ISLNAVCO's pre-August, 1977 receivables, assisted AKSHIP in AKSHIP's attempt to collect those receivables, at least as late as the end of 1977. (Tr. 1828, 2603-2605, 2516, 2589.)

15. In January 1977, ISLNAVCO's "General Agent" was CHIPAC. There is no evidence to show that this relationship was terminated at any time prior to the close of the hearing.[16] The first tariff "information circular" (FMC Form-9) which ISLNAVCO caused to be filed with the Commission was dated January 28, 1977. The "information circular" was signed by HAP as managing director of CHIPAC. The only address for ISLNAVCO which appears on that form is CHIPAC's

[14] I ruled at the prehearing conference (P.H. Tr. 12) that those admissions might be used against ISLNAVCO, but would not be binding upon OCEANIA. This ruling, of course, did not mean that OCEANIA would be insulated from proof of the allegations against it if sustained by independent evidence.

[15] Until the departure of GALLAGHER at the end of July 1977, an event which made ISLNAVCO virtually defunct, CANDOLETA was ISLNAVCO's operational manager. OCEANIA would attempt to cast some doubt on CANDOLETA's accession to the presidency in brief (Answering Brief, p. 13) just as it did at the hearing (Tr. 2641-44). However, I adhere to the ruling I made at the hearing, based upon CANDOLETA's testimony and demeanor, that without regard to his willingness or sophistication, he knew he had held himself out to be president and he knew that his presidency has never been terminated (Tr. 2603-4). The holding out particularly related to his efforts to collect ISLNAVCO's receivables for AKSHIP.

[16] OCEANIA contests a proposed finding of SAISHIP which speculates that CHIPAC may still be ISLNAVCO's general agent, citing Ex. 2 App. 43, an "information circular" filed by ISLNAVCO on July 18, 1977. This document shows ISLNAVCO's Guam address and makes no new reference to CHIPAC but does not state that CHIPAC's general agency, set forth in ISLNAVCO's first "information circular," was ended. CHIPAC's PATTERSON continued to represent ISLNAVCO in dealings with the Commission's staff after July 18, 1977.

Hong Kong street address.[17] See Ex. 2 App. 11. A document entitled Power of Attorney, bearing a blank date for February 1977 and signed by GALLAGHER, gave ITS a power of attorney to file tariffs in the name of ISLNAVCO. There, again, the only address shown for ISLNAVCO is c/o CHIPAC in Hong Kong. The Power of Attorney was mailed to ITS by HAP, by letter dated January 31, 1977. That letter also states that there is enclosed a CHIPAC "cheque" for "$400 as advance payment for the cost of preparation and filing" of a tariff, also enclosed, on behalf of ISLNAVCO.

16. AIS' "General Agent," at least since October 7, 1976, was CHIPAC. This fact appears in the FMC Form-9 which AIS caused to be filed with the Commission by HAP, its president, when AIS was preparing to inaugurate a service from Far East Ports to Guam. That form also shows ISLNAVCO as its Guam agent and Trans Trans as its U.S.A. agent. (Ex. 2 App. 13.) When AIS began its service to Saipan in 1977, either directly to Saipan from foreign ports or with a prior call at Guam, OCEANIA was its agent at Saipan. (Ex. 90).[18] Like ISLNAVCO, AIS gave ITS its tariff power of attorney. On that document AIS gave its address as c/o CHIPAC in Hong Kong. (Ex. 2 App. 13-A.)

17. Pursuant to that "General Agency," and the specific written instructions of REYES, AIS' service vessel revenues at Guam,[19] net of local port expense, were paid directly into CHIPAC's bank account by AKSHIP from about August 1977 through about September 1978 when the AIS/AKSHIP agency was terminated and a new AIS agent was appointed.

18. As already seen, AIS and ISLNAVCO were represented by the same San Francisco agent—Trans Trans—during 1977. On September 15, 1977, DIM, using his personal letterhead, wrote a personal and business letter to Werner Lewald, the president of Trans Trans. The business portion concerned the "Guam/Saipan (OCEANIA LINES) operations." The business portion assumed that Mr. Lewald was familiar with those operations, but to make certain, MARSHALL enclosed a

[17] Transpacific Transportation Company of San Francisco, California, (Trans Trans) is named as ISLNAVCO's "USA Agents" on the first Form FMC-9.

[18] OCEANIA objected to the proposed finding of SAISHIP which stated that AIS served Saipan as a common carrier because the record reference utilized by SAISHIP for that finding "does not support that AIS serviced Saipan as a common carrier prior to 1978." Insofar as the record reference is concerned, OCEANIA is correct. Unfortunately, and despite what charitably may be termed as equivocal testimony of ROBINSON to the contrary, the evidence of record convincingly shows that AIS served Saipan since 1977 and that OCEANIA was AIS' agent in Saipan. See, e.g., Exs. 36, 90.

[19] AIS' first FMC tariff to Guam became effective on November 13, 1976. This service involved cargo transported from Australia to Manila by another carrier under an arrangement whereby the cargo was transshipped via AIS vessels to Guam. AIS vessels also carried cargo from Taiwan and Hong Kong to Guam.

copy of a letter GALLAGHER sent on March 16, 1977.[20] MARSHALL also assumed that Mr. Lewald was aware that GALLAGHER "has departed Guam and his INCO operation is closed" and that AKSHIP was appointed a successor agent. MARSHALL informed Mr. Lewald that the subject operation had a problem with cargo originating at United States West Coast Ports, as mentioned in his letter of even date to Mr. Anderson of AKSHIP, which was also enclosed. MARSHALL's letter to AKSHIP contained, minimally, a suggestion that Mr. Anderson write to and request some assistance from Mr. Lewald in the solicitation of cargo for OCEANIA because MARSHALL concluded the business portion of the letter, saying that, after the AKSHIP letter to Trans Trans is written, "I'd greatly appreciate receiving your usual 'can do' support and, OCEANIA will naturally accept whatever charges you propose to cover your West Coast 'hustling.'" Copies of the MARSHALL letter were sent to Mr. Anderson, ROBINSON, KATINDOY, REYES and HAP.

19. On November 29, 1976, OCEANIA applied to the NMI government for another vessel entry assurance for vessels owned, operated or chartered by OCEANIA, a "Mariana based company, owned solely by Mariana citizens" (Ex. 2 App. 19), for service to, from and within the NMI from Hong Kong, Kaohsiung, Manila and Guam. At that time OCEANIA neither owned, operated nor chartered any vessel operating a service over the described route (the joint OCEANIA/DAIWA service did not follow that route). On November 30, 1976, the requested entry assurance was granted. Although no reference was made in the application to a barge service between Guam/Saipan, the general terms of the approval covered that service, as well as the service represented in the application.

The application specified that OCEANIA proposed a direct service involving three conventional vessels beginning in January 1977. OCEANIA represented that two of those vessels were then in operation on that route, excluding Saipan. OCEANIA represented that the third vessel would be added on the inclusion of Saipan "and will offer consignees a frequency of service which they have never previously enjoyed."

From that application and from such additional evidence showing that: the route described in the application (except for Saipan) was then being served by AIS; that ISLNAVCO was AIS' agent in Guam; ROBINSON and GALLAGHER had engaged in discussions about a Guam/Saipan service over the latter half of 1976; that in the latter part of November 1976, MARSHALL was brought into those discussions; that in January of 1977 GALLAGHER and ROBINSON made plans

[20] MARSHALL inferred that this letter was sent by GALLAGHER to Mr. Lewald. MARSHALL's possession of the letter is not explained.

for a call at Saipan by the AIS vessel *Endurance* in February 1977;[21] and because the AIS vessel *Endurance* did, in fact, call at Saipan in 1977 under OCEANIA's entry assurance, it is fair to find, as a fact, that prior to the end of November 1976, it had been agreed by OCEANIA, ISLNAVCO and AIS, among other things, that an AIS vessel call at Saipan would be protected by OCEANIA's entry assurance. See, also, Exs. 160, 161 and 162 showing, among other things, that this agreement, as refined, was reached during January 1977 meetings, arranged by MARSHALL, and attended by PATTERSON, GALLAGHER, ROBINSON and others (see text, No. 22, *infra*) and that HAP was balking at some of the arrangements but he finally agreed (in accordance with MARSHALL's views) to go ahead, reserving the right to have AIS *Endurance* cargo transshipped "via TM-644 at no additional freight cost to shippers. . . ."

20. During the latter part of November and during December 1976, ROBINSON (OCEANIA) and GALLAGHER (ISLNAVCO) negotiated with MARSHALL and with CABTUG[22] to obtain a tug and barge for a new common carrier barge service between Guam and Saipan. The tugs to be used were to be provided by CABTUG.[23] The barge was to be foreign built and registered. It was to be purchased by TRANSPAC, chartered to PACLOG and subchartered to OCEANIA along with a CABTUG tug. Among other things, Ex. 29 confirmed ISLNAVCO's involvement in the agreement as a condition of the deal.

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[21] GALLAGHER's letter of January 26, 1977, to ROBINSON (Ex. 68) reads:

> Reference is made to your cable of January 25th, and accordingly we've enclosed our brochures with the overseas agents addresses for your solicitation purposes. . . . We'll publish a joint Inco/Oceania flyer in March and advertise Saipan calls in the Pacific Daily News as well. For your guidance, the Endurance voyage I will commence loading Manila February 7th, then Hong Kong ETA 11th, then Kaohsiung ETA 15th, then Guam ETA 22nd then, Saipan ETA 24th. This should give you good lead time for soliciting. Do you have a copy of *our Far East tariff*? Please keep us advised as bookings develop and let us know if you need any assistance. [Emphasis supplied.]

Inasmuch as AIS was the only one of the three companies (OCEANIA, INCO and AIS) to have a Far East tariff at that time, it is manifest that this was a reference to an AIS, and not an OCEANIA, operation.

[22] Curiously in response to SAISHIP's proposed finding No. 20, OCEANIA disputes the proposed finding that CABTUG participated in the negotiations. Yet, it does not dispute, in fact, it confirms Saiship's statement, in the latter's proposed finding No. 21, that CABTUG participated in the discussions. See Tr. 1087, testimony of ROBINSON, in which he said that CABTUG "had been a party to the discussions all the way through." CABTUG, however, was not a party to the agreement for the charter of the equipment (tugs and barge). See Ex. 29. Ex. 29 is a letter, previously referred to in the sketch of MARSHALL, written on January 10, 1977, from ROBINSON to MARSHALL, with a copy to GALLAGHER. There was no provision made for a copy of the letter to be sent to CABTUG or KATINDOY. In stating that CABTUG participated in the discussions, ROBINSON did not show that it participated through KATINDOY. It is evident that CABTUG's participation derived from MARSHALL, directly, or, through GALLAGHER, indirectly.

[23] ROBINSON testified, ". . . it was agreed that [CABTUG] would charter direct from [PACLOG] tugs to be provided in the interim until such time as the PITI became available." Tr. 1087. The *Piti* was a former U.S. Navy tug rehabilitated in the Philippines. The *Terry M*, the first tug used, was registered in Panama. There is no clear cut evidence of registry of the *Husky* or *Piti*. Hahn testified that neither of the two were U.S. bottoms and that the crew of the *Piti* was not a U.S. crew.

The letter was addressed to MARSHALL as president of TRANSPAC at the same Manila Post Office Box number used by MARSHALL, AIS, SALVTUG and some other AFFILIATED/ASSOCIATED COMPANIES. MARSHALL arranged for PACLOG, in Singapore, to purchase the barge on behalf of TRANSPAC in late December, 1976, or early January, 1977, and the contract was signed with the builders on January 10, 1977, after MARSHALL made the decision to meet the builder's purchase price demands.

21. The broad outlines of the four basic terms and conditions of the OCEANIA agreement with ISLNAVCO and MARSHALL concerning the Guam/NMI tug and barge operation are covered in ROBINSON's letter of January 10, 1977 (Ex. 29). The letter confirmed the prior discussions with MARSHALL "regarding the viability of a new tug and barge service." It also confirmed that CABTUG would provide the tug(s).[24] Another of those basic terms provided for ISLNAVCO to be appointed "operational agents for the service." ROBINSON acknowledged that ISLNAVCO's participation, as operator, to "provide management and operational services" (Ex. 2 App. 56 App. 15) was a sine qua non for OCEANIA obtaining the tug and barge under charter. See, e.g., Exs. 24 p. 6, 2 App. 16, Tr. 1143-44, 158384, 1613, 1857-58, 1879.

22. During the third week in January 1977, GALLAGHER and ROBINSON traveled to Manila to discuss the proposed new barge service with MARSHALL and to negotiate the final terms. (While not entirely clear this appears to have been the first time that ROBINSON and MARSHALL saw each other.) Thereafter the three of them traveled to Singapore to inspect the new barge and then went to Hong Kong to discuss with HAP of CHIPAC/AIS a proposed AIS shuttle service from Manila to Guam in conjunction with an Australian carrier bringing Australian cargo as far as Manila. In connection with that visit to Hong Kong, MARSHALL directed GALLAGHER to carry with him ISLNAVCO's recapitulation of AIS' accounts for reconciliation.

23. The OCEANIA/ISLNAVCO contract (Ex. 2 App. 56 App. 15)[25] was executed January 24, 1977, but was prepared earlier and dated January 14, 1977. Much later on, after a Commission staff inquiry generated by a letter of complaint from SAISHIP, this document was ultimately transmitted to the Commission for filing by letter sent by GALLAGHER on ISLNAVCO's letterhead, on July 5, 1977. The

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[24] It is worthwhile noting that even though the discussions that led up to the agreement and Ex. 29, itself, contemplated that CABTUG would furnish its own tug, *Piti*, to tow the barge, it was never intended that charter hire payments for the tug would be paid to CABTUG. Tr. 1086-91. When testifying in San Francisco, ROBINSON said that charter hire payments for the tug were sent to PACLOG. In fact, as previously found the payments went to CHIPAC's numbered sundry account.

[25] Ex. 2 App. 56 App. 15 is identical to Ex. 2 App. 16.

letter was drafted by ROBINSON. The agreement was assigned FMC Agreement No. 10306.

24. Agreement 10306, however, was never formally acted upon by the Commission, as the parties withdrew it [26] by ISLNAVCO letter dated July 29, 1977 (Ex. 2-15). This letter was actually signed and dispatched from Guam on August 2, 1979. The text of the letter was suggested by ITS. Agreement 10306, which contains a reference to PACLOG, but not AIS, is between two parties—OCEANIA and ISLNAVCO. OCEANIA is denominated the "Charterer" and ISLNAVCO is called the "Operator." It recites that OCEANIA had undertaken to charter vessels from PACLOG on condition that OCEANIA appoint ISLNAVCO as "Operator to manage such charters on behalf of the Charterer." The importance of OCEANIA's NMI entry assurance in this undertaking is stressed by OCEANIA's affirmation in the first clause, that it is the holder of an NMI entry assurance which is appended as the only attachment to Agreement 10306. OCEANIA undertook to perform customary ship agency functions in the NMI for the service. ISLNAVCO as "Operator" agreed to do the same in Guam. ISLNAVCO was entitled to standard fees of 5% of outbound freight revenues and 2-½% of inbound freight revenues plus a minimum fee of $400.00 per vessel call as remuneration for agency functions performed at Guam. OCEANIA could charge the same standard fees plus the same minimum against the income of the service for agency functions performed at Saipan, but, at Tinian and Rota, OCEANIA was limited to the percentage fees without a minimum. Agreement 10306 stated that OCEANIA would provide ISLNAVCO with "a prompt and complete accounting of all disbursements and collections, made or received by" OCEANIA on the voyages performed. ISLNAVCO agreed to provide "operational management" for the voyage.

25. Agreement 10306 did not expressly state whether OCEANIA, as "Charterer," ISLNAVCO, as "Operator," or both were to hold out to the public as common carriers in the trade. It did provide that the management and operational services would be performed by ISLNAVCO for the chartered vessels on behalf of OCEANIA. The management to be provided included tariff preparation and filing, providing bills of lading and manifests, receiving and paying cargo claims (upon the charterer's approval), preparation of voyage accounts, making arrangements for insurance and performing other customary carrier management functions. Each entity agreed to make its books and documents relevant to the service available to the other upon request. The

[26] OCEANIA desires to substitute the words "it was withdrawn" for the words "the parties withdrew it" on the grounds that "Reference to the parties is ambiguous," without further explanation. In fact, both parties to the agreement wanted it withdrawn. The letter was signed by CANDOLETA, as Operations Manager, "by order of Peter R. Gallagher President."

agreement closed with a provision that ISLNAVCO would receive 40% of annual net profits in return for the management services performed. The agreement made no mention of losses.

26. Agreement 10306 referred to OCEANIA's undertaking to charter vessels from PACLOG. Remembering that Agreement 10306 was prepared for signatures not later than January 14, 1977, and recalling, too, that ROBINSON did not meet with MARSHALL to negotiate the final terms of the charter until the third week in January, 1977, it is clear that the undertaking referred to was the one contained in ROBINSON's letter to MARSHALL, as President of TRANSPAC, dated January 10, 1977. (Ex. 29) That letter contemplated provision of a barge by TRANSPAC and tugs by CABTUG and said nothing about PACLOG. Of course, GALLAGHER knew about PACLOG's involvement in negotiations for the barge on behalf of TRANSPAC because he was one of the distributees of a December 31, 1976, telecommunication from PACLOG to DIM asking DIM to make the decision whether to accept the purchase price demands made by the builder of the barge TM-644. Other distributees were REYES, KATINDOY and HAP. Ex. 65.

In part, the undertaking by OCEANIA resulted in a "MASTER TIME CHARTER" agreement between OCEANIA and PACLOG. The agreement was dated March 5, 1977, and was signed by an official of OCEANIA and by KATINDOY of CABTUG for PACLOG. This charter covered only the barge TM-644 and the tug *Terry M*, the latter vessel being owned either by CHIPAC S.A. or by SALVTUG, and managed either by TRANSPAC or SALVTUG.[27] The charter party designated PACLOG as "operators," the same term used to describe ISLNAVCO in Agreement 10306. The MASTER TIME CHARTER provided for a charter hire rate of $3,200.00 per 3-day voyage plus $200.00 per hour for demurrage. Charter hire payments were required to be made to PACLOG at the Hong Kong and Shanghai Bank in Singapore. It made no mention of either AIS or CHIPAC as the recipient of the charter hire payments. The agreement provided for a three-month moratorium on payment of charter hire, and was to be

[27] In response to SAISHIP's proposed finding No. 26, OCEANIA notes that there is no record citation given for the proposed finding that the *Terry M* is "managed" by TRANSPAC and SALVTUG, yet it agrees with this proposed finding. Nevertheless, it deems yet another of SAISHIP's proposed findings—No. 53—so unsupported and argumentative that it cannot be corrected. (SAISHIP's proposed finding No. 53, among other things, reiterates some of this data, relying primarily upon Lloyds Register of Ships and Lloyds List of Shipowners for 1979-1980.) Although OCEANIA does not dispute that CHIPAC S.A. is the owner, there is other evidence of record to show that SALVTUG may be the owner of that vessel. See Ex. 97, Tr. 16631666. It really does not matter whether CHIPAC S.A. or SALVTUG is the owner or whether TRANSPAC or SALVTUG is the manager of the *Terry M*. This blurring of corporate distinction between the AFFILIATED/ASSOCIATED COMPANIES throughout the record does matter, for it shows that they are managed and controlled in a common interest by MARSHALL.

effective for one year, provided that if any portion of the charter hire were to be in arrears for 30 days, PACLOG could withdraw the vessels from the service. It provided that OCEANIA would be billed by PACLOG for insurance premiums on the vessel. The agreement also provided for termination of the charter by PACLOG in the event of its breach by OCEANIA.

27. As described more fully at finding No. 15, *supra*, by letter dated January 31, 1977, seven days after the execution of Agreement 10306, HAP/CHIPAC, in Hong Kong, sent ITS, in Washington, an ISLNAVCO tariff to be filed with the Commission and an ISLNAVCO power of attorney authorizing ITS to file tariffs for ISLNAVCO. According to ROBINSON, the filing of a tariff for the Guam/Saipan service in the name of ISLNAVCO occurred without OCEANIA's prior knowledge and this position is consistent with OCEANIA's claim, in this proceeding, that it had decided to file an FMC tariff in its own name during February 1977. ROBINSON stated that he was surprised, later on, to learn that ISLNAVCO had not acted in accordance with OCEANIA's decision. Yet when ROBINSON learned of the ISLNAVCO filing of the tariff, ROBINSON admits that he did nothing to correct the alleged mistake. ROBINSON's knowledge of the existence of the ISLNAVCO tariff came about not later than the end of February 1977. On April 14, 1977, GALLAGHER was testifying in a court case brought by SAISHIP against OCEANIA, ISLNAVCO and others in a TT court, sitting in Saipan. In preparation for that trial ROBINSON attached a piece of OCEANIA stationery to the front of a copy of ISLNAVCO's tariff to make it appear to the TT that OCEANIA was the only carrier. However, ROBINSON let stand the holding out that OCEANIA was participating in ISLNAVCO's tariff by either adding or leaving unaltered the words "Islnavco Oceania Barge Service Tariff." That document was made an exhibit in the court case.

28. In February, 1977 ISLNAVCO and OCEANIA began circulating a draft of the ISLNAVCO tariff to shippers and connecting carriers, such as United States Lines, soliciting cargo in the trade. However, in Saipan, OCEANIA furnished a copy of the tariff with an OCEANIA letterhead attached thereto. ISLNAVCO entered into connecting and equipment interchange agreements for the Guam/Saipan service with United States Lines and Matson Navigation Company which were filed with the Commission during March, 1977 by United States Lines and Matson, respectively. Neither of those agreements nor anything else in those filings made mention of OCEANIA. ISLNAVCO authorized United States Lines to justify the section 15 agreement by representing that ISLNAVCO was a common carrier in the trade.

29. In February and March, 1977, as ISLNAVCO and OCEANIA were preparing to begin the contemplated tug and barge service between Guam and Saipan, ISLNAVCO was taking steps to promote an

inbound AIS service to Guam, and OCEANIA was doing the same with respect to an inbound AIS service to Saipan, aboard the AIS vessel *Endurance*. See n. 21, *supra*; Exs. 181 and 205. The call at Saipan was to be covered by OCEANIA's entry assurance.[28]

30. An ISLNAVCO letter (Ex. 2 App. 9), signed by GALLAGHER, to ITS, dated February 21, 1977, referred to the ISLNAVCO tariff filed by ISLNAVCO's Hong Kong agent, AIS,[29] and asked ITS to advise the Commission that OCEANIA "may participate in the use of this tariff." ISLNAVCO also asked that ITS advise AIS in Hong Kong directly when the Commission had approved such joint use of a single tariff. ITS claimed (no one from ITS testified) it never received this letter. Although ROBINSON later expressed doubts that ISLNAVCO ever sent it, he continued to rely upon its contents as late as July, 1977, in making representations to the Commission and to the NMI government. (Exs. 2 App. 39, 2 App. 18; Ex. 24 pp. 16, 17 and Ex. 26.)[30]

31. During late February and March, 1977, ISLNAVCO and OCEANIA commenced promoting the Guam/Saipan barge service. A promotional flier distributed to shippers and consignees advertised the service as "Island Navigation/Oceania Line," from which it is reasonable to infer[31] a joint service was being offered by the two parties. In early March, OCEANIA wrote additional promotional letters to consignees representing itself as the common carrier for both the *Endurance* and the barge services. ISLNAVCO sought cargo on Guam from

[28] OCEANIA proposes a finding that ISLNAVCO and OCEANIA, each, were promoting the *Endurance* as its own, and not an AIS, service. Ex. 205 is a brochure advertising an ISLNAVCO service, showing AIS as its Hong Kong agent. But it is the same brochure mentioned in Ex. 68. As seen, the service was an AIS service. Although ROBINSON did testify that he was promoting the *Endurance* as an OCEANIA operation and that OCEANIA's participation was under an oral space charter, that testimony conflicts with other testimony given by ROBINSON and does not stand up against more reliable evidence to the contrary. Documentary evidence shows that from the outset, as between AIS and OCEANIA, OCEANIA was AIS' agent at Saipan and not a space charterer. See, e.g., Exs. 36 and 90 referred to in n. 18, *supra*, and although those documents speak of a time period a few months later, Ex. 68 clearly shows that the agency goes back to January/February 1977. See, also, text, *infra*, No. 46.

[29] In this letter GALLAGHER recognized no distinction between AIS and CHIPAC, the general agent shown on ISLNAVCO's tariff power of attorney and on form FMC-9.

[30] Confronted by ROBINSON's reliance upon Ex. 2 App. 9 and its effect upon his credibility, OCEANIA tries to give the impression that ROBINSON had no doubts that GALLAGHER mailed Ex. 2 App. 9 until he prepared his testimony for this proceeding in November, 1978. (ROBINSON relied upon Ex. 2 App. 9 through July 1977 in: (a) Ex. 2 App. 18—the letter ROBINSON drafted for ISLNAVCO, dated July 5, 1977, and sent to the Commission; (b) Ex. 26—a July 20, 1977, letter from ROBINSON to ITS; (c) Ex. 148—a chronology prepared by ROBINSON some time after July 14, 1977, for ITS use in dealing with the Commission; and (d) Ex. 2 App. 39—a letter dated June 9, 1977, from ROBINSON to the NMI government.) However, OCEANIA's proposal suffers because ROBINSON testified to the contrary, claiming he had reservations about GALLAGHER sending Ex. 2 App. 9 as early as June 27, 1977. Tr. 1005-1006.

[31] OCEANIA opposed SAISHIP's proposed finding characterizing the advertising as indicating a joint service, as argumentative and conclusory. OCEANIA proffers no other meaning to be derived from the described promotional material.

shippers and connecting carriers, using a draft of the ISLNAVCO tariff for promotional material.

32. The first week of April, 1977, marked the beginning of the new Guam/Saipan barge service by ISLNAVCO/OCEANIA. After the first voyage, public allegations of respondents' violations of NMI entry assurance requirements and of the Shipping Act, 1916, surfaced. This was a quite natural consequence flowing from the shipping documents used in the new service. In the beginning, OCEANIA had no bills of lading or manifests in its own name even though it had obtained its entry assurance for the service in November, 1976. Thus, on the first voyage, the bills of lading were issued in the name of ISLNAVCO and the barge manifests bore the name of AIS. Therefore, unless a shipper or consignee had seen particular promotional advertising, of the kind referred to in No. 31, above, holding out either an ISLNAVCO/OCEANIA service or an OCEANIA service, it is difficult to understand how a shipper or consignee could recognize that OCEANIA was providing a common carrier service.

33. Meantime, during late February and March, 1977, the new barge service had come to SAISHIP's attention. Since SAISHIP was aware that it was being conducted and advertised as ISLNAVCO on Guam, through circulation of ISLNAVCO's draft FMC tariff, SAISHIP protested at various times to the NMI government. When this was unavailing, SAISHIP brought an action under local law in the Trust Territory court against respondents, seeking injunctive relief against ISLNAVCO's operation of a service without an entry assurance. On April 14, 1977, a preliminary injunction was denied.

A partial transcript of the testimony before the Court is an exhibit in this case (Ex. 2 App. 28). According to that transcript GALLAGHER early on gave an affirmative answer to a question asking if OCEANIA and ISLNAVCO had joined "in any sort of joint venture or anything." Later on he described the arrangement ISLNAVCO had with OCEANIA as that of general agent at Guam, loading and soliciting cargo, etc.

It must be observed that GALLAGHER's testimony in the injunction proceeding is not particularly helpful to OCEANIA's cause in this proceeding even though he testified that ISLNAVCO was OCEANIA's agent at Guam. GALLAGHER's interest lay in establishing before the NMI court that OCEANIA was the carrier in the trade. GALLAGHER, a graduate of the United States Merchant Marine Academy with thirteen years in the shipping business, also maintained, among other things, that even though ISLNAVCO had filed a tariff in its own name with the Commission, issued bills of lading in its own name and was allowing OCEANIA to participate in its (ISLNAVCO's) tariff, that OCEANIA was the carrier because ISLNAVCO signed bills of lading as agent for an unnamed master.

34. After the first voyage of the barge service and the hearing before the TT court there were some changes made in the documentation for subsequent voyages, although those changes varied. Until the end of July, 1977, however, the ISLNAVCO bill of lading continued to be used in most instances. For voyages from Guam to Saipan, there was added, by rubber stamp, the words "OCEANIA LINE," above the ISLNAVCO imprint on bills of lading. For shipments from Saipan to Guam the bills of lading bore the statement "ON BEHALF OF OCEANIA LINE, INC," beside the ISLNAVCO imprint. Similarly, the manifests continued to be AIS manifests: from Guam to Saipan there was added the OCEANIA rubber stamp; from Saipan to Guam the stamp was omitted for a time; at Tinian an OCEANIA stamped manifest was used.

35. As a result of protests concerning tariff filing violations by OCEANIA and section 15 violations by both ISLNAVCO and OCEANIA, from SAISHIP to the Commission, several responsive letters were written by the Commission staff (on May 20, 1977, June 6, 1977 and June 29, 1977). The letter of May 20, 1977, was sent to SAISHIP with a copy to the NMI government, producing an inquiry from the Office of the Resident Commissioner to OCEANIA.

Upon learning of the May 20th letter, ROBINSON, on May 28, 1977, telexed ITS requesting that ITS make an "urgent filing same [ISLNAVCO] tariff, in OCEANIA name." However, the telex did not request that the ISLNAVCO tariff be amended or canceled.[32] By letter dated June, 1977, the NMI government sent a formal inquiry to OCEANIA. On June 4, 1977, ROBINSON telexed GALLAGHER for information in order to respond to the inquiry. On June 9, 1977, ROBINSON responded stating that it was OCEANIA's earlier understanding that participation "in the use of a tariff filed by another carrier was permissible on giving notice of such participation" to the FMC and that ISLNAVCO, OCEANIA's managing agents, were instructed to arrange for that notification. ROBINSON attached a copy of the GALLAGHER/ISLNAVCO letter of February 21, 1977 (Ex. 2 App. 9) to ITS in support, as noted in No. 30, above.

Meanwhile, ITS, acting on OCEANIA's request, filed the OCEANIA tariff with the Commission on June 3, 1977, effective July 3, 1977. ROBINSON's response of June 9, 1977, informed the NMI of this.

On June 21, 1977, the NMI government suspended OCEANIA's entry assurance, pending the effective date of the OCEANIA tariff. This temporary halt to the barge operation until July 3, 1977, brought

[32] When ISLNAVCO's tariff later was canceled, in July, 1977, it was done after GALLAGHER instructed ITS to do so after GALLAGHER was instructed by ROBINSON to do so, after HAP advised ROBINSON to have GALLAGHER do so after the entire sequence was set in motion by ITS' advice.

to an end OCEANIA's violation of section 18 of the Shipping Act, 1916, arising from the absence of an OCEANIA tariff.

36. Although the June 21, 1977, NMI suspension of OCEANIA's entry assurance was based upon the absence of an effective OCEANIA tariff, the Attorney General of NMI had given the opinion that the OCEANIA/ISLNAVCO relationship was also subject to section 15 of the Shipping Act, 1916. An article referring to this opinion appeared in the local press on July 14, 1977, again raising the possibility that the OCEANIA entry assurance would be suspended. As a result of that article, ROBINSON met with the Resident Commissioner and Attorney General of the NMI on July 18, 1977. He disputed that there was any current violation of section 15. Following the meeting ROBINSON wrote a letter of even date to the Resident Commissioner, stating:

> Whilst such an opinion may have been valid prior to an approval by the FMC of Oceania Line tariff number 1, the approval and implementation of that tariff as of July 3, 1977 removed the need for a section 15 agreement between the two companies.

In the letter ROBINSON contended that as of July 3, 1977, ISLNAVCO was not a person subject to the Shipping Act (no reference was made to ISLNAVCO's tariff and section 15 agreements with United States Lines and Matson, all of which remained in effect). He stated that the earlier mistake of tariff filing had been corrected and that OCEANIA was now acting as a common carrier and ISLNAVCO was acting as OCEANIA's agent in Guam.

However, the bills of lading issued during July 1977 continued to be ISLNAVCO bills of lading, with OCEANIA rubber stamped thereon, additionally, and manifests continued to be AIS manifests, with an OCEANIA stamp on Guam origin cargo but without that stamp or any other on Saipan origin cargo. There is no evidence that a voyage schedule issued on ISLNAVCO stationery (without any mention of OCEANIA),[33] holding out the scheduled voyages from June 27, 1977 through July 28, 1977, was either canceled or recalled by ISLNAVCO or OCEANIA.

37. Meanwhile, by letter dated July 5, 1977,[34] in response to a June 6, 1977, request made by the Commission's Office of Agreements, GALLAGHER forwarded to the Commission for filing and approval, sixteen copies of the January 14, 1977, OCEANIA/ISLNAVCO agreement, which was later assigned No. 10306. Also enclosed in that letter

[33] Ex. 2 App. 47. The exhibit bears no date.

[34] In late June 1977, the first version of this letter was drafted by Mr. Cushnie, a Guam attorney who represented both ISLNAVCO and OCEANIA and who, at that time, was an officer of ISLNAVCO. The letter was redrafted by ROBINSON on June 30, 1977, and was sent to GALLAGHER. The letter sent by GALLAGHER changed only one word of ROBINSON's draft.

was an "information circular" in the name of OCEANIA and a revised "information circular" in the name of ISLNAVCO. The latter form FMC-9 made no reference to CHIPAC as ISLNAVCO's Hong Kong general agent and without reference to its earlier filing claimed that ISLNAVCO was an agent, only, and was not a common carrier.

38. Ex. 24 App. 18 is an important document in this proceeding. It is material not so much for what it purports to say or do, but, because the circumstances surrounding its introduction in this proceeding bear heavily on the credibility of ROBINSON.[35]

SAISHIP proposes the following finding for which citations are provided separately in its Opening Brief.

> 38. On or about July 18, 1977, respondents were faced with the prospect of further litigation with the NMI government over possible additional suspension of the OCEANIA entry assurance for violation of section 15 of the Shipping Act and executed a document backdated to July 3, 1977. The "July 3" document purported to create a fixed fee agency agreement in which Island would appear to be OCEANIA's Guam agent only. Neither the Federal Maritime Commission nor SAISHIP as a party in this case was advised of the existence of the revision to Agreement 10306 alleged by OCEANIA to have been executed on July 3. OCEANIA denied its existence in discovery responses in the case and failed to respond to document demands which covered the July 3 document.

OCEANIA rejects SAISHIP's proposed finding out of hand, and, although making reference to it in the argument section of its Answering Brief, proffers no alternative findings in response to No. 38 or in its proposed additional findings. OCEANIA's entire response to SAISHIP's proposed finding is as follows:

> 38. This proposed finding is specifically rejected particularly because of its lack of record reference (e.g. Complainant's brief Argument IV D). Proposed Finding 38 is argumentative and cannot be supported by evidence in the record.

I find:

By making no reference to the July 3, 1977, "agreement" in discovery responses in this proceeding and by failing to respond to document demands which should have produced that agreement,[36] OCEANIA denied the existence of that agreement.

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[35] As was often the case during particular portions of his testimony, ROBINSON's demeanor was carefully observed during his cross-examination concerning Ex. 24 App. 18 (Tr. 908). This may be illustrated by some of my inquiries, e.g.—Tr. 952-957, occasioned by the fact that the very existence of this document contradicted an answer to another question on cross-examination just a few minutes earlier.

[36] The circumstances concerning the finding of the document, itself, are not clear to anyone, including OCEANIA's counsel. Tr. 928, et seq.

The first reference to the July 3, 1977, agreement in this proceeding appears in ROBINSON's written prepared direct testimony (Ex. 24 p. 11 para. 20), which, under prehearing rulings, was not turned over to SAISHIP's counsel until complainant rested. This occurred on the sixth day of the hearing (Tr. 845). That reference is very brief, as follows:

> 20. On July 3rd Oceania entered into a new agreement with Island effective that date which eliminated the provisions for sharing of profits (Ex. 18).

Even though the prepared testimony of ROBINSON made specific reference to and attached a copy of the July 3, 1977 agreement which purports to be a replacement for a cancelled January 14, 1977 "MANAGEMENT AGENCY AGREEMENT," [37] in answer to a series of questions posed on cross-examination (prior to the time when SAISHIP's counsel directed ROBINSON's attention to Ex. 24 App. 18), ROBINSON testified that, as of July 21, 1977, there was no agreement between OCEANIA and ISLNAVCO other than the January 14, 1977, agreement (Tr. 896).

After he was referred to Ex. 24 App. 18 on cross-examination, ROBINSON agreed that it purported to terminate the January 14, 1977, agreement that was causing OCEANIA trouble with both the NMI government and the Commission over the section 15 issue (Tr. 904-906). ROBINSON acknowledged that if the Commission ruled that the January 14th agreement was subject to section 15, the NMI was going to shut down the OCEANIA operation until the Commission approved it.

Nevertheless, ROBINSON never informed the Commission of the July 3, 1977, agreement, directly or indirectly. Although PATTERSON and ITS representatives met with Commission personnel on July 26, 1977, in connection with the January 14th agreement on OCEANIA's behalf, neither PATTERSON nor the ITS representatives mentioned the July 3rd cancellation of and replacement to the January 14th agreement. ROBINSON doubted that it would have been mentioned because neither PATTERSON nor ITS was informed by him of the July 3rd agreement prior to the meeting of July 26, 1977, with the Commission staff (Tr. 906-909).[38]

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[37] See letter, purportedly dated July 3, 1977, from ROBINSON to GALLAGHER purporting to transmit the July 3, 1977, agreement. Ex. 24 App. 18, p. 1.

[38] In fact, it may be said that the Commission was not informed of the July 3, 1977, agreement until October 31, 1978, when the prepared testimony was marked for identification in this proceeding. The argument made in the Answering Brief by OCEANIA, attempting to excuse ROBINSON for not informing the Commission about the July 3rd agreement in the July 5, 1977, letter is unacceptable. It may be recalled that the July 5th letter was prepared in late June, 1977, by Mr. Cushnie, was redrafted by ROBINSON about June 30th and was sent over GALLAGHER's signature to the Office of Agreements virtually as redrafted by ROBINSON. OCEANIA's argument is that in preparing the response to the Office of Agreements' June 6th letter, ROBINSON "considered that he was responding

Continued

In answer to my question, "What was the significance of [Ex. 24 App. 18], in your mind?" Robinson gave the following answer (Tr. 908-09):

> I had been advised by Mr. Cushnie, arising out of our meeting, in fact, earlier because the indications, first of all, from the Northern Marianas Attorney General, Mr. La[y]ne, I think go back to late June on some of the documents, I think will reflect that. I had already been receiving indications from Mr. La[y]ne that regardless of the opinion, which I think is already in evidence, written by Mr. Cushnie as to the characterization of the January 14 agreement being a joint venture. Mr. La[y]ne was still of the opinion that such an agreement would, under Trust Territory and Northern Marianas' law, constitute a joint venture. Mr. Cushnie, towards the end of June, suggested that in order to remove that problem area it would be far better for the January 14 agreement which mentioned sharing of profits to be cancelled and a simple agency agreement setting a flat remuneration to be entered into. It was in that context that Mr. Cushnie was requested by me to draft a suitable agreement and the agreement, after drafting and some minor revisions discussed with Mr. Gallagher of Island Navigation and finally entered into between the parties. Now, this did not, in my view, do anything to stop the inquiries that were going on from the FMC to ourselves regarding the Section 15 aspects of the January 14 agreement.

Neither of the two documents comprising Ex. 24 App. 18 were signed on the date of July 3, 1977. The first document is ROBINSON's letter to GALLAGHER confirming their discussion of that day which culminated in the agreement dated July 3rd cancelling the January 14th

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to an inquiry for a specific agreement (Tr. 912-913); he made no connection between the January 14—Agreement—FMC Agreement No. 10306—and the July 3 agency agreement, although the latter in fact cancelled the former." OCEANIA adds, "it is little wonder that the July 3, 1977 agreement was relegated to insignificance by Mr. Robinson, who was at that time, striving to maintain the vitality of Oceania in the face of the onslaught by Saiship, the failure of Island and the desertion of his friend, Mr. Gallagher."

There are several answers to OCEANIA's arguments and statements. The short ones are that at the time ROBINSON prepared the July 5th letter, the failure of ISLNAVCO and the desertion of GALLAGHER were not even considered a matter of conjecture by OCEANIA and would not occur until about one month thereafter. Moreover, there is no evidence to show that those events were considered a possibility, much less a probability, by OCEANIA during the time of the PATTERSON, ITS and Commission staff meeting on July 26th.

For the longer answer, one must examine Mr. Cushnie's draft of late June (Ex. 156). In the very first paragraph of that draft, the statement was made that the enclosed agreement [Agreement No. 10306] "is also expected to be altered effective July 3, 1977 to provide for an agency operation by [ISLNAVCO] and an altered method of compensation for management services rendered by [ISLNAVCO] to [OCEANIA]." The draft closed with a paragraph referring once again to the fact that the enclosed agreement would be altered to provide for agency services by ISLNAVCO and for an altered method of compensation for management services when OCEANIA's own tariff would become effective on July 3rd. ROBINSON deliberately eliminated those references in his redraft of the letter.

agreement and replacing it with one that redefines the functions to be performed by ISLNAVCO and sets a flat monthly fee for those services performed above normal ship agency functions. It also confirms that ROBINSON has handed GALLAGHER two copies of the July 3rd agreement duly signed by both parties. The second document is the agreement, itself, which was signed by Jesus Q. Guerrero for OCEANIA and GALLAGHER for ISLNAVCO.

Ex. 129 contains copies of Mr. Cushnie's billings to OCEANIA and ISLNAVCO for several months during 1977. It shows that Mr. Cushnie did not even start to draw up the agreement that bears date of July 3, 1977, until July 5, 1977, and that Mr. Cushnie again revised the agreement upon review on July 8, 1977. (See, also, above citation from Tr. 908-09.) Moreover, ROBINSON's testimony describing the date when the two signatories executed the agreement and the circumstances of the signing is both vacillating and contradictory and hardly lends credence to his claim that both parts of Ex. 24 App. 18 were executed on July 3, 1977 (Tr. 981-83).

It should be said that on redirect examination ROBINSON sponsored Ex. 157 (Tr. 1966) to explain why there was a physical gap in the date shown on Ex. 24 App. 18. In the latter, the typed word "July" obviously did not occupy the planned spacing between "This 3rd day of" and "July." Ex. 157 is an unsigned version of Ex. 24 App. 18 and ROBINSON said it was used as the model for Ex. 24 App. 18, but his secretary made a mistake in copying the date, which ROBINSON corrected before Ex. 24 App. 18 was executed. On Ex. 157, the date appears as "This 3rd day of January, 1971," but "January" is crossed out.

Whenever Ex. 24 App. 18 was executed and whatever its purpose may have been, it is manifest that it was not intended to and did not, in fact, redefine or alter the mutual obligations of the January 14, 1977, agreement between OCEANIA and ISLNAVCO prior to the end of July, 1977, when ISLNAVCO became virtually defunct because of GALLAGHER's disappearance. See text, No. 42, *infra*.

39. Faced with anticipated NMI governmental action to suspend OCEANIA's entry assurance because of perceived section 15 violations arising from the Attorney General's opinion that; ISLNAVCO was an "other person subject to the Act," MARSHALL, then in Guam, agreed with GALLAGHER that a specified lawyer [39] be hired by OCEANIA to resist that action. From Guam, MARSHALL also called PATTERSON in Hong Kong directing him "to fly to Washington via Guam/Saipan to resolve this mess" with the Commission and, thereby, with the NMI government as well. (Ex. 2 App. 46.) Meantime PATTERSON had been in contact with ITS in Washington, asking ITS for

[39] Mr. Cushnie was out of town. The specified lawyer was associated with Mr. Cushnie's law firm.

the "most expedient course *we* could take" to stop further interference with "*our* Guam/NMI service" (Ex. 98, emphasis supplied). From CHIPAC, in Hong Kong, PATTERSON telexed MARSHALL, at CABTUG, in Guam, informing him that ITS had answered his communication (Ex. 98) advising that the "FMC intervention could be stopped cold." Apparently when ITS answered PATTERSON, it had not yet seen Agreement No. 10306 and erroneously believed it to relate to leasing or chartering of a barge and tug.

40. Following the course charted by ITS, PATTERSON and ROBINSON (see Ex. 2 App. 9-A; Exs. 25 and 26), PATTERSON and ITS made ITS' prediction come true. On July 26, 1977, PATTERSON and ITS personnel, representing both ISLNAVCO and OCEANIA (see Ex. 56, Ex. 258 (Schwarz Deposition p. 1-56), Ex. 24 App. 24), met with six members of the Commission's staff in Washington, D. C.[40] In essence, the staff was told that the tariff had been filed in ISLNAVCO's name by mistake, that ISLNAVCO was a mere agent and not a carrier and that OCEANIA was the only carrier in the trade. The staff was not advised that AIS and ISLNAVCO had a common "General Agent," [41] was not shown copies of the "Island Navigation/Oceania Line" promotional material (e.g., Ex. 2 App. 25) nor copies of the actual shipping documents used on the barge voyages in question.[42] No disclosure was made to the staff about ISLNAVCO's participation in section 15 agreements with United States Lines and Matson,[43] or its connecting carrier agreement with United States Lines. Nothing was said to the staff about the supposed July 3rd cancellation of the agreement that was on file with the Commission-Agreement No. 10306.[44] The staff was not told anything about CABTUG, CHIPAC, or SALVTUG or their relationships with OCEANIA, ISLNAVCO and AIS. The day before the meeting with the staff, PATTERSON had arranged, through OCEAN-

[40] The depositions of seven staff members, including the six who attended the meeting, appear in the two volumes of Ex. 258.

[41] The staff was not aware of the filing of Ex. 2 Apps. 11 and 13 (the information circulars on file with the Commission), showing that CHIPAC was the "general agent" of both AIS and ISLNAVCO at the time of the meeting.

[42] OCEANIA proposes that the staff indicated that none of the matters referred to in this sentence were important, citing Ex. 258 pp. 1-52, 53. A reading of pp. 1-52, 53 in each of the volumes of Ex. 258 fails to reveal that indication.

[43] Of course, ISLNAVCO's participation in those agreements with United States Lines and Matson were on record with the FMC and presumably were available to the staff just as were the information circulars. The depositions of those staff members fail to establish, however, that OCEANIA's and ISLNAVCO's representatives referred the staff to those documents during the meeting.

[44] OCEANIA proposes that this finding read "The record is silent as to whether the FMC staff was informed about the July 3 agency agreement," footnoting that SAISHIP's citation to Ex. 258, crossexamination is an "unintelligible record citation." The fact is, however, as found, *supra*, neither PATTERSON nor ITS was informed of the July 3rd "agreement" prior to the meeting and, thus, could not have told the staff about it, and as was also found, *supra*, the first time that either the Commission or SAISHIP learned of that "agreement" was the day ROBINSON took the stand to testify in this proceeding. (See text No. 38 and n. 38, *supra*.)

IA, for ISLNAVCO to send a message cancelling the ISLNAVCO tariff so that PATTERSON was able to represent to staff that the "mistaken" Island tariff (which Patterson himself had vouchsafed by forwarding it for filing as an ISLNAVCO tariff in the first place and which continued in effect until July 29, 1977) had been cancelled.

41. On July 29, 1977, ITS communicated by telex with PATTERSON who by then was at OCEANIA's office in Saipan. ITS suggested a draft letter be sent to the Commission staff "categorically" refuting alleged violations of the Shipping Act. Having taken care of the section 15 problem, this communication closed by referring to OCEANIA's "technical" violation of section 18 of the Act until July 3, 1977,[45] but advising that Oceania could "always argue that the tariff was filed in the name of INCO due to ignorance of the regulations and said tariff really belonged to Oceania." (Ex. 27.) From the July 26, 1977, meeting with the staff onward, OCEANIA, ISLNAVCO and their representatives made representations consistent with the argument suggested by ITS although their prior statements to the Commission, to the NMI government and to each other had represented something entirely different, i.e.—that OCEANIA and ISLNAVCO had attempted to provide for notification to the Commission of OCEANIA's use of or participation in ISLNAVCO's tariff.[46]

Moreover, Ex. 153, a letter, dated June 3, 1976, from ROBINSON to ITS, in connection with OCEANIA's joint service arrangement with DAIWA Line further detracts from the "mistake" argument, Ex. 153 patently establishes that ROBINSON had been informed by ITS and had become familiar with the Commission's tariff filing requirements as well as the need for proper captioning of shipping documents, i.e.—bills of lading-to show the identity of the person performing the common carrier service.

42. On or about July 30, 1977, GALLAGHER departed hastily from Guam allegedly with substantial amounts of ISLNAVCO's principals' money. This left ISLNAVCO in disarray but, more important, it left unpaid bills which ISLNAVCO was to have paid to the Port of Guam for both the AIS and the OCEANIA/ISLNAVCO services. His depar-

[45] OCEANIA had no tariff on file with the Commission and, therefore, no OCEANIA tariff was in effect from the time of the first voyage of the barge on April 5, 1977, to July 3, 1977, when OCEANIA's filed tariff became effective. See, text, No. 35, *supra*.

[46] OCEANIA proposes that the beginning date should not be July 26, but July 20, 1977, the date when ROBINSON wrote to ITS, enclosing copies of the January 14 agreement to be filed with the Commission (Ex. 26). ROBINSON, however, did not make that specific representation. He did say that it was always intended that ISLNAVCO act solely, as agent and not as a common carrier. While this statement may permit an interpretation that the ISLNAVCO filing was a mistake, the other representations previously made to the NMI and the Commission and to each other by GALLAGHER and ROBINSON shows that the argument which ITS advised be made is a subtle refinement of ROBINSON's statement. Therefore, the "mistake" position taken by OCEANIA cannot be justified by the letter of July 27th.

ture also left the OCEANIA/ ISLNAVCO service without an effective cargo solicitor on Guam. Accordingly, at meetings occurring in the first two days of August, 1977, at which MARSHALL, PATTERSON, KATINDOY, ROBINSON and others were present, AIS and OCEANIA jointly switched to AKSHIP, as their mutual Guam agent. (Exs. 48, 241.) [47]

43. Because the vessel deal with MARSHALL had been contingent on ISLNAVCO/GALLAGHER being the manager and operator of the service (Ex. 216, 29; Tr. 1857-58, 1879), ROBINSON was extremely concerned that, as a result of GALLAGHER's disappearance, the "owners" might withdraw the vessels from the service. (Tr. 1143-44, 1583-84, 1613.) The service had been losing substantial monies, extensive enough for MARSHALL to refer to them together with AIS losses as "our sacrifices." (Ex. 76; see Exs. 28, 38, 30, App. 20B-D; Tr. 1068-69, 1581-83.) [48] However, in early August, 1977, REYES advised ROBINSON that the vessels would continue to be available so long as, in the future, the pre-existing reporting and accounting functions of ISLNAVCO were channeled to SALVTUG, and barge service revenues, net of local expenses and OCEANIA draws, were channeled to AIS/CHIPAC. (Tr. 1143-44, 1583-84, 1613; Exs. 48, 237-38, 240, 241.) No changes were required or occurred as to the physical operation of the actual service, which continued with the tugs furnished by CABTUG without any provision for payment by OCEANIA or its new Guam agent, AKSHIP.

44. Accordingly, on August 5, 1977, by separate letters, but as part of the joint arrangement reached earlier,[49] ROBINSON and REYES directed AKSHIP in the manner it was to account, report and handle money for the OCEANIA/AIS service.[50] ROBINSON instructed

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[47] OCEANIA argues that the record does not support SAISHIP's use of the words "joint" and "mutual" in the proposed finding. OCEANIA is wrong. Ex. 48, ROBINSON's letter of August 5, 1977, to AKSHIP, concerning the TM-644, specifically refers to the remittance by AKSHIP of balances from freight collections after deduction of disbursements and agency fees to AIS, Hong Kong. Ex. 241, an AIS letter, signed by REYES, to AKSHIP, gives AKSHIP instructions in connection with both the AIS vessel *Endurance* and OCEANIA's barge TM-644.

[48] Ex. 76 is a letter dated May 17, 1977, from MARSHALL to GALLAGHER and an attached electronic communication from DIM to HAP of even date. The letter is on AIS stationery. The attachment was sent from SALVTUG's machine to ISLNAVCO's machine. In these messages, as in many others in the record, MARSHALL appears as the ultimate decision maker in all matters pertaining to the tugs and barge used in the Guam/Saipan service and the AIS vessel *Endurance*. Among other things, MARSHALL says in the letter:

> While wishing to give John Robinson, the Saipan consignees and Australian shippers our fullest support—I think, objectively speaking; they are enjoying, through the ANL/ENDURANCE/TM-644 linkage, the most reliable/ economical service obtainable under the circumstances—particularly considering our sacrifices through currently unprofitable ENDURANCE/TERRY/TM 644 operations.

It is interesting to note that Ex. 76 is DIM's 11th numbered AIS letter for 1977. He wrote many more. E.g., Ex. 105, dated October 25, 1977, is number 85.

[49] See text, No. 42, and n. 47, *supra*.

[50] *Id.*

AKSHIP to remit all freight collection balances after necessary disbursements and agency fees to AIS. (Ex. 48.) At first, ROBINSON testified that the instruction in Ex. 48 had been changed. (Tr. 1355.) Later, he conceded that there was no change authorized by him. (Tr. 1881.) [51]

ROBINSON's letter advised that statements of collections, deductions, and accounting would be handled in a manner to be advised. On the same day the further advice arrived. REYES, writing for AIS, gave detailed instructions for both AIS and OCEANIA reporting and accounting functions and payment of revenues. REYES' letter stated that PATTERSON was to approve payments made on behalf of both carriers.[52] Voyage accounts for both AIS and OCEANIA were to go to SALVTUG, attention of REYES. Freight collections were to be reported in a weekly telex summary to SALVTUG with a copy to OCEANIA as to OCEANIA collections. Monies due for both services were to be sent to an account maintained for AIS by CHIPAC at CITIBANK NA, Hong Kong,[53] with SALVTUG and REYES to be notified of remittances by telex. In general, these instructions from REYES were followed. Mr. Anderson believed that on one occasion payment was made by AKSHIP mistakenly to AIS instead of CHIPAC for both AIS and OCEANIA funds. In fact, on two occasions, checks were drawn to the order of AIS by AKSHIP in settlement of AIS/OCEANIA accounts (Exs. 239, 240). Ex. 239 includes a check dated March 21, 1978, for $19,761.00 and Ex. 240 includes a check dated April 21, 1978, for $34,975.93. On a third occasion AKSHIP sent a check drawn to the order of AIS solely in settlement of an OCEANIA account; that check was dated January 10, 1978, and was in the amount of $15,075.69. (Ex. 237.)

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[51] OCEANIA claims that Tr. 1881 "does not support the statement that Mr. Robinson conceded the directions of Ex. 48 were not changed." Although ROBINSON equivocated, the record supports SAISHIP's proposed finding. On cross-examination, ROBINSON answered questions as follows, Tr. 1881:

> Q. Did these handwritten instructions you refer to ever direct them to send the freight monies collected to anybody besides Asiatic Intermodal Seabridge?
>
> A. I don't think it did no. I can't remember ever writing such a document, my hand.
>
> Q. Do you assert that you gave an oral instruction now specifically, Mr. Robinson an oral instruction to give the freight monies collected on the TM-644 to anybody other than A.I.S.?
>
> A. I don't think I did. I believe that there may have been a written instruction from Mr. Reyes to Atkins Kroll regarding payment to the Pacific Logistics Hong Kong-Shanghai Bank. I believe I may have verbally confirmed that instruction with Mr. Anderson, but for myself writing such an instruction I have no memory and I don't think I did. I have no memory of giving a verbal instruction apart from what I've just described.

Moreover, AKSHIP's Manager, Mr. G. G. Anderson, testified that those instructions were not changed by ROBINSON. (Tr. 2508, et seq.)

[52] See Ex. 241 paragraph "B" under *M.V. Endurance* and under TM-644. AKSHIP refused to follow this instruction. Instead it paid the bills without prior approval after telling PATTERSON that REYES procedure was impractical because the commercial Port of Guam required payment of its bills within two weeks.

[53] Mr. Anderson was also told by PATTERSON to remit OCEANIA and AIS money to CHIPAC. (Tr. 2479.)

45. Commencing with the first TM-644 voyage in August, 1977. ISLNAVCO bills of lading ceased to be used and thereafter only OCEANIA bills of lading were used in the barge service. AIS manifests, however, continued to be used for a time into the autumn of 1977. Ultimately an OCEANIA manifest was developed and put into use.

46.[54] Beginning with OCEANIA's third answer to interrogatories in September, 1978 (Ex. 2 App. 55), ROBINSON has tried to give the impression that OCEANIA's relationship with AIS during 1977 was only that of a space charterer, on two occasions, on an AIS vessel. ROBINSON maintained that "No other contractual relationships existed during the period but a close informal relationship was maintained from a mutual interest in cargo movements within the Western Pacific." In effect, this answer denied the existence of any other relationship, including agency relationships between AIS or CHIPAC, on the one hand, and, OCEANIA, on the other hand. (Ex. 2 App. 55 p. 1). ROBINSON's prepared written testimony said virtually the same thing. (Ex. 24 p. 18.) Several times during his testimony, ROBINSON insisted that OCEANIA was not an agent of AIS during 1977, sometimes adding that the only relationship was that of space charterer on an AIS vessel (Tr. 1204-05, 1229, 1642, 1983). However, ROBINSON's characterization of OCEANIA's relationship with AIS does not stand up in the face of documentary evidence and his own testimony to the contrary, vacillating and evasive as that testimony might be. See, e.g., Ex. 36, 90, 92, 102, 106, 136, 176; Tr. 1384-90, 1401-02, 1519-29, 1674, 1833, 1983-90, 2012, 2158-2169, 2174.

The following are some examples of ROBINSON's testimony on this subject.

When questioned about an earlier statement, at Tr. 1229, denying that OCEANIA was an agent for AIS in 1977, ROBINSON testified, at Tr. 1242:

> Q. Now, Mr. Robinson, do you now wish to change your testimony where, I believe, you stated twice in answer to my questions, that you did not become the agent for Asiatic Intermodal Seabridge until January, 1978?
>
> A. Yeah, I guess you are right.
>
> * * *
>
> Q. But you were the agents for Asiatic Intermodal Seabridge as of June 11, 1977, weren't you.
>
> A. Yes, Sir, we handled the vessel at that time.

[54] OCEANIA rejects SAISHIP's proposed finding No. 46 as "being so argumentative and unsupported that they can not be corrected for purposes of modified proposed findings." However, I find little support for OCEANIA's statement. With slight modification and some amplification SAISHIP's No. 46 is incorporated in these findings.

Q. When did you now become the agents for Asiatic Intermodal Seabridge in Saipan. You recall you previously said January '78. Now when was the beginning of that agency relationship?

A. I guess it must have been the vessel's first call here in 1977, whatever date that was.

* * *

When asked again about the first AIS call at Saipan by the vessel *Endurance*, Voyage No. 1, in January or February 1977 (ROBINSON seems to have established to his own satisfaction that Voyage No. 1 called at Saipan then although he also refers to this event as having taken place in March), ROBINSON testified, Tr. 1523:

Q. Who was the Saipan Agent?

A. We handled the vessel in Saipan.

Q. We being Oceania Line?

A. Oceania Line, yes.

Q. And you were its agent for the Saipan call, local agent?

A. I guess you would characterize us in that fashion, yes.

I find:

From January or February, 1977, and for the rest of the year 1977, OCEANIA served as AIS agent on Saipan although the vessel *Endurance* called there only on Voyages 1 and 4. Voyage 1 brought little, if any, cargo but Voyage 4 was more productive. Despite ROBINSON's claims that Voyage 4 involved an oral space charter and despite the fact that OCEANIA had obtained an entry assurance to operate as a carrier in November 1976, OCEANIA had no bills of lading, no manifests and no tariffs of its own, for the "space charter" service. Although ROBINSON said that he intended to develop shipping documents if the cargo warranted, the cargo which arrived on the *Endurance*, Voyage No. 4, came in on AIS bills of lading, rated at the Guam rate set forth in the AIS tariff, and on an AIS manifest.

It is true that from time to time OCEANIA held out to the public that it was a common carrier in the service conducted by AIS in 1977 and 1978.[55] As late as mid-1978, OCEANIA was advertising the likeness of the AIS vessel *Endurance* in newspapers, depicting it as an OCEANIA vessel inbound to Guam [56] and representing that various

[55] This holding out is consistent with OCEANIA's "space charter" representations but inconsistent with other documentary and testimonial evidence showing OCEANIA to be an AIS agent during that time. See, e.g., ROBINSON's testimony at Tr. 1242, *supra*, in which he admits not only the undisputed fact that OCEANIA was an AIS agent from 1978 on, but that OCEANIA was an AIS agent in 1977 as well.

[56] OCEANIA had no tariff on file with the Commission from foreign ports to Guam.

AIS agents in foreign ports were OCEANIA agents. (Exs. 49, 50.)[57] This advertisement employed a similar format to the one that OCEANIA previously used for its joint service with DAIWA Line, *supra*, at No. 13 (Exs. 63, 146) because of entry assurance requirements.

47. The OCEANIA/ISLNAVCO barge operation together with its linkage to an exclusive transshipment agreement with AIS[58] affected SAISHIP adversely. By the time Voyage 14 of the TM-644 was completed, the impact on SAISHIP was considered significantly harmful by SAISHIP, albeit "dismal" by OCEANIA. According to ROBINSON's telex to MARSHALL and REYES at SALVTUG, for Voyages 7 through 14, inclusive, the TM-644 had carried 28.67% of the cargo in the Guam/Saipan trade.[59] Revenues for those eight voyages amounted to $45,725.93. Revenues for eight later voyages, e.g., 71 through 78, inclusive, increased substantially, amounting to $84,246.46.

48. The ISLNAVCO/OCEANIA draft of the ISLNAVCO tariff was circulated among shippers in February and March, 1977. Subsequent tariff filings and circulars mailed to shippers and consignees advertised the TM-644 barge rates to be lower than those of SAISHIP. (Exs. 45, 187, Tr. 228.)

Although the TM-644 rates remained below SAISHIP's up to the time when the hearing resumed in 1979, the TM-644 service operated at a loss in the sense that after paying local port and agency costs, the revenues that were paid to AIS/CHIPAC were only about fifty percent of what OCEANIA claimed to be a fixed charter hire obligation of $3,200.00 per voyage.[60] Through voyage 73 in 1978, the total net

[57] Prior to the time Ex. 49 was introduced, ROBINSON testified that CHIPAC was not OCEANIA's Hong Kong agent. Ex. 49, an advertisement in a publication, *New Pacific Magazine*, shows CHIPAC as OCEANIA's Hong Kong agent. ROBINSON placed the advertisement in the publication. (Tr. 1372-73.) PATTERSON provided ROBINSON with the list of agents. (Tr. 1375.)

[58] OCEANIA disputes SAISHIP's proposed finding that there was an exclusive transshipment agreement giving as its reason that the record citations do not support that finding. OCEANIA's position is not well taken. (See Exs. 76, 91, 160, 161; Tr. 1245-46, 1270, 1378, 1519-22, 1761, 1786.) The containers used by OCEANIA/ISLNAVCO, and, later, by OCEANIA, were assigned to the Guam/Saipan service by PATTERSON, acting either for AIS or TRANSPAC, the lessee, of those containers. In addition, those assigned containers were freely interchanged with other containers assigned to the *Endurance.* Further evidence of the linkage is seen in Ex. 164, a telex from ROBINSON to DIM at SALVTUG dated September 27, 1977. ROBINSON asks DIM if *Endurance* will call Saipan, saying that he has a booking for Manila which he will send via TM-644 if *Endurance* does not call. Copies of the telex were sent to REYES and HAP. Apparently, DIM sent two handwritten replies to this telex, one to ROBINSON, the other to PATTERSON. To ROBINSON, he wrote apologetically, "John—I'm deeply embarrassed—Don." The note to PATTERSON was a rebuke. DIM said, "HAP—This is glaringly poor AIS liason [sic]—." (Exs. 102, 103, 109; Tr. 1537-38.)

[59] Telex dated July 28, 1977. Voyage 14 occurred on July 20, 1977. (See Exs. 30, 38.)

[60] But these payments do not take into account what necessarily were extensive legal (Tr. 1777), accounting (Tr. 2088), travel (Ex. 60; Tr. 891, 1220-27, 1500), container (Tr. 1538-38), demurrage (Tr. 1782), insurance (Tr. 1875); printing (Tr. 2156-57), and other expenses of the service, e.g., remodeling of the barge at a cost of $30,000.00 (Tr. 1782), all of which were advanced by AIS, CHIPAC, PATTERSON, REYES and others controlled by or subordinate to MARSHALL without any increases in charter hire rates. Another advance, as noted earlier, was tariff filing and tariff watching. Ex. 60

Continued

revenues from the TM-644 service (after paying local port and agency expenses), which were sent to AIS/CHIPAC, came to only $1,355.00 per voyage. For the purpose of these computations, only, it is assumed that the $3,200.00 "charter hire" was a bona fide negotiated price reflecting the market value of the equipment. The same equipment at the rates stated in Ex. 16 [61] would have cost $7,425.00 per voyage, exclusive of demurrage. (Ex. 28.) OCEANIA notes that Ex. 16 is undated and contends that the rates shown therein are for salvage and not common carrier operations, implying that the rate of $3,200.00 reflected market value of the *Terry M/Husky/Piti* and TM-644 for the Guam/Saipan service whereas the $7,425.00 reflected the going rate for salvage usage. There is no validity to OCEANIA's position in regard to market value, as may be seen by an examination of Exs. 20 and 2 App. 20-E.

Ex. 20 is a confidential inquiry in the form of a letter dated November 11, 1976, from HAHN, representing SAISHIP, to PACLOG, attention of MARSHALL, asking that MARSHALL present a preliminary proposal to provide a tug and barge for service within the Marianas. The specifications were set out in the letter. Consistent with HAHN's understanding that KATINDOY was a subordinate of MARSHALL and that CABTUG was a MARSHALL company (see, e.g.—Tr. 2664-65) HAHN sent a copy to KATINDOY. HAHN's understanding of those relationships was confirmed when he received Ex. 2 App. 20-E in reply. Ex. 2 App. 20-E is a letter dated February 17, 1977, on CABTUG's letterhead from KATINDOY to HAHN containing a proposal for a tug and barge, identical to those used by OCEANIA/ ISLNAVCO, at the roundtrip charter rate of $7,600.00. (HAHN, as an employee of one of JOETEN's companies, may well have an interest in the outcome of the event. However, this does not detract from the evideniary value of his understanding, for at the time he wrote the letter there was no indication that MARSHALL or KATINDOY would be involved in an operation in competition with JOETEN. HAHN's understanding was based upon knowledge gained in the past, when he worked for LUSTVECO's former Guam agent. See, e.g., Tr. 2604-05, 2663-66, 2701-10, 2713-14.)

Until June 1, 1977, SAISHIP's charter cost for a tug and barge supplied by Dilmar were $6,400.00 per voyage, plus demurrage. This was later amended, retroactive to June 1, 1977, to $5,400.00 (a credit of

shows that ITS performed the watch over SAISHIP's tariff filings on behalf of its client, AIS. After receiving the watch report, HAP, writing on CHIPAC stationery, sent the report to ROBINSON and Mr. Anderson of AKSHIP, asking if they agreed with him that OCEANIA should promptly file identical tariff material. HAP sent a copy of this letter, with the same enclosures, to MARSHALL.

[61] Ex. 16 is a brochure published by SALVTUG. The brochure states that SALVTUG "is popularly known as SALVTUG and its OFFSHORE GROUP." The brochure identifies CHIPAC, TRANSPAC, APC, CABTUG and PACLOG as members of the OFFSHORE GROUP.

$1,000.00) per 45 hour voyage because Dilmar was hauling fuel in the deep tank of the barge. (Exs. 233, 235.) (OCEANIA's charter is for 72 hours.)

49. Even before the OCEANIA/ISLNAVCO service commenced, in Guam, GALLAGHER was representing to shippers that SAISHIP was going out of business. (Tr. 401, 418.) SAISHIP countered with its own letters denying those rumors and stating that it was in the trade to stay. (Ex. 2 Apps. 1 and 2.) Shortly after the OCEANIA/ISLNAVCO service began, while its performance was still "dismal," on Saipan, OCEANIA's president wrote to the TT and NMI governments in a similar vein. (Ex. 2 App. 4.) After claiming that OCEANIA had built a profitable operation (which was untrue), OCEANIA's president stated, in that letter, that SAISHIP's financial collapse was inevitable and asked the TT government to demand immediate repayment of the monies owed by SAISHIP. Had the TT government made that demand, SAISHIP would have gone under. (Ex. 2 p. 11; Tr. 1574.) [62] Although ROBINSON testified that he did not agree with the other stockholders of OCEANIA to send that letter, in later discussions with the governmental representatives about the letter, he did nothing to disassociate himself from the statement contained therein.[63]

50. Acting directly or indirectly through or together with PATTERSON, REYES, GALLAGHER, KATINDOY and others, MARSHALL guided and controlled the AFFILIATED/ASSOCIATED COMPANIES (TRANSPAC, APC, SALVTUG, CABTUG, PACLOG, CHIPAC S.A., AIS, CHIPAC and ISLNAVCO),[64] in supplying the vessels, management, accounting, administrative support, cargo solicitation and other services necessary for the operation of the Guam/Saipan barge service by OCEANIA/ISLNAVCO, in the beginning, and, later, by OCEANIA, after GALLAGHER's sudden departure at the end of July, 1977.

51.[65] In order to avoid the unpleasant consequences of being found to have engaged in a course of conduct subject to section 15 without

[62] OCEANIA would limit this sentence to a matter of speculation on the part of SCREEN. However, ROBINSON also believed that SAISHIP would be dealt a "crippling financial blow" if the loan had been called at that time (Tr. 1574).

[63] OCEANIA claims that ROBINSON disagreed with only that portion of the letter referring to OCEANIA's profitability. OCEANIA is wrong. ROBINSON testified that his disagreement stemmed from a belief that letters should not be "written in anger" because they serve no useful purpose (Tr. 1577). As to profitability of OCEANIA, ROBINSON first tried to leave the record with the impression that OCEANIA was profitable when the letter was sent (Tr. 1575-76). Afterwards, he testified that OCEANIA "turned the course" late in 1977 even though as late as September, 1978, OCEANIA had not paid one-half of its charter hire obligations. (Tr. 1581.)

[64] ISLNAVCO did not appear as one of the AFFILIATED/ASSOCIATED COMPANIES in the cast, *supra*, in order to permit a more orderly presentation of the events and not because of a rationally formed belief that it or GALLAGHER was independent of MARSHALL. Cf., Appendix.

[65] In order to simplify what is obviously an involved factual situation, I will no longer adhere to the numerical sequences of findings proposed by SAISHIP and responded to by OCEANIA. This depar-

Continued

prior Commission approval authorizing such conduct, from the early stages of the proceeding onward ROBINSON/OCEANIA sought to deflect inquiries which might lead to ties between them and MARSHALL or AIS and to minimize [66] some connections that could not be ignored. Thus, as seen, ROBINSON explained the agency of OCEANIA in Saipan as a space charter on AIS vessels, adding that "No other contractual relationship existed during the period but a close informal relationship was maintained from a mutual interest in cargo movements within the Western Pacific in 1977." [67] He also denied any knowledge of AIS and its affiliations, other than recognizing AIS to be a carrier operating from Far East ports to Guam, where ISLNAVCO was its agent, saying, "I do not have first hand knowledge of its affiliates." [68] ROBINSON made this statement despite his having obtained the brochure showing AIS' affiliations when he visited MARSHALL in Manila in January, 1977,[69] and despite the many communications in OCEANIA's file written by MARSHALL, REYES, PATTERSON and others on letterheads of AIS and its affiliates showing that those affiliations existed. There is other evidence to establish that ROBINSON knew AIS was part of the group shown in the brochure. E.g., Ex. 156 is the draft of the letter prepared by attorney Cushnie in response to the Commission's Office of Agreements' letter of June 6, 1977. The letter was prepared for GALLAGHER's signature and was reviewed by ROBINSON, who redrafted it because it was too "lengthy and not necessarily giving a clear statement." [70] Among other things, the draft said, "We have had prior dealings with [PACLOG] and [AIS], as well as other companies *in that group*." (Emphasis supplied.) Exhibit 156 was introduced on ROBINSON's re-direct examination. He was asked about the truth or inaccuracy of the statements in that draft. Responding, he identified the statements which he thought were not correct, but he did not include the cited sentence in that category.[71] See, also, reference to Ex. 96, *infra*.

Although there was no great consistency in OCEANIA's effort to divorce itself from a MARSHALL/AIS connection, as all too frequently the evidence introduced even on direct or re-direct examination of ROBINSON was on a collision course with this goal, the effort had two major areas of concentration, in addition to those others previously

ture from the format previously followed does not constitute a rejection of SAISHIP's proposals 51 through 55 or agreement with OCEANIA's responses, as the substance of most of SAISHIP's proposals 51 through 55 has been adopted elsewhere in my findings.

[66] ROBINSON was obliged to admit he minimized the AIS relationship. (Tr. 1760-61.)

[67] Ex. 24 p. 18, Ex. 2 App. 55.

[68] *Id.*

[69] Ex. 16, Tr. 2176-77.

[70] Tr. 1960.

[71] Tr. 1957-64.

mentioned. First, because the fact that it was a condition of the charter that ISLNAVCO was required to be the "managing agent" and to receive 40 percent of the profit for that service, it became necessary to prevent linking PACLOG, the charterer, with AIS/MARSHALL. Second, and this developed later on, some explanation had to be given to play down MARSHALL's pervasive interest in OCEANIA, the barge operation and the TM-644/*Endurance* linkage.

The first ploy developed early, during discovery, and continued thereafter. Initially, during discovery responses OCEANIA insisted that charter hire payments were being made to the owners of the barge for the use of the barge and tugs. Pushed into identifying the "owners," OCEANIA answered that payments were being made to PACLOG. Nudged further, OCEANIA specified that AKSHIP had paid PACLOG $48,000 during 1977-78 for voyages 1 through 15.[72] Bearing in mind that no payments were made for charter hire until AKSHIP was made AIS' and OCEANIA's agent in Guam, and assuming, as OCEANIA asks us to do, that the revenue payments made by AKSHIP went for charter hire, it must be found that there is no evidence that PACLOG received any charter hire payments at any time and that under ROBINSON's and REYES' explicit instructions, issued before interrogatories were answered and before ROBINSON testified, charter hire payments were made by AKSHIP, on behalf of OCEANIA, to AIS, or to CHIPAC for AIS.[73]

The second stratagem called for ROBINSON to deny that MARSHALL had any control or management function over any of the AFFILIATED/ASSOCIATED COMPANIES and to explain MARSHALL's extravagant interest in the demise of SAISHIP in terms of benevolent friendship as well as self interest, i.e.—protecting commissions he (MARSHALL) would earn from brokering the charter between PACLOG and OCEANIA.[74]

ROBINSON agreed that the rate of commission for this kind of brokerage was 2-½%, which would amount to $80 per voyage.[75] ROBINSON had earlier described MARSHALL as only a "ship broker," independent of PACLOG.[76] Still earlier, in his prepared testimony, ROBINSON had also described PACLOG as a "ship broker." [77]

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[72] Ex. 2 Apps. 20-C and 20-I), Tr. 1089, 1147, 1155, 1351-53.

[73] See No. 44, *supra.*

[74] Tr. 1135-37.

[75] *Id.*, Tr. 1221.

[76] Tr. 989-90

[77] Cf. Ex. 24 p. 6 where ROBINSON says,"Since I did not know [PACLOG], and they, in turn, did not know me, but had previous contacts with [GALLAGHER], a condition of this charter was that [ISLNAVCO] be named the managing agent for [OCEANIA] on Guam," with Tr. 1222, where ROBINSON testified, "Well, in the first place, it was that [MARSHALL] insist [sic] on the knowledge that [MARSHALL] had, of his personal acquaintance, I guess, with [GALLAGHER] that required us, [OCEANIA], to employ [GALLAGHER] as managing agent for us to obtain the equipment. . . ."

MARSHALL was not merely a "ship broker," as ROBINSON would have us believe. MARSHALL controlled and managed AIS and the other AFFILIATED/ ASSOCIATED COMPANIES. It was MARSHALL that made PACLOG's decision to purchase the TM-644 on behalf of TRANSPAC from the builder at the price offered by the builder.[78] MARSHALL was the president of TRANSPAC.[79] It was MARSHALL, who, on November 23, 1976, on CABTUG letterhead, told KATINDOY to expect the importation of the *Piti* into Guam service and to share this knowledge with GALLAGHER.[80] It was MARSHALL who wrote at will on AIS letterhead and who, in July 1977, commanded PATTERSON, AIS' president, to leave Hong Kong, come to Saipan and then go to Washington to resolve "the mess" OCEANIA and ISLNAVCO had gotten into with the Commission.[81] It was MARSHALL who rebuked PATTERSON for "glaringly poor AIS liason [sic]" in expressing his embarrassment to ROBINSON over HAP's failure to inform ROBINSON about the itinerary of a particular voyage of the *Endurance*.[82] It is MARSHALL who regularly decided whether and under what circumstances the *Endurance* would call at Saipan and informed PATTERSON, REYES, KATINDOY, ROBINSON (and GALLAGHER before August 1, 1977) of those decisions.[83] It was MARSHALL who ordered GALLAGHER to bring updated ISLNAVCO records to Hong Kong to reconcile ISLNAVCO/AIS accounts.[84] It is MARSHALL who decides which attorney to hire to represent OCEANIA and ISLNAVCO.[85]

It is MARSHALL to whom ROBINSON apologetically sends TM-644 voyage reports and monthly statements.[86] It is MARSHALL who, in his 73rd TRANSPAC letter in 1977, tells PATTERSON to act on the "continuing need for OCEANIA to contact MATSON/USL State-

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[78] Exs. 65, 66.

[79] Ex. 29, in which ROBINSON, by letter dated January 10, 1977, confirmed the arrangements for the charter, was addressed to MARSHALL at the latter's Philippine P.O. Box 1914, as President of TRANSPAC. Nevertheless, he testified that he knew of no relationship between MARSHALL and TRANSPAC. He said that when he wrote that letter to "Dear Don" as president, ". . . that is just a title I pulled out of the air." (Tr. 991.) On another occasion, he was asked why he addressed a letter Ex. 185, to MARSHALL at AIS at the Manila P.O. Box. He replied, "I really don't have [any] recollection of why that address appears on it. I think that when I send letters to Mr. Marshall I just addressed it to Mr. Marshall and leave it to my secretary to fill in the address." (Tr. 2225-26.)

[80] Ex. 253. This letter was DIM's 61st CABTUG letter in 1976.

[81] Ex. 24 App. 23.

[82] Ex. 164. MARSHALL's remarks are handwritten on a copy of the telex. The telex, itself, is from ROBINSON to MARSHALL, dated September 27, 1977, and is further evidence of the AIS/OCEANIA linkage. In it, ROBINSON states that if the *Endurance* will not call Saipan for a Manila booking, the cargo will be sent by the TM-644.

[83] E.g., Exs. 76, 83, 93, 105, 108, 120, 121.

[84] Ex. 67.

[85] Ex. 24 App. 23.

[86] Ex. 31. See Ex. 80, telex to ROBINSON from DIM demanding those reports. See, also, Ex. 78, DIM telex to ROBINSON, January 13, 1978, pressing ROBINSON for TM-644 voyage reports requested by REYES.

side *Shippers* towards nominating the TM-644."[87] It is MARSHALL who publicly rebukes PATTERSON, concerning his comments on the TM-644 RORO conversion, and ROBINSON and KATINDOY because MARSHALL is "getting weary of the 'yes-but' responses to our 'can-do' initiative."[88] It is MARSHALL, to whom KATINDOY defers, who makes CABTUG business decisions.[89]

It is MARSHALL who is disturbed over HAP's and KATINDOY's and ROBINSON's failure to alert SALVTUG about a towing job performed by LUSTVECO (Ex. 191), apparently a competitor of SALVTUG after LUSTVECO was "requisitioned by the Philippine Government in April 1975." Prior to that time MARSHALL was president of LUSTVECO. Ex. 193. It is MARSHALL who instructs ROBINSON and KATINDOY concerning public relations for the TM-644 service. (Ex. 192.)

It is MARSHALL who overseas ROBINSON and PATTERSON and who passes upon their rate making agreements for the AIS (*Endurance*) and OCEANIA (TM-644) through movements. (See, e.g., Exs. 47, 60, 90, 94, 107, 112, and 118).[90]

It is MARSHALL who receives ROBINSON's "my grateful thanks" for furnishing the "cavalry" (accountant ALAVA, whose supervisor is REYES), for two weeks of free accounting service for OCEANIA on Saipan. (Ex. 194, Tr. 2177-78.)

It is MARSHALL who deplanes from a through flight—United States to Manila—at Guam to deal with the OCEANIA/ISLNAVCO crisis brought on by GALLAGHER's sudden departure. (Tr. 979-80.)

It is MARSHALL who directed the intermingling of AIS and OCEANIA monies located on Guam to pay OCEANIA's Guam commercial port expenses. (Exs. 95, 96, 138-144. Note, in Ex. 96 ROBINSON makes the admission that *Endurance* and TM-644 "have same owner"). It is MARSHALL who refers to AIS (*Endurance*, voyage 5) and INCO funds in Guam as "our collectibles." *Id.*

And when it seems that the MARSHALL/ROBINSON enterprise is about to attain the goal of displacing SAISHIP in the Guam/NMI trade, they both exult. ROBINSON's telex of September 26, 1978, advises DIM that the "Fatted Calf [is] ready and waiting." He explained this cryptic remark by adding that he was happy about a telex he received from AKSHIP that day telling him that SAISHIP had to cancel its weekly trip due to lack of business. (Ex. 81.) To MAR-

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[87] Ex. 35.

[88] Ex. 61. MARSHALL's 12th TRANSPAC letter in 1978. Copies of this letter to HAP at CABTUG were sent to ROBINSON, KATINDOY, REYES and persons at PACLOG and CHIPAC.

[89] Ex. 64.

[90] HAP also met with ROBINSON to discuss commodity rates filed by OCEANIA, as a result of which, those rates were reduced. (Ex. 111.)

SHALL, the news of the cancellation was rhapsodic. He replied thankfully, ". . . cancellation is *sweet* music."

52. The testimony of Kenneth D. Jones, a shipper, falls far short of showing that he would have entered the trade between Guam/Saipan/Tinian in competition with SAISHIP, had OCEANIA/ISLNAVCO not entered the trade. His primary reason for considering such entry was to obtain two trips a week from Tinian. From April 1977 to the time he testified in 1978, Jones was not served twice a week, yet he took no steps of probative value to institute a competitive service.

53. The operation of the TM-644 during its first 78 voyages resulted in the diversion from SAISHIP of $267,755.11 net, after payment of expenses. Diversions from voyage 78 to the close of the hearing cannot be computed on this record.[91] (Ex. 30.)

54. To the extent that OCEANIA's proposed additional findings—56 through 82—are not incorporated in these findings, they are rejected.

A BRIEF OVERVIEW OF THE FACTS

The Administrative Procedure Act requires rulings on each of the proposed findings presented in the briefs submitted by the parties.[92] The most practical and convenient means for discharging that duty in this case was following the numerical sequence for proposed findings of fact employed by both SAISHIP and OCEANIA in their briefs. The obvious drawback to this format is found in the preceding detailed and involved individual findings, which, standing alone, may sometimes appear as confusing as the separate pieces of a picture jigsaw puzzle. The purpose of this section is to put those pieces together so that the entire picture may be appreciated.

Knowing that SAISHIP's weakened financial condition made it vulnerable to a competing common carrier tug and barge service, GALLAGHER and ROBINSON, in late 1976, conceived a plan to exploit that weakness to their mutual advantage. But the two of them did not have the means to do it. Two ingredients were needed to bring the plan to fruition. ROBINSON possessed one, through OCEANIA. He could provide the entry assurance, available only to TT/NMI citizens or corporations. Neither one could provide the capital to finance the contemplated operation, the other ingredient. However, GALLAGHER knew someone who could—MARSHALL.[93]

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[91] At the prehearing conference it was established and agreed by the parties that the formula for measuring damages would be gross revenues diverted less variable expenses that SAISHIP would have incurred in moving the cargo carried by OCEANIA or OCEANIA/ISLNAVCO. (Ex. 30.) Ex. 2 pp. 13 and 90 shows that SAISHIP's variable costs based on 1977 experience were 47.29% of gross revenues. The validity of that figure is not in controversy.

[92] 5 U.S.C. 557(c); See *Mediterranean Pools Investigation*, 9 F.M.C. 264, 267 (1966).

[93] It is not known how long GALLAGHER and MARSHALL had known each other. But, in late 1976, ISLNAVCO was AIS' Guam agent and its electronic terminal and call signs were used by CABTUG, as appears in the brochure of the AFFILIATED/ASSOCIATED COMPANIES.

In January 1977, shortly after negotiations began, an accord was reached. It is neither relevant nor material to determine whether the agreement was a partnership, a joint venture or some other arrangement. It is sufficient to recognize it as an agreement to work together toward a common objective. The twofold purpose of the agreement was to eliminate SAISHIP as a competitor in the Guam/Saipan trade and to control most, if not all, traffic between the United States, Australia, the critical FAR EAST ports of Hong Kong, MANILA and those in Taiwan and Guam, on the one hand, and Saipan, on the other hand.

Although the purposes and many of the terms of the agreement are evident, some portions are not clear, due in part to the fact that most of the evidence concerning the agreement was introduced by SAISHIP through ROBINSON, a hostile witness, or was obtained from OCEANIA, by way of discovery.[94]

Essentially, because MARSHALL provided the financial support and, thus, was undertaking the greater risk, he retained control of the entire operation and became entitled to the greater reward. He retained control of the vessels, though they were under charter to OCEANIA, through CABTUG. He kept control of the service through ISLNAVCO,[95] which, from that time forward, if it was not one before, became one of the AFFILIATED/ASSOCIATED COMPANIES. MARSHALL's financial reward would come from the combination of charter hire payments from the profit percentage he allocated to ISLNAVCO [96] and from OCEANIA's participation in the AIS' *Endurance* service to Saipan.

The agreement caused problems almost as soon as the tug and barge went into operation due, primarily, to the fact that OCEANIA, the holder of the entry assurance, did not appear to be the carrier in the trade. The manifestations of those problems were the law suit in Saipan, the inquiry by the Commission and the inquiry by the NMI Govern-

[94] Greater light could have been shed on the agreement and its terms had GALLAGHER, KATINDOY, MARSHALL, REYES or PATTERSON testified. GALLAGHER, of course, disappeared. MARSHALL, REYES and PATTERSON were beyond the jurisdictional reach of the subpena. KATINDOY simply did not obey the Commission's process.

[95] ISLNAVCO, the "operator" of the charter in its own name, held out to be the common carrier in the trade, filed the tariff with the Commission, issued bills of lading, and entered into common carrier agreements with mainland United States carriers.

[96] The agreement between OCEANIA and ISLNAVCO allocates forty percent of the profits to ISLNAVCO, but does not specify OCEANIA's share nor does it provide for the distribution of losses. Presumably OCEANIA would have been entitled to sixty percent of the profits. But this is not entirely certain: During a line of questioning on cross-examination, ROBINSON was asked if OCEANIA was not better off because of GALLAGHER's disappearance and the elimination of ISLNAVCO's participation; ROBINSON's responses indicated he had not realized that the departure of ISLNAVCO theoretically would allow OCEANIA to retain one hundred percent of the profits thereafter, if the OCEANIA/ISLNAVCO agreement truly reflected the universe of ROBINSON's commitment to MARSHALL.

ment. OCEANIA successively successfully resisted the injunction action and the two inquiries by satisfying all concerned that it was the common carrier in the trade. Those inquiries were not terminated, however, until OCEANIA filed its own tariff and ISLNAVCO canceled its tariff. It is evident that the Commission did not get the benefit of all the relevant facts from PATTERSON and ROBINSON when it terminated its informal section 15 inquiry.

When ISLNAVCO ceased to be a factor, AKSHIP became the Guam agent for the tug and barge and the AIS service. It took its instructions for remitting freight revenues, from both operations, from MARSHALL and REYES. This meant that AKSHIP sent its paper work for AIS and OCEANIA to REYES in Manila and the revenues to AIS or CHIPAC in Hong Kong. It also meant that AIS and OCEANIA revenues could be commingled to pay off Guam port expenses incurred by either of them.[97]

In defending this proceeding, OCEANIA/ROBINSON knew well in advance of the hearing that SAISHIP would attempt to prove a section 15 relationship between OCEANIA and AIS, as well as one between OCEANIA and ISLNAVCO. In a variety of ways, including withholding of documents sought by way of discovery and "equivocal" testimony by ROBINSON, OCEANIA attempted to prevent the disclosure of the full dimensions of the OCEANIA/AIS accord.

THE STATUTES INVOLVED

As pertinent, section 15 of the Shipping Act, 1916, provides:

> SEC. 15. Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such

[97] OCEANIA could and did draw directly on some of the revenues collected by AKSHIP from time to time.

agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

* * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation. . . .

As pertinent, section 18(b)(1) of the Shipping Act, 1916, provides: [98]

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

DISCUSSION

I. THE RELIEF SOUGHT IS WITHIN THE SCOPE OF THE COMPLAINT

OCEANIA's opening argument in its answering brief is referred to as a "preliminary procedural argument." In it, OCEANIA contends that because the complaint does not name any of the AFFILIATED/ASSOCIATED COMPANIES [99] as respondents, SAISHIP is barred

[98] In 1977, the trade between Guam and Saipan was in the foreign commerce of the United States.

[99] For the purposes of this contention, only, it will be assumed that ISLNAVCO is not included in this category.

from obtaining a cease and desist order against OCEANIA or ISLNAVCO and that SAISHIP should not be permitted to seek reparation against the AFFILIATED/ASSOCIATED COMPANIES in another docketed Commission proceeding based upon any finding in this proceeding.

OCEANIA's argument goes this way: The Commission's Rules of Practice and Procedure require that a complaint name "each carrier or person against whom complaint is made" and provide, further, that "reparation will not be awarded . . . upon a new complaint by or for the same complainant which is based upon a finding in the original proceeding;"[100] those Rules also require that necessary and proper parties be named and joined in a complaint and that if the complaint relates to more than one carrier or other person subject to the Shipping Act, 1916, all carriers or other persons against whom a rule or order is sought shall be made respondents;[101] SAISHIP seeks an order requiring OCEANIA and ISLNAVCO to cease and desist from carrying out the agreement with the AFFILIATED/ASSOCIATED COMPANIES, but it has not named any of them as respondents in this proceeding; SAISHIP filed another complaint, in Docket No. 79-71, on July 6, 1979, against most of those companies;[102] therefore, SAISHIP is not entitled to the cease and desist order and should not be permitted to seek reparation in the other complaint proceeding based on any finding in this proceeding.

In urging that SAISHIP is not entitled to the type of cease and desist order it seeks, OCEANIA is correct, but not for the reasons given. In arguing that SAISHIP should not be permitted to seek reparation against any of the respondents in Docket No. 79-71 not named in this proceeding, OCEANIA erroneously implies that SAISHIP has asked for such relief.

With respect to the cease and desist order contention, it should be observed that the order sought by SAISHIP would run against only those respondents named in the complaint even though the order might affect relationships with others not named in the complaint. It should also be noted that the instant complaint is broad enough to have allowed proof of the relationships between OCEANIA, ISLNAVCO and the nonrespondent AFFILIATED/ASSOCIATED COMPA-

[100] 46 C.F.R. 502.62.

[101] 46 C.F.R. 502.44.

[102] SAISHIP's complaint names AIS, CABTUG, SALVTUG, CHIPAC, CHIPAC S.A.,TRANSPAC, PACLOG, ISLNAVCO and OCEANIA as respondents. Docket No. 79-71 has been held in abeyance pending the outcome of this proceeding.

NIES, within the framework of the allegations of violation of section 15 of the Shipping Act.[103]

Nevertheless, whether SAISHIP would have been entitled to the issuance of any cease and desist order has become a moot issue. Any such order would have to be predicated on a continuing agreement between OCEANIA (since ISLNAVCO is no longer a carrier) and another carrier or other person subject to the Act. Inasmuch as AIS canceled its tariff, shortly after the last brief was filed, it, too, is no longer a carrier. Because on this record, any common carrier status of the AFFILIATED/ASSOCIATED COMPANIES, individually or together, is derived from AIS, it would be inappropriate to consider the issuance of a cease and desist order of the type requested. Of course, this ruling would not bar SAISHIP from seeking such relief upon a proper showing in Docket No. 79-71.

Insofar as the reparation contention is concerned, SAISHIP simply has not requested that it be permitted to seek reparation from the respondents named in Docket No. 79-71 based upon any finding in this proceeding. However, to allay OCEANIA's concern, it is ruled that any findings made in this proceeding concerning any respondent in Docket No. 79-71, save OCEANIA or ISLNAVCO,[104] shall not be binding on any respondent in that proceeding.

II. THE BURDEN OF PROOF HAS BEEN SUSTAINED BY SAISHIP

A: INFERENCES

Generally prefacing its initial substantive argument[105] OCEANIA warns that "The burden of proof can not be carried by inference." After having made that broad generalization, OCEANIA acknowledges, nevertheless, that in administrative proceedings, as in the courts, inferences may be drawn so long as they are reasonable and based upon evidence of record rather than mere speculation. *West Coast Line, Inc.*

[103] There is nothing of record to show that at the time the complaint was filed that SAISHIP was aware of the AIS connection with OCEANIA/ ISLNAVCO. Indeed, as found, OCEANIA tried very hard to keep SAISHIP from learning the full extent of the relationship. In any event, because SAISHIP gave ample advance notice to OCEANIA that it would introduce evidence showing violations of section 15 arising from the AIS connection, it is proper to rule that the complaint is conformed to the proof.

Moreover, even if SAISHIP had known of the other connections its complaint would not have been defective. It was SAISHIP's option to choose which if any tortfeasor to sue. See *Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M.B.H.*, 2 U.S.M.C. 62, 66 (1939); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D. GA. 1973); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 223 F.2d 1, 8 (9 Cir. 1963); *Port Commission of City of Beaumont, Texas v. Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 501 (1941).

[104] With respect to OCEANIA or ISLNAVCO, the related principles of res judicata and collateral estoppel shall govern the extent to which these findings are binding.

[105] This section will also cover the second substantive argument made by OCEANIA concerning the nature of proof to show section 15 relationships.

v. Grace Line, Inc., 3 F.M.B. 585, 595 (1951); *Alcoa Steamship Co., Inc. v. Cia. Anonima Venezolana*, 7 F.M.C. 345, 361 (1962). OCEANIA, of course, is correct in its statement, but in the circumstances of this proceeding, another guiding principle is apposite.

In a sense, that SAISHIP has introduced evidence showing a conspiracy to violate section 15, and OCEANIA contends that SAISHIP's presentation is devoid of any proof of that conspiracy. It can be said that much, but not all, of the evidence was circumstantial and that ROBINSON, the only witness having direct knowledge of the agreement, did not admit the existence of any plan or scheme to accomplish a violation of section 15. But it is well settled that this does not prevent the trier of the fact from drawing reasonable inferences in those circumstances. *United States v. Polin*, 323 F.2d 549, 559, 560 (3 Cir. 1963). In the *Polin* case, a jury found the defendant guilty of conspiracy to violate section 7 of the Interstate Commerce Act, 49 U.S.C. 5(4) and the Criminal Code, 49 U.S.C. 1001. In sustaining the jury's right to draw inferences where *all* of the evidence was circumstantial and no witness admitted to a plot to commit an offense, the court held, 323 F.2d at 558:

> [4] All of the evidence presented was circumstantial, none of the witnesses having admitted the existence of any plans or schemes to accomplish the offenses charged. However, it is fundamental that the offense of conspiracy is rarely provable by direct evidence and that conviction thereof may be based upon circumstantial evidence. *Delli Paoli v. United States*, 352 U.S. 232, 236, n. 4, 77 S.Ct. 294, 1 L.Ed.2d 278 (1956).

The Supreme Court and this Commission have recognized that this principle is applicable to section 15 proceedings. The existence and the substance of an agreement may be proven through inferences from circumstantial evidence that are "reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry. . . ." *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 249 (1968). In *Unapproved Section 15 Agreement—North Atlantic Spanish Trade*, 7 F.M.C. 337 (1962), the wisdom of the Commission's ruling, 7 F.M.C. at 342-43, is particularly appropriate:

> [C]onsidering the penalty prescribed by law for illicit anticompetitive activity, it is not to be expected that proof of such activity will be obtained either easily or in abundance. In such cases the solid evidence may consist of no more than a few contemporaneous memoranda or other documents. These, however, are far greater weight than oral testimony given at some later date by those who are under investigation and whose "explanations" of the documents simply cannot be squared with their contents. . . .

Here, of course, there was abundant, well-nigh overwhelming, documentation of the section 15 relationship between OCEANIA and AIS and the inferences contained therein are the exception rather than the rule.

B: SECTION 15 RELATIONSHIPS

Briefly, section 15 requires that certain specified kinds of agreements between two or more common carriers by water or other persons subject to the Act be filed with and approved by the Commission prior to implementation of the agreement. Thus, there must be both subject matter and personal jurisdiction in order that section 15 be invoked. Ship agents are neither carriers nor other persons subject to the Act and, therefore, agreements between agents and common carriers are not subject to section 15, as OCEANIA points out, citing *United States Gulf Atlantic and India, Ceylon and Burma Conference (Agreement No. 7620)*, 2 U.S.M.C. 749 (1945). Bearing this distinction in mind, SAISHIP has proved an agreement between two common carriers, OCEANIA and AIS, during all of the period covered by the complaint, and between those two carriers and a third carrier, ISLNAVCO, for a part of that period. Those agreements concerned section 15 subject matter.

III. APPLYING THE FACTS TO THE LAW

A: SAISHIP HAS ESTABLISHED THE VIOLATION OF SECTION 18(b)(1) BY OCEANIA AND IS ENTITLED TO RELIEF FOR THAT VIOLATION

OCEANIA makes a very brief preliminary argument with regard to its violation of section 18(b)(1) during the period from April 5, 1977, through July 2, 1977, when, admittedly, it operated as a common carrier in the Guam/NMI trade without having an effective tariff on file with the Federal Maritime Commission.[106] OCEANIA's entire argument is this: "Because [SAISHIP] has apparently abandoned its allegations as to the violations of the other sections of the Shipping Act mentioned in its Complaint (i.e. . . . 18), OCEANIA's effort in this brief is directed toward dispelling the conspiratorial allegations of a continuing, unfiled Section 15 agreement."

There is no reasonable or sound basis for OCEANIA's conclusion that SAISHIP has abandoned its right to relief for violation of section 18. Indeed, SAISHIP's proposed finding No. 55 explicitly proposes a finding of a section 18 tariff violation by OCEANIA.

[106] See, e.g., Answering Brief, p. 70, n. 67.

B: OCEANIA'S RELATIONSHIP WITH ISLNAVCO CREATED PERSONAL AND SUBJECT MATTER JURISDICTION UNDER SECTION 15

OCEANIA's argument that its relationship with ISLNAVCO was not subject to section 15 is divided into three parts. They are (a) the agreement with ISLNAVCO (FMC 10306) was not subject to section 15; (b) joint advertising does not create a joint service subject to section 15; and (c) ISLNAVCO's activities do not make it a person subject to the Act.

I shall not dwell too long on this argument for the obvious reasons (1) that the agreement between ISLNAVCO and OCEANIA did not have a life of its own but was merely a part of the arrangements made by ROBINSON and MARSHALL for OCEANIA and AIS, respectively; and (2) that it is primarily based upon the invalid proposition that ISLNAVCO was only an agent and not a common carrier by water.

In support of its claim that ISLNAVCO was merely an agent, OCEANIA submits that ISLNAVCO is in a situation similar to that of Kerr Steamship Co., Inc. in *Agreement No. 7620, supra*. In that case Kerr's status was found to be that of an agent and not a carrier even though Kerr had established "tariffs of rates" and did certain other things that were then (in 1945, prior to the time that section 18(b)(1) became a part of the Shipping Act) apparently consistent with common carriage.[107] However, Kerr's holding out did not involve an "undertaking to carry [continuing], for a certain period of time at least, subsequent to the receipt of the goods for the purpose of transportation." [108] Inasmuch as Kerr signed dock receipts and bills of lading for *known principals*, the Commission held that Kerr's undertaking ceased "before the act of water transportation commerce and before common carrier liability attaches." [109] Here, not only did ISLNAVCO sign the bills of lading without naming another as principal, it held itself out as the carrier through advertising and through tariff publication to perform a through transportation service, and it entered into agreements with common carriers, other than OCEANIA, to perform a through common carrier service.

Clearly, ISLNAVCO was no mere agent. ISLNAVCO was a common carrier in every sense of the term and its agreement to conduct a common carrier service with OCEANIA was subject to section

[107] 2 U.S.M.C. at 751.
[108] *Id.* at 752-53.
[109] *Id.* at 753.

15. *In the Matter of Agreement 9597,*[110] 12 F.M.C. 83 (1968); *Puget Sound Tug & Barge v. Foss Launch & Tug Co.*, 7 F.M.C. 43 (1962).

OCEANIA'S RELATIONSHIP WITH AIS CREATED PERSONAL AND SUBJECT MATTER JURISDICTION UNDER SECTION 15

The facts clearly disclose that under the arrangement agreed upon by ROBINSON and MARSHALL OCEANIA and AIS would work together to eliminate SAISHIP from the Guam/NMI trades. Among the things necessary to achieve this end MARSHALL provided OCEANIA with the tug and barges, financial, managerial and administrative support through the various AFFILIATED/ ASSOCIATED COMPANIES. In addition AIS and OCEANIA fixed and regulated rates for cargo transshipped exclusively from the *Endurance* to the TM-644.[111]

Thus at least four of the activities which require approval under section 15 were covered in the agreement between OCEANIA and AIS, both of which are common carriers subject to the personal jurisdiction of section 15. See *Uiterwyk, supra*; *Puget Sound Tug & Barge v. Foss Launch & Tug Co., supra.*

The Commission's approval of the OCEANIA/AIS agreement was neither sought nor obtained.

IV. EQUITABLE CONSIDERATIONS AND DAMAGES

In its Answering Brief, OCEANIA attempts to sidestep its agreement made at the prehearing conference concerning the measure of damages. It contends that SAISHIP's computation of damages based on revenues diverted less variable expenses that SAISHIP would have incurred is invalid because there is no record support for assuming SAISHIP would have moved all the cargo to the NMI. It is OCEANIA's contention that Mr. Jones, a Tinian shipper, would have entered the trade if OCEANIA had not. Mr. Jones' testimony does not support a finding to that effect.

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[110] Hereafter this case will be referred to as *Uiterwyk*.

[111] Citing a definition of transshipment in a Commission regulation, 46 C.F.R. 522.2(6), OCEANIA claims that there was no transshipment agreement between OCEANIA and AIS. The definition provides that a transshipment agreement is "an agreement between a common carrier of freight by water serving a port of origin and a common carrier of freight by water serving a port of destination to establish a joint through rate in which both participate between ports." OCEANIA continues by pointing out that movement of cargo on the basis of a combination of local rates cannot be a joint through rate. Consequently, OCEANIA concludes, that the movement of cargo to Guam via the *Endurance* and then on to Saipan by a combination of local rates cannot be considered a transshipment agreement. OCEANIA is mistaken on both the facts and the law. The cargo did not move in a combination of local rates. It moved under the through rate, under AIS' tariff, without the addition of even the Guam port costs, pursuant to the agreement of ROBINSON, MARSHALL and PATTERSON. Moreover, the Commission has consistently held movements conducted in this fashion to be transshipments. See *Transshipment and Through Billing ARRANGEMENT Between East Coast Ports of South Thailand and United States Atlantic and Gulf Ports*, 10 F.M.C. 199 (1966); *Transshipment and Apportionment Agreements From Indonesian Ports to U.S. Atlantic and Gulf Ports*, 10 F.M.C. 183 (1966).

It is clear that SAISHIP suffered the pecuniary loss computed under the agreed formula because of OCEANIA's entry in the trade in violation of section 15.[112]

Finally, OCEANIA urges that the Commission exercise its discretionary authority under principles of equity and justice and thus deny any reparation to SAISHIP. The short answer to this prayer is that the equities simply do not favor OCEANIA. The damage done to SAISHIP was not inadvertent. It was inflicted by design and with zest. To ROBINSON, SAISHIP was a Fatted Calf, waiting to be feasted on. To Marshall, news of SAISHIP's troubles was a happy event—SAISHIP's "cancellation is *sweet* music," he rejoiced.

CONCLUSION AND ORDER

It is found that during the period from April 5, 1977, through July 28, 1977, inclusive, that OCEANIA and ISLNAVCO jointly conducted a water carrier service between Guam and the NMI, except for the period between June 21, 1977, through July 2, 1977, inclusive, when operations were temporarily suspended. Inasmuch as OCEANIA did not have an effective tariff on file with the Commission during the period from April 5, 1977 through July 2, 1977, OCEANIA was operating as a common carrier in violation of section 18(b)(1) of the Shipping Act, 1916, from April 5, 1977 through June 20, 1977, inclusive.

It is found that the relationship between OCEANIA and ISLNAVCO, during the period from April 5, 1977 through July 28, 1977, constituted an agreement requiring approval under section 15 of the Shipping Act, 1916. It is further found that this agreement was implemented and continued in effect without prior approval by the Commission in violation of section 15 of the Shipping Act, 1916.

It is found that the relationship between OCEANIA and the AFFILIATED/ASSOCIATED COMPANIES[113] during the period

[112] OCEANIA charges that SAISHIP did nothing to mitigate its losses. OCEANIA suggests that SAISHIP could have done so by improving its service to meet competition or pass through to shippers any savings resulting from the reduction in its charter hire. This argument must fail. It is indeed ironic for OCEANIA to assert that SAISHIP, whose struggle to maintain a precarious economic viability was wrought about by OCEANIA's mischief, did not try to mitigate its losses. But, SAISHIP did attempt to do what OCEANIA suggests it did not do. Early on it sought to acquire a new barge to replace the one provided by Dilmar, only to be rebuffed by KATINDOY's demands which far exceeded the terms for the same kind of barge which MARSHALL ultimately furnished to OCEANIA. Moreover, even if SAISHIP could have improved its service or could have passed on savings to customers resulting from the reduction in the Dilmar charter hire (but there has been no satisfactory showing that SAISHIP lost business for those reasons) it is simply not wise to believe that SAISHIP could have retained any of the traffic directed to OCEANIA from Australian or Far East ports by AIS or from United States ports by Trans Trans.

[113] In the light of the immediate previous finding for the purpose of this finding it is not necessary to include ISLNAVCO in the group of AFFILIATED/ASSOCIATED COMPANIES. Of course, AIS is included.

from April 5, 1977 through February 4, 1979, constituted an agreement requiring approval under section 15 of the Shipping Act, 1916. It is further found that this agreement was implemented and continued in effect without prior approval by the Commission in violation of section 15 of the Shipping Act, 1916.

ORDER

It is ordered that:

1. OCEANIA shall pay SAISHIP by way of reparation for violation of section 15 of the Shipping Act, 1916, the sum of $267,755.11, for cargo diversion [114] caused by the first 78 voyages of the TM-644.

2. OCEANIA shall pay SAISHIP by way of reparation for violation of section 15 of the Shipping Act, 1916, for cargo diversion caused by voyages of the TM-644 subsequent to voyage number 78 and through February 4, 1979, an amount to be determined, in accordance with the procedures established in Rules 251 and 252 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.251 and 502.252.

3. OCEANIA shall pay SAISHIP by way of reparation for violation of section 18(b)(1) of the Shipping Act, 1916, an amount to be determined, pursuant to Rules 251 and 252 of the Commission's Rules of Practice and Procedure, for cargo diverted by voyages of the TM-644 prior to July 3, 1977. Recovery under this provision may take place only if SAISHIP is unable to effectuate recovery for those voyages under paragraphs 1 or 4 of this Order.

4. ISLNAVCO shall pay SAISHIP by way of reparation for violation of section 15 of the Shipping Act, 1916, an amount to be determined, pursuant to Rules 251 and 252 of the Commission's Rules of Practice and Procedure, for cargo diverted by voyages of the TM-644 from April 5, 1977 through July 28, 1977, inclusive. This liability of ISLNAVCO is joint and several with that of OCEANIA under paragraph 1 of this Order and recovery is governed by the law of damages affecting joint and several liability.

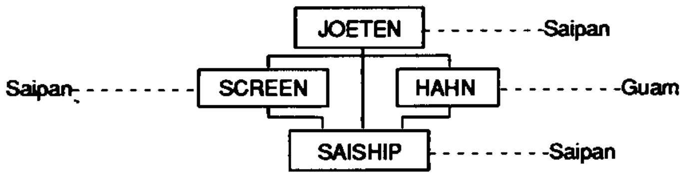
(S) SEYMOUR GLANZER
Administrative Law Judge

[114] See Fact No. 53 and n. 91.

APPENDIX

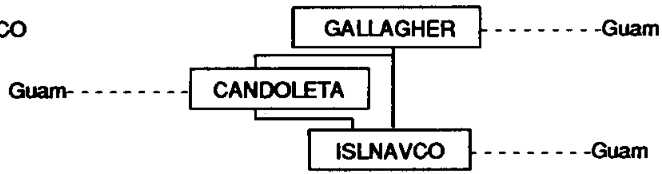
PROFILE TO ACCOMPANY SKETCH OF CAST

1. COMPLAINANT; SAISHIP



Common carrier
by tug and barge
in Guam/NMI trade.

2. RESPONDENT; ISLNAVCO



Common carrier
until cancellation of
tarrif on July 29, 1977.

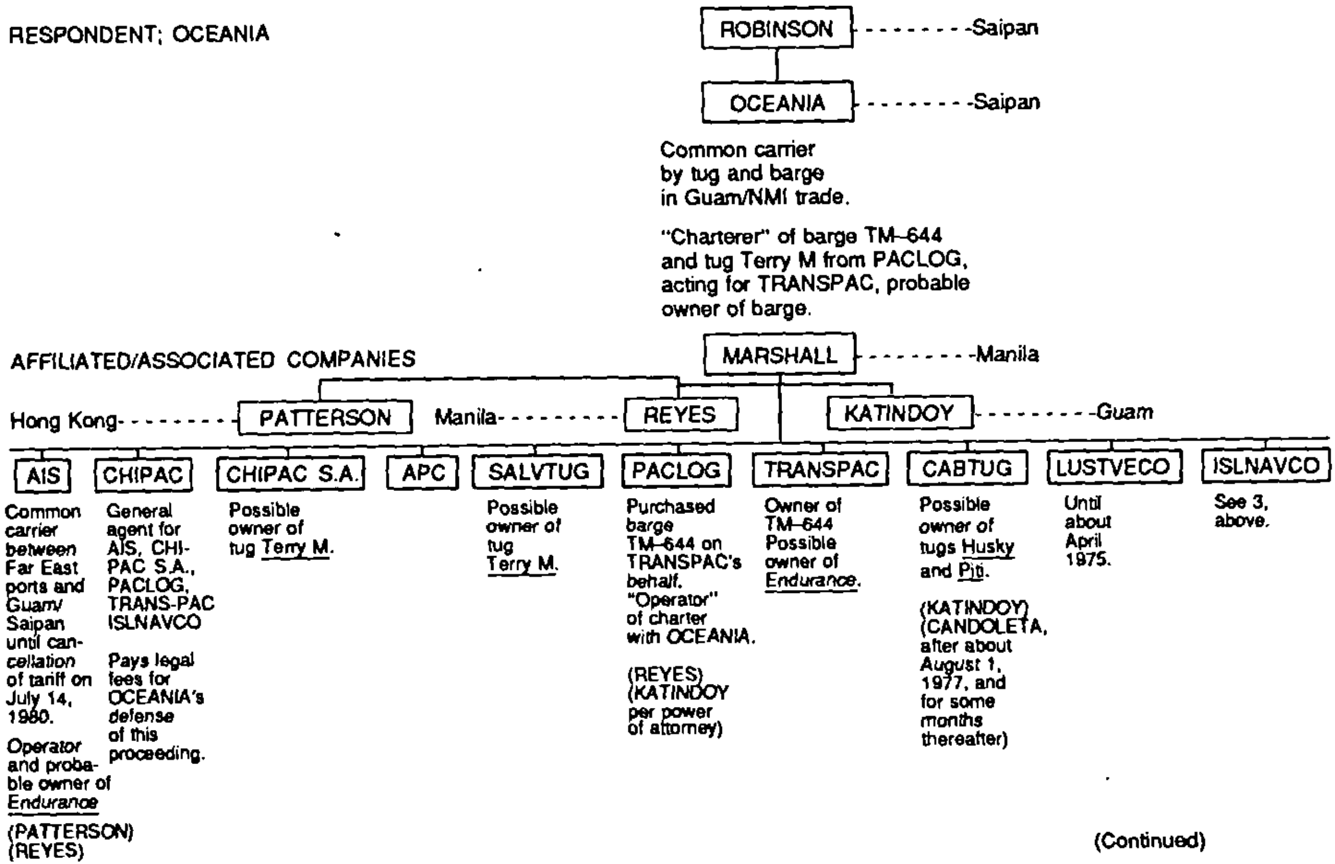
One of the AFFILIATED/ASSOCIATED COMPANIES (per Fact No. 50).

Per condition imposed by MARSHALL/PACLOG, on ROBINSON/OCEANIA's charter of tug and barge, ISLNAVCO was manager and operator of OCEANIA/ISLNAVCO's Guam/NMI barge service until about August 1, 1977, when GALLAGHER disappeared from Guam and ISLNAVCO ceased to function.

(Continued)

3. RESPONDENT; OCEANIA

4. AFFILIATED/ASSOCIATED COMPANIES



(Continued)

5. OTHERS

A:

AKSHIP

Guam agent for
AIS and OCEANIA
after GALLAGHER

(Anderson)

B:

ITS

Washington, D.C.
tarrif filing
agent and watch-
ing service for
AIDS, OCEANIA
and ISLNAVCO.

Fees paid by
CHIPAC or AIS for
those services.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-71

AGREEMENT NO. 10405 - NEW YORK OCEAN FREIGHT FORWARDER DISCUSSION GROUP

NOTICE

May 5, 1982

Notice is given that no appeal has been taken to the March 31, 1982 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 order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-71

AGREEMENT NO. 10405 - NEW YORK OCEAN FREIGHT FORWARDER DISCUSSION GROUP

AGREEMENT WITHDRAWN; PROCEEDING DISCONTINUED

Finalized May 5, 1982

On March 19, 1982, the Commission denied Proponents' motion requesting an indefinite suspension of this proceeding and advised Proponents that in lieu thereof, they were free to withdraw the agreement which is the subject of this proceeding without prejudice to subsequent resubmission. In response to this ruling of the Commission, Proponents, by letter of March 25, 1982, have requested that their agreement, which was submitted for approval, be withdrawn without prejudice.

Accordingly, there is nothing before the Commission to litigate and the proceeding is discontinued without prejudice to resubmission of the agreement, as the Commission indicated.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-60

FAR EASTERN SHIPPING COMPANY

POSSIBLE VIOLATIONS OF SECTIONS 16, SECOND PARAGRAPH,
18(b)(3), AND 18(c) SHIPPING ACT, 1916

NOTICE

May 7, 1982

Notice is given that no exceptions have been filed to the April 1, 1982 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. 80-60

FAR EASTERN SHIPPING COMPANY

POSSIBLE VIOLATIONS OF SECTIONS 16, SECOND PARAGRAPH, 18(b)(3), AND 18(c), SHIPPING ACT, 1916

Settlement of a proceeding seeking to determine whether Respondent's rating practices violated certain provisions of the Shipping Act, 1916, and if so, to determine whether penalties should be assessed for such violations, approved. Respondent ordered to pay $375,000, together with interest accumulated thereon in an escrow account, pursuant to the terms of the settlement agreement.

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

John Robert Ewers, Joseph B. Slunt, Alan Jacobson, Polly Haight Frawley and *Janet Katz* as Hearing Counsel.

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

Finalized May 7, 1982

This proceeding was instituted by Order of Investigation and Hearing, served September 10, 1980, to determine whether the Respondent, Far Eastern Shipping Company (FESCO), had violated sections 16, Second paragraph, 18(b)(3) and 18(c) of the Shipping Act, 1916, 46 U.S.C. 815, Second paragraph, 817(b)(3) and 817(c), by engaging in certain rating practices and, if so, to determine whether penalties should be assessed for those violations. In particular, the Order required the determination of the following issues:

> (1) whether FESCO violated section 16, second paragraph, by permitting any person to obtain transportation for property at less than the rates and charges then established in its tariffs on file with the Commission by any unjust or unfair device or means between May 1, 1979 and March 31, 1980, inclusive:
> (2) whether FESCO violated section 18(b)(3) by charging, demanding, collecting or receiving a greater or less 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, or by rebating, refunding

[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).

or remitting in any manner or by any device any portion of the rates or charges specified in its tariffs on file with the Commission between May 1, 1979 and March 31, 1980, inclusive;

(3) whether FESCO violated section 18(c)(1) by charging rates which have been suspended by the Commission between May 1, 1979 and March 31, 1980, inclusive; and

(4) whether penalties should be assessed against FESCO if it is found to have violated section 16, second paragraph, section 18(b)(3), or section 18(c), and, if so, the amount of such penalties.[2]

PROCEDURAL BACKGROUND TO THE SETTLEMENT

On September 17, 1980, one week after the Order was served, Hearing Counsel served its interrogatories and requests for production of documents on Respondent. Two days later, on September 19, 1980, Respondent served similar discovery and inspection requests upon Hearing Counsel.

At the first of several prehearing conferences, held on September 28, 1980, the scope of the proceeding was settled, a further prehearing conference was scheduled, and a target date for the hearing was set.

On October 20, 1980, Hearing Counsel served Respondent with answers to its interrogatories and documents in response to its request for production of documents. On October 31, 1981, Respondent answered Hearing Counsel's interrogatories and produced approximately ten thousand documents in response to Hearing Counsel's request for production of documents. These documents related to over seventeen hundred cargo shipments transported by Respondent in the Philippines/United States Pacific Coast inbound trade between May 1, 1979 and March 31, 1980. They included bills of lading, freight manifests, freight correctors and documentation showing payment of freight charges.

At the second prehearing conference, on November 12, 1980, the parties presented a status report, after which another prehearing conference was scheduled for January 21, 1981.

On December 31, 1980, the parties met. At that meeting, they discussed alleged rating errors pertinent to the documents furnished to

[2] Implicitly, the reference to assessment of penalties invokes provisions of section 32 of the Shipping Act, 1916, 46 U.S.C. 831, which provides in pertinent part:

> (e) 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.

The Shipping Act provides that for violation of section 16, Second paragraph, the civil penalty shall be "not more than $25,000 for each . . . violation." Section 16 (penultimate paragraph), 46 U.S.C. 815. The civil penalty for violation of section 18(b)(3) (other than for refunds or rebates) shall be "not more than $5,000 for each day such violation continues." Section 18(b)(6), 46 U.S.C. 817(b)(6).

Respondents by Hearing Counsel during the discovery process. In addition, Hearing Counsel provided information regarding other rating matters which it considered germane to the issues after reviewing documents relating to approximately one hundred fifty shipments.

A motion to postpone the January 21, 1981, prehearing conference to March 2, 1981, was granted on Hearing Counsel's showing that additional time was needed to review the multitude of documents discovered. Hearing Counsel explained that, mechanically, it took one month to copy and collate those documents by individual voyage, and that the process of reviewing the documents entailed having the Commission's tariff analysts familiarize themselves with Respondent's tariffs as well as Respondent's repetitive rating practices in order to enable them to develop a readily understandable system of recording alleged rating errors which Hearing Counsel could then use to inform Respondent of the positions it would take on the matters of fact and law to be presented at the hearing.

Thereafter, between January 9, 1981, and March 2, 1981, the parties met frequently to discuss specific shipments which Hearing Counsel believes were misrated by Respondent. It was during these meetings that settlement discussions were initiated.

At the March 2, 1981, prehearing conference, a further status report was presented. It was shown that additional discovery was needed and would require two months to complete. Based on those factors, a prehearing schedule was fixed and a hearing was set to commence on July 13, 1981.

A request to suspend the procedural schedule established at the March 2, 1981, prehearing conference was granted on April 30, 1981, when the parties reported that the settlement discussions were beginning to bear fruit and that they wished to devote their efforts to settlement negotiations rather than preparing for what appeared to be a very lengthy trial.

During the next months, the parties met on numerous occasions [3] to reach an agreement. Following an oral understanding, in principle, the parties devoted their efforts to the preparation of a detailed written agreement setting forth its terms. In midsummer, 1981, the oral settlement agreement was reduced to writing. Upon receipt of appropriate authorization, counsel for both parties executed the proposed settlement agreement on September 28, 1981.[4] The original of the proposed settle-

[3] At the request of the parties, I was present, informally, at some of those meetings. In order to hasten the settlement process, once it became clear that settlement was in the offing, some meetings were made formal. Thus, technically, portions of those meetings were conducted as part of the "hearing." Those formal sessions took place on August 18, 1981, September 9, 1981, October 19, 1981, and November 19, 1981. The hearing was closed *sine die* on the latter date.

[4] An informational copy was presented to me at that time.

ment agreement entitled "Proposed Settlement of Civil Penalties," [5] together with the parties' evidentiary stipulation and their individual concurrent memoranda in support of the settlement were filed on November 17, 1981.

THE STIPULATION [6]

Hearing Counsel and FESCO hereby stipulate and agree that the following statements are not admissions of fact nor waivers of any rights under law by either Hearing Counsel or FESCO. Hearing Counsel and FESCO stipulate and agree that the following statements are made pursuant to a settlement agreement entered into by the parties and are part of the settlement discussions and negotiations of the parties leading to the conclusion, execution and confirmation of the settlement of the above-referenced proceeding. Pursuant to Rule 502.91 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.91), these statements may not be used or considered in this proceeding or in any subsequent proceeding, either before the Federal Maritime Commission or any other governmental agency or court, except as such statements are offered in support of the confirmation and acceptance of the proposed settlement agreement submitted by the parties.

Hearing Counsel, at a hearing in the above referenced proceeding, would offer evidence of acts by FESCO which Hearing Counsel believe violated section 16, second paragraph, Shipping Act. 1916 (the "Act") on 46 occasions and section 18(b)(3) of the Act on 35 occasions. FESCO, at said hearing, would offer evidence it believes shows that it did not commit the acts alleged by Hearing Counsel, and that if such acts were committed by FESCO, that such acts did not violate the Act on those occasions cited by Hearing Counsel.

Hearing Counsel would further offer evidence to show that the above mentioned alleged violations relate to shipments aboard the PUTIVL voyage 41, the ROMAS voyage 9, the ZHUKOV voyage 27, and the IOGANSON voyage 30, from the Philippines to the United States. Specifically, Hearing Counsel would offer evidence relating to the following shipments:

I. *Cottage Craft Products—Alleged Violations of Section 16, Second Paragraph*

1. B/L: M/OAK/DT-1 [7]
   B/L Date: June 21, 1979
   Vessel Voyage: PUTIVL 41

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[5] Should this decision become the decision of the Commission, see n. 1 *supra*, pursuant to 46 C.F.R. 505.3, the Proposed Settlement of Civil Penalties is attached as an Appendix and made a part of this decision.

[6] The Stipulation is dated November 5, 1981, and was executed by counsel for the parties.

[7] FESCO bills of lading numbers indicate the port of loading and the port of discharge and if OCP or landbridge, the final destination.

2.	B/L:	M/OAK/DT-2
	B/L Date:	June 27, 1979
	Vessel Voyage:	PUTIVL 41
3.	B/L:	M/OAK/DT-3
	B/L Date:	July 2, 1979
	Vessel Voyage:	PUTIVL 41
4.	B/L:	M/OAK/DT-4
	B/L Date:	July 3, 1979
	Vessel Voyage:	PUTIVL
5.	B/L:	M/OAK/DT-1
	B/L Date:	December 11, 1979
	Vessel Voyage:	ROMAS 9
6.	B/L:	M/OAK/DT-1
	B/L Date:	October 1, 1979
	Vessel Voyage:	IOGANSON 30
7.	B/L:	M/OAK/DT-3
	B/L Date:	October 11, 1979
	Vessel Voyage:	IOGANSON 30
8.	B/L:	M/OAK/DT-4
	B/L Date:	October 15, 1979
	Vessel Voyage:	IOGANSON 30
9.	B/L:	M/OAK/DT-5
	B/L Date:	October 19, 1979
	Vessel Voyage:	IOGANSON 30
	B/L description for shipments 1-9:	Assorted Philippine Made Cottage Craft Products

Hearing Counsel would offer witnesses that would testify that shipments 1-9 each contained an assortment of Philippine products including furniture, baskets, brooms and figurines. Documentary evidence would include bills of lading, packing lists and commercial invoices.

Such testimony would be that: (1) FESCO rated each shipment, in its entirety, under its FMC Tariff No. 23, Item No. 490, furniture made of bamboo, buri, rattan, alone or in combination, in bales or in crates, and that FESCO charged and collected freight according to that rating; (2) the non-furniture cargo (woven articles, handicrafts) in each shipment should not have been rated as furniture, but rather as handicrafts and woven articles, under FESCO Tariff No. 23, Items 570 and 1070, respectively; (3) if each shipment had been rated as furniture, handicrafts and woven articles, the charge would have in each instance exceeded that charged and collected by FESCO; (4) FESCO's tariff required the shipper to furnish FESCO a list and description of the contents of the goods shipped; (5) it was common knowledge in the trade that furniture was often mixed in containers with handicrafts and woven articles; and (6) FESCO knew or should have known the actual contents of each of these shipments.

FESCO would offer testimony of shippers from the Philippines where these shipments originated that: (1) the term "cottage crafts" is a generic term used in the Philippines to refer to buri and rattan furniture products; (2) the term "cottage crafts" was the cargo description which was provided to FESCO's agents at the time the sealed containers containing this merchandise were delivered for shipment; (3) FESCO's agents were informed that the shipments were the types of buri and rattan furniture normally described as "cottage crafts"; (4) the cargo was as described; and (5) the description of the cargo given to FESCO's agents was consistent with the descriptions which they provided to the Philippines customs authorities in their applications for permission to export these commodities.

FESCO's agents from the Philippines would testify that: (1) the cargo tendered to them pursuant to these bills of lading was described as "cottage crafts," a term understood by FESCO's agents to refer to buri and rattan furniture, and that the cargo was manifested as such; (2) the shipper's export declarations conformed with the descriptions given to FESCO in the shipper's bills of lading, satisfying FESCO's requirements under the tariff, if any, for independent verification of the nature of the shipments; and (3) if any products other than buri and rattan furniture were included in these shipments, the amount of such products was only incidental to the shipment and the shipment would still have been properly rated as buri and rattan furniture.

FESCO would also show that any packing lists and commercial invoices which might be submitted as evidence by Hearing Counsel to attempt to prove that products other than buri and rattan furniture were included in these shipments do not correspond with the shipments covered by these bills of lading, but rather refer to other bills of lading.

II. *Pro-rating Per Container Rates—Alleged Violations of Section 18(b)(3)*

10.	B/L:	C/SAV-2
	Vessel Voyage:	PUTIVL 41
	B/L Description:	woven articles and rattan accessories
11.	B/L:	C/SAV-3
	Vessel Voyage:	PUTIVL 41
	B/L Description:	woven articles and rattan accessories

12.	B/L:	C/SAV-4
	Vessel Voyage:	PUTIVL 41
	B/L Description:	woven articles, rattan accessories and handicrafts
13.	B/L:	C/SAV-2a
	Vessel Voyage:	PUTIVL 41
	B/L Description:	rattan accessories
14.	B/L:	C/STL-1
	Vessel Voyage:	PUTIVL 41
	B/L Description:	rattan furniture, display items, baskets
15.	B/L:	C/STL-1A
	Vessel Voyage:	PUTIVL 41
	B/L Description:	rattan furniture

Hearing Counsel would offer witnesses that would testify that: (1) for shipments 10-15 FESCO charged and collected freight based, in part, on a pro-rated per container rate for the rattan portion of the shipments; (2) neither of FESCO's applicable tariffs (FMC No. 23 for local and OCP and FMC No. 29 for landbridge) had provisions allowing FESCO to pro-rate the per container rate for rattan items; and (3) had FESCO properly rated each shipment, on the basis of weight or measure commodity rates, it would have charged a different amount than that actually charged and collected.

FESCO would offer the testimony of tariff experts that: (1) FESCO's tariff rules for the rating of mixed container loads of merchandise were properly applied to the shipments listed above; (2) these rules provided that the transportation charges for mixed container loads would be calculated at the rate applicable on each commodity therein; (3) when the only rate for a commodity is a container load rate, such as was the case for rattan furniture, such a rate may be pro-rated to apply to a mixed container load shipment made up of such a commodity, unless such pro-rating of a container rate is precluded by the tariff; (4) no prohibition on pro-rating of container rates was to be found in either of FESCO's tariffs involved herein; (5) FESCO's interpretation of the proper application of its tariffs with respect to this issue results in a uniform and consistent rate level for all its shippers; and (6) the interpretation suggested by Hearing Counsel would have resulted in some shippers paying more and other shippers paying less than the transportation charges collected by FESCO under its more reasonable and evenhanded interpretation. FESCO would also offer the testimony of shippers that the description of the cargo given to FESCO's agents was consistent with the description which they provided to the Philippines customs authorities in their application for permission to export these commodities, and these representations would be confirmed by FESCO's agents.

III. *Buri/Rattan Furniture and Accessories/Fillers—Alleged Violations of Section 16, Second Paragraph*

16.	B/L:	C/DLS-1
	B/L Date:	July 2, 1979
	Vessel Voyage:	PUTIVL 41
	B/L Description:	Buri furniture and accessories
17.	B/L:	C/DLS-2
	B/L Date:	July 5, 1979
	Vessel Voyage:	PUTIVL 41
	B/L Description:	Buri Furniture and fillers
18.	B/L:	C/DLS-3
	B/L Date:	July 5, 1979
	Vessel Voyage:	PUTIVL 41
	B/L Description:	Buri furniture and accessories
19.	B/L:	M/SW-2
	B/L Date:	July 5, 1979
	Vessel Voyage:	PUTIVL 41
	B/L Description:	Buri/rattan furniture and accessories
20.	B/L:	M/SW-3
	B/L Date:	July 5, 1979
	Vessel Voyage:	PUTIVL 41
	B/L Description:	Buri/rattan furniture and accessories
21.	B/L:	M/LB/TA-1
	B/L Date:	December 12, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	Buri/rattan furniture and accessories
22.	B/L:	M/OAK-1
	B/L Date:	November 15, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri wicker furnitures with assorted woven accessories as loose fillers
23.	B/L:	L/LA-1
	B/L Date:	October 25, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri rattan: wares and accessories
24.	B/L:	M/LB/DT-1
	B/L Date:	November 13, 1979
	Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture and accessories
25.	B/L:	C/LA-1
	B/L Date:	October 29, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture and accessories

26.	B/L:	C/LA-2
	B/L Date:	October 29, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri/rattan wares and accessories
27.	B/L:	C/LA-5
	B/L Date:	October 30, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture and accessories
28.	B/L:	M/LB/TA-1
	B/L Date:	November 13, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri/rattan furnitures and accessories

Hearing Counsel would offer witnesses that would testify that shipments 16-28 each contained furniture, baskets, woven articles or other assorted handicrafts. Documentary evidence would include bills of lading, packing lists and commercial invoices.

Such testimony would be that: (1) FESCO rated each shipment, in its entirety, under its FMC Tariff No. 23, Item No. 480, furniture made of bamboo, buri, rattan, alone or in combination, in bales or in crates, and that FESCO charged and collected freight according to that rating; (2) the non-furniture cargo (woven articles and handicrafts) in each shipment should not have been rated as furniture, but rather as handicrafts and woven articles under FESCO Tariff No. 23, Items 570 and 1070, respectively; (3) if each shipment had been rated as furniture, handicrafts and woven articles, the charge would have in each instance exceeded that charged and collected by FESCO; (4) FESCO's tariff required the shipper to furnish FESCO a list and description of the contents of the goods shipped; (5) it was common knowledge in the trade that furniture was often mixed in containers with handicrafts and woven articles; and (6) FESCO knew or should have known the actual contents of each of these shipments.

FESCO would introduce as witnesses various furniture manufacturers from the Philippines who would testify that the term "accessories" as used in the bill of lading descriptions which they provided to FESCO for their products referred to various accoutrements and appointments which invariably accompany buri and rattan furniture and which are considered as part of such furniture by persons in the trade, and that while the addition of the word "accessories" was not generally necessary for most customers, some customers preferred or insisted on the inclusion of this term in the description of their shipments as evidence that the expected components had been included with the merchandise.

FESCO's tariff experts would also testify that FESCO's tariff items for buri and rattan furniture would not properly be rated under handicrafts, woven articles or any other item descriptions in FESCO's tariffs.

FESCO would also offer the testimony of various shippers and FESCO's agents that: (1) each of the above shipments was tendered to FESCO in a sealed container and that the shippers verified that the containers contained the merchandise described in their shipping documents; and (2) the descriptions provided to FESCO's agents were consistent with the descriptions contained in the shippers' export declarations and that this was confirmed by FESCO's agents.

FESCO would also show that any documentary evidence which might be introduced by Hearing Counsel was produced here in the United States by the consignee of the cargo and was not an independent and objective appraisal of the merchandise, nor were such documents known to FESCO at the time the shipment was rated or delivered.

IV. *Mixed Containerloads FMC 29—Alleged Violations of Section 18(b)(3)*

29.	B/L:	M/BAL-5
	B/L Date:	July 5, 1979
	Vessel Voyage:	PUTIVL 41
	B/L Description:	Buri furniture, basketwares and articles
30.	B/L:	M/PH-3
	B/L Date:	December 11, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	General Housewares (Rattan furniture and accessories)
31.	B/L:	M/PH-4
	B/L Date:	December 11, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	Buri furniture, basketwares
32.	B/L:	M/NJ-3
	B/L Date:	December 12, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	Rattanwares
33.	B/L:	M/NY-6
	B/L Date:	November 13, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture, giant fan
34.	B/L:	M/MOA-1
	B/L Date:	November 15, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture accessories
35.	B/L:	M/NY-3
	B/L Date:	November 13, 1979

	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture accessories
36.	B/L:	C/PHI-2
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri furniture and accessories
37.	B/L:	C/PHI-3
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Rattan furniture and wares
38.	B/L:	C/SAV-1
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri furniture and accessories
39.	B/L:	C/HTN-4
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Rattan furniture and wares

Hearing Counsel would offer witnesses who would testify that shipments 29-39 each contained an assortment of furniture, basketwares, woven articles and handicrafts. Documentary evidence would include bills of lading, packing lists and commercial invoices.

Such testimony would be that: (1) FESCO charged and collected a flat per container rate for each of these shipments; (2) under FESCO's applicable Tariff No. 29, Rule 90(1), a mixed volume or containerload shipment must be charged at the highest straight volume or containerload rate that would be applicable to any article in the shipment; and (3) the highest applicable rate fell under Tariff Item No. 12850, woven articles, producing freight charges in excess of those charged and collected by FESCO.

FESCO would offer witnesses who would testify that: (1) cargoes described immediately above as "buri furniture and accessories" or "rattan furniture and accessories" were not mixed shipments of commodities as alleged by Hearing Counsel but were shipments of buri furniture (or rattan furniture) with their normal accoutrements and appointments and were properly rated as such; (2) with respect to the shipments of mixed commodities, the proper application of FESCO's Tariff No. 29, Rule 90(1) requires a calculation of the transportation charge for each individually rated item, in accordance with the rules then applicable for minimum rates and other restrictions, as if the quantity of that item contained in that shipment were tendered alone, and the greatest of those amounts would then be selected as the applicable rate for the mixed commodity load; (3) in each instance cited by Hearing Counsel, FESCO's tariff rules were correctly applied; and (4) if such mixed commodities had been rated in accordance with the method advanced by Hearing Counsel, some of the shipments would have been assessed total charges above those assessed by FESCO while others would have been assessed charges below those assessed by FESCO, but the difference between these alternative assessments would not have been significant.

V. *Buri Furniture and Other Items, FMC 23—Alleged Violations of Section 16, Second Paragraph*

40.	B/L:	M/OAK/CHI-6
	B/L Date:	July 5, 1979
	Vessel Voyage:	PUTIVL 41
	B/L Description:	Buri furniture and Philippine basketwares
41.	B/L:	M/OAK/CHI
	B/L Date:	December 13, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	Philippine made Buri furniture and basketwares
42.	B/L:	M/LB-2
	B/L Date:	December 12, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	Assorted buri furnitures, fans, and rattan coat hangers
43.	B/L:	M/LA-8
	B/L Date:	December 12, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	Buri furniture, handwoven articles
44.	B/L:	M/LA-7
	B/L Date:	December 12, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	General Merchandise (assorted buriwares)
45.	B/L:	MNL/SLT-3
	B/L Date:	December 13, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	General merchandise, buri furniture
46.	B/L:	M/LB/CHI-1
	B/L Date:	November 11, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Furniture, buri/rattan
47.	B/L:	M/SEA/CHI-1
	B/L Date:	November 12, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture and midrib basket
48.	B/L:	M/OAK/DT-2
	B/L Date:	November 13, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri Furnitures, handwoven articles
49.	B/L:	C/CHI-1
	B/L Date:	October 30, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furnitures, handwoven articles

50.	B/L:	C/CHI-2
	B/L Date:	October 30, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture and wares
51.	B/L:	C/LA-4
	B/L Date:	October 30, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture and wares
52.	B/L:	M/LA-7
	B/L Date:	November 13, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buriwares
53.	B/L:	M/LA-10
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Assorted rattan furnitures
54.	B/L:	M/LA-11
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furnitures, handwoven articles
55.	B/L:	M/LA-13
	B/L Date:	November 15, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Rattan furniture and Philippine handicrafts
56.	B/L:	M/LB-1
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Rattan-buri furniture, assorted baskets
57.	B/L:	C/KNC-1
	B/L Date:	October 30, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture
58.	B/L:	M/OAK/DT-6
	B/L Date:	October 19, 1979
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri furniture, plastic elephant and lion, handwoven articles
59.	B/L:	M/LA-4
	B/L Date:	October 15, 1979
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri furniture, woven articles
60.	B/L:	M/LA-7
	B/L Date:	October 19, 1979
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri Furniture and cocomidrib basket

61.	B/L:	M/LA-10
	B/L Date:	October 19, 1979
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri furniture, handwoven articles
62.	B/L:	M/OAK/OH-1
	B/L Date:	October 17, 1979
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri furniture and stuffing merchandise
63.	B/L:	M/SF-1
	B/L Date:	September 30, 1979
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri, fan

Hearing Counsel would offer witnesses that would testify that shipments 40-63 each contained an assortment of furniture and baskets or other woven articles or craft products. Documentary evidence would include bills of lading, packing lists and commercial invoices.

Such testimony would be that: (1) FESCO rated each shipment, in its entirety, under its FMC Tariff No. 23, Item No. 490, furniture made of bamboo, buri, rattan, alone or in combination, in bales or in crates, and that FESCO charged and collected freight according to that rating; (2) the non-furniture cargo (woven articles, handicrafts) in each shipment should not have been rated as furniture, but rather as handicrafts and woven articles under FESCO Tariff No. 23, Items 570 and 1070, respectively; (3) if each shipment had been properly rated the proper charge would have in each instance exceeded that charged and collected by FESCO; (4) FESCO's tariff required the shipper to furnish FESCO a list and description of the contents of the goods shipped; (5) it was common knowledge in the trade that furniture was often mixed in containers with handicrafts and woven articles; and (6) FESCO knew or should have known the actual contents of each of these shipments.

FESCO would present the testimony of witnesses, both shippers and FESCO's agents from the Philippines, and documentary evidence which would show that: (1) the commodities carried in most of these shipments were buri and rattan furniture and that they were rated as such; (2) other shipments were composed predominantly of buri and rattan furniture and that other items which might have been described in the bills of lading made up such an insubstantial portion of these shipments that they could not properly be rated; (3) had these items been rated, the charges assessed would have differed both above and below those imposed by FESCO to such an insignificant amount that there was no requirement to so rate the shipments; and (4) Hearing Counsel's assertion that these items, if shipped in an amount sufficient to justify the selection of an applicable rate, would have been rated as handicrafts and woven articles is wrong, and that most such commodities would have incurred rates below those imposed. FESCO would further show that the invoices alleged by Hearing Counsel to show merchandise was carried which was other than buri and rattan furniture were prepared by consignees of the cargoes here in the United States and are not documents of intrinsic trustworthiness and were not known to FESCO's agents.

VI. *Failure to Assess Minimum Rate—Alleged Violations of Section 18(b)(3)*

64.	B/L:	M/PH-1
	B/L Date:	July 2, 1979
	Vessel Voyage:	PUTIVL 41
	B/L Description:	Beer
65.	B/L:	M/NY-1
	B/L Date:	November 8, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Used aircraft tires

Hearing Counsel would offer witnesses who would testify concerning shipments 64-65. Such evidence would be that FESCO Tariff No. 29, Rule 6(B)(2) requires a minimum charge of $1,700 per container; and (2) in each of these shipments FESCO charged and collected less than that minimum requirement.

FESCO would present witnesses who would testify that: (1) the minimum per container rate was not applicable in these instances; and (2) if such minimum rates were applicable, the difference in the total transportation charges collected was not significant.

VII. *Rating Errors—Alleged Violations of Section 18(b)(3)*

66.	B/L:	L/LA-2
	B/L Date:	December 3, 1979
	Vessel Voyage:	ROMAS 9
	B/L Description:	Buri/rattan furniture and baskets
67.	B/L:	M/LA-12
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Assorted woven articles

Hearing Counsel would offer witnesses who would testify that shipments 66-67 were rated under Tariff Item No. 1070, woven articles, at $59.25 per cubic meter. Such testimony would also show that the rate under Tariff Item No. 1070 at the time of these shipments was $59.50 per cubic meter.

FESCO would offer testimony of witnesses, supported by documentary evidence, that: (1) when these shipments were rated, the rate used by FESCO's agents was the rate then in effect; (2) the rate assessed by FESCO's agents, if not current, had expired less than ten days previous to the date these bills of lading were rated and that, in such instances, the assessed rate was not materially different from the new rate; and (3) the extent of any undercharge was $13.25 on one shipment totaling $3,900.00, and $6.63 on another shipment totaling $1,700.00.

VIII. *Rating Errors—Alleged Violations of Section 18(b)(3)*

68.	B/L:	M/LA-1
	B/L Date:	November 6, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Starkist brand chunk light tuna
69.	B/L:	M/LA-3
	B/L Date:	November 7, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Starkist brand chunk light tuna
70.	B/L:	M/LA-6
	B/L Date:	November 13, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Starkist brand chunk light tuna
71.	B/L:	M/LA-8
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Starkist brand chunk light tuna
72.	B/L:	M/LA-9
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Food stuffs bottled canned and preserved

Hearing Counsel would offer witnesses who would testify that shipments 68-72 were rated under FESCO Tariff No. 23, Item No. 460, at $57.50 per cubic meter. Such testimony would be that the rate under Tariff Item No. 460 applicable to these shipments was $57.75 per cubic meter.

FESCO would offer testimony that: (1) when these shipments were rated, the rate used by FESCO was the rate then in effect; (2) the rate assessed by FESCO's agents, if not current, expired less than ten days prior to the date these bills of lading were rated and that, in such instances, the assessed rate was not materially different from the new rate; and (3) the extent of any undercharge was $46.00 on shipments totaling $11,400.00.

IX. *Additional Rating Errors—Alleged Violations of Section 18(b)(3)*

73.	B/L:	M/OAK/CHI-1
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Bulk dried banana chips

Hearing Counsel would offer witnesses who would testify that: (1) this shipment of banana chips was rated at $53.25 per cubic meter and that FESCO charged and collected pursuant to that rating; and (2) this shipment should have been rated under FESCO Tariff No. 23, Item 82, Banana chips, at $53.80 per cubic meter.

FESCO would offer testimony that: (1) its agents assessed the proper rate for banana chips in effect at the time and collected the proper amount due; (2) the rate assessed by FESCO's agents, if not current, had expired less than ten days prior to the date these bills of lading were rated and that the assessed rate was not materially different than the new rate; and (3) the total difference between the rate alleged by Hearing Counsel to be proper and the rate assessed by FESCO was 25 cents per cubic meter, resulting in a total difference of $29.00 on total charges of over $3,000.00.

74.	B/L:	M/OAK/MM
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri rattan baskets and bath accessories and woven baskets of banana palm and seagrass

Hearing Counsel would offer witnesses who would testify that: (1) this shipment of woven articles was rated at $54.25 per cubic meter and that FESCO charged and collected freight revenues pursuant to that rating; and (2) this shipment should have been rated under FESCO Tariff No. 23, Item No. 1070, woven articles, at $54.50 per cubic meter.

FESCO would offer testimony that: (1) FESCO's agents assessed the proper rate for woven articles in effect at the time and collected the proper amount due; (2) the rate assessed by FESCO's agents, if not current, expired less than ten days prior to the date these bills of lading were rated and that the assessed rate was not materially different than the new rate; and (3) the difference between the rate assessed by FESCO's agents and the rate alleged by Hearing Counsel to be proper resulted in a total difference of only $13.25 on total charges of $3,100.00.

X. *Application of Bunker Surcharge Rule—Alleged Violations of Section 18(b)(3)*

75.	B/L:	M/OAK/PF-1
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri and rattan furnitures
76.	B/L:	M/NO-1
	B/L Date:	November 13, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	"Syskrin" sewing box, semi KD

Hearing Counsel would offer witnesses who would testify that shipments 75 and 76 were incorrectly rated by FESCO in that FESCO incorrectly applied Rule 440, Tariff No. 29, pertaining to bunker surcharges, and thereby collected more revenue than was due under its tariff.

FESCO would offer the testimony of tariff experts to show that: (1) the bunker surcharge was properly assessed in each instance; or alternatively, (2) the bunker surcharge was imposed in these circumstances only on this voyage, the first voyage after the bunker surcharge rule was first adopted, and no other voyage shows evidence of the imposition of a bunker surcharge under the same circumstances.

XI. *Minimum Charge Problems—Alleged Violations of Section 18(b)(3)*

77.	B/L:	M/NY-5
	B/L Date:	November 12, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Philippine light chunk tuna in brine
78.	B/L:	M/NY-7
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Knife blocks
79.	B/L:	M/Bal-1
	B/L Date:	November 7, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Woven Bread Baskets

Hearing Counsel would offer witnesses who would testify that: (1) for shipments 77-79 FESCO applied FMC Tariff No. 29, Rule 6(B)(2), a minimum charge per container, and additionally assessed a bunker surcharge pursuant to Rule 440; and (2) under FESCO's tariff, a bunker surcharge should not have been assessed in addition to the minimum charge per container under Rule 6(B)(2).

FESCO would offer the testimony of tariff experts to show that: (1) the bunker surcharge was properly assessed in each instance; or alternatively, (2) the bunker surcharge was imposed in these circumstances only on this voyage, the first voyage after the bunker surcharge rule was first adopted, and no other voyage shows evidence of the imposition of a bunker surcharge under the same circumstances.

80.	B/L:	M/NY-4
	B/L Date:	November 10, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Rufina Patis
81.	B/L:	M/NY-8
	B/L Date:	November 14, 1979
	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Canned Food and Food stuffs

Hearing Counsel would offer witnesses who would testify that: (1) for shipments 80 and 81 FESCO applied a per container rate of $1,700 and additionally assessed a bunker surcharge of $159 and $162 respectively; (2) these shipments should have been rated under Tariff Item No. 11030, foodstuffs, at $58.75 per cubic meter plus a bunker surcharge; and (3) had the shipments been rated as foodstuffs, the charges would have been below those charged and collected by FESCO.

FESCO would offer the testimony of tariff experts that: (1) the minimum per container rate of $1,700 plus a bunker surcharge were properly assessed on the shipments above; or alternatively, (2) the bunker surcharges were imposed in these circumstances only on this voyage, the first voyage after the bunker surcharge rule was first adopted, and no other voyage shows evidence of the imposition of a bunker surcharge under the same circumstances.

XII. *Additional Evidence*

FESCO would offer the testimony of liner shipping industry experts and regulatory experts that: (1) rating errors of the nature alleged by Hearing Counsel in this proceeding are experienced by all liner shipping companies; (2) the complicated nature of tariffs, a result largely due to regulatory resistance to the idea of FAK rates, and the great amount of time and expense involved in training tariff clerks, results inevitably in errors in the rating of ocean freight shipments; (3) the level of rating errors is generally higher on inbound shipments from countries where such tariffs are otherwise little known and where English is not the first language of the shipping agents and their tariff clerks; and (4) the level of rating errors, if any, experienced by FESCO is similar to the level experienced by most other ocean liner carriers, including U.S. flag carriers.

FESCO would also offer the testimony of its agents and company officials that FESCO conducts a rigorous auditing program to insure the proper assessment of rates and to improve the standard of performance of its agents and tariff clerks. The testimony of industry and regulatory experts would also be that the auditing and review procedures carried out by FESCO at this time were comparable to industry wide standards and could be expected to keep rating errors down to an acceptable level.

THE STIPULATION AND THE PROPOSED SETTLEMENT: A SUMMARY

A: THE STIPULATION

Because the parties are not in agreement on the material facts, the stipulation takes the form of an agreement as to the nature of the evidence each would seek to introduce at a hearing.

Thus, Hearing Counsel would attempt to show 81 violations of the Shipping Act resulting from shipments carried by FESCO from the Philippines to the United States during the calendar year 1979. Two types of violations are involved. First, Hearing Counsel would try to establish that on 46 occasions, Respondent knew, or should have known, that the amounts it charged and collected were not the proper charges under Respondent's applicable tariffs—FMC No. 23 (for local and OPC shipments) or FMC No. 29 (for minibridge shipments)—and that this conduct allowed persons to receive transportation at less than proper tariff rates by unfair and unjust means and devices in violation of section 16, Second paragraph. Second, Hearing Counsel would endeavor to prove that on 35 occasions, Respondent failed to make proper charges under the applicable tariffs in violation of section 18(b)(3).

For its part, FESCO would attempt to introduce evidence showing that it did not commit those violations.

B: THE MAXIMUM CIVIL PENALTY UNDER THE APPLICABLE STATUTES

The maximum civil penalty for a violation of section 16, Second paragraph, is $25,000 per offense. For a violation of section 18(b)(3), of the type here involved, the maximum penalty is $5,000.[8] Consequently, if it were to be found that Respondent had committed all 81 violations, the maximum civil penalty which could be assessed in this proceeding is $1,325,000.

C: THE PROPOSED SETTLEMENT

Rather than litigate the merits of the case, Hearing Counsel and FESCO entered into a proposed settlement agreement.

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[8] See n. 2, *supra*.

Insofar as the civil penalty is concerned, Respondent's undertaking [9] requires FESCO, within 10 days of service of an initial decision accepting and approving the settlement, to pay into an escrow account at a commercial bank in London, England, the sum of $375,000 in Eurodollar deposits or its equivalent for a term of one month and to roll over the deposit and accumulated interest each month thereafter until acceptance and approval of the settlement agreement by the Commission. Following such approval, the bank shall pay to the Commission the sum of $375,000, together with all interest accumulated thereon until the end of the monthly term during which such approval occurs. However, on its own initiative, the Respondent elected to accelerate the escrow deposit and to allow it to earn interest applicable to the settlement at an earlier date.[10]

Respondent also agrees,[11] in the event it should reestablish its containership service to or from the United States, to undertake to discourage, prevent and eliminate misratings and charging and collecting other than its proper tariff rates and charges. The measures Respondent is required to take to achieve this goal include: (1) making a review of its managerial procedures, and modifying them, to the extent necessary, to safeguard against the occurrence of practices by Respondent, its officers, directors, employees and agents which would result, directly or indirectly, in rebating or allowing any person any reduction in tariff rates and charges, and (2) causing to be written into every agency or terminal contract and into every interchange or other water-connecting carrier agreement entered into for service in United States trades, a requirement that FESCO's agents, terminal operators and connecting carriers, in the discharge of such contracts, will make no payment of a rebate, remittance or allowance in violation of sections 16 or 18 of the Shipping Act.

Respondent further agrees [12] to allow Commission investigators and attorneys unimpeded access to its vessel voyage manifests, bills of lading, and shippers' packing lists or other documentation which show the actual weight or measure of cargo tendered, and to allow Commission investigators unimpeded access to all containers and trailers in FESCO's custody in the United States.

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[9] Settlement Agreement, par. 1.

[10] See letter dated November 17, 1981, from counsel for Respondent to Hearing Counsel in which the former advises the latter:

> Pursuant to paragraph 1 of the Proposed Settlement of Civil Penalties executed by the parties to the above proceeding on September 28, 1981 and submitted to the Hearing Officer on this date, Fesco has established with the Moscow Narodny Bank of London, London, England, an escrow account for the proposed settlement payment and placed as of November 13, 1981 the sum of $375,000 in such account.

[11] Settlement Agreement, par. 3.

[12] *Id.*, par. 4 and 5.

The Commission agrees,[13] for the future, not to seek civil penalties from Respondent arising from acts, practices or violations of section 16, Second paragraph, section 18(b)(3) or section 18(c) of the Shipping Act, which Respondent committed or may have committed in any United States trade prior to September 30, 1980. However, the immunity thus conferred does not extend to violations of the cited section of the Shipping Act committed as part of a concerted course of illegal conduct [14] which involves misrating practices different than the variety identified at page 1 (shown by example) of the Order of Investigation and Hearing in United States trades other than the Philippines to United States trade.

The Commission agrees that within 30 days of a final Commission Order approving the settlement, Respondent may retrieve all copies of its documents in the Commission's possession, other than documents which have become a part of the record, that it produced during discovery. Respondent shall, however, maintain the retrieved documents in Washington, D.C., through December 31, 1985, and shall allow Commission representatives unimpeded access to them and removal of specified documents upon the request of such representatives.

DISCUSSION

Independently, Hearing Counsel and FESCO submit [15] that the proposed settlement meets well-settled criteria for approval of agreements settling administrative enforcement claims and, thus, merits approval. I agree.

Generally, the parties urge that the settlement lies comfortably within a zone of reasonableness determined after a thorough analysis of accepted standards for settlement of assessment proceedings and a full evaluation of the range of Respondent's conduct over an extensive period of time in a particular trade. The settlement is neither a coercive attempt to exact exorbitant punishment nor a profligate cession of "public rights," *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 442 U.S. 430, 450 (1977), to the alleged wrongdoer. The amount of the monetary penalty is substantial and its magnitude is perceived as having a strong deterrent effect upon the Respondent and others under regulation. In addition, the non-monetary conditions appear to be adequate safeguards ensuring Respondent's cooperation and compliance with regulation in the future.

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[13] *Id.*, par. 2.

[14] A concerted course of illegal conduct is defined in par. 2 as a series of at least fifteen related violations of the Shipping Act, 1916, occurring within a 180-day period and evidencing a design or plan to contravene the intents and purposes of the Shipping Act, 1916.

[15] See Hearing Counsel's Memorandum in Support of Proposed Settlement and FESCO's Respondent's Memorandum in Support of Proposed Settlement.

CRITERIA FOR SETTLEMENT

When section 32(e) became a part of the Shipping Act, 1916,[16] the Commission promulgated rules and regulations implementing that section.[17] Under those rules the "criteria for compromise, settlement or assessment" might "include, but need not be limited to those which are set forth in 4 C.F.R. Parts 101-105." [18] The criteria referred to are government-wide standards developed and published by the Comptroller General of the United States and the Attorney General of the United States under authority of section 3 of the Federal Claims Collection Act of 1966, 31 U.S.C. 952.

Those governmental standards, particularly those set forth in 4 C.F.R. 103, were a part of this Commission's program for collection of civil penalties even before the enactment of section 32(e). *Eastern Forwarding International, Inc.—Independent Ocean Freight Forwarder Application—Possible Violations, Section 44, Shipping Act, 1916*, 23 F.M.C. 206 (1980), Initial Decision, administratively final, September 8, 1980. "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." *Eastern Forwarding International, Inc., supra*, 23 F.M.C. 213; *Behring International, Inc.—Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973 (1981), Initial Decision, adopted June 30, 1981. Those standards recognize: that settlement may be based upon a determination that 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;" [19] that "the amount accepted in compromise . . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection;" [20] the value of setting claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; [21] and that penalties may be settled "for one or for more than one of the reasons authorized in this part." [22]

[16] The provisions of section 32(e) appear in Public Law 96-25, section 10. P.L. 96-25 was enacted June 19, 1979.

[17] General Order No. 30, 46 C.F.R. Part 505, Compromise Assessment, Settlement and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

[18] 46 C.F.R. 505.

[19] 4 C.F.R. 103.5.

[20] 4 C.F.R. 103.4.

[21] 4 C.F.R. 103.3.

[22] 4 C.F.R. 103.7.

A: ENFORCEMENT POLICY

Primary importance was attached to the Commission's enforcement policy by Hearing Counsel in conducting the settlement negotiations with Respondent. Achieving the goals of that policy called for a mix of monetary and non-monetary factors.

Monetarily, the settlement had to be substantial—meaning that it had to be sufficiently great so that the Respondent would not benefit financially from its wrongful conduct. Moreover, a substantial penalty would also have the desired deterrent effect on Respondent and others because it would serve as a disincentive to future unlawful activity. Hearing Counsel assert that the $375,000 penalty does just that. The penalty "indicates the Commission's clear determination that malpractices and misratings will not be tolerated. It conforms to the Commission's ongoing enforcement program and is further evidence to the industry that violations of the Shipping Act will result in substantial penalties."

The non-monetary terms of the settlement also serve the Commission's enforcement policy. These provisions require Respondent to review its managerial procedures and to modify them to comply with the Shipping Act. It further requires Respondent to ensure that its agents, terminal operators and connecting carriers also comply with the provisions of the Shipping Act. As an aid to Commission oversight of Respondent's future operations, should there be any, the settlement agreement requires Respondent to allow Commission representatives unimpeded access to shipping documents and all containers and trailers in its custody in the United States. Hearing Counsel deems the latter conditions to be necessary because Commission representatives have not always been afforded such access in the past.

B: COST OF COLLECTION

There is involved in this proceeding a broad investigation of a major ocean carrier's tariff and rating practices. The alleged violations which Hearing Counsel would try to prove concern shipments which originated at diverse places in the Philippines and were consigned to points throughout the United States. Thus, the geographic scope, alone, presages a protracted evidentiary hearing.

Hearing Counsel explain that they have already undergone the burdensome experience of reviewing over ten thousand documents provided by Respondent during discovery. Just the initial review required the efforts of three attorneys, two law clerks and four staff representatives on almost a full-time schedule. As a direct consequence of the review, personnel in the Commission's field offices in New York, San Francisco, Los Angeles, and New Orleans were assigned to obtain additional evidentiary material.

Yet, even as the proposed settlement was filed, Hearing Counsel had not completed discovery and other preparations for trial. Hearing Counsel estimate that to be ready for a hearing they would be required to devote hundreds of additional hours of attorney's time and that they would need the services of many staff and field representatives to obtain additional documentary material and to interview witnesses nationwide.

Hearing Counsel forecast that for their direct case they would require several weeks of hearing. Witnesses they expect to call are located in such cities as New York, Philadelphia, Savannah, Dallas, Los Angeles, San Francisco, Seattle and Chicago. Thus, they foresee substantial monetary outlays over and above the cost of time to be spent by attorneys and other Commission personnel. Hearing Counsel anticipate that Respondent's rebuttal would require additional weeks of hearing entailing still further cost.

Respondent expresses similar concern. It estimates a hearing lasting about twelve weeks. FESCO amplifies this perception by referring to certain specifics, as follows: the testimony of many fact and expert witnesses would be required; these witnesses are not centrally located; many reside in the Philippines, and the rest are scattered throughout the United States; there would be extensive documentary evidence, consisting of manifests, bills of lading, packing lists, invoices, customs declarations and tariffs; the taking of testimony on pertinent evidentiary matters would be complicated by the fact that many knowledgeable witnesses are no longer readily available; the termination of FESCO's container service to the United States and the accompanying closure of many offices of FESCO's former agents have resulted in a loss of key personnel previously involved in the rating, classification and documentation of cargo carried by FESCO on voyages such as the ones in issue here; many witnesses would have to testify through interpreters, which would further complicate and add expense to the hearing process.

Hearing Counsel express further concern. Because many of Respondent's witnesses reside in the Philippines, they perceive a possibility of sessions in Guam and, perhaps, extraterritorially, should a sovereign state consent thereto.

Another benefit would accrue from approval. The need for extensive briefing before an initial decision, possible exceptions and judicial review would be obviated.[23]

[23] It should be noted that by September 30, 1980, Respondent terminated regular service in the Philippines to United States trade and it is no longer serving any United States trade. Assuming that Hearing Counsel were to prevail on the merits, there remains the possibility, absent voluntary payment, that collection of an assessment could be difficult. In this connection, although not raised by FESCO as a consideration, it remains open to speculation whether the fact that Respondent is a state-owned carrier could escalate the issue of involuntary collection to a diplomatic level.

Both parties urge, therefore, that the settlement they propose is appropriate in the light of the expense each would be exposed to in litigating the issues. Hearing Counsel stress that the settlement agreement is fair and serves a valid regulatory purpose and, because the Commission's resources, in terms of both time and budgetary constraints, are limited, it is desirable that the settlement be approved so that the Commission's resources may be devoted more advantageously to other pressing matters.

C: LITIGATIVE PROBABILITIES

Hearing Counsel and Respondent have demonstrated good faith disagreement over both relevant facts and applicable legal principles, thus, litigative probabilities are relevant considerations in determining the reasonableness of the proposed settlement agreement.

As seen, the proposed settlement is not based on a disclosure of wrongdoing on the part of Respondent. While it is Hearing Counsel's view that Respondent might acknowledge certain inadvertent misratings, they recognize that Respondent has steadfastly denied committing any malpractices. Therefore, Hearing Counsel consider that one of their tasks would involve proving a measure of willfulness on Respondent's part. Although Hearing Counsel express confidence that at a hearing they would prevail on the merits, they recognize that whenever facts are in dispute, there is an element of risk in achieving that result.

Hearing Counsel note that this proceeding presents particularly difficult problems in marshalling the evidence. The persons with the best first-hand knowledge of the transactions in question, i.e., the shippers and Respondent's agents, are largely located in the Philippines, presenting great and possibly insurmountable logistical problems. Other potential witnesses such as consignees and Respondent's employees and agents in this country, have interests that do not necessarily coincide with Hearing Counsel's and, therefore, may not be effective witnesses in support of Hearing Counsel's case.

Hearing Counsel also foresee that at a hearing novel issues of law would be presented. For example, in certain instances, Hearing Counsel would attempt to show that Respondent's disregard of cargo descriptions shown on bills of lading when rating those shipments under applicable tariff provisions constituted willful acts enabling persons to receive transportation at less than applicable tariff rates. Hearing Counsel state that the law is not settled in this particular area, and though they believe that this is willful conduct in violation of section 16, Second paragraph, the outcome of this or any other novel legal issue cannot be predicted with certainty.

The vagaries of litigative probabilities also warrant approval of the settlement.

CONCLUSION

It is manifest that the settlement is fair to Respondent and advantageous to the Government. It conforms to the standards for settlement recognized by the Attorney General, the Comptroller General, and this Commission. It is separately supportable under the Commission's enforcement policy by consideration of the cost of litigation and by consideration of litigative possibilities. Together, those considerations make a persuasive case for approval. I am satisfied that the terms of the settlement, both monetary and non-monetary, represent a fair balance between the costs and uncertainty of continued litigation and the potential penalty that could be assessed at the conclusion of the proceeding.

ORDER

It is ordered that the settlement agreement entitled "Proposed Settlement of Civil Penalties" be approved. It is further ordered that the terms and conditions of the settlement agreement are incorporated in this ordering Paragraph as if more fully set forth herein. It is further ordered that the voluntary acceleration of the escrow deposit with the resultant accumulation of interest from November 17, 1981, be deemed to modify otherwise inconsistent provisions of paragraph 1 of the settlement agreement.

(S) SEYMOUR GLANZER
Administrative Law Judge

APPENDIX

BEFORE THE FEDERAL MARITIME COMMISSION

FAR EASTERN SHIPPING COMPANY POSSIBLE VIOLATIONS OF SECTIONS 16, SECOND PARAGRAPH, 18(b)(3), AND 18(c), SHIPPING ACT, 1916	DOCKET NO. 80-60

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement Agreement has been entered into between the Bureau of Hearings and Field Operations (Bureau) and Respondent Far Eastern Shipping Company (Fesco). It is submitted to the presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, and section 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 10, 1980, the Commission instituted the present proceeding to determine whether Fesco had violated sections 16, second paragraph, 18(b)(3), and 18(c) of the Shipping Act, 1916, 46 U.S.C. 815 and 817, and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of sections 16 and 18 of the Shipping Act, 1916, so found;

WHEREAS, the Order of Investigation and Hearing alleges that Fesco may have engaged in a variety of misrating practices in 1979 and 1980, which may have violated sections 16, second paragraph, and 18(b)(3) and (c), of the Shipping Act, 1916;

WHEREAS, Fesco has made available to the Bureau documents which the Bureau believes indicate that Fesco engaged in specific conduct which may be violative of sections 16, second paragraph, and 18(b)(3) and (c) of the Shipping Act, 1916, but Fesco denies that such conduct violated that Act;

WHEREAS, Fesco is not currently offering containership service to or from the United States, has terminated the practices which are the basis of the Commission's allegations in this proceeding, and has instituted and indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent these practices by Respondent or its officers, employees and agents should it reestablish its containership service to or from the United States;

WHEREAS, the parties in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issues raised by the Order of Investigation and Hearing; and

WHEREAS, section 32(e) of the Shipping Act, 1916, 46 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 provisions 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, the Commission and Fesco agree 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. Within ten (10) days of acceptance and approval of this Settlement Agreement by the presiding Administrative Law Judge and service of an initial decision, Fesco shall pay into an escrow account to be established by Fesco at a commercial bank at London, England ("the Bank") the sum of Three Hundred and Seventy-Five Thousand ($375,000) Dollars, which sum shall be placed in Eurodollar Deposits or its equivalent for a one month term, and rolled over each month until approval and acceptance of the Settlement Agreement by the Federal Maritime Commission. Upon the approval and acceptance of this Settlement Agreement by the Federal Maritime Commission and its incorporation into the Final Order in this proceeding, the Bank shall pay at the end of the Eurodollar Deposit monthly term such sum of $375,000 with all accrued interest to the Federal Maritime Commission; but in the event the settlement is not approved and accepted by the Federal Maritime Commission, such sum of $375,000 with all accrued interest shall be returned to Fesco.

2. Upon acceptance of this Agreement in writing by the Commission this instrument shall forever bar the commencement or institution of any civil or administrative action or other claim for recovery of civil penalties from Fesco based upon acts, practices or violations of sections 16, second paragraph, and 18(b)(3) and (c) of the Shipping Act, 1916, which Fesco committed or may have committed prior to September 30, 1980, but not including any violations of the Shipping Act, 1916, committed as part of a concerted course of illegal conduct of a type not described in the Order of Investigation and Hearing in FMC Docket No. 80-60 in any United States trade other than the trade from the Philippines to the United States. As used in this Agreement, a "concerted course of illegal conduct" is a series of at least fifteen (15) related violations of the Shipping Act, 1916, occurring within a 180-day period and evidencing a design or plan to contravene the intents and purposes of the Shipping Act, 1916. It is understood by Fesco that this Agree-

ment 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 other violations of law by Fesco.

3. Fesco agrees, in the event it should reestablish its containership service to or from the United States, to undertake to discourage, prevent, and eliminate misratings and the practice of charging and collecting other than its proper tariff rates and charges by measures including, but not limited to:

a. Review of its administration and procedures, and modification of such to the extent necessary to safeguard against the occurrence of practices by Fesco, its officers, directors, employees and agents which would result, directly or indirectly, in rebating, remitting or allowing to any person, in violation of sections 16 and 18 of the Act, any reduction of Fesco's tariff rates and charges on file with the Commission;

b. Fesco will cause to be written into every agency or terminal contract and into every interchange or other water connecting carrier agreement which is hereafter entered into for service in trades with the United States, a requirement that its agents, terminal operators, and connecting carriers, in the discharge of such contract, will make no payment of a rebate, remittance, or allowance in violation of sections 16 or 18 of the Act;

4. Fesco shall, upon reasonable notice, allow investigators and/or attorneys of the Commission unimpeded access to its vessel voyage manifests, bills of lading, and shippers' packing lists or other documentation which show or reflect the actual weight or measure of cargo tendered, and other related documents; provided, however, that prior to allowing such access or providing such documents, Fesco shall have received from Commission Investigators and/or attorneys an oral statement identifying the documents to be inspected and stating the reasons or alleged violations for which they seek access to the documents and the basis for believing any violations have occurred. Commission Investigators and/or attorneys shall have the right to make notes from and handcopy any such documents at the time such access is provided. In addition, after Commission investigators and/or attorneys have been allowed such access, Fesco shall provide copies of such documents specifically requested by the Commission investigators and/or attorneys, within ten (10) days of the request. Requests for access to documents and copies thereof shall not be made on a discriminatory basis. Such requests shall be in conformance with the nature, methods and procedures utilized by Commission investigators and/or attorneys in making such requests of U.S. and other common carriers serving the United States trades. This paragraph is specifically limited to documents located in the United States, its Districts, Territories, and possessions, and pertaining to shipments moving in the foreign commerce of the United States.

5. Fesco shall, upon reasonable notice, allow investigators of the Federal Maritime Commission unimpeded access to all containers and trailers in Fesco's custody in the United States, or any of its Districts, Territories, or possessions, and shall allow Commission investigators to open, inspect and record the contents of such containers and trailers; provided however, that prior to allowing such access, Fesco shall have received from Commission investigators an oral statement identifying the containers and trailers to be inspected and stating the alleged violations or reasons for which they seek access to the containers and trailers and, where appropriate, the basis for believing such violations occurred. Such requests shall not be made on a discriminatory basis. Such requests shall be in conformance with the nature, methods and procedures utilized by Commission investigators in making such requests of U.S. and other common carriers and shall not unreasonably interfere with Fesco's normal business operations.

6. If Fesco breaches any provision of paragraphs 3, 4 and 5 of this Agreement, except as otherwise provided by changes in the applicable law, prior to January 1, 1990, and if such noncompliance shall not have been corrected, or explained to the Commission's satisfaction, within thirty (30) days after written notice to Fesco by the Commission, the Commission shall have the right to seek to have the breach rectified, but the Commission shall not rescind this Agreement, nor shall Fesco be relieved of its future obligations as contained in those paragraphs.

7. In the event changes in law or other circumstances occur during the term of this Agreement which Fesco believes warrant modification or mitigation of the requirements or conditions imposed on Fesco by this Agreement, Fesco may petition for this purpose.

8. This Agreement does not constitute an admission by Fesco that it has engaged, directly or through its officers, directors, employees, agents or affiliates, in acts or practices resulting in violations of the Shipping Act, 1916.

9. The undersigned represent that they are properly authorized and empowered to execute this Agreement on behalf of Fesco and the Commission, respectively, and to fully bind Fesco and the Commission to all the terms and conditions contained herein.

10. Fesco acknowledges that it has voluntarily signed this Agreement and states that no promises or representations have been made to it other than the agreements and considerations herein expressed.

11. To the extent that this Agreement or any of its provisions do not conformwith the Commission's General Order 30 (46 C.F.R. 505.1 *et seq.*) establishing the procedures for compromising and settling claims pursuant to Public Law 92-416, the parties hereby waive application of such provisions.

12. The parties agree that within thirty (30) days of the Commission's Final Order approving this Agreement, Fesco is entitled to retrieve all

copies of Fesco documents in the Commission's possession with the exception of documents submitted into the record of FMC Docket No 80-60, that were produced by Fesco during discovery in FMC Docket No. 80-60; provided however, that Fesco shall maintain such documents in Washington, D.C., through December 31, 1985, and upon reasonable notice to Fesco's agent or attorney, allow Commission representatives unimpeded access to such documents and allow the removal of such documents specifically requested by the Commission representatives. The Bureau shall be notified of the identity and address of the custodian of the documents, and any changes thereto.

13. This Agreement shall take effect upon entry of a final Commission Order terminating FMC Docket No. 80-60.

Far Eastern Shipping Company

By: (s) Steven B. Chameides

Date: 28 September 1981

Pursuant to Telex Authority DLD/VV/5207

FEDERAL MARITIME COMMISSION

BY: (s) JOHN ROBERT EWERS
Director
Bureau of Hearings and Field Operations

(S) ALAN J. JACOBSON
Hearing Counsel

(S) POLLY HAIGHT FRAWLEY
Hearing Counsel

(S) JANET F. KATZ
Hearing Counsel

DATE: 9-28-81

FEDERAL MARITIME COMMISSION

(46 C.F.R. 524; DOCKET NO. 81-40)

EXEMPTION OF EXCLUSIVE EQUIPMENT INTERCHANGE AGREEMENTS FROM THE FILING AND APPROVAL REQUIREMENTS OF SECTION 15 OF THE SHIPPING ACT, 1916

May 12, 1982

ACTION: Final Rule

SUMMARY: This exempts from the filing and approval requirements of section 15 of the Shipping Act, 1916, exclusive equipment interchange agreements covering the exchange of empty containers, chassis, LASH/SEABEE barges and related equipment between two or more persons subject to the Act. 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 June 16, 1982.

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (46 U.S.C. § 833a) allows the Commission to exempt 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 be detrimental to commerce. Under this authority, the Commission previously gave notice (46 F.R. 32459-32460) that it proposed to amend 46 C.F.R. Part 524 to exempt exclusive equipment interchange agreements from the filing and approval requirements of section 15 of the Act (46 U.S.C. § 814).

Carriers often find that they have an imbalance of equipment, *i.e.*, a surplus of equipment at one location and a scarcity at another location. One remedy for this imbalance is for a carrier to move empty equipment from one location to another location. A second remedy is to lease the necessary equipment from another carrier. While the second alternative may render the same result as the first, the time required to obtain Commission approval of other than nonexclusive arrangements may make them commercially unacceptable to the parties. This exemption will afford carriers additional flexibility to meet and respond, in a timely manner, to the problems of equipment imbalance. Participants in such arrangements should also be able to make more effective use of expensive equipment with resultant benefits to shippers and consignees.

Six responses to the notice of proposed rulemaking were filed on behalf of 24 conference/rate agreements and 2 independent carriers. The Japan/Korea-Atlantic & Gulf Freight Conference, the Japan-Puerto Rico & Virgin Islands Freight Conference, the Trans-Pacific Freight Conference of Japan/Korea, the parties to the 8900 Lines Rate Agreement and both independents, Sea-Land Service, Inc. and American President Lines, Ltd. (APL), support the rule.

Sea-Land's support is premised on the availability of section 15 approval for such arrangements at the request of interested parties, something which is already provided by 46 C.F.R. § 524.7. APL favors the exemption but requests that it be further enlarged to include the interchange of loaded containers made in connection with a nonexclusive transshipment agreement. The Commission is presently considering a rulemaking to exempt nonexclusive transshipment agreements from the filing requirements of section 15 and APL's request will be considered in this context.

The 8900 Lines suggest that the title of 46 C.F.R. Part 524 be modified to reflect the fact that it exempts both "nonexclusive transshipment agreements" and "exclusive equipment interchange agreements." This has already been accomplished. In Docket No. 80-34, *Exemption of Nonexclusive Transshipment Agreements From Section 15 Approval Requirements,* the title of 46 C.F.R. Part 524 was amended to read: "Exemption of Certain Agreements From the Requirements of Section 15, Shipping Act, 1916." [1]

Eleven conferences responding as the North European Conferences (NEC) support adoption of the rule, but suggest that the language of the rule be modified to make it clear that any equipment involved in an exclusive interchange agreement could be used by the receiving carrier to transport its own cargo. The final rule has been so modified.

Nine conferences responding as the Associated Latin American Freight Conferences (ALAFC) oppose the rule.[2] Their objection is that the rule will not confer antitrust immunity upon the parties to the exclusive equipment interchange agreement unless the agreement is filed with the Commission for approval. They contend that an exempted agreement should be immune from the antitrust laws. This argument has heretofore been expressly rejected by the Commission in Docket No. 81-18, *Exemption of Agreements Covering the Collection, Compilation*

[1] The final rule in Docket No. 80-34 exempted only nonexclusive equipment interchange agreements.

[2] Sea-Land, a member of five ALAFC conferences, disassociated itself from these comments.

and Exchange of Credit Information, 24 F.M.C. 795 (1982). Nothing presented herein persuades the Commission to alter its position.

THEREFORE, pursuant to sections 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 833a and 841a) and 5 U.S.C. § 553, 46 C.F.R. Part 524 is amended by revising paragraph (b) of section 524.2 *Definitions*, to read as follows:

> (b) An equipment interchange agreement is an agreement between two or more common carriers by water for the exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment, which provides only for the transportation of the equipment as required, payment therefor, management of the logistics of transferring, handling and positioning equipment, its use by the receiving carrier, its repair and maintenance, damages thereto, and liability incidental to the interchange of equipment, and no other subject.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-5

BELCO PETROLEUM CORPORATION

v.

COMPANIA PERUANA DE VAPORES
(PERUVIAN STATE LINE)

NOTICE

May 17, 1982

Notice is given that no appeal has been taken to the April 12, 1982 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. 82-5

BELCO PETROLEUM CORPORATION

v.

COMPANIA PERUANA DE VAPORES (PERUVIAN STATE LINE)

John J.C. Martin of Arsham & Keenan for Complainant.

Bert I. Weinstein of Haight, Gardner, Poor & Havens for Respondent.

JOINT MOTION GRANTED FOR APPROVAL OF SETTLEMENT AND FOR DISMISSAL OF PROCEEDING

Finalized May 17, 1982

In a joint motion served March 26, 1982 (received March 30, 1982), the parties in this proceeding request approval of a settlement entered into by them in this complaint case. The parties set forth in the motion the following agreed upon facts.

THE FACTS

1. Belco Petroleum Corporation (Belco), complainant in this proceeding, is a corporation in the business of exploration and production of crude petroleum and natural gas.

2. Compania Peruana de Vapores (CPV) is a common carrier by water in the commerce of the United States, and participated in the trade in question as a member of the Atlantic & Gulf/West Coast of South America Conference (the Conference).

3. At all times in question Belco was an industrial contract shipper with the Conference, under Contract No. 10361, in effect since September 9, 1965.

4. For the shipment subject of the dispute in this complaint case Belco's freight forwarder prepared the documents for ocean carriage and, in particular, providing for shipment to Talara, Peru, under Conference tariff item 1050 which provides an industrial contract rate schedule.

5. Belco's complaint alleges that it was entitled to ship the cargoes subject of this proceeding at lower rates than those charged under tariff item 1050, pursuant to Conference tariff item 1036A, which states:

Talara Oilwell and Production Project

Shipments of proprietary material and equipment to Talara or Paita will be assessed base rate of $132.00 W/M plus all additional charges. Heavy lift charges as per tariff scale will be applicable on the weight basis (2,000 lbs.). Extra length charges will be applicable as per tariff scale W/M as cargo is freighted. Bills of lading shall be claused as set forth in Rule 50.*

*Rule 50 states:

> In order to identify the cargo which is covered by this tariff rule, it is understood and agreed shipper will arrange to have the following notation placed on each Bill of Lading:
>
> > "The Shipper shown in this Bill of Lading certifies that the cargo described hereon is forwarded pursuant to the terms and conditions of tariff item No. ________________ and that he is aware that the Shipping Act of 1916 declared it to be a violation of law, punishable by a penalty, for a shipper to utilize an unfair device or means to obtain transportation at less than the applicable rates."
> >
> > Further, it is understood and agreed that the shipper shall submit a freight copy of all such Bills of Lading or Bill of Lading and due bill to the Conference Chairman on a timely and confidential basis.

6. For the shipment subject of this action Belco paid ocean freight of $57,800.11. Belco alleges it should have paid only $50,342.47 for this shipment, under item 1036A.

7. For further reference, the bill of lading subject of this Docket is attached to the complaint.

8. In consequence of the aforesaid, were Belco to satisfy its burden of proof as to the qualification of the cargo for the item 1036A rate, it would be entitled to reparation of $7,457.64.

9. But the point of genuine dispute between the parties, and the principal basis for CPV's denial of Belco's claim for reparations, concerns whether this shipment, which was shipped over two years ago, in fact might have qualified for the lower rate at the date of shipment.

In reparation cases, where the shipper or its freight forwarder misdescribes cargo, resulting in inadvertent overcharges, the shipper has the burden of proof to show that the cargo in fact qualified at the time of shipment for the lower rate. *See, e.g., Abbott Laboratories v. Moore-McCormack*, Docket No. 274(I), 17 F.M.C. 191 (1973). The shipment subject of this proceeding is now over two years old. Under tariff item 1036A, Belco would have the heavy burden of proving that this old shipment consisted of "proprietary material and equipment" for use at

Talara oilwell and production projects. Those are the facts critical to the resolution of these disputes.

The reasons for the parties entering into a settlement of these cases are fully stated in the parties' Joint Affidavit, but to summarize: saving of legal expense; avoidance of impairing good commercial relations; saving the expense of finding proof and furnishing witnesses on the merits of the dispute; and saving the expense and avoiding the difficulty of ascertaining the evidence as to these shipments.

In *Organic Chemicals v. Atlanttraffic Express,* Docket Nos. 78-2, 78-3, 21 F.M.C. 1083 (1979), the Commission laid down the rule for permitting settlements of these kinds of cases:

> 1. A signed agreement is submitted to the Commission;
> 2. The parties file with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be;
> 3. The complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable.

As a general matter the law favors settlements, and under the Commission's guidelines the settlement of the parties is fully justified and should be approved, especially so because of the fact that the evidence and witnesses necessary to resolve the dispute as to the qualification of this shipment for the item 1036A rate are not reasonably ascertainable.

The settlement of the $7,457.64 claimed by Belco for $6,711.88, or for 90% of the amount claimed, is justified by comparison to other settlements approved by the Commission, and is most reasonable, especially so when the likely legal costs, man-power costs and executive time, and risks of litigation are considered. *See, e.g., Forte International v. Seatrain*, Docket No. 80-24, 23 F.M.C. 27 (1980), 60% settlement; *Ellenville v. FESCO*, Docket No. 80-9, 23 F.M.C 707 (1981), 80% settlement; *Terfloth v. APL*, Docket No. 78-20, 22 F.M.C. 81 (1979), 64% settlement; *Del Monte v. Matson*, Docket No. 79-11, 22 F.M.C. 365 (1979), 62% settlement. The Administrative Law Judge, and the Commission, are of course familiar with the settlement between these parties, just approved, in Docket Nos. 81-56 and 81-67 (for 82-1/2% of the amount claimed), which involved the same issues.

Set forth in full is the joint affidavit:

JOINT AFFIDAVIT

We, the undersigned Alejandro Moreno, New York Representative of Compania Peruana de Vapores, and Vincent A. Merola, Controller of Belco Petroleum Corporation, each first severally sworn, depose and say for and on behalf of our respective corporations:

(1) The parties have entered into a settlement of the claims subject of FMC Docket No. 82-5 to terminate this dispute. The amicable settlement of this case will avoid the substantial costs of further litigation which, based upon the estimates of our attorneys, could be most substantial, especially in view of the sum in controversy; the parties desire to continue to maintain the good commercial relations which exist between them, and to avoid the disruptions inevitably caused by litigation; further litigation, including searches for documents and information, and the attendance of witnesses for both sides would be disruptive to the normal commercial affairs of the parties, and would be a nonproductive use of expensive manpower and the valuable time of our executive and managerial personnel; and, in view of the uncertainties of litigating and the difficulties of obtaining evidence as to the shipment subject of this dispute, the settlement of this genuine dispute between the parties is most desirable.

(2) This settlement is a bona fide attempt by the parties to terminate this controversy and is not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916.

Sworn to before me this
25th day of March, 1982

(S) ALEJANDRO MORENO
New York Representative

(s) Joseph S. Labell
Notary Public

Sworn to before me this
22 day of March, 1982

(S) VINCENT A. MEROLA
Controller

(s) Mary Haig
Notary Public

The parties submitted the following Agreement of Settlement and Mutual Release:

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED by and between the undersigned, Belco Petroleum Corporation ("Belco"), Complainant in Federal Maritime Commission Docket No. 82-5, and Compania Peruana de Vapores ("CPV"), Respondent in said Docket, that said Docket shall be terminated by mutual accord on the terms and conditions set forth herein and for the reasons set forth in the accompanying Joint Affidavit of the parties:

1. CPV shall pay to Belco the sum of Six Thousand, Seven Hundred and Eleven Dollars and 88/100 cents ($6,711.88).

2. Belco shall, in consideration of CPV's payment as provided in paragraph 1 above, withdraw its complaint in Federal Maritime Commission Docket No. 82-5, with prejudice to further pursuing the claim subject of said Docket.

3. Neither Belco nor CPV, nor any successor in interest of either such party, shall initiate any new claims against the other party arising in connection with the shipment subject of the complaint in this proceeding except for enforcement of any provision of this Agreement.

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

5. This Agreement shall be submitted for approval to the Federal Maritime Commission and shall become effective and binding upon the parties when final approval is obtained, at which time CPV shall pay to Belco the sum provided in paragraph 1.

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

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

Dated: New York, New York
March 24, 1982

BELCO PETROLEUM CORPORATION

(S) VINCENT A. MEROLA
Controller

COMPANIA PERUANA DE VAPORES

(S) ALEJANDRO MORENO
New York Representative

DISCUSSION

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that the parties have made out a proper case for settlement and supplied facts and reasons in support which are found acceptable, and that the settlement should be approved. The parties have requested dismissal of this proceeding with prejudice.

Wherefore, it is ordered, subject to approval by the Commission as provided in its Rules of Practice and Procedure:

(A) The settlement is approved pursuant to the agreement of settlement and mutual release.

(B) The parties shall notify the Commission promptly upon their carrying out the terms of the settlement and mutual release.

(C) This proceeding is discontinued with prejudice.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC. PROPOSED RULES ON CONTAINERS

DOCKET NO. 74-40

PUERTO RICO MARITIME SHIPPING AUTHORITY PROPOSED ILA RULES ON CONTAINERS

REPORT AND ORDER ON REMAND

May 19, 1982

On March 2, 1982, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in *Council of North Atlantic Shipping Associations v. Federal Maritime Commission*, 672 F.2d 171 (D.C. Cir.), *cert. denied,* 459 U.S. 830 (1982) (*CONASA*).[1] Therein, the Court reviewed the "Report and Order Adopting Initial Decision" in these proceedings finding unlawful a tariff rule of the Puerto Rico Maritime Shipping Authority (PRMSA) establishing a so-called "50-mile rule" pursuant to PRMSA's collective bargaining agreement with the International Longshoremen's Association (ILA). The Court unanimously upheld the determination that the tariff rule was subject to the Commission's jurisdiction. The Court, however, on its own motion remanded the record for a reconsideration of the "merits," *i.e.,* the question of the violation of shipping statutes (Judge MacKinnon dissenting).

As explained by the Court, the remand was prompted by the Supreme Court's decisions in *FMC v. Pacific Maritime Association*, 435 U.S. 40 (1978) (*PMA*) and *NLRB v. International Longshoremen's Assn.*, 447 U.S. 490 (1980) (*ILA*). The Court observed, *PMA* "asserts the importance of labor policy in reaching substantive shipping law decisions," and *ILA* "discusses the role of collective bargaining in resolving the problems created by technological job displacement." (slip op. at 37). As explained below, labor factors were considered in reaching the Commission's earlier decision. Pursuant to the Court's order of remand, we have applied the teachings of *PMA* and *ILA* to the record of this proceeding and are convinced that neither requires any changes in the

[1] Citations to the Court's decision will reference page numbers from the slip opinion.

substantive scope of our earlier determinations made under the shipping statutes.

PMA held that the Commission possesses jurisdiction over some collective bargaining agreements, and that the imposition of collectively-bargained terms on those outside the collective bargaining unit removes a possible exemption from the Commission's jurisdiction for such agreements. *See PMA, supra,* at 61-62. *See also CONASA* slip op. at 26.[2] *PMA* says nothing about the process of applying the shipping laws to labor related conduct aside from the expressed need of the Commission to be sensitive to labor concerns in making such application. *See PMA, supra,* at 57, 63. *See also* slip op. of Judge MacKinnon, page 7.[3]

The Commission gave consideration to the role the collective bargaining process had played in resolving the problems created by technological job displacement[4] and has been sensitive to labor policy in reaching its decision.

In *ILA* the Supreme Court dealt only with obligations under the National Labor Relations Act and refused to pass upon the lawfulness of the practices being examined under the shipping statutes, characterizing that issue as presenting "difficult and complex problems which are not properly before us." *ILA, supra* at 512; *see CONASA* slip op. at 19; slip op. at 7 of Dissent of Judge MacKinnon; *see also* October 20, 1980 Order of the Court in D.C. No. 78-1776 denying motion for summary reversal and remand to reconsider the Commission's jurisdictional holding in light of the Supreme Court's decision in *ILA*.[5]

The major significance of *ILA* is that a decision by the Supreme Court outlawing the rules would have obviated the necessity of continuing with these Shipping Act proceedings. Regardless of their lawfulness under the Shipping Act and related statutes, PRMSA's tariff rules could not have been implemented had the Supreme Court found the collective bargaining agreement from which they arose unlawful under the National Labor Relations Act. *See* slip op. at 20, note 81. *See*

[2] The Court noted that these proceedings are governed by the law as it was when *PMA* was decided and are not subject to the subsequently enacted Maritime Labor Agreements Act of 1980 (P.L. 96-325; 94 Stat. 1021). That Act restricted the Commission's involvement in certain aspects of the collective bargaining process. It expressly did not exempt from Shipping Act coverage rates, charges, or practices required to be set forth in the common carrier tariffs. *See* slip op. at 20-24. *See* also slip op. of Judge MacKinnon's dissent, at 1.

[3] The Commission was aware of *PMA* in reaching its jurisdictional determination. *See* Report and Order at 10, note 7. J.A. 112a.

[4] *See* Joint Appendix (hereinafter "J.A.") 45a; 47a-57a; 78a-81a; 110a-111a; 115a-116a. Because this Order is issued in response to a remand from the Court of Appeals, it will contain Joint Appendix references in D.C. No. 78-1776 for the convenience of the Court and the parties.

[5] Actions lawful under the labor laws may still be unlawful under other statutes. *See, e.g., United Mine Workers v. Pennington,* 381 U.S. 657, 664-666 (1965); *Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676, 684-687 (1965) (opinion of Justice White); *Volkswagenwerk v. FMC,* 390 U.S. 261, 312 (dissent of Justice Douglas). The question of the validity of the "50-mile rules" under the labor laws is still pending before the National Labor Relations Board.

also the Commission's September 8, 1978 motion in D.C. Cir. No. 78-1776 seeking a stay pending decision in *ILA*.

Moreover, the concern for balance between labor and transportation considerations expressed by the Supreme Court in *PMA* is consistent with and fortifies the decision in *New York Shipping Association v. F.M.C.*, 495 F.2d 1215, 1222 (2d Cir.), *cert. denied*, 419 U.S. 964 (1974). This case was well-known to the Commission at the time of its decision and in fact was discussed by the Commission [6] and the Court.[7] Thus, the portions of *PMA* of greatest concern to the Court in this proceeding do not dictate a different result than that which flowed from parallel reasoning of *New York Shipping Association*.

The Commission found, after consideration of labor concerns, that PRMSA's tariff rule on containers was unlawful under the shipping statutes because of its effects on various interests the Commission was created to protect.[8] The Commission thoroughly discussed the genesis of the container rules in the negotiations between the carrier employer associations and the ILA and the consequences of their origin for purposes of regulation of PRMSA's related tariff rules under the shipping statutes.[9]

As the Commission explained, the 50-mile rule in the collective bargaining agreements arose as a result of labor displacement caused by the utilization of loaded containers for the transportation of cargo rather than the loading of that cargo piece by piece into a ship's hold. The ILA, in order to preserve what it claimed to be "work which historically was . . . performed at a waterfront facility by deepsea ILA labor," [10] attempted to require that all cargo be loaded into and unloaded from containers on the piers. The ILA was unsuccessful, and the union accepted compromises. In 1959 the union agreed to allow NYSA to use any containers it wished and imposed no requirement that it stuff and strip them. It accepted instead "royalty payments" on containers loaded away from the piers in the area of the port of New York.[11]

In 1968 and 1971, the ILA negotiated agreements requiring the stuffing and stripping on the piers of containers holding cargo coming from or destined to points within 50 miles of a port, and imposing liquidated damages for the breach of that obligation.[12] The so-called "Dublin Supplement" which was incorporated into the 1974 collective bargaining agreement, prohibited carriers from releasing containers to consoli-

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[6] *See* J.A. 78.

[7] *See* slip op. at 21, 36.

[8] J.A. 34a-37a; 51a; 60a-63a; 63a-67a; 67a-70a; 109a-111a.

[9] *See generally* J.A. 37a-38a; 45a; 47a-63a; 70a; 71a-81a.

[10] J.A. 1529a.

[11] J.A. 50a-51a; 54a-55a; *See also* 752a-752a-3a; 718a-720a.

[12] J.A. 54a-55a; *See also* 726a-730a; 733a-734a; 849a-855a; 875a-877a.

dators within the 50-mile area and clarified the exceptions to the rules relating to shipper or consignee-owned cargoes.[13]

The Commission recognized the union's interest in attempting to prevent the loss of jobs and in fact treated the 50-mile rule in the collective bargaining agreements, for the purpose of its decision, as a "work preservation rule . . . lawful in and of itself." [14] It was concerned, however, by what it found to be the unreasonable and discriminatory effects of PRMSA's tariff rule upon certain classes of shippers.

The tariff allowed free access to containers and movement over the piers of loaded containers without unloading and reloading for shippers large enough to ship and load full container loads of their own cargo. Small shippers not able to tender or receive full container loads, and even those tendering full container loads whose employees did not load or unload containers, were subject to the additional expense and delay of unloading and reloading on the piers. If containers were unloaded and reloaded on the piers, an additional "transfer charge" was assessed against the shippers. If the containers were not unloaded and reloaded on the piers, "liquidated damages" were imposed against them.

There was an exception to the stuffing and stripping limitation on inbound cargo for cargo warehoused for 30 days at normal warehouse charges. This exception caused certain shippers to experience expense and delay not imposed on other shippers. Consolidators and deconsolidators of cargo, some of which act as carriers with respect to the underlying shippers (non-vessel operating common carriers or NVOCCs), but all of whom are shippers in relation to the vessel operating carriers, were denied containers altogether.[15] The Commission found that implementation of the rules had serious detrimental consequences, perhaps the most damaging of which were forcing one consolidator out of business at two ports, causing another to curtail its service and lose customers, and making another temporarily cease operations at a port.[16]

The PRMSA rules found to be unlawful violated common carrier obligations which are at the very heart of the Commission's regulatory responsibilities.[17] The legal ground for the Commission's actions was twofold. First, the Commission held that requirements that loaded containers be stuffed and stripped on the piers, that containers not be given

[13] J.A. 55a-56a; *See also* 737a-738a; 900a-905a; 1528a-1533a.

[14] J.A. 70a.

[15] J.A. 34a-37a; 51a; 60a; 63a-67a.

[16] J.A. 60a-63a; *See also* J.A. 238a-281a; 461a-470a; 1412a-1420a; 1476a-1490a; 1491a-1493a.

[17] The rules found unlawful by the Commission would have allowed a common carrier by water regulated by the Commission to refuse to handle, without unloading and reloading at an additional charge or the imposition of a penalty against shippers or consignees, certain cargo in containers coming from or destined to areas within 50 miles of a port. They also permitted the common carrier to refuse to make available containers to certain classes of shippers, although containers were given to other classes of shippers.

to consolidators, and that inbound cargo not delivered to a shipper operating its own warehouse be stuffed and stripped on the piers unless stored for 30 days prior to delivery, were unjust and unreasonable within the meaning of section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. § 817 and § 845a). The basis for this finding was that: (a) there existed no transportation justification for the transfer on the piers of cargo already in containers into other containers, or the payment of a transfer charge for such service; (b) the assessment of penalties against shippers when containers were not stuffed and stripped bore no relationship to the cost of transportation or the handling of the container; (c) the rules were ambiguous on their face; and (d) the rules were discriminatory.[18]

Second, the Commission held that PRMSA rules: (a) unfairly treated and unjustly discriminated against consolidators by denying them transportation facilities (*i.e.*, containers) furnished other shippers, and making other transportation facilities (*i.e.*, piers) unequally available to shippers in violation of section 14, Fourth of the 1916 Act (46 U.S.C. § 812)[19]; and (b) unduly and unreasonably preferred certain shippers and consignees and unduly and unreasonably prejudiced and disadvantaged other shippers and consignees in violation of section 16, First of the 1916 Act (46 U.S.C. § 815) by permitting shippers or consignees who load or unload containers at their own facilities with their own employees to avoid restuffing and restripping on the piers, while requiring otherwise similarly situated shippers and consignees to have their containers restuffed and restripped on the piers and to pay an additional charge for such service.[20]

The Commission complied with the considerations reflected in *ILA* and *PMA* by taking labor concerns into account throughout these proceedings.[21] Although recognizing the importance of the "50 mile rule" to the union's claim of work preservation, the Commission ultimately relied upon the critical line of cases holding that a common carrier's duty to adhere to its tariffs is "almost an absolute one . . .", and that ". . . a common carrier may not bargain away its statutory obligations to the public and thereby relieve itself of such obligations." *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617, 626 (1957).[22]

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[18] *See* J.A. 69a; 80a; 37a; 42a; 54a; 56a-57a; 64a; 67a; 108a; 111a.

[19] *See* J.A. 67a-68a; 37a; 42a; 64a-66a; 109a-111a).

[20] *See* J.A. 68a; 75a; 64a-66a; 37a; 42a; 108a-111a). The Supreme Court has long held that a carrier may not discriminate among shippers tendering carload (or full-container) shipments on the basis of beneficial ownership. This is the precise violation in this case. *ICC v. Delaware, L. & W. R.R.*, 220 U.S. 235, 252 (1911).

[21] J.A. 37a; 76a-77a, 111a-115a; 38a, 58a, 69a-70a, 109a-111a; 58a, 70a, 78a-81a, 115a-116a.

[22] See J.A. 72a; 110a-111a. There must be a strong "justification" for practices which deviate from statutory obligations, the onus of which is on the carrier (*Carpenters' Union v. Labor Board*, 357 U.S.

Continued

The Commission cancelled PRMSA's tariff rules not simply because they would have been unlawful in the absence of their labor origin, but because, even considering that origin, the tariff rules still could not be justified.[23] The Commission reasoned:

> . . . we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other factors. The mere existence of the collective bargaining agreement does not pre-empt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount to an acknowledgment by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations (footnote omitted). We find that upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified. (J.A. 110a-111a) (Emphasis in original.)

While the Commission recognized that PRMSA's tariff rules, given their discriminatory, unreasonable, and detrimental effects demonstrated on the record, could not be allowed to stand, it also acknowledged the need to "proceed cautiously" in dealing with such practices.[24] The

93, 110 (1958)), and for such justification there must be "compelling considerations." (*Carpenters' Union v. Labor Board*, 357 U.S., *supra*, at 109.) In general, "hot cargo" clauses of the type here in issue in collective bargaining agreements have been recognized as insufficient to justify a carrier's refusal to carry out its tariff obligations. *See Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962); *Carpenters' Union v. Labor Board*, 357 U.S. *supra*, at 109-111; *Merchandise Warehouse Co. v. ABC Freight For. Corp.*, 165 F. Supp. 67, 75 (S.D. Ind. 1958); *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C., *supra*, at 625-630. In fact, even "peaceful picket lines coupled with union contractual provisions acquiesced in by the carriers" have been held not to excuse the carrier's obligation or to permit it to interfere with the rights of persons not parties to collective bargaining agreements. *See e.g.*, *Pickup and Delivery Restrictions, California, Rail*, 303 I.C.C. 579, 594 (1958). A strike by a carrier's own employees does not completely relieve it of its obligations under transportation law. *Railway Employees v. Florida E.C.R. Co.*, 384 U.S. 238, 244-245 (1966). A carrier must not refuse service to a particular shipper at the risk of a total labor shutdown forcing it out of business. See *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, 518 (D.C. Ore. 1953).

[23] J.A. 109a-111a.

[24] *See* J.A. 78a. As the Commission noted, a pre-implementation approval requirement of the sort sanctioned by the Supreme Court in *PMA* was not involved here.

remedy fashioned by the Commission was limited to an order to cease and desist of the type recognized by the Supreme Court as proper in *Burlington Truck Lines v. U.S., supra.*[25] Although this remedy bars certain particular methods of resolving labor/management conflicts, it in no way undermines the collective bargaining process itself. The Commission asserted no jurisdiction over any portion of the collective bargaining agreement. Thus, the Commission has shown proper sensitivity to the relevant labor concerns and that sensitivity is consistent not only with governing case law at the time of the Commission's decision but also with the Supreme Court's later decisions in *PMA* and *ILA*.

The proceedings in Docket Nos. 73-17 and 74-40, moreover, contain a full and complete factual record with respect to the issue of PRMSA's violation, and no party seeks further evidentiary hearings on this matter. PRMSA has never challenged the findings with respect to that violation, and the Court did not question the adequacy of the evidence supporting those findings on the original record under the law as it then stood. (*See CONASA* slip op. at 13, 14-17, 36).

Nearly four years have elapsed since the issuance of the Commission's decision in this case. Carriers no longer operate under the collective bargaining agreement which was the subject of that decision, and the Commission is now engaged in a broad scale proceeding examining the lawfulness of practices of numerous carriers including PRMSA arising out of the "50-mile rules" contained in the present (1980) collective bargaining agreements. On February 5, 1982, the Commission issued an "Interim Report and Order" in Docket No. 81-11 (February Order),[26] copies of which will be lodged with the Court together with this Order on Remand. The February Order asserts jurisdiction over the practices of those carriers imposing the "50-mile rules" against those who utilize their transportation services and refers the matter to an administrative law judge for evidentiary hearings on possible violations of the shipping statutes and the remedy to be applied to such violations.

Because the Commission's order in Docket Nos. 73-17 and 74-40 ran only against PRMSA and concerned activities pursuant to a collective bargaining agreement which is no longer in effect, and because there is pending a new proceeding dealing with the current collective bargaining agreement and the operations of many carriers, including PRMSA, the Commission believes that no further action is necessary or appropriate in these proceedings. They will accordingly be discontinued.

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[25] PRMSA, in light of possible labor complications, was allowed to redraw its own tariff to correct the problem and additional time in which to make such corrections. J.A. 70a, 79a-81a; 115a-116a.

[26] On March 31, 1982, a petition for review of the February Order was filed with the Court of Appeals for the D.C. Circuit.

Following the Court's March 2, 1982 decision, two petitions were filed with the Commission in Docket Nos. 73-17 and 74-40. The American Trucking Associations, Inc. (ATA), seeks leave to intervene. CONASA, NYSA, and PRMSA, which are parties to these proceedings, and the ILA and several individual carrier respondents in Docket No. 81-11 ask (hereinafter, "CONASA Petition") that the Commission reconsider and clarify its February Order in Docket No. 81-11 and consolidate that proceeding with those here.[27]

The Commission is of the opinion that Docket Nos. 73-17 and 74-40 have been correctly decided on a record amply supporting the result reached and by the application of the proper legal standards. The above analysis of our earlier decision in light of the *PMA* and *ILA* decisions does not alter this view. Moreover, there is no regulatory purpose to be served by investigating practices based upon provisions in a collective bargaining agreement which are no longer operative, particularly when current related carrier practices are now under investigation. Accordingly, ATA's Petition for leave to intervene and so much of CONASA's Petition as seeks to consolidate these proceedings with Docket No. 81-11 are denied. The request for modification and clarification of the February Order in Docket No. 81-11 is dealt with in a separate order served this date in that proceeding.

Nothing stated herein is to be construed as a prejudgment of any issues raised in Docket No. 81-11. The parties in that proceeding are free under the terms of the amended Interim Order to address the influence of *PMA* and *ILA* with respect to the record to be developed in that proceeding. This order is restricted to an analysis of *PMA* and *ILA* as they apply to the evidentiary record and decision of the Commission in Dockets 73-17 and 74-40.

THEREFORE, IT IS ORDERED, That the portions of the March 31, 1982 CONASA Petition requesting a consolidation of Docket Nos. 73-17 and 74-40 with the proceeding in Docket No. 81-11 are denied; and

IT IS FURTHER ORDERED, That ATA's petition for leave to intervene in Docket Nos. 73-17 and 74-40 is denied; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
Assistant Secretary

[27] The CONASA Petition had originally sought further evidentiary hearings in the remanded matter in these proceedings, but was subsequently amended to delete such request.

* Commissioner Richard J. Daschbach dissents.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-7

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA (AGREEMENT NO. 150-70 — MINORITY RATEMAKING)

Agreement permitting a minority of conference members to establish the conference rate on certain commodities found to be justified under the *Svenska* doctrine, provided the procedure is amended to remain in effect for a fixed period not to exceed thirty months.

Charles F. Warren, George Quadrino and *David Dunn* for the Trans-Pacific Freight Conference of Japan/Korea.

Roger W. Fones for the United States Department of Justice.

John Robert Ewers, Joseph B. Slunt and *Charles L. Hunter* for the Bureau of Hearings and Field Operations.

REPORT AND ORDER

May 20, 1982

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

The Commission instituted this proceeding on January 18, 1982 to consider the approvability under section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) of a proposed amendment (Amendment No. 70) to the organic agreement of the Trans-Pacific Freight Conference of Japan/Korea (TPFC or Conference).

Fifteen ocean carriers currently participate in the Conference (Proponents).[1] Amendment No. 70 would provide a mechanism whereby as few as three of these carriers could accomplish a reduction in Conference rates for a particular commodity whenever the Conference was carrying less than 70% of the total market for that commodity.[2] This

[1] The Proponents serve the import trade from Japan and Korea to the United States Pacific Coast. Current TPFC members are: American President Lines, Ltd.; Barber Blue Sea Line; Hapag-Lloyd, A.G.; Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Korea Marine Transport Co., Ltd.; Korea Shipping Corporation; Lykes Bros. Steamship Company, Inc.; Mitsui O.S.K. Lines, Ltd.; A. P. Moller-Maersk Line; Nippon Yusen Kaisha; Showa Line, Ltd.; The East Asiatic Company, Ltd.; United States Lines, Inc.; and Yamashita-Shinnihon Steamship Co., Ltd.

[2] Conference ratemaking decisions are otherwise accomplished by majority vote. Amendment No. 70 rate reductions require a minimum of 30 days' notice. Section 18(b) of the Shipping Act, 1916 (46 U.S.C. § 817(b)) otherwise permits rate reductions to take effect immediately upon the filing of an

Continued

procedure would automatically expire after 15 months, but could be reactivated for periods of up to six months by majority vote of the member lines whenever necessary to "meet substantial nonconference competition."

The proceeding has been limited to the submission of opening and reply affidavits and legal memoranda. Oral argument was held on March 17, 1982. Amendment No. 70 was determined to be categorically exempt from the environmental analysis requirements of 46 C.F.R. Part 547 on March 3, 1982.

The United States Department of Justice (DOJ) and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel), both of which oppose approval of the Agreement in its present form, are also parties to the proceeding.

PRELIMINARY MATTERS

Before addressing the substantive aspects of Amendment No. 70 it is necessary to dispose of Hearing Counsel's "Motion for Confidential Treatment" and DOJ's request for further evidentiary proceedings.

Hearing Counsel submitted as evidence the *aggregate* capacity and carryings of TPFC's six Japanese-flag members in TEU's for part of 1981. An aggregate capacity utilization percentage was obtained by dividing the carryings figure into the capacity figure. Hearing Counsel suggests that the disclosure of these figures would cause "irreparable competitive harm" to the six carriers involved, but provides no indication as to how such a result could occur. The ownership and capacity of ocean-going vessels is routinely available from public sources, *e.g.*, Lloyd's Register of Ships, and there is no factual basis for concluding that an ocean carrier's total cargo carryings (expressed in TEU's or tons) represents a "sensitive business matter." Capacity utilization is, however, critical to an informed regulatory assessment of Amendment No. 70. Accordingly, Hearing Counsel's Motion will be denied.

DOJ objects to the unavailability of discovery in the instant proceeding and argues that Amendment No. 70 may not be unconditionally approved unless a full evidentiary hearing is provided.[3] DOJ also states, however, that it is "not in a position" to present evidence or cross-examine witnesses, and has made no offer of proof or otherwise

FMC tariff. Amendment No. 70's procedural mechanisms, including the 69% market share trigger, are controlled by TPFC's chairman, who has sole authority to collect and interpret the necessary market statistics. Commodity market share percentages are based on carryings for the preceding quarter.

[3] DOJ wrote Proponents' counsel on January 22, 1982 and requested copies of 11 categories of documents pertaining to the creation and proposed implementation of Amendment No. 70 and competitive conditions in the trade. This request was denied by proponents on the grounds that the Order of Investigation did not contemplate the use of discovery procedures in this proceeding.

identified material issues of fact which are in dispute.[4] Moreover, DOJ's concerns about the competitive effects of Amendment No. 70 should be ameliorated by the Commission's decision to require deletion of the "reinstatement option." [5]

Further proceedings, and particularly an oral evidentiary hearing, are unnecessary under these circumstances. *United States v. Federal Communications Commission*, 652 F.2d 72, 89-92 (D.C. Cir. 1980). *See United States v. Federal Maritime Commission*, 15 S.R.R. 851 (D.C. Cir. 1978), *vacated pending rehearing* (March 31, 1981); *United States v. Federal Maritime Commission*, 584 F.2d 519, 536-537 (D.C. Cir. 1978); *Seatrain International, S.A. v. Federal Maritime Commission*, 584 F.2d 546, 550 (D.C. Cir. 1978). DOJ has had an adequate opportunity to raise any specific, relevant and substantial antitrust issues associated with Amendment No. 70. The present record is sufficient to allow the Commission to evaluate the competitive consequences of Amendment No. 70.[6] Further hearings would not enhance the decision-making process and would merely delay the date of final administrative action. DOJ's request for further proceedings will therefore be denied.

BACKGROUND INFORMATION

Proponents' evidence consists of two affidavits from TPFC Conference Chairman Robert Grey and an affidavit from Douglas C. Tucker, a consulting economist, and attachments thereto.[7] Hearing Counsel provided affidavits from Donna V. Dennis and Jay A. Copan, employees of the FMC's Office of Conferences and Office of Regulatory Policy and Planning, respectively. DOJ introduced no evidence. This record supports several relevant factual findings which are listed below.

1. Eleven nonconference lines operate almost 100 vessels, including 56 containerships, in the Japan and Korea/U.S. Pacific Coast trade (the Trade) and offer 32 sailings per month. Proponents consider Sea-Land

[4] DOJ and Proponents do differ on whether the 69% trigger mechanism can operate to "signal" independent lines operating in the trade so as to create a *de facto* market division between them and the Proponents. As discussed further below, a market allocation scheme is unlikely to occur and no purpose would be served by further probing this point in an oral hearing. *See generally Costle v. Pacific Legal Foundation*, 445 U.S. 198, 220 (1980); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-290 (1968).

[5] DOJ affirmatively favors "pure" (permanent and unrestricted) minority ratemaking because it would introduce additional price competition into intra-conference activities as well as the liner market as a whole. DOJ opposes Amendment No. 70's "69% trigger" and "reinstatement options" because they focus TPFC's attention on the level of independent competition and allegedly suggest an intention to eliminate such competition.

[6] *Citizens for Allegan County, Inc. v. Federal Power Commission*, 414 F.2d 1125, 1128-1129 (D.C. Cir. 1969). *See City of Lafayette v. Securities and Exchange Commission*, 454 F.2d 941, 953 (D.C. Cir. 1971), *aff'd sub nom., Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 474 (1973).

[7] The Grey affidavits were both signed and sworn to on March 10, 1982. Affidavit I was filed February 18, 1982 and Affidavit II on March 8, 1982. Affidavit I contains several statistical attachments.

Service, Inc., OOCL-Seapac, Neptune Orient Line and Hanjin to be their most serious competitors.[8]

2. The Trade has experienced especially strong rate competition during the past three years, largely as a result of excess vessel capacity.[9] Although operating costs have increased steadily and significantly, TPFC has been forced to reduce its rates frequently and to such an extent that its revenue per ton of cargo carried in 1981 declined below the 1979 level.[10] Sea-Land, Zim, OOCL and Hanjin have withdrawn from the Conference since 1979. Other lines have reduced their service or withdrawn from the trade entirely within the same period.[11]

3. Trade conditions have improved since 1979, when some TPFC members may have experienced vessel utilization as low as 60%, but the current competitive environment unreasonably prevents carriers from making necessary improvements in their net revenue situation.[12] Although Proponents are not yet operating below marginal cost levels, they are not enjoying the type of economic results which trade conditions would otherwise produce and which would generate long-term investment and stability in the trade. Tucker Affidavit at 9, 10, 22. Copan Affidavit at 15-17. TPFC filed a general rate increase on April 1, 1980 (FMC Tariff No. 7, Supplement No. 3), which was postponed and then cancelled entirely because of rate competition. Grey Affidavit II at 2-3. A smaller group of rate increases took effect January 1, 1982 as the first stage of a planned "revenue recovery program" to increase rates to their June, 1979 level by early 1983 (FMC Tariff No. 7,

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[8] Proponents offer a full range of port-to-port and intermodal services directly to U.S. West Coast ports on essentially a weekly basis. Hoegh Line and Shipping Corporation of India offer specialized services and do not publish intermodal tariffs. Star Shipping A/S has a large number of vessels (36), but is primarily a breakbulk carrier, despite its publication of some interior point rates. The other independent lines are: Evergreen Marine Corporation (7 vessels); Hong Kong Islands Shipping Co., Ltd. (5 vessels); Yangming Marine Transport Corporation (7 vessels); and Zim Container Service (8 vessels). These carriers are less effective competitors of TPFC because their vessels call at both U.S. East and West Coast ports on the same voyage, or, in the case of Hong Islands Line, use relatively small vessels with only two sailings between Japan/Korea and California per month. Grey Affidavit I at 3-6, Appendices 1-3.

[9] Copan Affidavit at 10-13; Tucker Affidavit at 5-7, 9; Grey Affidavit I at 4, 6.

[10] TPFC lines averaged $66.47 per revenue ton in 1979 and only $49.01 for the first nine months of 1981. Grey Affidavit I at 4-9, Appendices 4-6. The 1981 figure is the lowest since 1975. Grey Affidavit II at 4-5. TPFC made 853 rate reductions on 279 commodities as a result of nonconference competition in the third quarter of 1981. *Id.* Some TPFC rates on major moving commodities were lower in 1981 than they were in 1976. Copan Affidavit, at 7-9, Schedules 4-8.

[11] Asia America Line; Seaway Express; CSC, Ltd.; United Yugoslav Line; Seaway Express; Ro-Lo Pacific; and Uni-Pacific Line have left the trade. Knutsen Line merged with East Asiatic Line. Phoenix Line was acquired by Kawasaki Kisen Kaisha. Seatrain Pacific Services was acquired by C. Y. Tung and merged into OOCL's operation. Evergreen and Yangming Lines offer only a combined U.S. Pacific and Atlantic Coast service where they previously offered separate services. Grey Affidavit I at 10-11, Appendix 7; Tucker Affidavit at 5-7; Copan Affidavit at 6-7.

[12] Grey Affidavit I at 6-9. Tucker Affidavit at 9-12. The six Japanese-flag carriers had vessel utilizations of 74% and 78% for the first and second quarter of 1981. Approximately 80% utilization is necessary for economically satisfactory operation of a modern containership service. Copan Affidavit at 10-13.

Supplement No. 3). TPFC believes these increases are in "serious jeopardy," however, and if the revenue recovery plan is unsuccessful, service reductions are likely. Grey Affidavit I at 6, 27; Grey Affidavit II at 4-5. Completion of the next two stages of TPFC's revenue recovery program is necessary, but will require additional carriers to join the Conference. Grey Affidavit I at 6.

4. TPFC has historically controlled over 75% of the liner trade, but carried only about 60% during 1981.[13] Proponents do not seek a 70% share of total cargo or of each commodity listed in TPFC's tariff, but rather seek to induce carriers to join the Conference voluntarily and thereby curtail short-run price competition through collective ratemaking practices. Grey Affidavit at 19-21, 24-26. Sea-Land, Hanjin, OOCL and Zim collectively control about 21% of the trade and are the independent lines Proponents most desire to rejoin the Conference. *Id.*, Copan Affidavit at 5.

5. The purpose of Amendment No. 70 is to increase rates gradually, not to drive independent lines from the trade. Although some TPFC rates may initially decrease under minority ratemaking, the availability of this procedure should make it psychologically easier for a majority of Conference lines to vote for rate increases and discourage independent lines from cutting their rates in response to TPFC rate increases. Grey Affidavit II at 11-15. If Amendment No. 70 were approved, some major independent lines can be expected to rejoin the Conference. *Id.*, at 15. If more of the trade moved under Conference rates, destructive short term rate competition would be reduced and rates would eventually stabilize at levels beneficial to conference carriers, independent carriers and shippers. *Id.*, at 15-20; Tucker Affidavit at 16-17.[14]

6. Approval of Amendment No. 70 should increase TPFC's market share because additional lines would join the conference and not because the present independent lines would lose cargo. If Sea-Land, OOCL-Seapac, Neptune Orient, Hanjin and Zim all joined TPFC, the Conference's market share would exceed 80% and the 69% trigger would prevent the Proponents from aggressively using minority ratemaking to curtail independent competition. Copan Affidavit at 5-23; Grey Affidavit I at 24-26; Tucker Affidavit at 13-24.

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[13] Grey Affidavit I at 25-26 (TPFC's market share was 76% in 1978 and is presently about 60%); Tucker Affidavit at 7 (TPFC presently carries 63-65%); Copan Affidavit at 5, Schedules 1-3 (TPFC carried only 55% during the first half of 1981 if OOCL is excluded; OOCL resigned from TPFC on June 15, 1981).

[14] Minority ratemaking should contribute towards an economically efficient market featuring lower *long run* average rates than would occur if vigorous competition continued. Independent competition would be preserved as a check against possible conference abuses and capital investment in the trade would be encouraged. Tucker Affidavit at 14-18; Copan Affidavit at 20-22.

POSITION OF THE PARTIES

A. *Proponents*

The Proponents claim they have provided sufficient evidence to support an informed conclusion to approve Amendment No. 70 under the *Svenska* doctrine.[15] Approval would allegedly increase competition between the Conference lines and independent carriers and make conference membership more attractive to independents. Proponents also contend there is no legal impediment to Amendment No. 70's reinstatement option and describe DOJ's antitrust objections as "speculative, unproven, and untested theories." [16]

More specifically, Proponents allege that the affidavits of Messrs. Grey, Tucker and Copan establish that: (1) Amendment No. 70 should induce independent lines to join TPFC and thereby stabilize the trade, preventing probable service decreases and promoting long-run commercial benefits; [17] (2) the 69% trigger and reinstatement option are both necessary to provide a mix of competitive flexibility and restraint necessary to achieve rate stability; [18] and (3) Amendment No. 70 cannot cause a tacit market division or other reduction in competition between TPFC and independent lines and that such competition would continue even if major independents do join the Conference.[19]

B. *Hearing Counsel*

Hearing Counsel argues that minority ratemaking is subject to the *Svenska* doctrine because its intended effect is to decrease rate competi-

[15] The *Svenska* doctrine is the proposition affirmed in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968), whereby section 15 agreements which interfere with the policies of the antitrust laws will be disapproved as "contrary to the public interest" unless justified by evidence establishing that the agreement, if approved, will meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. The burden is on proponents of such agreements to come forward with the necessary evidence.

Proponents distinguish this case from the section 15 justification found wanting in *United States v. Federal Maritime Commission,* 15 S.R.R. 851 (D.C. Cir. 1980), *vacated pending rehearing* (March 31, 1981), because their justification is supported by detailed factual data. *See* 15 S.R.R. at 888.

[16] Proponents cite the independent action and emergency rate provisions of Agreement Nos. 93, 2846, 5660 and 8210-8 as examples of analogous ratemaking activities triggered by special competitive circumstances, which have been approved by the Commission.

[17] Proponents state that the industry's natural vulnerability to unchecked rate competition makes the likelihood of service disruptions "very real." Proponents alternatively suggest that any proposal to increase the market share of the conference is consistent with the purpose of the Shipping Act because section 522.2(a)(1) of the Commission's Rules defines a conference agreement as one among carriers which "may reasonably be expected to function as a dominant force in the subject trade." (46 C.F.R. § 522.2(a)(1)).

[18] Proponents claim that without the reinstatement option TPFC would be unable to respond promptly to future crises and defeat the long-term confidence in Conference voting procedures necessary to induce existing TPFC members to raise their rates and induce independent lines to join the Conference.

[19] Proponents argue that they would not and could not use Amendment No. 70 to act concertedly with independent lines or otherwise violate the antitrust laws. Independent lines would lack access to conference operating statistics and the statistics of other independent lines as well. Meaningful market share data are allegedly unavailable from shippers.

tion in the Trade, but believes Amendment No. 70 would be justified if the reinstatement option were deleted. Amendment No. 70 allegedly would not result in an agreement to divide the liner cargo market between Proponents and independent lines on a 70%/30% basis or prompt the Proponents to engage in predatory pricing, but if such anticompetitive conduct occurred, Proponents would have exceeded the scope of Amendment No. 70 and thereby violated the Shipping Act and the antitrust laws.[20] FMC decisions are cited for the proposition that agreements should not be disapproved simply because they could provide a vehicle for harmful unapproved conduct or the exact effects of approved conduct cannot be measured.[21] According to Hearing Counsel, DOJ has presented no evidentiary support for its allegation that Amendment No. 70 is unnecessarily anticompetitive and has not controverted any material evidence offered by the Proponents.

Hearing Counsel contends that Amendment No. 70 would provide public benefits because: (1) the Trade is unstable and overtonnaged; (2) price competition among ocean carriers is disruptive and tends to cause carrier bankruptcies; (3) minority ratemaking would improve stability by attracting new conference members and encouraging all carriers to increase their rates to more reasonable levels; (4) a more stable Trade will improve the efficiency of the liner shipping industry and generally benefit commerce; and (5) vigorous "service competition" will continue to exist between conference and nonconference lines alike.[22]

Hearing Counsel defends minority ratemaking and the 69% trigger mechanism as necessary to assure that TPFC can effectively react to destructive rate competition and thereby improve stability in the trade. No other procedural device would allegedly attract new conference members and permit rates to increase while still keeping intra-Conference competition within reasonable limits. Hearing Counsel does argue that approval of Amendment No. 70 should be conditioned on the deletion of the reinstatement option and the addition of quarterly re-

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[20] Hearing Counsel claims Amendment No. 70 would not "signal" independents whenever TPFC's market share was below 70% because independent lines, *acting alone*, lack sufficient information regarding TPFC procedures and cargo carryings to know they were being signaled. Even if the signal were accurately received, Hearing Counsel believes such lines would lack sufficient market power to make a competitively meaningful response.

[21] *Agreement No. 9955-1*, 18 F.M.C. 435, 470 (1975); *Agreement No. 10203*, 16 S.R.R. 859, 860 (1976); *Agreement No. 9903*, 11 S.R.R. 1056 (1970); *Agreement No. 134-21*, 8 F.M.C. 459, 460 (1965); *Agreement No. 8492*, 7 F.M.C. 511, 519 (1963).

[22] Hearing Counsel cites passages from congressional committee reports on the Shipping Act, 1916, which state that conference agreements are intended to curb undesirable rate competition between ocean carriers. HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE, REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADE, H.R. DOC. NO. 805, 63rd Cong., 2d Sess., Vol. IV, 416-417 (1914); SENATE COMMITTEE ON COMMERCE, STEAMSHIP CONFERENCE AND DUAL RATE CONTRACTS, S. REPT. NO. 860, 87th Cong., 1st Sess. 10-11 (1961).

porting requirements covering minority ratemaking activities during the initial 15-month period.[23]

C. *Department of Justice*

DOJ does not oppose minority ratemaking in principle because it increases rate competition both within and without the Conference, but believes no justification has been presented for Amendment No. 70's 69% trigger and reinstatement option features.

DOJ objects to the fact that Amendment No. 70 offers minority ratemaking as a temporary measure to control independent competition rather than a permanent pro-competitive reform. According to DOJ, independent competition is itself a public benefit which should be preserved as a check on conference power; it cannot be cited as a "problem," the elimination of which justifies increased conference revenues. *See* H.R. DOC. NO. 805, *supra*, at 290-300; HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE, HEARINGS IN THE INVESTIGATION OF SHIPPING COMBINATIONS UNDER H. RES. 587, 63rd Cong., 1st Sess., Vol. II, 1365-1367 (1913).

DOJ perceives the 69% trigger as an unnecessary signal to independent carriers that TPFC will accept a 70% market share, an anticompetitive effect allegedly aggravated by the reinstatement option.[24] The four existing section 15 agreements which allow conferences to invoke special ratemaking responses to difficult competitive conditions are distinguished from Amendment No. 70 by DOJ on the grounds they are independent action arrangements which create *intra-conference* competition where none otherwise existed.[25]

DOJ argues that the Proponents have offered no explanation of why minority ratemaking is only desirable when TPFC's market share falls below 70% and claims less anticompetitive alternatives are available. DOJ reasons that minority ratemaking is less likely to provide excessive intra-conference competition than would an independent action provision because under the latter arrangement the member lines may seek price advantages over *each other.* Minority ratemaking, however, creates a uniform conference price directed exclusively at outside competi-

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[23] Deletion of the reinstatement option is recommended because the novelty of minority ratemaking allegedly warrants close observation before being approved on a long-term basis. The quarterly reports recommended by Hearing Counsel would describe each instance when minority ratemaking is used to reduce a rate and list the commodity, the old and new rates, the carrier proposing the reduction, and the carriers which supported the proposal. Similar information would also be provided for rate reduction proposals governed by majority action.

[24] DOJ argues that imperfect knowledge of market conditions will not eliminate the trigger's capability for signaling TPFC's competitors and notes that both Hearing Counsel and Proponents expect the trigger to drive rates up for independent and conference lines alike—the anticompetitive effect usually associated with market division agreements.

[25] DOJ has seemingly abandoned the erroneous argument that the Commission lacks statutory authority to approve an agreement permitting carriers to vary their ratemaking procedures from time to time based upon the carriers' determination that certain competitive conditions are present.

tion and cannot divert cargo from other member lines. Assuming that ocean carrier rates are made with the objective of maximizing profits, DOJ alleges that competitive problems would not arise from allowing a minority of conference members an unrestricted opportunity to experiment with lower prices because rates which proved unprofitable could be raised again by majority vote.[26]

DOJ also contends that the Trade is not suffering from true instability in rates or service and that the only "stabilization" which would result from Amendment No. 70 is increased carrier rates and revenues.[27] Thus, DOJ faults the evidence of Proponents and Hearing Counsel for not revealing the causes of the described rate reductions, including the role of declining demand on TPFC pricing practices. DOJ describes aggressive price competition as the natural and desirable result of reductions in demand.

DOJ also objects to the absence of data which would permit a finding that present TPFC earnings per revenue ton are comparatively low, and notes that Hearing Counsel's reference to trade press reports of poor profit performance by Sea-Land and American President Lines is unconnected to these carriers' operations in the instant trade. DOJ claims that no new capacity would have entered the Trade since 1978 if capacity utilization levels were chronically unprofitable.

Finally, DOJ finds no connection between the departure of six conference lines, four of which continued in the trade as independents and two of which were acquired by other TPFC members, and the prospect of declining service levels.[28] Instead, DOJ argues that adequate service is available and that the existence of independent competition alone does not create "unstable" trading conditions. According to DOJ, Proponents have not met their burden of demonstrating that independent competition has reached a stage which hinders the realization of some important transportation need or public benefit.[29]

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[26] DOJ also suggests that the 69% trigger provision could be replaced by the less anticompetitive alternative of allocating each TPFC member line a finite number of opportunities to sponsor minority ratemaking proposals over a given time period. Another suggested alternative is to make rates reduced by minority action apply only to the carriers voting for the reduction ("three-carrier independent action").

[27] DOJ does not believe the paced reduction of selected rates over a three-year period shown by the Tucker, Grey and Copan affidavits represents "rate instability."

[28] DOJ cites the Commission's 1980 *East Asia Trade Study* at 166, wherein Sea-Land affirmed its commitment to continued service in the trade *after* it left the Conference.

[29] DOJ states that only Hearing Counsel has attempted to explain why reduced independent competition would produce public benefits (*see* Copan affidavit at 11), but that the evidence does not show that marginal cost pricing has reached critical levels (*see* Tucker Affidavit at 12 and Copan Affidavit at 6 and 12.

DISCUSSION AND CONCLUSION

Amendment No. 70 will be approved for a *single fixed* term of between 15 and 30 months.[30] The reinstatement option, which would effectively extend minority ratemaking for an indefinite period, has not been justified and must be deleted as a condition of approval.

This decision is based upon uncontroverted evidence that rate levels in the Trade are depressed over past periods and carriers are being squeezed between increasing costs and stagnant revenues. Although the TPFC lines are probably not operating below marginal cost levels, they are encountering a level of price competition which has disrupted the ordinary equilibrium between conference and independent line rates.[31] A pattern of rate cutting has developed between the major independents and the TPFC lines which continues even though trade conditions have improved to a point where rates would otherwise increase. This situation, if unchecked, would necessarily cause service disruptions and other undesirable trading conditions which the Shipping Act was intended to remedy.[32]

It is the prospect of increased carrier revenues which most disturbs DOJ about Amendment No. 70. In an unregulated domestic industry, the antitrust laws prohibit concerted activities which would increase price levels or market shares, but traditional antitrust theory cannot be applied uncritically to the ocean shipping industry.[33] The Shipping Act, 1916, is premised on the existence of ocean carrier conferences, and not only permits, but requires that membership in such conferences

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[30] If the present 15-month fixed term is sufficient to attract new conference members and curtail destructive rate competition, it may be retained. If the Proponents believe a longer fixed period is necessary to accomplish these objectives, they may submit a modified version of their agreement which contains a term of up to 30 months.

[31] *See* Transcript of Oral Argument at 9-10. Independent and conference lines ordinarily coexist peacefully under circumstances where the independents' rates are slightly lower than their competitors'; active rate competition disrupts this equilibrium. *See* Tucker Affidavit at 17, 16-19; Grey Affidavit at 21, 25-26.

[32] Individual users of ocean transportation services are quite sensitive to price advantages, but *total* demand for such services is relatively inelastic. *See* Copan Affidavit at 15-17. Rate competition may therefore provide short-term advantages to a low cost carrier, but will not increase the total amount of cargo moving in the trade. If other carriers attempt to match the reductions of a price-cutter, they will, all things being equal, simply receive less total revenue for performing the same services and incurring the same operating costs. The fixed costs of ocean carriers are very high in relation to other industries. *Id.*

[33] *See generally Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86, 98 (1953), regarding the need to evaluate competition in light of the "special considerations" of a particular regulated industry; *McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944), regarding the need to balance competition against reliability of service and other transportation factors.

The keystone of the Shipping Act is the avoidance of unfair discriminations. Ocean carrier rates in foreign commerce are not subject to rate regulation *per se*. Although particular incidents of abuse may be corrected under section 15 and section 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. §§ 814 and 817(b)(5)), there is no prohibition against pricing based upon what the market will bear. If ocean carriers are to weather periods of market decline, they must be allowed to recoup their losses during periods of market advance.

be openly available to all reasonably qualified lines. When trade conditions favor conference membership, an independent line such as Sea-Land may join a conference without separate section 15 approval and changes in conference market shares resulting from voluntary decisions to renew or resign from conference membership are not ordinarily matters of regulatory concern.[34] Thus, the commercial results (*i.e.* the increase in TPFC's market share and enhanced ability to raise rates) expected from Amendment No. 70 could have as readily occurred without benefit of special section 15 procedures. Unfortunately, rate competition has reached a point in the Trade where it prevents carriers from independently responding to serious revenue needs.

The Proponents have responded to the problem of depressed rates and uncontrolled rate competition by amending their organic agreement in a manner which they believe will make conference membership attractive to several former member lines. If this effort is successful, the TPFC market share would increase to a point where the 69% trigger mechanism would minimize any possibility of minority ratemaking aggressively aimed at the remaining independent carriers. If Conference membership does not increase, there is no indication the present TPFC lines possess the means or the desire to escalate rate competition beyond its already overheated level. For these reasons, and those advanced by Proponents and Hearing Counsel, no market division arrangement would result from Amendment No. 70.

Other methods may exist for dealing with the demonstrated problem of undue rate competition and depressed rate levels. There is no indication, however, that the method chosen by the Proponents unnecessarily restricts competition in the Trade. The alternatives suggested by DOJ would merely escalate price competition between the Proponents and the independent lines, aggravating the carrier revenue problem which now exists and encouraging the Conference lines to increase their carryings by conquest rather than by accommodation.

A conference is not a single ocean carrier and does not compete as such. Its function is to minimize the harmful effects of rate competition. In so doing, conference members may and must consider the nature and extent of independent competition, although they may not conspire to drive independent lines from the trade. The purpose and probable effect

[34] Some trades have many independent lines. In others, all carriers belong to a conference. The percentage of the trade carried by conference lines is not subject to the type of analysis used to evaluate monopolies under section 2 of the Sherman Act (15 U.S.C. § 2) and other provisions of the antitrust laws. The Shipping Act focuses on the basic fairness of the interaction between conference lines and independent lines and between conference lines and shippers, not the abstract competitive structure of the market. Conferences are not, by Commission rule or any other authority, entitled to or precluded from a particular market share or ratemaking role. The conference system is merely a means to the broader end of a healthy U.S. ocean-borne foreign transportation system and the procedural definitions found in section 522.2(a)(1) of the Commission's Rules provide no substantive support for measures designed to increase conference market shares.

of Amendment No. 70 is not to eliminate opportunities for independent lines to operate successfully. Instead, Amendment No. 70, as approved, should provide a respite from rate competition which has become harmful to all carriers in the trade, not just the TPFC lines.

Proponents have not, however, justified their proposal to make minority ratemaking a permanent feature of TPFC's organic agreement. The reinstatement option has a long-run effect upon the relationship between conference and independent lines which, at least on the present record, does not meet a particular transportation need or public benefit. It can be readily argued, of course, that any device which strengthens a conference's ratemaking role "stabilizes" ocean transportation services, but the fact remains that the Shipping Act also contemplates the preservation of independent line operations. The Commission has been assigned the role of balancing the divergent interests of stable service and competitive opportunity in the ocean transportation industry. We concur in DOJ's argument that minority ratemaking is most likely to contribute towards a reasonable balance of these interests if section 15 approval is not granted on an indefinite basis.

In the short run, the competitive position of independent lines would not be disrupted by allowing TPFC to overcome apparent limitations in its majority voting procedures which, in combination with adverse trading conditions, prompted four of its members to withdraw and prevent rates from rising to reasonable levels. Nonetheless, these majority voting problems have not been clearly identified and may cease during the 15-30 month term of Amendment No. 70, as approved. If they do continue, they should be directly and more closely examined in light of trading conditions as they then exist. A special mechanism intended to preserve higher rates on a long-term basis must be found contrary to the public interest in the absence of justifying evidence.

Finally, the Commission rejects Hearing Counsel's request for approval conditioned upon the submission of quarterly reports. The shortness of the minority ratemaking term and the immediacy of the rate level problems it is designed to meet limit the practical value of such reports. Should the Proponents later seek any further approval of a minority ratemaking proposal, however, information at least as detailed as that described by Hearing Counsel should be submitted as part of their justification for the new agreement.

THEREFORE, IT IS ORDERED, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 150-70 is disapproved effective July 1, 1982, unless on or before June 30, 1982 the Proponents file a complete and accurate copy of Agreement No. 150-70, signed by all parties thereto, which amends Article 31(e) to read as follows:

> (e) *Effectiveness.* The procedures for taking rate initiative, as set forth in subsection (d) of this Article, shall be effective for a period of ______________ [insert number between 15-

30] months from the date this Article is approved by the Federal Maritime Commission and shall automatically terminate upon the expiration of this period.

IT IS FURTHER ORDERED, That if the Proponents amend Agreement No. 150-70 as specified in the preceding ordering paragraph, the Agreement shall be approved effective on the date of filing; and

IT IS FURTHER ORDERED, That for purposes of this Order, a document is filed when it is actually received by the Secretary of the Federal Maritime Commission.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

Vice Chairman Moakley, concurring:

I would approve the agreement for the fifteen (15) month period requested by the proponents.

I find no mention in the record of the possibility of extending the agreement to thirty (30) months.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-52

ABBOTT HOSPITALS, INC.

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY

DOCKET NO. 81-53

ABBOTT HOSPITALS, INC.

v.

TRAILER MARINE TRANSPORT CORPORATION

DOCKET NO. 81-61

ABBOTT LABORATORIES

v.

TRAILER MARINE TRANSPORT CORPORATION

NOTICE

May 25, 1982

Notice is given that no appeal has been taken to the April 15, 1982 dismissal of the complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-52

ABBOTT HOSPITALS, INC.

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY

DOCKET NO. 81-53

ABBOTT HOSPITALS, INC.

v.

TRAILER MARINE TRANSPORT CORPORATION

DOCKET NO. 81-61

ABBOTT LABORATORIES

v.

TRAILER MARINE TRANSPORT CORPORATION

DISMISSAL OF PROCEEDINGS

Finalized May 25, 1982

These three cases arise out of a number of shipments made by Abbott Laboratories on vessels of respondents Trailer Marine Transport (TMT) and the Puerto Rico Maritime Shipping Authority (PRMSA). Since the cases involve the same issue and complainant they are hereby consolidated for the purposes of this order. These shipments of hospital kits moved in containers and the respondents calculated freight charges on the basis of 100% of the cubic capacity of the container rather than the actual measurement of the contents of the container. This resulted in alleged overcharges of $91,358.46 by TMT and $17,743.89 by PRMSA.

Preliminary investigation of the complaints by respondents led both to the conclusion that the allegations of Abbott were essentially correct and as a result of a conference telephone call on October 16, 1981, it was decided to proceed under Rule 93 of the Commission's Rules of Practice and Procedure which provides in relevant part:

> If a respondent satisfies a complaint either before . . . a statement to that effect setting forth when and how the com-

> plaint has been satisfied . . . Such a statement . . . shall show the amount of reparation agreed upon [and] shall contain the data called for in Appendix I(4), insofar as said form is applicable . . . .

The problem with the otherwise straightforward procedure which is contemplated by the rule is the provision requiring a showing of the manner in which the complaint was satisfied and the reference to the form in "Appendix I(4)." To begin with there is no Appendix I(4) to the Rules. There is however an Appendix II(4) which is a "Reparation Statement." This form seemed to fit the purposes of Rule 93 and was used here. As for the manner in which the complaint was satisfied, it was, strictly speaking, satisfied by the payment or the agreement to pay the overcharges which resulted from the error in assessing the freight charges on the shipments.

In deciding to proceed under Rule 93, both respondents satisfied themselves that the allegations of the complaint were valid by a review of the documentation which Abbott furnished in support of its claims. Quite early on in these proceedings both respondents had satisfied themselves that the complaints were valid and the ensuing months were consumed in preparing the statement called for in Rule 93. For example in the case of TMT Abbott had to supply the following information on some 300 or so shipments: "Claimant's Number; Date of Bill of Lading; Bill of Lading No.; Trailer No.; Date Charges Paid; Vessel; Voyage No.; Measurement; Rate; Amount Charged; Correct Amount and Reparation." While no one would question the legitimacy of the Commission's interest in insuring that a respondent's satisfaction of a complaint is valid and not an attempt to circumvent the requirements of the law, there nevertheless seems to be a real need to balance the regulatory concerns of the Commission with the burdens that concern places upon parties to proceedings who are for good and valid reasons seeking to avoid the time and expense of formal proceedings. A reasonable substitution for the procedure now required by Rule 93 might be a simple requirement that when a complaint is satisfied, the parties file a brief statement of the nature of the satisfaction coupled with a provision that the complainant hold open for inspection by the Commission all the documentation or materials supporting the claims made and affording the basis for the satisfaction of the complaint.[1]

I have reviewed the submissions of the parties and I find that the requirements of Rule 93 have been met.

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[1] As has been noted many times in the past, a complainant may at any time withdraw his complaint and may do so without giving reasons. Of course, the Commission can conduct its own investigation into the allegations of the complaint and the reasons for its withdrawal, but this is another matter outside the right of the complainant to withdraw his complaint.

The complaint against TMT sought $91,358.46 in reparation and the complaint against PRMSA sought $17,743.89. The parties' review of the documents resulted in the adjustment downward of these amounts to $83,637.84 and $16,925.00, respectively. PRMSA has paid Abbott but TMT felt that it could not make payment absent an order from the Commission authorizing it to do so.[2] It has, however, agreed to make payment when the order is issued. The complaint in 81-61 was a precautionary filing in case the motion to amend the complaint in No. 81-53 by substituting Abbott Laboratories for Abbott Hospitals as complainant was denied. The disposition here of No. 81-53 makes action upon the motion unnecessary and Docket No. 81-61 is hereby dismissed.

The complaint in Docket No. 81-52 having been satisfied is hereby dismissed.

Trailer Marine Transport is hereby ordered to pay to Abbott Laboratories the amount of $83,637.84 and upon such payment the complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

[2] Thus technically TMT has not "satisfied" the complaint. Its fear that it would be charged with rebating if it paid was of course unfounded.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 870

APPLICATION OF PACIFIC WESTBOUND CONFERENCE ON BEHALF

OF NIPPON YUSEN KAISHA (NYK LINE) FOR THE BENEFIT OF

THE KROGER COMPANY, BIRD IN HAND INTERNATIONAL CORP.,

E. BOYD & ASSOCIATES, INC.

ORDER OF REMAND

May 27, 1982

The Commission determined to review the Initial Decision of Administrative Law Judge Charles E. Morgan, in which he granted Nippon Yusen Kaisha (NYK Line) permission to waive collection of $4,838.16 of the freight charges applicable at the time of the shipment on nine containers of frozen chicken parts from points in Alabama, Arkansas and Georgia, to Kobe and Tokyo, Japan, under bills of lading dated October 1, and 2, 1981.

The Presiding Officer granted the waivers upon a finding that due to clerical error the Conference had failed to timely file in its tariff a reduction in the "bunker surcharge" and the "currency adjustment factor".[1] He also concluded that the grant of the waivers will not result in discrimination among shippers.

Pursuant to section 18(b)(3) of the Shipping Act, 1916, the Commission may grant a refund or a waiver,

> . . . where it appears that there is an error in a tariff . . . due to inadvertence to file a new tariff and that such refund or waiver will not result in discrimination among shippers . . . 46 U.S.C. § 817(b)(3).

The present application merely states that no shipments of other shippers of the same or of a similar commodity moved on the same voyage on the same vessel. However, with the exception of outport arbitraries, or as provided in individual commodity items, the "bunker surcharge" applies to all cargo shipped to all points in the scope of the tariff. Likewise, the "currency adjustment factor" applies with a few

[1] The reductions were intended to go into effect on October 1, 1981, whereas the tariff setting forth the reduced charges was filed on October 7, 1981.

exceptions to all rates and charges applicable to ports in Japan.[2] Consequently, the reduction is not limited to shipments of frozen chicken parts but would appear to apply to all cargo (not otherwise exempt) carried under the Conference tariff between October 1 and October 7, 1981.

The application is silent on surcharges collected from shippers of other commodities, if any, which moved during that time and for the benefit of which no application for a refund or waiver has been filed. In the absence of such information, the conclusion that the grant of waivers will not result in discrimination among shippers finds no support in this record.

Consequently, the proceeding is remanded to the Presiding Officer to afford the Conference an opportunity to furnish additional information in this regard and take whatever steps are necessary to ensure that the grant of waivers will not result in discrimination among shippers.

THEREFORE, IT IS ORDERED, That the matter be and is hereby remanded to the Presiding Officer for further proceedings in accordance with the foregoing.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] Excepted are diversion, demurrage or detention charges. PWC Motorbridge Tariff No. PWC-712, FMC No. 22, Rule 10.1.1.

FEDERAL MARITIME COMMISSION

46 C.F.R. 510

(GENERAL ORDER 4, REVISED; AMDT. 1;

DOCKET NO. 81-76)

LICENSING OF INDEPENDENT OCEAN FREIGHT FORWARDERS

June 1, 1982

ACTION: Final Rules

SUMMARY: This amends the Commission's independent ocean freight forwarder regulations to remove restrictions against affiliations between such forwarders and persons who have a beneficial interest in export shipments via oceangoing common carriers. These revisions are necessary to conform the regulations to amendments to the Shipping Act, 1916, made by the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35).

DATE: The changes contained herein will be effective June 7, 1982, except for the change to section 510.33(c) which will be effective September 7, 1982.

SUPPLEMENTARY INFORMATION: The Federal Maritime Commission's rules governing the licensing and operation of independent ocean freight forwarders are contained at 46 C.F.R. 510 [1] and are commonly known as General Order 4, Revised. The definition of the term "independent ocean freight forwarder" and the conditions under which forwarders are licensed to operate are based on and subject to sections 1 and 44 of the Shipping Act, 1916 (the Act). As a result of amendments made by Public Law 97-35 to sections 1 and 44 of the Act,[2] the Commission, on December 28, 1981, proposed five revisions to its rules solely for the purpose of conforming its rules to the statutory amendments. Those five revisions are now being adopted by the Commission.

Section 1 of the Act has been amended by Public Law 97-35 to define a forwarder as follows:

[1] See 46 F.R. 24565, May 1, 1981.

[2] See section 1608 of Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981, effective August 13, 1981.

> The term "independent ocean freight forwarder" means a person that is carrying on the business of forwarding for a consideration who is not a shipper, consignee, seller, or purchaser of shipments to foreign countries.

Previously, the definition read:

> An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, *nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.* (emphasis added.)

Section 44 of the Act has been amended by adding new subsection (f):

> (f) A forwarder may not receive compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.

The above-quoted changes to sections 1 and 44 of the Act are scheduled to remain in effect only until December 31, 1983. After that date the definition of an "independent ocean freight forwarder" will revert back to that in effect prior to August 13, 1981, the date of enactment of the amendments.

Comments on the Commission's proposed revisions to General Order 4 were received from the National Customs Brokers and Forwarders Association of America, Inc. (the Association), which represents over three hundred and fifty forwarders and/or customs brokers, and an individual forwarder, Bee International, Inc. of Jacksonville, Florida (Bee).

The Association states that although the proposed rule revisions comport with the changes made by Public Law 97-35, additional rules are required to permit effective supervision over exporter affiliated forwarders. Otherwise, the Association states, wholesale violations of the law will result. The Association suggests that forwarders affiliated with exporters be made to identify such affiliations on their stationery and billing forms so that a prospective client-exporter may know, before hiring such forwarder, that the forwarder is affiliated with a potential competitor. The Association also suggests that affiliated forwarders be made to certify semi-annually to the Commission (1) the name of each affiliated exporter, along with the names of each affiliate's officers, directors and shareholders; (2) the number of shipments handled by the forwarder for each of its affiliates, together with a copy of each bill of lading; and (3) that no compensation was received from oceangoing common carriers on any such shipments. The Association also suggests that a forwarder who becomes affiliated with an exporter be made to advise the Commission in writing within ten days, setting forth the name of the exporter, its location, and the names of the exporter's officers, directors and shareholders.

Bee states that the proposed amendments could result in a loss of business and in illegal rebating, and sets forth examples of how illegal rebates could occur without detection by the Commission or by the ocean carriers. Bee concludes by stating that either it does not understand the new law and proposed rules, or, if it does, it does not understand why "the U.S. Government and the FMC" would allow such a situation. Whatever the merits of Bee's objections, they are clearly beyond the scope of this rulemaking proceeding.

The Association's suggestion would result in a substantial additional paperwork and reporting burden upon the ocean freight forwarder industry. In addition, the Commission cannot publish as a final rule the new regulations requested by the Association. Such regulations would have to be made the subject of a new proposed rulemaking proceeding so that comments could be received from all segments of the public.

The Commission does not wish to downplay the seriousness with which it views the Association's concern that surreptitious siphoning off of business will occur. However, section 20 of the Shipping Act, 1916, already prohibits forwarders from passing on to their shipper affiliates, here or in foreign countries, the confidential, proprietary information a forwarder acquires in its position of fiduciary for U.S. exporters. The Commission would not hesitate to bring the full weight of the law to bear upon any forwarder found to violate section 20. A finding that a shipper-affiliated forwarder has abused its fiduciary responsibility by improperly disclosing to its foreign or domestic affiliates any information which may be used to the detriment of U.S. exporters would subject the forwarder to possible revocation of its license and the imposition of appropriate civil penalties.

Pursuant to 5 U.S.C. 601 *et seq.*, the Commission certifies that the rule revisions adopted herein will not have a significant economic impact on a substantial number of small entities. The proposals do not require additional reports or records; and are based entirely on changes to the underlying law. The economic impact which will occur will occur as a direct result of the changes to the law.

List of subjects in 46 C.F.R. 510: Freight Forwarders

THEREFORE, pursuant to sections 18, 21, 43, and 44 of the Shipping Act, 1916 (46 U.S.C. 817, 820, 841a and 841b), and 5 U.S.C. 553, the following provisions of Title 46 of the Code of Federal Regulations are amended to read as follows:

1) Section 510.2(j):

(j) "independent ocean freight forwarder" refers to a person performing freight forwarding services for a consideration, either monetary or otherwise, who is not a shipper or consignee or seller or purchaser of property in commerce from the United States.

2) Section 510.12:

No person is eligible for a license who is a shipper, consignee, seller, or purchaser of shipments in commerce from the United States.

3) Section 510.32(a):

(a) *Prohibition*. No licensee shall act in the capacity of a shipper, consignee, seller, or purchaser of any shipment in commerce from the United States.

4) Section 510.33(c):

(c) *Form of certification*. Prior to receipt of compensation, the licensee shall file with the carrier, in addition to the anti-rebate certification required by section 510.31(h) of this part, a signed certification as set forth below on one copy of the relevant ocean bill of lading which indicates performance of at least two of the listed services in addition to arranging for space:

The undersigned hereby certifies that neither it nor any holding company, subsidiary, affiliate, officer, director, agent or executive of the undersigned has a beneficial interest in this shipment; that it is the holder of valid FMC License No. ________________, issued by the Federal Maritime Commission and has, in addition to soliciting and securing the cargo specified herein or booking or otherwise arranging for space for such cargo, performed at least two (2) of the following services, as indicated:

(1) Coordinated the movement of the cargo to shipside.

(2) Prepared and processed the ocean bill of lading.

(3) Prepared and processed dock receipts or delivery orders.

(4) Prepared and processed consular documents or export declarations.

(5) Paid the ocean freight charges.

A copy of such certificate shall be retained by the licensee pursuant to section 510.34 of this part.

5) Section 510.33 is amended by the addition of new paragraph (h):

(h) A freight forwarder may not receive compensation from an oceangoing common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-71

SAIPAN SHIPPING COMPANY, INC.

v.

ASIATIC INTERMODAL SEABRIDGE, S.A., CABRAS MARINE CORP.,
MALAYAN TOWAGE & SALVAGE CO., CHINA-PACIFIC INTERMODAL, LTD.,
CHINA-PACIFIC, S.A., TRANSPAC MARINE, S.A., PACIFIC LOGISTICS, S.A.,
ISLAND NAVIGATION CO., LTD. AND OCEANIA LINE, INC.

NOTICE

June 4, 1982

Notice is given that no appeal has been taken to the April 26, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-71

SAIPAN SHIPPING COMPANY, INC.

v.

ASIATIC INTERMODAL SEABRIDGE, S.A.,
CABRAS MARINE CORP.,
MALAYAN TOWAGE & SALVAGE CO.,
CHINA-PACIFIC INTERMODAL, LTD.,
CHINA-PACIFIC, S.A.,
TRANSPAC MARINE, S.A.,
PACIFIC LOGISTICS, S.A.,
ISLAND NAVIGATION CO., LTD. AND
OCEANIA LINE, INC.

COMPLAINT DISMISSED WITH PREJUDICE

Finalized June 4, 1982

By notice filed April 22, 1982, Saipan Shipping Co., Inc., the complainant, stated that it was withdrawing its complaint prior to Answer [1] and requested that the proceeding be discontinued. I am orally advised by counsel for the respondents that the motion is unopposed.

The motion is granted and the complaint is ordered dismissed with prejudice.

(S) SEYMOUR GLANZER
Administrative Law Judge

[1] By order of September 27, 1979, no Answers were required to be filed unless and until further ordered.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-8

ROHM & HAAS COMPANY

v.

ITALIAN LINE

NOTICE

June 7, 1982

Notice is given that no appeal has been taken to the April 27, 1982 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. 81-8

ROHM AND HAAS COMPANY

v.

ITALIAN LINE

Complainant alleged that respondent overcharged it on two shipments of a product known as "Kerb," which complainant claims to have been a "herbicide," but which respondent rated otherwise. After several preliminary jurisdictional problems concerning complainant's standing to seek reparation were resolved, the parties began discovery and other prehearing activities which began to consume time and money unduly. Therefore, in order to avoid difficult and costly litigation, the parties agreed to settle on the basis of a $21,000 payment instead of the original claim of $25,492.48.

The settlement agreement comports with both general principles of law applicable to settlements and to the specific requirements established by the Commission in cases arising under section 18(b)(3) of the Shipping Act, 1916. It represents the considered judgment of the parties as to the value of the claim and the risks and expenses of continued litigation and is shown to be a bona fide attempt to resolve a controversy rather than to evade tariff law in a case in which there are genuine disputes of fact and critical facts necessary to resolve the disputes are not reasonably ascertainable.

William D. Outman II, Munford Page Hall II, and *Albert J. Bartosic* for complainant.

Stanley O. Sher, Anthony J. Ciccone, Jr., and *John R. Attanasio* for respondent.

SETTLEMENT APPROVED; COMPLAINT DISMISSED

Finalized June 7, 1982

NORMAN D. KLINE, Administrative Law Judge.

Complainant, Rohm and Haas Company, and respondent, Italian Line, have filed a joint motion requesting approval of a settlement agreement and dismissal of the complaint with prejudice. In support of their motion, the parties have furnished the text of their agreement,[1] a joint affidavit attesting to the *bona fides* of the settlement,[2] and have cited ample case law on the subject of settlements before the Commission. As more fully described below, I find that the settlement comports with applicable standards of law and accordingly grant the motion.

The case began with the filing of a complaint on January 26, 1981, by the above-named complainant, a manufacturer of chemicals whose business is located in Philadelphia, Pennsylvania. Complainant alleged that respondent, Italian Line, violated section 18(b)(3) of the Shipping

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

[2] The Joint Affidavit in Support of Settlement Agreement is attached as Appendix II.

Act, 1916, by overcharging on two shipments of a product known as "Kerb," an alleged "wet cake herbicide" which respondent carried in late January and February of 1979 from Philadelphia and New York to Genoa, Italy. Complainant sought reparation in the amount of $25,492.48 plus interest.

Before the case could proceed to decision on the merits, certain events occurred which served to prolong the preliminary phase of the proceeding. First, the parties entered into discussions seeking a possible settlement even before respondent's answer to the complaint was filed. When these discussions failed to produce an agreement, respondent filed its answer denying any violation of law and asserting that it had been precluded from rating the shipments as "herbicides," which complainant contended was the correct tariff description, because of the bill-of-lading description. Second, the pleadings revealed jurisdictional problems concerning complainant's standing to seek reparation since complainant's foreign affiliate paid the freight rather than complainant, the possibility that the first shipment and payment for it occurred beyond the two-year period of limitation set forth in section 22 of the Act, and the further possibility that complainant could not cure the standing problem by amending its complaint or otherwise obtaining standing without going beyond the two-year period. Accordingly, I instructed the parties to furnish appropriate materials in support of their respective positions on these matters. (See Order to Parties to Furnish Affidavits and Legal Memoranda on Jurisdictional Problems, March 31, 1981.) On June 1, 1981, in response to various legal memoranda and complainant's motion seeking permission to amend its complaint, I ruled that complainant ought to be allowed to cure the problem of standing by amending its complaint and that such amendment should not be precluded by the two-year period of limitation. Since previous Commission decisions seemed to hold that such amendments would be time barred, I granted leave to appeal. (See Motion to Amend Complaint to Allow Complainant to Appear, etc., served June 10, 1981.) On November 13, 1981, the Commission agreed that the problem of standing could be cured notwithstanding the two-year period and ordered complainant to obtain an assignment from its Italian subsidiary, which had paid the freight, within 60 days in order to proceed on the merits, *Rohm and Haas Company v. Italian Line*, 24 F.M.C. 429 (1981). On December 18, 1981, complainant filed an apparent assignment from its subsidiary, in response to the Commission's ruling.[3] Thereafter an informal prehear-

[3] The other problem cited in my rulings of June 1 concerning the closeness of the first shipment to the two-year period was treated by complainant which filed a document purporting to be a receipt for freight charges showing payment of freight on March 1, 1979, well within the two-year period prior to the filing of the complaint. (See letter dated June 8, 1981, from Mr. Bartosic to me, enclosing the receipt.)

ing conference was held in January, at which time an expedited schedule was established calling for complainant to serve its written case which would then undergo discovery to be conducted by respondent so as to conclude by March 26, with prehearing statements and a second prehearing conference scheduled for April 2 and April 12 respectively.

Before discovery had been completed, however, complainant sought a quick resolution of the controversy by filing a motion for summary judgment on the basis of the written case it had filed. This would have required a reply by respondent and a consideration of the state of the issues separating the parties, and, if denied, a resumption of the discovery schedule and prehearing schedule which had to be suspended following the filing of the motion. (See Change in Procedural Schedule, March 15, 1982.) By this time it had become evident that the proceeding was becoming too costly and time-consuming and the parties again attempted to reach a settlement. This time the discussions met with success, and the settlement agreement was filed together with supporting documents and authorities.

JUSTIFICATION FOR THE SETTLEMENT

The parties have persuasively shown in their joint motion that there is considerable justification for settlement of this case. As they state in their motion, the main issues in the case involve the proper identification of commodities which were shipped over three years ago, a determination of the applicable tariff rates, and proof as to whether certain alleged overcharges were actually paid by the foreign consignee. These are issues which the parties were unable to concede and which initial discovery was unable to resolve. It appeared quite likely, therefore, that further discovery would be necessary and that expert witnesses would have to testify on complicated chemical issues. At issue, furthermore, was the propriety of at least three different possible rates, the $149.50 W rate for "herbicides" which complainant sought, a $291.50 M rate for "Cargo, dangerous or hazardous, N.O.S." which respondent contended was the correct rate, and still a third rate of $295.75 W for "toluene" which respondent applied to one shipment. Although complainant contended that the product shipped, namely, "Kerb wet cake," is a "herbicide" and submitted various documents which it believed would support its case, the bills of lading indicate that the product "contains toluene" and is a "flammable solid," among other things. Determining exactly what the "Kerb wet cake" is chemically and what tariff rate should have applied among the three suggested, and how the presence of "toluene" is to be treated in determining the correct tariff rate, is, as the parties have indicated, a difficult problem. Understandably, the parties have determined that resolution of such problems by full-blown litigation "would not only entail the wasteful expenditure of considerable additional funds, but could also possibly approach or exceed the total amount for which reparations are claimed." (Joint motion, p. 6.) Accordingly, the parties have agreed that complainant will release respondent from any and all claims arising under the shipments in controversy, and will take necessary action to have its complaint against respondent dismissed with prejudice provided that respondent pays to complainant the sum of $21,000 in satisfaction of the complaint and the settlement is submitted to and approved by the appropriate governmental authorities.

EVALUATION OF THE SETTLEMENT UNDER APPLICABLE PRINCIPLES OF LAW

It is clear that the settlement comports with applicable principles of law. It is, of course, well established that both law and Commission policy "encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid." *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 23 F.M.C. 707, 709 (ALJ, administratively final, February 25, 1981); *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (I.D. adopted by the Commission, December 29, 1978). Settlements are particularly justified when, as here, the parties are "faced with the uncertainty and expense of further litigation, including a potential evidentiary hearing on [a] commodity description." *Celanese Corp. v. The Prudential Steamship Company*, 23 F.M.C. 1, 5 (ALJ, administratively final, July 2, 1980). There are now innumerable Commission proceedings in which the parties have settled their differences for amounts less than those originally sought in the complaints and without admissions of statutory violations. *Del Monte Corp. v. Matson Navigation Company*, 22 F.M.C. 364, 368–369 (ALJ, administratively final, December 27, 1979); *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, cited above, 23 F.M.C. at 710. These principles have been extended by the Commission into virtually every type of complaint case under the Shipping Act, including those involving alleged overcharges in violation of section 18(b)(3) of the Act, provided, however, that in the overcharge cases there is a showing that the settlement is *bona fide* and not a device for rebating. See *Organic Chemicals v. Atlanttrafik Express Service*, 18 SRR 153a (1979); *Celanese Corporation, Inc. v. The Prudential Steamship Company*, cited above, 23 F.M.C. 1, 6.

In considering settlements which parties submit with requests that their cases before the Commission be dismissed, the Commission has followed the traditional view that the settlement deserves approval if it avoids wasteful litigation and if it appears that the parties have correctly made an economical judgment that continued litigation would cost more to each side regardless of who ultimately prevailed on the merits than the amount of money which complainant had agreed to accept and respondent had agreed to pay in exchange for a release. *Old Ben Coal*

Co., cited above, 21 F.M.C. at 510. Since this is a settlement fashioned by the parties in a proceeding involving the tariff-adherence requirements of section 18(b)(3) of the Shipping Act, 1916, however, the Commission exercises special care to assure itself that the settlement is a legitimate attempt to avoid unnecessarily costly and wasteful litigation rather than a device to sanction rebating. To be assured of the *bona fides* of such cases, therefore, the Commission requires three things: (1) submission of the signed agreement; (2) an affidavit setting forth the reasons for the settlement and attesting to the fact that it is a *bona fide* attempt by the parties to terminate their controversy and not a device to circumvent tariff law; and (3) a showing that the complaint on its face presents a genuine dispute and that the facts critical to the resolution of the dispute are not reasonably ascertainable. See *Organic Chemicals v. Atlanttrafik Express Service,* cited above, 18 S.R.R. at 1539-1540; *Celanese Corporation, Inc. v. The Prudential Steamship Company,* cited above, 23 F.M.C. 1; *Tupperware Company v. Compania Sud-Americana de Vapores,* 24 F.M.C. 525 (1982). I find that the parties have shown that their settlement complies with both the general standards governing approvability of settlements as well as the particular conditions attached to settlements submitted in section 18(b)(3) cases.

The subject settlement appears to be reasonable and to represent the considered judgment of the parties. As indicated above, the issues are complicated and the events are relatively remote in time and continued litigation would entail further discovery, expert testimony, and an undue expenditure of funds compared to the amount of settlement. The amount of the settlement ($21,000), furthermore, appears to fall within a zone of reasonableness and represents the considered opinion of the economic worth of the claim in consideration of the risks of litigation and even appears to have some basis in the tariff.[4] Thus, the settlement comports with general principles of law applicable to all settlements. See *Old Ben Coal Co.*, cited above, 21 F.M.C. at 511–515.

The settlement, furthermore, also comports with the specific requirements established by the Commission in *Organic Chemical v. Atlanttrafik Express Service,* cited above, 18 S.R.R. at 1539-1540, and such cases as *Celanese Corporation, Inc. v. The Prudential Steamship Company,* cited above, 23 F.M.C. 1, and *Tupperware Company v. Compania Sud-Ameri-*

[4] As the parties state, the amount of the settlement represents a valid compromise since it approximates freight due under a general herbicide rate in the tariff which is lower than the "Toluene" and "N.O.S." rates originally applied by respondent while being somewhat higher than the "nonhazardous" herbicide rate sought by complainant. Basing a settlement amount on a compromise rate or commodity item published in the tariff which the product appears to approximate is a recognized method of deriving an amount for settlement purposes. Cf. *Maizena, S.A. v. Flota Mercante Grancolombiana S.A.*, 21 S.R.R. 522, 524 (ALJ, administratively final, March 22, 1982). Parties are also permitted to waive interest. See *Interest in Reparation Proceedings*, 20 S.R.R. 1511, 1514 (1981) (". . . [b]ecause interest is not part of the freight rate, it is appropriate that its treatment in settlement agreements be left to the parties").

cana de Vapores, cited above, 24 F.M.C. 525 (1982). Thus, the parties have submitted their signed agreement, have filed an affidavit attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than applicable tariff rates in contravention of law, and have shown that the facts critical to the resolution of the dispute are not reasonably ascertainable. As I have discussed above, the dispute centers on the nature of a product known as "Kerb," which may be a "herbicide" as some documents indicate but which may contain "toluene" and may be a "flammable solid," among other things, and could arguably be rated under at least three different tariff rates. Determination of the precise nature of the product would obviously entail considerable litigation expenses.

Accordingly, the settlement is approved and the complaint is dismissed with prejudice. Within twenty (20) days after date of service of the Commission's Notice rendering this ruling administratively final, the parties shall effectuate the terms of the settlement agreement and file an affidavit with the Commission attesting to the effectuation of their settlement.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX I
BEFORE THE FEDERAL MARITIME COMMISSION

ROHM & HAAS COMPANY,

Complainant

v. DOCKET NO. 81-8

ITALIAN LINE,

Respondent

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

It is hereby agreed, by and between the undersigned, complainant Rohm & Haas Company (R&H) and respondent Italian Line (Italian Line), that the dispute between these parties as embodied in Docket No. 81-8 should be fully settled and resolved by mutual accord, on the following terms and conditions:

1. Italian Line shall pay to R&H the sum of $21,000 in full satisfaction of R&H's complaint in Docket No. 81-8. Italian Line's obligations under this paragraph are, however, contingent upon the occurrence of the conditions discussed below.

2. R&H, in consideration said payment as provided in paragraph 1 above, hereby releases Italian Line from any and all claims arising out of the shipments which are the subject of the claim in Docket No. 81-8. R&H shall, in addition, take all necessary action to have its complaint against Italian Line in Docket No. 81-8 dismissed with prejudice to R&H, and shall refrain from further pursuing its claim in this or any future proceedings.

3. Neither R&H nor Italian Line, nor any successor in interest of either such party, shall initiate any new claim against the other party arising in connection with the complaint in Docket No. 81-8, except for enforcement of any provision of this Agreement.

4. It is understood and agreed that this Agreement Of Settlement And Mutual Release is in full accord and satisfaction of all the claims involved in Docket No. 81-8.

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

6. This Agreement Of Settlement And Mutual Release constitutes the entire agreement between the parties.

ROHM & HAAS COMPANY

(S) BY: MUNFORD PAGE HALL, II
Attorney for Complainant
Rohm & Haas Company

Subscribed and sworn to before me
this 1st day of April, 1982.

C. Marie Moore
Notary Public
My Commission Expires: Jan. 31, 1985

ITALIAN LINE

(S) BY: ANTHONY J. CICCONE, JR.
Attorney for Respondent
Italian Line

Subscribed and sworn to before me
this 5th day of April, 1982.

Rosalie A. Daniels
Notary Public
My Commission Expires: October 14, 1986

APPENDIX II
BEFORE THE FEDERAL MARITIME COMMISSION

ROHM & HAAS COMPANY,

Complainant

v. DOCKET NO. 81-8

ITALIAN LINE,

Respondent

JOINT AFFIDAVIT IN SUPPORT OF SETTLEMENT AGREEMENT

We, the undersigned, on behalf of complainant Rohm & Haas Company (R&H) and respondent Italian Line (Italian Line), and being each first severally sworn, depose and say for and on behalf of our respective parties:

1. The claim involved in Docket No. 81-8 arises under Sections 22 and 18(b)(3) of the 1916 Shipping Act (46 U.S.C. § 821, § 817), and presents a genuine dispute, the facts critical to the resolution of which are not readily ascertainable.

2. The parties to Docket No. 81-8 have entered into the accompanying Agreement Of Settlement And Mutual Release (Settlement Agreement) which, upon approval by the Commission, will conclusively resolve their dispute.

3. The accompanying Settlement Agreement was entered into after full and thorough consideration of all the material circumstances involved herein including, among other things, the estimated cost of further litigating the issues herein, the possibility to each party of an unfavorable decision on the merits after further litigation, and the desirability of maintaining amicable relations between the parties.

4. The accompanying Settlement Agreement is a fair and reasonable commercial settlement of the dispute in this case which will avoid the need for further extensive, costly and economically unjustified litigation.

5. The accompanying Settlement Agreement is a *bona fide* attempt by the parties to terminate this controversy in a commercially reasonable manner, and is not a device to obtain transportation at other than the lawfully applicable rates and charges or otherwise circumvent the requirements of the 1916 Shipping Act, the 1933 Intercoastal Shipping Act, or any other applicable law.

WHEREFORE, for all the foregoing reasons, the parties respectfully request Commission approval of their settlement, and dismissal of the proceeding herein, in accordance with the terms of the accompanying Settlement Agreement.

ROHM & HAAS COMPANY

(S) BY: ALBERT J. BARTOSIC
Regulatory Counsel

Subscribed and sworn to before me
this 1st day of April, 1982.

C. Marie Moore
Notary Public
My Commission Expires: Jan. 31, 1985

ITALIAN LINE

(S) BY: LODOVICO TERRANOVA
Equipment and Operations Manager

Subscribed and sworn to before me
this 12th day of April, 1982.

Gustav Brand
Notary Public
My Commission Expires: March 30, 1984

FEDERAL MARITIME COMMISSION

(46 C.F.R. PART 510)

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

LICENSING OF INDEPENDENT OCEAN FREIGHT FORWARDERS

June 8, 1982

ACTION: Final Rule

SUMMARY: The effect of this action is to continue to allow vessel operating common carriers and their agents to receive freight forwarder compensation on shipments with respect to which they performed both common carrier and freight forwarding functions. It amends a proposal adopted by the Commission, but not made effective, which would have prohibited the receipt of such compensation.

DATE: Section 510.33(g), as revised herein, will be effective July 14, 1982.

SUPPLEMENTARY INFORMATION: The Commission instituted this proposed rulemaking proceeding on March 17, 1980 (45 F.R. 17029) to revise General Order 4 (46 C.F.R. 510), which governs the licensing and operations of independent ocean freight forwarders (forwarders). One of the proposed revisions was the substitution of a new rule for original section 510.22(c). Insofar as is relevant here, section 510.22(c) prohibited the receipt of compensation [1] by a forwarder who also acted as, or who was related to a person who acted as, a nonvessel operating common carrier (NVO) on the same shipment.

In pertinent part, section 510.22(c) read as follows:

> A nonvessel operating common carrier by water or person related thereto . . . may collect compensation under section 44(e) when, and only when, the following certification is made on the "line copy" of the ocean carrier's bill of lading, in addition to all other certifications required by section 44 of the Shipping Act, 1916, and this part: "The undersigned certifies that neither it, nor any related person, has issued a bill of

[1] The term "compensation", as used in the Commission's forwarder regulations, means the payment by a water common carrier to a forwarder. Such payment is prohibited by section 44(e) of the Shipping Act, 1916, unless the forwarder performs certain functions that the common carrier otherwise would have to perform itself.

> lading covering ocean transportation or otherwise undertaken common carrier responsibility for the ocean transportation of the shipment covered by this bill of lading." Whenever a person acts in the capacity of a nonvessel operating common carrier by water as to any shipment he shall not be entitled to collect compensation under section 44(e) nor shall a common carrier by water pay such compensation to a nonvessel operating common carrier for such shipment.

The proposed revision of section 510.22(c) initially was designated as new section 510.33(i). This proposed new rule would have expanded the prohibition in section 510.22(c) by also prohibiting the receipt of compensation by a forwarder who acted as a vessel operating common carrier, or agent of such carrier, on the same shipment.

In its final version, published by the Commission on May 1, 1981 (46 F.R. 24565), with a scheduled effective date of October 1, 1981, section 510.33(i) was redesignated as section 510.33(g) and read as follows:

> (g) *Licensed oceangoing common carriers; compensation.* An oceangoing common carrier, agent or person related thereto, acting as an independent ocean freight forwarder, may collect compensation when, and only when, the following certification is made on the "line copy" of the underlying carrier's bill of lading, in addition to all other certifications required by this part:
>
> > The undersigned certifies that neither it, nor any related person, has issued a bill of lading covering the ocean transportation of the shipment covered by this bill of lading or otherwise undertaken common carrier responsibility therefor.
>
> Whenever a person acts in the capacity of an oceangoing common carrier or agent thereof as to any shipment, such person shall not be entitled to collect compensation nor shall any underlying carrier pay such compensation to such oceangoing common carrier or agent thereof for such shipment.

On May 27, 1981, a Petition for Clarification and Reconsideration was filed on behalf of five forwarders operating in Florida, North Carolina, South Carolina and Georgia. As a result of this petition, on July 14, 1981, the Commission stayed the effective date of section 510.33(g) as to vessel operating common carriers and agents, and gave further notice of proposed rulemaking so that the merits of the expanded prohibition could be explored in full.

Subsequently, comments were submitted by the following:

1. Freehill, Hogan and Mahar, Attorneys for Associated Latin American Freight Conferences;
2. Independent Freight Forwarders and Customs Brokers Association of Savannah, Inc.;

3. Senator Jesse Helms of North Carolina;
4. Congressman Walter B. Jones of North Carolina;
5. National Customs Brokers and Forwarders Association of America, Inc.; and
6. Kominers, Fort, Schlefer and Boyer, Attorneys for the five original forwarder/petitioners in Florida, North Carolina, South Carolina and Georgia.

The position taken by each commentator is summarized below:

Associated Latin American Freight Conferences

The Conferences favor section 510.33(g) as adopted in the final rules. They state that in instances where a forwarder is controlled by a carrier, the forwarder would not be acting in the typical arm's-length fashion, but more like an "in-house" sales and booking department. They raise the question of whether such a forwarder/agent actually was performing the statutorily required services to be eligible to receive compensation, i.e., it could be argued that the carrier already was providing the services for itself and thus was barred by law from paying compensation for such services.

Independent Freight Forwarders and Customs Brokers Association of Savannah, Inc.

The Association favors section 510.33(g) and argues that carriers and their agents should not be licensed in the first place. The Association also requests a rule which would make carriers pay compensation promptly.

Senator Jesse Helms

Senator Helms objects to section 510.33(g). He states that if there is no basis for denying licenses to forwarder/agents, there is no apparent basis for denying them the right to collect compensation. He maintains that the effect of the rule will be anti-competitive because forwarder/agents will be forced to choose between the ship's agent business and freight forwarding business. Such a choice, he states, would seriously affect ports where there is insufficient business to justify separate freight forwarding and ship's agency business. Senator Helms also states that he understands there are serious legal impediments to the rule.

Congressman Walter B. Jones

Congressman Jones objects to section 510.33(g) because of its restriction on compensation to forwarder/agents. He feels the rule would severely jeopardize the livelihood of small-port forwarders who combine their forwarding business with ship agency business, and believes that the rule may be contrary to the intent of Congress.

National Customs Brokers and Forwarders Association of America, Inc.

The Association supports section 510.33(g) and maintains that the rule will prevent forwarder/agents from receiving double payment for substantially the same services, i.e., an agency commission and forwarder compensation, thus dissipating carrier revenue. The Association also points out that Congress has prohibited a carrier from paying compensation to a forwarder who has not performed certain functions specified in the Shipping Act, 1916—functions which the carrier must otherwise perform itself. The question is, in the case of a person who acts as both a forwarder and an agent, who actually is performing such functions—the forwarder or the agent? Further, if the forwarder and carrier are represented by the same person, there is no motivation for such person to ensure that the statutory prerequisites for the payment of compensation have been met. Such conflict of interest extends even more obviously to a forwarder/agent attempting to service the opposing interests of the shipper and carrier at the same time. The Association also states that section 510.33(g) will serve to correct the present anti-competitive situation in small ports where nonagent forwarders find it difficult to compete with forwarder/agents. It is difficult for nonagent forwarders to compete because forwarder/agents receive double payment from the carrier and are able to use such higher revenue to underquote nonagent forwarders when soliciting export shippers.

Florida, North Carolina, South Carolina and Georgia Forwarders

The five Florida, North Carolina, South Carolina and Georgia forwarders mentioned above object to section 510.33(g) because it restricts their "right" to collect compensation when and if they choose to act as agents. They state that Congress, in the 1959-1961 period, deliberately refused to give the Commission power to deny licenses to carriers or agents or to restrict their right to compensation. Thus, they state that the restriction in section 510.33(g) would violate a forwarder's right to compensation under section 44(e) of the Shipping Act, 1916 (Act), and also would violate section 44(d) of the Act and section 9(b) of the Administrative Procedure Act by restricting a license without affording a hearing to the licensee. Further, they state that fifteen years of Commission files disclosed no basis for the "concern" expressed in the March, 1980 notice of proposed rulemaking. In addition, these forwarders argue that the Commission ignores the fact that forwarder/agents are entitled to dual compensation (i.e., forwarder compensation and agency commissions or fees) because they perform dual functions. Finally, these five forwarders argue that, for a number of procedural reasons, due process has been denied. They request oral argument.

After giving full consideration to the above summarized comments, the Commission has decided against adopting the proposed change to the previous rule (section 510.22(c) of General Order 4) concerning the receipt of compensation.Thus, a vessel operating common carrier or its agent, who also functions as a licensed ocean freight forwarder on the same shipment, may continue to receive compensation. Licensed nonvessel operating common carriers by water and forwarders related thereto will not be permitted to receive compensation. In short, all parties will be left as they were under previous section 510.22(c). After reconsidering all of the arguments pro and con, the Commission sees no reason to alter the status quo concerning this issue.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that this action will not have a significant economic impact on a substantial number of small entities within the meaning of the said Act. This action will not require forwarders or any other persons to submit reports or maintain records. Since it is a decision against adopting a new rule, it will result in no regulatory burden of any type on any person.

List of subjects in 46 C.F.R. 510: Freight Forwarders and Common Carriers.

Therefore, pursuant to sections 43 and 44 of the Shipping Act, 1916 (46 U.S.C. 841a and 841b), and 5 U.S.C. 553, section 510.33(g) of Title 46, Code of Federal Regulations, is amended to read as follows:

> (g) *Licensed oceangoing common carriers; compensation.* A nonvessel operating common carrier by water or person related thereto licensed under this part, may collect compensation when, and only when, the following certification is made on the "line copy" of the underlying carrier's bill of lading, in addition to all other certifications required by this part:
>
> > The undersigned certifies that neither it nor any related person has issued a bill of lading or otherwise undertaken common carrier responsibility as a nonvessel operating common carrier for the ocean transportation of the shipment covered by this bill of lading.
>
> Whenever a person acts in the capacity of a nonvessel operating common carrier by water as to any shipment such person shall not collect compensation, nor shall any underlying carrier pay compensation to such person for such shipment.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-59

STUTE INTERNATIONAL, INC.

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

ORDER ON REOPENING

June 9, 1982

The Commission reopened this proceeding by Order on Remand served February 12, 1982, to determine whether Stute International, Inc. qualifies for a license as an independent ocean freight forwarder (IOFF) under the current statutory scheme.[1] Previously, the Commission had denied Stute's application for failure to meet the standard of independence required for licensing under former law.[2] In accordance with the Order on Remand, Stute has filed an affidavit updating its original application together with a memorandum of law addressing the impact of the Budget Act amendments on its eligibility for a freight forwarder license. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) has filed a Reply urging that Stute's renewed license application be granted.

BACKGROUND

This proceeding was instituted on June 4, 1979, to determine whether Stute met the independence requirement under the Shipping Act, 1916 and whether Stute was otherwise qualified to carry on the business of forwarding. In an Initial Decision served October 14, 1980, Chief Administrative Law Judge John E. Cograve concluded that Stute failed to meet the statutory standard of independence because of a connection, through Stute's parent company, with a consignee of goods from the United States.[3] Although this holding with regard to independence was

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[1] The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 752 (August 13, 1981) (Budget Act) amended section 1 of the Shipping Act, 1916 (46 U.S.C. § 801) to provide that:

> The term "independent ocean freight forwarder" means a person that is carrying on the business of forwarding for a consideration who is not a shipper, consignee, seller, or purchaser of shipments to foreign countries.

[2] *Stute International, Inc. - Independent Ocean Freight Forwarder Application*, 23 F.M.C. 654 (1981). The definition of an IOFF in effect at the time of the Commission's decision provided that:

> An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

[3] *Stute International, Inc. - Independent Ocean Freight Forwarder Application*, 23 F.M.C. 656 (I.D. 1980). The Initial Decision and the Appendix thereto set forth the stipulated facts regarding these cor-

Continued

dispositive, the Presiding Officer also addressed the question of Stute's fitness and concluded that if Stute's intercorporate connection to a consignee were not so close as to bar licensing, then the activities of that consignee would have no bearing on its fitness.

In its Order Adopting Initial Decision served February 5, 1981, the Commission agreed that a person subject to a shipper's legal right to control, whether exercised or not, lacked the independence required for licensing under the law in effect at that time.[4] The Commission accordingly denied Stute's application. Stute thereupon filed a petition for review of the Commission's Order with the United States Court of Appeals for the Second Circuit.

Subsequent to the Commission's denial of Stute's application and to the filing of the appeal, the statutory definition of an IOFF was amended to eliminate the prohibition against a shipper or consignee connection. The Commission, therefore, sought a voluntary remand of Stute's appeal which was granted by the Court on October 20, 1981. This proceeding was then reopened to reconsider the denial of Stute's application.

POSITIONS OF THE PARTIES ON REMAND

A. Stute

The affidavit of Hans J. Hottenrott, Vice President and Director of Stute, filed pursuant to the Commission's Order on Remand, indicates certain changes in Kloeckner's holdings, including acquisitions, mergers and sales or dissolutions of subsidiary companies, and changes of personnel.[5] However, Stute's method of doing business, and its relationship to its parent, Verkehrs, to Kloeckner, and to Chemie remain unchanged.

Stute's position is that the Budget Act amendments remove the impediment to licensing under former law. Stute points out that the change in the statutory definition of an IOFF deletes that language which required that an IOFF not have any beneficial interest in shipments nor directly or indirectly control or be controlled by a shipper or consignee or by any person having a beneficial interest in a shipment.

porate relationships. Briefly, Stute, a Delaware corporation engaged in the import-export business in the United States, is a wholly-owned subsidiary of Stute Verkehrs GmbH (Verkehrs), a German freight forwarder with worldwide operations. Verkehrs, in turn, is wholly-owned by Kloeckner & Co. (Kloeckner), a multinational holding and trading company based in Germany. Among more than 100 companies in which it has a significant interest, Kloeckner owns a 98% interest in Chemie-Mineralien K.G. (Chemie), a consignee of shipments from the United States. Stute's affidavit filed on reopening states: "The facts set forth in Judge Cograve's decision and in the stipulation relating to the relationship among Stute, Kloeckner & Co., Chemie-Mineralien and Stute Verkehrs, and the manner in which those various entities conduct business remain unchanged."

[4] *Stute International, Inc. - Independent Ocean Freight Forwarder Application*, 23 F.M.C. at 654.

[5] As a result of these changes, Stute advises that, through the holdings of Kloeckner, it is now *both* shipper and consignee connected as interpreted under the statute prior to amendment.

Stute argues that the effect of the statutory changes is to allow the granting of a freight forwarder license to a person who is shipper or consignee connected or who indirectly controls or is controlled by a shipper or consignee or who has a beneficial interest in shipments to foreign countries. The amended statute is said now only to prohibit the issuance of a license to a person who is a shipper, consignee, seller, or purchaser of shipments to foreign countries. Neither Stute nor its parent allegedly acts as a shipper or consignee; both are engaged solely in the freight traffic business. Stute further argues that Congress intended for the Commission to license persons such as Stute, who are shipper or consignee connected, in order to gain experience so as to assess the enforceability of the new freight forwarder provisions.[6]

Finally, Stute argues that the issue of fitness has been mooted by the Budget Act amendments. Congress has determined that shipper or consignee connections do not constitute a barrier to licensing. Therefore, according to Stute, Chemie's involvement in shipments in the foreign commerce of the United States on which it received rebates should have no bearing on its fitness as a freight forwarder.

B. Hearing Counsel

Hearing Counsel concurs with Stute's conclusion that the recent amendment of section 1 of the Shipping Act removes the obstacle which previously prevented Stute from qualifying as an IOFF. It states that Stute is not otherwise a shipper or consignee or seller or purchaser of shipments to foreign countries and is in all respects fit, willing and able properly to carry on the business of forwarding. Hearing Counsel accordingly urges that Stute's application be granted.

DISCUSSION

The issue before the Commission is whether the 1981 freight forwarder amendments remove the legal barrier under former law to licensing Stute as an independent ocean freight forwarder. In a recent decision addressing the impact of the Budget Act amendments, the Commission held that shipper connections no longer bar licensing as an IOFF. *Universal Transcontinental Corporation and J. S. Stass Co., Division of Universal Transcontinental Corporation - Independent Ocean Freight Forwarder License No. 394-R,* 24 F.M.C. 911 (1982). In *Universal Transcontinental* a licensed freight forwarder was a subsidiary of a holding company which also owned an export shipper. The Commission ruled that under the new definition of independence such an intercorporate connection does not in itself present a barrier to licensing. The same result must obtain here.

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[6] Conference Report, Omnibus Budget Reconciliation Act of 1981 (Book 2), H.R. Rep. No. 97-208, 97th Cong., 1st Sess. 911 (1981).

The fact that Stute is both shipper and consignee connected through a holding company does not preclude licensing as a freight forwarder under the new statutory scheme. The new statute only prohibits issuance of a license to a shipper, consignee, seller or purchaser of shipments to foreign countries. The record in this proceeding reveals that neither Stute nor its parent, Verkehrs, is any of these.

Given the fact that Stute's relationship to Chemie no longer bars licensing, the only issue that remains to be resolved is whether Stute is otherwise "fit" to be licensed. This issue was raised as a result of the fact that Chemie had accepted rebates during the period 1973-74. Although the Presiding Officer's finding that Stute was shipper-connected obviated the need to address the fitness issue, he nevertheless determined that if the Commission were to disagree with him on this point and find that Stute met the independence standard, then Chemie's conduct could not be imputed to Stute for the purpose of rendering Stute unfit for licensing. This determination was not excepted to by Hearing Counsel, and it was, in effect, concurred in by the Commission as part of the adoption of the Initial Decision. It remains dispositive of the question of Stute's fitness. Accordingly, Stute is found to be otherwise qualified to carry on the business of forwarding and its application is approved, subject to its complying with all relevant procedural regulations.

THEREFORE, IT IS ORDERED, That the application of Stute International, Inc. for a license as an independent ocean freight forwarder is approved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 536

GENERAL ORDER 13, AMENDMENT NO. 11; DOCKET NO. 81-50

PER CONTAINER RATES - TARIFF FILING

REGULATIONS APPLICABLE TO CARRIERS AND CONFERENCES

IN THE FOREIGN COMMERCE OF THE UNITED STATES

June 9, 1982

ACTION: Final Rule

SUMMARY: This prescribes the form and manner governing the establishment of per-container/trailer rates to ensure the proper application of such rates.

DATE: The Final Rules were published in the Federal Register of June 14, 1982 (47 FR 25532) to become effective on August 13, 1982, but on July 29, 1982 (47 FR 32714) and again on October 14, 1982 (47 FR 45883) the Commission postponed the effective date, and finally discontinued the proceeding on April 27, 1984 (49 FR 18138).

SUPPLEMENTARY INFORMATION:

On August 28, 1981 the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (46 F.R. 43474) which proposed two alternative rules to govern the establishment of per-container/trailer rates. The first would require the publication of the size and capacity specifications of containers and trailers upon which per-container/trailer rates are based and would require that the rate vary directly with the capacity. The second alternative would not require a specific relationship between the capacity of the container/trailer and the rate charged (although carriers would certainly be free to establish such a relationship), but rather it would permit the carrier to establish categories of containers and to charge the same rate for any container or trailer falling within the category, *e.g.*, 20-foot dry van, 40-foot reefer, etc.

Comments to the Notice of Proposed Rulemaking were submitted by or on behalf of eight shippers,[1] three carriers,[2] four other organizations and associations[3] and forty-five conferences.[4] These comments are addressed below.

I. *Definitions*

Several commentators argued that the definitions governing the terms used in the per-container/trailer rate rule should appear in the rule itself rather than in that section of Part 536 establishing tariff filing definitions generally. The Commission agrees. While there are advantages in having all the definitions in one place, because the terms defined here pertain only to per-container/trailer rates, the definitions will be relocated to section 536.12.

Several comments were received regarding the definition of "capacity." However, because the term is not otherwise used in the final rule adopted, there is no need for this definition and it will be deleted.

One commentator suggested that the definition of containers be expanded to include "any receptacle used for the storage of shipments during transportation." The Commission agrees that a more expansive definition is necessary but is of the opinion that the word "receptacle" is too vague. Accordingly, the definition will be modified to include

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[1] Union Carbide Company, RCA Corporation, E. I. du Pont de Nemours & Co., Emerson Electric Co., General Electric Company, Military Sealift Command, Airco Carbon, Rohm and Haas.

[2] Compagnie Maritime d'Affretement, United States Lines, Inc., Sea-Land Service, Inc.

[3] Houston Port Bureau, Inc., Tobacco Association of United States, California Association of Port Authorities, Motor Vehicle Manufacturers Association.

[4] Lillick, McHose & Charles for Pacific-Straits Conference, Pacific Indonesian Conference, Malaysia-Pacific Rate Agreement - Lillick, McHose & Charles for Trans-Pacific American Flag Berth Operators - Lillick, McHose & Charles for Pacific Westbound Conference - Far East Conference, Graham & James for North Europe-U.S. Pacific Freight Conference, Pacific Australia-New Zealand Conference, Pacific Coast European Conference, Freehill, Hogan & Mahar for Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference, Atlantic & Gulf/West Coast of South America Conference, East Coast Colombia Conference, Southeastern Caribbean Conference, United States Atlantic & Gulf-Jamaica Conference, United States Atlantic & Gulf-Santo Domingo Conference, United States Atlantic & Gulf Venezuela Conference, West Coast South America Northbound Conference, United States Atlantic & Gulf-Haiti Conference, United States Atlantic & Gulf Ecuador Freight Conference, Warren & Associates for Trans-Pacific Freight Conference of Japan/Korea, Japan/Korea-Atlantic and Gulf Freight Conference, Warren & Associates for Philippines North America Conference, Billig, Sher & Jones, P.C. for Australia-Eastern U.S.A. Shipping Conference, Greece/U.S. Atlantic Rate Agreement, Iberian/U.S. North Atlantic Westbound Freight Conference, Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, Mediterranean-North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. Atlantic & Gulf/Australian-New Zealand Conference, U.S. North Atlantic Spain Rate Agreement, U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement, The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC), Burlington Underwood & Lord for Inter-American Freight Conference, Howard A. Levy for the North European Conferences consisting of North Atlantic United Kingdom Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic Baltic Freight Conference, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, Continental North Atlantic Westbound Freight Conference, North Atlantic Westbound Freight Association, United Kingdom & U.S.A. Gulf Westbound Rate Agreement, Continental-U.S. Gulf Freight Association, Gulf-United Kingdom Conference, Gulf-European Freight Association.

examples of those sorts of containers that are encompassed in the definition.

Many conferences contended that the definition of "mixed shipments" should be limited to CY/CY shipments. While such a limitation has merit, the Commission has concluded that any limitation should be made on a commercial basis by the conference or carrier rather than imposed by rulemaking.

The definition of "shipment" in the proposed rule concluded with the phrase "for delivery to one *or more* destination location." Several commentators opposed the rule's application to more than one delivery port or point. They pointed out that the words "or more" in the definition of "shipment" might be read as allowing "per-container/trailer" rates to be quoted for *less* than containerload ("LCL") shipments. There is merit to this contention. If "per-container/trailer" rates are to be applied to a *portion* of a container/trailer load at each destination port, confusion could arise as to how much of the container/trailer is occupied by the cargo. This would be in essence a return to a weight/measurement system and is inconsistent with the concept of per-container/trailer rates. Allowing per-container/trailer rates to be quoted to multiple destinations would defeat a principal advantage of per-container/trailer rates to shippers and carriers, which is the ability to calculate transportation rates on the basis of a uniform and interchangeable cargo unit, the container/trailer. Therefore, the words "or more" have been deleted from the final rule. Moreover, because the "shipment" provision imposes a limitation on the publication of per-container/trailer rates and is not merely a definition in any event, it has been included as a filing requirement in section 536.12(b)(1).

At the suggestion of one commentator, the word "freight" has been changed to "cargo" in the definition of "trailer" to make it conform to other sections of the Commission's tariff filing rules embodied in Part 536.

II. *Tariff Filing Requirements*

Most commentators preferred what has been termed the second alternative, *i.e.* permit the establishment of categories of containers/trailers. Although the first alternative is more precise, the Commission is of the opinion that the objective of the rulemaking can be accomplished by adopting the second alternative. Accordingly, it has incorporated it into the final rule.

The second alternative requires the carrier to limit the application of the per-container/trailer rate to a given category of equipment. The types of containers falling within the category must be clearly described. For example, a per-container/trailer rate which, by its terms, is limited to standard 40-foot dry vans may not be applied to a 40-foot high cube container. However, a carrier may provide a formula for the use of an alternate container/trailer where equipment in the specified category is unavailable. Absent such a formula, weight and measure commodity rates must be applied to shipments moving in containers/trailers which do not fall within the category of equipment specified by the per-container/trailer rate item.

Likewise when there is no specific provision for a given mixture of cargo, the weight or measurement rate for each commodity shall apply. Several commentators suggested, as an alternative, that tariffs with mixed shipment rates be required to contain a residual rating formula for mixtures not specifically itemized in the tariff. However, it is unclear how rates established by a residual formula could be applied so as to ensure that they would not alternate or conflict with individual commodity rates found in the tariff. Absent a clear application of rates, the potential for abuse is significant. Accordingly, the suggestion has not been adopted. This decision does not prevent the carrier from meeting the needs of the shippers it serves. The Commission is not prescribing the terms of any mixing provision. If a shipper cannot or does not meet the requirements for a published rate, it can request the carrier to publish a rate with a mixture requirement which it can meet.

It has been suggested that the requirement that the mixed shipment rates specify "limitations as to ports or points of destination" be deleted because the port range served is published in a general section of a tariff and, as a result, would be applicable to mixed shipments as well as to other shipments. Section 536.12(b)(1) limits the application of per-container/trailer rates to shipments moving between a single origin point or port and a single destination point or port within the range served. Per-container/trailer rate items need not identify these ports or points by name.

Several other non-substantive changes have been made to clarify the intent of section 536.12(b)(1) establishing the per-container/trailer rate filing requirements. The number of examples in the rule has been expanded to more clearly indicate what information should be included when categorizing a container or trailer.

Some commentators are concerned that by this rule the Commission is encouraging the establishment of per-container/trailer rates while others fear that the rule will hamper the development of this type of rates. It is the Commission's intention neither to promote nor discourage this form of ratemaking. The Commission's only interest is providing a meaningful form and manner by which per-container/trailer rates may be lawfully established. The decision whether to establish such rates remains with the carriers and conferences. Nor does the Commission intend by this rule to limit the categories of containers/trailers for which the rule format would apply. Carriers are not only free to develop innovative and simplified rate and tariff structures, but are encouraged to do so.

A number of commentators argue that the rule should not require a mixed shipment per-container/trailer rate item to specify the commodities to which the rate applies. The commentators were particularly concerned over the effect of the rule on shipments by non-vessel operating common carriers and containerloads of odd lots of cargo tendered as a consolidated container shipment. The requirement to identify the commodities which are subject to a per-container/trailer rate is designed to prevent mixed shipment per-container/trailer rates from duplicating or conflicting with any FAK (Freight All Kinds) and Cargo N.O.S. (Not Otherwise Specified) rates which may be published in the same tariff. FAK and Cargo N.O.S. rates present unique problems and potential duplications and conflicts. Cargo N.O.S. is an all-encompassing description which is utilized to provide a rate for a given commodity when no specific rate for that commodity appears in the tariff. An FAK rate is as the name implies, a description utilized to rate "All Kinds" of freight. Without some qualification it would duplicate or conflict with a Cargo N.O.S. rate. To permit both FAK and Cargo N.O.S. rates in the same tariff, carriers usually qualify the FAK description in order to distinguish it from the Cargo N.O.S. rate. Likewise, mixed shipment per-container/trailer rates must be distinguished from FAK and Cargo N.O.S. rates. However, the requirement to distinguish mixed shipment per-container/trailer rates from FAK rates should not be construed to require any particular limitation or qualification on FAK or Cargo N.O.S. rates. Nor is it intended to limit the flexibility of carriers in designing tariff provisions to serve the needs of the U.S. foreign commerce.

Carriers and conferences will be provided 60 days after its publication in the *Federal Register* to bring their tariffs into conformity with this rule.

The Commission finds that this rule is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601). Section 601(2) of that Act excepts from its coverage any "rule of particular applicability relating to such rates. . . ." As this rule clearly relates to rates and practices, the Regulatory Flexibility Act requirements are determined to be inapplicable.

Information collection requirements contained in this regulation (section 536.12(b)(1), (2) and (3)) have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (P.L. 96-511) and have been assigned OMB control number 3072.0036.

List of subjects in 46 C.F.R. Rates, Maritime Carriers

Therefore, pursuant to 5 U.S.C. 533 and sections 18(b), 22, and 43 of the Shipping Act, 1916 (46 U.S.C. 817(b), 821 and 941(a)), 46 C.F.R.

Part 536 is amended by adding a new section, 536.12 reading as follows:

§ *536.12* Tariffs publishing per-container and/or per-trailer rates

(a) *Definitions.* The following definitions shall apply for purposes of this section.

(1) *Container.* A van, flatrack, open top trailer, or other similar trailer body on or into which cargo is loaded and transported without chassis aboard ocean vessels.

(2) *Mixed Shipment.* A shipment consisting of more than one commodity; articles described under more than one class or commodity rate item in a tariff.

(3) *Per-Container Rate.* Rates and/or charges on shipments transported in containers or trailers and rated on the basis of the category of the container or trailer.

(4) *Trailer.* A van, flatrack, open top trailer, or other similar trailer body on or into which cargo is loaded and transported complete with chassis aboard ocean vessels.

(b) *Tariff Filing Requirements.*

(1) Tariffs which publish rates and/or charges on shipments transported in containers or trailers and rated on the basis of the container or trailer shall state a rate for each category of carrier designated container or trailer to which such rate applies, *e.g.*, 20-foot dry van container, 40-foot refrigerated trailer, 40-foot hi-cube van container, 40-foot dry van container 9′6″ high, 20-foot dry van container 9 feet high, etc. Per-container/trailer rates shall only apply to cargo received from one shipper at one origin location, consigned to one consignee, carried on one voyage, on one bill of lading for delivery to one destination location.

(2) Tariffs which publish rates for mixed shipments shall contain a governing rule or provide reference to a separate publication which shall clearly define the application of such rates. The tariff shall also provide that whenever there is a mixing of cargoes in a container/trailer for which there is no specific rate item permitting and indicating a rate for that mixture, the weight or measurement rate for each commodity shall apply.

(3) A mixed shipment rate item shall list therein all articles or merchandise which may be shipped under the item. Any restrictions on the application of the rate item shall be explained. Each commodity contained in mixed shipment rate item shall be listed in the tariff's commodity index or cross-referenced in the body of the tariff. A mixed shipment rate item shall specify any conditions which apply, *e.g.*:

(i) Type of service offered, whether CY/CY or CY/CFS, etc.;

(ii) Limitation in the number of commodities allowed or required per bill of lading and the percentage of the total shipment that one commodity may not exceed;

Approved by the Office of Management under OMB control number 3072-0036.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-4

BELCO PETROLEUM CORPORATION

v.

LYKES BROS. STEAMSHIP CO., INC.

PARTIAL ADOPTION OF INITIAL DECISION

June 14, 1982

This proceeding is before the Commission upon its determination to review the Initial Decision of Administrative Law Judge William Beasley Harris awarding reparation without interest to Belco Petroleum Corporation for violation by Lykes Bros. Steamship Co., Inc. of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817).

In cases involving the misrating of cargo and arising under section 18(b)(3), the Commission has determined to grant interest on awards of reparations, to accrue from the date of payment of freight charges to the date reparations are paid. *See* 46 C.F.R. § 502.253. Thus, the Commission shall grant interest on the Presiding Officer's award of reparations in this proceeding.

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

IT IS FURTHER ORDERED, That Lykes Bros. Steamship Co., Inc. pay reparations in the amount of $15,984.08 to Belco Petroleum Corporation, with simple interest at 12.69 percent from the date of payment of the freight to the date on which reparations are paid; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-4

BELCO PETROLEUM CORPORATION

v.

LYKES BROS. STEAMSHIP CO., INC.

Reparation awarded without interest in this instance.

Shipment of proprietary material and equipment to Talara, Peru, by industrial contract shipper under a tariff with more than one tariff item applicable to the commodity shipped is entitled to the freight charge under that tariff item producing the least cost to the shipper.

Robert S. Groydah, Accounting Manager, Belco Petroleum Corporation, for Complainant.

David W. Gunther, Manager, Traffic Advisory Services, Lykes Bros. Steamship Co., Inc., for Respondent.

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

Partially Adopted June 14, 1982

This is a proceeding under shortened procedure without oral hearing pursuant to Rule 181 (46 C.F.R. 502.181) of the Commission's Rules of Practice and Procedure.

The complaint covers a shipment of proprietary material and equipment made from the Port of Houston, Texas, aboard Lykes' vessel *Gulf Merchant* to the complainant's oil well facilities at Talara, Peru, under Bill of Lading No. 3 dated January 15, 1980. Based on the bill of lading descriptions, the rates and charges billed were $58,908.41. The complainant asserts the bill should have been $42,924.33, a difference of $15,984.08, which complainant says is an overcharge in violation of section 18(b)(3) of the Shipping Act, 1916, entitling recovery by complainant with interest.

BACKGROUND

The complaint in this proceeding was served January 12, 1982. Notice of the filing of the complaint and assignment of the Presiding

[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).

Administrative Law Judge was published in the *Federal Register,* Vol. 47, No. 13, Wednesday, January 20, 1982, pp. 2925-2926.

The Director of the Commission's Office of Energy and Environmental Impact advised in a memo dated January 22, 1982, that the OEEI has examined this Docket No. 82-4 and has determined that section 547.4(a)(22) of the Commission's "Procedures for Environmental Analysis" applies; that no environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket.

In a motion served February 1, 1982 (received February 2, 1982), the respondent requested an extension of time for twenty (20) days following February 1, 1982, within which to file answer to the complaint herein, including the ability to file such answer without agreement to the conduct of this proceeding pursuant to the shortened procedure provided in Rules 181 to 187 of the Commission's Rules of Practice and Procedure.

On February 15, 1982, respondent served (received February 17, 1982) Interrogatories and Request for Production of Documents to the complainant.

Respondent's answer to the complaint in this proceeding was received February 17, 1982, in which it was stated, among other things, that the respondent does not consent to the shortened procedure provided in Rules 181 to 187 of the Commission's Rules of Practice and Procedure.

The Presiding Administrative Law Judge by notice served February 23, 1982, set a prehearing conference to commence Tuesday, March 16, 1982.

On March 15, 1982, Mr. Gunther of the respondent telephoned the Presiding Judge relative to amending respondent's answer. The Presiding Judge requested Mr. Gunther to submit his request in writing. In a letter dated March 15, 1982 (received March 17, 1982), the respondent stated, among other things, it requested permission to amend its answer by striking Articles I and IX thereof and inserting in their place new Articles I and IX, concurring and agreeing to the conduct of this proceeding pursuant to the shortened procedure provided in Rules 181 to 187 of the Commission's Rules of Practice and Procedure. The other articles of the answer remain unchanged. The answer, as so amended, now constitutes respondent's answering memorandum. The respondent also withdrew the propounded interrogatories and request for production of documents. The respondent objects to any award of interest should reparation be granted.

Upon review of the record and materials submitted herein, the Presiding Judge finds the following:

FACTS

The complainant is a corporation whose principal business is the exploration for and production of crude petroleum and natural gas. Operations are conducted in the United States and abroad. Complainant's principal place of business is New York, New York, the address of which is One Dag Hammarskjold Plaza, New York, New York 10017.

Complainant has extensive petroleum production facilities at Talara, Peru, which are maintained by Belco Petroleum Corporation of Peru, a wholly owned subsidiary of Belco Petroleum Corporation.

The respondent is a common carrier engaged in transportation by water between ports in the United States and ports in Peru and as such is subject to the provisions of the Shipping Act, 1916, as amended.

The principal United States business office for Lykes Bros. Steamship Co., Inc., is 300 Poydras Street, Lykes Center, New Orleans, Louisiana 70130.

Respondent is a member of the Atlantic & Gulf/West Coast of South America Conference. Said Conference publishes the Atlantic & Gulf/West Coast of South America Conference S.B. SA-13 Freight Tariff F.M.C. No. 2. Respondent participates in the tariff.

Complainant is an industrial contract shipper with the Conference under Contract No. 10361 in effect since September 9, 1965. Complainant has shipped to Talara, Peru, under Tariff Item 1050, which provides an Industrial Contract Rate Schedule covering cargo said to be of a proprietary nature. Complainant's bill of lading No. 3 herein was claused as follows:

> The above described cargo is proprietary, not for resale, and in all other respects forwarded in conformity with the provisions of Conference Tariff Item 1050.

The complainant alleged and the respondent admitted that under the designation "Special and Project Rates," Tariff Page 360, as revised, a "project rate" is provided for in Item 1036A as follows:

> *Talara Oilwell and Production Project*
> Shipments of proprietary material and equipment to Talara or Paita will be assessed base rate of $132.00 W/M plus all additional charges. Heavy lift charges as per tariff scale will be applicable on the weight basis (2,000 lbs.) Extra length charges will be applicable as per tariff scale W/M as cargo is freighted. Bills of lading shall be claused as set forth in Rule 50.

That Rule 50 above mentioned, reads in part as follows:

> In order to identify the cargo which is covered by this tariff rule, it is understood and agreed shipper will arrange to have the following notation placed on each Bill of Lading:

The Shipper shown in this Bill of Lading certifies that the cargo described hereon is forwarded pursuant to the terms and conditions of tariff Item No. ________________
and that he is aware that the Shipping Act of 1916 declared it to be a violation of law, punishable by a penalty, for a shipper to utilize an unfair device or means to obtain transportation at less than the applicable rates.

Further, it is understood and agreed that the shipper shall submit a freighted copy of all such Bills of Lading or Bill of Lading and due bill to the Conference Chairman on a timely and confidential basis.

The bill of lading descriptions are as follows:

No. of Pkgs.	Description	Gross Weight	Measurement
27 Boxes	Parts for oil and gas field well drilling machines	156,953#	6,510 cf
23 Bdles	Parts for oil and gas field well drilling machines	262,452#	4,021 cf
1 Box	Asphalt cutback (Flam. Liq. 900° F. Pkg. 37)	140#	6 cf
1 Box	Batteries, Potassium Hydroxide, Dry Solid (corrosive label Pkg. No. 44)	3,870#	123 cf
52 Pkgs		423,415#	10,660 cf

The 23 bundles described above as "Parts for oil and gas field well drilling machines" actually, as explained by respondent, were continuous weld integral joint steel tubing. Integral joint signifies that the joint is designed as a part of the pipe or tubing rather than as a separate piece. "Asphalt cutback" is in essence a "freight of all kinds rate," which requires no classification.

Based on the prior bill of lading descriptions above, rates and charges were billed as follows:

	W/M	Rate	Amount
Ocean Freight	18,694 lbs.	$161.00/2000	$ 1,504.87
Ocean Freight	6,191 cft	161.00/40	24,918.78
Ocean Freight	262,425 lbs.	161.00/20	21,127.39
Ocean Freight	6 cft	110.00/40	15.67
		Less 5%	
Heavy Lift	10,895 lbs.	6.20/2000	33.77
Heavy Lift	255,640 lbs.	6.20/2000	792.48
Ocean Freight	123 cft	161.00/40	495.08
B/S	6,320 cft	9.00/40	1,422.00
B/S	281,146 lbs.	9.00/2000	1,265.00
PCS		15%	7,333.21
Total Freight			$58,908.41

The Schedule B commodity number shown on the Vinson Supply Company Customer's Order No. and Requisition No. E-11-7856-79-A dated 12/19/79 is in error. The appropriate number should be 610.3035. The corresponding description is iron or steel welded oil well tubing.

DISCUSSION

Complainant contends the applicable tariff is conflicting and ambiguous and that both Items 1036A and 1050 apply to this shipment. Item 1050 applies to steel joints for steel tubing rated as steel pipe straight, not over 8″ I.D., not bell and spigot or flanged. The balance of cargo should be rated in accordance with Item 1036A. In view of this, rates and charges should have been billed as follows:

	W/M	Rate	Amount
Ocean Freight	262,452 lbs.	92.00/2000	$12,072.79
Ocean Freight	18,694 lbs.	132.00/2000	1,233.80
Ocean Freight	6,320 cft	132.00/40	20,856.00
Heavy Lift	10,895 lbs.	6.20/2000	33.77
Heavy Lift	255,640 lbs.	6.20/2000	792.48
Subtotal			$34,988.84
Port Congestion S/C		15%	5,248.33
B/S	281,146 lbs.	9.00/2000	1,265.16
B/S	6,320 cft	9.00/40	1,422.00
Total Freight			$42,924.33

The charges billed ($58,908.41) versus charges suggested ($42,924.33) represents a difference of $15,984.08 (overcharge).

By reason of the facts and arguments stated in the foregoing paragraphs, complainant asserts it has been subjected to the payment of unjust and unreasonable charges in violation of section 18(b)(3) of the Shipping Act, 1916, as amended, to its damage in the sum of $15,984.08, with interest.

The respondent contends that the bill of lading was properly rated as submitted based on the bill of lading descriptions and clausing furnished by the freight forwarder as agent of the complainant. Respondent also contends the tariff rates are presented in the tariff in a clear and easily understood fashion. Respondent argues that misdescribing the commodities involved and clausing the bill of lading incorrectly for purposes of rate application arise from initial errors by complainant and/or complainant's agent freight forwarder, thus the respondent objects to and deems inappropriate and invalid any claim for interest.

Complainant contends that despite failure to clause the shipment as provided for in Tariff Rule 50, it also qualifies for rates in Item 1036A by virtue of the fact that it has operating oil wells at Talara, Peru. The complainant asserts that this issue was previously decided in favor of complainant in Docket No. 80-46. *Belco Petroleum Corp. v. Lykes Bros. Steamship Co., Inc., and Peruvian State Line*, 23 F.M.C. 1003 (1981), Order Adopting Initial Decision, 23 F.M.C. 1001 (1981).

In the Docket No. 80-46 *Belco* case, the Presiding Administrative Law Judge observes that there the complainant alleged it traditionally made its shipments of oil well supplies and equipment under Item 1050, which provided an Industrial Contract Rate Schedule covering cargo of a proprietary nature. The clause was amended in 1978 by adding a "project rate" for cargo of a proprietary nature under Item 1036A. Nevertheless, complainant continued to annotate its bills of lading according to the terms of Item 1050 instead of Item 1036A. The Commission's Chief Administrative Law Judge, John E. Cograve, in his opinion in Docket No. 80-46, stated, the sole issue presented was whether the absence from the bill of ladings of that specific clause required by Item 1036A precluded the complainant from obtaining the lower rates provided for in that term. The respondents did not dispute the fact that the shipments in question were proprietary and the bills of lading show that the shipments were to Talara. He held, since the essential facts are clear and undisputed, *i.e.*, the cargo was proprietary and was destined for Talara, the complainant had been overcharged in violation of section 18(b)(3). Reparation was awarded. In its Order Adopting the Initial Decision, 23 F.M.C. 1001 (June 30, 1981), the Commission determined that the Presiding Officer's ultimate findings and conclusions are correct. The Initial Decision was adopted with the modification addressed to the Presiding Officer not having included interest in the reparation awarded. Interest on the amount of reparation awarded should have been included as an element of damages. The Commission modified the award to include interest at the rate of 12% per annum.

The Presiding Administrative Law Judge takes official notice that since the Docket No. 80-46 *Belco* case, *supra*, there have been, besides the Docket No. 82-4, other Dockets, *i.e.*, Nos. 81-56, 81-67 and 82-5 in which this Judge presided. Docket Nos. 81-56 and 81-67 were settled and dismissed January 19, 1982 (administratively final February 25, 1982). Docket No. 82-5 was settled and dismissed April 12, 1982, subject to approval by the Commission as provided in the Commission's Rules of Practice and Procedure. Each Docket, No. 81-56, 81-67 and 82-5 involved providing for shipment to Talara, Peru, under Conference tariff Item 1050 and 1036A of proprietary material as does this Docket No. 82-4.

The respondent has raised the question of whether there is sufficient evidence of record in this proceeding for a decision. In this case, as in the Docket No. 80-46 *Belco* case, *supra*, the respondent did not dispute the fact that the shipment in question was proprietary, and the bill of lading shows that the shipment was to Talara. The Presiding Administrative Law Judge *finds* there is sufficient evidence of record for decision and *concludes* since the essential facts are clear and undisputed, i.e., the cargo was proprietary and was destined for Talara, the complainant has been overcharged in violation of section 18(b)(3). The complainant is entitled to reparation from the respondent in the amount of $15,984.08, and as hereinafter explained, without interest.

The respondent in its March 15, 1982, amended answer, constituting its answering memorandum, asserted among other things that it was content to rely on the presiding officer's authority under Rule 184 to insure that there will be sufficient evidence of record for a decision. Rule 184 provides that "within fifteen (15) days after the date of service of the answering memorandum prescribed in § 502.183 . . . each complainant may file a memorandum in reply. . . . This will close the record for decision unless the presiding officer determines that the record is insufficient and orders the submission of additional evidentiary materials." The Presiding Administrative Law Judge, as indicated above, accepted the closed record for decision.

Reparation and interest on reparation are matters within the discretion of the Commission. In this instance, upon consideration of the record herein, and the official notice taken of the settlement of the other dockets named herein dealing with the same subject, the Presiding Administrative Law Judge deems that demands of fairness, reasonableness, as well as the serving of justice, in his discretion, warrant denying, in this instance, interest on reparation. He *finds* and *concludes* interest on reparation should be denied.

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

(A) The respondent, Lykes Bros. Steamship Co., Inc., shall pay reparation in the amount of $15,984.08, without interest, to the complainant, Belco Petroleum Corporation.

(B) The parties, upon complying with this decision, shall notify the Commission in writing with the details thereof.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-35

PACIFIC WESTBOUND CONFERENCE - INVESTIGATION OF RATES, RULES AND PRACTICES PERTAINING TO THE MOVEMENT OF WASTEPAPER AND WOODPULP FROM UNITED STATES WEST COAST PORTS TO PORTS IN JAPAN, THE PHILIPPINES, TAIWAN, KOREA, SOUTH VIETNAM AND THAILAND

ORDER

June 15, 1982

On January 11, 1982, the Commission served a notice in the above-captioned proceeding soliciting the parties' views as to whether any further administrative proceedings were necessary in the wake of the decision by the United States Court of Appeals in *National Association of Recycling Industries, Inc. v. FMC*, 658 F.2d 816 (D.C. Cir. 1980). Responses to the Commission's notice were filed by the National Association of Recycling Industries, Inc. (NARI) and the Pacific Westbound Conference (PWC).

NARI stated that a controversy still existed between itself and PWC concerning PWC's wastepaper rates. However, NARI further stated that it intended to file an antitrust suit against PWC in U.S. District Court, and that the controversy between itself and PWC would be resolved through that suit. NARI thus concluded that this Commission proceeding should be terminated.

PWC urged in its response that this proceeding should remain open, also pointing out that there is a present controversy between itself and NARI concerning its wastepaper rates.

Since the parties' responses were filed, NARI has brought an antitrust action against PWC and its member lines in U.S. District Court in Los Angeles. *National Association of Recycling Industries, Inc. v. American Mail Line, Ltd., et al.*, C.D. Ca. Civ. No. 82-0895-LTL. The case is based on allegations that PWC's ratemaking practices were and continue to be unlawful under the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*) In their answer to NARI's complaint, the PWC lines have moved for dismissal of the case on the ground that the complaint fails to state a claim upon which relief can be granted. The motion is presently scheduled for hearing on July 6, 1982. If the District Court should decline to dismiss the case, the PWC lines have asked as alternative relief that further proceedings be stayed pending referral to the Commission of NARI's allegations concerning PWC's rates.

Thus, NARI's antitrust action against PWC raises the possibility that the District Court might refer certain issues to the Commission for resolution under the Shipping Act. Because those issues might be directly related to the subject matter of this investigation, it is appropriate that further proceedings herein be held in abeyance until such time as the District Court rules on PWC's motion and the scope of any such proceedings can be accurately defined.

THEREFORE, IT IS ORDERED, That further proceedings in this Docket are stayed until further notice from the Commission.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NOS. 81-30 AND 81-31

THE BOSTON SHIPPING ASSOCIATION

v.

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.

ORDER ADOPTING INITIAL DECISION

June 15, 1982

These consolidated proceedings were initiated on April 21, 1981 upon the complaints of the Boston Shipping Association, Inc. (BSA) against the New York Shipping Association, Inc. (NYSA).[1] On June 17, 1981, BSA filed amended complaints in both dockets naming as additional respondents the International Longshoremen's Association, AFL-CIO (ILA), the Council of North Atlantic Shipping Associations (CONASA), the West Gulf Maritime Association (WGMA), the Mobile Steamship Association, Inc. (MSSA), and the South East Florida Employers Port Association, Inc. (SEFEPA). The complaints allege that Respondents violated sections 15, 16, 17 and 18, Shipping Act, 1916 (46 U.S.C. §§ 814-817), section 8 of the Merchant Marine Act, 1920 (46 U.S.C. § 867), as well as section 205 of the Merchant Marine Act, 1936 (46 U.S.C. § 1115) by implementing Rule 10 of certain "Master Contracts" [2] between the ILA and the various employer groups in an unjustly discriminatory and unfair manner.

On February 12, 1982, Administrative Law Judge Joseph N. Ingolia issued an Initial Decision: (1) denying Respondents' motions to dismiss and motion for summary judgment; (2) finding that Complainant had failed to meet its burden of proving that Rule 10 is unlawful as alleged; and (3) denying the Complainant's request for reparations and assessment adjustments. Complainant filed Exceptions to the Initial Decision to which NYSA replied. NYSA also filed cross-exceptions to the Initial Decision with its Reply.

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[1] The complaint in Docket No. 81-30 was filed pursuant to section 4 of the Maritime Labor Agreements Act (MLAA), Public Law 96-325 (94 Stat. 1021), which amended section 15, Shipping Act, 1916 (46 U.S.C. § 814). The complaint in Docket No. 81-31 was filed pursuant to section 22, Shipping Act, 1916 (46 U.S.C. § 821).

[2] The "Master Contracts" at issue provide for assessments called "Container Royalty Payments." Under Rule 10 of these "Master Contracts":

> The Container Royalty Payments shall be payable only once within the continental United States. They shall be paid in the ILA port where the container is first handled by ILA longshore labor at longshore rates.

BACKGROUND

Between 1960 and 1980, the ILA and the various multi-employer bargaining units, including BSA, negotiated certain master contracts requiring oceangoing common carriers to pay container royalties for the benefit of eligible ILA members. These royalties are assessed on full shipper loads (FSL) beneficially owned by a single shipper or consignee and loaded or unloaded by the owners' employees at the owners' places of business.[3] The container royalties have, since their inception, only been assessed and payable at the port where the container is first handled by ILA longshore labor at longshore rates.[4] The essence of BSA complaints is that the container royalties are administered unlawfully because Rule 10 permits the assessment to benefit the port of transshipment rather than the port of destination.

INITIAL DECISION

The Presiding Officer found that BSA had failed to sustain its burden of proving Rule 10 unlawful. He noted that the evidence of record did not support Complainant's allegation that Rule 10 is maintained solely as a result of NYSA's domination of the ILA negotiations. He reasoned that although the Port of New York, the largest Atlantic Coast port, was influential in the ILA negotiations, the other port associations, including BSA, were not bound to accept NYSA's negotiating position. It was noted that NYSA itself withdrew from CONASA in 1977 when it could not persuade CONASA to accept its position in negotiations with the ILA.

The Presiding Officer also explained that even if the record supported BSA's "domination" theory, this alone would not render the "first port rule" unlawful because BSA had not presented any evidence demonstrating that the rule was unlawful. He found that BSA failed to support its contention that the "first port rule" has caused the assessment of the "Boston Dollar" to continue. This was deemed to be particularly significant because the "Boston Dollar" assessment was initiated in 1971 before the inauguration of the feeder service which transships Boston cargoes from New York. The Presiding Officer further determined that BSA had failed to present any evidence to demonstrate what funds are necessary to maintain the actuarial soundness of the BSA-ILA Pension Fund.

BSA was also found to have failed to establish that the "first port rule" has put it at a competitive disadvantage. In this regard, the

[3] There are three master contract container royalty assessments levied against FSL cargoes. These assessments were imposed by the 1960, 1971 and 1977 ILA Master Contracts. BSA levies an additional container royalty assessment on FSL cargoes. This assessment, which is referred to as the Boston Dollar, was negotiated in connection with the 1968 local BSA/ILA labor contract.

[4] This "first port" rule was initially codified in the 1971 ILA Master Contract.

Presiding Officer pointed out that BSA had not presented any evidence comparing the Port of Boston's overall labor costs, including the "Boston Dollar" assessment, with the labor costs of competing ports, nor was there evidence adduced to support BSA's argument that Boston's decrease in cargo volume is attributable to the diversion of cargo to other ports because of the "first port rule." Moreover, there was no evidence presented which would indicate that Boston's competitor ports were enjoying increased tonnage corresponding to Boston's decrease.

Based on his finding that the Complainant had failed to sustain his burden of proof, the Presiding Officer concluded that Rule 10 does not violate the Shipping Act, 1916, the Merchant Marine Act, 1920 or the Merchant Marine Act, 1936, as alleged, and accordingly denied the relief requested.

POSITIONS OF THE PARTIES

BSA

BSA excepts to the Presiding Officer's finding that it has failed to sustain its burden of proof. It views its burden as requiring it only to present evidence that indicates "to some degree" that Rule 10 is unlawful, and not to prove "that it suffered some quantifiable injury or damage." BSA maintains that the Commission has a responsibility in these complaint proceedings to protect the public interest and the commerce of the United States by ensuring that the contracts at issue are the fairest that can be devised. BSA argues that the Presiding Officer erred by failing to apply the Commission's regulatory powers to the issues raised in these proceedings.

BSA also challenges the Presiding Officer's refusal to find that NYSA has dominated the ILA's negotiations. BSA points out that the Port of Boston is dwarfed by the Port of New York in size, significance, and economic bargaining power. NYSA's dominance is alleged to be significant because the "first port rule" became an accepted practice under NYSA's influence ten years before container traffic began to move to Boston. BSA insists it does not have the economic power to defy NYSA with respect to the "first port rule" by negotiating a different arrangement with the ILA.

BSA contends that the "first port rule" is discriminatory because it undermines the parties' objectives in initiating the container royalty in the first instance. Because the royalties are designed to protect the longshoremen who have lost job opportunities, BSA believes that the assessment should benefit longshoremen at the port of destination rather than the port of transshipment.

BSA advises that because the container royalty funds are administered locally within each port area, its members may have to raise additional funds, "if the royalty payments received in the Port of Boston are insufficient to support the fringe benefit programs involved." This would allegedly cause BSA members to pass these additional costs onto users of the port and thereby make Boston less competitive.

BSA concludes that it has presented sufficient evidence for the Presiding Officer to have found that Rule 10 is unjustly discriminatory and unfair and therefore detrimental to the commerce of the United States.

NYSA

NYSA generally supports the Presiding Officer's findings and conclusions that BSA has failed to prove shipping statute violations.[5] NYSA submits that BSA failed to establish that:

(1) Boston's pension funds are currently financially unsound;

(2) Container royalties allegedly lost to New York have caused this fiscal plight;

(3) The deficiency has required the imposition of additional assessments;

(4) The added cost has made Boston uncompetitive;

(5) This competitive disadvantage has induced a diversion of Boston cargo to other ports; and

(6) The abolition of the "first port rule" would remedy these deficiencies.

DISCUSSION

Upon review of the entire record in this proceeding, the Commission concludes that the Presiding Officer's disposition of BSA's complaints is well reasoned and supportable in both law and fact. The Commission also concludes that the Presiding Officer properly denied the Respondent's various preliminary motions, although the discussion of the merits of these preliminary motions ranged unnecessarily beyond the stated basis for their denial. Accordingly, the Commission will adopt the Presiding Officer's denial of Respondent's motions only to the extent it is based on a finding that his ultimate disposition of the substantive issues in these proceedings rendered it unnecessary for him to dispose of the Respondent's motions on the merits.

[5] However, NYSA filed "cross-exceptions" with its Reply Brief in the event the Commission determines that the Presiding Officer disposed of its Motion for Summary Judgment on the merits rather than procedural grounds. Exceptions in these proceedings were due on March 1, 1982. NYSA's "Cross-Exceptions" were filed on March 16, 1982. These exceptions are therefore untimely and will be denied.

Complaint proceedings initiated pursuant to either section 22 or section 15 of the Shipping Act, 1916 (as amended by the MLAA) are governed by section 556 of the Administrative Procedures Act (5 U.S.C. § 556). Section 556 and the Commission's Rules of Practice and Procedure [6] provide that the burden of proof shall be on the proponent of a rule or order. Because BSA has proposed that Rule 10 is unlawful and should be disapproved, it has the burden of so demonstrating in these consolidated proceedings.[7] The Commission as a quasi-judicial body does not have any role in complaint proceedings other than that of decision maker. As the trier of fact, the Commission, upon review of the evidence in these proceedings and BSA's exceptions, agrees with the Presiding Officer's finding that BSA has failed to sustain its burden of proving that Rule 10 is unlawful.

BSA failed to demonstrate that Rule 10 causes injury to Boston shipping interests under sections 16 or 17 of the Shipping Act, 1916. Although BSA argued that the "first port" rule could place it at a competitive disadvantage because of increased labor costs at Boston, BSA failed to present any evidence comparing its overall labor cost, including the "Boston Dollar", with the labor cost of competing ports.[8] Nor did BSA present any evidence which would tie the decreasing cargo volumes in the Port of Boston to increased labor cost flowing from the "first port" rule. Finally, although BSA alleges that it has lost container royalties, this loss is admitted to be a "direct result of the barge feeder service" rather than Rule 10 of the ILA Master contracts. In short, BSA has not cited any evidence which would support its allegations that the operation of Rule 10 is unfair and unjustly discriminatory.

THEREFORE, IT IS ORDERED, That the Boston Shipping Association's Exceptions in these proceedings are denied.

IT IS FURTHER ORDERED, That NYSA's "Cross-Exceptions" are denied as being untimely.

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[6] 46 C.F.R. § 502.155.

[7] *Atchison T. S.F. Ry. v. Wichita Board of Trade*, 412 U.S. 800 (1973); *Prince Mfg. Co. v. United States*, 437 F.Supp. 1041 (1977).

[8] The speculative nature of BSA's arguments is indicated by the following statement in its Exceptions:

> *If* the royalty payments received in the Port of Boston are insufficient . . . then the members of BSA must raise the necessary funds . . . from other sources. Such activity, of course, would undoubtedly cause the BSA members to pass these charges on to the users of the Port, thereby making it less competitive. (Emphasis added).

The Commission must decide cases on the evidence of recordand the reasonable deductions to be drawn therefrom. It may not adjudicate disputes arising under the Shipping Act on the basis of speculative possibilities. *Agreement No. 9932*, 16 F.M.C. 293 (1973); *Alcoa S.S. Co., Inc. v. Cia Anonima Venezolana*, 7 F.M.C. 345 (1962); *West Coast Line Inc. v. Grace Line*, 3 F.M.B. 586 (1951).

IT IS FURTHER ORDERED, That the Initial Decision in these proceedings is adopted to the extent indicated above.

FINALLY, IT IS ORDERED, That these proceedings are discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

*Vice Chairman Moakley did not participate in these proceedings.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 81-30 AND 81-31

THE BOSTON SHIPPING ASSOCIATION, INC.

v.

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.

1. Motion for Summary Judgment and to Dismiss the Complaints will be denied where there are facts in dispute in the record and where a decision on the merits is warranted.
2. Where a provision in a collectively bargained labor agreement is unobjectionable on its face, it does not violate the shipping laws where it requires a container royalty to be collected on cargo at the "first port" the cargo is handled by ILA labor, even if the cargo is transshipped to another port, and where the purpose of the provision is to protect union members against the effects of containerization.
3. Where a provision in a collectively bargained labor agreement is alleged to have violated sections 15, 16, 17 and 18 of the Shipping Act, 1916, section 8 of the Merchant Marine Act of 1920, and section 205 of the Merchant Marine Act of 1936, and where said provision is alleged to be unjustly discriminatory as between carriers, shippers and ports and to operate to the detriment of the commerce of the United States, the burden of proof is on the Complainant, and where the Complainant fails to adduce specific facts setting forth the exact nature of the discriminatory practice and its adverse impact on competition and/or the commerce of the United States, his burden has not been met and his claims for relief must be denied.

Allan van Gestel and *Robert P. Wasson, Jr.*, for Complainant, The Boston Shipping Association, Inc.

C. Peter Lambos, *Donato Caruso* and *Peter C. Lambos* for Respondent New York Shipping Association, Inc.

Rodney Earl Walton for Respondent Southeast Florida Employers Port Association, Inc.

William K. Thomas and *Frank McRight* for Respondent Mobile Steamship Association, Inc.

Francis A. Scanlan and *A. Adjorte Duer* for Respondent Council of North Atlantic Shipping Associations.

Ernest L. Mathews and *Thomas W. Gleason* for Respondent International Longshoremen's Association, AFL-CIO.

James Patrick Cooney for Respondent West Gulf Maritime Association, Inc.

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

Adopted June 15, 1982

BACKGROUND INFORMATION

These consolidated cases [2] began with the filing of a Complaint pursuant to the Maritime Labor Agreements Act of 1980 (MLAA), Public Law 96-325,[3] and the filing of a Complaint pursuant to the provisions of section 22 of the Shipping Act of 1916 (46 U.S.C. 821).[4]The original Complaints, which were filed by The Boston Shipping Association (BSA), named the New York Shipping Association, Inc. (NYSA), as Respondent. On May 22, 1981, NYSA filed its Answer raising several Affirmative Defenses which will be discussed later. On June 17, 1981, BSA filed Amended Complaints in both cases.[5]

The substantive issues raised in both the Original and the Amended Complaints are the same. However, in the Amended Complaints, additional Respondents were added, namely, the International Longshoremen's Association, AFL-CIO (ILA), the Council of North Atlantic Shipping Associations (CONASA), the West Gulf Maritime Association, Inc. (WGMA), the Mobile Steamship Association, Inc. (MSSA), and the Southeast Florida Employer's Port Association, Inc. (SEFEPA). All of the Respondents answered the Amended Complaints, asserting similar affirmative defenses which will be discussed later. In addition to the Answers, most of the Respondents filed Motions to Dismiss the Amended Complaints. Also, Motions for Summary Judgment have been filed.

On October 13, 1981, these cases were set down for hearing. At that time the parties agreed that the cases would be submitted without the need to take oral testimony. BSA and NYSA submitted an agreed stipulation of facts, which is somewhat limited and incomplete when related to the issues involved, and various documents were placed in the evidentiary record. The exhibits submitted by the parties will be referred to throughout this decision as follows:

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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] These cases were consolidated for hearing and briefing by Order served June 7, 1981.

[3] Docket No. 81-30.

[4] Docket No. 81-31.

[5] Under Public Law 96-325 (section 15 of the Shipping Act, 1916), the Commission must issue its decision in these cases within one year of the filing of the Complaint, as amended. The Commission's Rules of Practice and Procedure (46 C.F.R. 502) require that the Initial Decision must be issued on or before February 16, 1982.

JOINT EXHIBIT	-	JX
BSA EXHIBIT	-	BX
CONASA EXHIBIT	-	CX
NYSA EXHIBIT	-	NX

FINDINGS OF FACT

The facts found below are drawn from the joint stipulation of facts submitted by the parties, and from the various exhibits contained in the record. References to various paragraphs of the joint stipulation of facts will be prefaced by the letters "SF."

1. Complainant, The Boston Shipping Association, Inc. ("BSA"), is a non-profit corporation, organized under the laws of the Commonwealth of Massachusetts and having its usual and principal place of business at 223 Lewis Wharf, Boston, Massachusetts 02110. At all times material hereto BSA is, and has been, a multi-employer bargaining association and is, and has been, the employer or management negotiating representative for all collectively bargained, longshore, labor-management agreements affecting the Port of Boston, and is, and has been, the administrator of all fringe benefit funds collected pursuant to such agreements. BSA's membership is comprised of twenty-five (25) commercial firms including contracting stevedores and deep water lines, as well as the Massachusetts Port Authority, a public instrumentality of the Commonwealth of Massachusetts, charged with the responsibility of promoting, developing and protecting the waterborne commerce of the Port of Boston. BSA's membership owns or operates virtually all maritime facilities in the Port of Boston which are regularly used in the foreign and intercoastal trade. (SF, par. 1.)

2. The Respondent, New York Shipping Association, Inc. ("NYSA"), is a New York corporation having its usual place of business at 80 Broad Street, New York. New York. It is and has been the negotiating representative for employers of the International Longshoremen's Association members in the geographic area subject to the jurisdiction of the Port Authority of New York and New Jersey ("Port of New York"). Its membership is comprised of approximately one hundred thirty (130) steamship carriers, both American flag and foreign flag, serving the ocean commerce of the United States (SF, par. 2.)

3. The Respondent, International Longshoremen's Association, AFL-CIO ("ILA"), has its principal place of business at 17 Battery Place, New York, New York 10004. It is the certified collective bargaining representative for units of employees comprising virtually all of the more than eighty thousand (80,000) persons employed as longshoremen, carloaders, clerks, checkers, timekeepers and in related crafts in the various ports on the Atlantic and Gulf coasts from Portland, Maine, to and including Brownsville, Texas. (SF, par. 3.)

4. The Respondent, Council of North Atlantic Shipping Associations, Inc. ("CONASA"), is a corporation having its principal place of business at Suite 600, Lafayette Building, Philadelphia, Pennsylvania 19106. It is an association of shipping associations. Among its members is the BSA. It is a multi-employer bargaining association which, at all times material hereto, is, and has been, the employer or management negotiating representative for the ports of its members in connection with the Master Contracts between itself, various employer representatives on the Atlantic and Gulf coasts, and the ILA. (SF, par. 4.)

5. The Respondents, West Gulf Maritime Association, Inc. ("WGMA"), a corporation whose principal place of business is Suite 600, 2616 South Loop West, Houston, Texas 77054; Mobile Steamship Association, Inc. ("MSSA"), a corporation whose principal place of business is at Post Office Box 1077, Mobile, Alabama 36601; and Southeast Florida Employers Port Association, Inc. ("SEFEPA"), a corporation whose principal place of business is at 1177 South American Way, Miami, Florida 33132, are all multi-employer bargaining associations similar to BSA and were and are, at all times material hereto, the employers or management negotiating representatives for the port they represent in connection with the Master Contracts. (SF, par. 5.)

6. NYSA, CONASA, WGMA, MSSA, SEFEPA and the ILA are, in their representative capacities, parties and signatories to the Master Contract in effect starting October 1, 1980 (SF, par. 6.)

7. NYSA, CONASA, and the ILA were each, in their representative capacities, parties and signatories to the Master Contract in effect from October 1, 1977, to September 30, 1980. (SF, par 7.)

8. The Master Contracts between the ILA and the various employer representatives on the Atlantic and Gulf coasts, including BSA and NYSA, govern certain matters affecting all ILA Ports from Portland, Maine, to and including Brownsville, Texas. (SF, par. 8.)

9. With the exception of the Job Security Program ("JSP") established in the Master Contracts, fringe benefit funds are collected, handled, managed and administered on a separate basis within each port area without any allocation to other port areas. (SF, par. 9.)

10. Since 1971, CONASA has acted on behalf of its members as a multi-employer bargaining representative in negotiating master contracts with the ILA covering certain terms and conditions of employment of longshore labor, including container royalties. The constituent members of CONASA include the local multi-employer port associations in five major ports or the North Atlantic Coast of the United States, *i.e.*, Boston, Providence, Philadelphia, Baltimore and Hampton Roads. NYSA was a member of CONASA until October 22, 1977. Each of these local associations has basically the same structure, type of membership and functions as NYSA. Complainant BSA is one of the constituent members of CONASA. (SF, par. 10.)

11. Respondent WGMA is a not-for-profit board of trade incorporated under the laws of Texas. WGMA functions on behalf of its members as the multi-employer bargaining association in the negotiation and administration of labor agreements covering ten ports from Lake Charles, Louisiana, to Brownsville, Texas. (SF, par. 11.)

12. Respondent MSSA is an Alabama not-for-profit membership corporation which acts as the multi-employer bargaining representative for the longshore industry in the port of Mobile. (SF, par. 12.)

13. Respondent SEFEPA is a multi-employer bargaining association which represents shipping employers in the ports of Miami and Port Everglades, Florida. (SF, par. 13.)

14. ILA, on behalf of its constituent divisions, local unions and individual members, has negotiated and entered into master and local collective bargaining agreements with CONASA, NYSA, BSA and the other multi-employer bargaining associations in this case covering the terms and conditions of employment of these dock employees. (SF, par. 13.)

15. For many decades, bargaining on the Atlantic and Gulf Coasts commenced with negotiations between the ILA and NYSA in the Port of New York. After agreement had been reached with NYSA, the ILA would then bargain with other ports which generally adopted the master terms of the labor agreement negotiated in New York. In 1956 the ILA demanded bargaining on a coast-wide basis. After a lengthy strike that year, the employer associations in the other major North Atlantic ports permitted NYSA to negotiate a master contract on behalf of all North Atlantic ports with respect to certain specific master issues. In 1956, and each of the succeeding collective bargaining periods, including the one ending September 30, 1971, master contracts covering the specified bargaining items were entered into by NYSA with the ILA for and on behalf of itself and the other North Atlantic employer associations, including BSA. Local issues, however, were negotiated separately between each port association and the ILA locals in the individual ports. (SF, par. 15; NX 8 at 6, 53-54.)

16. Prior to the negotiation of the 1971 master longshore contract, CONASA was organized. On November 16, 1971, CONASA and ILA formalized the scope of their consensual multi-employer bargaining unit in a memorandum of agreement signed by each member of CONASA, including BSA. This agreement reads in pertinent part as follows:

> ILA and CONASA agree to act as the collective bargaining representatives for their constituent locals and members, as referred to above, on the seven master contract items which are as follows:
>
> A. Wages
>
> B. Hours

C. Contributions to the Welfare Plans
   (but not the benefits)

D. Contributions to Pension Plans
   (but not the benefits)

E. Term of the Agreement

F. Containerization [which includes
   the Rules on Containers]

G. Lash

All other terms and conditions of employment are local items which will be negotiated locally by each of the above port associations and their ILA locals in each respective port.

The resulting 1971-1974 CONASA-ILA master labor contract was then generally adopted in other South Atlantic and Gulf ports. In the Port of Boston, the 1971 Master Contract (NX 2) was incorporated into the local BSA-ILA collective bargaining agreement (SF, par. 16; NX 9 at 32-36, 53-55, 60-61, 90-94, 105-108).

17. After the formation of CONASA, the ILA continued to advocate "national" bargaining on a Maine to Texas basis. The structure of bargaining that prevailed in 1971 remained in effect during the 1974 longshore negotiations. Again, the Master Contract was embodied into the local labor contract in Boston. However, during the 1977 negotiations, a selective coastwide ILA strike against automated steamship carriers led to the formation of a new multi-employer bargaining unit comprised of steamship carriers ("Carriers") operating in the thirty-four (34) major ports on the Atlantic and Gulf Coasts. The multi-carrier unit and the ILA negotiated the collectively bargained JSP Program to assure the fiscal integrity of pension, welfare and Guaranteed Annual Income ("GAI") trust funds in the covered ports. (SF, par. 17; NX 10 at 39-51, 76-78, 85-87, 128-140, 155-156, 158-160.)

18. Differences arose between NYSA and other CONASA members concerning this new bargaining format. As a result, NYSA withdrew from CONASA on October 22, 1977. The resulting 1977 Master Contract with ILA was negotiated by NYSA, CONASA, and the Carriers. This labor accord, which included the JSP agreement negotiated by the Carriers, was thereafter adopted in the individual labor agreements negotiated in other Atlantic and Gulf Coast ports. (SF, par. 18.)

19. In the 1980 longshore labor negotiations, for the first time a "national" bargaining format prevailed. NYSA, CONASA, WGMA, MSSA, SEFEPA and the Carriers negotiated with the ILA on the master bargaining subjects. Representatives of the New Orleans Steamship Association and the South Atlantic Employers' Negotiating Committee, the other major multi-employer associations in the longshore industry on the Atlantic and Gulf coasts, attended some of the bargain-

ing sessions as observers. The 1980 Master Contract ensued. It constitutes the first longshore labor contract binding all shipping employers and employer associations within the East and Gulf coast areas, direct employer and Carrier management group. The 1980 Master Contract (NX 5) was incorporated into the local labor agreement in the Port of Boston. (SF, par. 19; NX 12 at 33-47, 71-73, 79-82, 96-103.)

20. The Port of New York by virtue of its size and prominence has always been the bellweather in longshore labor negotiations. Prior to the formation of CONASA, NYSA was the bargaining spokesman for the entire North Atlantic range. However, the settlement of the master terms in the Port of New York was not binding in other ports. BSA expressly limited the scope of NYSA's bargaining authority by insisting that the New York settlement would not be binding until expressly adopted in a local Boston labor contract. (BX 24 at 2.) In 1968, both Boston and Philadelphia refused to endorse NYSA's bargaining position. (BX 5 at 11.) In fact, BSA revoked NYSA's bargaining authority when the ILA demanded that GAI be negotiated as a master subject. (BX 5 at 11.)

21. From the formation of CONASA in 1971 until NYSA's resignation in 1977, NYSA was assigned 40 percent of the vote. (NX 49 at 13.) After NYSA resigned, the other members of CONASA reaffirmed CONASA's sole and exclusive authority as their bargaining agent. They expressly admonished that neither NYSA nor the Carriers could negotiate a master contract on their behalf. (BX 27.)

22. The members of CONASA selected NYSA's president. James J. Dickman, as CONASA's president and chief negotiator. BSA was disappointed with Mr. Dickman's conduct of the bargaining in 1971, 1974 and 1977, but it never made any attempt to resign from CONASA or to replace Mr. Dickman as chief negotiator. (NX 49 at 26-29.)

23. In the negotiations of every master contract, all management representatives participated in the bargaining. They were appointed to committees which met with their union counterparts in isolated groups. (NX 48 at 68.) Every representative was kept fully informed of the union's positions and demands. (NX 48 at 69-70.) Every management position was formulated after extensive discussions in which all management representatives took part. (NX 50 at 36-37.) Containerization, the principal bargaining issue, was discussed among management representatives "around the negotiating table." (NX48 at 222.) Management's position on money items was arrived at by formal voting. (NX 48 at 74.) Once the management groups were able to reach a meeting of the minds, then their united position was transmitted to Thomas W. Gleason, the ILA's chief negotiator, by a management team composed of Mr. Dickman and a representative of CONASA, which at times was Arthur Lane, the president of BSA. (NX 48 (Vol. 2) at 94; NX49 at 17-18; NX 50 at 37-38.) If any major port association or group of port

associations objected to a management proposal, it would not be transmitted to the ILA, but would go "back to the drawing board." (NX 48 at 84.)

24. Although the bargaining format has gravitated toward a national bargaining unit, each local port association retains its right to bargain individually. New Orleans Steamship Association and South Atlantic Employers' Negotiating Committee have declined to negotiate or execute a master contract. (NX 48 at 31-32.) In 1977, when NYSA was unable to convince the other CONASA members to endorse the Carrier Group and its negotiation of JSP as a master contract item, NYSA resigned and reverted to independent bargaining status. (JX 1 at 4, 7; NX 47 at 6; BX 5 at 3, 17; NX 50 at 38-39.) After NYSA's withdrawal from CONASA, the other members reaffirmed the bargaining authority of CONASA and refused to surrender their negotiating rights to NYSA even on a limited basis. (BX 16 (12/6/79 Minutes at 2.)

25. At no time was any port required to adopt the terms of the New York contract. Although since 1968 GAI in New York has been provided on a 2,080 hours per year basis, a substantially lower level has prevailed in Boston: 1,400 hours per year during the 1974-77 contract and 1,700 hours per year during the 1977-80 agreement. (BX 5 at 15, 18.)

26. During the past three decades, the longshore industry has experienced an industrial revolution during which new and highly innovative methods of cargo handling have been introduced and increasingly implemented. During this period, large metal containers, having dimensions as large as 40′ X 8′ X 8′, have been replacing the traditional piece-by-piece and carton-by-carton loading and unloading work performed by longshoremen on the piers. Now many tons of cargo in one metal container can be loaded on a vessel as a single block unit. This innovative process, known as containerization, and other forms of automation, while increasing work productivity, have produced, during the period from the 1950's to the present, a drastic and constant decline in jobs and work opportunities of longshoremen. (SF, par. 20.)

27. Automation has been the single most troublesome issue in longshore labor relations since its advent in the 1950's. It has caused the ILA from the very beginning to insist at the bargaining table that the industry protect its members from this technological job displacement caused by containerization and other forms of mechanization. The result was a bitter conflict in labor relations marked by ILA grievances, strikes and other forms of labor unrest in almost every year from 1958 to the present time. (SF, par. 21.)

28. The principal subject of bargaining from 1959 to the present has been the protection of longshoremen displaced by automation. During each of the major collective bargaining negotiations from 1959 to the present, the ILA has argued that a container was part of the hold of

the ship and should be loaded piece-by-piece and package-by-package, as had been done traditionally, and that the carriers were trying to take that part of the work from ILA's dockworker members. The shipping employers, on the other hand, sought the use of all kinds and sizes of containers without any restrictions. (SF, par. 22.)

29. The first collective agreement on the issue of containerization was reached in 1959 in the Port of New York. The compromise reached in 1959 was set forth in section 8 of the 1959 Memorandum of Settlement as follows:

> (a) Any employer shall have the right to use any and all type [sic] of containers without restriction or stripping by the union.
>
> (b) The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached, shall submit to arbitration in the manner described in paragraph 13 below, the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.
>
> (c) Any work performed in connection with the loading and discharging of containers for employer members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

This compromise permitted shipping employers to use all types and sizes of containers and to transport full shipper load ("FSL") containers [6] without prior handling of their contents by longshoremen (Section 8(a)), subject only to the payment of a royalty, the amount of which was to be fixed by an arbitrator's award (Section 8(b)). However, less than containerload and consolidated cargo originating in or destined to a point within the area of the Port of Greater New York, which historically arrived at the piers piece-by-piece, was to be stuffed and stripped at the piers by longshoremen in order to preserve their traditional dock work (Section 8(c)). (SF, par. 23.)

30. After a lengthy arbitration on the container royalty question, an award was issued on November 21, 1960, fixing the amount of the royalty at 35 cents per long ton on conventional ships, 70 cents per long ton on partially automated ships, and $1.00 per long ton on fully automated ships. This arbitration award is known as the "Stein Award." Virtually the same container royalty agreement and arbitration award was subsequently adopted in all ports from Maine to Texas. In 1968, a similar container royalty agreement was adopted in the local

[6] An FSL container is a full container load of goods beneficially owned by a single shipper or consignee which has its own employees load or unload the container at its own place of business. *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 497.

labor contract negotiated by BSA and the ILA, and has in all subsequent local Boston contracts to date. (SF, par. 24; NX 9 at 60; NX 10 at 84; NX 11 at 78-79; NX 12 at 78-79.)

31. The amount of this First Container Royalty, which is paid by steamship carriers on FSL containers loaded or unloaded away from the piers by non-longshore labor, was later doubled in a subsequent labor contract, effective May 1, 1977 (the second dollar of the First Container Royalties). In the 1971-74 CONASA-ILA master contract, a Second Container Royalty was adopted to be used to defray the costs of fringe benefits. (SF, par. 25.)

32. The award (Stein Award) did not address any issue relating to the use of the royalties. The award expressly noted that any resolution of that issue was reserved for later negotiation by the parties. (NX 7 (Opinion at 6).) The First Container Royalties have been distributed in cash to the longshoremen and distribution of container royalty allowances among ILA members has been embodied in the master contracts. The 1980 Master Contract, as incorporated in the local Boston labor agreement, expressly provides that the First Container Royalties (both the 1960 and 1977 dollars) must be used to provide supplemental cash payments each year to eligible longshoremen. (NX 5 at 3, 10; NX 12 at 46.) Since its inception in 1971, the ILA has agreed to contribute its Second Container Royalty (the 1971 dollar) to defray the costs of its members' fringe benefits. (JX 1 at 11; NX 2 at 2; NX 50 at 33-34.)

33. The Container Royalty Program in the Port of New York is administered by the NYSA-ILA Container Royalty Fund ("CRF"), a joint labor-management trust fund, jointly administered on a port-wide basis by trustees equally selected by NYSA and ILA and established pursuant to the provisions of Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. All container royalties paid in the Port of New York are transmitted by the steamship carriers directly to the CRF. The CRF annually pays a supplemental cash benefit to all eligible longshore employees attributable to the first container royalty collections. Amounts representing collections of the second container royalty are transferred by the CRF to the NYSA-ILA Fringe Benefits Escrow Fund, an LMRA § 302 joint labor-management trust fund. In addition to the second container royalty, it collects and holds fringe benefit tonnage and excepted commodity man-hour assessments imposed upon steamship carriers pursuant to the provisions of the collectively bargained NYSA-ILA tonnage assessment. The Escrow Fund transfers these tonnage and man-hour assessments, as well as the second container royalty payments, and any income earned thereon, to the joint labor-management fringe benefit trust funds, including welfare, GAI, vacation and holiday and medical and clinical services funds, as monies are required to meet the costs incurred by these funds. They in

turn directly dispense fringe benefits to longshoremen and their dependents. (SF, par. 26.)

34. The Container Royalty Program in the Port of Boston is administered unilaterally by BSA. All container royalties paid in the Port of Boston are transmitted either by the steamship carriers or their agents or stevedores to BSA, which pays supplemental cash benefits to those longshore employees selected by the ILA locals in Boston attributable to the second (1977) dollar of the First Container Royalty. Amounts representing collections of the first (1960) dollar of the First Container Royalty and of the Second (1971) Container Royalty are transferred by BSA to the BSA-ILA Pension Fund. (SF, par. 27.)

35. In the Port of Boston, BSA transmits to the ILA International (a) ten percent (10%) of the first dollar of the First Container Royalty BSA collects, and (b) ten percent (10%) of the supplemental cash income BSA disburses attributable to the second dollar of the First Container Royalty. (SF, par. 28.)

36. From the outset of the Container Royalty Program, it has been the prevailing rule that the royalty should be paid only once. It was also the routine custom and practice from the 1960's to impose the royalty only once in the port where the shipment was first handled by longshoremen working under a collective bargaining agreement which contained a container royalty provision. This "first port" rule was codified in the 1971-74 CONASA-ILA Master Contract and has remained intact in all subsequent master labor contracts as part of Rule 10 of the Rules on Containers. (SF, par. 29.)

37. BSA has incorporated Rule 10 in every local longshore collective bargaining agreement in the Port of Boston since 1971 to date. During this period, BSA has applied the "first port" rule in the Port of Boston: it has collected the royalties on every container handled first in the Port of Boston even though that container may have later been rehandled in another port. BSA never objected to the first port rule in either the 1971, 1974 or 1977 Master Contract negotiations. (SF, par. 30; NX 48 (Vol. 2) at 75-77; NX 49 at 36-37.)

38. Prior to the 1980 longshore negotiations, a meeting was held in Atlanta, Georgia, among representatives of NYSA, CONASA (including BSA), WGMA, MSSA, SEFEPA and other employer associations to formulate bargaining strategy. At that meeting, Arthur Lane, President of BSA, questioned the "first port" rule. He was told that this issue was one which should be considered in the first instance by CONASA. (SF, par. 31.)

39. BSA endeavored to have CONASA seek a change in or to request the ILA to negotiate a change in the first port rule. BSA's proposal with respect to Rule 10 was voted on by the members of CONASA and was rejected. (SF, par. 32.)

40. Since at least 1971, the BSA-ILA Pension Fund has been financed by:

(a) man-hour assessments imposed on all ILA man-hours at the rates set forth in the Master Contract;

(b) collections of the Pension Royalty imposed at the rate of $1 (the "Boston Dollar") per short ton on house-to-house containerized cargo as prescribed in the local Boston labor contract (JX 1 at 14; NX 9 at 42, 100; NX 10 at 59-60, 147-48; NX 11 at 55-56, 140; NX 12 at 55; NX 34 at 44; NX 48 at 102-05, 118, 121, 123; NX 48 (Vol. 2) at 35; NX 49 at 47; [7] and,

(c) contributions at the union's direction of amounts collected by BSA attributable to the first (1960) dollar of the First Container Royalty and the 1971 Second Container Royalty (NX 48 at 182-83, 186, 188; NX 48 (Vol. 2) at 31).

41. Although the Master Contract, as embodied in the local Boston labor agreement, requires that both the first (1960) and second (1977) dollar of the First Container Royalty be used exclusively for supplemental cash distributions (NX 5 at 3, 10; NX 12 at 46), BSA takes the position that its transfer of the first dollar of the First Container Royalty to the BSA-ILA Pension Fund complies with these contractual provisions. BSA contends that, in effect, the first dollar of the First Container Royalty is paid to Boston longshoremen, who then voluntarily contribute this payment to their Pension Fund. (BX 7; BX 9 at 8; BX 10 at 1; BX 11 at 2; NX 48 at 176, 178, 182-83, 200-01, 209; NX 49 at 41.)

42. Any increase in container royalty collections in the Port of Boston by reason of a modification of the "first port" rule would inure to the benefit of Boston longshore employees, either in the form of increased pension or health and welfare benefits or direct cash payments. (SF, par. 34.)

43. Since at least 1971, health and welfare benefits in the Port of Boston have been financed by a man-hour assessment on all ILA man-hours at rates set forth in the master contract. (NX 9 at 43, 101; NX 10 at 60, 148-49; NX 11 at 57, 141; NX 12 at 56; NX 48 (Vol. 2) at 36.)

44. Since at least 1971, vacation and holiday payments in the Port of Boston have been financed by a man-hour assessment on all ILA man-hours at rates unilaterally established by BSA. (NX 48 (Vol. 2) at 40-41.)

45. Since at least 1968, GAI in the Port of Boston has been financed by a tonnage assessment upon every long ton of cargo discharged or loaded in the Port of Boston at rates unilaterally established by BSA

[7] The Boston Dollar is not applied to "containerized cargo which has been or will be transshipped at another United States East Coast Port moving to or from Puerto Rico or in the domestic and/or intercoastal trade." (NX 9 at 42; NX 10 at 59-60; NX 11 at 55-56; NX 12 at 55.)

pursuant to a formula filed with the Federal Maritime Commission. (NX 10 at 68, 116; NX 11 at 64-65, 109; NX 12 at 64; NX 48 at 133-37; NX 48 (Vol. 2) at 39.) The GAI tonnage assessment rates have fluctuated. In the fiscal year ending September 30, 1980, a rate of \$.10 per ton was in effect, a reduction from the prior year's rate of \$.50 per ton. (BX 32 at 3; NX 34 at 53; *compare* NX 20 at 2 *with* NX 19 at 2.) In the fiscal year ending September 30, 1981, the GAI assessment rate was increased twice: to \$.50 per ton, effective October 1, 1980, and then to \$1.00 per ton, effective March 15, 1981. (BX 32 at 3.)

46. Feeder services have existed between the Ports of New York and Boston since the early 1970's. (JX 1 at 15; NX 35 at 16.) A barge feeder service operated by McAllister Lighterage Line, Inc., between New York and Boston has been in operation since 1976. (JX 1 at 15; NX 35 at 16-17.) Feeder services between Boston and Canadian ports were recently inaugurated. (JX 1 at 15; NX 48 at 55.) Feeder services also operate between other ports on the East Coast. (NX 48 at 163-64.)

47. Since 1972, container traffic in the Port of Boston has increased sixfold. (NX 27 at 4; NX 48 at 114.) Although Boston has traditionally been an import port (NX 48 at 172), the major increase in the volume of containerized cargo moving through the port in recent years has involved export rather than import cargo. From 1974 through 1980, total container tonnage increased by 18.6% from 678,948 tons in 1974 to 805,224 tons in 1980. (NX 14 at 2.) Export tonnage accounted for a 25.9% increase from 291,421 tons in 1974 to 366,880 tons in 1980 compared to only a 13.1% increase for import tonnage (387,527 tons in 1974 to 438,344 tons in 1980). (NX 14 at 2.)

48. In 1980, overall tonnage in the port of Boston increased by 4% to 898,262 tons (NX 13 at 1.) [8] Boston handled more high-valued cargo than any other port on the East Coast. (NX 13 at 1.) New cargo business was provided by the inauguration of a feeder service between Boston and Canada. (NX 13 at 1.)

49. During the nine-month period from October 1, 1980, to June 30, 1981, cargo volumes in the port declined. During this period, 457,056.79 container tons were moved, a decrease of 95,383.21 tons, or 17.2%, from the container tonnage moved in the comparable nine-month period of the prior year (552,440 tons) (*compare* NX 23 at 1 *with* NX 23 at 2). The decrease was more pronounced for breakbulk cargo and for pier-to-pier container movements, neither of which is subject to either container royalties or the Boston Dollar. The volume of break-

[8] These statistics compiled and published by the Massachusetts Port Authority are corroborated by BSA's own figures (*compare* NX 22 at 1 *with* NX 21 at 1). The BSA data show a 5% increase in general cargo tonnages in the fiscal year ending September 30, 1980 (752,751.66 tons in fiscal 1979 compared to 796,297.98 tons in fiscal 1980). BSA's statistics also demonstrate an even larger increase, 6%, in house-to-house container tonnage, which is subject to both the container royalties and the Boston Dollar (from 463,013.61 tons in fiscal 1979 to 495,226.09 tons in fiscal 1980).

bulk cargo declined by 59% from 27,896 tons in the 1979/80 period to 11,425 tons in 1980/81 period (*compare* NX 23 at 1 *with* NX 23 at 2). Pier-to-pier tonnage decreased by 27.9% from 42,759.66 tons in the 1979/80 period to 30,828.21 tons in the corresponding 1980/81 nine-month period (*compare* NX 23 at 1 *with* NX 23 at 2). Import house-to-house barge traffic, which is subject to both the container royalties and the Boston Dollar, decreased by 10% from 121,108.69 tons in the 1979/80 period to 108,877.81 tons in the corresponding 1980/81 period (*compare* NX 23 at 1 *with* NX 23 at 2).

50. Recently, the Massachusetts Port Authority ("Massport") has expended millions of dollars for the construction of new container facilities in the port to accommodate the expected cargo volume increases. (NX 27 at 5, 13; NX 48 at 146.) A new container terminal at Castle Island became operational this year. (NX 27 at 6; NX 48 at 111.) Massport expects to invest more than $100 million in port construction in the 1980's and 1990's which will include the development of a second new container terminal at the South Boston Naval Annex scheduled for use in the 1990's. (NX 13 at 1; NX 27 at 6, 13.)

51. Container royalties collected in the Port of Boston in the contract year ending September 30, 1981, exceeded by more than 29.8% the container royalties collected in the contract year ending September 30, 1978—from $946,461 in contract year 1978 to $1,228,582.77 in contract year 1981 (*compare* NX 16 at 2 *with* BX 32 at 1-2).

52. All pension, health, welfare, GAI and vacation and holiday benefits, prescribed in the BSA-ILA labor contracts from 1971 to date, have been paid in full. (NX 16; NX 19; NX 20; NX 48 (Vol. 2) at 61,, NX 49 at 92, 100-01; BX 32.) Pension benefits in the Port of Boston have been increased on three occasions since 1971, the latest being in the 1980 contract year. (NX 49 at 92-93, 102-03.)

53. Over the four-year period beginning October 1, 1977, and ending September 30, 1981, the fund balances of the Pension, Health & Welfare, GAI, Container Royalty, and Supplemental First Container Royalty Funds in the Port of Boston have increased (*compare* NX 16 at 2 *with* BX 32). The Pension Fund experienced a 79.5% increase of $8,369,418 in its fund balance over this period ($10,527,229 as of October 1, 1977, compared to $18,896,647 as of September 30, 1981) (*compare* NX 16 at 2 *with* BX 32 at 4). Only part of this increase was attributable to the Boston Dollar. During this four-year period, the Boston Dollar provided $2,550,462.20 to the Pension Fund.

54. In recent years and to an increasing extent, carrier members of NYSA which utilize and ship containerized cargo to the Port of Boston have changed their method of operation by first delivering containerized cargo to the Port of New York and then transshipping that cargo to the Port of Boston by barge or similar vessel. Such cargo is consequently "first handled by ILA longshore labor, at longshore rates," in

the Port of New York even though it is actually destined for the Port of Boston. (NX 21 and 22; NX 35; Answer to Interr. No. 19; NX 48 at 149-157; II-70 - II-79; NX 49 at 36-43.)

55. During the period, from October 1, 1980 (the effective date of the 1980 Master Contract), through June 30, 1981 (the latest month for which actual figures are available), the amount of container royalty revenue paid in the Port of New York on cargo transshipped to Boston amounted to Three Hundred Twenty-Six Thousand, Six Hundred Thirty-Three Dollars and Forty-Three Cents ($326,633.43), or approximately Thirty-Six Thousand Dollars ($36,000) per month (NX 23 at 1, line "inbound-barge" multiplied by $3 container royalty).

56. During the period from May 1, 1979, through September 30, 1980, the amount of container royalty revenue paid in the Port of New York on cargo transshipped to Boston amounted to Six Hundred Thirty-Eight Thousand, Five Hundred Sixty-Five Dollars and Fifty-Seven Cents ($638,565.57) (NX 23 at 1, line "inbound-barge" multiplied by $3 container royalty).

57. By letters dated May 12, 1978, and September 19, 1978, NYSA filed with the Commission all master and local New York longshore contracts. (NX 28; NX 29.) The transmittal letters contained the reservation that in the opinion of NYSA the agreements were not subject to § 15 or any other provision of the shipping laws. (NX 28 at 2; NX 29 at 1.) On October 20, 1980, NYSA filed with the Commission the master and local agreements for the period October 1, 1980, through September 30, 1983 (NX 30), noting, however, that with the exception of the JSP agreement and the NYSA-ILA tonnage assessment agreement, no other portion of either the master or local labor agreements was required to be filed for § 15 approval under the Maritime Labor Agreements Act ("MLAA"). (NX 30 at 2.)

58. The 1977 and 1980 Master Contract agreements contain the three assessments previously described as "container royalty payments." Within the Master Contracts under the heading "Management-ILA Rules On Containers," at Rule 10, it is provided in pertinent part that:

> The two Container Royalty payments, effective in 1960 and 1977 respectively, shall be continued and shall be used exclusively for supplemental cash payments to employees covered by the Management Agreements, and for no other purpose. The remaining royalty payment effective in 1971, also shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port to port basis. The Container Royalty payments shall be payable only once in the continental United States. They shall be paid in that ILA port where the container is first handled by ILA longshore labor at longshore rates. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to

another foreign port ("foreign-sea-to-foreign-sea containers") are exempt from the payment of container royalties. Container royalty payments shall be assessed against all containers moving across the continental United States by rail or truck in the foreign-to-foreign "LAND-BRIDGE" system.

Management and the Carriers agree that the payment of Container Royalties as provided in their agreements is of the essence of this agreement and if for any reason during the term of this agreement such payments cannot be made in their present form, then Management and the Carrier shall provide by some other form of assessment for the payment of equivalent amounts to be used for the same purposes as said Container Royalties are presently used. (NX 5.)

59. On August 8, 1980, the Maritime Labor Agreements Act ("MLAA"), P.L. 96-325, 94 Stat. 1021 (codified in 46 U.S.C. §§ 801, 814 and 841(c)), was signed into law. It provides in pertinent part that:

The term "maritime labor agreement" means any collective bargaining agreement between an employer subject to this Act, or group of such employers and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group.[9]

Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrange-

[9] Public Law 96-325 (94 Stat. 1021) amended sections 1, 15 and 45 of the Shipping Act, 1916, with respect to collective bargaining agreements. Section 6 of Public Law 96-325 (94 Stat. 1022) provides:

SEC. 6. The changes made to existing laws by the provisions of this Act shall not affect any claims for reparation, if any, based upon conduct occurring prior to the date of enactment of this Act or formal Commission proceedings commenced prior to the date of enactment of this Act.

ment. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter, upon complaint filed within 2 years of the date of filing of the agreement, disapprove, cancel or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. The Commission shall issue its final decision in any such complaint proceeding within 1 year of the date of filing of the complaint. To the extent that any assessment or charge is found, in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of section 22 or any other section of this Act, or of the Intercoastal Shipping Act, 1933, the provisions of this paragraph shall control in any matter involving assessment agreements described herein.

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

60. The MLAA originated on the House side of the Congress. As originally drafted, it provided an absolute exemption for all labor agreements from any provisions of the Shipping Act and related laws. When it reached the Senate side of the Congress, a "compromise" bill was ultimately approved. It exempted all labor agreements except those assessment agreements described above (par. 59), and those involving the tariff requirements set forth above. (BX 2-4.)

ULTIMATE FINDINGS OF FACT

61. Rule 10 in the Master Contracts is unobjectionable on its face and does not violate any provisions of the shipping laws.

62. The fact that Rule 10 allows New York longshoremen to receive certain monies on cargo ultimately destined for Boston, rather than Boston longshoremen, does not violate any provisions of the shipping laws.

63. The record fails to establish that Rule 10 has caused assessment of the "Boston Dollar" to continue, that the assessment of the "Boston Dollar" is necessary to allow continued funding of the BSA-ILA provision plan, and that the "Boston Dollar" causes cargo to be diverted from Boston to other ports.

64. The record contains insufficient facts to sustain the Complainant's burden of proof.

DISCUSSION AND CONCLUSIONS

These consolidated cases arise from the filing of two complaints. One (Docket No. 81-30), as amended, is brought under the Maritime Labor Agreements Act of 1980 (MLAA) and relates to a collectively bargained agreement entered into between negotiating representatives of Atlantic and Gulf Ports and the ILA in a "Master Contract" covering the period from October 1, 1980, through September 30, 1983. It asks in pertinent part that the Respondents "cease and desist from the aforesaid violations," and that the "Commission order to be established and put in force such assessment adjustments as are necessary to remedy the unjust discrimination or unfairness between the Port of Boston and the Port of New York herein complained of." [10] The second complaint (Docket No. 81-31), as amended, is brought under section 22 of the Shipping Act of 1916, 46 U.S.C. § 821, and relates to a "Master Contract" between the ILA and NYSA and CONASA for the period October 1, 1977, through September 30, 1980. It asks, in pertinent part,

[10] In its reply to SEFEPA's Motion to Dismiss, BSA specifically states it is a request to the Commission to "invalidate Rule 10."

that "the Commission order the Respondent N.Y.S.A. to pay to the Complainant by way of reparation for the unlawful charges hereinabove described the sum of Six Hundred Thirty-Eight Thousand, Five Hundred Sixty-Five and 57/100 ($638,565.57) Dollars, together with interest thereon, or such other sum as the Commission may determine to be proper as an award of reparation to remedy the unjust discrimination or unfairness between the Port of Boston and the Port of New York herein complained of."

In answering the Amended Complaints in the consolidated cases NYSA and the other Respondents raised as many as eight affirmative defenses in asking that the Complaints be dismissed. They are as follows:

> 1. The Commission lacks subject matter jurisdiction to entertain the amended complaint since the Master Contract is a maritime labor agreement exempt from regulation under the Act by virtue of the doctrine of labor exemption.
>
> 2. The Commission lacks jurisdiction to entertain the amended complaint since Respondent NYSA is not a person subject to the Act.
>
> 3. The Boston Shipping Association, Inc. ("BSA") is bound to the terms and provisions of the collectively bargained multi-employer Master Contract which was negotiated on its behalf by its representative, Respondent Council of North Atlantic Shipping Associations ("CONASA"). BSA's failure to resign from CONASA, withdraw from the multi-employer unit or otherwise disassociate itself from the Master Contract constitutes a waiver of any right BSA might have had to challenge the Master Contract. This collectively bargained accord constitutes a full and irrevocable settlement of the issues raised in the amended complaint.
>
> 4. Under the circumstances of this case, it would be inequitable and would not further the purposes of the Act to grant reparations or any other relief.
>
> 5. The amended complaint fails to state a claim on which relief may be granted.
>
> 6. The amended complaint is barred by the Statute of Limitations.
>
> 7. The amended complaint is barred by laches.
>
> 8. Complainant, BSA lacks standing to bring this action.

Further, SEFEPA raised three additional affirmative defenses stating:

> 1. The Amended Complaint fails to state a claim upon which relief can be granted because, among other reasons, (1) there is no relief requested against S.E.F.E.P.A., and (2) there is no privity between S.E.F.E.P.A. and the Complaintant [sic].
>
> 2. The Complaintant [sic] lacks standing to bring this action against S.E.F.E.P.A.

3. The Commission lacks subject matter jurisdiction over this claim as it relates to S.E.F.E.P.A.

In addition to the affirmative defenses and the Motions to Dismiss the Complaints, NYSA has filed a Motion For Summary Judgment. It bases its motion on five of the affirmative defenses set forth in its Answer to the Amended Complaint as follows:

1. The challenged maritime labor agreement is exempt from shipping law challenge (NYSA's Answers to Amended Complaints, 1st Aff. Def.);

2. NYSA is not a person against whom reparations may be imposed (*Id.*, 2nd Aff. Def.);

3. The collectively bargained labor contract at issue constitutes a full waiver, accord and settlement (*Id.*, 3rd Aff. Def.);

4. The complaints are time barred (*Id.*, 6th and 7th Aff. Defs.); and

5. BSA has no standing to recover reparations in this case (*Id.*, 8th Aff. Def.).

As to the preliminary motions, it should be noted at the outset that given the nature of the consolidated cases, and the record being made in them, we were reluctant to rule on the Motions to Dismiss the Complaints and the Motion For Summary Judgment. It was clear that, while the interpretation and application of a new statute was involved, there were material facts in dispute as to each of the preliminary issues raised. It was equally clear that once the case was fully submitted, resolution of the issues on the merits would be both possible and practicable. For these reasons and within the ambit of the Commission's holding in *Pouch Terminal Inc. v. The Port Authority of New York and New Jersey, Agreement No. T-2880 As Amended*, Docket Nos. 74-35, 74-42, served 3/14/75, 14 S.R.R. 1567, we have until now declined to rule on the various preliminary motions. In *Pouch*, the Commission reversed a ruling which denied the Respondent's motions to dismiss because of lack of jurisdiction. It properly and succinctly stated:

> . . . it is our opinion that the rulings . . . on the Port Authority's motion to dismiss was not only improvident but also premature at this stage of the proceeding. Uncertainties . . . and the question of section 15 jurisdiction should be resolved at a full hearing. Further, we find that a separate evidentiary hearing on jurisdiction would serve no regulatory purpose but might well cause unnecessary delays.

The Commission's perceptions in *Pouch* are equally applicable here. Even further, it is our view in light of the record before us, that the parties and the Commission will best be served by a decision on the merits. The issues raised on the merits overlap both factually and legally with many issues raised in the preliminary motions and the decision on the merits makes rulings on the preliminary matters raised unnecessary.

With this background then, let us now consider the Motion For Summary Judgment,[11] as well as the motions to dismiss the complaints. As to the latter, it should be noted generally that according to applicable principles of law, motions to dismiss are to be construed against the moving party and in the light most favorable to the complainant. Movants for dismissal must accept facts alleged by the complainant as true for purposes of ruling on the motion, and the motion will not be granted unless it appears beyond doubt that complainant can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Schenley Industries Inc. v. N. J. Wine & Spirit Whole. Ass'n*, 272 F. Supp. 872, 875-876 (D.N.J., 1967); *Continental Collieries v. Shober*, 130 F.2d 631, 635 (10 Cir., 1942); *Dewitt Motor Company v. Chrysler Motor Corporation*, 391 F.2d 912 (6 Cir., 1968). Further, motions to dismiss are granted sparingly in order to make sure that a complainant is not improperly denied an opportunity to prove his case and have his claim adjudicated on the merits. 5 Wright & Miller, *Federal Practice and Procedure*, § 1357, p. 598; *Hospital Building Company v. Trustees of Rex Hospital*, 511 F.2d 678, 680 (4 Cir., 1975). And finally, even if it appears unlikely that a complainant can prove his case, he is nevertheless entitled to try. *Continental Collieries, supra*.

As to the Motion For Summary Judgment, it is fundamental that a party seeking summary judgment must demonstrate the absence of genuine issues of material facts. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Isbrandtsen Co., Inc. v. State Marine Corp. of Delaware*, 4 FMB 511, 513 (1954), citing *Welling v. Fairmont Creamery Co.*, 139 F.2d 318 (8th Cir., 1943). It is also fundamental that in considering motions for summary judgment, courts will construe materials submitted by movants in the light most favorable to the parties opposing the motion. *Dewitt Motor Company, supra*. Also, argument can be made that the Commission does not have authority to decide such motions in the first instance based on the holding in *Isbrandtsen* (4 FMC 511), *supra*.[12]

In applying the above principles and considerations to the instant case, it is clear that the Motions to Dismiss the Complaints and the Motion for Summary Judgment must be denied. In its Motion for

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[11] The arguments presented by NYSA are similar to or have been adopted by other Respondents in presenting their affirmative defenses and motions to dismiss the complaints. Unless it is otherwise stated, the treatment of the NYSA arguments will also be applicable to the defenses raised and the motions made by the other Respondents.

[12] One law review article implies that a summary judgment procedure is lacking in the Commission's rules except for show cause proceedings. *Gellhorn & Robinson*, Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612, n. 51 (1971).

Summary Judgment, NYSA asserts that the "challenged maritime labor agreement is exempt from shipping law challenge" and that, therefore, the Commission has no jurisdiction over the agreement. NYSA predicates its case for summary judgment on the assertion that "The material facts germane to the adjudication of NYSA's affirmative defenses are well established and undisputed." It cites the testimony of James J. Dickman and Thomas W. Gleason as establishing those "undisputed" facts. While the cited testimony is informative and compelling, it is hardly undisputed. There are clear differences in the facts testified to by the witnesses and those advanced by the Complainant. They disagree as to whether or not the Rule 10 assessment was to fund fringe benefits. They differ on whether or not NYSA "dominated" the labor negotiations; on whether or not Rule 10 is "the only sound, fair, and workable rule"; on whether or not it equitably apportions the container royalty equally between dockworkers; on whether or not Rule 10 discriminates against the Port of Boston. In short, there are many factual differences which defeat the preliminary motions on the basis of the labor exemption and jurisdiction. Further, even if facts were not in dispute, the legal arguments made to support the motions either under the statutory exemption provided by the MLAA or the nonstatutory exemption set forth in *United Stevedoring Corp. v. Boston Shipping Ass'n (BSA)*, 16 FMC 7 (report on remand, 1972), are far from conclusive. Certainly, they are too important and too susceptible of varying interpretations to be disposed of by summary judgment or motions to dismiss.

As to the other preliminary matters raised by the Respondents (NYSA is not a person against whom reparations may be imposed; BSA has waived its rights with respect to Rule 10; the Complaints are barred by the statute of limitations; BSA has no standing; it would be inequitable to grant relief; the Complaints fail to state a claim on which relief may be granted; the Complaints are barred by laches; certain Respondents are improperly joined because there is no relief requested specifically from them or privity to them or jurisdiction over them)—all of these issues are such that they either were not fully developed factually at the time they were made or they were legally insufficient. In any event, it is our view that they need not be addressed individually and at length at this time. The decision on the merits will finally dispose of the ultimate issues involved and will make any long dissertation on the preliminary motions unnecessary. In addition, as will be evident in latter portions of this decision, some of the issues discussed in arriving at a decision on the merits would necessarily have been discussed and decided in ruling on the motions.

As to the determination on the merits of the issues involved, we have already noted the precise nature of each of the Complaints. At this point, it would be well to recall that Docket No. 81-31 involves a

Master Contract that was effective from October 1, 1977, through and including September 30, 1980, and that it does not involve a contract or any conduct executed or engaged in prior to the enactment of the MLAA,[13] and therefore the claim for reparation is governed by prior law. In Docket No. 81-30, the Complaint is brought specifically under the MLAA and seeks "assessment adjustments" under that Act and revocation of Rule 10. It involves a Master Contract that is effective from October 1, 1980, through September 30, 1983.

In its original brief, the Complainant allocates 45 of the 50 pages in its brief to refuting the affirmative defenses raised by the Respondents. We have already indicated we intend to deny all the preliminary motions and move on to the merits. However, the question of jurisdiction does cut across the issues raised on the merits so that some discussion of that issue is warranted. In its briefs, NYSA asserts generally that, "The first port rule is entitled to the labor exemption of the shipping laws." It seeks to support that argument by establishing that the first port rule is not an "assessment agreement" within the meaning of the MLAA because it is not "an assessment mechanism or formula" and does not allocate or apportion costs among shipping employers—"*the essential element of an assessment agreement*" (emphasis supplied). It cites language from the Senate Committee Report on the MLAA as well as certain case law to support its view.[14] NYSA also argues that the first port rule does not fund fringe benefits. It states "Container royalties are not fringe benefits" and that "the distribution of the royalties to the union members does not convert the royalty into a fringe benefit." It argues that "the supplemental income payments attributable to the 1960 dollar and the 1977 dollar of the First Container Royalty" are "an intraunion distribution of the royalties or licensing fees collected by the ILA." As to the 1971 Second Container Royalty dollar, it states that its use "to defray fringe benefit costs does not convert the royalty into a fringe benefit funding mechanism." In its original brief, NYSA then argues that even under the nonstatutory exemption set forth in *United Stevedoring Corp. v. Boston Shipping Ass'n (BSA)*, *supra*, the first port rule is exempt from Commission jurisdiction. It states that MLAA's statutory exemption is a codification of the preexisting nonstatutory exemption.[15]

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[13] Under section 6 of Public Law 96-325 (*supra*, fn. 9), the reparations requested in the Complaint would not be governed by the provisions of the MLAA, and prior law would govern. Since Docket No. 81-31 was begun after enactment of the MLAA, a question does arise as to whether or not relief requested other than reparations comes within the ambit of the MLAA or prior law. It is not necessary to make a determination on the issue in these cases.

[14] See page 11 of NYSA's Brief in Support of Summary Judgment and page 36 of NYSA's original brief.

[15] The four guidelines patterned after the "nonstatutory labor exemption" from the antitrust laws are:

Continued

The BSA, in its original brief, argues that the Commission does have jurisdiction over the Master Contracts at issue. It cites *Volkswagenwerk, supra*, and *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (1978), in support of its position. The Complainant asserts that, "The only question therefore is whether the Maritime Labor Agreements Act of 1980 ('MLAA of 1980') amended then existing law to remove Commission jurisdiction over maritime labor agreements." [16] As to whether or not the agreements involved were assessment agreements, BSA cites *Volkswagenwerk, supra*, and *NewYork Shipping Ass'n v. Federal Maritime Commission*, 495 F.2d 1215 (2d cir.) *cert. denied*, 419 U.S. 964 (1974). It alleges that the latter case involves the 1971 assessment agreement and that it was incorporated in the actual maritime labor agreement.

With respect to fringe benefits, BSA rejects NYSA's distinction between the "container royalty" fund and "other fringe benefit funds" administered in the Port of New York. It cites the language of the agreements involved, the purpose of the agreements (to offset the effects of technological job displacement caused by containerization), and the language of the Senate Report to the MLAA in support of its views.

At this point, we think the overlap between the jurisdictional aspect of the issues involved and their disposition on a merit basis is clear. It is equally clear that even when one rejects the jurisdictional arguments and proceeds to the merits, the resolution of issues does not become any easier. For example, as to the question of whether or not Rule 10 comes under the definition of an "assessment agreement" as used in the MLAA, one is hard-pressed to accept NYSA's argument that Rule 10 was not an assessment agreement because it is not a "formula" that allocates costs between shipping employers. The language of the MLAA that amended the Shipping Act, 1916, suggests otherwise.[17] It provides that, "assessment agreements, *whether part of a collective bargaining agreement or negotiated separately*, are subject to Commission jurisdiction, if they are to fund fringe benefits on other than a man-hour basis" (section 15, paragraph 5). In defining a maritime labor agreement which would include a nonexempt assessment agreement, the MLAA does not limit agreements to those between shipping employers (FF, par. 59).

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(1) the agreement was bargained in good faith;
(2) the matter is a mandatory subject of bargaining;
(3) the agreement does not impose terms on entities outside the collective bargaining group;
(4) the union is acting purely in its own self-interest and not in conspiracy with management.

[16] This statement seems to ignore the fact that at least insofar as Docket No. 81-31 is concerned, the MLAA would not apply to reparations and perhaps to certain other aspects of the relief requested.

[17] See also the Senate Report No. 96-854 on the MLAA (BX 4, page 4507).

As to the argument that the agreement was not to fund fringe benefits, once again NYSA's position is not easy to accept. The express language of the Master Contract, after discussing the 1960 and 1977 container royalties, states, "The remaining royalty payment effective in 1971, *also* shall be continued and shall be used *for fringe benefit purposes only*, other than the supplemental cash benefit . . ." (emphasis supplied). No matter how NYSA seeks to obviate this language by separating the language used in the agreement itself and its signatories from the direct payment of fringe benefits, certainly as to the 1971 royalty payment at least, the payments were used to fund fringe benefits.

As we move from the specifics of these cases to the MLAA generally, the issues become even more beclouded. When H.R. 6613, which ultimately became the MLAA, was originally passed by the House of Representatives, it exempted *all* "collective bargaining agreements and agreements preparatory thereto" from all Shipping Act regulation (Senate hearings, BX 4, page 4503). This meant that not only were such agreements exempt from section 15, but that they were exempt from all other sections of the Shipping Act. (See the colloquy between Vice-Chairman Moakley and Mr. Seifert, BX 2, page 14.) However, on June 4, 1980, the Merchant Marine Subcommittee of the Senate Committee on Commerce, Science held hearings where witnesses testified the House bill went "beyond what was necessary to assure free and unfettered collective bargaining, and that it stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo, and localities, and to prevent abuses made possible by one concerted activity of carriers and others." On June 16, the Senate Committee released a staff draft of an amendment in the nature of a substitute to H.R. 6613. After comments of interested parties, the amendment was adopted and ultimately enacted into law. Instead of exempting all maritime labor agreements, it exempted all such agreements *except* for agreements or arrangements for the funding of collectively bargained fringe benefits on other than a uniform, full man-hour basis arrived at without regard to the cargo handled. The MLAA also made it clear that the exemption granted would not affect the ability of the Commission to exercise authority over matters which are properly the subject of tariffs required to be filed with the agency whether or not those matters arise out of a maritime labor agreement.[18]

So here, whatever the original intent of Congress may have been, it ultimately rejected the idea that *all* maritime labor agreements were exempt from the shipping laws, simply because they were part of a

[18] None of the parties herein have even raised, much less discussed, the issues involved in the light of the tariff requirement set forth in the second sentence of the new section 45 of the Shipping Act, 1916. While the decision on the merits will make such discussion unnecessary, it would be pertinent to the Respondents' preliminary motions considering the burden of proof that is theirs.

labor agreement. It engrafted certain exceptions and qualifications in the MLAA which beg clarification and definition. It did not, as NYSA alleges, "codify" the preexisting nonstatutory exemption set forth in *United Stevedoring Corp. v. BSA, supra.* Whether or not and to what extent BSA is still applicable to maritime labor agreements, there is nothing in the MLAA which could lead one to conclude that it "codifies" the BSA exemption.

Finally, we come to the ultimate question presented in these cases. Assuming that all preliminary matters are resolved in the Complainant's favor and assuming further that Rule 10 of the Master Contract involved here is an assessment agreement for the funding of collectively bargained fringe benefits on other than a uniform, full man-hour basis—how does the agreement violate any of the shipping laws cited by the Complainant? We think the evidentiary record and legal argument fails to establish any violation whatsoever, and that the Complainant has failed to sustain his burden of proof.[19] In its original brief, BSA offers no real legal argument, nor does it cite one case in support of any specific assertion of any shipping law violation. Practically all of its arguments are concerned with preliminary matters. As to facts, it requests findings of 12 facts. It asks that NYSA be found to have "dominated" the various employer negotiating representatives and to have effectively controlled the course of negotiations leading to the formation of Master Contracts with the ILA. It then notes that in recent years, transshipments of cargo destined for Boston have been made from New York and that the cargo was "first handled" by New York longshoremen who received the container royalty. BSA then sets forth the "amount of container royalty revenue diverted to New York and lost to the Port of Boston." It asks that we find that the application of Rule 10 to the transshipped cargo forced BSA "to continue collection of an additional assessment on cargo moving through the Port of Boston (the Boston dollar) in order to maintain the actuarial soundness of fringe benefit funds that it administers." BSA then concludes that Rule 10 assessments are therefore "unjustly discriminatory and unfair as between carriers, shippers and ports, operate to the detriment of the commerce of the United States and violate Section 15, 16, 17 and 18 of the Shipping Act as amended 46 U.S.C. §§ 814-817, Section 8 of the Merchant Marine Act of 1920 as amended, 46 U.S.C. §§ 867, and Section 205 of the Merchant Marine Act of 1936 as amended, 46 U.S.C. §§ 1115."

We think the pivotal facts requested by the Complainant are unsupported in the record. The record hardly supports the view that NYSA

[19] *West Gulf Maritime Ass'n v. Port of Boston Authority,* Docket No. 75-21, slip op. at 8 (FMC, 1978); *Household Goods Forwarders Ass'n v. American Export Lines,* 20 FMC 496 (1978); *In re States Steamship Co.,* 5 FMB 304 (1957).

was as "dominant" as BSA suggests. Since New York is the largest U.S. port, certainly NYSA is a leader and its actions are often followed. However, the evidence is clear and we have found as fact that others were free to adopt or depart from NYSA's position and they often did (FF, pars. 20-25). NYSA itself withdrew from CONASA in 1977 when it could not bring CONASA members around to its point of view. So here, BSA is incorrect in its description of NYSA. Even if it were correct, however, that fact would add little to its case. This is so because NYSA "domination," standing alone, is unavailing and there is nothing in the record to even suggest that NYSA did anything improper during the negotiation of the Master Contracts involved. BSA suggests that "Rule 10 is particularly subject to NYSA's domination because the ILA is indifferent as to the competitive position among employers as long as the various fringe benefit funds are being funded" (Complainant's original brief, page 38). We find nothing in the record to support such an assumption. Indeed, the opposite seems true.

As to the BSA assertion that the application of Rule 10 causes the continuation of the "Boston Dollar" assessment to maintain the actuarial soundness of the BSA-ILA Pension Fund, once again facts are wanting. BSA makes no real attempt to factually demonstrate that the claimed unavailability of funds causes continuation of the "Boston Dollar." Such a showing would seem essential to BSA's argument since the "Boston Dollar" was initiated in 1971, many years prior to the expansion of the feeder service. Further, it presents no evidence as to what monies would be necessary to maintain "actuarial soundness," or evidence that present revenues are lacking, or that Rule 10 container royalties paid to New York on import feeder cargo would meet any shortage, or that if the above container royalties were paid to Boston, the assessment of the "Boston Dollar" would be discontinued.[20] Once again, even if BSA did factually support its argument, a question would still remain as to whether or not the viability of the BSA-ILA pension fund is a proper maritime issue requiring FMC consideration.

As to BSA's assertion that the continuation of the "Boston Dollar" places the Port of Boston at a competitive disadvantage, once again BSA has failed in its burden. There are no factual comparisons with competing ports, such as overall labor costs, so that it is impossible to determine whether or not Boston is at a competitive disadvantage. There is no conclusive testimonial evidence from carriers, shippers or other competent witnesses that the additional "Boston Dollar" is a significant competitive factor.

[20] The evidence shows that BSA-ILA fringe benefit funds and particularly the pension fund are healthy and have enjoyed increases in fund balances. Even without the "Boston Dollar," the pension fund has increased 55 percent in the past four years (FF par. 53).

Finally, as to the claim that competitive disadvantage causes a diversion of cargo from Boston to other competing ports, the record again is devoid of persuasive facts supporting such a claim. While BSA presents evidence showing a decrease in Boston cargo volume in the fiscal year ending September 30, 1981, there is no factual development to show that the decrease is attributable solely and exclusively to the diversion of cargo to other ports. There is no showing that while Boston's volume was decreasing, other competing ports were enjoying corresponding increases. Indeed, there is no showing that the decrease was not the result of factors completely unrelated to cost induced diversion, such as the effect of minibridge on East Coast ports (BX 5 at 16), the effect of the growing Canadian service provided by CAST (NX 48 at 170), or other factors, such as general recessionary conditions in the maritime industry and the proliferation of intermodal tariffs.

From all of the above, we believe the picture presented in these cases is clear. The history of the labor negotiations involved is undisputed. The record is replete with statements describing their origin and evolution. It is also undisputed that Rule 10 was the result of ILA's concern regarding the effect containerization would have on its members. The rule sprung from legitimate labor negotiations, which initially resulted in arbitration and advanced to the point where the rule was included in progressive and far-reaching labor negotiations on a national scale. At its inception in 1961 and well into the 1970's, no one complained about the rule. The requirement that the assessment it made be paid in the "first port" where ILA labor handled the cargo was accepted by all as a reasonable method of collection. Indeed, local ports, and in particular Boston, included it in their local labor contracts. It was not until the transshipment service in New York began to grow that BSA realized the implications and effect of Rule 10. It meant that cargo destined for Boston but transshipped from New York would generate a Rule 10 payment to New York and not Boston. As the transshipment service grew, BSA saw the disadvantage Rule 10 worked against Boston. In seeking to redress that disadvantage by invoking the shipping laws, BSA has failed in its burden, as we have already noted. It asks that Rule 10 be modified so that the port of destination be determinative of where the assessment is paid rather than the first port, and that it be allowed reparations or given relief under the MLAA for amounts "diverted" from Boston to New York as a result of Rule 10.

One need only consider the effect of granting the relief BSA requests to know that it is unwarranted. Were we to change Rule 10 as BSA suggests, what would be accomplished? Certainly, BSA would have more money to fund fringe benefit programs, but what would be the effect on other ports? If the transshipment service is a viable service in the industry—and there is no showing that it is not—why is it any fairer to give Boston longshoremen the Rule 10 dollar than New York longshoremen? The latter must handle the cargo off the vessel and onto the barge, so should they not be recompensed? Further, if Rule 10 were changed to accommodate Boston, what would be the effect on other ports who do not want the change? Would the new rule apply to all other ports or would there be a different rule on a port-to-port basis? Since the real cause of BSA's complaint is the effect of import feeder services, any attempt by the Commission to modify the first port rule to accommodate the Port of Boston would necessarily involve the Commission on a continuing basis. If external conditions changed in Boston or other ports, the rule would have to be revised, perhaps even returned to its original posture.

It seems clear to us that on this record BSA cannot sustain its position because Rule 10 simply does not constitute an unjustified competitive practice. While it may contain "the potential for interport discrimination," as the Complainant suggests (Complainant's Reply Brief, page 6)—that fact standing alone, its extent undefined, is hardly sufficient reason for us to intrude on the provision of a labor agreement, unobjectionable on its face, where the alleged injury is both factually and legally insufficient to establish any violation of the shipping laws.

In view of the above, we hold that Rule 10, as set forth in the Master Contracts in Docket Nos. 81-30 and 81-31, respectively, does not operate so as to violate sections 15, 16, 17 and 18 of the Shipping Act, 1916, section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act of 1936. Therefore, the relief requested in both consolidated proceedings under the MLAA and section 22 of the Shipping Act is hereby denied. It is further held that all preliminary motions of the Respondents, including Motions For Summary Judgment and the Motion to Dismiss the Complaint are hereby denied.[21]

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[21] We believe we would be remiss if, before closing, we did not make certain comments which, although not absolutely necessary to the decision made here, nevertheless may be of aid to these parties and others who may be similarly situated in the future. A reading of the history of MLAA given to the Congress by various witnesses indicates that neither the unions affected nor the Commission believes provisions of labor contracts ought generally to be subject to section 15 of the Shipping Act. As to other shipping law provisions (sections 15, 16 and 17, for example), witnesses disagreed and the MLAA was enacted with something less than an absolute exemption. On the basis of a reading of the record, we would suggest that where, as here, an issue is presented which does not involve a complicated assessment formula between carriers or types of cargo, but rather a simple, definitive, one-time assessment on all cargo, and where the issue is really a dispute between union interests in different ports—the parties themselves might well be able to negotiate the issue out of the labor agreement. This is so especially where that agreement is the result of nationwide bargaining. Such action would insure that the Commission would not need to become involved and would avoid the kind of result which, while deciding the rights of the litigants, does not finally dispose of the problem. Here, for example, the Complainant lost because it failed in its burden. However, should it perfect its case, the issue would again arise. We believe it might have been better for all concerned if the parties could have jointly assessed the effect of Rule 10 in an atmosphere of negotiation and cooperation, marshalled the facts, and reached an accommodation if one were warranted.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1120(I)

SINGER PRODUCTS CO., INC.

v.

DELTA STEAMSHIP LINES, INC.

ORDER ON RECONSIDERATION

June 24, 1982

This proceeding is before the Commission upon receipt of a letter dated April 13, 1982 from Singer Products Co., Inc. constituting in effect a request for reconsideration of the Commission's April 7, 1982 Order reversing the Settlement Officer's award of reparations. In support of its request, Singer submits copies of documents already in the record.

Rule 261 of the Commission's Rules of Practice and Procedure provides that a petition for reconsideration will be summarily rejected unless it

> (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;
>
> (2) identifies a substantive error in material fact contained in the decision or order; or
>
> (3) addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party.

46 C.F.R. 502.261(a). Singer's petition is merely a reargument and resubmission of evidence which the Commission has already concluded is inadequate. Because it fails to meet any of the criteria of Rule 261, Singer's request must be rejected.*

* Singer does allege a factual error in that the Commission noted at page 5 of its Order that there was an inconsistency in Singer's submissions: the packing slips refer to 78 pallets but the packing list indicates 77. The confusion derives from the fact that, intending to submit packing slips in Informal Docket No. 1120(I), Singer supplied packing slips for Informal Docket No. 1126(I), the latter involving 78 pallets. This error was reinforced in Singer's cover letter specifying that the slips cover "the 78 Pallets in question." Thus, the alleged "error" in the Commission's Order was of Singer's own making. The matter now having been clarified, however, we find that the "error" in question is of minor significance, is not critical to the disposition of this proceeding, and does not constitute a substantive error in material fact within the meaning of 46 C.F.R. 502.261 (a)(2).

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Singer Products Co., Inc. is denied; and

IT IS FURTHER ORDERED, That this proceeding is 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 James V. Day did not participate. Commissioner Daschbach's separate opinion is attached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1126(I)

SINGER PRODUCTS CO., INC.

v.

DELTA STEAMSHIP LINES, INC.

ORDER ON RECONSIDERATION

June 24, 1982

This proceeding is before the Commission upon receipt of a letter dated May 5, 1982 from Singer Products Co., Inc. constituting in effect a request for reconsideration of the Commission's April 27, 1982 Order reversing the Settlement Officer's partial award of reparations. In support of its request, Singer submits copies of several documents either already in the record or imparting information already considered by the Settlement Officer and the Commission.

Rule 261 of the Commission's Rules of Practice and Procedure provides that a petition for reconsideration will be summarily rejected unless it

> (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;
>
> (2) identifies a substantive error in material fact contained in the decision or order; or
>
> (3) addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party.

46 C.F.R. 502.261(a). Singer's petition is merely a reargument and resubmission of evidence which the Commission has already concluded is inadequate. Because it fails to meet any of the criteria of Rule 261, Singer's request must be rejected.*

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Singer Products Co., Inc. is denied; and

* Singer also objects for the first time to the Settlement Officer's decision not to award all the reparations sought in Singer's original complaint. If Singer intends its letter to constitute a petition for reconsideration of the Settlement Officer's February 8, 1982 decision, then it must be denied as untimely. *See* 46 C.F.R. 502.261(a).

IT IS FURTHER ORDERED, That this proceeding is 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's separate opinion is attached.