DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1984

Alan Green, Jr., Chairman
James J. Carey, Member
James V. Day, Member
Thomas F. Moakley, Member
Robert Setrakian, Member

CONTENTS

TABLE OF CASES REPORTED

DOCKET NUMBERS OF CASES REPORTED

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 522]

GENERAL ORDER 24, AMENDMENT NO. 3

DOCKET NO. 76–63

FILING OF AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT, 1916

July 11, 1983

ACTION: Amendment of Final Rules.

SUMMARY: This grants, in part, Petitions for Reconsideration of the final rules issued in this proceeding. These amendments are for the purpose of further clarifying the status and treatment of supporting statements, and for allowing communications between Commission staff and agreement proponents in the case of uncontested agreements.

DATE: Effective July 15, 1983.

SUPPLEMENTARY INFORMATION:

On October 18, 1982, the Commission issued final rules [1] in this proceeding which revised regulations governing the filing and processing of agreements pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. §814). A supplement to the final rules was issued on November 2, 1982,[2] and the rules became effective on January 1, 1983. Petitions seeking relief from certain provisions of the final rules have been filed by a group of fifteen steamship conferences and rate agreements (Conference Group),[3] by the Pacific Coast European Conference (PCEC),[4] by Sea-Land Service,

[1] *General Order* 24, Amdt. 2, 25 F.M.C. 423.

[2] 25 F.M.C. 445. Notice of the Office of Management and Budget clearance of the reporting requirements of the rules appeared in the *Federal Register* on January 7, 1983 (48 F.R. 797).

[3] The Conference Group filed a "Petition For Reconsideration Or Modification Of, And Relief From, The Commission's Final Rules" pursuant to Rules 261, 51 and 69 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261, 502.51 & 502.69). The fifteen conferences and rate agreements joining in this Petition are: Australia/Eastern U.S.A. Shipping Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Israel/North Atlantic Ports Westbound Freight Conference; Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico (Med-Gulf) Conference; Marseilles North Atlantic U.S.A. Freight Conference; Mediterranean-North Pacific Coast Freight Conference; Mediterranean U.S.A. Great Lakes Westbound Freight Conference; North Atlantic/Israel Freight Conference; North Atlantic Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-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.

[4] PCEC filed a "Petition For Reconsideration" on behalf of the Conference and its member lines.

Inc. (Sea-Land),[5] by six of the member conferences of the Associated Latin American Freight Conferences (ALAFC),[6] and by the Council of European & Japanese National Shipowners' Associations (CENSA).[7]

BACKGROUND

The final rules revise Commission procedures for: (a) filing agreement approval requests pursuant to section 15, including statements in support thereof; (b) filing comments and protests to such agreements, and responsive pleadings thereto; and (c) the disposition of agreement approval requests. The purpose of the final rules is to ensure fair, orderly and expeditious processing of agreement approval requests.

The original Notice of Proposed Rulemaking appeared in the *Federal Register* on November 23, 1976 (41 F.R. 51622-51623). Numerous comments to the proposed rulemaking were filed by carriers, conferences of carriers, and other interested parties. On June 20, 1979, the Commission issued revised proposed rules and invited further comment (44 F.R. 36077-36080). Additional comments were submitted on the revised rules.[8]

These comments were carefully considered and, where appropriate, were incorporated in the final rules issued by the Commission. The Petitioners seeking relief from the final rules have, for the most part, been participants during the course of this rulemaking proceeding.[9]

DISCUSSION

The particular sections of the final rules objected to by the Petitioners are: (1) sections 522.5 and 522.6 as they concern the status of supporting statements and affidavits as public records and the confidential treatment of such documents; (2) section 522.7 as it concerns communications between Commission staff and agreement proponents and the good cause requirement for supplementation of a filing; and (3) section 522.8 as it relates to the "notice and hearing" requirement of section 15 of the Shipping Act. In addition, Petitioners object to the absence from the final rules of a provision which would establish internal Commission deadlines for processing agreements, and the absence of a provision which would indicate that internal staff memoranda and recommendations are part of the administrative

[5] Sea-Land filed a "Petition For Clarification Or Amendment" pursuant to Rules 51 and 69 of the Commission's Rules of Practice and Procedure.

[6] Six of the member conferences of the ALAFC filed "Comments In Support Of A Petition For Reconsideration Or Modification Of, And Relief From, The Commission's Final Rules." The comments support the Conference Group Petition and urge that it be granted. The six ALAFC members subscribing to the comments are: United States Atlantic & Gulf/Ecuador Freight Conference; Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference; Atlantic & Gulf/West Coast of South America Conference; East Coast Colombia Conference; West Coast of South America Northbound Conference; and United States Atlantic & Gulf-Venezuela Conference.

[7] CENSA filed a "Petition For Reconsideration And Modification Of Final Rules."

[8] A list of commentators is set forth in Appendix A of the final rules. 47 F.R. 46286-46287.

[9] One member conference joining in the ALAFC Petition and four conferences subscribing to the Conference Group Petition appear not to have previously submitted comments.

record in the agreement review process. Each of these objections are discussed below.[10]

1. Section 522.5 Supporting Statements and Section 522.6 Federal Register Notice

Section 522.5 provides that supporting statements are public records and that no claims of confidentiality with regard to such statements will be allowed. Section 522.5 also provides that affidavits or other evidence may be attached to supporting statements. Section 522.6(e) provides that supporting statements shall be available for inspection at the Commission's offices. The earlier revised rule provided that copies of the agreement and the supporting statement would be available for inspection at the Commission offices. It did not explicitly state that requests for confidentiality would not be allowed.

Several Petitioners object to these sections as they relate to affidavits and supporting statements filed in connection with requests for approval of an agreement. Sea-Land claims that it is unclear whether the affidavits submitted with supporting statements may be given confidential treatment. Sea-Land believes that this section should be clarified to permit confidential treatment of proprietary information contained in an affidavit or other document submitted with a supporting statement CENSA also argues that some measure of confidentiality should be provided for in order to avoid the alleged harm that may result from disclosure of sensitive business information. Sea-Land states further that, if confidential treatment is not permitted, these sections should then be modified to affirm Commission practice of providing notice to agreement proponents of any request for proprietary data so that such information may be withdrawn prior to disclosure.

Affidavits and other documents submitted with a supporting statement are part of the supporting statement and, therefore, are public documents for which confidentiality claims are not permitted. This is the clear intent of sections 522.5 and 522.6. However, in order to avoid any possible ambiguity, these sections shall be amended to expressly state that affidavits and other evidence attached to supporting statements are part of the public record.

No amendment to these sections to allow for confidential treatment of supporting statements is necessary or appropriate. Making such information public is the consequence that proponents must accept when they seek section 15 authority. Such agreements are impressed with a public interest and are not merely contracts governing the private business relationships of the parties. Full disclosure is required to enable protestants, commentators

[10] Petitioners also complain that the record in this proceeding is stale and that the final rules were issued without additional notice and comment. Petitioners do not explain how the length of this proceeding would affect the record or the final rules themselves. Moreover, Petitioners and other interested persons have had ample opportunity to comment on the rules throughout this proceeding. Many of the objections raised by Petitioners have previously been considered. Finally, these very Petitions have provided an opportunity to comment on the final rules.

and other interested persons to know the basis for an agreement and be able to fashion informed responses. Therefore, Petitioners' request that this section be amended to allow for confidential treatment of supporting statements is denied.

Nor is it practical to notify agreement proponents of any request for proprietary data prior to disclosure. Such a provision would be contrary to the purpose of the final rules since it would be likely to delay the processing of agreements. Therefore, Petitioners' request for such an amendment is denied.

2. *Section 522.7 Comments and Protests*

Section 522.7 defines and sets forth procedures for the filing of comments and protests. This section also provides for the service of comments and protests and for the filing and service of any response by proponents of an agreement. Section 522.7(e) limits communications between parties to section 15 agreements and Commission staff and prohibits further supplementation of the proponent's filing unless good cause is shown. The provision of 522.7(e) which sets forth the good cause requirement did not appear in the earlier revised proposed rules. Other changes in section 522.7 from the revised proposed rules are non-substantive in nature.

Petitioners object to the prohibition against communications between Commission staff and agreement proponents in the case of unprotested agreements. Petitioners argue that such contacts facilitate the agreement review process, that the prohibition against such contacts will delay consideration of agreements, and that such a prohibition should apply only where protests or comments have been filed.

Petitioners also object to the good cause requirement of section 522.7(e). They argue that the good cause requirement unduly restricts a proponent's ability to supplement its support of an agreement in unprotested cases and is not in keeping with the Commission's responsibility to base its decisions on the fullest possible record.

The final rule's preclusion of communication with staff in the case of unprotested agreements was intended to expedite the agreement review process by encouraging proponents to make the proper showing required for approval with their initial submission and to avoid piecemeal additions of supporting information which could delay the agreement review process. There are, however, instances where such communications may resolve staff questions and aid the review process. The Commission has determined that, with respect to unprotested agreements, such contacts may on balance be of more benefit than detriment to the agreement review process. Therefore, section 522.7 shall be amended to permit members of the staff of the Bureau of Agreements and Trade Monitoring (Bureau) to contact the parties to unprotested agreements, at the discretion of the Bureau Director. Such contacts would not be undertaken prior to the close of the comment period. The preclusion of such contacts by the Bureau staff in the case of protested or commented agreements remains in effect. Contacts initiated by parties to an agreement are not permitted.

The "good cause" requirement of section 522.7 is also intended to expedite agreement review by limiting supplementary submissions to those instances wherein good cause is shown. This provision ensures a definite termination of the agreement review process and at the same time establishes a procedure for dealing with those instances in which special circumstances call for allowing supplementary submissions. This mechanism appears to be reasonable and fair and no amendments to the good cause requirement appear to be warranted. Therefore, Petitioners' requests to amend the "good cause" requirement shall be denied.

3. Section 522.8 Disposition of Agreement Approval Requests

Section 522.8 sets forth procedures for the disposition of agreement approval requests. This section provides for further proceedings regarding an agreement when the Commission considers further inquiry advisable, when a protest alleges material facts which would preclude approval, and when the proponents of an agreement properly exercise their right to request a further hearing. This section also establishes procedures for conditional approval of agreements and describes the factual showing that must be made when proponents request further hearing. Although this section of the final rules reflects certain clarifying, technical and editorial changes, it is substantially the same as published in the revised proposed rules.

The Conference Group contends that section 522.8 fails to ensure a hearing prior to conditional or unconditional disapproval of an agreement by treating the statutory right to a hearing prior to disapproval as discretionary. It also argues that this section places an unfair triple burden on the proponent which the Commission has not explained or justified.[11] The Conference Group believes that this section will delay rather than expedite the processing of agreements.

ALAFC goes further and argues that section 15 guarantees proponents an evidentiary hearing prior to conditional disapproval. ALAFC also notes that section 522.8 contains no definition of "conditional order of disapproval," and that such orders are not final orders of the Commission and may not be appealed to the United States Courts of Appeals.

PCEC contends that the proponent of a section 15 agreement has a statutory right to a hearing upon "simple request" and attacks those provisions in sections 522.8(b)(3) and (d)(2) which require that a proponent prove entitlement to a hearing.

CENSA argues that section 522.8 improperly limits proponents' right to a hearing and imposes new, unnecessary, burdensome, and costly requirements. CENSA contends that the conditional disapproval procedure is not consistent with the statutory right to a hearing before disapproval.

[11] The alleged triple burden is: (1) in the initial supporting statement; (2) in the requirement to prove entitlement to a hearing; and (3) in the hearing itself.

The basic issue raised by these rules and the contentions of the parties is not so much the right of parties to a hearing, but the right of the Commission to control the structure and procedures of hearings conducted under the Shipping Act. It is clear that the statute requires "notice and hearing" before the Commission may disapprove an agreement.[12] It is also clear that the Commission has substantial latitude in constructing the type of procedures best suited to fulfilling this hearing obligation.[13] The procedures set forth in the final rules afford filing parties a basic hearing procedure from the date an agreement is filed. Neither the language of the statute nor the decisions of the courts require the Commission to hold a formal evidentiary hearing prior to action on a request for approval. The kind of hearing required will depend upon the nature of the agreement and the issues which must be resolved.[14]

In determining what kind of hearing is appropriate in a particular case, the Commission must, of course, be guided by principles of due process and fairness to the parties.[15] Where an application for approval raises disputed issues of material fact, a trial-type evidentiary hearing may well be required.[16] However, where the disposition of the case does not involve such issues, the Commission must be able to reach intelligent decisions about other types of proceedings which will most economically provide fair procedures to the parties and an adequate record for Commission decision and judicial review.[17] The Commission must also ensure that it obtains

[12] Section 15 of the Shipping Act, 1916 provides in relevant part that:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

[13] *Sea-Land Service, Inc.* v. *United States*, 683 F.2d 491, 495 (D.C. Cir. 1982); *United States Lines, Inc.* v. *Federal Maritime Commission*, 584 F.2d 519, 537 (D.C. Cir. 1978). In *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F.2d 577, 589 (D.C. Cir. 1969) the court stated that: "The requirement of a hearing in a proceeding before an administrative agency may be satisfied by something less time-consuming than courtroom drama."

[14] "The statute does not require that a hearing be held where no one requests one, rather, it requires only that interested persons be given the opportunity for a hearing. This applies equally to approval or disapproval of agreements. Further, a trial-type evidentiary hearing is not always required. Where there are no disputes as to the material facts, an appropriate hearing could consist of the filing of briefs or memoranda of law. In the usual case, the Commission affords interested parties an opportunity for hearing by the publication in the Federal Register of an invitation to submit comments, protests, and requests for hearing. If no one takes advantage of that opportunity, or if the comments, protests, or requests for hearing are frivolous, the Commission is not required to hold a hearing before approving an agreement." *Canadian-American Working Arrangement*, 16 S.R.R. 733, 738.

[15] *Seatrain International, S.A.* v. *Federal Maritime Commission*, 584 F.2d 546, 550 (D.C. Cir. 1978).

[16] In *Marine Space Enclosures* the court held that where agreements which are anticompetitive in nature involve disputed issues of material fact a further hearing was necessary. As the court noted, antitrust issues ". . . do not lend themselves to disposition solely on briefs and argument." In remanding the case to the Commission, however, the *Marine Space Enclosures* court deliberately and explicitly refrained from requiring the Commission to hold formal evidentiary hearings. *Marine Space Enclosures, supra*, 420 F.2d at 590.

[17] *Outward Continental North Pacific Freight Conference* v. *Federal Maritime Commission*, 385 F.2d 981, 984 n.9 (D.C. Cir. 1967); *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F.2d 335, 340–41 (D.C. Cir. 1967).

sufficient information so that its decision is based on substantial evidence,[18] and reflects a consideration of all relevant factors.[19]

An appropriate hearing within the meaning of section 15 is one in which the proponents of an agreement are afforded an effective opportunity to develop a factual record and legal argument in support of the request for approval. Typically, the hearing requirement of section 15 is satisfied by affording all interested parties the opportunity to submit comments or argument and present evidence in the form of affidavits or other documents. The procedures set forth in section 522.8 provide this opportunity and are in harmony with the statute and relevant court decisions. Proponents may file whatever supporting information they believe is necessary in their initial filing. Should the Commission determine that this initial showing is not adequate and issue an order of conditional disapproval, section 522.8 provides that proponents may exercise their right to request a further hearing. This further hearing will be granted provided a proper showing is made that additional proceedings will serve some legitimate purpose which cannot be fulfilled by less formal tools. The conditional disapproval order is in essence a notice to parties of the Commission's view that the state of the record is such that approval cannot be granted, and that absent a request for additional procedures to demonstrate material evidence, the subject agreement will be finally disapproved at a subsequent date.

Petitioners complain that section 522.8 places an undue burden on proponents.[20] The final rules, however, do not impose any mandatory filing requirements. The only burden imposed on proponents of an agreement is the burden to satisfy the standards of section 15. In the particular case of an agreement which would otherwise be violative of the antitrust laws or which would be likely to have serious anticompetitive consequences, a proponent has a burden to justify the agreement under the *Svenska* doctrine.[21] The final rules merely set forth a procedure for meeting the burden imposed by section 15 and, where applicable, the *Svenska* doctrine. Petitioners' arguments that the final rules impose additional, extra-statutory, substantive burdens on filing parties are without merit. The Commission has

[18] *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 (1966).

[19] *Seatrain International S.A.* v. *Federal Maritime Commission, supra*, 584 F.2d at 550.

[20] Petitioners' objections to this section contain certain internal inconsistencies. On the one hand, they claim that proponents are deprived of an adequate hearing, and on the other, that the provisions in section 522.8 which provide an additional opportunity to justify an agreement place an undue burden upon proponents. The so-called "triple burden" is in fact but one requirement: the requirement that parties seeking Commission action on agreements explain the reasons for the requested action and provide the agency with sufficient information about their presentation to enable the agency to structure an appropriate proceeding.

[21] 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.

simply established uniform procedures for making determinations as to the type of hearing required.

Petitioners claim that section 522.8 will delay the processing of agreements. The procedures set forth in section 522.8, however, should promote more efficient management of Commission resources and hence expedite the agency's processes. A rule which would require formal hearings upon mere request without any supporting information would be likely to lead to unnecessary hearings. The Conference Group's suggestion that parties would not frivolously undertake an expensive hearing is beside the point. It is the Commission's responsibility to control its administrative processes. The burden is properly on proponents of an agreement to make a sufficient showing of approvability to warrant further hearing. Such a requirement is not unreasonable.

It is not clear what point ALAFC intends to make when it states that conditional orders of disapproval are not final orders of the Commission and may not be appealed. Such orders become final when the conditions stated therein are not met, and thereafter may be appealed.[22] No right of appeal is denied by the procedures of this section.

ALAFC also complains that section 522.8 does not define the term "conditional order of disapproval." While the term is not defined in the rules, the language of section 522.8 makes the meaning of the term readily apparent and inclusion of an actual definition would appear to be unnecessary.

Accordingly, no further revision of section 522.8 appears to be warranted and Petitioners' various requests for modification of or relief from this section shall be denied.

4. Internal Deadlines for Processing Agreements

The Preamble to the final rules states that: "Internal deadlines and procedures have been established and are now in the process of being further updated. However, these matters are inappropriate for inclusion in a Commission General Order and are more properly the subject of an internal Commission directive." 25 F.M.C. 423–424. On October 18, 1982, simultaneously with the issuance of the final rules, the Commission published Commission Order No. 104 which sets forth internal procedures governing the processing of agreements (47 F.R. 46376–46379). This Order also became effective on January 1, 1983.

The Conference Group objects to the absence in the final rules issued in Docket No. 76–63 of any provision establishing binding internal deadlines for the processing of agreements. The Conference Group is aware of the procedures set forth in Commission Order No. 104,[23] but contends that

[22] Proponents are also free at that time to refile the agreement with appropriate justification, the conditional disapproval order having indicated the deficiencies.

[23] In its Petition filed on November 12, 1982, PCEC stated that the Commission's internal processing guidelines should be made public. PCEC's comment completely overlooks the publication of the Commis-

those procedures are inadequate because they are not mandatory and because there are no sanctions for non-compliance. The Conference Group contends that agreements should be processed in the order in which they are filed.

The Commission has established adequate internal procedures to ensure the expeditious processing of agreements. The procedures set forth in Commission Order No. 104 should ensure that agreements generally will be processed in the order in which they are filed. The final rules do not, nor would it be feasible, given the varying complexity of agreements, guarantee that agreements will be processed strictly in the order in which they are filed. Such a rule would unduly restrict the flexibility of the Commission.

Although the internal rules do not have the force of law, they do establish a clear regime for processing agreements which the Commission is now implementing. Petitioners suggest that the rules should contain sanctions for non-compliance but do not state what sanctions would be appropriate. Commission Order No. 104 sets forth the requirements which the staff of the Commission must meet. Adherence to these requirements is a matter which concerns the performance of Commission personnel and any failure to meet those requirements may be addressed through established Commission personnel policy. This is not a matter which involves the approvability of an agreement pursuant to section 15 and hence should not be included in General Order 24. Accordingly, Petitioners' request for an amendment to the final rules providing for inclusion of internal processing rules and sanctions related thereto shall be denied.

5. Availability of Internal Reports or Information

CENSA objects that both the final rules in Docket No. 76–63 and the procedures set forth in Commission Order No. 104[24] permit the Commission to make determinations on the approvability of agreements on the basis of information which CENSA contends is not in the record. CENSA argues that staff recommendations and memoranda are part of the administrative record upon which the Commission relies in its decision making process and should be available to the parties. CENSA argues that the full administrative record must be disclosed in order to determine whether the Commission acted arbitrarily.

As authority for this contention, CENSA cites *United States Lines, Inc.* v. *Federal Maritime Commisson,* 584 F.2d 519 (D.C. Cir. 1978) and *Home Box Office, Inc.* v. *Federal Communications Commission,* 567 F.2d 9 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977). These cases deal with the issue of *ex parte* communications and hold that if a communication from outside

sion's internal rules on October 18, 1982, in the same issue of the *Federal Register* as appeared the final rules in Docket No. 76–63.

[24] CENSA objects to the procedures in section 5 of Commission Order No. 104 which provides for the development of "additional facts" and the preparation of a "data package" by the Office of Regulatory Policy and Planning upon request of the Director, Bureau of Agreements and Trade Monitoring.

the agency contains information which forms the basis for agency action, then that information must be disclosed to the public.

These decisions do not require the routine disclosure of internal memoranda or recommendations, prepared to assist the Commission in its deliberations, either during the agreement review process or even prior to a decision by the Commission. It is sufficient for the Commission to articulate the facts relied upon to support its decision in the order itself even where those facts are derived from internal Commission sources. We are aware of no legal precedent which would require the routine disclosure of internal memoranda in all cases. Accordingly, Petitioners' request to amend the rules to require that such internal documents be made available to the public shall be denied.

List of subjects in 46 C.F.R.: Administrative Practice and Procedure.

THEREFORE, IT IS ORDERED, That pursuant to 5 U.S.C. §553 and sections 15, 21, 22 and 43 of the Shipping Act, 1916 (46 U.S.C. §§814, 820, 821 and 841a), Part 522 of Title 46, Code of Federal Regulations, is amended as follows.

1. Section 522.5 is amended by revising the third sentence to read as follows:

> Supporting statements, including all documents, affidavits, or other evidence attached thereto, are public records.

2. Section 522.6 is amended by revising paragraph (e) to read as follows:

> (e) A statement that the agreement and any supporting statement, including all documents, affidavits, or other evidence attached thereto, are available for inspection at the Commission's offices;

3. Section 522.7 is amended by revising the first sentence of paragraph (e) to read as follows:

> (e) Except as provided in this section and §522.5, or except, in the case of an unprotested agreement, as the Director, Bureau of Agreements and Trade Monitoring may in his/her discretion initiate, or unless specifically requested in writing by the Commission, with copies to the proponents and persons which have filed protests or comments, no other written or oral communication concerning a pending agreement shall be permitted.

and

IT IS FURTHER ORDERED, That Petitioners' requests for reconsideration, clarification, modification or withdrawal of, relief from, or amendment to the final rules issued in Docket No. 76-63 are granted to the extent indicated above and denied in all other respects.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 536]

GENERAL ORDER 13, AMDT. 11; DOCKET NO. 83–18

FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

July 26, 1983

ACTION: Final Rule

SUMMARY: This amends FMC tariff filing rules to permit conferences and rate agreements to file, on behalf of member line controlled carriers, lower rates on less than 30 days' notice to meet the independent action rates of member line non-controlled carriers and to meet the actions taken by member line non-controlled carriers on open rated commodities. It also permits member line controlled carriers to initiate action and lower their rates on open-rated commodities to a level at or above the conference minimum.

DATE: Effective September 2, 1983.

SUPPLEMENTARY INFORMATION:

The Commission previously gave notice (48 FR 12576-77) that it proposed to amend 46 C.F.R. Part 536 to permit conferences and rate agreements to file reduced rates with less than 30 days' notice, on behalf of member line controlled carriers on open-rated commodities and independent action rates, where the basic agreement provides for independent action. Such filings, however, would not be permitted where controlled carrier member line rates would be lower than rates of non-controlled carrier member lines.

Comments were received from a controlled carrier,[1] a manufacturers association,[2] 7 conferences or rate agreements,[3] and a non-controlled carrier.[4]

All commentators support the Commission's proposed rule though some have expressed reservations about certain aspects. The Inter-American Freight Conference, is concerned that the rule will make Conferences responsible for identifying a given carrier as a "controlled carrier" without their having all the facts necessary to make that determination. This concern has merit, and the rule has been amended so that conferences may rely upon the Commission's prior and continuing determinations as to which carriers are controlled and subject to the regulatory provisions of the Shipping Act, 1916, as amended (the Act).

The Trans-Pacific conferences suggest that the rule be changed to specifically permit controlled carrier members to initiate rate reductions on open-rated commodities where the conference or ratemaking agreement has established open rates subject to minimum rate levels. The Commission concurs. Establishing rates "open, subject to a minimum" requires collective conference action. Therefore, controlled carrier members should be allowed to initiate rates and lower their rates on open-rated commodities to a level at or above the conference minimum. This would violate neither the intent nor the letter of the Act. That portion of the rule has been amended to permit controlled carriers to initiate actions on open-rated commodities subject to a conference imposed minimum.

The Commission finds that these amendments to its rules are 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 applicablity relating to rates . . . or practices relating to such rates. . . ." As the proposed amendments clearly relate to rates and rate practices the Regulatory Flexibility Act requirements are inapplicable.

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[1] Shipping Corporation of India.

[2] Motor Vehicle Manufacturers Association of the United States, Inc., whose members are:
American Motors Corporation
Chrysler Corporation
Ford Motor Company
General Motors Corporation
International Harvester Company
M.A.N. Truck & Bus Corporation
PACCAR Inc.
Volkswagen of America, Inc.
Volvo North America Corporation

[3] Malaysia Pacific Rate Agreement
Trans-Pacific Freight Conference of Japan/Korea
Japan/Korea-Atlantic and Gulf Freight Conference
Philippine North America Conference
Agreement No. 10107
Agreement No. 10108
Inter-American Freight Conference

[4] Sea-Land Service, Inc.

List of Subjects in 46 C.F.R. Part 536:
Rates, Maritime Carriers

Therefore, pursuant to 5 U.S.C. §553 and sections 18(c) and 43 of the Shipping Act, 1916 (46 U.S.C. §§817(c) and 841a), 46 C.F.R. Part 536 is amended by:

1. The addition of a new sentence at the end of §536.6(n), as follows:

   "*Provided however*, that conferences or rate agreements may, on less than 30 days' notice, file reduced rates on behalf of controlled carrier members for open-rated commodities: 1) at or above the minimum level set by the conference or rate agreement, or 2) at or above the level set by a member of the conference or rate agreement that has not been determined by the Commission to be a controlled carrier subject to section 18(c) of the Shipping Act, 1916, in the trade involved."

2. The addition of a new sentence at the end of §536.10(a)(3) as follows:

   "*Provided further*, that conferences or rate agreements whose basic agreements provide for independent action, may file on behalf of their controlled carrier members, lower independent action rates on less than 30 days' notice, subject to the requirements of their basic agreements and subject to such rates being filed at or above the level set by a member of the conference or rate agreement that has not been determined by the Commission to be a controlled carrier, subject to section 18(c) of the Shipping Act, 1916, in the trade involved."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–22

EQUAL ACCESS AGREEMENT IN THE UNITED STATES/REPUBLIC OF THE PHILIPPINES OCEAN LINER TRADE

(AGREEMENT NO. 10461)

NOTICE

August 3, 1983

Notice is given that no appeal has been taken to the June 28, 1983, dismissal of 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. 83–22

EQUAL ACCESS AGREEMENT IN THE UNITED STATES/REPUBLIC OF THE PHILIPPINES OCEAN LINER TRADE

(AGREEMENT NO. 10461)

PROCEEDING DISMISSED

Finalized August 3, 1983

This proceeding was instituted by Order of Investigation and Hearing, served April 14, 1983, to determine whether Agreement No. 10461, an equal access agreement between certain United States-flag carriers and Philippine-flag carriers (Proponent) should be approved, disapproved or modified under the provisions of section 15 of the Shipping Act, 1916, 46 U.S.C. 814.

Following some interim motions and events, including a prehearing conference and the issuance of some procedural orders, the Proponents determined to withdraw the Agreement. By letters dated June 15, 1983, Proponents withdrew the Agreement without prejudice to later refiling and asked that the proceeding be discontinued. By Order, served June 15, 1983, I advised that the request was deemed a motion to dismiss and that replies, if any, would be due not later than June 22, 1983. No reply was received.

Accordingly, there being no opposition to the motion and there being no useful regulatory purpose to be served by continuing this proceeding, it is ordered dismissed.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–15

AMERICAN COASTAL LINE JOINT VENTURE, INC.

v.

UNITED STATES LINES, INC. AND SEA-LAND SERVICE, INC.

NOTICE

August 8, 1983

Notice is given that the time within which the Commission could determine to review the June 21, 1983 discontinuance of the complaint in this proceeding 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. 83–15

AMERICAN COASTAL LINE JOINT VENTURE, INC.

v.

UNITED STATES LINES, INC. AND SEA-LAND SERVICE, INC.

MOTION TO WITHDRAW COMPLAINT GRANTED; PROCEEDING DISCONTINUED

Finalized August 8, 1983

Complainant American Coastal Line Joint Venture, Inc. (AMCO) has filed a Motion to Withdraw Complaint. AMCO states that it "hereby requests leave to withdraw its complaint in this proceeding without prejudice" and furthermore states that counsel for respondents United States Lines, Inc. and Sea-Land Service, Inc. have advised that respondents do not oppose the motion.

In its complaint AMCO had alleged that respondents had concertedly submitted rates for the carriage of military cargo under the military bidding system, which rates were non-compensatory and so unreasonably low as to be detrimental to the commerce of the United States, causing damage to AMCO in an unspecified amount, such conduct allegedly being in violation of sections 15 and 18(b)(5) of the Shipping Act, 1916. Respondents had denied any concerted action or violation of law or the filing of non-compensatory rates. The Military Sealift Command (MSC) was granted leave to intervene.[1]

The proceeding moved into its prehearing inspection and discovery phase, the parties serving various discovery requests on each other. Several prehearing conferences were held, as a result of which protective orders were fashioned and established, information was exchanged, and other rulings issued designed to narrow issues and expedite progress toward a reasonably prompt decision.

DISCUSSION AND CONCLUSIONS

AMCO's motion in this proceeding resembles a similar motion filed in a similar proceeding involving allegations of non-compensatory military rates, which proceeding was discontinued on complainant's motion. (See Docket No. 83–19, *Farrell Lines Incorporated* v. *Sea-Land Service, Inc.*, Motion to Withdraw Complaint Granted; Proceeding Discontinued, 25

[1] Counsel for MSC has orally advised that MSC does not intend to oppose the motion.

F.M.C. 729 (1983)). As I discussed in the ruling cited, a complainant's motion to withdraw its complaint can be handled under Rule 73, 46 CFR 502.73, the rule governing motions generally, and Rule 147, 46 CFR 502.147, the rule setting forth the powers of presiding officers, including the power to "hear and rule upon motions." Furthermore, under the federal rules, specifically Rule 41(a), 28 U.S.C.A., complainants are permitted to withdraw their complaints even after answers have been filed and other action taken in the case subject to possible terms and conditions which courts may impose which are not relevant here. In practice, moreover, complainants' rights to withdraw their complaints have been respected by this Commission since the Commission has the power to institute its own investigations if it chooses and it is generally recognized that complainants should not be compelled to litigate cases if they do not choose to do so. See, e.g., *Smoot* v. *Fox,* 340 F. 2d 301 (6th Cir. 1964); *Tyco Laboratories, Inc.* v. *Koppers Co.,* 627 F. 2d 54 (7th Cir. 1980); 9 Wright and Miller, *Federal Practice and Procedure,* section 2364, p. 169 (voluntary dismissals permitted in early stages of a proceeding).

The instant proceeding is still in a relatively early stage and AMCO simply wishes to withdraw its complaint without prejudice. Respondents do not object to the motion. Accordingly, the motion is granted and the proceeding is discontinued. The parties are reminded of the need to comply with paragraph 10 of the Protective Order regarding the return of confidential materials to the parties furnishing them at the conclusion of the proceeding.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–24

BOB AKIN MOTOR RACING, INC.

v.

COSMOS SHIPPING COMPANY, INC.

NOTICE

August 19, 1983

Notice is given that the time within which the Commission could determine to review the July 8, 1993 discontinuance of the complaint in this proceeding 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. 83–24

BOB AKIN MOTOR RACING, INC.

v.

COSMOS SHIPPING COMPANY, INC.

Sam R. Watkins, Jr., of Rockwood, Edelstein & Duffy, P.C., for complainant.

Gerald H. Ullman, P.C., for respondent.

PROCEEDING DISCONTINUED WITH PREJUDICE TO RENEW AS REQUESTED BY PARTIES

Finalized August 19, 1983

A complaint filed by Bob Akin Motor Racing, Inc., against Cosmos Shipping Company was served April 27, 1983. Complainant alleged that respondent had breached its duties and responsibilities as a freight forwarder in violation of section 44 of the Shipping Act, 1916, in connection with the shipment of a truck, racing car and related parts. Complainant sought reparation in the amount of $21,569.49.

The complainant also brought action in the Supreme Court of the State of New York County of Westchester charging defendant with (1) breach of contract, (2) negligence, and (3) negligent and/or fraudulent misrepresentations, seeking damages in the amount of $21,534.49 for each.

The defendant answered denying all allegations, made five affirmative defenses as well as a counterclaim for $3,769.94 plus interest, together with the costs and disbursements of the action.

As was noted in the memorandum anent cancellation of Thursday, June 16, 1983, Prehearing Conference due to parties having settled, that was served June 20, 1983, settlement in this proceeding was worked out by Mr. Ullman who represents the respondent and Mr. Watkins who represents the complainant.

In a letter dated June 28, 1983 (received June 30, 1983), Mr. Watkins submitted the following:

1. General Release from Cosmos Shipping Company, Inc. to Bob Akin Motor Racing, Inc. (filed in this docket)
2. General Release from Bob Akin Motor Racing, Inc. to Cosmos Shipping Company, Inc. (filed in this docket)
3. Letter dated June 16, 1983 describing the terms of the settlement and contersigned by counsel for Cosmos Shipping Company, Inc. The letter reads as follows:

Gerald H. Ullman, Esq.
Gerald H. Ullman, P.C.
120 Broadway
New York, New York 10271

Re: Bob Akin Motor Racing, Inc. v. Cosmos Shipping Company, Inc.
Our Reference Number 1337–A

Dear Gerry:

Pursuant to our agreement, please find enclosed herewith three signed copies of a Stipulation Discontinuing the captioned Action with Prejudice. You should keep one copy for your records and return the others to me. I will file one with the Westchester Supreme Court and forward the other one to the Federal Maritime Commission.

I also enclose an original General Release to be executed by your Client, Cosmos Shipping Company, Inc., and returned to me after it has been executed and notarized. I also enclose a copy of a Release which has been forwarded to our client for execution.

The net result of the agreed upon settlement between our clients is that Cosmos Shipping Company, Inc. will tender a check to Bob Akin Motor Racing, Inc. in the amount of $5,581.81. This check should be certified or bank funds. General Releases as enclosed herewith will be exchanged between our clients. The action commenced by Bob Akin Motor Racing, Inc. in the Westchester Supreme Court will be discontinued with prejudice and Bob Akin Motor Racing, Inc. will withdraw its Complaint which it filed with the Federal Maritime Commission.

You will hold in escrow all settlement documents received from us in connection with this matter until we have received your client's check, General Release, your signed copy of this letter and the Stipulation Discontinuing the Action.

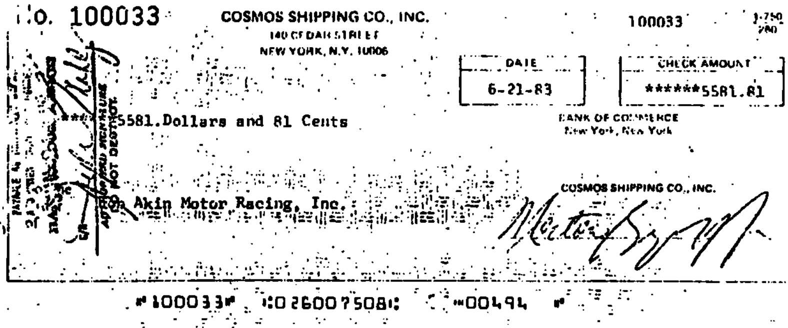
Please be kind enough to indicate your client's agreement to the settlement arrangements as set forth herein by signing and returning the enclosed copy of this letter. Thereafter I will submit a copy of this letter along with all other settlement documents to Judge Harris of the Federal Maritime Commission for his approval.

I thank you for your professional courtesy and cooperation in reaching this settlement and throughout the course of this matter.

Very sincerely,
ROCKWOOD, EDELSTEIN & DUFFY, P.C.

BY ______________________________
Sam R. Watkins, Jr.

4. Copy of certified check from Cosmos Shipping Company, Inc. in the amount of $5,581.81:


No. 100033
COSMOS SHIPPING CO., INC.
140 CEDAR STREET
NEW YORK, N.Y. 10006
100033
DATE
6-21-83
CHECK AMOUNT
******5581.81
*****5581.Dollars and 81 Cents
BANK OF COMMERCE
New York, New York
Bob Akin Motor Racing, Inc.
COSMOS SHIPPING CO., INC.
⑈100033⑈ ⑆026007508⑆ 00494⑈

5. Copy of Stipulation Discontinuing Action with Prejudice which was filed with the Westchester County Clerk. The stipulation follows:

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF WESTCHESTER

Index No. 24429/82

BOB AKIN MOTOR RACING, INC.,
Plaintiff
against
COSMOS SHIPPING COMPANY, INC.,
Defendant

Calendar No.

STIPULATION DISCONTINUING ACTION WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, the attorneys of record for all the parties to the above entitled action, that whereas no party hereto is an infant or incompetent person for whom a committee has been appointed and no person not a party has an interest in the subject matter of the action, the above entitled action be, and the same hereby is discontinued with prejudice without costs to either party as against the other. This stipulation may be filed without further notice with the clerk of the court.

Dated: June 16, 1983

GERALD H. ULLMAN, P.C.
Attorney(s) for Defendant

120 Broadway
New York, New York 10271
(212)732–2570

ROCKWOOD, EDELSTEIN & DUFFY, P.C.
Attorney(s) for Plaintiff

One Water Street
White Plains, New York 10601
(914)328–1500

DISCUSSION

This proceeding had all the prospects of a very interesting and important case involving the duties and responsibilities of a freight forwarder. Forwarders are subject to the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder. As to whether in this proceeding the facts bring it within the necessary purview is not known, the parties having settled. Although the parties in the above settlement material do not mention the financial saving in time, research and possible hearings, official notice is taken that trial of the issues herein could be very costly and that there is financial saving in settlement.

In short, as seen from the material herein, approval of the settlement in this forum is unnecessary, as the complainant has withdrawn his complaint here and stipulated discontinuing the action with prejudice in the New York Court.

The law favors compromise and settlement. The parties in three months by settling have had this matter discontinued in two forums. Counsel for the parties deserve congratulations as well as the forums for such speedy action.

Upon consideration of the above, the requests for discontinuing this proceeding with prejudice to renew are granted, subject to approval by the Commission as provided in the Commission's Rules of Practice and Procedure, wherefore, it is ordered:

Proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80–22

INTERNATIONAL PAPER CO.

v.

SEATRAIN PACIFIC SERVICES S.A., ET AL.

ORDER ADOPTING INITIAL DECISION

August 23, 1983

This proceeding was initiated as a result of a complaint filed by the International Paper Co. (IP) against eight named carriers (Respondents)[1] alleging violations of section 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 815 and 816). The complaint states that certain currency adjustment factors (CAFs) imposed by Respondents are discriminatory and unlawful, requests that the Commission issue a cease and desist order against the collection of the CAFs, and claims reparations on all of IP's shipments of woodpulp and milk carton stock to Japan from New Orleans.

The Presiding Officer, Administrative Law Judge William Beasley Harris, issued an Initial Decision (I.D.) finding that IP had failed to prove violations of the Shipping Act. Exceptions to the I.D. have been filed by IP and Respondent, OOCL-Seapac. Replies to Exceptions have been filed by IP and Respondents. The Commission heard oral argument on June 21, 1983.

DISCUSSION

As a threshold matter, IP and OOCL-Seapac argue that the I.D. is seriously deficient in necessary findings of fact and law. While not completely unfounded, these arguments are substantially overstated. An administrative law judge need only address issues which are critical to the disposition of the proceeding and need not address every factual or legal issue raised

[1] The carriers named in the original complaint were: Seatrain Pacific Services, S.A., Kawasaki Kisen Kaisha, Ltd., Sea-Land Service, Inc., Nippon Yusen Kaisha, Showa Line, Ltd., Japan Line, Ltd., and Yamashita-Shinnihon Steamship Co., Ltd. Subsequently, Seapac Pacific Services, S.A. succeeded to Seatrain Pacific Services, S.A. and, thereafter, merged with Orient Overseas Container Line now operating as OOCL-Seapac. I.P.'s motion to amend its complaint to name OOCL-Seapac as a Respondent was granted by the Presiding Officer. On Exception, OOCL-Seapac contends that because the amended complaint was not served upon it until after the hearing and it entered no formal appearance, it should not be deemed a respondent in its own right. We disagree. OOCL-Seapac is the successor corporation to Seatrain and Seapac and because it has assumed the outstanding liabilities of those corporations it ordinarily would be held as a party in the proceedings. Furthermore, it was at all times fully apprised of all relevant issues in this proceeding and has fully participated in this proceeding before the Presiding Officer and the Commission. It has been afforded due process and therefore will be held to be a party respondent in its own right. *See Aloha Airlines, Inc. v. C.A.B.*, 598 F.2d 250, 262 (D.C. Cir. 1979).

by the parties.[2] The I.D. discusses the nature of the charge at issue here and how it is applied to IP. It discusses the theories of the parties and the law to be applied to the facts of this case. The I.D. does fail to include a succinct discussion of whether the facts presented on the record constitute a *prima facie* case of discrimination under section 16 and 17 and relies on rhetorical questions. However, for reasons stated below, Respondents are correct that IP has failed to prove a *prima facie* case of discrimination under section 16 and 17 in light of existing case law. The Presiding Officer was therefore correct in ultimately finding no violations of law.

IP correctly argues that the "absolute obligation" test of section 16 discrimination is the most relevant method of analysis that could be applied in this proceeding.[3] A CAF is an across-the-board surcharge levied without regard to the particular commodity or other transportation factors involved.[4] As such, it is viewed as a separate charge from the underlying freight rates which must be equally applied to all commodities. Although Respondents are technically correct that a "triangular relationship" must still be shown, such a relationship need not be competitive and is always present when a carrier treats a shipper differently than others it serves.

There is however no evidence in the record that IP or the commodities it ships have been singled out for adverse treatment by Respondents. Although the surcharge method selected by Respondents results in different levels of charges depending on the particular commodity involved, and may not be the fairest or most desirable available alternative, it is not illegal. The equality of treatment required under the "absolute obligation" test cannot be carried to the point of requiring that all shippers, regardless of the commodity or service provided, be charged identical rates or surcharges.

A percentage method of imposing surcharges has been found to be lawful in a prior Commission proceeding.[5] There is no legal requirement that a surcharge be imposed on a uniform per ton basis as opposed to a percentage basis. Both types of surcharges have been accepted by the Commission as lawful alternative methods of spreading common costs across a carrier's service.[6] We cannot accept IP's argument that a CAF must be calculated on the basis of the underlying cost factors of specific movements which require currency conversions. The Commission will not, in the context of a section 16 or 17 complaint proceeding, require a movement-specific method of cost allocation in the setting of such rates.[7]

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[2] *See Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1092–1093 (D.C. Cir. 1979).

[3] *See Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970).

[4] *See Nonassessment of Fuel Surcharges on Military Sealift Command Rates*, 15 F.M.C. 92, 98 (1972).

[5] *See Surcharge at U.S. Atlantic and Gulf Ports*, 6 S.R.R. 657, 673 (I.D. 1965) *sustained*, 10 F.M.C. 13, 20 (1966).

[6] *Id., Surcharge on Cargo to Manila*, 8 F.M.C. 395, 400 (1965).

[7] *See Ludwig Mueller Co. v. Peralta Shipping Corp.*, 8 F.M.C. 361, 366 (1965).

Respondents argue that the CAF must be viewed as an adjunct of the underlying freight rate and that IP's complaint must therefore meet the section 16 "traditional" discrimination test. This IP has allegedly failed to do because it has not established on the record the necessary "competitive triangular relationship" between itself, Respondents, and a preferred shipper utilizing all-water rates.[8] The Presiding Officer adopted this analysis and held that because the rate differences that result from the CAF are based upon the differences in the underlying rates of the different shippers, the complaint is not against the currency adjustment *per se* but rather against the underlying rate structure of the carriers. Because the same misconception is present in both IP's "traditional" and "absolute obligation" test analysis, i.e. that CAF's must be based upon the currency conversion requirements underlying a specific cargo movement, it need not be determined whether IP has proven that such a "competitive triangular relationship" exists in this case.

IP submitted no evidence that the rate structure of the carriers is discriminatory. The discrimination theory it presented depends entirely upon its allegations that the mini-landbridge rate includes a cost element, the rail division, which does not entail currency exchanges. There is no basis to find that CAFs must be imposed on each movement of cargo in strict accordance with the underlying cost factors attendant to moving that cargo. Respondents have adequately established that currency conversion "costs" cannot be allocated with precision to each cargo movement and must be treated as "overhead." The fact that this "overhead" item has been apportioned among shippers in proportion to established rate relationships does not, standing alone, establish unlawful rate discrimination.

Under a "traditional" discrimination theory IP must show that the *overall* rate differential is unreasonable in light of costs and other transportation factors. A showing of a disparity in one "cost" element in the overall rate is insufficient to establish "undue or unreasonable" rate discrimination in the absence of a particularized and significant injury proximately caused thereby. By its own admission and the evidence of record, IP's only injury is the difference in the amount of CAF it pays. Because mini-landbridge and local rates are for substantially different services, it is not sufficient to merely show that there is a difference in rates between mini-landbridge and local shippers.[9]

Finally, IP has failed to prove a prima facie case of discrimination under section 17 of the Shipping Act. Respondents correctly argue that to find a violation of section 17 it must normally be shown that two shippers of similar commodities have been charged different rates for the

[8] *See North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202, 209 (1967).

[9] See *Cargill, Inc.* v. *Waterman Steamship Co.*, 24 F.M.C. 442, 461 (1981).

same movement.[10] It is clear that the mini-landbridge movement and the local movements at issue here are not similar services even if it is assumed that they involve similar commodities.[11]

THEREFORE, IT IS ORDERED, That the Initial Decision of Administrative Law Judge William Beasley Harris, issued in this proceeding on February 25, 1983, is adopted, and,

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision are, except to the extent noted herein, denied, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[10] *North Atlantic Mediterranean Freight Conference—Rates on Household Goods, supra*, at 213 (1967). However, a surcharge which violates section 16 under the "absolute obligation" test of discrimination will also normally violate section 17. *See Nonassessment of Fuel Surcharges on Military Sealift Command Rates, supra* at 99.

[11] *Council of North Atlantic Shipping Associations* v. *American Mail Lines*, 21 F.M.C. 96, 140 (1977) *adopted*, 21 F.M.C. 91 (1978).

FEDERAL MARITIME COMMISSION

DOCKET NO. 80–22

INTERNATIONAL PAPER COMPANY

v.

SEATRAIN PACIFIC SERVICES, S.A., ET AL.

Complainant IP is found not entitled to a refund of the difference between the CAF paid by IP for intermodal transportation from the Gulf to Japan and the CAF paid by its competitors shipping directly from the West Coast to Japan. IP expects to pay more and does for mini-landbridge than for the local tariff because there is an additional service in mini-landbridge. There is no violation of section 16 First or section 17 by the respondents.

Proceeding is discontinued.

Robert N. Kharasch, Olga Boikess, Richard D. Gluck, Rhonda G. Magdail, Kathleen Mahon and *William E. Cohen,* of Galland, Kharasch, Calkins & Short, P.C., for complainant International Paper Company.

Robert B. Yoshitomi, Edward D. Ransom, R. Frederick Fisher, Thomas E. Kimball, Charles L. Coleman, III, and *Juliana A. Jensen,* of Lillick, McHose & Charles, for 7 respondents: (1) Japan Line, Ltd., (2) Kawasaki Kisen Kaisha, Ltd., (3) Mitsui O.S.K. Lines, Ltd., (4) Nippon Yusen Kaisha, (5) Sea-Land Service, Inc., (6) Showa Line Ltd., and (7) Yamashita-Shinnihon Steamship Co., Ltd.[1]

Neal Michael Mayer, Paul D. Coleman, David S. Healy and *Peter J. King,* of Hoppel, Mayer & Coleman (formerly Coles & Goertner) for respondent Seatrain Pacific Services, Inc., now OOCL-Seapac Service.

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

Adopted August 23, 1983

The complaint in this proceeding, pursuant to section 22 of the Shipping Act, 1916, and Rules 61, 62 and 63 of Rules of Practice and Procedure, 46 CFR 502.61, 62 and 63, received April 10, 1980, was served April 11, 1980. The Commission was asked to (a) find that the carriers' purported surcharge on intermodal minibridge traffic violates section 16 First and section 17 of the Shipping Act, 1916; (b) order that the carriers cease and desist from any further imposition of discriminatory currency adjustment or similar surcharges on intermodal minibridge traffic; (c) order that the carriers pay reparation to International Paper Company (IP) in the amounts

[1] Is a steamship company, headquartered in Tokyo, which serves ocean trades around the world with liner, tanker and tramp vessels (Exh. 36, p. 2).

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

shown below, plus interest, for unlawful currency surcharges paid by IP on shipments of woodpulp and milk carton stock moving to Japan via New Orleans.

		Since Amended To:
Seatrain	$159,756.35 (OOCL-Seapac & predecessor)	$181,556.85
Kawasaki Kisen Kaisha, Ltd.	18,045.16	28,200.00
Mitsui OSK Lines, Ltd.	8,220.62	13,759.40
Sea-Land Service, Inc.	2,663.76	13,629.79
Nippon Yusen Kaisha	7,520.43	20,087.15
Showa Line, Ltd.	506.89	1,565.19
Japan Line, Ltd.	786.54	2,285.28
Yamashita-Shinnihon Steamship Co. Ltd.	7,398.11	9,740.82
		$270,824.51

An issue arose about subpoenas and enforcement of those subpoenas. The proceeding in the Commission was in abeyance while IP and the FMC went to federal court to enforce the subpoenas, *International Paper Co.* v. *Mitsui OSK Lines, Ltd.*, No. C–81–11 Misc. (N.D. Ca., April 21, 1981). The Court refused to enforce the subpoenas. Aff'd No. 81–4263 and 81–4325 (9th Cir. February 4, 1982).

IP presented its case through the written direct testimony of T.A. Przedpelski, Manager, IP Operations (Exh. No. 17); Edward R. Mooney, IP's Manager, Export Services (Exh. No. 18); Charles J. Nash, Jr., IP's Marketing Manager, Chemical Cellulose, Pulp Division (Exh. No. 19); and Harvey R. Thomas, III, IP's Manager, Business Analysis, Consumer Packaging Group. These witnesses were presented for cross-examination and cross-examined, on June 28, 1982, witness Przedpelski; on June 29, 1982, witness E.R. Mooney; on June 30, 1982, witness Charles J. Nash, Jr.; and on July 23, 1982, witness Harvey L. Thomas, III.

The respondents sponsored the testimony of Dr. Ernest Nadel (Exh. No. 35) and Donovan D. Day, Jr. (Exh. No. 37). (In a letter dated July 12, 1982, signed by Peter J. King, it was stated "OOCL-Seapac Service and Seapac Container Service, SA, advises that it respectfully declines to submit direct written testimony on their part. OOCL-Seapac believes that the presentation of a direct case is neither warranted nor required by the present state of the record."

They jointly sponsor testimony prepared by witnesses Don D. Day, Jr., and Dr. Ernest Nadel; not the testimony of Seiichi Hirano.

The testimony of Seiichi Hirano, Senior President, Representative and General Manager for the Pacific Coast of Yamashita-Shinnihon Steamship Co., Ltd., commonly known as Y-S Line was presented (Exh. No. 36).

In its opening brief, IP submitted 69 proposed findings of fact; the 7 respondents in their reply to the brief of IP, proposed 101 findings of fact and OOCL-Seapac Service in its reply brief to the opening brief of IP proposed 139 findings of fact. Thus, the parties have presented 309 proposed findings of fact. All of the proposed findings of fact have been considered and have been granted, granted in substance, or denied as indicated from the facts found as follows:

FACTS

The complainant, IP, a New York corporation, manufactures and exports large quantities of wood-pulp and milk carton stock to Japan.

The complainant IP's initial step prior to filing this complaint was to protest the assessment of the currency adjustment factor (CAF) to the Pacific Westbound Conference (PWC) (Exh. 17, page 2, attachment 1). Tadeusz H. Przedpelski, Manager, International Distribution Operations, for International Paper Company, sent the protest in a telex March 9, 1979, to D.D. Day, Jr., Chairman of the Pacific Westbound Conference (*Ibid.*).

Under date of March 12, 1979, Mr. Day replied to Mr. Przedpelski's March 9, 1979 telex: "Acknowledge your message which we will distribute to our member lines who may then consider your claim that the currency surcharge in the PWC intermodal tariff is inappropriate. Nevertheless the member lines are each required by law to assess this charge as it is a tariff requirement."

The conference took no action (Tr. 6/28/82, p. 21).

The instant complaint was served April 11, 1980. The Pacific Westbound Conference is not a respondent (Tr. 6/28/82, p. 20). The PWC is a steamship conference acting pursuant to FMC approved Agreement No. 57 (Exh. 37, page 2). The eight (8) named respondents[3] in this proceeding were each members of the PWC at the time the complaint was filed (*Ibid.*, p. 3). The respondents are common carriers by water in the foreign commerce of the United States and subject to the Shipping Act, 1916.

The claim involves two commodities—woodpulp and milk carton stock which IP ships to Japan (Exh. 17, page 2). Lost sales of woodpulp or milk carton stock is not an issue herein.

Terms Acetakraft, Viscokraft, AV–19 or Tyrecell, Supercell $A0_2$ and Supersoft all are grades of woodpulp produced by IP in its Natchez, Mississippi, manufacturing facility (Tr. 6/30/82, p. 332). For convenience the following definitions were given (Tr. 6/30/82, p. 338).

Acetakraft is a high purity chemical cellulose grade used for the production or the manufacturing of various cellulose acetate products. Acetakraft is a trade name (Exh. 19, p. 4).

Viscokraft is a lower purity, lower alpha chemical cellulose grade that is used for the manufacturing of cellophane or rayon.

[3] Since the time the complaint was filed Seatrain was succeeded and substituted for in this case by Seapac Container Service, S.A. OOCL-Seapac Service (OOCL-Seapac) is the successor to the liabilities of Seatrain and Seapac in this case (Exh. 37, p. 3).

AV–19 or Tyrecell is a high purity, high alpha grade used for manufacturing in high tenacity industrial rayon or in the case of a shipment to Japan, it is used to manufacture carboxy methyl cellulose.

Supercell AO_2 is a commodity woodpulp used primarily by fine paper makers to make business papers.

Supersoft is a specialty paper pulp used to manufacture disposable diapers or female personal products.

IP prefers to ship all milk carton stock in containers. From time to time due to container shortages or other contingencies woodpulp is shipped breakbulk (Exh. 18, p. 3). The use of containers minimizes handling and reduces the chance for contamination or other damage in transit (Exh. 18, p. 3). Largely for the same reasons, IP also prefers to use containers for the shipment of woodpulp (*Ibid.*).

Milk carton stock originates at IP's mill in Pine Bluff, Arkansas, while woodpulp originates at a mill in Natchez, Mississippi (Exh. 17, p. 2). IP makes its own land arrangements from these mills to New Orleans (Tr. 6/28/82, p. 24). For the milk carton stock IP's cargo is a polyethylene coated variety. There is a small amount of milk carton stock that is uncoated (Tr. 6/29/82, p. 203).

With the inception of intermodal container service by the PWC from New Orleans, starting about 1976, IP began to rely more and more on the containerized intermodal service to Japan, due at first to the superior "outburns" (lack of damage to cargo at destination) experienced with the intermodal service, and more recently because few alternatives now exist (Exh. 8, p. 4).

The volume of IP present shipments of milk carton stock and woodpulp to Japan, added together, amounts to approximately 5,000 tons per month. Each 40 foot container can accommodate approximately 20 tons. Seatrain now guarantees IP approximately 35 containers per week, or 140 per month. IP needs approximately 250 containers per month for its U.S.-Japan shipments (250 × 20 tons = 5,000 tons) (Exh. 18, p. 8).

IP is the No. 2 world supplier of chemical cellulose (Exh. 19, p. 4). The No. 1 supplier and IP's major competitor is Rayonier with 4 mills in the U.S. (*Ibid.*, page 5). At present, IP's only Acetakraft customer in Japan is Daicel (*Ibid.*).

In the case of milk carton stock, there is one competitor, Potlatch (Tr. 6/28/82, p. 26), located just across the border from Washington in Idaho. IP has two mills in the U.S. producing 470,000 tons annually of milk carton stock for sale within the U.S. and offshore. These mills are located at Pine Bluff, Arkansas, and Texarkana, Texas.

For the milk carton stock IP's cargo is predominantly a polyethylene coated variety (Tr. 6/29/82, p. 203). There is a small amount of milk carton stock that is uncoated. Most of the milk carton stock manufactured by IP and by its U.S. competitors is used to produce cartons sold under the trade name "Pure-Pak" (Exh. 20, p. 3).

No milk carton stock is produced in Japan (Exh. 20, p. 6). Four American companies presently supply the Japanese market. They are Potlatch, Weyerhauser, Champion and IP. An additional company has entered the Japanese market selling milk carton stock: Enzo Gutzeil, a Finnish corporation (Tr. 7/28/82, p. 398). IP recognizes that because its mill is located in Arkansas, it must pay more freight than its major competitor, Potlatch, whose mill is located in Lewiston, Idaho, closer to the West Coast and Japan (*Ibid.*, p. 8).

IP is the largest annual producer of milk carton stock in the world (Tr. 7/23/82, p. 423). Milk carton stock is essentially interchangeable no matter where or by whom it is produced (*Ibid.*, p. 405).

PWC publishes currently Tariff No. 11 from the Local and Overland Territory to ports in the Far East and Southeast Asia, and Tariff No. 708–A from U.S. Port cities on the Atlantic and Gulf Coasts to the Far East (Tr. 2/24/81, p. 30). Since the imposition of a currency adjustment factor (CAF) under the PWC—after 1978—the CAF expressed as a percentage has been the same percentage to Japan on local or water service or on intermodal service. (*Ibid.*, p. 50). IP expects to pay more for mini-landbridge than the local tariff because there is an additional service in mini-landbridge.

PWC has 15 regular members and two associate members. The 15 regular members consist of carriers whose corporate nationalities include 7 nations—the United States, Japan, Liberia, Philippines, Denmark, Korea and Israel. (Exh. 37, p. 2).

Each carrier member of PWC submits for itself (and without disclosure to any other member carrier) on a calendar quarter basis the percentages for the PWC Japan trade constituting the items described by letters A, B, C, and D in the formula (Exh. 37, p. 11).

The formula by which the PWC calculates the revenue loss of its membership in the U.S. to Japan trade is as follows:

$$(A - (A \times D) + (B \times C)) \times R = X$$

A is the percentage of revenue from cargo bound for Japan which is collected in Japanese yen.

B is the percentage of such revenue which is collected in U.S. dollars.

C represents the percentage of U.S. dollar collections converted into yen.

D is the percentage of yen collections which are converted into U.S. dollars.

R is the percentage increase in the value of the yen with respect to the dollar.

X is the percentage of that revenue derived from cargo consigned to Japan which is lost due to the depreciation of the value of the dollar.

(Exh. 37, p. 8)

Since the inception of the CAF on March 1, 1978, at any point in time, the CAF has been the same percentage in both the Local/Overland and the MLB tariffs (*Ibid.*, p. 12).

IP is not a PWC Dual Rate Contract signator. Therefore, IP is not obligated to ship on PWC member vessels under any PWC tariff but, rather, is free to utilize any carrier it wishes (Exh. 37, p. 19).

The transit time from the Gulf to Japan all-water is slightly longer than the minibridge transit time from the Gulf to Japan. It is approximately one week quicker by mini-landbridge (Tr. 6/29/82, p. 174).

Tr. 6/29/82, pages 226, 227, 228, 229 show the stipulations entered into herein covering some figures and statistics.

DISCUSSION, REASONS, FINDINGS, AND CONCLUSIONS

IP's theory in this case is that IP pays for minibridge transportation in U.S. dollars and that the money paid by the ocean carrier to the railroad is solely in dollars and doesn't involve a currency exchange; that since there is no foreign currency exchange on the rail division, it is improper to apply the currency exchange to the rail division (Tr. 6/28/82, pp. 46, 47). IP asserts that no transportation considerations justify imposition of the surcharge on the inland portion of the rates, and that the ineluctable conclusion emerges that the assessment of the CAF on the inland portion of the carriers' intermodal rates both subjects the intermodal cargo to undue and unreasonable prejudice and disadvantage in violation of section 16 and is unjustly discriminatory between shippers in violation of section 17 (IP opening brief, p. 36). IP feels it is entitled to a refund of the difference between the CAF paid by IP for intermodal transportation and the CAF paid by its competitors shipping directly from the West Coast to Japan (Exh. No. 20, p. 10).

IP contends while it is possible to analyze the section 16 violations by the respondent carriers in this instance in terms of the classical triangular case (involving the carrier, a preferred shipper and a prejudiced shipper, which IP says was described in *North Atlantic Mediterranean Freight Conference—Rates on Household Goods,* Docket No. 66–49, 11 F.M.C. 202 (1967)) of disparity in transportation charges, the assessment of the currency adjustment factor of which IP complains, because it applies across the board and is not dependent on the particular commodity IP ships, falls most plainly within the criteria stated by the Commission in *International Trade & Development, Inc.* v. *Sentinel Line & Anchor Shipping Corp.*, Docket No. 78–28, 22 FMC 231 (1979), that a competitive relationship is not required when the facts reveal a clear comparative disadvantage or other type of "special injury" to the complaining shipper (or locality) which (1) goes beyond the simple payment of a higher rate; and (2) cannot reasonably be justified on the basis of traditional transportation factors (IP opening brief, p. 40).

IP says it and other shippers of intermodal cargo suffer a clear comparative disadvantage which goes beyond the simple payment of a higher rate and is completely without justification on the basis of traditional transportation factors: IP must pay a surcharge for the carriers' currency conversion costs—which the carriers incur only with respect to the ocean portion of their rates—based on the portion of the rate allocated to inland transportation in addition to the portion of the rate allocable to the ocean carriage. That, says IP, is a "clear comparative disadvantage" imposed on intermodal cargo which is not imposed on all-water cargo. According to IP, the assessment of the CAF on the inland portion of the carriers' intermodal rates violates section 16.

IP asserts the violation of section 16 found by the Commission in *Violations of Sections 14 Fourth, 16 First and 17 in the Nonassessment of Fuel Surcharges*, Docket No. 71–17, 15 F.M.C. 92 (1972), is closely analogous to the one at bar. (IP opening brief, p. 43). And, says IP, ". . . the violation of section 16 found by the Commission in *Nonassessment of Fuel Surcharges* is very nearly a mirror image of the situation now presented to the Commission" (*Ibid.*, p. 45). In their reply, the seven (7) respondents say "IP labels the *Nonassessment of Fuel Surcharges* case as 'very nearly a mirror image' of IP's complaint, when the complaint is in fact the *exact opposite* of that case. That case has no similarity to the position urged by IP, but rather is the *reverse* of that position." (7 respondents reply brief, p. 142). The 8th respondent (OOCL-Seapac Service) asserts the complainant's reference to *Nonassessment of Fuel Surcharges* is unsupportive of IP's position, but the facts are inapposite to the instant case (reply brief, p. 103).

IP says further, the exaction of a currency adjustment factor based on the inland portion of an intermodal rate, to compensate for currency conversion costs incurred only with respect to the water portion of the rate, is plainly an unjust discrimination between shippers utilizing the carrier's intermodal service and those utilizing its all-water service, is a violation of section 17 (IP opening brief, p. 49).

In sum, says IP, the respondent carriers' assessment of a currency charge on the inland portion of its intermodal rate as well as on the water portion, when the carrier has no currency costs on the inland portion of its rates, is a patent failure to administer its surcharge fairly and impartially, and creates a clear situation of undue prejudice to intermodal cargo vis-a-vis all water cargo in violation of section 16. (opening brief, p. 48).

The 7 respondents reply that IP's claim is defective for each of two separate reasons. First, IP cannot be compared with Pacific Coast shippers because there is no common leg between the MLB and all-water movements so the traffic does not in any way move "over the same line." Second, even if there were a common leg between these movements, it would not be sufficient to state a claim under section 17 because "between the same points" means the same points of origin and destination (reply brief, p. 154). The 7 respondents further say IP has failed to prove it has suffered any special injury which goes beyond the simple payment of a higher rate; that IP has not lost any sales as a result of the PWC CAF (*Ibid.*, p. 143).

Witness T. A. Przedpelski, Manager, International Distribution Operations, for International Paper Company, whose direct testimony is Exhibit No. 17, on cross-examination was asked (Tr. 6/28/82, p. 20), is the PWC a defendant in this case? He replied, No. Then (on page 21 Tr. 6/28/82) stated ". . . being a member of the PWC was not the ingredient involved, it was whoever assessed the charge, and I believe it was exclusively by the PWC members, as far as I know."

"The initial step was to approach the Conference itself because the Conference is the machinery to which you speak to the various members." Tr. 21. The approach had to do with an attempt to prevent continuation of the situation as it then existed. The Conference failed to respond favorably to that, leaving the matters apparently in the hands of the individual members and not taking any Conference action. So when lodged, the complaint was aimed at those parties who were assessing the charge rather than the conference itself (Tr. 6/28/82, p. 22).

IP in its dealings with the Conference and the carriers discussed the fact that the level of the CAF was too high, but IP did not bring any legal action on that subject. (*Ibid.*, p. 39).

Respondent Yamashita-Shinnihon Steamship Co., Ltd., provides both all-water and intermodal service to Japan as a PWC member. The all-water service is provided under the PWC Local and Overland Tariff (Exh. 36, p. 4). Witness Hirano testified that if a PWC-MLB rate or charge is to be compared with anything, it should be compared with (a) a Gulf or Atlantic all-water rate or charge or (b) an independent carrier MLB rate or charge (*Ibid.*, p. 6).

Witness Hirano testified the Japanese yen is a widely used currency in the PWC trade to Japan. Some debts are payable in yen—long term such as shipbuilding costs, equipment leases, crews' and stevedores' wages payable under labor contracts, etc., and short-term such as administrative salaries, agents' commissions, supplies, repair and maintenance of vessels, etc. (*Ibid.*, p. 7).

Further, there are yen expenses directly related to the rail segment of the MLB movement. For example, containers owned by some carriers were manufactured in Japan and are financed in yen. Rental payments for some of leased containers are also in yen. So, a carrier pays in yen the capital or lease cost of many of its containers and this includes payment for the periods when the containers are used in the rail movement (*Ibid.*).

Witness Dr. Nadel testified steamship companies operating in the foreign trade of the United States have financial expenses and commitments and therefore revenue needs, in many foreign currencies (Exh. 35, p. 13).

The sharp and uncertain changes in the value of the U.S. dollar measured against the currencies of other major trading countries has created a risk of significant economic loss to carriers engaged in the foreign commerce of the United States. The depreciation of the U.S. dollar vis-a-vis the Japanese yen has at times been particularly severe in recent years. The problem for the carriers arises because the dollar value of revenues is fixed in the tariff but the yen value is not. Carrier dollar revenues become increasingly insufficient to meet yen commitments, expenses and needs.

As the dollar depreciates relative to the yen, the need arises for carriers to increase revenues (*Ibid.*, p. 14).

For example, a carrier with a base freight revenue of $100,000 has determined that, for a variety of business reasons, has a need for 10 million yen. At an exchange rate of, say, 275 yen to the dollar, this yen revenue need equates to $10,000,000 ÷ 275 = $36,364. So long as the exchange rate does not change, $36,364 of the carrier's earnings converts to 10 million yen. (The remaining $63,636 of the earnings stay in dollars). But, if the exchange rate subsequently falls to, say 230 yen to the dollar, the carrier's $36,364 earnings convert to only 36,364 x 230 = 8.364 million yen. Under these circumstances, the carrier would be revenue deficient, by approximately 1.636 million yen, due to the depreciation of the dollar (*Ibid.*, p. 15).

To make the carrier's revenue "whole in terms of yen" a currency adjustment factor is required (*Ibid.*, p. 16).

The PWC–MLB rates are far more closely related to FEC rates than to PWC local rates (*Ibid.*, p. 57).

IP's implicit theory that MLB is "local service plus a train ride" is simply incorrect (*Ibid.*, p. 60).

If MLB rates were cost-based, the MLB rates would exceed the local rates for "corresponding" commodities by more than they do now (*Ibid.*, p. 83).

IP makes a simplistic and unrealistic evaluation of the economic difference between local or MLB service. IP has focused only on the rail division, and has ignored other economic components of MLB. (*Ibid.*, p. 87).

The carriers do not know the precise amount of yen revenue losses caused by dollar depreciation, or the impact of these losses in their revenue needs, until after freight charges are paid by shippers and financial commitments are met by the carriers. (*Ibid.*, p. 17).

The CAF could just as well take the form of a percentage general rate increase (GRI) as it could a surcharge (*Ibid.*, p. 34).

Witness Day testified separating out the rail division when the bill of lading is prepared is a physical impossibility. At the time the bill of lading is prepared and the freight rate including surcharge is calculated, a PWC carrier does not know how much the rail division is (so that it can be substituted for the through rate freight). The ICC has deregulated the Trailer on Flatcar and Container on Flatcar rates which constitute the "rail division" of the MLB rate. This deregulation included removal of the requirement that the rail carriers publish or file their rates. The FMC has a similar exemption for ocean tariffs, and the PWC no longer publishes the rail division in PWC tariffs (Exh. 37, p. 16).

There is no sound rationale to justify treating rail divisions differently from any of the myriad other dollar expenses incurred by the ocean carrier (*Ibid.*, p. 17).

IP is not a PWC Dual Rate Contract signator. Therefore, IP is not obligated to ship on PWC member vessels under any PWC tariff but, rather, is free to utilize any carrier it wishes (*Ibid.*, p. 19).

The basic purpose behind surcharges is to reimburse the carriers for additional costs temporarily incurred by the performance of their services, and which costs the carriers are not recovering through their basic freight rates. *Surcharge on Cargo to Manila,* Docket No. 1155, 8 F.M.C. 395, 399 (1965). As the United States Shipping Board Bureau said in *Intercoastal Rate of Nelson SS Co.,* Docket No. 139, 1 U.S.S.B.B. 326, 336 (1934), "the interest of the public demands that the carrier shall receive revenues which will enable them to keep their fleets in good repair and maintain efficient service." That is just as true today as it was in 1934.

It is true that the Commission has been and is concerned about the development of methods of transportation to serve shipping needs. IP says that the Commission's references to its desire to foster intermodal transportation are legion (opening brief, p. 54) and that the Commission said in *Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11,* Docket No. 68–8, 11 F.M.C. 476, 489 (1968) (*Ibid.*, p. 55), ". . . the Federal Maritime Commission can and must play an important role in encouraging improved services for shippers." In that same paragraph the Commission said, ". . . the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlightened regulation is the key to effective regulation."

In the instant case IP calls attention to the case of *Harborlite Corp.* v. *ICC,* 613 F.2d 1088 (1979), and the opinion of Circuit Judge Tamm upon review of a decision of the ICC dismissing a complaint that alleged unlawful rate discrimination in violation of section 3(1) of the Interstate Commerce Act, 49 U.S.C.A. § 10741(b). The case was remanded for further proceedings consistent with the opinion.

Circuit Judge Tamm wrote in the *Harborlite* case (p. 1091), "In the leading case of *Chicago and Eastern Illinois Railroad* v. *United States,* 384 F. Supp. 298 (N.D. Ill. 1974) (three Judge court) (per curiam), aff'd mem. 421 U.S. 956, 959 Ct. 1943, 44 L. Ed. (2d) 445 (1975), the court stated the four elements of a section 3(1) action and the burden of proof on these elements to support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor.''

To connect, IP cites *North Atlantic Mediterranean Freight Conference—Rates on Household Goods,* Docket No. 66–49, 11 F.M.C. 202, 209 (1967), that it is well settled that the provisions of the Shipping Act which confer upon the Commission authority over the rates and practices of water carriers and prescribe its mode of exercise closely parallel those of the Interstate Commerce Act establishing relations of the Interstate Commerce Commission to carriers by rail; and where dissimilarities in the respective modes of transportation do not warrant a different construction, the Shipping Act should be construed in the light of the similar provision of the Commerce Act. Section 16 of the Shipping Act is substantially identical with section 3(1) of the Interstate Commerce Act.

Containerization has been one of the developments in the maritime field that has moved rapidly and changed the face of the industry in recent years. Intermodal service, similarly, has been greeted as part of the present and future service in transportation. The Federal Maritime Commission and the various conferences are interested in such developments. However, as the Commission said in *Agreement No. 17–34—Application of the Far East Conference for Intermodal Authority,* Docket No. 74–53, 21 F.M.C. 750, 753 (1979): Overall this evidence shows that conferences generally have not acted quickly to develop intermodal services after approval of their intermodal amendments, and the majority of those which did implement intermodal service did so only after an individual member pioneered in the field. The record here, therefore, tends to run counter to previous Commission findings regarding the expected public benefit of promoting intermodal development under conference rate authority.

In this case, the CAF is under PWC authority. The conference has developed a formula for the CAF. No one brought the PWC into this proceeding as a respondent, nor did the PWC seek intervention. Since the tariff is on file, the tariff is approved and lawful. No one has questioned the operation of the tariff. Nevertheless, how can one check on the application of the formula without the information supplied by the carriers in the conference only to the conference and not even to the individual members of the conference?

It is patently clear that intermodal service is distinctive, a sought after service in a new, still developing phase of change in transportation. Users such as IP benefit from such service and to sanction no CAF on the services land leg and to require a rate for mini-landbridge from the Gulf to Japan to be the same as the all water route from the West Coast to Japan would be an irony not encompassed by any ICC action, or common sense.

Undoubtedly, the issue of foreign currency, revenue needs, costs and many other factors are prevalent in the maritime picture today more so than ever before. Is the PWC–CAF the answer?

Upon consideration of the above and the record herein the Presiding Administrative Law Judge *finds* and *concludes* that the respondents have not violated section 16 First[4] or section 17[5] of the Shipping Act, 1916, as amended.

Wherefore, for the reasons given above and the record herein, IP's requests are denied.

It is *ordered:*

This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

[4] Section 16 First—To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[5] Section 15—That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1021

APPLICATION OF KOREA SHIPPING CORPORATION FOR THE BENEFIT OF SUNKYONG MAGNETIC, LTD.

SPECIAL DOCKET NO. 1022

APPLICATION OF HANJIN CONTAINER LINES, LTD. FOR THE BENEFIT OF LATEX GLOVE CO., INC.

SPECIAL DOCKET NO. 1023

APPLICATION OF AMERICAN PRESIDENT LINES, LTD. FOR THE BENEFIT OF LUX CHEMICAL CORP.

SPECIAL DOCKET NO. 1024

APPLICATION OF YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. FOR THE BENEFIT OF MELCO SALES SINGAPORE PTE., LTD.

In special docket applications, the Commission has discretion whether to require the identification of every affected shipment for which refund or waiver of freight charges is sought.

Under the present circumstances, caused by a single error and involving a very large number of shipments, a detailed description of each shipment would be unnecessarily burdensome. The Order of Discontinuance is, therefore, reversed and the relief sought is granted.

Ted F. Fordney for the applicants.

REPORT AND ORDER

August 23, 1983

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* Thomas F. Moakley, *Vice Chairman;* James Joseph Carey, James V. Day and Robert Setrakian, *Commissioners.*

These four proceedings are before the Commission upon its determination to review the April 20, 1983 discontinuance by Administrative Law Judge William Beasley Harris "for failure to prosecute."

Special docket applications were filed on March 9, 1983 by Ted F. Fordney, a registered practitioner with the Pacific Coast Tariff Bureau (PCTB), on behalf of the above-captioned carriers. The carriers allege that on October 1, 1982, "approximately 450 tariff amendments to FMC tariffs were inadvertently delivered to the ICC." The error was discovered on

October 14, 1982, whereupon PCTB filed the intended rates. However, for three weeks, shipments were rated in accordance with amendments erroneously believed to be on file with the Commission.

The instant applications consist of documents describing a single affected shipment for each carrier. Each application requests that:

> [i]f the waiver of freight charges is approved it is intended that the required notice be published in a general way without noting any one specific shipment or tariff item and then to be filed as a supplement to the effected [sic] tariffs instead of within each tariff item involved.
>
> This "general" approach is requested to lessen the burden to the applicant, to PCTB and also to the FMC in its workload directed towards the application and the other applications citing this unfortunate mishap.

By letter dated March 23, 1983, the Presiding Officer advised the carriers that they failed to conform with the form prescribed for special docket applications at 46 C.F.R. § 502.92(a)(5). He noted that each application included only one bill of lading for one shipment, and appeared to suggest that this rendered the applications defective.* He requested an amended application or individual applications within 10 days of the letter. In a March 29, 1983 telephone conversation with Mr. Fordney, the Presiding Officer advised him that possibly the wrong applicant had gone forward and that he might submit a brief in support of his position. Finally, on April 20, 1983, having received no response, the Presiding Officer discontinued the proceedings for "failure to prosecute." The Commission determined to review that decision *sua sponte.*

DISCUSSION

It is unclear whether the Presiding Officer's action stemmed from the carriers' failure to address each individual shipment, the failure to brief the Presiding Officer on Mr. Fordney's standing to file the applications, or both. As a registered practitioner before the Commission, Mr. Fordney could file on behalf of the carriers. Thus, any misgivings by the Presiding Officer on the latter issue were unfounded.

On the former issue, the Commission has discretion whether to require or waive the identification of specific shipments. In Special Docket No. 1026, *Application of F.M.C. Agreement No. 10107 for the Benefit of Atari, Inc. and Others,* also served on April 20, 1983, the administrative law judge granted a waiver of freight charges where the applicant-Agreement identified "at least 10" affected shipments by a single member line and requested relief for other shipments of the commodity which may have

*The Presiding Officer's letter stated:

> It is my judgment that your proposed disposition is not in keeping with the handling of special docket applications. Since you know or should know all affected, you should provide for each the information required by the form referred above.

been carried by unspecified other member lines. It was not deemed necessary that the applicant provide detailed information on every affected shipment with its application.

In the instant proceedings, there are very likely a large number of shipments affected by the misfiled tariff amendments. To require a detailed description of each shipment in the applications would be extraordinarily burdensome under these circumstances, and would serve little purpose. The error which caused all the misratings has been fully described. Moreover, when special docket relief is afforded, carriers are required to publish notice of the corrected tariffs for the information of any and all affected shippers during the relevant period.

The Commission has determined, therefore, to reverse the Presiding Officer's discontinuance of these proceedings and to grant the requested relief. The Commission is satisfied that it received, prior to the filing of these applications, the effective tariff amendments setting forth the rates on which any waivers would be based. *See* 46 C.F.R. § 502.92(a)(2).

THEREFORE, IT IS ORDERED, That the Order of Discontinuance in these proceedings is reversed; and

IT IS FURTHER ORDERED, That Korea Shipping Corporation, Hanjin Container Lines, Ltd., American President Lines, Ltd., and Yamashita-Shinnihon Steamship Co., Ltd. are granted permission to refund and/or waive freight charges as requested in their special docket applications, on the condition that each carrier publish the applicable portion of the following as a supplement to its tariff:

Korea Shipping Corporation Tariff FMC No. 19:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The currency surcharge of 3% and the bunker surcharge of $2.00 per revenue ton, published on 50th Revised Page 5, are effective October 1, 1982 and continuing through October 18, 1982.

(b) The matter contained on 66th Revised Page 66–A, 66th Revised Page 72 and 34th Revised Page 74–B is effective October 1, 1982 and continuing through October 5, 1982.

(c) The matter contained on 72nd Revised Page 52, 75th Revised Page 54, 34th Revised Page 64 and 68th Revised Page 74, is effective October 1, 1982 and continuing through October 7, 1982.

(d) The matter contained on 58th Revised Page 50, 51st Revised Page 51–A, 32nd Revised Page 66–B and 57th Revised Page 77–A, is effective October 1, 1982 and continuing through October 12, 1982.

(e) The matter contained on 54th Revised Page 65 and 6th Revised Page 76–A, is effective October 1, 1982 and continuing through October 14, 1982.

(f) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 18, 1982, except as otherwise noted:

21st R/P 1	2nd R/P 64–C (except special rate to Nagoya of $1600 per 20′ container in Item 5240, effective 11/18/82)	55th R/P 74–A
36th R/P 52–E	83rd R/P 72–A	65th R/P 76
35th R/P 52–F	52nd R/P 72–B	2nd R/P 76–B
20th R/P 57–B		17th R/P 77–B–1
58th R/P 60		17th R/P 77–C–1
45th R/P 62–A		12th R/P 77–C–2
44th R/P 64–A		

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Korea Shipping Corporation Tariff FMC No. 20:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The matter contained on 8th Revised Page 83–A, 32nd Revised Page 85–A, 48th Revised Page 91–A and 31st Revised Page 93–A, is effective October 1, 1982 and continuing through October 3, 1982.

(b) The matter contained on 41st Revised Page 95 and 29th Revised Page 99, is effective October 1, 1982 and continuing through October 18, 1982.

This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities contained on the above referenced pages which may have been shipped during the specified period of time.

Korea Shipping Corporation Tariff FMC No. 22:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The currency surcharge of 3% and the bunker surcharge of $20.00 per revenue ton, published on 29th Revised Page 8, are effective October 1, 1982 and continuing through October 27, 1982.

(b) The matter contained on 11th Revised Page 167 (except for the special rate applicable to Japan in Item 646–1/a which is effective October 8, 1982) and 14th Revised Page 316–B, is effective October 1, 1982 and continuing through October 14, 1982.

(c) The matter contained on 10th Revised Page 182 is effective October 1, 1982 and continuing through October 18, 1982.

This Notice is effective for purposes or waiver of bunker and currency surcharges assessed during the specified period of time and of freight charges on any shipments of the commodities described on the above referenced pages except as noted, which may have been shipped during the specified period of time.

Korea Shipping Corporation Tariff FMC No. 23:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:
(a) The currency surcharge of 3% and the bunker surcharges of $16.00 per revenue ton, published on 20th Revised Page 7, are effective October 1, 1982 and continuing through October 18, 1982.
(b) The matter contained on 3rd Revised Page 79 is effective October 1, 1982 and continuing through October 18, 1982.
This Notice is effective for purposes of refund or waiver of surcharges assessed during the specified period of time and of freight charges on any shipments of the commodities contained on the above referenced pages which may have been shipped during the specified period of time.

Korea Shipping Corporation Tariff FMC No. 25:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:
(a) The matter contained on 56th Revised Page 56–A, 4th Revised Page 56–A–2 and 11th Revised Page 56–D, is effective October 1, 1982 and continuing through October 3, 1982.
(b) The matter contained on 22nd Revised Page 56–B is effective October 1, 1982 and continuing through October 12, 1982.
This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities described on the above referenced pages which may have been shipped during the specified period of time.

Korea Shipping Corporation Tariff FMC No. 27:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:
(a) The currency surcharge of 4% published on 3rd Revised Page 7, is effective October 1, 1982 and continuing through October 18, 1982.
(b) The bunker surcharge of $10.00 per revenue ton, published on 5th Revised Page 8, is effective October 1, 1982 and continuing through October 18, 1982.
This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time.

Hanjin Container Lines, Ltd. Tariff FMC No. 2:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The bunker surcharges of $12.00 per revenue ton, $400 per 20′ container and $600 per 40′ container, published on 33rd Revised Page 8, are effective October 1, 1982 and continuing through October 18, 1982.

(b) The matter contained on 15th Revised Page 157 is effective October 1, 1982 and continuing through October 18, 1982.

This Notice is effective for purposes of refund or waiver of surcharges assessed during the specified period of time and of freight charges on any shipments of the commodities described on the above referenced pages which may have been shipped during the specified period of time.

Hanjin Container Lines, Ltd. Tariff FMC No. 4:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The currency surcharge of 4% published on 40th Revised Page 8 is effective October 1, 1982 and continuing through October 19, 1982 and the bunker surcharges of $10.00 per revenue ton, $325 per 20′ container and $400 per 40′ container, published on 40th Revised Page 8, are effective October 10, 1982 and continuing through October 19, 1982.

(b) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 20, 1982, except as otherwise noted:

Supplement No. 7	2nd R/P 218	2nd R/P 238
2nd R/P 199	2nd R/P 219	2nd R/P 239
2nd R/P 201	2nd R/P 220	2nd R/P 240
2nd R/P 202	2nd R/P 221	4th R/P 241
2nd R/P 203	2nd R/P 222	10th R/P 242 (except as noted on rates from Japan in Item 33440–10)
2nd R/P 204	4th R/P 223	2nd R/P 243
2nd R/P 205	2nd R/P 225	6th R/P 244
2nd R/P 206	2nd R/P 226	1st R/P 245
2nd R/P 207	2nd R/P 227	8th R/P 245–A
2nd R/P 208	2nd R/P 228	2nd R/P 248
2nd R/P 209	2nd R/P 229	5th R/P 249
2nd R/P 210	2nd R/P 230	4th R/P 251
2nd R/P 211	2nd R/P 231	3rd R/P 252
2nd R/P 212	2nd R/P 232	3rd R/P 253
3rd R/P 213	4th R/P 233	2nd R/P 254
7th R/P 214 (except as noted in Item 1320–00)	2nd R/P 234	3rd R/P 255–A
2nd R/P 215	2nd R/P 235	
2nd R/P 217	2nd R/P 236	
	2nd R/P 237	

10th R/P 256
3rd R/P 257
1st R/P 258
3rd R/P 259
2nd R/P 260
1st R/P 261
5th R/P 262
8th R/P 263
5th R/P 264 (except for 40′ per container rates for Stethoscopes applicable from Japan in Item 4720–20)
2nd R/P 265
6th R/P 266
2nd R/P 267
2nd R/P 268
2nd R/P 269
2nd R/P 270
3rd R/P 271
4th R/P 272
3rd R/P 273
4th R/P 275
3rd R/P 276
2nd R/P 277
2nd R/P 278
3rd R/P 279
6th R/P 280
1st R/P 281
1st R/P 282
5th R/P 283
3rd R/P 284
2nd R/P 285
4th R/P 286
2nd R/P 287
2nd R/P 288
2nd R/P 289
2nd R/P 290
3rd R/P 291–A
2nd R/P 292
2nd R/P 293
2nd R/P 294
2nd R/P 295
2nd R/P 296
6th R/P 297
1st R/P 298
2nd R/P 299
6th R/P 300
2nd R/P 301
1st R/P 302
3rd R/P 303
7th R/P 304
6th R/P 305
8th R/P 306
1st R/P 307
1st R/P 308
1st R/P 309
1st R/P 310
3rd R/P 311
8th R/P 312
7th R/P 313
2nd R/P 314
2nd R/P 315
8th R/P 316
2nd R/P 317
4th R/P 318
13th R/P 319
2nd R/P 320
5th R/P 321
2nd R/P 323
2nd R/P 324
3rd R/P 325
3rd R/P 326
2nd R/P 327
2nd R/P 328
2nd R/P 329
2nd R/P 330

(c) The matter contained on the pages listed is effective October 1, 1982 and continuing through October 26, 1982, except as otherwise noted:

9th R/P 246 (Except as noted in Item 3610–00)
8th R/P 246–A (Except as noted in Item 3612–00 and Item 3615–00)
18th R/P 247 (Except as noted in Item 3650–05, Item 3650–07 and Item 3655–05)
16th R/P 250 (Except as noted in Item 4110–00)
8th R/P 255 (Except the addition of New Orleans for Special Rate in Item 4360–00 is effective October 8, 1982)
10th R/P 274
23rd R/P 291 (Except as noted in Item No. 5573–00)

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Hanjin Container Line, Ltd. Tariff FMC No. 5:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff;

(a) The currency surcharge of 4% published on 39th Revised Page 7, is effective October 1, 1982 and continuing through October 19, 1982 and the bunker surcharges of $10.00 per revenue ton, $325 per 20′ container and $400 per 40′ container, published on 39th Revised Page 7, are effective October 10, 1982 and continuing through October 18, 1982.

(b) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 19, 1982, except as otherwise noted:

Supplement No. 7	18th R/P 228	7th R/P 264
2nd R/P 188	7th R/P 228–A	2nd R/P 265
2nd R/P 190	10th R/P 229	4th R/P 266
2nd R/P 191	19th R/P 231	2nd R/P 267
2nd R/P 192	6th R/P 232	3rd R/P 268
3rd R/P 193	4th R/P 233	9th R/P 269
2nd R/P 194	20th R/P 234	1st R/P 270
2nd R/P 195	9th R/P 235	1st R/P 271
2nd R/P 196	5th R/P 236	17th R/P 272
2nd R/P 197	3rd R/P 237	3rd R/P 274
2nd R/P 198	3rd R/P 238	11th R/P 275
2nd R/P 199	3rd R/P 239	2nd R/P 276
2nd R/P 200	5th R/P 240	4th R/P 277
6th R/P 201	4th R/P 243	2nd R/P 278
4th R/P 202	1st R/P 244	3rd R/P 279
12th R/P 203	5th R/P 245	2nd R/P 280
2nd R/P 205	2nd R/P 246	23rd R/P 281
8th R/P 207	1st R/P 247	2nd R/P 282
3rd R/P 208	5th R/P 248	3rd R/P 283
3rd R/P 210	7th R/P 249	2nd R/P 284
5th R/P 211	3rd R/P 250	2nd R/P 285
5th R/P 212	2nd R/P 251	2nd R/P 286
2nd R/P 213	2nd R/P 252	1st R/P 288
2nd R/P 214	10th R/P 253	2nd R/P 289
3rd R/P 215	2nd R/P 254	9th R/P 290
3rd R/P 216	8th R/P 255	2nd R/P 291
2nd R/P 217	5th R/P 256	1st R/P 292
4th R/P 218	9th R/P 257	2nd R/P 293
2nd R/P 219	6th R/P 258	9th R/P 294
2nd R/P 220	5th R/P 259	8th R/P 295
2nd R/P 221	4th R/P 260	1st R/P 297
2nd R/P 222	2nd R/P 261	1st R/P 298
4th R/P 224	1st R/P 262	1st R/P 299
2nd R/P 226	1st R/P 262–A	1st R/P 300
4th R/P 227	3rd R/P 263	6th R/P 301

2nd R/P 302
12th R/P 303 (except as noted in Item 6200–00)
5th R/P 304
3rd R/P 306
2nd R/P 307
4th R/P 308
4th R/P 309
5th R/P 310
5th R/P 312
3rd R/P 313
2nd R/P 315
2nd R/P 316
6th R/P 317
5th R/P 318
4th R/P 319
7th R/P 320
3rd R/P 321
2nd R/P 322
5th R/P 323
2nd R/P 324
3rd R/P 325
2nd R/P 326
2nd R/P 327
2nd R/P 328
1st R/P 329
5th R/P 330
7th R/P 331
3rd R/P 332
3rd R/P 333
8th R/P 334
4th R/P 335
4th R/P 336
7th R/P 337
2nd R/P 338
2nd R/P 339
2nd R/P 340
2nd R/P 341
2nd R/P 342
9th R/P 344

(c) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 24, 1982, except as otherwise noted:

8th R/P 206
15th R/P 209
8th R/P 225
9th R/P 227-A
18th R/P 230
13th R/P 241 (Except the Special rate of $1590 per 40′ container for Wooden Kitchen and Vanity Cabinets from Korea to Los Angeles and Long Beach only, published in Item 4360-14, which is effective October 4, 1982.)
24th R/P 242 (Except the $2133 per 40′ container rate applicable from Japan, published in Item 4380-05, which is effective October 4, 1982.)
14th R/P 287 (Except the $2150 per 40′ container rate applicable from Korea in Item 5820-12, which is effective October 4, 1982.)
14th R/P 296
10th R/P 305 (Except the $2375 per 40′ container rate applicable from Korea in Item 6240-00, which is effective October 4, 1982.)
12th R/P 311 (Except the $2125 per 40′ container Special rate for 2 or more containers per vessel in Item 6540-00, which is effective October 4, 1982.)
16th R/P 343

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Hanjin Container Line, Ltd. Tariff FMC No. 6:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The currency surcharge of 4% and the bunker surcharges of $12.00 per revenue ton, $400 per 20′ container and $600 per 40′ container applicable from Hong Kong and Taiwan, published on 41st Revised Page 7, are effective October 1, 1982 and continuing through October 18, 1982 and the bunker surcharges of $10.00 per revenue ton, $325 per 20′ container and $400 per 40′ container, applicable from Korea and Japan, published on 41st Revised Page 7, are effective October 10, 1982 and continuing through October 18, 1982.

(b) The matter contained on 163rd Revised Page 1 is effective October 1, 1982 and continuing through October 5, 1982.

(c) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 18, 1982:

Supplement No. 9	4th R/P 92	5th R/P 107
3rd R/P 78	6th R/P 93	1st R/P 108
3rd R/P 80	3rd R/P 94	1st R/P 109
4th R/P 82	3rd R/P 96	11th R/P 111
6th R/P 83	3rd R/P 97	12th R/P 113
4th R/P 84	3rd R/P 98	17th R/P 114
7th R/P 85	4th R/P 100	7th R/P 115
3rd R/P 86	11th R/P 101	1st R/P 116
24th R/P 87	10th R/P 102	1st R/P 117
7th R/P 87-A	4th R/P 103	1st R/P 118
3rd R/P 88	6th R/P 104	1st R/P 120-A
8th R/P 89	7th R/P 105	8th R/P 121
12th R/P 91	11th R/P 106	3rd R/P 122

(d) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 24, 1982, except as otherwise noted:

14th R/P 79

21st R/P 81 (Except for the $2600 per 40′ container rate applicable from Korea to Chicago and the $2650 per 40′ container rate applicable from Korea to Dallas in Item 0100-00, which are effective October 4, 1982.)

10th R/P 90

15th R/P 95

15th R/P 99

16th R/P 110

6th R/P 112

14th R/P 119

20th R/P 120

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Hanjin Container Line, Ltd. Tariff FMC No. 9:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The matter contained on 81st Revised Page 1 is effective October 1, 1982 and continuing through October 5, 1982.

(b) The currency surcharge of 3% and the bunker surcharges of $18.00 per 1000 kilos or $16.50 per 1 cubic meter, published on 31st Revised Page 8, are effective October 1, 1982 and continuing through October 18, 1982.

(c) The matter contained on 8th Revised Page 84-A-1 is effective October 1, 1982 and continuing through October 7, 1982.

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Hanjin Container Line, Ltd. Tariff FMC No. 10:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The currency surcharge of 3% and the bunker surcharge of $13.00 per revenue ton, published on 31st Revised Page 5, are effective October 1, 1982 and continuing through October 18, 1982.

(b) The matter contained on 24th Revised Page 104 is effective October 1, 1982 and continuing through October 12, 1982.

(c) The matter contained on 37th Revised Page 127 is effective on October 1, 1982 and continuing through October 6, 1982.

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

American President Lines, Ltd. Tariff FMC No. 124:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1023, that, subject to all applicable regulations, terms and conditions of American President Lines, Ltd. Tariff FMC No. 80:

(a) The bunker surcharge of $27.50 per revenue ton applicable from Sri Lanka, as published on 66th Revised Page 7-A of American President Lines, Ltd. Tariff FMC No. 80, is effective October 1, 1982 and continuing through October 18, 1982.

(b) This matter contained on 2nd Revised Page 76-A-2 of American President Lines, Ltd. Tariff No. 80, is effective October 1, 1982 and continuing through October 18, 1982.

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

American President Lines, Ltd. Tariff FMC No. 81:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1023, that the bunker surcharge applicable to Hong Kong, Manila and Japan of $2.50 per revenue ton, the bunker surcharge applicable in India, Pakistan and Sri Lanka of $21.00 per revenue ton, and the currency adjustment factor applicable to Japan of 3%, as published on 55th Revised Page 7, are effective October 1, 1982 and continuing through October 18, 1982, subject to all applicable regulations, terms and conditions of this tariff.

This Notice is effective for purposes of refund or waiver of bunker and currency surcharges assessed during the specified period of time.

American President Lines, Ltd. Tariff FMC No. 118:

Notice is hereby given, as required by the decision of the Federal Maritime Ccmmission in Special Docket No. 1023, that the bunker surcharge of 16½%, as published on 13th Revised Page 5, is effective October 1, 1982 and continuing through October 17, 1982, subject to all applicable regulations, terms and conditions of this tariff.

This Notice is effective for purposes of refund or waiver of surcharges assessed during the specified period of time.

American President Lines, Ltd. Tariff FMC No. 119:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1023, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The matter contained on 4th Revised Page 3 and 8th Revised Page 167 (except as noted by telex filing of September 27, 1982 to Item 5650), is effective October 1, 1982 and continuing through October 18, 1982.

(b) The matter contained on 9th Revised Page 168 is effective October 1, 1982 and continuing through October 5, 1982.

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Yamashita-Shinnihon Steamship Company, Ltd. Tariff FMC No. 33:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1024, that, subject to all applicable regulations, terms and conditions of this tariff, the matter contained on the pages listed below is effective October 1, 1982 and continuing through October 20, 1982:

7th R/P 2	2nd R/P 38	2nd R/P 51
11th R/P 5	Original 39	Original 52
27th R/P 25	2nd R/P 40	Original 53
Original 28	2nd R/P 41	4th R/P 54
2nd R/P 29	Original 42	Original 55
Original 30	2nd R/P 43	2nd R/P 56
Original 31	3rd R/P 44	Original 57
Original 32	Original 45	Original 58
Original 33	Original 46	2nd R/P 59
Original 34	Original 47	Original 60
Original 35	2nd R/P 48	Original 61
2nd R/P 36	Original 49	
2nd R/P 37	3rd R/P 50	

This Notice is effective for purposes of refund or waiver of the freight charges on any shipments of the commodities contained on the above referenced pages which may have been shipped during the specified period of time.

Yamashita-Shinnihon Steamship Company, Ltd. Tariff FMC No. 37:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1024, that, subject to all applicable regulations, terms and conditions of this tariff, the matter contained on 66th Revised Page 1, 1st Revised Page 4, 8th Revised Page 60 and 9th Revised Page 61, is effective October 1, 1982 and continuing through October 17, 1982.

This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities described on the above referenced pages which may have been shipped during the specified period of time.

Yamashita-Shinnihon Steamship Company, Ltd. Tariff FMC No. 40:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1024, that, subject to all applicable regulations, terms and conditions of this tariff, the matter contained on 2nd Revised Page 3 and 1st Revised Page 530, is effective October 1, 1982 and continuing through October 17, 1982.
This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities described on the above referenced pages which may have been shipped during the specified period of time.

and that each carrier shall file with the Secretary within 60 days of the date of this Order a copy of the tariffs so amended; and

IT IS FURTHER ORDERED, That each carrier shall notify the Commission of the actual waiver or refund of charges within five days of said waiver or refund; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–36

[46 C.F.R. PART 536]

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

REQUIREMENTS FOR FILING CURRENCY ADJUSTMENT FACTORS REFLECTING CHANGES IN THE EXCHANGE RATE OF TARIFF CURRENCIES

September 6, 1983

ACTION: Discontinuance of Proceeding.

SUMMARY: The Commission has determined to discontinue this proceeding without issuing a final rule.

DATE: Effective September 13, 1983.

SUPPLEMENTARY INFORMATION:

By notice published in this proceeding (47 F.R. 31407–31410, July 20, 1982), the Federal Maritime Commission proposed to amend its rules to provide requirements for filing currency adjustment factors reflecting changes in the exchange rate of tariff currencies. Comments were received from conferences, carriers, and shippers. Upon consideration of these comments the Commission has decided to discontinue this proceeding. The Commission will continue to monitor industry practices and shipper complaints concerning currency adjustment factors in the foreign trades of the United States.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. 538.10; DOCKET NO. 81–54]

PROPOSED RULEMAKING TO ALLOW A THIRD REBUTTABLE PRESUMPTION UNDER ARTICLE 6, CLAUSE (D) OF THE UNIFORM MERCHANT'S CONTRACT

September 27, 1983

ACTION: Discontinuance of Proceeding.

SUMMARY: The Commission has determined to discontinue this proceeding without modifying the Uniform Merchant's Contract to allow for the inclusion of an optional provision raising a third rebuttable presumption "that the merchant paying the freight charges on a given shipment has the legal right to select the ocean carrier."

DATES: Effective October 4, 1983.

SUPPLEMENTARY INFORMATION:

The Uniform Merchant's Contract (46 C.F.R. 538.10) implements the provisions of section 14(b) of the Shipping Act, 1916, which authorizes the use by carriers or conferences of carriers of a dual-rate system that provides for lower freight rates for merchants who pledge all or a fixed portion of their shipments to said carriers. By "Notice of Proposed Rulemaking" (46 FR 4498) published in the *Federal Register* on September 9, 1981, the Commission instituted this proceeding to allow the optional inclusion in the Uniform Merchant's Contract of a rebuttable presumption "that the merchant paying the freight charges on a given shipment has the legal right to select the ocean carrier." In response to the Notice, comments were received from 18 conferences, 7 shippers, and an association representing approximately 400 freight forwarders and customs brokers.

Upon review of the comments submitted and reexamination of the rule proposed, the Commission has determined that no regulatory purpose would be served by promulgating that rule at this time. Accordingly, the Commission is withdrawing the proposed rule and discontinuing this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–34

AGREEMENT NO. T–3856

NOTICE

October 7, 1983

Notice is given that no exceptions have been filed to the August 29, 1983, 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.

As set forth in the initial decision, a revised copy of Agreement No. T–3856, signed by the parties or their duly authorized representatives, shall be filed with the Commission amending Article 8 to provide for the agreement's termination five years from the date of approval. The agreement will stand approved effective on the date the appropriately modified agreement is received by the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–34

AGREEMENT NO. T–3856

Proponents have established that certain anticompetitive provisions of Article 2 of Agreement No. T–3856, which authorize members to discuss and make non-binding recommendations with respect to rates and charges, are required by a serious transportation need, are necessary to secure public benefits and are in furtherance of a valid regulatory purpose.

Application approved upon condition that Proponents file an amendment, providing for termination of Agreement No. T–3856 five years after the date of approval by the Commission.

Robert L. McGeorge and *Joseph Tasker, Jr.*, for Proponents, Mid-Gulf Seaports Marine Terminal Conference, Terminal Operators Conference of Hampton Roads, and South Atlantic Marine Terminal Conference.

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

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

Finalized October 7, 1983

This proceeding is an investigation instituted under the provisions of sections 15 and 22 of the Shipping Act, 1916, 46 U.S.C. 814 and 821, to determine whether Agreement No. T–3856 should be approved, disapproved or modified.

The proceeding was initiated by Order of Investigation and Hearing (Order), served July 7, 1982. The Order designated the three parties to Agreement No. T–3856 as Proponents and named Hearing Counsel as a party. The Proponents are Mid-Gulf Seaports Marine Terminal Conference (MGSMTC), Terminal Operators Conference of Hampton Roads (TOCHR) and South Atlantic Marine Terminal Conference (SAMTC).

As their names indicate, each of the Proponents is a regional marine terminal conference, operating under an approved section 15 agreement.[2] TOCHR's membership is comprised of Virginia ports at the mouth of Chesapeake Bay in the area known as Hampton Roads. SAMTC's members range from North Carolina to, and including, Florida, but not those Florida ports which are members of the agreements shown in the note below.[3]

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

[2] MGSMTC's approved agreement is No. T–2002; TOCHR's is No. T–8435; and SAMTC's is No. T–8455.

[3] Port Everglades Freight Handlers, Agreement No. T–2592; Marine Freight Handlers, Agreement No. T–2629; Marine Terminal Operators of Tampa, Agreement No. T–2291.

MGSMTC's members are the ports in Alabama, Louisiana, Mississippi and Texas.[4]

Agreement No. T-3856 was entered into on August 1, 1979, and was filed with the Commission, for approval, on September 4, 1979. The substantive purposes of Agreement No. T-3856 are contained in Article 2, which, as pertinent, provides that the members of the Proponent conferences, acting through those conferences, may ". . . meet, confer, discuss, exchange information and make recommendations with respect to rates, charges, practices, legislation, port administration and on matters of concern to the marine terminal industry." Article 8 of Agreement No. T-3856 provides that the agreement shall become effective when approved by the Commission and that, upon approval, another agreement—No. T-2299—between TOCHR and SAMTC shall terminate. Agreement No. T-2299 essentially authorizes TOCHR and SAMTC to engage in those practices which approval of Agreement No. T-3856 would empower TOCHR, SAMTC and MGSMTC to do.

Although the filing of Agreement No. T-3856 evoked neither protest nor comment, the Commission determined that it was not approvable, as filed. In lieu of unconditional approval, the Commission issued an Order, dated April 16, 1981, granting approval conditioned upon deletion of those parts of Article 2 which would allow Proponents to discuss and make recommendations concerning rates and charges.[5]

The Commission imposed its conditions because it was concerned that there was insufficient support, in the material submitted by Proponents, to demonstrate that the discussion of rates and charges was required by legitimate transportation needs or other public interest objectives. In the Order initiating this proceeding, the Commission explained its concerns as follows:

> The Commission imposed the above conditions because the discussion of matters relating to rates, even though the Agreement does not confer rate-making authority or bind the members to recommendations made pursuant to the Agreement,[6] can be expected to affect the level of rates and charges or result in the establishment of uniform rates and charges in the relevant port areas. As such, the Agreement is anticompetitive and cannot be approved unless Proponents can demonstrate that the Agreement is required by a serious transportation need, necessary to secure public benefits, or is in furtherance of a valid regulatory purpose. *Federal Maritime Commission, et al.*, v. *Aktiebolaget Svenska Amerika Linien, et al.*, 390 U.S. 238 (1968) [hereinafter, *Svenska*], *United*

[4] A list of the members of each of the Proponents at the time of filing of Agreement No. T-3856 appears in Appendix I. A list of current members appears in Appendix II.

[5] The Order of April 16, 1981, also required that parallel references to discussions and recommendations with respect to rates and charges, which appear in a Whereas clause of Agreement No. T-3856, be deleted.

[6] The several conference agreements—Nos. T-2002, T-8435 and T-8455—do include ratemaking authority, but, at the present time, only TOCHR publishes a conference-wide tariff.

States Lines, Inc. v. *Federal Maritime Commission,* 584 F.2d 519 (1978).

The Order of April 16, 1981, further provided that, if the conditions were not met, Agreement No. T–3856 would be disapproved unless a request for further hearing were to be filed by one of its signatories. On August 17, 1981, the Proponents filed a petition declining to make the changes suggested by the Order of April 16, 1981, and requested a hearing to determine whether said Agreement should be unconditionally approved, as filed. The petition was granted by the Order initiating the proceeding.

There were two prehearing conferences.[7] Afterwards, there was one day of hearing.[8] At the hearing, Proponents submitted several volumes of prepared documentation,[9] together with proposed findings of fact[10] based on the evidence contained in those documents. Hearing Counsel joined with Proponents in the proposed findings of fact.[11] Hearing Counsel and Proponents each called one witness to testify in support of unconditional approval of Agreement No. T–3856.[12] Thereafter, on April 11, 1983, Hearing Counsel and Proponents submitted separate briefs in support of approval of the Agreement.[13]

In my judgment, the Agreement, as filed (and as modified, see n. 13 below) should be approved.

STIPULATED FACTS[14]

1. Pursuant to Agreement No. T–8435, TOCHR members meet periodically to discuss issues of common concern to port authorities and operators. Agreement No. T–8435 grants authority to TOCHR to publish conference-wide tariffs applicable to all members, subject to each member's reserved right of independent action. TOCHR currently has a conference-wide tariff published and on file with the Commission.

2. Pursuant to Agreement No. T–8455, SAMTC members meet periodically to discuss issues of common concern to port authorities and operators.

[7] August 3, 1982, and December 7, 1982.

[8] March 21, 1983.

[9] Exhibit Nos. 1, 2, 3, 3(a), 4(a), 5 and 6.

[10] Exhibit No. 7.

[11] Thus, in effect, the facts are stipulated.

[12] On January 10, 1983, the California Association of Port Authorities and Northwest Marine Terminals Association wrote a letter to the Secretary of the Commission advising the Commission of its support "of the inclusion of rate making discussion rights" in Agreement No. T–3856. A copy of that letter was addressed to me. By letter dated January 17, 1983, the sender of the letter was advised by the Secretary that I rejected the letter and that I would not consider any of the views expressed therein.

[13] Proponents' brief contained some additional proposed findings of fact based upon testimony adduced at the hearing. In addition, Proponents acquiesced in the recommendation concerning the term of the Agreement made by Hearing Counsel's witness at the hearing. Proponents had sought an open-ended term upon approval. Hearing Counsel's witness, Mr. Robert E. Hollifield of the Commission's Shoreside Agreements staff, suggested a definite term of five year's duration. In their brief, Proponents agreed to this modification.

[14] With slight editing, these findings generally accept the stipulated facts (including Proponents' unopposed additional proposed findings) as submitted.

Agreement No. T–8455 grants authority to SAMTC to publish conference-wide tariffs applicable to all members, subject to each member's reserved right of independent action. SAMTC does not at the present time have a conference-wide tariff published or on file with the Commission.

3. Pursuant to Agreement No. T–2002, MGSMTC members meet periodically to discuss issues of common concern to port authorities and operators. While Agreement No. T–2002 grants authority to MGSMTC to publish conference-wide tariffs, there have been no conference-wide tariffs for several years. Each MGSMTC member sets and publishes its own rates and charges independently.

4. Members of TOCHR and SAMTC met periodically since 1969 to discuss issues of common concern to port authorities and operators in the Hampton Roads and South Atlantic port ranges pursuant to Agreement No. T–2299, as amended. This agreement authorizes the parties to discuss, but not to agree upon, terminal rates and charges.

5. Proposed Agreement No. T–3856 would permit MGSMTC members to join in inter-port discussions (including discussions of terminal rates and charges) currently authorized by Agreement No. T–2299, as amended. As is the case under Agreement No. T–2299, participants in discussions under Agreement No. T–3856 could discuss rates and charges in a multitude of contexts but would not have authority to set rates and charges among the participants.

6. United States maritime ports are vital elements of our national transportation system, particularly that portion of the transportation system which serves our foreign and domestic offshore trades.

7. In 1980, imports and exports amounting to 847.5 million short tons moved through the nation's ports.

8. As much as 95 percent of all United States foreign trade moves through the nation's ports.

9. On a tonnage basis, TOCHR, SAMTC and MGSMTC ports handle about one-third of the nation's import and export ocean-borne cargoes.

10. Historically, most United States ports were operated as public services. A significant portion of their operating and capital costs were furnished by local, state and federal governments because terminal rates and charges were not sufficient to operate or develop the ports on a self-sustaining basis. This governmental support was based, at least in part, on the perception that economic benefits to the general public are to be derived from port activity.

11. At present, but in terms of 1977 dollars, the cash value of all types of marine terminal facilities at the nation's 189 seaports is over $40 billion and the estimated replacement cost of these facilities is about $54 billion.

12. The value of capital assets at those TOCHR, SAMTC and MGSMTC ports which were able to provide data are:

(a) Port facilities at Lambert's and Sewell's Points, Norfolk, Newport News and Portsmouth—$137.8 million (acquisition basis).

(b) Facilities of the South Carolina State Ports Authority at Georgetown, Charleston, and Port Royal—$176.7 million (acquisition basis) and $436.6 million (replacement cost basis).

(c) Facilities at the Port of Gulfport, Mississippi—$28 million.

(d) Facilities owned by the Port of Lake Charles—$71.2 million (in 1975 dollars). Current replacement cost is estimated at $100 million.

(e) Facilities of the Port of Orange—$13.3 million invested. The estimated replacement cost is $43 million.

13. The United States Department of Transportation, Maritime Administration (MarAd) estimates that total capital requirements for development of necessary marine facilities in the United States from 1980 to 1990 will be more than $5 billion.

14. Particular port development plans for the 1980's, exclusive of dredging, at TOCHR and MGSMTC ports, are expected to involve the following outlays:

(a) TOCHR ports—$50.75 million.

(b) MGSMTC ports—$76 million at the Port of Mobile, Alabama; $380 million by 1992 at the Port of New Orleans (the Port of New Orleans currently spends $100,000 on capital improvements every working day); $1.8 million at the Port of Orange (now under construction).

15. MarAd also estimates that these new marine terminal facilities will be required during the 1980's to handle a 40 percent increase in the total volume of foreign trade moving through U.S. ports.

16. The Chairman of MGSMTC estimates that expenditures of $3.8 billion will be needed for port facilities throughout the State of Louisiana by the year 2000 because it is estimated, also, that cargo at all of Mid-America's ports will exceed existing capacity by almost 700 million tons annually.

17. Historically, ports relied heavily upon state, local or port authority bonds to finance necessary capital improvements. However, in recent years, the capital formation process has become more difficult and expensive for the nation's ports, in part due to highly volatile financial markets.

18. Historically, the federal government provided significant amounts of financial and other assistance to the ports' maintenance and development programs. Primarily, the United States Army Corps of Engineers constructed and maintained navigation channels and harbors. In addition, the United States Department of Commerce's Economic Development Administration provided loans and grants to help finance port improvements. However, since the beginning of the fiscal year, 1983, the latter no longer provides such federal funding.

19. Federal support for dredging the nation's harbors declined since World War II. While expenditures for Corps of Engineers maintenance dredging increased 400 percent from 1963 to 1979, actual yardage dredged increased by only 8 percent.

20. No new seaport dredging project has been authorized by Congress since 1976, despite the fact that, generally, larger and deeper draft ships were coming on line. For example, at the Port of New Orleans, the number of large vessels (60,000 deadweight tons and over) that could draw up to 55 feet (if channels were that deep) increased from 23 to 3,000 between 1970 and 1979.

21. Currently, some officials and some private sector groups are proposing that the federal government impose a user fee on the nation's ports to recoup all or a significant portion of the Army Corps of Engineers dredging costs.

22. In the meantime, some ports are assuming the increasing dredging costs themselves. For example:

(a) The Jacksonville Port Authority spent $1 million per year for each of the last five years on maintenance dredging.

(b) The South Carolina Ports Authority spent more than $1.1 million on dredging projects over the last five years.

(c) The Mississippi State Port Authority at Gulfport spent $100,000 over the three years 1980-1982 on dredging.

(d) The Port of Houston spent $5.8 million on maintenance dredging in 1981 alone.[15]

23. All of Proponents' ports were subjected to rapidly escalating operating costs in the last several years, due to inflation and resultant increases in the areas of construction, energy and labor.

24. Cost increases in the recent and more distant past vary significantly among the ports, sometimes even within a single conference. For example, those member ports which provided data on cost increases reported the following:

(a) TOCHR ports, from 1976–1980:
Labor—57% increase;
Equipment maintenance—48% increase;
Fuel and power—48% increase.

(b) Georgia Ports Authority (SAMTC): Total costs increased 300% from 1970 to 1980.

(c) South Carolina State Port Authority (SAMTC), from 1978–1982:
Labor—64.5% increase;
Equipment Maintenance—100% increase;

[15] The Port of New Orleans is contemplating plans, including a financial support program, for dredging its existing 40-foot deep channel to a depth of 55 feet. The estimated cost is $435 million.

Fuel and Power—127.6% increase;

General repairs—40.9% increase.

(d) Mississippi State Port Authority at Gulfport (MGSMTC), from 1976–1980:

Labor (excluding ILA labor)—60.7% increase;

Fuel and Power—93.9% increase.

(e) Orange County Navigation and Port District, Texas (MGSMTC), from 1976–1980:

Labor—112% increase;

Fuel and Power—96.7% increase;

General repairs—112% increase.

25. The nation's ports, collectively, are spending about $42 million per year to comply with mandatory federal and state environmental, employee health and safety and cargo security regulations. These expenditures are expected to increase about 50% (to $64 million) during the 1980's. TOCHR, SAMTC and MGSMTC ports bear a proportionate share of these costs.

26. Faced with prospective diminishing federal, state, and local financial support, the TOCHR, SAMTC and MGSMTC ports must develop methods to become self-sufficient. This means that the ports will be operated more as businesses than as municipal services and that port revenues, rather than tax dollars, will have to provide funding to cover operating costs as well as capital for future development.

27. To achieve this self-sufficiency, ports need to initiate and maintain procedures to insure that they possess the most accurate and current information before undertaking programs designed to control costs and to develop terminal facilities.

28. In recognition of these needs, MarAd recommended that:

> Individual ports should (not already having done so):
> 1. Develop a careful and realistic assessment of the revenue supportive short fall in their tariff rated facilities, taking into account depreciation factors and replacement requirements; a fair rate of return; rates of inflation; and levels of cargo volume.[16]

In order to implement those recommendations, MarAd further recommended that those ports, voluntarily:

> 2. Consider participation with existing or new regional or subregional Maritime Terminal Conferences *for the purposes of discussing rates and charges.*[17] (Emphasis supplied.)

29. Members of the TOCHR and SAMTC discussion agreement (Agreement No. T–2299) utilized their existing discussion authority to improve

[16] MarAd, *Current Trends in Port Pricing* (August 1978) at ii. (Ex. 1, Exhibit C attached to Keown affidavit).

[17] *Id.*

the efficiency of their ports. TOCHR/SAMTC discussions focused on topics such as: (a) operations and procedures; (b) cost management; (c) compliance with government regulations; (d) ratemaking philosophies; and (e) planning. Some of the details of those topics are, as follows:

(a) Discussion of operations and procedures over the past five years included such things as federal and state regulations relating to the handling of hazardous materials; Coast Guard regulations; a TOCHR/SAMTC Port Procedures Committee study on ways to increase operating efficiencies; the advantages of uniform dock receipts and delivery order forms; collection problems and solutions; and cost accounting systems to identify all relevant costs and determine whether existing tariff charges cover associated costs. Of necessity, these discussions involved related issues including such matters as the imposition of charges to cover those costs and the appropriate level of those charges.

(b) TOCHR/SAMTC cost management discussions concerned projections regarding ILA wage demands in forthcoming labor negotiations, including analyses of the impact of a "50 mile rule" and ILA's proposal for a unified contract for all Atlantic and Gulf ports.

(c) TOCHR/SAMTC discussions with respect to compliance with federal and state regulations involved such matters as MarAd reports and contracts; federal record retention requirements; federal and state hazardous materials regulations; and Federal Maritime Commission regulations, including licensing of independent ocean freight forwarders and the impact of those regulations on marine terminal operators, free time and demurrage regulations and rules concerning section 15 agreements.

(d) TOCHR/SAMTC ratemaking discussions[18] examined the many facets of marine terminal ratemaking philosophy. In the course of these discussions, members exchanged information on costs and prices, including the following:

(i) the proper level of wharfage charges for loaded containers, empty containers and containers stuffed or stripped at the pier;

(ii) incentive container-handling rates;

(iii) dockage charges;

(iv) minimum assessments and the proper definition of a "shipment" for assessment purposes;

(v) free time and demurrage charges;

[18] Of course, neither Agreement No. T–2299 nor Agreement No. T–3856 confers ratemaking authority, as such. However, because discussing rates and charges and making recommendations pursuant to those discussions may "affect the level of rates and charges or result in the establishment of uniform rates and charges in the relevant port areas" (pp. 3–4, *supra*), I will refer to those features of the two agreements as ratemaking, hereafter.

(vi) charges for in-transit cargoes;
(vii) terminal services charges;
(viii) charges for stevedores' use of terminal equipment;
(ix) charges for cleaning rail cars;
(x) surcharges for late-arriving vessels; and
(xi) surcharge for hazardous cargoes.

(e) TOCHR/SAMTC planning discussions involved:
(i) projections indicating further declines in break-bulk traffic and increases in containerized traffic, and resulting requirements for acquisition of additional container-handling equipment and facilities.
(ii) estimates of the frequency and legal implication of mainland China-flag vessel calls at Atlantic ports.
(iii) analysis of the increased exposure of terminal operators to claims for liability arising from a recent container accident case.
(iv) analysis of the proposed federal user fee's impact on harbor improvement and maintenance costs.

30. One of the benefits to be derived from ratemaking discussions under Agreement No. T–3856 is the continuing education of participants concerning the factors which should be given consideration when a pricing structure is established. Those factors, of course, include costs and the appropriate levels of charges (rates) to recover those costs. The experiences of TOCHR/SAMTC ratemaking discussions, some of which were detailed above, show that members acquired those benefits and were thereby aided in their daily operations and in developmental planning.

31. Some topics which MGSMTC members suggested for future discussion, upon approval of Agreement No. T–3856, are:

(a) the economics of a COFC/TOFC facility. This would involve utilizing particular traffic studies of various participating ports;
(b) capital improvement programs examining the possible role of U.S. customs revenue;
(c) procedures for collecting delinquent accounts;
(d) the effects of trigger price mechanisms;
(e) the effects of government or labor induced embargoes;
(f) the establishment of dual metric criteria in tariffs; and
(g) free time and demurrage charges.

32. Statistical studies [19] for 1970 show that the port industry was responsible directly and indirectly for:

(a) gross sales (revenues) of $28 billion;

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[19] MarAd, *Economic Impact of the U.S. Port Industry*, pp. ii–iii (1978).

(b) a $15 billion contribution to the gross national product;

(c) over 1 million jobs;

(d) personal income of $9.6 billion;

(e) business income totaling $3.7 billion;

(f) federal taxes totaling $5.7 billion; and

(g) state and local taxes amounting to $2 billion.

It is estimated that the foregoing dollar impact figures have doubled since 1970.[20]

33. The following are some illustrations of the economic impact of particular ports on communities and surrounding regions:

(a) *Hampton Roads Ports.* In 1979 general cargo operations generated 7,315 jobs, $117 million in payroll and $12.9 million in tax revenues. In that same year, throughout the Commonwealth of Virginia, there were 134,693 jobs related to the movement of cargo through the Hampton Roads ports. The port related jobs resulted in earnings of $2.3 billion and yielded tax revenues amounting to $267.4 million. In the Hampton Roads area alone, the ports created more than 50,000 jobs, approximately $1 billion in payroll and $120 million in state and local taxes. Directly and indirectly, the businesses which are attracted to the ports create another 10,000 jobs, a payroll of $184 million and taxes of $20.4 million.

(b) *Georgia Ports Authority.* In 1982 the public ports were responsible for 10,000 port related jobs, a payroll of $200 million and $100 million in retail sales throughout Georgia. Directly and indirectly, port activities induced another 19,900 jobs, $290 million in personal income and $162 million in statewide retail sales.

(c) *Port of Houston.* In 1981 port activities provided employment, directly and indirectly, for 160,000 people and generated more than $3 billion in wages and sales. Port activities resulted in more than $47 million in state and local tax revenues.

(d) *Port of New Orleans.* Total direct and indirect employment from oceangoing commerce at the port is estimated to be over 44,000 jobs, paying $600 million in wages. Total employment, including that induced by the presence of the port is estimated to be 100,000 jobs with an almost $1.3 billion payroll in a six parish area. State tax revenues, measured by the annual value of Louisiana goods and services generated by port activities, amount to $143 million a year. A 1980 study indicated that the overall impact on the State of Louisiana amounts to almost 9 percent ($2.9 billion) of the State's gross product.

34. Members of TOCHR, SAMTC and MGSMTC must develop terminal facilities which are closely matched to the Nation's future transportation needs.

[20] *Id.*

35. Any significant shortages of necessary general or specialized marine terminal facilities are likely to lead to bottlenecks in the Nation's transportation system, thereby reducing the efficiency of the national economy and defense. Nevertheless, TOCHR, SAMTC, and MGSMTC ports cannot afford to build superfluous facilities which will not be amortized by user fees.

36. The Nation's ports in general, and TOCHR, SAMTC and MGSMTC ports in particular, are essential factors in the U.S. defense program.

37. Most of the public TOCHR, SAMTC and MGMTC members were created by state law in the public interest.

38. If they are to continue to provide the marine terminal services which are essential to the economy and national security, TOCHR, SAMTC and MGSMTC members soon must make crucial, near- and long-term decisions concerning the operation and future development of their facilities. The quality of this decisionmaking will be greatly enhanced if it is based on the most current information available and the shared knowledge and experience of other port operators.

39. Agreement No. T–2299 demonstrates that TOCHR, SAMTC and MGSMTC members will gain valuable insights into managing their ports more efficiently by becoming familiar with the methods of operation, organizational structures, rate-setting philosophies, labor-management relationships, accounting principles and management programs of other operators in their regions.

40. At the beginning of an era of self-sufficiency, in which ports will be required to depend upon operational revenues instead of tax dollars to finance operations and improvements, the need to exchange shared knowledge and experience with respect to terminal management, generally, and ratemaking, in particular, takes on added importance in decisionmaking. However, these exchanges of information are not likely to result in competition between ports being stifled because Agreement No. T–3856 does not empower the participants to fix common rates or to allocate rates to individual ports or conferences.

41. The right of each port operator to independent action will not be altered by approval of Agreement No. T–3856, just as it was not affected by approval of Agreement No. T–2299. Experience under the latter Agreement demonstrates that the right of independent action continued to be exercised on many occasions.

42. There are other examples establishing that Agreement No. T–2299 did not produce TOCHR/SAMTC common rates and charges merely because discussions of those subjects were authorized and, in fact, took place:

(a) Wharfage charges are not equal and uniform. During October 1982, wharfage charges on breakbulk cargo per net ton were $1.55 at Hampton Roads, Charleston, and Savannah and $1.60 at Jacksonville and Wilmington. Wharfage charges for containerized cargo per net ton were $1.20 at Charleston, Jacksonville and Savannah, $1.25 at Hampton Roads, and $1.30 at Wilmington.

(b) Handling charges are not equal and uniform. During October 1982, handling charges per net ton on plywood were $5.05 at Wilmington, $5.15 at Charleston, $5.00 at Savannah, $5.00 to $7.75 at Hampton Roads, and $4.10 to $6.60 at Jacksonville.

(c) Dockage charges are not equal and uniform. Dockage charges during October 1982 were 11 cents per registered gross ton and $1.75 per lineal foot at Wilmington, Charleston, Savannah and Jacksonville, and 12¼ cents per registered gross ton and $1.85 per lineal foot at Hampton Roads.

43. There are at least three forcing factors which acted as safeguards against uniform ratemaking under Agreement No. T–2299 and, concomitantly, are likely to continue having that effect under Agreement No. T–3856. They are competition between ports, local economic conditions which cause rates and charges to reflect the community's cost structure[21] and vigorous state government regulation of public ports. The latter two factors also serve as a further stimulus to competition.

44. There is no evidence of abuse of the discussion authority, with respect to rates and charges, under Agreement No. T–2299. There continues to be a great diversity of rates and charges at TOCHR/SAMTC ports. Yet there is evidence of relative rate stability among the port members of those conferences. Although there is no necessary direct connection between this stability and Agreement No. T–2299, it is a fact that, from 1974 to 1981, terminal charges at the member ports rose only about 57 percent compared to an increase of about 83 percent in the producer price index, an overall economic indicator measuring approximately equivalent levels of economic activity.[22]

45. A number of ocean carriers serving the affected ports have increased their bargaining power in negotiating terminal rates and charges by forming Commission-approved joint service agreements. Among the leading joint services currently providing services in these port ranges are:

Hoegh Lines
Atlantic Container Line, G.I.E.
Dart Container Line
Associated Container Transportation (Australia) Ltd.
Hoegh-Ugland Auto Liners, A/S
Orient Overseas Container Line
Barber Blue Sea Line
Gulf Europe Express

[21] E.g., there are separate rate structures at each of the two Georgia Ports Authority's ports due to differences in local conditions and cost factors.

[22] The Commission's Office of Shoreside Agreements, which has the responsibility to review all marine terminal agreements and to prepare recommendations to the Commission concerning approval, disapproval or modification thereof, pursuant to section 15, suggests that the lag behind the producer price index demonstrates that those terminal charges are depressed.

Other joint services with authority to serve one or more of these ports include:

Moller-Maersk Line, A.P.
R.C.D. Shipping Services
Central Gulf Container Line
Combi Line
Sea Express Service
Celtic Bulk Carriers
Georgia-Aztec Line
Pakistan Line
Bank and Saville Line

46. Inter-conference terminal discussion agreements which permit the parties to discuss terminal rates and charges should provide ports with a carefully measured and controlled counterbalance to the bargaining power enjoyed by participants in joint service agreements, even though there is nothing in the record to show that so far, ports have been placed at a disadvantage by this bargaining power.

47. TOCHR, SAMTC and MGSMTC ports face strong competition from Canadian and Mexican ports. This is manifest from evidence that Servico Multimodal Transistmico, a Mexican container landbridge system, now competes directly with Continental United States surface carriers and carriers using the Panama Canal for European and Far East cargo and by sightings of Canadian port based CAST Lines containers in Atlanta, Georgia. The ability to discuss rates and charges is expected to be a useful tool to enable member ports to meet Canadian and Mexican competition.[23]

48. The empiric evidence supports Proponents' premise that members of terminal conferences need authority to discuss ratemaking factors and make non-binding recommendations with respect to rates and charges in the developing era of public, as well as private, port self-sufficiency and Proponents' other premise that, if allowed, this authority will enable ports to become more cost effective and operationally efficient without adversely affecting inter-port competition, all of which will permit those ports to continue to induce economic growth in and provide other public benefits to their communities.

DISCUSSION AND CONCLUSIONS

I. GENERAL

The vital role of terminal operators in the stream of interstate and foreign commerce subject to regulation by the Federal Maritime Commission is

[23] There are indicators that its government has allocated billions of dollars to be spent over the next twenty years for Mexican port development. Coupled with Mexico's natural labor and fuel cost advantages, this funding is expected to presage even greater competitive impact in the future.

well established. "Terminal operators form an intermediate link between carriers and the shippers or consignees." *The Boston Shipping Association, Inc.* v. *Port of Boston Marine Terminal Association*, 10 F.M.C. 409, 414 (1967).[24] The importance of that link to the regulatory scheme formulated by the Congress was pinpointed by the Court of Appeals for the District of Columbia Circuit in *American Export-Isbrandtsen Lines, Inc.* v. *Federal Maritime Commission*, 444 F.2d 824, 828, 829 (D.C. Cir. 1970):

> The law for centuries has recognized that public wharves, piers, and marine terminals are affected with a public interest. [Footnote omitted.]
>
> These terminals stand athwart the path of trade. . . . Efficiency of the manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned. . . .
>
> . . . Because of the vital importance of these Terminals to interstate and foreign commerce, Congress in the Shipping Act of 1916 provided for their regulation by the Federal Maritime Commission and authorized it to promulgate and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering of property at harbor terminal facilities. . . .
>
> The power thus conferred . . . is to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system.

Manifestly, then, "facilitating the free flow of commerce by guaranteeing an efficient terminal system" is the beacon by which the Commission charts the course of marine terminal regulation, and the ratemaking features of Article 2 must be examined in that light.

The Order of April 16, 1981, is not to the contrary. It does not stand for the proposition that, under the standard for marine terminal regulation, Agreement No. T-3856 is unapprovable, substantively, if the ratemaking features remain. That order finds that the ratemaking provisions are anticompetitive and thereby invade the territory of the national antitrust laws. It is well settled that such anticompetitive provisions in an agreement submitted for approval pursuant to section 15 cannot be approved absent a proper showing that the agreement is required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.[25] Because the justification

[24] After the decision in the cited case became administratively final, it was collaterally attacked in the United States District Court for the District of Massachusetts, but the District Court refused to review the merits. The Court of Appeals for the First Circuit disagreed, allowing a collateral review on the merits. *Port of Boston Marine Terminal Assn.* v. *Boston Shipping Assn., Inc.*, 420 F.2d 419 (1 Cir. 1970). The Supreme Court reversed the First Circuit and upheld the District Court on the collateral review issue. *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970).

[25] Svenska, supra, 390 U.S. at 243.

submitted by Proponents at that time failed to meet the *Svenska* requirements, the ratemaking provisions could not pass muster. Thus, the Order of April 16, 1981, simply holds that there was a failure of proof.

In my judgment, Proponents remedied that failure at the hearing, and now the ratemaking features of Agreement No. T–3856 merit approval.

II. THE ANTITRUST ISSUE

Although Proponents generally acquiesce in the Commission's determination, expressed both in the Order of April 16, 1981, and in the Order, that the ratemaking features are anticompetitive and an incursion into antitrust principles, they suggest that, perhaps, these features are not an intrusion into the antitrust laws.[26] This suggestion is rejected.

The argument, as conceived by Proponents, has its genesis in some Supreme Court cases holding that some exchanging of price information among competitors is permitted under the antitrust laws or that the per se violation rule has never been applied to the dissemination of price information itself.[27] Whatever validity there may be to that argument in those cases, the contention is wide of the mark in this proceeding for the very reason contained in the statement of the standard by which Proponents ask that this issue be judged—the "rule of reason."

The "rule of reason," which governs analysis of exchanges of price information among competitors, frequently has been cited with approval by the courts. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 49 (1977). In *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918), Mr. Justice Brandeis explained the rule this way:

> . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

It is not necessary to belabor the issue to understand the differences between the circumstances and commercial enterprises involved in those cases where dissemination of price information may be permitted under

[26] Proponents' brief, pp. 4, 13–27.

[27] Proponents cite *United States* v. *Citizens and Southern National Bank,* 422 U.S. 86, 113 (1975), and cases cited therein.

the antitrust laws and those involved in this proceeding. It is sufficient to recognize that here (1) the Proponents are bodies which are empowered to fix rates for their members[28] under limited antitrust immunity granted by approved section 15 agreements; (2) Proponents' members' individual terminal practices are subject to regulation by this Commission; and (3) although the authorization to recommend rates and charges may not be binding upon Proponents or their members, it would be folly to believe that the sought for power to recommend rate action is intended solely for the purpose of having the participants in the discussion agreement reject the recommendation.

Thus, applying the "rule of reason" to the facts and circumstances of this proceeding, I find that the ratemaking features of the agreement are anticompetitive and invade the antitrust laws.

III. THE *SVENSKA* TEST HAS BEEN MET—THE AGREEMENT IS REQUIRED BY A SERIOUS TRANSPORTATION NEED, NECESSARY TO SECURE PUBLIC BENEFITS AND IS IN FURTHERANCE OF A VALID REGULATORY PURPOSE

Preliminarily, it may be observed that, by specifying Agreement No. T–3856 is to be measured by the *Svenska* yardstick, the Order subsumes that the other criteria for approval under section 15 have been adjudged satisfied and are not in issue at this time.

Proponents have established that the ratemaking features of Agreement No. T–3856 are required by a variety of earnest transportation imperatives, each of which reflects a serious transportation need, but overall, may be seen as constituent elements of the need to maintain and preserve an efficient marine terminal system in order to accommodate the present and future demands of the nation's commerce and defense. In turn, the ratemaking features represent a measured response and minimal intrusion into the antitrust laws, but one necessary to secure the public benefits (contained in the statement of the need) and one which serves the regulatory purpose of "facilitating the free flow of commerce by guaranteeing an efficient terminal system."

As more fully set forth in the Facts, *supra*, the Proponents demonstrated that the nation's port system is in transition from an age of public funding of operational and capital investment costs to an era in which ports must finance their operations and capital improvements from revenues alone. This incoming era has brought with it an urgent need for sophisticated and exact decisionmaking by port managers in order to avoid the potential for profligate redundancy, while maintaining port efficiency, providing the shipping public with essential transportation services, preserving the delicate competitive balance within the system and fostering effective competition with foreign ports.

[28] Albeit the right of independent action is preserved.

I find that the ratemaking features of Article 2 of Agreement No. T–3856 meet the criteria enunciated in *Svenska* and warrant approval under section 15 of the Shipping Act.

I find further that the Agreement shall be amended to include a provision for termination at the end of five years from the date when Agreement No. T–3856 is approved by the Commission.[29]

ORDER

It is ordered that Agreement No. T-3856 be approved upon condition that Article 8 be amended to provide for termination five years after the date of approval by the Commission.

It is further ordered that, within five days after approval by the Commission, Proponents shall file with the Commission the amendment required under the terms of the preceding ordering paragraph.

(S) SEYMOUR GLANZER
Administrative Law Judge

[29] The provisions of 46 CFR 521.2(c) set forth the procedures for applying for an extension of an approved agreement due to expire by its own terms.

APPENDIX I

List of Members of Proponent Conferences at Time of Filing of Agreement No. T-3856

I. *MID-GULF SEAPORTS MARINE TERMINAL CONFERENCE (MGSMTC)*

(1) Alabama State Docks Department
(2) Board of Commissioners of the Port of Beaumont Navigation District of Jefferson County, Texas
(3) Board of Commissioners of Lake Charles Harbor and Terminal District
(4) Board of Commissioners of the Port of New Orleans
(5) Board of Trustees of the Galveston Wharves
(6) Greater Baton Rouge Port Commission
(7) Mississippi State Port Authority at Gulfport, Gulfport, Mississippi
(8) Orange County Navigation and Port District of Orange, Texas
(9) Port Commission of the Port of Houston Authority of Harris County, Texas
(10) South Louisiana Port Commission

II. *TERMINAL OPERATORS CONFERENCE OF HAMPTON ROADS (TOCHR)*

(1) Elizabeth River Terminals, Inc.
(2) Lamberts Point Docks, Inc.
(3) Maritime Terminals, Inc.
(4) Peninsula Terminals, Ltd.
(5) Portsmouth Terminals, Inc.
(6) Virginia Port Authority

III. *SOUTH ATLANTIC MARINE TERMINAL CONFERENCE (SAMTC)*

(1) Almont Shipping Company
(2) Brunswick Ports Authority
(3) Georgia Ports Authority
(4) Jacksonville Port Authority
(5) North Carolina State Ports Authority
(6) South Carolina State Ports Authority

APPENDIX II

Current List of Members of Proponent Conferences

I. *MID-GULF SEAPORTS MARINE TERMINAL CONFERENCE (MGSMTC)*

(1) Alabama State Docks Department

(2) Board of Commissioners of the Port of Beaumont Navigation District of Jefferson County, Texas

(3) Board of Commissioners of Lake Charles Harbor and Terminal District

(4) Board of Commissioners of the Port of New Orleans

(5) Board of Trustees of the Galveston Wharves

(6) Greater Baton Rouge Port Commission

(7) Mississippi State Port Authority at Gulfport, Gulfport, Mississippi

(8) Orange County Navigation and Port District of Orange, Texas

(9) Port Commission of the Port of Houston Authority of Harris County, Texas

(10) South Louisiana Port Commission

II. *TERMINAL OPERATORS CONFERENCE OF HAMPTON ROADS (TOCHR)*

(1) Elizabeth River Terminals, Inc.

(2) Lamberts Point Docks, Inc.

(3) Portsmouth Terminals, Inc.

(4) Virginia Port Authority

(5) Port Authority Terminals, Inc.

(6) Virginia International Terminals Corp.

(7) Pier 8 Terminal

III. *SOUTH ATLANTIC MARINE TERMINAL CONFERENCE (SAMTC)*

(1) Almont Shipping Company

(2) Brunswick Port Authority

(3) Georgia Ports Authority

(4) Jacksonville Port Authority

(5) North Carolina State Ports Authority

(6) South Carolina State Ports Authority

(7) Port Carriers, Inc.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–56

SNYDER GENERAL CORPORATION AND
AIRCONDI REFRIGERATION (PTY), LTD.

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

NOTICE

October 7, 1983

Notice is given that no exceptions have been filed to the August 31, 1983, 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. 82–56

SNYDER GENERAL CORPORATION AND AIRCONDI REFRIGERATION (PTY), LTD.[1]

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.[2]

M. Troy Murrell for Complainants.

David A. Brauner for Respondent.

INITIAL DECISION[3] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Finalized October 7, 1983

The complainants allege they have been injured by reason of respondent's overcharge for freight in the amount of $64,278.35 and seek reparation thereof in accordance with section 18(b)(3) of the Shipping Act, 1916. This proceeding, by consent of the parties and with approval of the Presiding Administrative Law Judge, was conducted under Shortened procedure, 46 C.F.R. 502.181 et seq., without oral hearing.

The original complaint herein was served December 3, 1982. At the prehearing conference in Washington, D.C., on Tuesday, February 1, 1983, the complainants requested and were granted leave to file an amended complaint (Tr. 11). The First Amended Complaint was served February 28, 1983. The respondent served its Answering Memorandum of Facts and Argument to First Amended Complaint March 16, 1983. The respondent stated, among other things, "There is absolutely no change in the substance of the Complaint or in the evidence submitted in support thereof . . . all of the arguments and citations contained in Respondent's Answering Memorandum of Facts and Argument to the original Complaint are equally applicable to and are hereby incorporated herein, and renewed in reply to the First Amended Complaint."

The amended complaint alleges that the Complainant Snyder is a Texas corporation engaged in the manufacturing of heating and air conditioning equipment. Its principal place of business is Red Bud, Illinois. Its export operations are conducted from its office in Carteret, New Jersey. Complain-

[1] Added as a complainant in First Amended Complaint.

[2] Two, named as respondents in the original complaint, Springbok Line Limited and Springbok Shipping Company Limited, by stipulation of the parties at February 1, 1983 prehearing conference (Tr. 16), were dismissed from this complaint.

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

ant Aircondi is a concern in the business of buying and selling refrigeration equipment. Its principal place of business is Pretoria, South Africa.

Respondent, South African Marine Corp., Ltd., does not dispute the fact that the shipments which are the subject of this proceeding were made and billed as set forth in the complaint and further concedes that it was the common carrier by water with respect thereto (Answering Memorandum of Facts and Argument served December 22, 1982, Received December 27, 1982).

The Commission's Office of Energy and Environmental Impact, under date of December 21, 1982, reported it had examined this Docket No. 82–56 and determined that no environmental analysis needs to be undertaken and no environmental documents prepared in connection with this docket.

There are six (6) shipments involved. The South African Marine Corporation (N.Y.), as Agents, Bills of Lading show:

B/L No. 18 dated at New York (date illeginle). The Singer Company Climate Control Division shipped on the vessel *Iktinos* for discharge at Capetown, South Africa.

One—20′ Container—STC
52 Cartons of Industrial Air Conditioning & Parts
Gross Weight 6,351 lbs. 292 cft.
Freight Forwarder—American Forwarder Service, Inc. FMC–1657–R
Paid Freight
Consignee—Aircondi Refrigeration, Pretoria, South Africa
Freight Prepaid—Sailing date July 10, 1982. Alleged overcharge for freight is $3,333.41

1. *S.A. Iktinos*. The complainant alleges the products coded as CC are self-contained products and less than 60,000 BTU/HR as illustrated by Climate Control Brochure attahced as document #2. The freight rate charged for the products was $166.50 M3. The total freight bill for these products was $4,858.13 as illustrated by Document #3. As stated above, Document #3 is illegible. Copy of check is also illegible. Nor has complainant proved by a preponderance of the evidence that the commodity shipped was Air Conditioners, Self-Contained (nor Air Conditioning Equipment). Complainant says the units shipped on the *Iktinos* were entirely self-contained air conditioners. It was without question that the "CC" units were heat pumps.

Respondent says Claimant attaches to its memoranda a tariff page that shows a higher rate for self-contained air conditioners.

B/L No. 3 dated at New York (date illegible). The Singer Company Climate Control Division shipped on the vessel *S.A. Morgenster* for discharge at Durban/South Africa,

3–40′ H/H Containers STC
Industrial Air Conditioners
Container #1TLU5035777

Said to contain 255 ctn—21,955 lbs. 1973–0 cft.

Container #SCXU4263632

Said to contain 193 ctn—16,757 lbs. 1517–10 cft.

Container #SCXU4302580

Said to contain—29,600 lbs. 1640–0 cft.

Freight Forwarder—The Singer Co. Export Import Dept.
Paid Freight
Consignee—Aircondi Refrigeration, Pretoria, South Africa
Freight Prepaid—Sailing date May 8, 1981. Overcharge for freight allegedly is $10,601.74

2. *S.A. Morgenster.* The complainant alleges the products coded as EA are self-contained products and less than 60,000 BTU/HR. The respondent says the EA unit is conceded to be apparently self-contained.

The documents as to payment are illegible.

B/L No. 13 dated 12/31/82 at New York. The Singer Company Climate Control Division shipped on the vessel *S.A. Constantia* for discharge at Durban/South Africa,

One—40′ Container STC

228 Ctns Air Conditioning Machinery Equipment
Gross Weight 32,180 lbs. 1966 cft.

One Container NR CTIU443900–7

One—40′ Container STC

138 Ctns and 8 crates Air Conditioning Machinery Equipment
Gross Weight 36,196 lbs. 1691 cft.

One—40′ Container STC

294 Ctns Air Conditioning Machinery Equipment
Gross Weight 32,028 lbs. 1969 cft.

One—40′ Container STC

228 Ctns Air Conditioning Machinery Equipment
Gross Weight 31,616 lbs. 1846 cft.

Freight Forwarder—American Forwarding Services, Inc. FMC 1657–R

Consignee—Aircondi Refrigeration, Pretoria, South Africa
Freight collect. Sailing date December 31, 1981. Overcharge of $14,190.18 alleged.

3. *S.A. Constantia.* The complainant alleges the products, coded as EA, are self-contained products and less than 60,000 BTU/HR. The products, coded as AJ and AK, are compressors for the products coded EJ and EK.

Respondent says although the EA, EJ and EK units appear to be self-contained the only way this shipment could be entitled to self-contained air conditioner rate would be on the basis of Rule 2(G). However Tariff contains specific rates for compressors.

B/L No. 35 dated 5/7/82 at New York. The Climate Control Division of Snyder Gen. Corp. shipped on the vessel *Ostfriesland* for discharge at Durban/South Africa,

One—40′ Container H/H STC
238 Cartons—Air Conditioning Machinery & Parts
Gross Weight 31,356 #1825 cft.
14,223 Kg 51.679M3
One—40′ Container H/H STC
262 Cartons—Air Conditioning Machinery & Parts
Gross Weight 31,644 #1846 cft.
14,354 Kg 52.274M3
One—40′ Container H/H STC
210 Cartons—Air Conditioning Machinery & Parts
Gross Weight 31,020 #1799 cft.
14,071 Kg 50.943M3
One—20′ Container H/H STC
70 Cartons—Air Conditioning Machinery & Parts
Gross Weight 14,140 # 814 cft.
6,414 Kg 23.050M3
Freight Forwarder—Rohner, Gehrig & Co. Inc. FMC 375
Notify Aircondi Refrigeration, Pretoria, South Africa
Freight Collect
Sailing date May 7, 1982. Complainants claim to have been overcharged $13,644.37

4. *Ostfriesland.* The complainant alleges the products, coded as EA, are self-contained products and less than 60,000 BTU/HR. Checks are illegible.

Respondent says the EA unit described herein appears to be self-contained. However says complainant submits wrong tariff page in support of claim. It would be the 21st revision of Page 153 which reflects a rate of $77.00 not $85.50 as sought by claimant. Complainant says it will gladly accept respondent's suggestion of a $77.00 tariff rate with respect to this shipment.

B/L No. 11 dated at New York (date illegible). The Singer Company Climate Control Division shipped on the vessel *Iason* for discharge at Durban/South Africa. Overcharge for freight allegedly $3,615.56.

One—40′ Container STC
227 Cartons Air Conditioning Machinery Equipment
Gross Weight 18,728 lbs.-1,545 cft.

Freight Forwarder—American Forwarding Services, Inc. FMC 1657–R

Consignee—Aircondi Refrigeration, Pretoria, South Africa

Freight collect. Sailing date December 4, 1981.

5. *Iason.* The complainant alleges the products, coded as HW, are self-contained air conditioners and less than 60,000 BTU/HR. The products, coded as EJ, are self-contained products and less than 60,000 BTU/HR. The products, coded as AR, are self-contained products and less than 60,000 BTU/HR.

Respondent says the HW system described herein is, by its own literature, a split system and therefore irrefutably not self-contained although it does appear to be under 60,000 BTU's in capacity. The EJ unit appears to be self-contained. The AR unit is not by any means an air conditioner, it is a "remote condensing unit." The appropriate rate for this unit is probably, "machinery NOS" at $274.00.

Neither the HW nor AR units are entitled to self-contained air-conditioner treatment.

B/L (No. and date illegible) at New York. The Singer Company Climate Control Division shipped on the vessel *Alanti* for discharge at Durban/ South Africa,

One—40′ Container STC

233 Cartons—Air Conditioning Machinery Equipment

Gross Weight 31,140 lbs. 1779 cft.

Freight Forwarder—American Forwarding Services, Inc. FMC 1657–R

Consignee—Aircondi Refrigeration Freight Collect.

Sailing date January 8, 1982. Overcharge of $3,425.57 alleged.

6. *Alanti.* The complainant alleges the products, coded as EA, are self-contained products and less than 60,000 BTU/HR.

The respondent says the EA unit described is self-contained but the part in question is the heating coil bringing into focus the previously made argument concerning whether these combined heating-cooling units are, under any circumstances, entitled to air conditioner treatment.

Claimant says such heat pumps are entitled to air conditioner treatment.

The burden of proof that the complainant has to meet is proof by a preponderance of the evidence as to what is claimed.

The applicable tariff covering all shipments is United States/South and East Africa Conference, Southbound Freight Tariff No. 6, FMC No. 8, From: United States Atlantic and Gulf Ports To: Ports in Southwest, South, Southeast and East Africa and the Islands of Malagasy Republic (Madagascar) Reunion, Mauritius, Comotos, Ascension, Seychelles, St. Helena, as named. The 16th Revised Page 153 of the Tariff, effective date July 1, 1981 Item 130—Air Conditioners, Self Contained (See Rule 21) (not air conditioning machinery) C (contract) Capetown, 142.50, 1 Note: when shipped in carriers standard 12.19 m container on a house-to-house movement shall be subject to minimum utilization of 49.53 CBM per container of one commodity or any combination of the following commodities at $85.50 W/M Contract basis Capetown/Durban Range Exception to Rule 20–13–15, 16 and 17.

The complainant stated, because of the number of shipments and the volume of documents presented herewith for each shipment, the Memorandum of Facts and Argument is presented separately by shipment, with the documents pertaining to each shipment immediately following the recitation of facts and arguments for that shipment (page 1 complainant's Memorandum of Facts and Argument received June 14, 1983).

Discussion, Reasons, Findings and Conclusions

In this proceeding the complainants seek, *inter alia*, reparation in the amount of $64,278.35; an order commanding the respondent to cease and desist from violation of the Shipping Act, 1916. Of course, the burden of proof is upon the proponent of the . . . order (Rule 155, Commission Rules of Practice and Procedure, 46 C.F.R. 502.155), to prove by a preponderance of the evidence the claim.

The complainant Snyder General Corporation's allegation of being the successor in interest to the Climate Control Division of the Singer Company, brought a prove it response from the respondent. Respondent asserts that the claimant's bold allegation of being the "successor in interest" to the Singer Company's Climate Control Division hardly constitutes even a scintilla of evidence to that effect much less that such allegation, even if true, gives claimant standing to pursue this claim. (Respondent Memorandum of Facts and Argument, received December 27, 1982, page 3.) And, respondent says, insofar as the standing of Aircondi to pursue this claim is concerned, there is no more evidence that Aircondi paid the freight charges on some or all of the subject shipments than there was that Snyder had paid such charges. The mere fact that the bills of lading indicate "freight collect" is not sufficient to give Aircondi standing herein. Documentary evidence of the actual payment of the freight charges by Aircondi or Snyder, as the case may be, or an assignment from the person who did pay such charges, is required to confer standing. (Answering Memorandum of Facts and Arguments to First Amended Complaint, received March 21, 1983, pages 2 and 3.) The complainants in their reply (served July 5, 1983) to respondent's contention that no evidence has been submitted to support the proposition that Snyder is the successor in interest to the Singer Company, state that Snyder purchased the Climate Control Division of the Singer Co. on April 3, 1982. The contract pursuant to which that purchase was made is voluminous; the closing documents comprise two bound volumes consisting of almost 2,000 pages. That is not, and should not be, an issue in this case. However, if the Commission feels that such proof is necessary, it can be furnished by supplemental affidavit, although the complainant maintains that the same is not material and constitutes an invasion of privacy of both the Singer Company and Snyder General Corporation (pages 2 and 3). The complainant failed to cite any Commission or judicial decision in support.

Respondents argue that the complaint is deficient in that it failed to provide paid freight bills in support of the claim for reparation as provided in Rule 186 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.186. Without these documents it cannot even be determined whether, in fact, claimant paid the freight charges. Claimant submits, in support of its complaint in this regard, copies of five checks, four of which are such poor copies as to be illegible in various significant respects such as payee and amount. Respondent requests that it be provided with legible copies of the documents. (Answering Memorandum of Facts and Argument, received December 27, 1982, page 2.) No evidence was submitted with the First Amended Complaint other than duplicate copies of documents submitted with the original complaint which, incidentally, are as illegible as those submitted previously. (March 23, 1983 Answering Memorandum to First Amended Complaint, page 3.)

The respondent asserts that complainant's submission of Memorandum of Facts and Arguments under cover letter of June 13, 1983, represents complainant's third "formal" opportunity to document and support its case. (Respondent's Answering Memorandum of Facts and Arguments received June 28, 1983, page 2.) Respondent says that complainant has still failed to submit adequate evidence of the payment of the freight charges by either Snyder or Aircondi (Ibid. p. 3). Only the actual payment of freight charges by a Complainant or receipt of an assignment from the actual payor of freight charges creates standing to pursue a claim for reparation (Ibid. p. 4). Complainant having failed to provide such evidence on at least three separate occasions in formal submissions to the Commission, it must be concluded that no such evidence exists and/or no such payment was made (Ibid.).

Complainants submit that the evidence of payment to South African Marine is complete with respect to each and every shipment; that respondent presents absolutely no evidence, and indeed does not even argue, that South African Marine was not paid (Complainant's Reply Brief received July 12, 1983, page 2).

As to issue of legibility, the complainants argue that those attachments which were submitted are as legible as can be obtained from the microfilm records which were thereafter photocopied.

The Presiding Administrative Law Judge upon consideration of the above, *finds* and *concludes* that the complainant acknowledges if proof is needed that Snyder is successor in interest to the Climate Control Division of the Singer Co., it can be furnished by supplemental affidavit. Thus complainant tacitly admits such proof is needed. The respondent has alluded to the complainant having had three "formal" opportunities to document and support its case. This case is not the same as a special docket application under section 18(b)(3) of the Act where there is only the applicant(s) seeking permission to waive collection of or refund a portion of freight charges for the benefit of person who paid or is responsible for payment of freight charges. In such cases additional information is sometimes sought and obtained to complete processing the application. In this shortened procedure case, in which there is a complainant and respondent, it is an adversary proceeding. And, the memorandum should contain concise arguments and fact, the same as would be offered if a formal hearing were held and briefs filed. If reparation is sought, paid freight bills should accompany complainant's original memorandum (Rule 186 of Commission's Rules of Practice and Procedure, 46 C.F.R. 502.186). Complainants have had ample opportunity to prove they have standing to pursue their claim. There is no reason, equitable or otherwise, to allow complainants any further opportunity to prove they have standing to sue. Respondent has already been subjected to lengthy proceedings and fairness dictates that the decision in this proceeding be made on what has been submitted. See *Pacific Freight Audit, Inc.* v. *Sea-Land Service, Inc.*, Docket No. 78–24, *Pacific Freight Audit, Inc.* v. *American President Lines*, Docket No. 78–25, 22 F.M.C. 207 (1979).

The complainants seek reparation. To seek reparation a person must show proof of pecuniary loss or valid succession to another's claim. See *Fiat-Allis Construction Machinery Co.* v. *Sea-Land Service Co.*, Docket Nos. 810(I), 811(I), 20 SRR 481, 482 (1980) citing *Trane Co.* v. *South African Marine Corp.*, Docket No. 76–25, 19 F.M.C. 375 (1976), *Ocean Freight Consultants, Inc.* v. *The Bank Line, Ltd.*, Docket No. 1185, 9 F.M.C. 211 (1966).

In its answering memorandum of facts and argument received December 27, 1982, the respondent requested that it be supplied with legible copies of documents. The complainant did not comply. Rule 111 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.111 calls for clear and legible copies. The Presiding Administrative Law Judge *finds* and *concludes* some of the documents are not clear and legible, for example Documents 2 (consisting of 5 pages), 4 and 7 as to the vessel *S.A. Iktinos.*

Thus, the failure of the complainants to prove they have standing to sue, after at least three opportunities to do so, warrants no further opportunity by amendment of the complaint but does warrant dismissal of the complaint.

The merits as to each separate shipment was considered herein above as the complainant aligned them in the booklet containing them in complainant's Memorandum of Facts and Argument received June 14, 1983.

The only case mentioned by the complainants is the *Fedders* case cited by the respondent, *Fedders World Trade Corporation* v. *South African Marine, Ltd.*, Informal Docket No. 1242(I), 1983. The complainants respectfully urge that Commission applied the wrong interpretation to the phrase "self-contained." If one strictly applied the Commission's standard enunciated in *Fedder*, then even a through-the-window air conditioning unit would not qualify for self-contained treatment, since all it does is "bestir ambient air." Yet, no one would seriously argue that such unit is not a self-contained air conditioner. Complainants submit that the Commission should carefully re-examine the meaning of "self-contained." However the complainant offers no substantive suggestions as to what any re-examination should consider or for that matter what is self-contained as it applies in this case.

One further observation, the tariff page submitted herein presents a code (C) denotes contract rates, (S) single rates. (See Rule 14 for noncontract rates.) The rates the complainant proposes as applicable are all C or contract rates. The complainants did not introduce any evidence tending to show they were eligible for the carrier's contract rate. The Commission has determined that where a claimant is seeking the benefit of a contract rate, evidence should be adduced showing that the shipper was indeed eligible for such rate. *National Starch & Chemical Corp.* v. *Hapag-Lloyd & United States Navigation, Inc., Agent,* Informal Docket No. 340(1), 20 F.M.C. 321 (1977).

In addition to the findings above, the Presiding Administrative Law Judge *finds* and *concludes* that the complainants have failed to prove by a preponderance of the evidence the burden of their claims. This complaint should be dismissed.

Wherefore, it is *ordered:*

(A) Complaint is dismissed.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81–75

E.A. JUFFALI & BROTHERS

v.

WATERMAN STEAMSHIP COMPANY

ORDER OF ADOPTION

October 21, 1983

The proceeding is before the Commission on Exceptions of Complainant E.A. Juffali and Brothers and the Reply of Respondent Waterman Steamship Company, to the Initial Decision of Administrative Law Judge Joseph N. Ingolia, in which he denied the Complainant's request for refund of freight overcharges. Complainant also excepts to the Presiding Officer's Order of July 12, 1983, denying a motion that he recuse himself. For the reasons set forth below, the Initial Decision rendered in this proceeding as well as the Presiding Officer's denial of the Motion to Recuse Himself are hereby adopted by the Commission.

DISCUSSION

The complaint alleges freight overcharges in the amount of $19,191.77 on five shipments of household freezers carried by Respondent from Norfolk, Virginia, to Damman, Saudi Arabia. The overcharges allegedly stem from Respondent's refusal to grant a $3.00 pallet allowance provided in Rule 28 of the applicable tariff.[1]

The Presiding Officer denied relief on the ground that, although the shipments were delivered on pallets, Complainant had failed to prove that the pallets complied with the requirements of the tariff. The Presiding Officer also rejected a request of counsel for Complainant to recuse himself from the case for his allegedly "intemperate overreaction" to Complainant's request for a postponement of the hearing and "insuitability" to be impartial in this matter.

On Exceptions, Complainant contends that the Presiding Officer misinterpreted both the facts and the tariff when he concluded that the conditions set forth in Rule 28 were material elements which called for strict compliance and that Complainant had not shown that the shipments met those requirements. Complainant's position is that Items 2 through 5 of the Rule

[1] "8900" Rate Agreement, F.M.C. Agreement No. 8900, Freight Tariff No. 8, F.M.C. No. 8, 1st and 2nd rev. page 35, effective 11/1/80 and 6/1/80, respectively, and original page 36, effective 8/1/79.

are merely "technical" in nature so that non-compliance with those requirements should not bar recovery if what was actually shipped can be identified. Complainant points out that the bills of lading not only confirm that the freezers moved on pallets, but also show the total weight and measurements of each shipment, which confirm that on the average, the pallets exceeded the 2000 pounds or 40 cubic feet minimum requirement of Tariff Item (3)(b).

With respect to the Presiding Officer's refusal to remove himself from the case, Complainant contends that the Presiding Officer's "patently improper conclusion" supports the request for recusal, as well as his "intemperate and unjudicial" treatment of an application for extension of time which demonstrated obvious predisposition towards one of the parties. Complainant therefore asks that the Initial Decision be reversed and Complainant be granted the relief requested.

Respondent disagrees with the argument that the mere statement in the bills of lading of the gross weight and measurements and of the number of pallets satisfied the requirements of Rule 28. Respondent maintains that Complainant has failed to show by a preponderance of the evidence that the packing of the cargo actually complied with the material elements of the palletization allowance rule.[2]

Upon a careful consideration of the record in this proceeding, the Commission affirms the Presiding Officer's finding that Complainant has not sustained its burden of proving by a preponderance of the evidence that the pallets satisfied the requirements of Rule 28 of the tariff and supports his refusal to recuse himself from the proceeding.

Complainant's argument that the conditions set forth in Rule 28 are merely "technical" and "procedural" and need not be strictly adhered to is without merit. As the Presiding Officer correctly found, those conditions are material elements of the palletization rule in that the rationale for requiring that the pallets be constructed in a certain manner is the benefit to the carrier of greater efficiency in loading and handling the cargo.[3] While the bills of lading confirm that the shipments were palletized, the record contains no evidence that the pallets complied with the other requirements of the palletization rule.

A tariff must be considered in whole and not in part in order to avoid discrimination among shippers. *Storage Practices at Longview, Wash.*, 6 F.M.B. 178, 182 (1960). Rule 28 requires among other things that the pallets be constructed to provide a lip of at least 4 inches on two opposite sides for the lighting aboard vessel with ship's own equipment and that the pallets be double decked and constructed so as to permit the entry

[2] Even though it finds it irrelevant, Respondent also objects to Complainant's introduction at this stage of the proceeding of a telex and a letter from the export packer, attached to Complainant's brief on exceptions, which were not offered in evidence in the course of the hearing nor mentioned in Complainant's post-hearing brief.

[3] Rule 28 does not apply to palletized cargo moving in containers or on trailers.

of forks or fingers of fork lift trucks or pallet trucks. Apart from showing that the shipments were palletized, Complainant has failed to prove that the pallets met any of those requirements. Furthermore, Complainant's attempt to show that the pallets complied with the weight and measurements requirements of the Rule is meaningless. Because not all the pallets contained the same number of pieces, averaging the total weight and measurement of the pallets in each shipment, as Complainant suggests, does not necessarily prove that each pallet exceeded the minimum weight or measurement requirement of Item (3)(b) of the Rule. See *e.g. Singer Manufacturing Co., Inc.* v. *Delta Steamship Lines, Inc.*, 24 F.M.C. 907 (1982); *The Carborundum Company* v. *Venezuelan Line*, 17 F.M.C. 195 (1973); *Kraft Foods* v. *Prudential Grace Line*, 17 F.M.C. 159 (1973).

With respect to Complainant's challenge to the Presiding Officer's denial of the Motion to Recuse Himself, the record is completely devoid of any evidence that Complainant's counsel was subjected to any abuse. In *National Labor Relations Board* v. *Webb Ford, Inc.*, 689 F.2d 733 (7th Cir. 1982), the court stated:

> Our standard in determining whether an ALJ's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for hearing before a new ALJ is an exacting one, and requires that his conduct be so extreme that it deprives the hearing of the fairness and impartiality necessary to the fundamental fairness required by due process. [Citations omitted.]

Nothing in this record reflects a lack of fairness and impartiality on the part of the Presiding Officer. Rather, in light of the Commission's time limit on the hearing, it tends to indicate the Presiding Officer's concern for an orderly and speedy disposition of the proceeding. *See In re IBM Corp.*, 618 F.2d 923 (2d Cir. 1980). Furthermore, the rendering of an adverse decision is not an indication of bias on the part of the Presiding Officer. *Capitol Transportation, Inc.* v. *U.S.*, 612 F.2d 1312 (1st Cir. 1979).

In conclusion, the Commission finds that the record supports the Presiding Officer's denial of the pallet allowance as well as his refusal to remove himself from the proceeding. Other contentions and arguments not specifically discussed have nevertheless been carefully considered and found to be either without merit or irrelevant to the issues presented.

THEREFORE, IT IS ORDERED, That the Initial Decision of Administrative Law Judge Joseph N. Ingolia rendered in this proceeding as well as his denial of the Motion to Recuse Himself are adopted by the Commission and made a part hereof.

IT IS FURTHER ORDERED, That the complaint is dismissed.

FINALLY IT IS ORDERED, That the proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81–75

E.A. JUFFALI & BROTHERS

v.

WATERMAN STEAMSHIP COMPANY

1. Where a tariff provided for a pallet allowance of $3.00 per 40 cu. ft., and further contained specific requirements including those that the pallets had to be constructed and stacked in a prescribed manner for loading, it is the complainant's burden of proof to establish that those requirements have been met. Such requirements are not merely "technical" in nature and are the basis of the pallet allowance in the first instance.
2. Where the record contains bills of lading indicating that household freezers moved on pallets, such description standing alone is insufficient to establish that the tariff requirements giving rise to a pallet allowance have been met and the complainant has failed in its burden of proving what was actually shipped.

Henry Martin and *Paul S. Aufrichtig* for complainant.

George H. Hearn for respondent.

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

ADOPTED OCTOBER 21, 1983

By complaint filed on December 10, 1981, E.A. Juffali & Brothers (Juffali) alleged that Waterman Steamship Corporation (Waterman) had subjected it to payment of rates for ocean transportation in violation of section 18(b)(3) of the Shipping Act, 1961. The allegation is based on the failure of Waterman to make a pallet allowance for household freezers shipped by Juffali aboard vessels owned by Waterman. More detailed facts and discussion are set forth below.

FINDINGS OF FACT

1. On December 10, 1981, the complainant filed a complaint wherein it alleged that the respondent had subjected Juffali to:

> * * * assessment of an ocean freight rate on an exported commodity which is entitled to a pallet allowance properly applicable in accordance with the issued tariff filed with the Federal Maritime Commission and in effect at the time of this shipment.
>
> We challenge the omission of the pallet allowance for tariff No. 8, rule 25, page 5.

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

> * * * E.A. Juffali & Brothers has been subjected to payment of freight rate(s) without pallet allowance which is unjust and unreasonable and in violation of 18(b)(3)[2]
>
> Complainant prays that the respondent be required to * * * pay to said complainant by way of reparation for the unlawful charge(s) described in the attached claims the sum of "19,191.77." (Complaint)

2. The complainant submitted bills of lading for the record indicating that it made five shipments of household freezers from Norfolk, Virginia, to Damman, Saudi Arabia, during the period March 20, 1980, through July 8, 1980, aboard Waterman vessels (Attachment to Complaint).

3. At the time the shipments described in paragraph (2) above were made, "The '8900' Rate Agreement (under F.M.C. Agreement No. 8900), Freight Tariff No. 8, FMC No. 8" tariff was in effect. Page 35, Rule 28 of the tariff, in pertinent part, is as follows:

28. *PALLETIZED CARGO:*

1. The provisions in these rules will apply only to prepalletized cargo on shipper's non-returnable pallets, *except not applicable* to the following commodities:

TARIFF ITEMS:

(*)30	Air Conditioners/Coolers & Parts.
305	Sodium Tripolyphosphate.
....	All Dangerous and Hazardous Cargo Items in Accordance with Rule 16.
420	Drilling Muds, Clays and Additives.
425	Drugs, Medicines and Pharmaceuticals (Refrigerated Stowage only).
490	Feed, Animal or Poultry, Packed.
530	Flour, not prepared, packed in Bags or Balers.
795	Meal, including Soybean, Cottonseed and Meat.
905	Photographic Apparatus, Equipment etc. as described in Item 905 (Refrigerated Stowage only).
995	All Refrigerated Cargo.
(*)1000	Refrigerators or Freezers, H.H.
1015	Rice, packed in bags or balers.
1065	Salt, Table
(*)1155	Stoves, Ranges or Ovens and Parts.
(*)1265	Washing Machines & Dryers, H.H.

(*) Applicable via Waterman-Isthmian Line Only.

Rule 28 at Page 36 also provided, in pertinent part, that:

[2] The complainant later amended the complaint to include section 22 of the Shipping Act, 1916.

28. *PALLETIZED CARGO: (Continued)*

2. These rules do not apply to palletized cargo shipped in cargo containers and trailers.
3. (a) Shipper to indicate at time of booking that the shipment will be pre-palletized (it being understood that each unit is to comprise cargo destined for one port of discharge and to one consignee only.)

   (b) The gross weight or measurement of the pallet and cargo shall not be less than 2000 lbs. or alternatively 40 cubic feet, nor exceed 4480 lbs.

   (c) Pallets with cargo (unit load) are to be of sufficient strength to withstand the ordinary risks of the ocean voyage and for handling and movement during loading and discharge by slings, for lift trucks etc. in respect of which it is the shipper's responsibility to ensure that these conditions are fulfilled.

Pallets must be constructed to provide a lip of at least 4 inches on two opposite sides for lifting aboard vessel with ship's equipment.

Furthermore, the pallet must be double decked and constructed so as to permit the entry of forks or fingers of fork lift trucks or pallet trucks preferably from any side but at least from two opposite sides.

Recommendable size of pallet 40'' by 48''.

(d) The unit load (cargo and pallet) must be squared on all four sides, level on top, be of sufficient strength to allow overstowage by other pallets and/or other cargo and the cargo must completely cover and preferably overlap the pallet. It is recommended that the overlap does not exceed about one inch on any one side.

Cargo must be securely fastened on pallets.

(e) When pallet load is made up of more than one commodity, and provided the carrier is supplied with shipper or supplier's packing list showing dimensions and contents of each package on the pallet, the freight will be assessed on basis of the rate applicable on each individually packed commodity. However, if a package contains more than one commodity, the rate for the highest rated commodity contained therein must be assessed on the package.

(f) The identifying marks including the port mark and gross weight of the cargo and pallet to be clearly visible on two opposite sides, viz.: those sides adopted for fork lift entry.

(g) Where dangerous cargo is concerned, if more than one commodity is included in the unit load, the commodities must be compatible in classification and stowage requirements and the statutory regulations of the country of the carrying Line as to marking, labelling and packing both of unit load and individual package must be strictly observed.

4. Bills of Lading shall be claused as follows:
"___________ pallet (s) said to contain ___________ packages of ___________ pounds gross weight, including gross weight of Pallet (s)."

5. (a) Freight-charges on shipments complying with this rule will be assessed on the measurement (based on tariff rule 21) or weight of the cargo which information must appear on the Bill of Lading and supported by certified packing list. If the measurement of the unit load (cargo and pallet) Rule 5(b) below applies. In the event at time of shipment the packing list is not supplied by the shipper or forwarder or alternatively at the shipper's request Rule 5–B will apply instead of 5–A.

(b) On Unit loads complying with this rule the cubic measurement shall be determined by subtracting 10% of the overall cubic measurement of the unit load. On cargo freighted on a weight basis the freight to be charged on the gross weight of the unit load less an allowance of 5%.

(c) Further a discount of three dollars ($3.00) per revenue ton for cargo moving under the terms and conditions of this rule will be made.

(Exhibits 1, 2 and 5)

4. Effective September 26, 1980, Page 35 of Rule 28 was changed as follows:

28. *PALLETIZED CARGO:*

1. The provisions in these rules will apply only to pre-palletized cargo on shipper's non-returnable pallets, *except not applicable* to the following commodities:

TARIFF ITEMS:

305	Sodium Tripolyphosphate.
....	All Dangerous and Hazardous Cargo Items in Accordance with Rule 16.
425	Drugs, Medicines and Pharmaceuticals (Refrigerated Stowage only).
490	Feed, Animal or Poultry, Packed.
530	Flour, not prepared, packed in Bags or Balers.
795	Meal, including Soybean, Cottonseed and Meat.
905	Photographic Apparatus, Equipment etc. as described in Item 905 (Refrigerated Stowage only).
995	All Refrigerated Cargo.
1015	Rice, packed in bags or balers.
1065	Salt, Table.

(Attachment to Complainant's Post Hearing Brief.)

5. After the shipments involved here were made Ocean Freight Consultants (OFC) conducted a post-audit of the complainant's shipping expenses. As a result it filed five overcharge claims for a total amount of $19,191.77 with Waterman, dated December 8, 1980. The basis for the claims was as follows:

> "*Reason for correction:* Pallet allowance omitted in error, see Rule 28, 'applicable via Waterman Line only. PLEASE SEND US A COPY OF CORRECTION NOTICE'."
> (Attachments to complaint.)

6. After receiving the overcharge claims Waterman issued correction notices in the amount claimed during the period December 1980, through March 1981. However, Waterman later cancelled the corrections and made no refunds. (Attachment 3 to Respondent's Post Hearing Brief.)

7. By letter dated April 23, 1981, the complainant wrote the Federal Maritime Commission (FMC) as follows:

Mr. James A. Warner, Chief
Office of Foreign Tariffs
Bureau of Tariffs
Federal Maritime Commission
Washington, D.C. 20573

Dear Mr. Warner:

We are sorry to be directed to you so needlessly but we have encountered a confusing exemption which leads us to a dual interpretation of Rule 28 on page 35 1st rev. in freight tariff No. FMC No. 8.

In this rule there is a list of tariff items that are excluded from the benefits of the provision. Within the list item 1000 appears exempting refrigerators from being eligible for the pallet allowance. However, the asterisk and its explanations denote that shipments of refrigerators carried via Waterman Line would in fact be granted the allowance provided by Rule 28. If this is not the case, it is our contention that all other carriers maintained by your conference would have been listed instead making it clear that the exemption for refrigerators is *NOT APPLICABLE* to them but it is applicable to Waterman only.

In addition, we would also like to make mention of the fact that this particular carrier had amended previous shipments via manifest correction notices therefore agreeing with our contention as stated above. We ask kindly for your informal opinion so we may have the understanding intended and will consequently be guided in the right direction.

Sincerely,
(S) ROBERT LEE

P.S. Another point for consideration is the matter of ambiguity in the tariff, which as a general rule and if ambiguity does exist, it should be decided in favor of the shipper and not the writer of the tariff, in this case the conference or the steamship company.

(Attachment to complaint.)

8. The reply to the letter dated May 28, 1981, was as follows:

Mr. Robert Lee
The OFC Group
World Headquarters
1 World Trade Center
Suite 2473
New York, New York 10048

Dear Mr. Lee:

Reference is made to your letter dated April 23, 1981, with enclosures, seeking our informal opinion on the interpretation of Rule 28 published on 1st Revised Page 35 to 8900 Lines, Freight Tariff, FMC–8, as it applies to Waterman-Isthmian Line.

We agree with your contention, and the position as allegedly concurred in by Waterman-Isthmian Line, that those items annotated with an asterisk on the above tariff reference are subject to a pallet allowance when shipped via Waterman-Isthmian Line.

As you are perhaps aware, 3rd Revised Page 35 effective September 26, 1980, provides that Rule 28 is not applicable to Waterman-Isthmian Line. Therefore, from that date forward Waterman-Isthmian Line offers no allowances for pre-palletized cargo on shipper's non-returnable pallets.

If we can be of further service please feel free to call on us.

Sincerely yours,
(S) JAMES A. WARNER
JAMES A. WARNER, CHIEF
OFFICE OF FOREIGN TARIFFS
BUREAU OF TARIFFS

(Attachment to complaint.)

ULTIMATE FINDINGS OF FACT

9. The pallet allowance provided for in the pertinent tariff is applicable only after certain requirements set forth in the tariff have been satisfied.

10. Many of the requirements are not mere "technical" or "bookkeeping" requirements, but rather are material requirements directed to the manner in which the cargo is loaded and unloaded, which in turn, affect the costs of handling the cargo and the reason for the "pallet allowance" in the first instance.

11. The record in this case is insufficient and does not establish that the material requirements contained in the tariff have been satisfied so as to justify the pallet allowance. The complainant has failed to sustain its burden of proof.

DISCUSSION AND CONCLUSIONS

There is no controversy in this proceeding regarding the fact that the complainant made five shipments of household refrigerators aboard vessels of the respondent, and as to the date the shipments took place. The parties also agree that the tariff on file governing the shipment contained a basic rate of $106.00 per 40 cu. ft. Where they do disagree is on whether or not a pallet allowance of $3.00 per cu. ft. should be applied to each of the shipments giving rise to a refund of $19,191.77.

Initially, the parties argued the applicability of the pallet allowance on the basis of the meaning of page 35 of the tariff as set forth in the Findings of Fact, paragraph 3. The complainant argued that Rule 28, excepted certain tariff items from the palletized cargo rules, but that the four items bearing an asterisk and applicable to Waterman only, were not excepted and gave rise to the $3.00 per 40 cu. ft. allowance. On the other hand, the respondent argued that the text of Rule 28 identifies 13 commodity items for which no palletization will be provided by any of the member lines, and that as to the four asterisked items, including household refrigerators, the rule's nonapplicability would extend only to Waterman.

Once the case was at issue, the respondent also asserted that the complainant was not entitled to the pallet allowance "absent a showing that he has complied with the rule." He asserts that:

> Complainant's only evidence to substantiate his claim consists of bills of lading and single-page freight claims prepared by a freight consultant up to eight months after the cargoes were shipped. The bills of lading show only the gross weight and measurement of each shipment. The freight claims simply give a number of pallets and a gross measurement.
>
> Provisions of Rule 28(5) of the applicable tariff provide that shipments complying with all of the provisions of the rule will be assessed on the measurement or weight of the cargo, less the measurement of the pallet, if this information appears on

> the bill of lading and is supported by a certified packing list. In the event that the measurement of the pallet itself exceeds 10% of the measurement of the unit load (cargo and pallet), or if a certified packing list is not supplied, or upon the shipper's request, the freight charges will be reduced by 10% of the unit load measurement on measurement-rated cargo, or 5% of the unit load weight on weight-rated cargo.
>
> Section 4 of the Palletized Cargo Rule requires that bills of lading shall contain a clause stating the number of pallets, the number of packages, and the gross weight of the unit loads.
>
> Complaint has not complied with these requirements.

On the other hand the complainant argues that the "bills of lading issued by the Respondent correctly identify on their face that the goods in question were palletized." Further the complainant asserts:

> A review of the testimony demonstrates that the Respondent placed its principle emphasis for seeking to escape liability in this proceeding upon the alleged technical noncompliance by the Complainant with certain procedural aspects of Rule 28. The conditions to which Respondent alludes are procedural in nature only. Nothing can gainsay the fact that the shipment was accepted by Respondent and shipped as palletized cargo (and is identified as such on the bills of lading issued by the respondent). * * *

In their briefs both of the parties agree with the principle enunciated by the Commission in *Western Publishing Co.* v. *Hapag-Lloyd A.G.*, 13 SRR 16 (1972), that reparation for overcharges is based on what is actually shipped.[3] In supporting its view that the tariff palletization requirements here are merely technical in nature and should not bar recovery the complainant cites a series of cases. They indicate that the Commission has allowed reparation even though the shipper did not comply with the tariff trademark rule,[4] or has failed to indicate on the bill of lading that the cargo was proprietary even though the tariff requires such a designation.[5]

While we do not disagree with the holdings in these cases as well as others cited by the complainant, we do not think they are controlling here. In those cases the Commission *determined what was shipped and then held* that having once determined what moved it would apply the tariff rate despite the fact that the bill of lading might be in error, or

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[3] See also *Ocean Freight Consultants Inc.* v. *Italapacific Line*, 15 F.M.C. 314, 13 SRR 151 (1972); *Merck Sharp & Dohme (I.A.) Corp.* v. *Flota Mercante Grancolombiana, S.A.*, 18 F.M.C. 384, 14 SRR 1624 (1975).

[4] *Pan-American Health Organization* v. *Prudential Lines, Inc.*, 19 F.M.C. 412 (1976), where the tariff provided that, "Bills of lading describing articles by trade name are not acceptable for commodity rating. * * * Bill of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo N.O.S. as minimum." See also *Abbott Laboratories* v. *Venezuelan Line*, 19 F.M.C. 412 (1976); *Carborundum Co.* v. *Royal Netherlands Steamship Co. (Antilles) N.V.*, 19 F.M.C. 431 (1977).

[5] See *Durite Corp., Ltd.* v. *Sea-Land Service, Inc.*, 20 F.M.C. 674 (1978), where the tariff required the bill of lading to be claused. "All materials included in this bill of lading are of a wholly proprietary nature and may not be resold at destination * * *." See also *Cities Service International, Inc.* v. *The Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976).

that the shipper misdescribed the cargo or that requirements as to trade names and proprietary cargo may not have been complied with. Here, we must determine "what moved" in light of the issue presented. In determining "what moved" we are not faced with the usual dilemma of identifying a particular commodity—there is no question that household refrigerators were shipped. Rather, in determining "what moved" here we must ascertain whether in shipping the refrigerators on pallets the complainant complied with the material requirements of the tariff which give rise to the pallet allowance in the first instance.

In essence, the complainant urges us to hold that since the bills of lading indicate the refrigerators were on pallets that is sufficient and all other tariff requirements are "technical" in nature. We cannot agree. While it may be true that some of the tariff's paper requirements are not material, it is obvious that others are. The $300 allowance is clearly based on the shipper's ability to construct the pallet to provide a 4 inch lip on two opposite sides, to permit the entry of fork lift trucks from at least two opposite sides, to allow the load to be stowed in a particular manner, etc.[6] These prerequisites are not technical but are obviously intended to allow for more efficient loading of the cargo, and that efficiency is precisely why any carrier would give a pallet allowance. Merely placing the refrigerator on a pallet is not sufficient.

So here, the complainant has the burden of establishing what was actually shipped.[7] Admittedly, that burden is in the Commission's words a "heavy burden" in that it is difficult to assimilate the necessary facts after shipment.[8] Such is the case here and the burden has not been met. The record is silent as to whether or not the palletized cargo satisfied any of the material requirements of the tariff rule and therefore the pallet allowance cannot be allowed. While cases of this nature will generally rise or fall on their own facts this case is similar to the Commission's holding in *Singer Products Co. Inc.* v. *Delta Steamship Lines Inc.*, 24 F.M.C. 907 (1982), Informal Docket No. 1120(I). Like *Singer*, there is a failure of proof.

In their briefs the parties make argument about whether the pallet allowance was ever claimed before by the complainant and about the effect of the respondent's issuance of correction notices. These facts while indirectly material are not controlling to the resolution of the issue here. The same is true regarding the correspondence with Commission personnel, especially where there is a question of whether or not all facts were known at the time the correspondence took place.

Finally, since we have held that the complainant has not met its burden of proof in establishing what was shipped, it is unnecessary to "interpret" the meaning of the respondent's tariff rule 28, page 35. We would be

[6] See Finding of Fact No. 3.

[7] *Western Publishing Co. Inc., supra.*

[8] *Sanrio Company, Ltd.* v. *Maersk Line*, 23 F.M.C. 150, 204 (1980).

remiss, however, if we did not comment by way of dicta that the language of the tariff and the rule itself was ambiguous and should be avoided in the future. In summary, we again wish to stress the fact that in our view, where a pallet allowance is predicated on satisfying material requirements enumerated in a tariff it is the responsibility of the shipper to prove what was actually shipped; namely whether cargo was correctly palletized so as to warrant the allowance. Conclusory statements on bills of lading are not enough to satisfy the "preponderance of the evidence" test, and the record must contain additional facts to establish just how the cargo was palletized in light of the tariff requirements. Any other result would establish a precedent whereby, in effect, the respondents in these cases would be asked to carry a burden of proof which rightfully is that of the complainants.

In light of the above, the relief sought in the complaint is denied and this matter is discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–29

UNITED STATES NORTH ATLANTIC-ITALY POOL AGREEMENT

(AGREEMENT NO. 10286–2)

NOTICE

October 25, 1983

Notice is given that no appeal has been taken to the September 8, 1983, discontinuance of 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. 83-29

UNITED STATES NORTH ATLANTIC-ITALY POOL AGREEMENT (AGREEMENT NO. 10286-2)

MOTION TO WITHDRAW AGREEMENT GRANTED

Finalized October 25, 1983

The Proponents filed Agreement No. 10286-2 (Amendment No. 2), which amends Agreement No. 10286, a revenue pooling agreement among Costa Line, Farrell Lines, Inc., "Italia" S.p.A.N., Jugolinija, Sea-Land Service, Inc., and Zim Israel Navigation Company, Ltd. The Commission served an Order of Investigation and Hearing on July 13, 1983. By letter dated July 29, 1983, the Proponents by their counsel, withdrew Agreement No. 10286-2 and requested that this proceeding be discontinued. The Bureau of Hearing Counsel, the only other party to the proceeding, has not offered any objection to the discontinuance. Wherefore, it is

Ordered, that Docket No. 83-29 is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 540]

DOCKET NO. 83–30

SECURITY FOR THE PROTECTION OF THE PUBLIC

ACTION: Discontinuance of Proceeding

SUMMARY: By notice published in this proceeding (48 F.R. 35675, August 5, 1983) the Federal Maritime Commission solicited comments regarding its regulations concerning the Proof of Financial Responsibility to meet Liability Incurred for Death or Injury to Passengers and Other Persons on Voyages and for Indemnification of Passengers for Nonperformance of Transportation (46 C.F.R. Part 540). This notice was published in conjunction with the Commission's review of the instant regulations conducted pursuant to section 610 of the Regulatory Flexibility Act (Pub. L. 96–354 94 Stat. 1164, 1169). No comments were received. Since the Commission is unaware of any need or basis for amending or modifying the requirements of Part 540 at this time and no comments were received, the Commission has decided to discontinue this proceeding.

DATE: Effective October 27, 1983.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–34

CONTRACT MARINE CARRIERS, INC.

v.

RICHMOND WATERFRONT TERMINALS, INC.

NOTICE

November 7, 1983

Notice is given that no appeal has been taken to the September 28, 1983 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. 83–34

CONTRACT MARINE CARRIERS, INC.

v.

RICHMOND WATERFRONT TERMINALS, INC.

COMPLAINT DISMISSED

Finalized November 7, 1983

This proceeding began with the filing of a complaint on August 17, 1983, by Contract Marine Carriers, Inc. which, for the purposes of the complaint, alleged that it is a common carrier by water. Complainant alleged furthermore that respondent Richmond Waterfront Terminals, Incorporated, a marine terminal operator, filed a "Port Improvement Fee" in its tariff effective August 1, 1983, which would be assessed against all cargo moved by complainant through respondent's wharves. Such fee, according to complainant, constituted an unjust and unreasonable practice in violation of section 17 of the Shipping Act, 1916, and was prohibited by the Commission's regulations dealing with wharfage. At the request of the parties, I permitted respondent to defer filing its answer to the complaint to allow the parties to discuss the situation.

On September 22, 1983, complainant notified me and respondent by letter that it wished to withdraw its complaint on the ground that respondent has withdrawn the subject fee from its tariff, effective September 17, 1983.

In the instant case, as complainant notes, no answer has been filed. Customarily both the federal courts under Federal Rule 41(a)(1), 28 U.S.C.A., and the Commission recognize that a complainant has the right to withdraw its complaint without conditions when no answer has been filed and can do so under the federal rules merely by filing a notice of dismissal. See discussion in *Companhia Siderurgica Nacional* v. *Lloyd Brasileiro*, Complaint Dismissed, 25 F.M.C. 655 (1983).

Accordingly, the complaint is dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 531

GENERAL ORDER 38, AMENDMENT 5; DOCKET NO. 83–51

PUBLISHING, FILING AND POSTING OF TARIFFS IN DOMESTIC OFFSHORE TRADE

December 8, 1983

ACTION: Final Rule.

SUMMARY: This amends Federal Maritime Commission tariff filing rules to provide for 24-hour receipt of tariff filings in the domestic offshore commerce, including those transmitted by use of electronic filing methods. This will benefit carriers and shippers by enabling them to meet commercial exigencies.

DATE: Effective December 14, 1983.

SUPPLEMENTARY INFORMATION: By Notice published in the *Federal Register* of October 25, 1983 (48 F.R. 49308-49309) the Commission proposed to amend its tariff rules for filings in the domestic offshore trade to permit the receipt of tariff filings on a 24-hour basis, including those transmitted by means of electronic filing methods.

Comments were received from Matson Navigation Company and United States Lines in response to the Notice. Both carriers supported the proposal fully. Accordingly, the Commission is adopting the proposed in final form.

The provisions of the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*) do not apply to this final rule. Section 601(2) of that Act excepts from its coverage any "rule of particular applicability relating to rates . . . or practices relating to such rates. . . ."

List of Subjects in 46 C.F.R. Part 531 Maritime Carriers, Reporting and Recordkeeping Requirements

Therefore, pursuant to 5 U.S.C. 553; section 43 of the Shipping Act, 1916 (46 U.S.C. 841(a)); and section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844), Part 531 of Title 46 is amended as follows:

Section 531.2 is amended by revising paragraph (i) to read as follows:

(i) *File, Filed, Filing (of Tariff Matter).* The actual receipt by the Federal Maritime Commission at its offices in Washington, D.C., including those received by electronic transmission.

(1) Electronic filings are those transmitted through the use of commercial data processing terminals and conforming to all the regulations applicable to permanent tariff filings.

Section 531.3 is amended by revising paragraph (e) to read as follows:

(e) Tariff matter will be received by the Commission at its Washington, D.C., offices on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time stamped at a tariff mail drop in the lobby of the Commission's Washington, D.C., offices. Electronic tariff filings transmitted by electronic modes will be receipted by a date/time device on the receiving machine.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–50

GENERAL MOTORS CORPORATION V. MAERSK LINE AND W.R. FILBIN & CO., INC.

NOTICE

December 13, 1983

Notice is given that no appeal has been taken to the November 3, 1983 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. 82-50

GENERAL MOTORS CORPORATION

v.

MAERSK LINE AND W.R. FILBIN & CO., INC.

SETTLEMENT APPROVED; COMPLAINT DISMISSED WITH PREJUDICE

Finalized December 13, 1983

The complainant, General Motors Corporation (GM), and the two respondents, Maersk Line and W.R. Filbin & Co., Inc., filed a joint motion requesting approval of their settlement agreement [1] and dismissal of the complaint with prejudice.

In my judgment the motion should be granted.

PROCEDURAL BACKBROUND

GM filed a complaint, served by the Secretary of the Commission on October 27, 1982, seeking reparation in the amount of $25,812.10 from Maersk,[2] a common carrier by water in the foreign commerce of the United States, in connection with thirty-nine shipments of internal combustion diesel engines or such engines and parts from Oakland, California, to Singapore during the period from August 1981 through April 1982.

As later amended,[3] the complaint alleged that Maersk had misclassified the shipments and charged higher rates for them than should have been charged had another classification with lower rates been applied, all in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3).

Maersk responded to the complaint, alleging that it had applied the proper tariff classification and rate to the shipments and requesting that the complaint be dismissed.[4]

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[1] The settlement agreement (Settlement) is appended to this order as Appendix II.

[2] A.P. Moller-Maersk Agency and, A.P. Moller-Maersk Line were named as respondents in the complaint. Later, Maersk Line was substituted for those respondents, and the caption of the proceeding was amended to reflect that change. See Procedural Schedule, served April 6, 1983. Maersk is a member of the Pacific Straits Conference.

[3] Amendment to Complaint, November 10, 1982.

[4] Memorandum of Arguments on Behalf of Respondents Maersk Line Agency and Maersk Line (Answer), December 6, 1982.

Thereafter, GM again amended the complaint,[5] this time to bring in Filbin as an additional respondent. Filbin is a licensed foreign freight forwarder.[6] In effect, GM alleged that after Filbin was informed by Maersk that the tariff classification affording the lower rates could not be applied to GM's shipments, Filbin failed to relay this information to GM, in violation of 46 CFR 510.32 (c) and (d), and, therefore, in violation of section 44(c) of the Shipping Act, 1916, 46 U.S.C. 841b(c).[7]

Filbin filed an answer to the amended complaint,[8] denying that it had failed to inform GM of Maersk's refusal to apply the tariff classification with the lower rate.

There was an extensive prehearing conference on April 5, 1983. Near the conclusion of that conference, the parties indicated a willingness to enter into discussions to explore the possibility of settlement,. With the understanding of all parties that my presence during settlement discussions and negotiations would not result in a request for my recusal should the effort fail to succeed, I agreed to participate, to the extent requested, in order to facilitate the settlement process.[9] In accordance with that standard, I did participate in off-the-record discussions at the prehearing conference and in subsequent telephone conferences.

THE TARIFF PROVISIONS IN ISSUE

The governing tariff is Pacific Straits Conference Local and Overland Freight Tariff No. 12—FMC–8. The following Commodity Descriptions and Commodity Item Numbers appear in that tariff:

Commodity Description	*Commodity Item*
(1) Engines, Internal Combustion Piston-Type Engines; Compression-Ignition Engines, Including Locomotive	660 4130 50[10] (Hereafter, 600 series)
(2) Parts of Internal Combustion Engines, Including Parts of Non-Piston Type Engines	660 5000 30[11] (Hereafter, 600 series)

[5] Second Amendment to Complaint, January 10, 1983.

[6] F.M.C. No. 803.

[7] *See Tractors and Farm Equipment Ltd.* v. *Waterman Steamship Corp.*, 25 F.M.C. 375 (1982), and *Terfloth and Kennedy Ltd.* v. *American President Lines, Ltd.*, 22 F.M.C. 81 (1979), administratively final (1979). Both stand for the proposition that the Commission has jurisdiction to entertain a complaint alleging a violation of section 44 arising from a violation of 46 CFR 510 *et seq.*, the Commission's regulations prescribing the conduct of licensed freight forwarders, and to award reparation therefor under section 22 of the Shipping Act, 1916, 46 U.S.C. 821.

[8] Answer to Complaint and Affirmative Defenses (Filbin Answer), February 17, 1983.

[9] Transcript (Tr. 43–45).

[10] Tariff, p. 287.

[11] *Id.*, p. 289.

Commodity Description	*Commodity Item*
(3) *Mixed Commodities* Parts as Per Following Replacement Assembly and Component Tractor Parts, and Roadmaking Machinery Parts, and/or Combined With Engine Parts and Generator Parts	795 0000 11[12] (Hereafter, 700 series)

NOTE

Bills of Lading must be claused as follows:

> "This will certify the commodities contained in this shipment comply with Item 795.000.11 of Pacific Straits Tariff No. 12–FMC–8."[13]

GM urges that the proper classification and rating for the shipments is the 700 series, whereas Maersk takes the position that the proper classification is one of the two Items in the 600 series, depending on whether the shipment consisted of engines or engines and parts. The rates for the 600 series are higher than the rates for the 700 series.

FACTS[14]

GM conducts its business through various manufacturing divisions and wholly owned subsidiaries.[15] Among the many things GM so produces and sells are diesel engines and parts. Over the past twenty years, one of its customers of those products has been General Diesel Supply(S) PTE, Ltd. (GDS) of Singapore. GDS is a fabricator, assembler and distributor of machinery, including generator sets and diesel electric power plants.

In February 1981, GM informed Maersk that it would be making shipments of diesel engines and parts to GDS. GM advised Maersk that it believed the 700 series classification and rates to be applicable and, shortly thereafter, commenced shipping the engines and parts to Singapore. In

[12] Id., p. 348.

[13] Among other things, Maersk defended on the grounds that the 39 Bills of Lading did not contain the cited clause. A parallel situation was presented in *Durite Corporation, Ltd.* v. *Sea-Land Service, Inc.*, 20 F.M.C. 674 (1979), *aff'd sub nom. Sea-Land Service, Inc.* v. *Federal Maritime Commission*, 610 F.2d 1000 (D.C. Cir. 1979). In *Durite*, the Commission ruled that a Commission regulation directing the publication of a similar clausing statement in a tariff (i.e., special project rates) was an obligation placed on the carrier but "does not itself impose any obligation on the shipper." 20 F.M.C. at 676. Thus, the shipper's failure to clause the Bill of Lading is not fatal to its cause in a section 18(b)(3) reparation case because "what actually is shipped governs the rate to be applied." *Id.*

[14] The facts are disputed. The statement of facts which appears in the text and which, generally, paraphrases complainant's untested allegations, is intended for the dual purposes of explaining the circumstances underlying the proceeding and placing the Settlement in perspective. The statement shall not be deemed to constitute findings of fact.

[15] No useful purpose will be served by singling out the division and subsidiary participating in the shipments, although they are specified in the various documents which make up the administrative record.

March 1981, Maersk notified GM that it was Maersk's preliminary opinion that the 600 series commodity description was applicable.

In May 1981, GM received confirmation from GDS that the end use of the engines and parts conformed to the standards contained in the 700 series commodity description. This information was transmitted to Maersk, whereupon Maersk's Detroit office agreed that the 700 series classification and rates would be appropriate. At approximately the same time, GM notified Filbin, its freight forwarder, to use the 700 series on the documents for all upcoming shipments to GDS.

Still later, on September 3, 1981,[16] Maersk decided that the shipment's were not entitled to the 700 series rates and that the 600 series rates should be charged. Maersk notified Filbin of its decision to terminate the 700 series rates and to apply the 600 series rates. Filbin failed to inform GM of Maersk's decision.[17]

GM did not discover the effect of the September 3rd decision until the paid freight bills were audited.[18]

Sometime during the latter part of May 1982, Maersk again permitted the traffic to move at the 700 series rates.[19]

THE SETTLEMENT

As more fully described in the Joint Motion For Dismissal of Complaint and Approval of Settlement (Joint Motion), the Joint Affidavit In Support of Settlement Agreement,[20] and in the Settlement, in order to avoid the expense of what might otherwise become costly and time-consuming litigation, including an oral hearing to resolve both disputed material facts and expert testimony, the parties have agreed to an allocation whereby the $25,812.10[21] claim can be settled. The allocation requires Maersk to pay GM the sum of $13,500.00 and requires Filbin to pay GM the sum of $4,000.00 in full satisfaction of GM's claims against them. Mutual releases will be exchanged. Neither respondent admits to a violation of the Shipping Act.

The parties also agree that the Settlement shall become effective only upon approval by the Commission.

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[16] None of the shipments which took place before August 1, 1981, is in issue. Apparently, the September 3rd decision was given retroactive effect 10 August 1st by way of the issuance of corrected freight bills. *See, e.g.*, Complaint, Appendix J. Nevertheless, Filbin's Answer, Appendixes D, E and F, indicates that, with the knowledge and approval of someone at Maersk, some August shipments were carried at 700 series rates.

[17] There are three different versions concerning the events which occurred on or about September 3rd.

[18] Tr. 37.

[19] The events which precipitated this action are unclear, but the use of the 700 series rates seems to have received the sanction of the Pacific Straits Conference. Complaint, Appendix I; Answer, p. 7; Tr. 21–29, 38–40, 41.

[20] The Joint Affidavit is appended as Appendix I.

[21] By my calculations, based on Complaint, Appendix K, the claim should be reduced to $25,655.28. This minimal difference does not, however, affect the Settlement.

DISCUSSION AND CONCLUSION

It is well settled that legislative and Commission policy encourage settlement of administrative proceedings and that this policy has met with judicial favor. *See. e.g., Terfloth and Kennedy, Ltd.* v. *American President Lines, Ltd., supra,* 22 F.M.C. at 85, and *Del Monte Corp.* v. *Matson Navigation Co.,* 22 F.M.C. 364, 367–369 (1979), and the authorities cited in each. Nevertheless, "it is the responsibility of the Commission to ensure that settlements of section 18(b)(3) complaints do not result in payment of charges for transportation which would not otherwise be permitted under the carrier's tariff." Docket No. 82–57, *Clark International Marketing S.A., A Division of Clark Equipment Company* v. *Venezuelan Line,* Order of Remand, served October 5, 1983. Otherwise, the Commission explained, "to permit application of an improper rate contrary to the provision of a tariff would be to permit a refund or rebate prohibited by section 18(b)(3)." *Id.*

In accordance with those principles, the established test to determine approvability of a settlement of a section 18(b)(3) complaint[22] is as follows:

> A settlement of a section 18(b)(3) complaint, therefore, can only be approved on a finding that the settlement reflects a reasonable interpretation of the carrier tariff, unless circumstances make such a finding infeasible. [Footnote omitted.] [*Id.*]

The test laid down is stringent, but it is infused with an elastic capability enabling adaptation to situations where circumstances warrant. Thus, the strictness of the requirement that the settlement reflect a reasonable interpretation of the tariff may be alleviated if it is shown that circumstances exist which make infeasible an application of rates and charges exactly conforming to the tariff rates indicated by the reasonable construction. The following are some illustrative examples.

Tupperware Co. v. *Compania Sud-Americana De Vapores (Chilean Line),* 24 F.M.C. 140 (1981), exemplifies the application of the compound strict test.[23] There, the Commission vacated an order approving a $40,000 settlement of a section 18(b)(3) complaint seeking reparation in the amount of $72,072.37. Although the tariff reasonably could have been interpreted to mean what the complainant claimed, and the carrier and shipper agreed that under that construction there was an overcharge of $72,072.37, no infeasibility factors were present to invoke the flexibility approach. Consequently, a settlement for less than the amount claimed could not be approved.

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[22] The test was developed to give parties the opportunity to settle section 18(b)(3) disputes without a finding of violation. *Organic Chemicals (Glidden-Durkee) Division of SCM Corp.* v. *Atlanttrafik Express Service,* 18 SRR 1536a, 1539 (1979) *(Organic Chemicals).*

[23] N.b. The twofold test requires that: (a) a reasonable construction of the tariff permits application of lower rates to the shipments; and (b) the settlement conform precisely to the specified rates which match that interpretation.

The flexible test was applied in *Terfloth and Kennedy, Ltd.* v. *American President Lines, Ltd., supra.* The complaint in that case, as here, alleged violations of section 18(b)(3) by a carrier and violations of section 44(c) by a freight forwarder. Approval was given to a settlement whereby the allegedly culpable carrier and freight forwarder agreed to make individual payments, which, together. amounted to less than the precise charges under the tariff, as reasonably interpreted.

Similarly, in *Organic Chemicals, supra,* the Commission departed from the strict test in favor of the more flexible approach stating that a proposed settlement may be approved, even if a finding that the settlement is consistent with the tariff cannot be made, provided "* * * (3)[24] the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable."

Again, in *Robinson Lumber Co., Inc.* v. *Delta Steamship Lines, Inc.*, 21 F.M.C. 354 (1978), a settlement was approved for less than the full amount of the section 18(b)(3) claim where the complaint also alleged other violations of the Shipping Act (sections 15, 16 and 17, 46 U.S.C. 814, 815 and 816), and where termination of a companion court action was included in the settlement.

In applying the approvability test to the Joint Motion, I find that the Settlement reflects a reasonable interpretation of Pacific Straits Conference Tariff No. 12–FMC–8 and that circumstances exist which make it infeasible for the Settlement precisely to conform to the 700 series rates.

The finding that the Settlement reflects a reasonable interpretation of the tariff is manifest from the text of the 700 series commodity description and this interpretation is buttressed by Maersk's rating of identical shipments made before September 1, 1981, and, with apparent Conference approval, after April 30, 1982.

The finding that there are circumstances which make infeasible the need for the Settlement exactly to conform to the 700 series rates is based on several factors. As seen, the complaint alleges violations of section 18(b)(3) by a carrier and of section 44(c) by a freight forwarder. *Cf. Terfloth and Kennedy, Ltd.* v. *American President Lines, Ltd., supra.* Moreover, it is clear that absent a settlement, this proceeding will continue to be vigorously contested and will require an oral hearing in Detroit, Michigan, and possibly San Francisco, California, to resolve disputed facts

[24] Subparagraphs (1) and (2), the technical standards of *Organic Chemicals*, require the following conditions to be met:

> (1) a signed agreement is submitted to the Commission; (2) the parties file with the settlement agreement an affidavit setting forth the reasons for settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act; . . .

I have characterized subparagraphs (1) and (2) as technical standards for ease of reference only. Obviously, the information required by those subparagraphs provides the substantive basis for the decision-maker to determine whether the settlement is bona fide and approvable under the broader criteria for settlement of formal proceedings, generally.

(including the putative testimony of expert witnesses) and issues of culpability, if any.

Generally, I find that the Settlement and Joint Affidavit, appended hereto, meet the technical standards of *Organic Chemicals, supra.* More important, I find that the Settlement reflects a valid, fair and rational solution to a knotty dispute and obviates the need for extensive and costly litigation. Finally, I find that the Settlement is a bona fide attempt by the parties to terminate the controversy and is not a device to obtain transportation at other than applicable rates or charges. I find the Settlement does not do violence to the regulatory scheme nor does it otherwise seek to circumvent the requirements of the Shipping Act.

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

(S) SEYMOUR GLANZER
Administrative Law Judge

APPENDIX I

BEFORE THE FEDERAL MARITIME COMMISSION

GENERAL MOTORS CORPORATION
Complainant,
v.
MAERSK LINE and W. R. FILBIN & CO., INC.
Respondents.

DOCKET NO. 82–50

JOINT AFFIDAVIT IN SUPPORT OF SETTLEMENT AGREEMENT

We, the undersigned, on behalf of complainant General Motors Corporation and respondents Maersk Line and W.R. Filbin and Company, Inc., and being each first severally sworn, depose and say for and on behalf of our respective parties.

1. The claim involved in Docket. No. 82–50 arises under the Shipping Act, 1916 and presents a genuine dispute, the facts critical to the resolution of which are not readily ascertainable.

2. The parties to Docket No. 82–50 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 a 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 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.

MAERSK LINE

By: (S) MARC J. FINK
ROBERT A. HAZEL
2033 K Street, N.W.
Washington, D.C. 20006
(202) 429-9090

NOTARIZED

GENERAL MOTORS CORPORATION

By: (S) BENSON T. BUCK
3044 West Grand Boulevard
Detroit, Michigan 48202
(313) 556-4013

NOTARIZED

W.R. FILBIN & COMPANY, INC.

By: (S) ROBERT L. HINDELANG
235 Lincoln Road
Grosse Pointe, MI 48230
(313) 834–0608

NOTARIZED

APPENDIX II

BEFORE THE FEDERAL MARITIME COMMISSION

GENERAL MOTORS CORPORATION
Complainant,
v.
MAERSK LINE and W. R. FILBIN & CO., INC.
Respondents.

DOCKET NO. 82–50

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

It is hereby agreed, by and between the undersigned, complainant General Motors Corporation (GM) and respondents Maersk Line (Maersk) and W.R. Filbin & Company, Inc. (Filbin), that the dispute between these parties as embodied in Docket No. 82–50 should be fully settled and resolved by mutual accord, on the following terms and conditions:

1. Within fifteen days after approval of this Agreement by the Federal Maritime Commission, Maersk shall pay to GM the sum of $13,500 in full satisfaction of GM's claims against Maersk in Docket No. 82–50.

2. GM, in consideration of said payment as provided in paragraph 1 above, hereby releases Maersk from any and all claims arising out of the shipments which are the subject of the claim in Docket No. 82–50. GM shall, in addition, consent to Maersk's taking all necessary action to have the complaint against it in Docket No. 82–50 dismissed with prejudice.

3. Within fifteen days after approval of this Agreement by the Federal Maritime Commission, Filbin shall pay to GM the sum of $4,000 in full satisfaction of GM's claims against Filbin in Docket No. 82–50.

4. GM, in consideration of said payment as provided in paragraph 3 above, hereby releases Filbin from any and all claims arising out of the shipments which are the subject of the claim in Docket No. 82–50. GM shall, in addition, consent to Filbin's taking all necessary action to have the complaint against it in Docket No. 82–50 dismissed with prejudice.

5. Neither GM, Maersk, Filbin nor any successor in interest of the foregoing parties, shall initiate any new claim against any of the other parties arising in connection with the complaint in Docket No. 82–50 except for enforcement of any provision of this Agreement.

6. 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. 82–50.

7. 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.

8. This Agreement of Settlement and Mutual Release constitutes the entire agreement between the parties.

MAERSK LINE

By: (S) MARC J. FINK
ROBERT A. HAZEL
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NOTARIZED

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NOTARIZED

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1059

APPLICATION OF DISTRIBUTION SERVICES LTD.
FOR THE BENEFIT OF TARGET STORES, A DIVISION
OF DAYTON HUDSON CORPORATION

ORDER

December 14, 1983

This proceeding arose from an application filed by Distribution Services Ltd. (DSL), requesting permission, pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)), to waive portions of freight charges on certain shipments of various commodities. The applications are based on DSL's alleged inadvertent failure to file timely time-volume contracts which it negotiated with Target Stores, a shipper.

In his Initial Decision issued on September 16, 1983, Administrative Law Judge Norman D. Kline granted the application subject to certain minor adjustments and required the following notice published in DSL's tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1059, that this contract became effective on January 1, 1983, for the purposes of refunding or waiving any portion of freight charges on any shipment that may have moved at a time when the contract was not filed in this tariff or in DSL's previous tariff (FMC No. 2).

No exceptions were filed to the Initial Decision, but by Notice served October 24, 1983, the Commission determined to review the decision of the Presiding Officer.

The Commission has reviewed the Initial Decision and has determined that the Presiding Officer's findings and conclusions were proper and well-founded. However, because the Commission is concerned that the notice which the Presiding Officer required may not adequately define the period during which shipments must have moved in order to qualify for a refund or waiver of freight charges, and may not indicate clearly that other, qualified shippers may take advantage of these contract rates, this notice will be revised by the Commission. The Initial Decision will otherwise be adopted.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding be modified to delete the first ordering paragraph and substitute in its place the following:

(1) DSL shall 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. 1059 that this contract was effective January 1, 1983, continuing through June 24, 1983. This notice is effective for the purposes of refund or waiver of freight charges on shipments qualifying for the time-volume contract rates which were shipped during the specified period of time. Retroactive contracts for other qualified shippers during this time period are hereby offered at the same terms applicable to Target Stores.

IT IS FURTHER ORDERED, That in all other respects, the Initial Decision issued in this proceeding is adopted and is made a part hereof.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1059
APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF TARGET STORES, A DIVISION OF DAYTON HUDSON CORPORATION

Application for permission to waive portions of freight charges on approximately 190 shipments of various commodities granted.

Applicant had negotiated a time-volume contract with the shipper, Target Stores, but its tariff-publishing agent had inadvertently neglected to file the contract in the tariff before January 1, 1983, as intended. The contract was filed effective March 6, 1983, was rejected on March 28, 1983, refiled on April 8, and further clarified on April 19 and June 24, 1983.

Supplemental evidence furnished by applicant's tariff-filing agent provides justification to permit applicant to apply the time-volume contract from January 1, 1983 to June 24, 1983, and thereafter notwithstanding the temporary rejection and subsequent filing and clarifications. Otherwise the innocent shipper would be deprived of its contractual rights and similar shipments would be treated differently.

Slight misratings occurred on three shipments, resulting in a small net undercharge. Applicant will adjust the account accordingly.

John Collins, Lee Meister, and *Roy R. Sumner* for applicant.

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

Partially Adopted December 14, 1983.

This is the first of three applications filed by a non-vessel operating common carrier by water known as Distribution Services Limited (DSL) located in California involving the failure of DSL to file time-volume contracts which it had negotiated with three individual shippers in its tariff.[2]

The application was first filed (received by the Commission's Secretary) on June 27, 1983, and was prepared by DSL's tariff publishing agent, Transworld Tariff and Research Service, Inc., located in Washington, D.C. Essentially, by this application, DSL is seeking permission to waive approximately $66,000 in connection with over 190 shipments of various commodities which DSL carried from Taiwan, Hong Kong, and Japan to Los Angeles utilizing vessels of underlying ocean carriers during the period January 1, 1983 through early April 1983. The reason for the application, in short, is that DSL's tariff publisher, Transworld, failed to file the time-

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

[2] The other two applications involve Wal-Mart Stores (Special Docket No. 1060) and Edison Brothers, Inc. (Special Docket No. 1061).

volume contract which DSL had negotiated with the shipper, Target Stores, in DSL's tariff to be effective on January 1, 1983, as intended. Instead the contract was not filed to be effective until March 6, 1983 and, because of certain technical problems with the filing, was rejected on March 28, 1983, refiled on April 8 and further clarified on April 19 and June 24, 1983. The upshot of this failure to file was that, except for the period March 6 to March 28, DSL's time-volume contract with Target was not on file in its tariff and the numerous shipments carried under that tariff for Target were subject to higher tariff rates and, in the aggregate, substantially higher freight costs. Because DSL honored the contract and generally charged the rates which the contract provided, DSL is now asking permission to waive the substantial additional freight due under non-contract tariff rates in effect at the times of the shipments. DSL therefore is simply trying to implement the time-volume contract which it had negotiated with Target from January 1, 1983 to the time it filed the contract in its tariff, notwithstanding the initial failure to file, on the ground that such failure constituted the type of clerical, administrative, or inadvertent error which caused unintended freight increases and which section 18(b)(3) was amended to cure.

The application and supporting evidence originally submitted with it presented a number of problems. Thus, although the evidence included a tabulation of the 190 or so shipments and copies of the relevant bills of lading, the time-volume contract, and tariff pages, the factual narrative was relatively sketchy and did not fully explain the error involved nor the various events following the error and the subsequent filing of the time-volume contract. Because of the inadequacy of the initial evidence, furthermore, it was impossible to determine a number of critical matters relating to the validity of the application under law. For example, one could not determine if the error involved an inadvertent failure to file rather than a mistaken understanding of law, whether the time-volume contract had ultimately been filed in the tariff prior to the filing of the application as required by law, whether an application was necessary during the period March 6 through March 28, 1983, when the time-volume contract was on file with DSL's tariff, whether the application could be granted for the period between March 28, 1983, when the time-volume contract had been rejected by the Commission's staff for technical reasons and April 8, 1983 when it was refiled, whether DSL had misrated a number of shipments, whether the time-volume contract in some instances provided for higher rates than the regular tariff, and whether there were discrepancies between applicant's tabulation of shipments and the data shown on the underlying bills of lading. (See my letter to Messrs. Sumner and Granthan dated July 22, 1983, asking for explanations of these particular matters.) In response to my inquiries, Mr. Lee Meister of Transworld obtained answers to these various questions, conducted a more thorough analysis of the critical events, and furnished supplemental evidence which corrected the various deficiencies in the original record. (See Applicant's Submission of Additional Justification Statements, August 19, 1983, "Addendum A," and various tariff pages and bills of lading attached.) On the basis of these supplementary materials, the record has been sufficiently developed to permit the following findings and conclusions.

FINDINGS AND CONCLUSIONS

As shown by the supplemental evidence furnished by DSL's tariff publisher, Transworld, DSL failed to file a time-volume contract which it had negotiated with the shipper, Target Stores, in its tariff, and had intended to become effective on January 1, 1983. This time-volume contract was originally executed between DSL and Target on December 16, 1982, and, as is customary with such contracts, provided that DSL would charge Target certain rates for the transportation of containerized cargo from Far Eastern countries to Los Angeles or Long Beach, California in return for Target's commitment to ship a certain minimum volume of cargo. The rates set forth in the contract were f.a.k. (freight all kinds) rates ranging from $37 to $48 per cubic meter. However, if DSL's tariff published a lower per-container rate on a particular commodity, Target would get the benefit of that lower rate. (Paragraph 4 E of the original contract). Such contracts are lawful provided they are filed in the carrier's tariff and comply with other conditions set forth in the Commission regulation, 46 CFR 536.7.

After negotiating and executing the time-volume contract, DSL sent a letter to its tariff publishing agent in Washington, Transworld, on December 26, 1982, instructing Transworld to file the contract in DSL's then current tariff (FMC No. 2). However, the instructions were sent during the holiday season which was rather hectic and Transworld set them aside to permit other filings and then overlooked them with the result that the contract was not filed to be effective on January 1, 1983, as intended. The failure to file, furthermore, which normally would have been promptly detected by DSL, was not discovered because DSL's pricing supervisor who had been involved with the contract had taken personal leave from the office in early January and that person's acting successor had not been informed that there were any problems about the filing of the contract in DSL's tariff. DSL therefore believed that its time-volume contract with Target had been properly filed in its current tariff and accordingly carried and rated shipments of Target at the rates prescribed in the contract between the two. It was not until DSL prepared its new tariff (FMC No. 7) which included the contract with Target and instructed that it be filed with the Commission, which filing was accomplished on or about February 4, 1983, to be effective March 6, 1983, that the failure to file the time-volume contract in DSL's tariff was initially corrected. However, even after March 6, 1983, further problems with the filing occurred. Thus, on March 28, 1983, the Commission's staff rejected the contract because of certain ambiguities which the staff believed required correction under the provisions of the relevant regulation, 46 CFR 536.7.[3] Promptly after this rejection, DSL and its tariff publishing agent, Transworld, consulted with the Commission's staff in order to correct the deficiencies and on April 8, 1983, the corrected time-volume contract was filed once more in DSL's current tariff (FMC No. 7). Still further modifications and corrections were necessary as a result of the Commission's staff's concern regarding publication of a mailing address in the United States and the arrangement of certain items in the contract. These matters were corrected on April 19, 1983. Finally, on June 24, 1983, DSL, through its agent Transworld, filed further revisions to the contract concerning the method for calculating penalty charges to the shipper and how minimum-volume quantity levels would change if the force majeure clause had to be invoked. To summarize, DSL's time-volume contract was not filed with its then current tariff (FMC No. 2) between January 1, 1983 and March 6, 1983. From March 6, 1983 to March 28, 1983, it was on file. It was not on file from March 28, 1983 to April 8, 1983, because of the staff's rejection. It was again on file with certain modifications and clarifications after April 8, 1983, and remained in the tariff but was again clarified in certain respects on April 19, 1983 and on June 24, 1983, in response to certain concerns expressed by the Commission's staff.

The above history of filings, rejections and corrections may appear to complicate the validity of this application. That is because DSL is seeking to implement an unfiled time-volume contract which it negotiated with Target although for a period of time (March 6 to March 28, 1983) the contract was in fact on file in its tariff (FMC No. 7), was temporarily out of the tariff (between March 28 and April 8, 1983) while corrections and clarifications were made, and was again on file in the tariff but was subjected to further clarifications and modifications. The question arises whether the application can be granted to implement the contract notwithstanding the various changes in the contract and the fact that from March 28 to April 8, 1983, the contract was out of the tariff not because of DSL's inadvertence in failure to file it but because of the staff's concern over technical requirements and ambiguities in the contract. Upon careful consideration of this situation, however, I conclude that the particular technical deficiencies and peculiar filing history of the contract ought not to be interpreted so as to deny the innocent shipper, Target, the relief which the remedial statute was intended to grant.

[3] The corrections to the contract which the staff required had to do with clarifying what rates covered what cargo and a change in the force majeure clause of the contract. As originally filed, effective March 6, 1983, the contract provided for f.a.k. rates per cubic meter ranging from $37 to $48 depending on the country of origin. It also provided for alternative commodity rates when application of such rates would result in lower freight. (See paragraph 4 E of the original filing.) This rating situation was clarified by the filing on April 8 to specify the alternate commodity rates. The force majeure clause (paragraph 8) was also amended to eliminate reference to commercial contingencies, as required by 46 CFR 536.7(b)(6).

It is clear that P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916, was designed to be remedial, i.e. to relieve innocent shippers of additional freight costs which they in no way caused but were brought about because of carriers' tariff-filing errors. The statute is therefore to be liberally construed and not hindered by narrow interpretations in order to effectuate its remedial purposes. *Nepara Chemical, Inc.* v. *Federal Maritime Commission,* 662 F.2d 18, 22 (D.C. Cir. 1981) (". . . [T]he statute is intended to remedy carrier tariff errors which have adverse economic effects on shippers: 'shippers . . . should not be made to bear the consequences of a carrier's bona fide neglect or omission'."); *D. F. Young, Inc.* v. *Cie. Nationale Algerienne de Navigation,* 21 F.M.C. 730, 731 (1979) ("P.L. 90–298 is a remedial statute enacted to relieve shippers from the economic consequences of a carrier's error in the filing of tariff rates. Too narrow a construction of the statute would defeat the legislative intent."); *Ghiselli Bros.* v. *Micronesia Interocean Line, Inc.,* 13 F.M.C. 179, 182 (". . . [T]here is no reason to impose such a strict interpretation to the filing of 'special docket' applications. P.L. 90–298 itself is permissive and affords the Commission wide latitude of discretion in the granting of special docket applications."); *Application of Lykes Bros. to Benefit Texas Turbo Jet, Inc.,* 24 F.M.C. 408, 411 (1981) ("As a remedial statute section 18(b)(3) needs to be liberally construed.")

In order to effectuate the purposes of the remedial statute and to ensure uniformity to all shipments rated under the contract negotiated between DSL and Target and ultimately filed in DSL's tariff, I conclude that the application should be granted so as to implement the time-volume contract from the original date (January 1, 1983) on which it should have been filed but through the inadvertence of DSL's tariff-publishing agent, Transworld, was not so filed. Therefore, from the period January 1, 1983 to March 6. 1983, when the time-volume contract was not on file in either DSL's tariff FMC No. 2 or its later tariff FMC No. 7, relief clearly ought to be granted and DSL ought to be permitted to waive collection of additional freight due under tariff rates other than those provided in the time-volume contract. From March 6, 1983 to March 28, 1983, technically DSL may not need permission to apply the time-volume contract rates. That is because that contract had been filed effective March 6 and remained in the tariff until rejected by the Commission's staff on March 28, 1983, because of certain ambiguities or deficiencies in the contract which the staff believed to require clarification under the relevant regulation, 46 CFR 536.7. For the period March 28 to April 8, 1983, however, when the contract was temporarily out of the tariff, I conclude that DSL should likewise be permitted to waive collection of additional freight due under higher non-contract tariff rates. Although one may argue that during this period the failure to have the contract on file was not caused by the usual type of clerical or administrative error encountered in special-docket proceedings, one could also argue that the failure was the result of an inadequate or unclear filing, that DSL had therefore committed another error which is remediable under section 18(b)(3) of the Act, and that DSL had never succeeded in filing the contract in fully satisfactory condition until June 24, 1983. If so, then relief should be given the shipper from January 1, 1983 through that date so as to eliminate all adverse effects flowing from the original error and any subsequent errors.

Regardless of how one construes the error involved in the March 28 rejection by the staff, however, there are independent grounds for granting the relief requested during the entire period between January 1, 1983 and June 24, 1983. First, the remedial provisions of section 18(b)(3) of the Act require uniformity among similar shippers and shipments by providing that applications can be granted only if discrimination among shippers does not thereby result. Section 18(b)(3), first proviso, last clause. Although the statute refers to "shippers" rather than "shipments," clearly it promotes uniformity among shipments of similar commodities in accordance with the traditional purpose of tariff law.[4] As DSL argues, denial of relief for the brief period March 28–April 8 on technical grounds would result in disparate treatment of shipments which were all intended to be covered by rates provided in the contract, namely, application of the contractual rates from January 1, 1983 to March 28, 1983, application of non-contract tariff rates between March 28 and April 8, 1983, and application of contractual rates thereafter. This result would upset the contractual expectations of both parties and produce a bizarre disparity in rating among shipments of similar commodities. Such denial would also penalize the innocent shipper, Target, by prohibiting application of its contractual rights because of ambiguities in the original filing of the contract of a technical nature and a consequent staff decision to reject the filing pending clarifications. Second, the Commission does not usually penalize parties because of technical errors which result in temporary rejection of a filing which is later corrected, especially under a remedial statute. See *Application of Southern Pacific International, Inc. for the Benefit of General Motors Overseas Corp.*, 21 SRR 833 (I.D., F.M.C. notice of finality, June 11, 1982); *TDK Electronics Co., Ltd.* v. *Japan Lines, Ltd.*, 22 F.M.C. 769 (1980).[5] I conclude

[4] Moreover, the implementing regulation, Rule 92(a), 46 CFR 502.92(a), indicates that uniformity among similar shipments is also intended when it specifies that applicants must state whether there are shipments of other shippers "of the same or similar commodity." See also *Application of Pacific Westbound Conference for the Benefit of Minnesota Mining & Mfg. Co.*, 21 SRR 793 (I.D., F.M.C. notice of finality, May 14, 1982). In that application, relief was granted to shipments of the same commodity for the single shipper even though some early shipments fell outside the 180-day period of limitation. This was done to prevent discrimination among similar shipments.

[5] In the former case cited, the Commission permitted the grant of an application which had first been rejected for technical reasons by the Commission's Secretary but had been corrected and refiled beyond the 180-day period of limitation prescribed by section 18(b)(3) of the Act. The Commission considered the original defective filing, which had been within the 180-day period, as valid for purposes of meeting the time limitation. In *TDK Electronics*, similarly, the Commission considered the merits of a complaint alleging violations of law even though the complaint had originally been returned because of technical deficiencies but had been corrected and refiled beyond the two-year period permitted by section 22 of the Act. Moreover, in an effort to ensure uniformity among shipments of similar commodities in special-docket proceedings, the

therefore that there are valid grounds to permit DSL to waive collection of additional freight costs on every shipment moving between January 1, 1983, and June 24, 1983, when the final corrected version of the contract was filed in satisfactory condition, including the brief period March 28 to April 8 when the contract was out of the tariff undergoing correction in response to the requests of the Commission's staff.

I conclude, in summary, that DSL committed an error of the type contemplated by section 18(b)(3) of the Act when its tariff publishing agent inadvertently failed to file in DSL's tariff the time-volume contract which DSL had negotiated with the shipper, Target Stores, by January 1, 1983. I conclude furthermore that to ensure uniformity among shipments and eradicate all effects of the original tariff filing error, DSL should be allowed to implement the time-volume contract from January 1, 1983, when it should have been filed, to the time it finally filed a fully satisfactory form of the contract in compliance with the Commission's regulation, which was done on June 24, 1983 (and of course to implement the contract thereafter as published in DSL's tariff). The effect of this decision is to relieve the shipper, Target Stores, of some $60,000 of additional freight costs (less some additional costs which DSL erroneously included in its application during the period March 6 to March 28, 1983 when the contract had been on file and such costs would not have been due.) [6]

I find also that the three statutory conditions regarding the time of filing the application, the filing of the new, corrective tariff, and the prevention of discrimination among shippers have been satisfied.[7] The only remain-

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Commission has permitted retroactive application of unfiled tariff rates for over a year's time notwithstanding the normal 180-day period of limitation in the filing of such special-docket applications. See *Application of Pacific Westbound Conference on Behalf of Korea Marine Transport Co., Ltd. for the Benefit of Mitsui and Co. (U.S.A.), Inc.*, 25 F.M.C. 350 (1982). See also *Application of Pacific Westbound Conference for the Benefit of Minnesota Mining & Mfg. Co*, cited above, 21 SRR 793.

[6] Although the original filing of the time-volume contract on March 6, 1983, was rejected by the staff on March 28, 1983, for certain technical reasons and ambiguities of language, the general rule is that the tariff contract, while it was on file, was legally binding and did not become unlawful until after rejection. Therefore, DSL would have been bound to charge contract rates during the period March 6 to March 28, 1983. See *E.I. DuPont de Nemours and Co.* v. *Sea-Land Service, Inc.*, 22 F.M.C. 525, 535–536 (1980), and cases cited therein.

[7] As mentioned earlier, the application was originally filed (received by the Commission's Secretary) on June 27, 1983. The application was lacking a certificate showing the date of delivery or mailing, which certificate was furnished on July 8. 1983. The Commission has permitted the original date of filing to control, notwithstanding later corrections and refilings, as I have discussed above. See *Application of Southern Pacific International, Inc.*, cited above, 21 SRR 833, and *TDK Electronics Co., Ltd.* v. *Japan Lines, Ltd.*, cited above, 22 F.M.C. 769. All of the shipments concerned moved on or after January 5, 1983, which is only 173 days before June 27, 1983, and therefore within the 180-day period required by law. The time-volume contract was filed in DSL's tariff (FMC No. 7) initially effective March 6, 1983, and again with clarifications on April 8 1983, April 19, 1983, and finally, on June 24, 1983. (See DSL's tariff (FMC No. 7) original, first, second, and third revised pp. 147, 148, 149.) The affected shipments all concern one shipper, Target Stores. As required by section 18(b)(3) and the Commission's regulation concerning the filing of time-volume contracts, DSL will be required to file a tariff notice which will publicize the contract with Target. This should prevent discrimination among shippers. However, it should be noted that there is no evidence of another Target-like shipper seeking such a contract and DSL has negotiated and filed contracts with other large-volume shippers, for two of whom DSL has also filed special-docket applications because of similar failures to file the contracts.

ing matter concerns a few misratings which DSL will be required to correct as a condition for the granting of the application.

INADVERTENT MISRATINGS AND NECESSARY CORRECTIONS

As mentioned above earlier in this decision, examination of the bills of rating under which the approximately 190 shipments moved revealed several apparent discrepancies and rating errors. On certain shipments it appeared that DSL had applied incorrect rates not found in the tariff or in the TVC and initially that on some shipments, granting the application might result in increased freight costs because contract rates were higher. However, applicant has furnished explanations and evidence showing that in most of the questionable shipments DSL applied correct rates and that freight costs did not increase under the contract rates. On three shipments out of more than the 190 involved, however, it appeared that DSL had made inadvertent rating errors, and after DSL had been notified of these apparent mistakes, DSL acknowledged them. (See my letter to Messrs. Collins of DSL and Meister of Transworld, dated August 23, 1983, and Mr. Meister's sworn statement of September 7, 1983.) The net result of the rating errors on the three shipments is an undercharge of $67.31, which DSL will be required to recover by an appropriate adjustment in its account with Target.[8]

Accordingly, the application is granted provided that DSL complies with the following instructions:

1. DSL shall publish the following notice in an appropriate place in its time-volume contract filed in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1059, that this contract became effective on January 1, 1983, for the purpose of refunding or waiving any portions of freight charges on any shipments that may have moved at a time when the contract was not filed in this tariff or in DSL's previous tariff (FMC No. 2).

2. DSL shall waive portions of freight charges in connection with the shipments discussed above for the benefit of the shipper, Target Stores, within 30 days of service of the Commission's notice rendering this Initial Decision administratively final, and shall within 5 days thereafter notify the Commission of its action in this regard.

[8] The three shipments are shown as nos. 2, 10, and 16 on applicant's "Addendum A" and in my letter of August 23, 1983. In no. 2, DSL had inadvertently applied a rate of $45 to a shipment from Japan instead of the correct rate of $48, resulting in an undercharge of $27.83. In no. 10, DSL had charged a shipment of furniture k/d under a $2,000 per container rate for two containers and a $37 rate for the third. The correct rate for each container was $1680. The error resulted in an overcharge of $660.52. In no. 16, DSL had charged a shipment of seven containers at $1400 per container instead of the correct rate of $1500 per container for a shipment of seven containers. The result was an undercharge of $700. The net result of these undercharges and overcharge is $67.31 ($727.83 less $660.52). (See Meister statement of September 7, 1983.)

3. DSL shall make an appropriate adjustment to its account with Target to correct the rating errors that occurred on three shipments discussed above and similarly notify the Commission.

NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1060

APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF WAL-MART STORES, INC.

SPECIAL DOCKET NO. 1061

APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF EDISON BROTHERS INC.

ORDER

December 14, 1983

This proceeding arose from two applications filed by Distribution Services Ltd. (DSL), requesting permission, pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)), to waive portions of freight charges on certain shipments of various commodities. The applications are based on DSL's alleged inadvertent failure to file timely time-volume contracts which it negotiated with two shippers, Wal-Mart Stores, Inc. and Edison Brothers Stores, Inc. The applications were consolidated for decision by Administrative Law Judge Norman D. Kline.

In his Initial Decision issued on October 3, 1983, the Presiding Officer granted the applications subject to certain minor adjustments and required the following notices published in DSL's tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1060, that this contract became effective on January 1, 1983, for the purposes of refunding or waiving any portion of freight charges on any shipment that may have moved at a time when the contract was not filed in this tariff or in DSL's previous tariff (FMC No. 2).
>
> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Docket. No. 1061, that this contract became effective on January 1, 1983, for the purpose of refunding or waiving any portion of freight charges on any shipment that may have moved at a time when the contract was not filed in this tariff or in the previous tariff (FMC No. 2).

No exceptions were filed to the Initial Decision, but by Notice served October 26, 1983, the Commission determined to review the decision of the Presiding Officer.

The Commission has reviewed the Initial Decision and has determined that the Presiding Officer's findings and conclusions were proper and well-founded. However, because the Commission is concerned that the notices which the Presiding Officer required may not adequately define the period during which shipments must have moved in order to qualify for a refund or waiver of freight charges, and may not indicate clearly that other qualified shippers may take advantage of these contract rates, those notices will be revised by the Commission. The Initial Decision will otherwise be adopted.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding be modified to delete the first and second ordering paragraphs and substitute in their place the following:

(1) DSL shall publish the following notice in an appropriate place or places in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket Nos. 1060 and 1061 that this contract was effective January 1, 1983, continuing through June 24, 1983. This notice is effective for the purposes of refund or waiver of freight charges on shipments qualifying for the time-volume contract rates which were shipped during the specified period of time. Retroactive contracts for other, qualified shippers during this time period are hereby offered at the same terms applicable to Wal-Mart Stores, Inc. and Edison Brothers Stores, Inc.

IT IS FURTHER ORDERED, That in all other respects, the Initial Decision issued in this proceeding is adopted and is made a part hereof.

By the Commission.

FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1060

APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF WAL-MART STORES INC.

SPECIAL DOCKET NO. 1061

APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF EDISON BROTHERS INC.

Applications for permission to waive portions of freight charges on approximately 300 shipments of various commodities granted.

Applicant had negotiated time-volume contracts with two shippers but its tariff-publishing agent had inadvertently neglected to file the contracts in the tariff before January 1, 1983, as intended, subjecting the two shippers to substantial increases in freight costs. Essentially the same error occurred affecting another contract in Special Docket No. 1059, *Application of Distribution Services Ltd. for the benefit of Target Stores,* which application was granted.

Slight misratings occurred on three shipments of Wal-Mart Stores, Inc., resulting in a small net undercharge. Applicant will adjust the account accordingly.

John Collins, Lee Meister, and *Roy R. Sumner* for applicant.

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

Partially adopted December 14, 1983.

This decision involves two applications filed by a non-vessel operating common carrier by water known as Distribution Services Limited (DSL) located in California and concerns DSL's inadvertent failure to file timely two time-volume contracts which it had negotiated with two shippers, Wal-Mart Stores, Inc., and Edison Brothers Stores, Inc. Because the applications involve virtually the same problems, I have consolidated them for decision as designee of the Chief Judge. (Rule 148, 46 CFR 502.148).

The facts surrounding DSL's inadvertent failure to file the two time-volume contracts and DSL's subsequent filings and clarifications of the contracts in its tariff are virtually identical to those existing in an earlier special-docket proceeding, Special Docket No. 1059, *Application of Distribution Services, Ltd. for the Benefit of Target Stores, a Division of Dayton*

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

Hudson Corporation, 26 F.M.C. 123.[2] Essentially, as in No. 1059, DSL had negotiated time-volume contracts with the shippers, Wal-Mart and Edison Brothers, some time in December of 1982 (December 16 and December 27, respectively) providing for certain rates in return for a specified minimum volume of cargo, the contracts to expire on December 31, 1983, and September 30, 1983, respectively. However, as in No. 1059, DSL sent instructions in late December of 1982 to its tariff publishing agent, Transworld Tariff and Research Service, Inc., located in Washington, D.C., but because of end-of-the-year pressures, Transworld overlooked the instructions and failed to file the contracts by January 1, 1983, as DSL had intended. Furthermore, because of DSL's failure to note that the time-volume contracts had not been filed in DSL's current tariff (FMC No. 2) as of January 1, 1983, the contracts were not filed until early February to be effective on March 6, 1983, in DSL's new tariff (FMC No. 7). As with the Target contract in No. 1059, furthermore, the two contracts were found to be defective under the Commission's regulations, 46 CFR 536.7, were rejected by the Commission's staff on March 28, 1983, to allow appropriate clarifications, and were refiled on April 8, 1983, after the corrections had been made. In response to other staff concerns, the contracts were again corrected and refiled on June 24, 1983.[3]

DSL's inadvertent failure to file the contracts by January 1, 1983, and the subsequent rejection on March 28, 1983, affected numerous shipments which DSL had carried for Wal-Mart and Edison Brothers beginning on or after January 7 and January 8, 1983, respectively, approximately 141 shipments for Wal-Mart and 160 for Edison Brothers. Unless DSL is granted relief and is allowed to implement its contracts with these two shippers, DSL will have to recover something like $23,000 in additional freight from Wal-Mart and $18,000 from Edison Brothers although those shippers had entered into contracts with DSL in the expectation of having the contracts honored under the lower rates prescribed and DSL honored the contracts and charged the rates prescribed therein notwithstanding the tariff-filing error.[4]

[2] In No. 1059, applicant's original application and supporting evidence were incomplete and unclear as to the nature of the tariff-filing error, the events surrounding the filing of the contract, and other matters. The record was satisfactorily developed by supplemental evidence, however, and the various ambiguities and uncertainties were eliminated. Similarly, applicant has supplemented the record in these two proceedings, showing that the contract involved in No. 1059 and the two contracts involved in these two proceedings were essentially all affected by the same events. See sworn statement of Lee Meister, September 27, 1983.

[3] As with the Target contract, the staff had rejected the filings on March 28, 1983, because of lack of clarity as to what rates applied on particular commodities and because of a problem with the wording of the force majeure provisions of the contracts. After refiling on April 8, there were other technical problems with the contracts which were corrected on May 9 and June 3, 1983, having to do with inclusion of a United States mailing address, description of the foreign ports covered, and inclusion of a rate on handtrucks. On June 24, 1983, the contract was clarified again with respect to the force majeure and penalty provisions. See sworn statement of Lee Meister, September 27, 1983.

[4] As in the case of the Target application (No. 1059) these figures may be somewhat overstated because they include the period March 28 through April 8, 1983, when the contracts were on file in the tariff and

Continued

I have discussed the facts and legal consequences in detail in my Initial Decision in No. 1059, cited above, and need not repeat them here in detail. Briefly, I found that the initial failure to file the time-volume contract qualified under the remedial provisions of section 18(b)(3) of the Shipping Act, 1916, as an inadvertent failure to file negotiated rates resulting in increased costs to an innocent shipper. I further found that the subsequent rejection, clarifications, and refilings on March 28, April 8, and June 24, 1983, in that case, ought not to prevent the granting of complete relief. In other words, as in No. 1059, DSL ought to be able to implement its contracts from January 1, 1983 to date and give the shippers the benefits of their bargains, regardless of the peculiar filing history of the contracts and the question of whether during the period March 6 through March 28, 1983, when the contracts were on file, relief is technically required. As in No. 1059, I rely upon the remedial purposes of the statute, the various admonitions of a court and the Commission to read the statute broadly rather than narrowly and technically, in order to effectuate its beneficial purposes, the specific need to ensure uniformity among similarly situated shipments carried throughout the affected periods, and the Commission's policy of not penalizing parties because of their technical filing errors which are later corrected.

I conclude, therefore, that, as in No. 1059, DSL committed a tariff-filing error in failing to file two time-volume contracts in its tariff by January 1, 1983, as intended, and that the application should be granted to cover the entire period January 1, 1983 to June 24, 1983, the date of final filing, so as to implement the contractual rights of the innocent shippers and ensure uniformity among shipments. I find also that the three statutory conditions regarding the time of filing the application, the filing of the new, corrective tariff, and the prevention of discrimination among shippers have been satisfied.[5] The only remaining matter concerns a few misratings in connection with three Wal-Mart shipments which DSL will be required to correct as a condition for the granting of the application.

INADVERTENT MISRATINGS AND NECESSARY CORRECTIONS

As happened in the Target case, it appears that out of some 141 shipments for Wal-Mart DSL inadvertently committed some minor errors in rating. These rating errors occurred on three shipments, on bills of lading dated January 20, January 24, and March 23, 1983. On the first bill of lading, DSL charged a rate of $40.00 WM instead of the contract rate of $60.60

were probably legally binding. If so, then DSL would have had to charge contract rates anyway and arguably need not seek permission to waive additional charges for that period of time.

[5] The applications were both filed (received by the Commission's Secretary) on June 27, 1983, which is less than the 180 days required by law from the date of shipment (on or after January 7, 1983). The contracts were filed effective March 6, 1983, and with clarifications, on June 24, 1983. The affected shipments involve only Wal-Mart and Edison Brothers. The tariff notice which DSL will be required to file will publicize the contracts, and there is no evidence of any similar shippers who were seeking the same contracts but were denied such contracts.

WM from the Philippines. On the second bill of lading, DSL charged a rate of $43.18 WM instead of the contract rate of $42.52 from Korea. On the third bill of lading, a tiny shipment of only .24 cubic meters, DSL apparently showed no charge at all on its bill of lading. These apparent errors I called to DSL's attention through its tariff-publishing agent, Transworld, to allow DSL to check and verify them. After so doing, DSL acknowledged the errors. The net result of the three errors is an undercharge of $258.95. (See Addendum A attached to sworn statement of Lee Meister, September 27, 1983.) DSL will be required to recover this amount by an appropriate adjustment to its account with Wal-Mart.

Accordingly, the applications are granted provided that DSL complies with the following instructions:

1. DSL shall publish the following notice in an appropriate place in its tariff applicable to the subject contract with Wal-Mart:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1060, that this contract became effective on January 1, 1983, for the purpose of refunding or waiving any portions of freight charges on any shipments that may have moved at a time when the contract was not filed in this tariff or in DSL's previous tariff (FMC No. 2).

2. DSL shall publish the following notice in an appropriate place in its tariff applicable to the subject contract with Edison Brothers:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1061, that this contract became effective on January 1, 1983, for the purpose of refunding or waiving any portions of freight charges on any shipments that may have moved at a time when the contract was not filed in this tariff or in the previous tariff (FMC No. 2).

3. DSL shall waive portions of freight charges in connection with the shipments discussed above for the benefit of the shippers, Wal-Mart Stores, Inc., and Edison Brothers Stores, Inc., within 30 days of service of the Commission's notice rendering this Initial Decision administratively final, and shall within 5 days thereafter notify the Commission of its action in this regard.

4. DSL shall make an appropriate adjustment to its account with Wal-Mart to correct the rating errors that occurred on the three shipments discussed above and similarly notify the Commission.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–21

MODIFICATION OF NEW YORK FREIGHT BUREAU AGREEMENT NO. 5700–29

NOTICE

December 21, 1983

Notice is given that no appeal has been taken to the November 14, 1983 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. 83–21

MODIFICATION OF NEW YORK FREIGHT BUREAU AGREEMENT NO. 5700–29

MOTION TO DISMISS GRANTED

Finalized December 21, 1983

On November 3, 1983, the respondents filed a motion to dismiss this proceeding pursuant to Rule 73 of the Commission's Rules of Practice and Procedure (46 CFR 502.73). They state:

> * * * In a duly constituted action taken in Hong Kong on November 1, 1983, the Bureau voted to withdraw the application (i.e., Agreement No. 5700–29) and to notify the Commission's Secretary of the said withdrawal action. * * *
>
> This motion is grounded upon the premise that inasmuch as the subject matter of the proceeding has become moot, there is no longer a need to pursue the issues assigned in the docketed case and the proceeding should be dismissed.

On November 7, 1983, Hearing Counsel which is the only other party to the proceeding, other than the respondents, filed a reply to the respondents' Motion to Dismiss, wherein they stated they had no objection to the motion being granted.

Wherefore, in view of the above, it is,

Ordered, that the respondents' Motion to Dismiss this proceeding is granted and the proceeding is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 C.F.R. 508; DOCKET NO. 82–58]

ACTION TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE UNITED STATES/VENEZUELA TRADE

December 30, 1983

ACTION: Discontinuance of Proposed Rule.

SUMMARY: On September 13, 1983, Concorde/Nopal Line moved the Commission to suspend action on its Petition For Issuance of Rules To Adjust Or Meet Conditions Unfavorable to Shipping in The United States/Venezuela Trade filed on July 8, 1983. In that motion, the Commission was advised that the United States and Venezuela had entered into a "Memorandum of Consultation" encompassing terms permitting Concorde/Nopal to apply for provisional status to participate in the U.S./Venezuela trade. Concorde/Nopal has now notified the Commission, by letter from its counsel, that its application for provisional status has been granted.

Concorde/Nopal will thus be able to carry cargoes otherwise reserved by the Government of Venezuela to Venezuelan-flag and associate carriers, continuing its longstanding service in the trade. Concorde/Nopal states that its status is "provisional pending the outcome of further negotiations (scheduled for the first quarter of 1984) between the U.S. and Venezuela concerning a bilateral maritime agreement" and is subject to certain unspecified conditions applicable only to the operations of Concorde/Nopal in this trade. Concorde/Nopal asks the Commission to "continue to suspend further proceedings" on this matter.

Concorde/Nopal's concerns regarding its continued participation in the trade appear to have been alleviated by the Venezuelan government's grant of provisional associate status. The Commission sees no reason to continue the present docket because of Concorde/Nopal's apparent fears that its provisional status will prove transitory or because of dissatisfaction with the unnamed conditions imposed on its service. The information provided the Commission by Concorde/Nopal indicates simply that it has been granted provisional associate status, a state of affairs no more transitory or less secure than the interim associate status previously granted the two U.S. flag carriers whose petitions for relief under section 19(b) of the Merchant Marine Act, 1920, 46 U.S.C. 876(b), resulted in initiation of this proceeding.* If Concorde/Nopal's status changes, or its service suffers from the imposition of significant discriminatory conditions, it may again petition

*Delta Steamship Lines, Inc. and Coordinated Caribbean Transport.

the Commission for action pursuant to section 19. No purpose would be served by continuation of the present inactive proceeding.

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

DATE: Effective January 12, 1984.

SUPPLEMENTARY INFORMATION:
None.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–33

IN THE MATTER OF RATES APPLICABLE TO OCEAN SHIPMENT OF ASSOCIATED FACTORIES, INC.

Because neither the carrier's tariff nor prevailing steamship practice define the method to be used to calculate the cube of rolls of carpet, shipper may have the benefit of the measurement method which yields the lowest rate.

Where an ambiguity exists in the carrier's tariff, it will be construed in a manner most favorable to the shipper.

Edward T. Brennan and Stephen W. Irving for Associated Factories, Inc.

Claudia E. Stone and Stephen F. Wahl for Sea-Land Service, Inc.

REPORT

December 30, 1983

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* James J. Carey, *Vice Chairman;* James V. Day, Thomas F. Moakley and Robert Setrakian, *Commissioners*)

This matter comes before the Commission on referral from the United States District Court for the Southern District of Georgia.

The case before the Court concerns a dispute between Associated Factories, Inc. (Associated) and Sea-Land Service, Inc. (Sea-Land) over the correct method of rating shipments of carpets. Associated has refused to pay ocean freight which Sea-Land believes is due on several shipments of carpets. As a result, the 8900 Rate Agreement to which Sea-Land belongs has revoked Associated's credit privileges. Associated brought the action in District Court seeking to have its credit privileges restored and is seeking punitive damages. The specific question referred to the Commission by the District Court is how the volume of carpet rolls should be measured for the purpose of calculating ocean freight.

By Notice served August 3, 1983 (August Notice), the Commission advised that it would treat the matter as a request for declaratory order under Rule 68 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.68). The August Notice also established a briefing schedule allowing for the filing of memoranda of law and affidavits of fact. Both Associated and Sea-Land have responded to the Commission's August Notice.

DISCUSSION

The ultimate issue presented here is simply whether Sea-Land properly rated the shipments of carpets tendered to it by Associated in calculating the cubic measurement of the rolled carpet using the greatest dimensions of the roll (hereinafter "rectangularization").

Sea-Land argues that Rule 21(A) of the 8900 Rate Agreement Freight Tariff No. 8, FMC No. 8, Original Page 29 governs the measurement of carpet rolls. Rule 21(A) states in relevant part: "(1) All cargo shall be measured on the overall measurements of the individual packages, unless otherwise specified." Sea-Land contends that applying Rule 21(A) to the measurement of a roll of carpet results in a volume which is the product of the length of the roll times its width (*i.e., diameter*) times its height (*i.e., diameter*).

Associated, on the other hand, claims that the tariff rule is ambiguous and believes the proper and commercially acceptable method for measuring the volume of rolls of carpet is pi (3.14) times the radius squared times the length, which is the formula for finding the volume of a cylinder (hereinafter "the geometric formula"). Upon consideration of the arguments presented and review of the tariff provisions relied upon, the Commission finds for Associated.

Rule 21(A) states only that all cargo shall be measured on the *overall measurements* of the individual packages. What is meant by the "overall measurements" of a package is not defined or explained. Nor does Rule 21 specify what method is to be used to calculate the "overall measurements" of a package. In this regard, it is unlike those tariffs which state that the cubic measurement shall be the product of the three greatest dimensions. Specifying that the cubic measurement of the cargo shall be based on the depth, width and length of the cargo precludes the use of the geometric formula for calculating the cubic volume of a cylinder. In contrast, nothing in Rule 21 precludes the use of the geometric formula in determining the "overall measurements" of the carpet rolls.* By this decision we are in no way overruling the general rule stated in *Orleans Material and Equipment Co., Inc.* v. *Matson Navigation Co.*, 8 F.M.C. 160 (1964). Where rectangularization is clearly indicated, it continues to be a valid and essential means of rating cargo. Our holding here is based on our judgment that Rule 21(A) is sufficiently ambiguous to lead us to rule in favor of Associated.

In the absence of a tariff rule which clearly specifies the method to be used in order to determine the "overall measurements" of cargo, we conclude that in this instance Associated may have the benefit of the geometric formula. Ambiguous tariff provisions are construed against the maker, *i.e.,* the carrier, and in a manner most favorable to the shipper

*The Commission may look to matters outside the express language of the tariff to aid in its construction if there exists a custom or usage of a trade or course of dealing of the parties which, although not in the tariff, is such that it should be applied. *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U.S. 285, 291, 292 (1922); *Sacramento-Yolo Port Dist.* v. *Fred F. Noonan Co., Inc.*, 9 F.M.C. 551, 560 (1966). Although many tariffs specifically require "rectangularization" of cargo in calculating the cubic measurement for rating purposes, this does not establish that "rectangularization" is such a universal custom or usage in this trade and with this commodity so that it must be applied even though it is not specifically required by the tariff.

in terms of yielding the lowest rate. *Bratti* v. *Prudential et al.*, 8 F.M.C. 375, 379 (1964); *Sacramento-Yolo Port Dist.* v. *Fred F. Noonan Co., Inc.*, 9 F.M.C. 551, 558 (1966); *United Nations Children's Fund* v. *Blue Sea Line*, 15 F.M.C. 206, 209 (1972).

We therefore find and conclude that under the facts presented the carpet rolls at issue should have been measured for rating purposes using the geometric formula rather than the rectangularization method.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–39

ARMADA/GLTL EAST AFRICA SERVICE (AGREEMENT NO. 10464)

NOTICE

January 5, 1984

Notice is given that no exceptions have been filed to the November 23, 1983 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. 83–39

ARMADA/GLTL EAST AFRICA SERVICE (AGREEMENT NO. 10464)

An Agreement between a company known as Armada Great Lakes/East Africa Service Ltd. (Armada/East Africa), a purported non-common carrier, and Great Lakes Transcaribbean Line (GLTL), an admitted common carrier, establishes by joint venture a common carrier known as Armada/GLTL East Africa Service (Armada/GLTL line). The parties to this Agreement contend that it is not subject to section 15 of the Shipping Act, 1916, because Armada East Africa is not a common carrier. Protesting carriers and Hearing Counsel disagree. It is held:

(1) There are significant continuing relationships between the common-carrier joint service and GLTL, the common-carrier owner, relating to options to charter vessels to the joint service, handling claims, voting on sailings and vessels, and not competing with the service. These relationships alone support section 15 jurisdiction.

(2) The very words of the Agreement, contemporary affidavits, and other evidence show that the Agreement is really intended to include common-carrier affiliates of Armada East Africa and GLTL.

(3) Armada East Africa operates the common-carrier service as a full, active partner with GLTL, using a trade name for the joint service, shares earnings and liabilities for the joint service, provides funds, makes operational decisions, and carries out the very purpose for which Armada East Africa was first formed, and has even filed Anti-rebating Certificates as required of common carriers. Armada East Africa is therefore a common carrier itself.

Thomas D. Wilcox for proponents.

John W. Angus III for protestants.

John Robert Ewers, Joseph B. Slunt, and *Stuart James* for Hearing Counsel.

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

Finalized January 5, 1984

On January 11, 1983, Agreement No. 10464 was filed with the Commission under section 15 of the Shipping Act, 1916. The Agreement is between two companies, one known as Armada Great Lakes/East Africa Service, Ltd. (Armada East Africa) and the other, a company known as Great Lakes Transcaribbean Line, GMBH (GLTL). Under the Agreement, these two companies agreed to operate a common-carrier service as a joint venture in the trade between Canada/U.S. Great Lakes, Atlantic and Gulf Coasts ports and South/East Africa known as Armada/GLTL East Africa Service (Armada/GLTL line).

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

The Commission noted that although one of the owners of the new line, GLTL, was a common carrier by water operating between ports in the United States and various ports in the Caribbean and South America, the other, Armada East Africa, did not appear to be operating as a common carrier subject to the Act. Therefore, the Commission was concerned that it might not have jurisdiction to approve or disapprove the Agreement and before turning to the question of the merits of the Agreement, the Commission wished to determine the jurisdictional question. Therefore, by Order of Investigation, served September 9, 1983, the Commission instituted this expedited proceeding limited to the jurisdictional question and ordered the presiding judge to serve an Initial Decision no more than 75 days after service of its Order, i.e., on or before November 23, 1983.

In describing its concerns as to the jurisdictional question, the Commission delineated several areas of inquiry. First, it specified that "the issue that must be resolved is whether Agreement No. 10464 involves two or more common carriers by water over which the Commission has *in personam* jurisdiction." (Order, p. 2, footnote citation omitted.) In this regard, the Commission noted that Armada East Africa, the apparent non-common carrier owner of the new joint service, was part of the so-called "Armada Group," which consists of a number of companies providing shipping services, among which companies were two common carriers by water subject to the Act, Armada Lines and Atlantic Cross Shipping. Because the Agreement apparently contained a covenant not to compete which bound not only the signatory owners but affiliates, the Commission was concerned that this covenant involved two common carriers, namely, the Armada/GLTL line joint service itself and at least one affiliate of the owner, Armada East Africa, namely, Armada Lines. Therefore, the Commission questioned whether Armada East Africa should be considered to be a common carrier, in other words, whether the common-carrier status of the affiliate, Armada Lines, should be imputed to Armada East Africa.

A second area of inquiry set forth by the Commission concerned the question whether the two owners of the Armada/GLTL line existed as separate entities in the subject trade by doing such things as issuing separate bills of lading or furnishing crews and operating vessels in that trade. If such separate identities existed and were not subsumed in the Armada/GLTL line, the Commission opined that both owners might be common carriers subject to the Act.

Finally, the Commission stated that even if Armada East Africa could not be considered to be a common carrier subject to the Act, there may yet be section 15 jurisdiction over the Agreement "if it establishes a continuing relationship between [the Armada/GLTL line] and GLTL, both of which are common carriers subject to the Act." (Order, p. 3.) In this regard, the Commission cited a previous decision in which it had found jurisdiction on the basis of a continuing relationship (*Agreement No. 9955–1*, 18 F.M.C. 426 (1975)) and even though the Armada/GLTL line did not itself sign the Agreement, the Commission nevertheless stated that "it may be appropriate to consider [the Armada/GLTL line] a party to the Agreement if it places obligations on the joint venture vis-a-vis its owners." (Order, p. 4.)

In order to meet the expedited schedule mandated by the Commission's Order, I convened a prehearing conference on September 27, 1983. The conference was attended by counsel for proponents, for the protesting members of the United States/South and East Africa Conference,[2] and by Hearing Counsel. At the conference it was agreed and established that proponents would answer certain questions posed by Hearing Counsel mainly in affidavit form, would attempt to stipulate the facts, and would file a single round of briefs if all parties agreed that the Commission had jurisdiction over the Agreement. If not, the parties would file opening and reply briefs. As it turned out, following the submission of affidavits, proponents continued to contend that the Commission lacked jurisdiction whereas protesting members of the Conference and Hearing Counsel contended to the contrary. The parties expressed satisfaction with the adequacy of the record and, accordingly, these briefs were filed. (See my rulings, served September 30 and October 19, 1983.) [3]

FACTUAL BACKGROUND

The Parties to the Agreement and Their Operations

1. Great Lakes Transcaribbean Line GmbH (GLTL), formerly known as KG Great Lakes Transcaribbean Line GmbH, has since 1965 operated a common-carrier service only between U.S./Canadian Great Lakes ports and ports in the Caribbean Sea/West Coast of South America under a tariff filed with the Federal Maritime Commission. GLTL has not and does not own or operate any ships in any trade between U.S. ports and ports in East, South or West Africa.

2. GLTL is currently owned by Mr. Hellmuth Essen of Hamburg, Germany, a private person and by KG MONSUN Schiffahrtsgesellschaft & Co. Nachfolger, Hamburg, a company which is owned and controlled by

[2] Two protests to the Agreement had been filed in February 1983 by members of the Conference and by Ceres Navigation, Ltd., having to do with the merits and approvability of the Agreement, which protests, because of the limited jurisdictional issue in this expedited proceeding, are not now relevant. (On request of the protesting member lines, I amended the Commission's Order which had stated that the Conference had filed the protests. See 46 CFR 502.147(a) and Notice of Rulings Made at Prehearing Conference, September 30, 1983.) Protestant Ceres, although kept informed of the conference and the proceeding, did not participate in this limited proceeding.

[3] As finally developed, the evidentiary record consisted of two affidavits of officers or managers of Armada East Africa and of GLTL, a copy of the Agreement No. 10464 and two amendments, and a copy of the letter of transmittal of the Agreement to the Commission, dated January 11, 1983, with supporting statements. (See my ruling, October 19, 1983.)

Hugo Stinnes Mulheim, a private limited partnership.[4] GLTL does not know of Mr. Essen's ownership, if any, in any other common carrier by water in the U.S. foreign commerce. KG MONSUN does not own or operate a common-carrier service in the U.S. foreign commerce. Hugo Stinnes Mulheim are engaged in industrial and shipping businesses. They partially own and operate five general-cargo vessels which are chartered to other lines. They do not operate any other common-carrier service operating in the U.S. foreign commerce. Hugo Stinnes Mulheim and another, independent company known as Ozean-Linie GmbH, Hamburg, own Ozean/Stinnes-Linien Gemeinschaftsdienst, a carrier operating in the trade between Mexico-Gulf and North Europe.

3. Armada Great Lakes/East Africa Service Ltd., (Armada East Africa), the other party to Agreement No. 10464, was incorporated under the laws of the Republic of Liberia on March 26, 1981, for the sole purpose of entering into a joint venture with GLTL to provide common-carrier service between U.S. and Canadian ports on the Great Lakes and ports in South and East Africa. Armada East Africa neither owns nor operates vessels in any trade and is a one-half owner only of the Armada/GLTL line joint service.

4. Armada East Africa is a member of the Armada Group. (See table in Appendix.) The Armada Group is owned two-thirds by Guldan Maritime Co., Ltd. and one-third by Skua (Holding) Ltd., both Liberian companies. The Armada Group owns, in whole or in part, several companies engaged in all aspects of maritime commerce world-wide, of which only three are engaged in common carrier service at United States ports. The three are: (a) Armada Lines Ltd., a Liberian corporation organized in 1978 to operate as a common carrier between Montreal, U.S. Atlantic and Gulf ports and ports in West Africa, changing in 1979 to concentrate between U.S. and Canadian Great Lakes ports and Montreal as loading areas. Armada Lines files a tariff with the Commission. It is managed jointly by three companies which are also members of the Armada Group (Armada Shipping S.A. (Switzerland); Armada Shipping Aps. (Denmark); and Armada Shipping Inc. (Houston, Texas, U.S.)). It has three general agents for booking and ports services (Protos Shipping Company, Montreal; Protos Shipping Company, Chicago, Illinois; and Bateaux Maritime Inc., New York, N.Y.).

(b) Atlantic Cross Shipping Co., a joint venture between Clipper Maritime, Inc., a Liberian corporation and member of the Armada Group, and Georgia Pacific Corporation (FMC Agreement No. 10434). Atlantic Cross operates as a common carrier between U.S. East and Gulf Coast ports and ports in Europe and the United Kingdom pursuant to tariffs filed with the Commission. Since November 1981 Atlantic Cross has been managed by Armada Shipping Inc., (Houston, Texas). Initially Atlantic Cross

[4] For ready reference and visual aid, a table of ownership, showing how the parties to the Agreement are owned by and related to other companies discussed in this decision, is attached to this decision as an Appendix.

employed ships furnished by Georgia Pacific but later chartered ships itself. Atlantic Cross has three managing agents (Armada Shipping Aps. (Denmark); Armada Shipping S.A. (Switzerland); and Armada Shipping Inc. (Texas, U.S.)). These three do not own or operate vessels.

(c) Armada/GLTL East Africa Service (Armada/GLTL line), the joint venture created by the subject Agreement, is described more fully below.

5. Armada/GLTL line is a vessel-operating common carrier which is jointly and equally owned by Armada East Africa and GLTL. It began as a joint-venture agreement which these two parties entered into on April 24, 1981. Since its beginning, it has operated as a common carrier pursuant to tariffs on file with the Commission between ports in the U.S. and Canadian Great Lakes and ports in East and South Africa under the trade name of Armada/GLTL East Africa Service. In December 1982 the owners decided to expand the service to include U.S. Atlantic and Gulf Coast ports and filed the appropriate tariffs with the Commission.

6. Armada/GLTL line is managed jointly by Armada Shipping S.A. (Switzerland); Armada Shipping Aps. (Denmark); and Armada Shipping Inc. (Houston, Texas, U.S.). Initially, Protos Shipping Company (Montreal and Chicago) were booking and port agents for the service but later Norton Lilly Co. Inc. (New York) was added as agent with the expansion of service to the U.S. Atlantic and Gulf ports.

7. Armada/GLTL line owns no vessels, to date has employed vessels chartered on the open market, and has not employed or chartered vessels owned by any Armada company, GLTL, or the Stinnes Group of Hamburg, Germany. All cargo of the service has been carried under bills of lading issued in the trade name of Armada/GLTL East and South Africa Service pursuant to the tariffs on file with the Commission. No cargo has been carried by the service under a bill of lading issued by any other carrier or agent of any such carrier.

8. Since there is no westbound cargo available to the service from ports in East and South Africa, the service presently is eastbound only from the United States and is performed by vessels that are voyage or trip chartered on the free market and returned "off-hire" to the owner or chartered at the completion of the eastbound voyage.

9. The broad or general operational decisions of the service are made by representatives of its owners, Armada East Africa and GLTL. Day-to-day management is under the direction of Per Gullestrop, Armada Shipping Inc. (Texas, U.S.).

10. The service does not coordinate its operations with GLTL or with Atlantic Cross Shipping or Armada Lines, Ltd. Each of these is a separate legal and operational entity. GLTL does provide certain services for the Armada/GLTL line as discussed below and does participate in broad policy decisions. However, the parties to the joint service view the Agreement as not legally binding on affiliates of either Armada East Africa or GLTL. Similarly the parties view their covenant not to compete (Article 6 of

the Agreement) as being an agreement between the two owners of the joint service that neither owner will compete with the joint service without the consent of the other owner.

Description of the Agreement

11. Agreement No. 10464, originally entered into on April 24, 1981, was established for the purpose of operating "a line between Canada/US-Great Lakes and East-/South Africa . . ." as a joint venture between its two owners, Armada East Africa and GLTL. The parties agreed to "participate with a share of 50% each on the expenditures, earnings, responsibilities and liabilities of the joint venture." The liner service was to be operated "in accordance with the general cargo policy to be always mutually agreed between the parties."

12. Article 2 of the Agreement provides for agreement between the parties as to the frequency of the sailings and the insertion of vessels in the liner service. It also provides that:

> When Armada which shall deem to include any company in the Armada group, shall have a vessel in position, Armada shall have the first option to fix such vessel to the line at the market rate prevailing . . . and in the event Armada shall have no vessel in position or does not exercise their option, GLTL shall have the second option of fixing one of their or Stinnes-group's own or chartered vessels to the line.

13. Article 3 of the Agreement provides for the appointment of Armada Shipping Aps. (Fredensborg, Denmark) as the exclusive agents and manager of the line and sets forth the agents' commission. It also provides that tonnage shall be fixed with Armada East Africa as charterers and "that GLTL shall indemnify Armada with 50% on claims and/or disputes arising under such charter or bills of ladings and that GLTL shall have the same rights and obligations under such charter party or bills of lading as if they had been inserted as joint charterers with Armada." GLTL also agrees to provide a cargo superintendent for the line to "supervise the loading and discharging of the cargo and see that voyages are prosecuted with the utmost dispatch." Article 3 also provides that "all cargo claims and claims in connection with the chartering of vessels are to be handled by GLTL" and that "as to the handling of claims a commission at 0.25 per cent of the gross amount of voyage freight of all cargoes booked to the line is to be paid to GLTL."

14. Article 4 of the Agreement, among other things, gives GLTL authority to commence legal proceedings or defend in them in the matter of claims or other proceedings brought against "the ship, her owners, charterers or managers." GLTL is authorized to settle claims up to less than $1,000. All claims are to be "forwarded directly to GLTL who will register such

claims enabling the parties at all times to ascertain the exact claims amount settled/outstanding on each voyage."

15. Article 5 provides for the furnishing of funds to operate the line by the parties and, among other things, provides for the funds to be deposited in a separate bank account for the line and for "surplus of financial liquidity" to be distributed to the parties under certain conditions.

16. Article 6 provides:

> None of the parties of this agreement nor any of their affiliated, controlled or associated companies shall during the duration of the joint venture carry out similar or competing liner service in the same trade provided for in this agreement unless the other party shall give its consent thereto.

The parties now state that this covenant not to compete means only that the two parties to the Agreement will not compete with the joint service without the consent of the other party and not that the covenant is legally binding on any companies affiliated with Armada East Africa or GLTL. The only way to bind those affiliates, in the view of the parties to the Agreement, would be to have those companies sign the Agreement themselves, which they have not done.

17. The remaining Articles of the Agreement (7 through 11) deal with effective dates of its existence, termination and agreement not to use the trade name of the line in such event, the sending of notices to the parties, scheduling of meetings every three months, and the applicability of English law.

18. The Agreement was amended twice. In the first amendment, dated February 5, 1982, the Agreement was extended from April 1, 1982 to March 31, 1983, and Article 5 was amended regarding the furnishing of statements of account of the line and distribution of surplus. In the second amendment, dated December 16, 1982, the line was expanded beyond the Great Lakes to serve U.S. Atlantic and Gulf ports, GLTL's name was changed to reflect its current status, and the Agreement was extended to March 31, 1984.

The Filing of the Agreement for Approval and Contemporaneous Statements

19. The Agreement was filed with the Commission on January 11, 1983. At that time the proponents requested "the Commission to approve pursuant to its authority under section 15 of the Shipping Act, 1916," and requested expedited processing to permit sailings out of the Atlantic by late January or early February 1983 and to meet shipper needs. They contended that the requirements of section 15 had been met and that "the agreements should be approved."

20. The parties to the Agreement acknowledged that they had not previously filed their agreements for approval by the Commission but stated that the reason for this failure was the fact that Armada East Africa had

not been a common carrier although GLTL was. At the time they first filed on January 11, 1983, however, they thought that Armada East Africa "presumably" might have become a common carrier when the Armada/GLTL line's tariffs were first filed with the Commission and the Armada/GLTL line's service was advertised to the shipping public. They stated no intention to avoid any legal obligations, cited the fact that they duly filed tariffs required by law, and stated that they made a true and complete disclosure of all material facts underlying their agreements.

21. In support of their request for approval, the proponents submitted a Statement of Affidavit, dated January 21, 1983, in the name of three gentlemen, Mr. Wolf Neuendorff, GLTL Line Manager; Mr. Dietrich Moehle v. Hoffmannswaldau, "Manager of the Legal Department" of GLTL; and Mr. Jens-Erik Valentin, Treasurer of Armada East Africa.[5] They stated:

> In order to establish an efficient, regular, workable Liner Service the Parties agreed that only with the consent of the Partners of the Joint Venture their affiliated, controlled or associated Companies shall carry out a similar Liner Service in the same trade and to assure participation of all subsidiary or controlled Companies of the two Partners.

Identical language is contained in a companion "Statement" in the name of the above three-named gentlemen, also dated January 21, 1983.

Contentions of the Parties

As noted earlier, notwithstanding the filing of the Agreement on January 11, 1983, or the earlier beliefs of the parties to the Agreement regarding the status of Armada East Africa, proponents of Agreement No. 10464 now contend that the Commission lacks jurisdiction over it. Essentially proponents contend that one of the parties to the Agreement, Armada East Africa, is not now and never has been a common carrier by water subject to the Shipping Act, that the Agreement cannot legally bind common-carrier affiliates of Armada East Africa or of GLTL, and that there are no ongoing relationships between the Armada/GLTL line and its common-carrier owner, GLTL, which could subject the Agreement to section 15 of the Act. In more detail, proponents argue that Armada East Africa

[5] Mr. Jens-Erik Valentin is also Secretary of Armada East Africa, the non-common carrier party to the Agreement, is Senior Vice-President of Armada Shipping Inc. (Texas), and is an officer of other companies of the Armada Group. According to the Anti-rebating Certificates filed with the Commission pursuant to 46 CFR 552, Mr. Valentin was Chief Executive Officer of Armada East Africa and of Armada Lines Ltd., the common carrier affiliate of Armada East Africa, in July 1981 and August 1982, when the certificates were filed. The facts of these filings are officially noticed under 46 CFR 502.226. Interestingly, Armada East Africa, one of the parties to the Agreement which contends that it is not a common carrier, does not own or operate ships nor publish tariffs, and which contends that its common-carrier affiliates are not affected by the Agreement and that their common-carrier status cannot be imputed to Armada East Africa, nevertheless filed the Anti-rebating Certificates under 46 CFR 552 which normally are filed by common carriers or other persons subject to the Act. As noted, however, at least as of January 1983, the parties thought that Armada East Africa might have become a common carrier when the Armada/GLTL line filed tariffs and advertised its service.

does not own or operate ships, does not publish any tariffs, and does not hold itself out as a common carrier in any trade. Proponents argue further that the mere fact that Armada East Africa is a member of the Armada Group which comprises at least two common carriers (Armada Lines and Atlantic Cross) or that GLTL is affiliated with a common-carrier member of the Stinnes group (Ozean/Stinnes Linien) does not mean that Armada East Africa should be considered to be a common carrier itself or to have the common-carrier status of its common-carrier affiliates imputed to Armada East Africa. That is because, according to proponents, each of the companies is a separate entity which cannot be bound by the parties to the Agreement. Furthermore, notwithstanding the language of Articles 2 and 6 of the Agreement stating that Armada "shall deem to include any company in the Armada Group" and that "none of the parties of this agreement nor any of their affiliated, controlled or associated companies shall" carry on competing services etc., the parties to the Agreement contend that such language cannot legally bind those affiliated companies, and these two Articles merely express an agreement between the two owners of the joint service, one of which is not a common carrier, not to compete with their jointly owned subsidiary without the consent of the other parent. Proponents argue that neither Armada East Africa nor GLTL issues bills of lading, files tariffs, or furnishes crews for ships in the subject trade, in other words, that the identities of the two owners are totally subsumed in the joint venture which alone holds out to provide service to the trade. Proponents see no ongoing relationships between the joint service and GLTL which subject the Agreement to section 15. The various functions which GLTL provides for the joint service, according to proponents, i.e., appointment of the managing agent, cargo supervision and claims handling, are only managerial functions incidental to ownership as are decisions regarding frequency of sailings and insertion of vessels. Finally, the language of Article 2 of the Agreement which gives Armada East Africa a first option and GLTL a second option to "fix" a vessel to the joint service does not convert the Agreement into one requiring approval under section 15. All that Article means is that "if either owner, or a company related to an owner, has a ship 'in position' and wants to offer it (at market rate prevailing) to the joint service, then the owners, first Armada [East Africa] and then GLTL, shall have the first option to fix the ship to the joint service." (Proponents' Opening Brief, pp. 8-9.) Proponents state that neither owner has ever chartered a ship to the joint service in the past and that unlike the agreement in the *Dart Containerline* case, cited below, the joint service, if it charters from its owners, would do so at market rates rather than at rates to be determined by the owners. Nor is the joint service here required to charter from its owners and compensate the owners by a portion of the profits derived from the operation of the ship by the joint service, as was the situation in another case, *Agreement No. 9955-1 (Star Shipping)*, 18 F.M.C. 426, 428 (1975).

Protesting members of the United States/South and East Africa Conference strongly dispute proponents' contentions. Protestants argue that Armada East Africa became a common carrier when it signed the Agreement or even before when it was incorporated solely to operate a common-carrier service and that Armada East Africa is part of the Armada Group which owns in whole or in part three common carriers by water including the present Armada/GLTL line joint service. Protestants argue that the Agreement confers rights, privileges, and obligations on members of the Armada Group as well as on GLTL, a recognized common carrier, with respect to the common-carrier joint service, and notes that the Chief Executive Officer of Armada East Africa is also the Chief Executive Officer of a common-carrier Armada affiliate. Protestants argue vigorously that the Commission ought to "pierce the corporate veil," citing much case law, because of the close affiliation of Armada East Africa with other common carriers in the Armada Group, common management or officers, and in order to carry out statutory objectives. Protestants point out that members of the Armada Group and GLTL have certain options to charter ships to the Armada/GLTL line joint service, that GLTL is given authority to handle claims for the line, and that proponents' contentions now that the language in Article 6 (covenant not to compete) that appears to cover companies affiliated with or related to the parties to the Agreement has no binding effect on such companies, contradicts the proponents' statements when they first filed the Agreement.

Hearing Counsel argue similarly. Hearing Counsel contend that Armada East Africa was formed solely to enter a joint service with GLTL, is a member of the Armada Group, and has common management and other ties with the common-carrier members of that Group. Hence common-carrier status ought to be extended to Armada East Africa. Hearing Counsel also argue that there are certain ongoing relationships between the Armada/GLTL line joint service and with GLTL. Thus Hearing Counsel point out that GLTL has second-option rights to charter vessels to the joint service and that GLTL provides supervising services and handles claims for the joint service. Hearing Counsel express concern that if the subject Agreement can be found not subject to section 15 because of the formation of a new corporation, Armada East Africa, which joins with a common carrier to do something otherwise covered by section 15, and no one looks behind the formation of such corporation, "it will open the door for any common carrier to evade the requirements of section 15 by merely forming new corporations to enter into any new section 15 agreements." (Opening Brief of Hearing Counsel, pp. 5-6.)

In the final round of reply briefs, proponents argue against jurisdiction under section 15 by pointing out that the joint-service line, as well as the common carrier, GLTL, and any common-carrier member of the Armada or Stinnes Group, are still subject to the Shipping Act and that the Agreement is designed to promote competition. Proponents also contend that the protesting members of the Conference actually desire to restrict competition and are seeking to "artificially transform a non common carrier owner into a common carrier owner" in order to limit or prevent competition in their trades. Proponents contend, furthermore, that it was not the intent of Congress to have the Commission engage in legal fictions simply to exercise jurisdiction over an agreement which increases competition and that there is no reason in this case to "pierce any corporate veil."[6] Proponents concede, however, that there is an obligation on the part of the joint service to its owners regarding the owners' options to fix vessels to the line but contend that the charter rates for such vessels will ultimately be fixed by arbitrators in case of dispute. (Proponents' Reply Brief, p. 5.)

Hearing Counsel, in their reply brief, reiterate their earlier contentions, namely, that there are ongoing relationships between the joint service and GLTL, the common-carrier owner, regarding sailings, vessels, funding, handling claims and legal proceedings, supervising, not competing, and making operational decisions. Hearing Counsel also reiterate their argument that the common-carrier status of members of the Armada Group ought to be imputed to Armada East Africa because of language in the Agreement tying those members to the Agreement, especially with respect to the covenant not to compete with the joint-service line, and because of common management between common-carrier members of the Armada Group and the joint service. Hearing Counsel note that the proponents even explain in their opening brief (p. 6) that the purpose of Article 6 of the Agreement was to ensure that the "joint service would be free from direct competition by the owners or the owners' affiliated, controlled or associated companies without the consent of the owner. . . ."

DISCUSSION AND CONCLUSIONS

As mentioned earlier, the Commission advanced three areas of inquiry: (1) whether Armada East Africa should be considered to be a common carrier because of its relationship with common-carrier members of the Armada Group and because of certain language in the Agreement appearing to apply to those members; (2) whether the two owners and parties to the Agreement, Armada East Africa and GLTL, retain separate identities

[6] Proponents' final arguments that their Agreement promotes rather than restricts competition, in my opinion, goes to the merits of the Agreement rather than to the question of jurisdiction over it. If parties enter into cooperative working arrangements or other ventures falling under section 15, the fact that the arrangements may promote competition by introducing a new competitor or otherwise does not mean that the arrangements are removed from section 15 jurisdiction. See discussion in *Agreement No. 9955-1 (Star Shipping)*, 18 F.M.C. at 456. Similarly, the possible motivations of protestants in opposing approval of the subject Agreement are not relevant to the question of jurisdiction. Finally, as will be seen later in this decision, the facts of record are sufficient to determine the status of Armada East Africa without engaging in fictions or piercing corporate veils.

in the subject trade and are therefore, in effect, common carriers in the trade; and (3) whether there was a continuing relationship between the Armada/GLTL line joint service and GLTL, both of which are common carriers subject to the Act, such as if the joint service had certain obligations toward its owners imposed upon it by the Agreement.

I find that there are clearly continuing relationships which create rights, privileges, and obligations between the Armada/GLTL line joint service and at least one of its owners, the common carrier GLTL, so that there is section 15 jurisdiction on that basis alone. I find also that there are sufficient grounds to consider that the parties to the Agreement include common-carrier members of the Armada Group. I find finally that the record persuasively shows that Armada East Africa, far from losing its identity, is a full and active partner in running a common-carrier service with GLTL, funding that service, sharing earnings and liabilities, and carrying out Armada East Africa's sole purpose, which was to operate a common-carrier service in partnership with GLTL. Accordingly, Armada East Africa is itself a common carrier by water, as apparently it believed itself to be until recently arguing to the contrary.

The Continuing Relationship Between the Joint Service and GLTL

It is of course basic that section 15 jurisdiction does not attach to an agreement unless there is an ongoing relationship between two or more common carriers by water subject to the Commission's jurisdiction rather than a single, discrete event over which the Commission would have no continuing duty of surveillance. *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 729 (1973). In the case of a joint venture in which one party only is clearly a common carrier by water subject to Commission jurisdiction but the other or others are not, it has been held that jurisdiction will still lie over the agreement if there is a continuing relationship between at least one common-carrier owner and the common-carrier joint venture itself. See *Dart Containerline Company, Ltd. (Agreement No. 9745–3)*, Report on Remand, September 2, 1983, 22 SRR 352, 355;[7] *Agreement No. 9955–1 (Star Shipping)*, 18 F.M.C. 426, 453, 455 (1975).

Section 15 of the Act, 46 U.S.C. § 814, provides in pertinent part that a common carrier must file:

> 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 . . . to which it may be a party or conform in whole or in part . . . giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; allotting ports or re-

[7] This case is back before the Court of Appeals and is pending decision of that Court in *Dart Containerline Co. Ltd. v. Federal Maritime Commission*, No. 82–1403 (D.C. Cir.).

> stricting or otherwise regulating the number and character of sailings between ports; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

The above statute has been held to be broadly drafted and therefore not to be given unduly narrow interpretations. *Volkswagenwerk v. F.M.C.*, 390 U.S. 261, 273 (1968) ("The Commission thus took an extremely narrow view of a statute that uses expansive language."); *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40, 54 (1978) ("It is appropriate, therefore, that the Court has recognized the broad reach of section 15 and resisted improvident attempts to narrow it."); *Id.*, at 55–56 (". . . but the Court [in *Volkswagenwerk*] did emphasize the breadth of the statutory language and the determination of Congress, reflected in section 15, to 'subject to the scrutiny of a specialized governmental agency the myriad of restrictive agreements in the maritime industry'.").

In interpreting agreements under the Shipping Act and determining their scope, furthermore, it has also been held that the Commission has some flexibility, is not strictly bound by what the parties claim to be their intent, and in case of ambiguity the agreement is construed against the parties who drafted them. See *Swift & Co. v. Federal Maritime Commission*, 306 F. 2d 277, 281 (D.C. Cir. 1962); *Federal Maritime Commission v. Australia/U.S. Atlantic & Gulf Conference*, 337 F. Supp. 1032, 1037 (S.D.N.Y. 1972) (. . . "having drafted the Agreement [a dual-rate contract under section 14b of the Act] any ambiguity in its terms will be resolved against the Conference."). Furthermore, although usually encountered when determining the approvability of agreements rather than jurisdiction over them, it is established doctrine that the Commission is not confined to the mere words in an agreement submitted under section 15 of the Act but must consider the effects of such agreement. See, e.g., *Agreement No. T–4; Terminal Lease Agreement, Long Beach, California*, 8 F.M.C. 521, 529 (1965) ("Where agreements are strongly protested, as here, we must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objectives and results of the agreements."); see also discussion in *Agreement No. 9955–1 (Star Shipping)*, cited above, 18 F.M.C. at 465–466.

In the instant case I find that there are clearly ongoing relationships between the Armada/GLTL line joint service and its owners, of which one, GLTL, is admittedly a common carrier by water subject to the Act, which relationships furthermore are the type specified in section 15. This is most clearly seen in Article 2 of the Agreement which confers a right of first option on Armada East Africa and a second option on GLTL for the fixing of vessels to the joint service at market rates. Although proponents contend that the joint service has never had to charter ships from its owners and that even if it did, the charter rates would simply be the prevailing market rates, it is clear that the joint service cannot simply go out into the charter market to obtain ships but first must see if its owners have a ship available and wish to charter it to the joint service. The owners, in other words, enjoy an option which is a special right or privilege not enjoyed by other shipowners or ship charterers generally. Thus, this option granted to Armada East Africa and the common carrier-owner, GLTL, constitutes a "special privilege or advantage" as well as "providing for an exclusive, preferential, or cooperative working arrangement."[8] Of course, if Article 2 is read as it is written, then any number of the Armada Group, which includes two common carriers, would also have the right of first option to fix vessels.[9]

The ongoing or continuing relationships between the joint service and its owners GLTL is also shown elsewhere in the Agreement. Thus, Article 2 also imposes some control over the joint service's decisions as to frequency of sailings and insertion of vessels because GLTL has the right to vote down sailing or vessel plans which the joint service might proffer to the owners. Perhaps this is merely an agreement between the two owners and deals with management or is incidental to ownership as proponents would contend. This might be the case if the literal terms of the Agreement were to be construed in favor of the parties who drafted it. As noted, however, it is more proper to construe any doubts against the persons drafting the Agreement.

There are, however, perhaps clearer examples of continuing relationships between the joint service and GLTL which fall within the scope of activities set forth in section 15. Article 3 of the Agreement gives GLTL certain rights and obligations toward the joint service. Thus, GLTL agrees to handle "all cargo claims and claims in connection with the chartering of vessels" for which it is paid a commission derived from gross amount of voyage freight earned by the joint service. Article 4 further describes GLTL's authority in handling claims against the joint service by authorizing GLTL to prosecute legal proceedings or arbitrations or oppose and defend in such proceedings brought against "the ship, her owners, or charterers or managers," including the right to settle certain claims. It is very difficult to conclude that this undertaking by the common-carrier owner in behalf of the common-carrier service does not constitute at the very least a "cooperative working arrangement" within the meaning of the expansively written section 15. It is also arguable that the undertaking by GLTL to act for the joint service in this fashion gives that joint service a "special privilege

[8] In other contexts, an "option" is considered to be a right or privilege conferred on someone for consideration to purchase, lease, etc. See Black's Law Dictionary (5th Ed.) at 986. ("A right, which acts as a continuing offer . . . a privilege existing in one person . . . .")

[9] As I discuss later, the record shows that it was the intent of the parties or their understanding that related companies of the parties would be involved notwithstanding their later disclaimers. Indeed, even in proponents' opening brief (pp. 8–9) proponents explain that "All that Article 2 of Agreement No. 10464 means is that if either owner, *or a company related to an owner*, has a ship 'in position' and wants to offer it (at market rates prevailing) to the joint service, then the owners, first Armada [East Africa] and then GLTL, shall have the first option to fix the ship to the joint service." (Emphasis added.)

or advantage'' not normally enjoyed by other common carriers. Cf. *Agreement No. 9955–1 (Star Shipping)*, cited above, 18 F.M.C. at 456–457, and *In the Matter of Agreement FF 71–7*, 17 F.M.C. 302, 305 (1974) regarding the enhanced competitive abilities of parties to an agreement as constituting ''special privileges and advantages.''

Finally, although the full meaning and extent of the words cannot be ascertained in this limited proceeding, it appears from Article 3 that, in addition to agreeing to indemnify Armada East Africa with 50 percent on claims or disputes arising under charters or bills of lading, GLTL is given the ''same rights and obligations under such charter party or bills of ladings as if they had been inserted as joint charterers with Armada.'' Without a full record which would describe what these words or other words in the Agreement are supposed to mean, it is difficult to find with certainty how the Agreement operates. However, again construing any doubts against the persons drafting the Agreement, I would at least have to conclude that GLTL has some rights or obligations in connection with the joint service's bills of ladings which must constitute a type of cooperative working arrangement and that, contrary to proponents' contentions, the GLTL entity might not have become completely subsumed in the Armada/GLTL line joint service which issues bills of lading in the name of the joint service. As I discuss below, whether there is a continuing relationship between GLTL and the common-carrier members of the Armada Group because of the covenant not to compete in Article 6 depends upon the interpretation of the literal language of Article 6 and the weighing of certain contradictory evidence.

Involvement of Armada Group Members in the Agreement

Although the above discussion demonstrates that the Commission has jurisdiction over the Agreement because of continuing relationships written into the Agreement between the Armada/GLTL line joint service and at least one of its owners, the common carrier, GLTL, there are further grounds on which jurisdiction can be based although the record is limited. However, even on this limited record the preponderance of the evidence shows that the Agreement was drafted with the intention of involving members of the Armada Group notwithstanding later denials.

As discussed above, proponents contend that despite the explicit language in Article 2 which refers to ''Armada, which shall deem to include any company in the Armada Group'' and in Article 6, which refers not only to the parties to the Agreement but to ''any of their affiliated, controlled or associated companies,'' these other companies have not signed the Agreement and therefore cannot be legally bound by it. In other words, notwithstanding clear language, proponents contend that the members of the Armada Group or affiliates of GLTL are not involved in the Agreement. Protestants and Hearing Counsel, on the other hand, ask me to pierce the corporate fictions and extend the common-carrier status of two members of the Armada Group, at least, to Armada East Africa.[10]

The Agreement here is certainly clearly written to include "any company in the Armada group" (Article 2) and "affiliated, controlled or associated companies" (Article 6). Furthermore, contemporaneously (more or less) with the filing of the Agreement in January of 1983, the statements of the three officers of Armada East Africa and GLTL asserted that "only with the consent of the Partners of the Joint Venture their affiliated, controlled or associated companies shall carry out a similar Liner Service in the same trade and to assure participation of all subsidiary or controlled Companies of the two Partners." (Statement of Affidavit, January 21, 1983, and Statement, January 21, 1983, found in Exhibit 4.) As late as the filing of the proponents' opening brief, on October 31, 1983, proponents explained Article 2 to mean "that if either owner, *or a company related to an owner*, has a ship 'in position,'" then the two nominal parties, Armada East Africa and GLTL, have the options described above. Proponents' Opening Brief, p. 8. (Emphasis added.) In contrast to the above evidence, the same three officers who gave the evidence above at the time of filing, now contend that Article 6 has no legal effect because the related companies are not signatories to the Agreement and cannot be bound to it. (No express mention is made by them of Article 2 regarding the options to fix vessels to the joint service but there is a general statement in Mr. Valentin's later affidavit that there is no operational coordination or relationship between the joint service and common-carrier members of the Armada Group in the matter of vessel utilization.)

This later evidence, which was prepared and submitted in response to questions of Hearing Counsel during litigation, must be compared with earlier statements which were prepared in order to seek approval under section 15 without regard to the jurisdictional issue. It is usual to give more weight to evidence given without contemplation of litigation than to evidence prepared in contemplation of or during litigation. However, even if this rule were not applied, proponents' own remarks in their opening brief interpreting Article 2 to refer to "related" companies would tilt the balance against proponents. Furthermore, as discussed above, if there were any doubt, such doubt should be construed against the parties who drafted the Agreement. *Federal Maritime Commission* v. *Australia/U.S. Atlantic & Gulf Conference*, cited above, 337 F. Supp. at 1037.

On the basis of the above evidence of record, limited though it may be by the time constraints established in this proceeding, I find that the

[10] Protestants and also Hearing Counsel argue that I should disregard corporate fictions and "pierce the corporate veil" so as to impute common-carrier status to Armada East Africa because of its affiliation with common-carrier members of the parent Armada Group. Protestants provide numerous case authorities holding that courts and regulatory agencies can disregard corporate fictions when necessary to prevent fraud, injustice, circumvention of law, etc. As I discuss below, however, I find no deliberate attempts by proponents to circumvent law in the past on this record, and, in any event, find ample evidence to show that it is not necessary to pierce any corporate veils in order to find jurisdiction over the Agreement.

preponderance of credible evidence shows that the Agreement was intended to apply to members of the Armada Group and to affiliates of GLTL, which members and affiliates include several common carriers by water subject to the Act. I note, furthermore, that the evidence tending to show that the affiliates of the nominal parties were intended to be participants in the Agreement is fortified by other facts consistent with such a conclusion, cited by protestants and Hearing Counsel relating to the management and staffing of Armada East Africa. Thus, Armada East Africa shares the same three management companies, members of the Armada Group, with Armada Lines, a common-carrier member of the Group. Armada East Africa has or did have the same Chief Executive Officer, Mr. Valentin, as Armada Lines, and Armada East Africa employs the services of the same agents, Protos Shipping Company, as Armada Lines. While these facts of commonality may not by themselves show that the members of the Armada Group were supposed to participate in the fixing of vessels under the option granted in Article 2 or the covenant not to compete under Article 6, such common relationships certainly are consistent with that conclusion and would facilitate such intentions. The cumulative effect of all of the above evidence therefore is to support the conclusion that it really was the parties' intention "to assure participation of all subsidiary or controlled companies of the two partners," as all three witnesses for proponents stated in January 1983.[11] There is therefore sufficient evidence to find that the affiliates of the two nominal parties are involved with the Agreement and that they are, in effect, parties to it even if they did not themselves sign it. Cf. *Dart Containerline Company Ltd. (Agreement No. 9745–3)*, cited above, 22 SRR at 354–355.

Armada East Africa Is Itself a Common Carrier by Virtue of its Partnership Arrangement With GLTL

As discussed above, the Commission's two areas of inquiry into the question whether there are continuing relationships between the Armada/GLTL joint service and GLTL and whether common-carrier members of the Armada Group or affiliates of GLTL are involved with the Agreement can be answered affirmatively, thus conferring jurisdiction over the Agreement. The Commission, however, also inquired whether Armada East Africa

[11] As Hearing Counsel noted in their reply brief (p. 3), furthermore, even as late as October 31, 1983, proponents, in their opening brief (p. 6) seem to concede that the purpose of Article 6, the covenant not to compete, was to make sure that the joint service "would be free from direct competition by the owners or the owners' affiliated, controlled, or associated companies . . . ." Proponents insist that this covenant is really only an agreement between Armada East Africa and GLTL. However, under a more realistic and common-sense analysis, it appears at least that neither of the owners would want to compete with their offspring, as the courts recognize in cases involving joint ventures under the antitrust laws. See *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 169 (1964). The effect, then, is that the new common-carrier joint service would enjoy a protection against competition from either of its owners and, as even proponents seem to concede in their opening brief, from any affiliates of the owners. In effect, then, the Agreement either involves the joint service and its owner, GLTL, another common carrier, or involves the joint service and carriers affiliated with its owners.

and GLTL maintained their separate identities so that both could be considered to be common carriers and not to have been subsumed in the joint service. Although the Commission cited such possible facts as providing crews and issuing bills of lading as facts showing separate common-carrier identities, I find that the record shows persuasively a number of reasons why Armada East Africa as well as GLTL, far from erasing their identities as common carriers, have maintained themselves as common carriers, to a large extent because, unlike the situation in the *Dart Containerline* and *Star Shipping* cases, cited above, or the *Viking* Line case, cited below, Armada East Africa and GLTL formed not a corporation but a simple partnership in which the partners retain responsibility and liability personally for the activities of the partnership, provide funds, and make operational decisions, thereby demonstrating that they are not simply "incorporators" who lie silently in the background. In addition, other evidence relating to Armada East Africa's purpose when it became a corporation and its own previous actions tending to show that even it believed that it had become a common carrier notwithstanding the more recent denials in this proceeding, demonstrate that Armada East Africa itself became a common carrier in partnership with GLTL, another common carrier when these companies decided to operate their partnership under the Armada/GLTL line trade name. Therefore, for purposes of jurisdiction the Commission may consider the joint service as a trade entity with continuing relationships with GLTL, its common carrier "owner," may conclude that common-carrier members of the Armada Group are involved in the Agreement, or may look at the arrangement between the parties more realistically and conclude that all it is is a partnership between two common carriers operating jointly under a trade name.

The record shows that Armada East Africa was formed for only one purpose, namely, to enter into a joint venture with another common carrier, GLTL, to provide common-carrier service in a United States trade and that in April 1981, it became "half owner" in the joint service. The Agreement which embodies this joint venture, however, does not appear to be a corporation but rather a partnership. Indeed, the three witnesses for the joint service referred to each of the owners as "partners" in the affidavit and statement submitted in January 1983. It appears to be true that Armada East Africa neither owns nor has it chartered ships to the joint service. However, as in any partnership arrangement, the Agreement provides that Armada East Africa shares "expenditures, earnings, responsibilities and liabilities of the joint venture." (Agreement No. 10464, first page.)

Proponents, however, contend that Armada East Africa has no identity in the trade as a common carrier, does not publish tariffs, own or operate ships, etc., therefore, it should not be considered to be a common carrier itself but has been subsumed in the joint service. The above contention gets into the question of who or what is a common carrier, i.e., when does an owner itself become the common carrier rather than being a person or company remaining silently in the background. Interestingly, at one time proponents thought that Armada East Africa itself became subject to the Act when tariffs of the joint service were filed and the joint service was advertised to the shipping public. (See letter of transmittal, dated January 11, 1983, page 4, Exhibit 4.)

The Commission has held for some time that one may become a common carrier although not owning or operating vessels. Such a carrier has long been known as a "non-vessel operating common carrier" (NVOCC). See *Common Carriers by Water-Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245 (1961); *Puget Sound Tug & Barge* v. *Foss Launch & Tug Co.*, 7 F.M.C. 43 (1962); *Charging Higher Rates than Tariff*, 19 F.M.C. 43, 51 (1975). Therefore, owning or operating vessels is not the factor determining status. The Commission has also held that *incorporators* do not become common carriers by water merely because they have formed a new company. See *Grace Line, Inc.* v. *Skips A/S Viking Line et al.*, 7 F.M.C. 432, 448–449 (1962). In the *Viking* case, it was argued that two companies which otherwise appeared to be shipowners located in Norway (known as Laly and Imica), who had incorporated the Viking Line, themselves became common carriers by so doing. The Commission rejected this argument because "if it be correct, it means that all individual incorporators of a steamship line have always been and are violators of section 15 of the 1916 Act." 7 F.M.C. at 448–449. Cf. also *Agreement No. 9955–1 (Star Shipping)*, cited above, 18 F.M.C. 436, 451, 452–453, 462, in which the Star arrangement which set up a corporation under Norwegian law did not serve to convert the non-common carrier owners of Star into common carriers subject to the Act.

In the instant case, it does not appear that the joint service is a corporation but rather a partnership, in which case it is really two companies, Armada East Africa and GLTL, doing business as the Armada/GLTL line. The joint service itself is therefore no corporate entity. Indeed, as proponents' witnesses themselves state: "The use of the name Armada/GLTL Line East Africa Service is purely a marketing decision unrelated to any legal considerations." (Valentin Affidavit, Exhibit 1.) Nor is it therefore necessary to "pierce the corporate veil" so as to impute to Armada East Africa the common-carrier status of affiliated companies in the Armada Group. All that is necessary is to recognize that Armada East Africa was set up to operate a common carrier service as a partner with another company, a common carrier, that such a partnership was set up, that the two partners share earnings and liabilities as in all partnerships, and that they do business as common carriers as the Armada/GLTL line, a trade name only "unrelated to any legal considerations." In previous cases the Commission has looked behind mere forms to determine who the real carriers were even though such scrutiny required disregarding corporate entities and even though the person found to be a common carrier had suppressed its own name, its identity, and its holding out in favor of another carrier. In *Agreement 9597 (Uiterwyk),* cited above, 12 F.M.C. 83, the Commission rejected claims of companies known as Uiterwyk and Continental which argued that they were agents of a common carrier known as Flomerca because, among other things, the carrier operation in question was conducted in the name of Flomerca only, whose name was used in manifests, bills of lading, advertising, solicitation, and tariffs, and that neither Uiterwyk nor Continental had ever operated as a common carrier. 12 F.M.C. at 92, 100. The Commission found, however, that Uiterwyk/Continental were in reality the common carriers notwithstanding their disclaimers and that they had entered into agreements with Flomerca which had not been filed as required by section 15 of the Act. The Commission also answered the argument that Uiterwyk/Continental could not be the common carriers involved because only Flomerca held itself out as such in the trade by holding that both Flomerca and Uiterwyk/Continental were common carriers, the former, a nonvessel operating common carrier and the latter, the underlying common carrier. 12 F.M.C. at 100.[12] The Commission was also motivated by the legal principle that corporate fictions may be disregarded when necessary to prevent parties from attempting to circumvent a statute or when companies are erected as implements for avoiding clear legislative purposes. 12 F.M.C. at 101–102. (The record in the *Uiterwyk* case showed that the arrangements in question had been drafted in order "to free the operation from Commission jurisdiction and to immunize it from protests by competing carriers," and that the parties "felt that this could best be done by putting it 'purely in the name of Flomerca.' " 12 F.M.C. at 93.)

In the instant case, the limited record does not show that the Armada Group deliberately formed the Armada East Africa corporation as a means to avoid the requirements of section 15 of the Act or any law. On the contrary, as mentioned, Armada East Africa believed, at least in January 1983, that Armada East Africa had "presumably" become a common carrier itself when it published tariffs in the name of the Armada/GLTL line joint service and advertised the service. Moreover, Armada East Africa filed two Anti-rebating Certificates, as required of common carriers by Commission regulations, again indicating an apparent belief that it was operating as a common carrier. Nor does the record show that Armada East Africa was formed as a "shell" corporation in order to conceal the fact that common-carrier members of the Armada Group were intended to be participants in the Agreement. On the contrary, the parties did file

[12] Interestingly, although Flomerca, which otherwise in other trades was a vessel operating common carrier, in the subject trade was merely a sort of dummy whose name was being used by the real operators of the service, Uiterwyk, who gave Flomerca royalty payments for the use of the Flomerca name, Flomerca doing little else. Nevertheless the Commission found Flomerca as well as Uiterwyk to be a common carrier in the subject trade. In the instant case the Agreement provides that Armada East Africa shall "share earnings, responsibilities, and liabilities of the joint venture." Armada East Africa is far more than the mere dummy that was Flomerca in the Uiterwyk agreement, yet the Commission found Flomerca to be a common-carrier party to the agreement.

the Agreement in January 1983 and even submitted affidavits conceding that they intended to "assure participation" of all "subsidiary or controlled companies of the two partners." Therefore, I cannot find on this record that there is an element of concealment or deception as there was in the *Uiterwyk* case in which Uiterwyk had established a number of puppet corporations and otherwise suppressed its name in order to avoid the requirements of section 15.[13]

Nevertheless, although apparently free of the scheming that was prevalent in the *Uiterwyk* case, Armada East Africa is as much as or more of a common carrier in the subject trade than was Flomerca, the dummy "owner" in the *Uiterwyk* case, since unlike Flomerca, which had merely lent its name to the common-carrier operation and received "royalty" payments, Armada East Africa shares earnings, responsibilities and liabilities of the Armada/GLTL line, provides funds, "whenever necessary for operating of the line," and participates in operational decisions for the line, in other words, is a full, active partner operating a common-carrier service under a different trade name with a recognized common-carrier partner.

In conclusion, then, I find Armada East Africa, which was formed specifically "for the sole purpose of entering into a joint venture . . . to provide common carrier service," which believed it had become a common carrier when it filed tariffs and advertised for the joint service, which filed Anti-rebating Certificates with the Commission, as common carriers are required to do, which shares earnings, responsibilities and liabilities of the common-carrier joint service, which presumably provides its share of funds to operate the line, and which participates in operational decisions for the line, is itself a common carrier doing business as a partner with another common carrier using a trade name which admittedly was selected for marketing, not legal purposes. To paraphrase a common saying, if it walks like a duck, acts like a duck, quacks like a duck, and was born to be a duck, it is indeed a duck.[14]

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[13] I am aware of the protest filed by Ceres Navigation, Ltd. relating to the question of approvability of the Agreement, an issue not before me, in which Ceres argues against approving the Agreement on the ground that the parties operated without approval and should have been or were aware of the requirements of section 15 as evidenced by the filing of Anti-rebating Certificates by GLTL or Armada officials. My findings in this proceeding have nothing to do with approvability nor with the parties' motivations or beliefs in failing to file for approval. I cite the evidence regarding the filing of Anti-rebating Certificates and the belief that Armada East Africa may have become a common carrier at some time as showing just that, namely, that at some time before January 1983, Armada East Africa came to the belief that it might have become a common carrier by water and should file its Agreement with GLTL with the Commission under section 15. In other words, the record before me is not sufficient to find that the parties were engaging in the type of deliberate deception that was the situation in the *Uiterwyk* case.

[14] It is surprising that neither protestants nor Hearing Counsel, who are concerned that corporate fictions not be used to shield the real parties and carriers from their legal obligations, did not quite perceive that the Armada/GLTL line joint service is not even a corporation but is simply a partnership and a trade name. If corporation A, incorporated to be a common carrier, had operated and advertised the "C Line," a trade name only, would anyone doubt that the common carrier was corporation A? Why should it make any difference if corporation A and corporation B, a common carrier, operated the "C Line" as a partnership, the "C Line" being a trade name only? That is precisely what Armada East Africa and GLTL have done in operating the Armada/GLTL line.

ULTIMATE CONCLUSIONS

Proponents of Agreement No. 10464 contend that it is not subject to section 15 of the Act because one of the nominal parties to the Agreement, Armada East Africa, is not a common carrier by water and that there are no continuing relationships with the common-carrier line joint service, Armada/GLTL line, which Armada East Africa and GLTL, a recognized common carrier, formed by the Agreement. Protestants and Hearing Counsel disagree strongly, arguing that Armada East Africa is tied to common-carrier members of the so-called Armada Group by the very terms of the Agreement, should therefore be considered a common carrier itself, and that there are continuing relationships between GLTL, the common-carrier owner of the Armada/GLTL line, and the line.

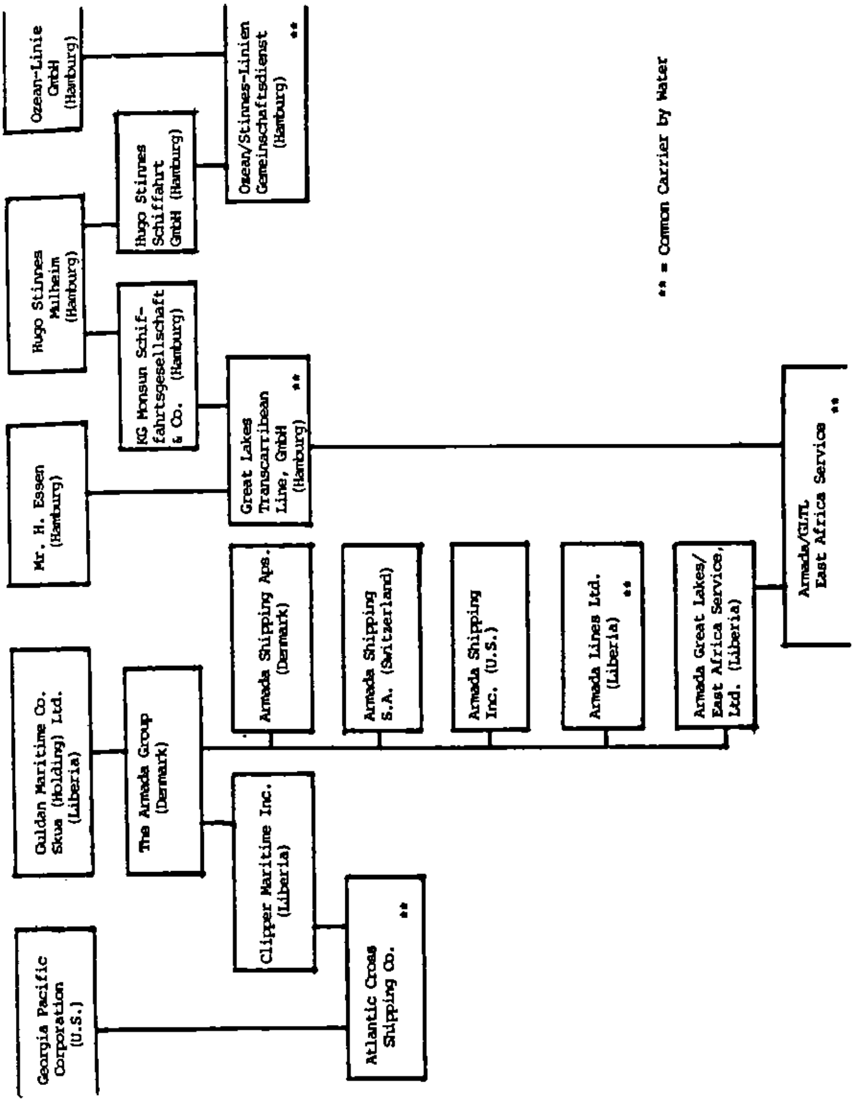
The record shows three grounds for finding jurisdiction over the Agreement. First, there are continuing relationships between GLTL, the admitted common-carrier owner of the Armada/GLTL joint service, which are critical, relating to GLTL's option to charter vessels to the joint service, to vote on sailings and insertions of vessels, to handle claims and legal proceedings, and a covenant not to compete with the joint service. These relationships constitute special privileges or advantages or cooperative working arrangements between GLTL and the joint-service line within the meaning of section 15 of the Act.

Second, as shown by the very words of the Agreement, by affidavits filed contemporaneously with the Agreement when it filed for approval, and even by the parties to the Agreement in their more recent opening brief, these parties intended to "assure participation" of companies affiliated with and related to Armada East Africa in the Armada Group and to GLTL. Therefore, the Agreement really includes common-carrier members of the Armada Group, which owns Armada East Africa, regarding critical covenants not to compete and options to charter vessels.

Third, the record leads persuasively to the conclusion that Armada East Africa has itself become a common carrier by water so that it is not even necessary to pierce corporate fictions or impute common-carrier status to Armada East Africa because of its ties to common-carrier members of its parent Armada Group. That is because, as the record shows, Armada East Africa is operating a common-carrier service, a partnership, not a corporation, as a full partner with GLTL, using the trade name for marketing, not legal purposes, of the Armada/GLTL line. In so operating, Armada East Africa is carrying out the purpose for which it was specifically formed, namely, to operate a common-carrier service jointly with GLTL. Furthermore, Armada East Africa itself had believed that it had become a common carrier when the joint service filed tariffs and advertised to the shipping public and Armada East Africa had even filed Anti-rebating Certificates with the Commission, as common carriers are required to do. Armada East Africa also shares earnings, responsibilities and liabilities of the joint service line as is customary in partnerships, and Armada East Africa provides its share of funds to operate the line and participates in operational decisions for the line. To paraphrase a common saying, if it walks like a duck, acts like a duck, quacks like a duck, and even was born to be a duck, it is indeed a duck.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX 1


Ozean-Linie GmbH (Hamburg)
Ozean/Stinnes-Linien Gemeinschaftsdienst (Hamburg) **
Hugo Stinnes Schiffahrt GmbH (Hamburg)
Hugo Stinnes Mülheim (Hamburg)
KG Monsun Schiffahrtsgesellschaft & Co. (Hamburg)
Great Lakes Transcaribbean Line, GmbH (Hamburg) **
Mr. H. Essen (Hamburg)
Armada/GLTL East Africa Service **
Armada Shipping Aps. (Denmark)
Armada Shipping S.A. (Switzerland)
Armada Shipping Inc. (U.S.)
Armada Lines Ltd. (Liberia) **
Armada Great Lakes/East Africa Service, Ltd. (Liberia)
Guldan Maritime Co. Skua (Holding) Ltd. (Liberia)
The Armada Group (Denmark)
Clipper Maritime Inc. (Liberia)
Atlantic Cross Shipping Co. **
Georgia Pacific Corporation (U.S.)
** = Common Carrier by Water

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–26

PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

A 120-day advance notice provision in the Conference Agreement is found to be contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916, and ordered to be deleted from the Agreement.

David C. Nolan for Pacific Coast European Conference.

Stuart James and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

January 18, 1984

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* James J. Carey, *Vice Chairman;* James V. Day and Robert Setrakian, *Commissioners;* Thomas F. Moakley, *Commissioner*, dissenting in part) *

This proceeding was initiated by Order of May 31, 1983, directing the Pacific Coast European Conference (PCEC) and its member lines to show cause why Agreement No. 5200 should not be modified to delete from the Agreement a 120-day advance notice provision on intermodal rate offerings, and if not so modified why the Agreement should not be found contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916 (46 U.S.C. §814), and disapproved pursuant to that section. The proceeding was limited to the filing of affidavits of fact and memoranda of law but allowed for requests for evidentiary hearing and discovery. PCEC filed a response with exhibits.[1] The Bureau of Hearing

* Commissioner Moakley's opinion dissenting in part is attached.

[1] PCEC submitted the following exhibits: a portion of the sworn statement, dated December 3, 1976, of Raymond A. Velez, a former PCEC Chairman (Exh. A); a statement dated November 16, 1976, of Manuel Diaz, the Executive Director of the Associated North Atlantic Freight Conferences (Exh. B); the sworn testimony, dated July 8, 1983, of Donald Thiess, the present PCEC Chairman (Exh. C); an affidavit, dated July 7, 1983, submitted on behalf of Johnson Scanstar (Exh. D); an affidavit, dated July 7, 1983, submitted on behalf of Scan Pacific Line (Exh. E); an affidavit, dated July 8, 1983, submitted on behalf of United Yugoslav Lines (Exh. F); an affidavit, dated July 8, 1983, submitted on behalf of Compagnie Generale Maritime (Exh. G); an affidavit, dated July 8, 1983, submitted on behalf of Intercontinental (ICT) B.V. (Exh. H); an affidavit, dated July 8, 1983, submitted on behalf of Hapag-Lloyd A.G. (Exh. I); an affidavit, dated July 11, 1983, submitted on behalf of d'Amico Societa Di Navigazione SpA (Exh. J); an affidavit, dated July 11, 1983, submitted on behalf of Italian Line (Exh. K); and an affidavit, dated July 11, 1983, submitted on behalf of Zim Israel Navigation Co. Ltd. (Exh. L).

Counsel (Hearing Counsel) filed a reply and one exhibit.[2] The parties did not request an evidentiary hearing or discovery.

BACKGROUND

Agreement No. 5200 is the basic agreement of the Pacific Coast European Conference. The members of the Conference are: Johnson Scanstar; Scan Pacific Line; United Yugoslav Line; French Line; Incotrans Line; Hapag-Lloyd; D'Amico Line; Italian Line; and Zim Container Line. The Conference was originally established in 1937 to provide all-water service in the trade from U.S. Pacific Coast ports to European destination ports.

In 1977, the Commission approved, subject to certain conditions, Agreement No. 5200–29 (Amendment 29), an amendment authorizing Conference service to inland points in Europe. *See Conditional Approval of Agreement No. 5200–29,* January 12, 1977. Amendment 29 required an individual member line to give the Conference 120 days advance notice before offering an intermodal service which is within the scope of the Agreement and which is not being served under a Conference tariff.[3] One of the conditions to approval imposed by the Commission required amendment of the notice clause to add a proviso that an individual intermodal tariff would be superseded only where the Conference tariff is no less favorable to the promotion and development of the intermodal service involved than the parallel provisions of the applicable individual tariff. The Conference accepted this condition of approval.

Subsequent to the approval of Amendment 29, the Commission, in addressing another conference's request for intermodal authority, ruled that an individual member of a conference may not be required to provide *any* advance notice to a conference where the member wishes to offer a new intermodal service that is within the scope of conference authority and that is not included in a conference tariff. *See Application for Approval of an Amendment to the American West African Freight Conference Agreement No. 7680–36,* 18 S.R.R. 339, 342 (1978) (*AWAFC*). The Commission found that advance notice provisions generally burdened the filing of indi-

[2] Hearing Counsel submitted the affidavit of Austin L. Schmitt, Chief Economist of the Office of Policy and Planning and International Affairs, Federal Maritime Commission (Schmitt Affidavit).

[3] The notice provision in the third paragraph of Article 1, as modified, provided that:

> In the event a member line desires to offer an intermodal service within the scope of this Agreement, but not being offered by the Conference under its tariff, it shall first present the matter to the Conference in writing for consideration and joint action. Only in the event the Conference does not, within one hundred twenty (120) days of such presentation, establish such service shall the proposing member, or any other member line, be free to act unilaterally in respect to the matter proposed. In the event the Conference shall, by such vote, subsequently adopt and effectuate a tariff or tariffs covering the service embraced by any such member's individual tariff, the member's tariff, to the extent of such duplication, shall be cancelled by said member or members which are parties thereto coincidentally with the effectiveness of such Conference tariff or tariffs. Provided, however, that such cancellation shall be required only to the extent the relevant tariff rates, rules or regulations so adopted by the Conference are no less favorable to the promotion and development of the intermodal service involved than the parallel provisions of the applicable independent tariff or tariffs.

vidual intermodal tariffs to an unreasonable degree and therefore held that the only notice period which an individual member line must observe is the 30-day statutory notice upon filing of a tariff required under section 18(b) of the Shipping Act, 1916 (46 U.S.C. §817(b)).

The 120-day notice provision contained in Agreement No. 5200 came to the attention of the Commission in connection with the filing of Agreement No. 5200–40 (Amendment 40). This amendment divided the Conference into trade area groups and authorized each group to take independent action. Amendment 40 also restated the entire basic agreement. The Commission found that the previously approved 120-day notice provision was contrary to the policy and precedent established in *AWAFC* and therefore approved Amendment 40 on the condition that the 120-day notice provision be deleted from the Agreement. *See Modification of the Pacific Coast European Conference Agreement (Agreement No. 5200–40)*, Order of Conditional Approval, August 20, 1982.

Subsequently, and as a result of a petition filed by PCEC, the Commission modified its August 20, 1982 order and approved Amendment 40 as filed, without condition,[4] but, at the same time, initiated this proceeding by separate Order to Show Cause.[5]

DISCUSSION

In the Order commencing this proceeding, the Commission directed PCEC to show cause why its 120-day advance notice provision should not be deleted from Agreement No. 5200. Despite extensive briefing of general issues relating to advance notice, the Conference has not addressed the specific issue which caused the Commission to initiate this action. For reasons stated below, we adhere to established precedent on this issue and will require PCEC to delete the provision from its Agreement.

PCEC's advance notice clause must be analyzed under the principles expressed in the Commission's *AWAFC* decision. *AWAFC* stated as Commission policy that conferences generally may not require a member to observe a notice period prior to the filing of an individual intermodal tariff where the proposed service is within the scope of the conference agreement and is not being provided under a conference tariff. This policy is based on the Commission's finding that the practice of requiring a member line to provide advance notice to the conference prior to the publication of an intermodal tariff had not brought about the rapid development of intermodal transportation by conferences. The Commission adopted this policy in order to secure the development of innovative transportation services by protecting the initiative of an individual member line.

The Commission has in a number of instances required agreements which do not comply with the *AWAFC* policy to be modified. The Commission

[4] *See Modification of the Pacific Coast European Conference Agreement (Agreement No. 5200–40)*, Order, May 25, 1983.

[5] In its petition, PCEC indicated its willingness to defend the 120-day notice clause in a proceeding.

has required that any expansion of an agreement's intermodal authority be conditioned upon the deletion of advance notice provisions.[6] The Commission has also required the deletion of previously approved advance notice clauses.[7] In order to justify a departure from this policy, a conference must demonstrate the existence of specific trade conditions which require some specific period of notice (beyond that otherwise required of a member line by section 18(b))[8] prior to the filing of an individual intermodal tariff or otherwise adequately explain the need for any such notice.[9]

PCEC suggests that its advance notice provision should be judged under a legal standard which is similar to that applied in the case of independent rate action provisions.[10] PCEC believes that the independent naming of a new inland point is similar to the taking of an independent rate action and argues that a notice period should be permitted in both instances. The concept of notice prior to independent rate action, however, should not be confused with advance notice prior to the offering of an independent intermodal service. Notice of independent rate action and advance notice of a new intermodal service differ in terms of their manner of operation, and the particular interests which are at stake. The Commission, therefore, has formulated different policies with regard to each.

Independent rate action provides that a conference member may offer its own rate for a particular commodity which differs from an already existing conference rate. Some period of notice to the conference is generally required before the member may file its own tariff. In the case of independent rate action there is already a service being offered by the conference for a particular commodity at a particular rate. Independent rate action contemplates that the independent rate will co-exist with the conference rate. The purpose of an independent rate action provision is to introduce an element of flexibility into the conference ratemaking mechanism. Independent rate action may help to maintain conference stability by allowing enough flexibility to retain membership and by providing a means by which members compete more effectively with non-conference carriers. The Commission has recently announced an interim policy or presumptive approval of independent rate action authority which provides for a 30-day notice period. Such a period of notice is deemed to strike a proper balance between the conflicting interests of stability and flexibility, while at the same time taking into account the potential predatory effects of conference line independent action on non-conference carriers in the

[6] *Philippines North America Conference (Agreement No. 5600–42)*, 21 S.R.R. 345, 347 (1981).

[7] *Conditional Approval of Agreement No. 8090–16*, 19 S.R.R. 831, 833 (1979).

[8] Section 18(b) provides that a new rate or service may not become effective until 30 days after the filing of the tariff with the Federal Maritime Commission. This 30-day statutory waiting period would apply to the naming of a new inland point by a PCEC member.

[9] *U.S. Atlantic & Gulf/Australia-New Zealand Conference (Agreement No. 6200–20,—Intermodal Authority)*, 21 S.R.R. 89, 93 (1981); *Japan/Korea Atlantic and Gulf Conference Intermodal Amendment Agreement No. 3103–67*, 23 F.M.C. 941, 948 n. 24 (1981).

[10] Hearing Counsel takes the position that the Commission's decision in *AWAFC* is the controlling standard by which PCEC's advance notice clause must be judged.

trade. Shorter or more extended notice periods require explanation and justification in order to ensure that independent action is neither ineffective nor predatory.

A notice period prior to the offering of a new intermodal service by an individual conference member operates in a different manner and involves different concerns than independent rate action and calls for a different policy. Advance notice provisions with respect to intermodal service apply where an individual conference member wishes to offer an intermodal service that is within the scope of the agreement and that is not offered by the conference. Such provisions require the member to notify the conference and then wait for a specified period of time before filing an intermodal tariff with the Commission. In the event that the conference subsequently files a tariff which offers the same service, the individual tariff is automatically superseded by the conference tariff. The purpose of such a clause is to prevent the individual member from offering a new service until the conference has had an opportunity to consider, for example, the naming of a new inland point. Balanced against this collective desire for stability, however, is not only the interest of the individual member, but also a public interest in the development of new, efficient, innovative transportation services. The Commission has determined that the development of such new services by an innovative member should not be hampered in any way and that no notice, other than the 30-day statutory notice required by section 18(b) of the Shipping Act, need be given.[11]

Because of the different underlying interests, the Commission has established different policies with regard to intermodal service and advance notice on independent rate action. It is not correct, therefore, to treat intermodal notice provisions as if they were independent rate action clauses. Commission policy regarding independent rate action is not applicable to the question of whether PCEC's 120-day advance notice provision is justified. The relevant legal standard and policy by which that provision must be judged is that expressed in the *AWAFC* decision.

As support for its 120-day clause, PCEC relies upon the Commission's decision in *Atlantic & Gulf/West Coast of South America Conference Agreement No. 2744–30,* 13 F.M.C. 121 (1969) (*Atlantic & Gulf*). In the *Atlantic & Gulf* case, Hearing Counsel had urged that the grant of intermodal authority be linked to a provision which would allow an individual member to establish an independent intermodal service where the conference failed to do so. Hearing Counsel's position in that case was based upon its concern that a conference might refuse to file a conference intermodal tariff and thereby frustrate the desire of an individual member to establish an intermodal service on its own. Although it recognized the validity of Hearing Counsel's concern, the Commission required individual conference

[11] PCEC only argues that some advance notice is required. However, as noted above, section 18(b) already applies a 30-day notice period to the naming of a new inland point by a PCEC line. PCEC would, in fact, have such notice if it monitored the tariffs filed by its members with the Commission.

members to wait 12 months before negotiating their own tariffs. In this early statement of intermodal policy, the Commission favored collective action by the conference because of the novelty of intermodalism.[12] Subsequently, the Commission acquired additional experience in intermodal transportation[13] that led to a change from the view expressed in *Atlantic & Gulf,* and the adoption of the policy in *AWAFC.* The decision relied upon by PCEC has been superseded by *AWAFC* which is the present controlling policy.

PCEC takes exception to this change in policy and to the general application of the principles expressed in *AWAFC.* PCEC states that *Atlantic & Gulf* represents the correct determination on the issue of whether advance notice should be permitted and further states that it does not know what facts or evidence led to the change in policy. PCEC also believes that the general rule of "no-notice" enunciated in *AWAFC* should have been adopted by rulemaking rather than adjudication. PCEC claims that it had no opportunity to comment on the *AWAFC* policy at the time it was promulgated.

These objections are without merit. The *AWAFC* decision, itself, clearly articulates the background for the change in policy and discusses the early approaches that the Commission tried regarding intermodalism. What PCEC would prefer is an earlier, interim policy of the Commission. PCEC apparently would not object to the general application of the *Atlantic and Gulf* decision. PCEC cites *Patel* v. *INS*, 638 F.2d 1199 (9th Cir. 1980) (*Patel*) for the general proposition that the practice of adopting rules of general application through adjudication rather than rulemaking has been disapproved. However, the *Patel* decision itself acknowledges that an agency is not precluded from announcing new principles or policies in an adjudicatory proceeding and that the choice between rulemaking and adjudication lies primarily in the informed discretion of the administrative agency. *See NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *see also British Caledonian Airways, Ltd.* v. *C.A.B.*, 584 F.2d 982, 992–93 (D.C. Cir. 1978). PCEC has introduced nothing into the record which would in any

[12] The Commission stated in *Atlantic & Gulf,* 13 F.M.C. at 126–127, that:

> Current forms of the intermodal concept are new and their fruition will occur, undoubtedly, only after some experimentation and much give-and-take among the parties in interest. It can come about only through the cooperation of all concerned. Thus, if each member of a conference is free to pursue his own way at any point in the midst of conference efforts, the possibility is very real that successful conference action would be frustrated.

[13] *See,* for example, the Commission's summary of its subsequent experience as stated in *Application of the Far East Conference for Intermodal Authority,* 21 F.M.C. 750, 753 (1979):

> Statistical evidence in this record indicates that of the thirty-two intermodal amendments to conference agreements approved by the Commission, only six have even filed intermodal tariffs. Of those six, five conferences did not file tariffs until after individual members had instituted intermodal service. Overall, this evidence shows that conferences generally have not acted quickly to develop intermodal services after approval of their intermodal amendments, and the majority of those which did implement intermodal service did so only after an individual member pioneered in the field. The record here, therefore, tends to run counter to previous Commission findings regarding the expected public benefit of promoting intermodal development under conference authority.

way indicate that the Commission abused its discretion by adopting a new policy in the *AWAFC* decision.

Finally, PCEC argues that the *AWAFC* standard should not be applied where a conference has implemented its existing intermodal authority through the filing of an intermodal tariff, as it has done for its European intermodal service.[14] PCEC believes that such tariff filing is a sufficient indication that intermodalism has not been stifled.[15] Therefore, PCEC concludes that *AWAFC* should not apply and that its advance notice clause should not be deleted.

While the policy enunciated in *AWAFC* is based upon the Commission's finding that the practice of requiring advance notice had not brought about the rapid development of intermodal transportation by conferences, its objective is not limited to those cases where the conference has never implemented its intermodal authority through the filing of a tariff. The rationale of the *AWAFC* decision has a broader purpose—namely to ensure that the development of intermodalism is not hindered and that the transportation benefits achieved by such service are not arbitrarily restricted. An advance notice requirement is a mechanism that, on its face, restrains innovative action by an individual member.[16] In order to justify such a restraint the Conference must show trade conditions which require it or otherwise explain why such a restriction is necessary.

In this proceeding, the burden is on the Conference to justify the 120-day restraint. The mere fact that the Conference has filed an intermodal tariff does not justify an exception to the established policy. The purpose of the policy would be defeated were it possible to avoid its requirements by the mere filing of a tariff. The tariff might be a paper tariff under which no cargo moved. PCEC makes no effort to describe the services provided under its European intermodal tariffs by, for example, indicating how much cargo moves under these tariffs.

PCEC argues that Conference control over the inland portion of a physically intermodal movement is necessary in order to preserve Conference stability. Moreover, according to PCEC, unless such control is maintained,

[14] PCEC refers to its European inland tariffs but does not further describe this service (Exh. C at 11). Hearing Counsel cites the following PCEC inland European tariffs: FMC Tariff Nos. 2, 3 and 18 (Hearing Counsel Reply at 3).

[15] The affidavits of PCEC members also state that, in their view, the development of intermodalism has not been inhibited by the 120-day rule (Exhs. D–L).

[16] The restraining effects of such a provision were described in *AWAFC*, 18 S.R.R. at 341, as follows:

> This procedure requires any member line of the Conference that wishes to offer an intermodal service to expend that member's time, money, and effort to research the points of origin of different commodities, negotiate agreements with land carriers, calculate the appropriate intermodal rates for various commodities, and fashion an intermodal tariff, and then, hand the result of those expenditures to its purported competitors in the Conference, who, after preventing the implementation of the proposal for 90 days, may adopt it as their own. The result would be to deny to the innovative carrier any reward for its efforts. There being no reward, it is not to be expected that the efforts will be expended.

Such a restraining impact would appear to be heightened in a trade where short season agricultural products are a significant portion of the commodities shipped.

competitive forces within the Conference will be unleashed which will hamper the ability of the Conference to stabilize the trade and which may even destroy the Conference.[17] PCEC contends that a notice requirement is necessary in order to prevent uncontrolled and reckless point naming. According to PCEC, some period of notice is needed in order to give other members of the Conference an opportunity to consider a proposed new point for possible collective action. Without the control provided by a notice period, PCEC believes that a proliferation of individual tariffs naming a host of inland points would result which would produce intense intra-conference competition and undermine Conference stability.[18]

Instead of offering evidence of actual conditions to support its instability argument,[19] PCEC offers a theory illustrated by hypothetical examples. One example posits that a PCEC member might establish a rate on pencil slats to Nuremberg while another might name a competing rate on pencil slats to Stuttgart. In another example, PCEC theorizes that Conference rates could be avoided by naming Monza rather than Milan on walnut shipments.

While we do not dismiss the possibility of a theoretical justification of an advance notice provision, we believe that a theoretical justification must go beyond the general assertion that a "no-notice" rule will increase intra-conference competition and that intra-conference competition is destabilizing. Some specific potential for this instability in the PCEC trade in the absence of a notice clause should be demonstrated. PCEC also might demonstrate the existence of destabilizing point-naming in a similar conference trade which does not have a notice provision. No attempt at submitting this kind of evidence was undertaken by the Conference.

PCEC also maintains that some period of advance notice is necessary in order to provide other members of the Conference with a fair opportunity to consider the naming of a new inland point and to compete with the proposed new service. PCEC states that the naming of new inland points involves substantial operational changes. Without sufficient notice of the naming of a point, an individual member who was the first to file a new tariff allegedly could obtain an unfair advantage over other Conference members in soliciting cargo. As a hypothetical example, PCEC describes a situation which might occur on a shipment of walnuts to Hanover, Germany. Walnuts, as do other agricultural products which make up a large part of the PCEC trade, have a short shipping season. Without any notice

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[17] PCEC cites the reasons for its original application for European inland authority in Amendment 29, namely that without such authority Conference members would be able to undercut other Conference members by offering benefits or making concessions on the inland transportation arrangements beyond the terminal gate.

[18] Both the statement of the Conference Chairman and several member lines' statements express the belief that a "no-notice" rule would lead to intense intra-conference competition.

[19] We recognize that, in this instance, PCEC may not be able to introduce evidence of actual destabilizing point naming. The fact that PCEC is currently operating under the 120-day provision prevents actual impact of "no-notice" conditions from being established. This is to be expected because of the highly restrictive nature of a 120-day notice requirement.

requirement, an individual member allegedly could secretly make all of the necessary arrangements to support an independent intermodal rate to an inland point not named in the Conference tariff and then use this rate to undercut the Conference rate. On the hypothetical walnut shipment, it is alleged that a carrier could gain a competitive advantage over other Conference members and could solicit and obtain a significant portion of that cargo before other members could respond to the new point and complete the difficult and time-consuming arrangements for offering a competitive service (Exh. C at 8–10). According to PCEC, an advance notice provision prevents the possibility of such *sub rosa* bookings by which an individual member might gain an unfair competitive advantage.

This argument is, for the most part, based on the assumption that naming a new inland point involves a substantial amount of time and effort. PCEC offers no evidence to indicate how difficult it might be to name a new inland point or how much lead time might be required. Moreover, in a different context, PCEC maintains that there is no difficulty at all in naming a new inland point on walnut shipments.[20] Furthermore, in a short season market of 2–6 months, a long notice period such as appears in Agreement No. 5200 might effectively preclude an individual member from ever offering a new intermodal service. Finally, PCEC's argument overlooks the fact that the naming of a new inland point could not become legally effective until the 30-day statutory notice under section 18(b) is observed. An attentive Conference would be aware of the filing of any new intermodal service and would have 30 days notice before cargo could be carried under the new tariff. Other member lines would have an opportunity to match the proposed new service. The Conference could adopt the tariff of the individual member, thereby superseding that service and obviating any possible competitive advantage.[21]

PCEC maintains that the notice provision in its Agreement should not be deleted or modified in any way (Response at 8). PCEC therefore seeks to retain the full 120-day period of notice. Throughout its submission, PCEC, however, argues only that some period of notice is necessary. At

[20] *See* Response at pp. 3–4: "In this day and age of containerized shipping there is virtually no operational obstacle to delivering a container of, *e.g.*, California walnuts, to anywhere in Western Europe. If an individual PCEC member line wished to increase or reduce the walnut rate, it would have to go to the Conference, and, if the member line were out-voted, that would be the end of the proposal. Perhaps one could say its "innovative proposal" has been "stifled," yet the procedure represents the very essence of the steamship conference system, something which has not only been permitted, but encouraged in U.S. trades since 1916. Under the apparent view espoused in the Show Cause Order, however, that same member line could take that same container of walnuts at the same total rate proposed, not to Milan which the PCEC tariff covers, but to Monza, a few kilometers further, where the Conference does not (yet) have tariff coverage, all without any consideration, let alone democratic vote, by the other member lines. *No "costly service" is involved; all it takes is a booking.*" (Emphasis added).

[21] Nor would there necessarily be any lag time in the effective date of a superseding conference tariff because section 18(b)(2) (46 U.S.C. §817(b)(2)) empowers the Commission, in its discretion and for good cause, to allow a tariff change to become effective upon less than 30 days notice. The Commission's Rules allow for expedited means of filing such applications for special permission in emergency situations. *See* 46 C.F.R. §536.15(c).

one point, PCEC approaches the question of how long that period of notice should be, but does not expressly state that 120 days is needed (Exh. C at 7–8).

Hearing Counsel states that although PCEC should be allowed to retain some period of advance notice in its Agreement, the present 120-day period is excessive. It suggests 30 days as being sufficient to provide adequate notice to the Conference.

Neither Hearing Counsel nor PCEC discuss the effect of the statutory notice provisions of section 18(b). At least for the first filing of a rate to a particular inland point, a 30-day notice period prior to tariff filing would, in effect, result in a 60-day delay because of the additional 30-day statutory notice on new or initial rates required under section 18(b). With respect to short season commodities, such a waiting period can render meaningless the option to offer an independent service.

Finally, we note that it would not be inconsistent with Commission policy for PCEC, through amendment to its Agreement, to require members to notify the Conference at the time that an individual intermodal tariff is filed. Such a provision would relieve the Conference of the task of monitoring intermodal filings by its members and would ensure that the Conference and each of its members had 30 days actual notice before a new intermodal service became effective.

CONCLUSION

PCEC has failed to provide either evidence of actual trade conditions or an adequate rationale which would justify the highly restrictive 120-day notice requirement in its Agreement or the lesser 30-day period suggested by Hearing Counsel. Accordingly, we conclude that the 120-day advance notice provision is contrary to the public interest within the meaning of section 15.

PCEC shall have 60 days in which to file an appropriate modification which deletes the advance notice requirement from its Agreement. Otherwise the Agreement shall be disapproved pursuant to section 15, as contrary to the public interest.

PCEC is free at any time to seek to reinstate a notice period by showing actual or potential trade conditions which require it. Moreover, PCEC may, through appropriate amendment to its Agreement, require its members to give actual notice to the Conference of a new intermodal service simultaneously with the filing of an individual tariff.

THEREFORE, IT IS ORDERED, That the Pacific Coast European Conference shall, by March 19, 1984, file an amendment with the Secretary which deletes the 120-day notice provision from the third paragraph of Article 1 of Agreement No. 5200.

FURTHER, IT IS ORDERED, That if by March 19, 1984, the amendment required by the first ordering paragraph is not filed as required, then Agreement No. 5200 is disapproved pursuant to section 15 on March 20, 1984.

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

By the Commission.*

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

Commissioner Moakley, dissenting in part.

While I agree with the majority that 120 days' notice is an excessive time period for conference review of a member's proposal for new intermodal service, I disagree with their decision to permit *no* such notice. The reasons for this policy disagreement are essentially those set forth in my recent partial dissents in connection with *Agreement Nos. 93–30 and 93–31—North Europe-U.S. Pacific Coast Freight Conference Agreement* and *Agreement Nos. 9314–31, et al.—North Atlantic Intermodal Agreements.* However, the majority here have offered a rationale for this "no notice" policy which did not appear in those prior decisions.

In attempting to explain why the decision in *American West African Freight Conference (AWAFC)*[1] is better policy than earlier, contrary decisions upon which respondent PCEC relies, the majority opinion explains that additional experience with intermodal transportation between 1969 and 1978 led to this change in policy.[2] I wholeheartedly agree that regulation of intermodal transportation has been rapidly evolving since the late 1960's, but would strongly suggest that the pace of this evolution has *accelerated* since the late 1970's. Ritual adherence, in 1983, to an intermodal policy decision founded upon 1978 circumstances is therefore at least as questionable as such adherence would have been in 1978 to a policy founded on 1969 circumstances.

The Commission's concern expressed in *AWAFC* in 1978 and in *Far East Conference, supra,* in 1979, that some conferences had used their intermodal authority to stifle the intermodal initiatives of member lines was well founded and well documented. Today, however, most conferences must either offer meaningful and attractive intermodal services or face the risk of extinction. Shippers have become accustomed to the service, and independent carriers or individual conference members will offer such service if the conference is unwilling or unable to do so. The Commission had graphic evidence of this before it recently in connection with the applications by various North Atlantic Conferences for intermodal authority.[3]

In this case, PCEC has implemented its intermodal authority since 1977, without complaint from either carriers or shippers. There is no allegation,

* Commissioner Thomas F. Moakley's dissent in part is attached.

[1] *Application for Approval of an Amendment to the American West African Freight Conference Agreement No. 7680–36,* 18 S.R.R. 339 (1978).

[2] Curiously, the only citation to a record in which facts were developed as the basis for this policy change is *Application of the Far East Conference for Intermodal Authority,* 21 F.M.C. 750, 753 (1979), decided the year *after* the *AWAFC* policy pronouncement.

[3] *Agreement Nos. 9314–31 et al.—North Atlantic Intermodal Agreements,* Order of Approval, served December 9, 1983.

much less any evidence, that this conference has used its authority to stifle the initiative of member lines. In fact, all of the member lines have submitted affidavits in support of retaining the present notice provision and the conference chairman states that he is aware of no instance where a member indicated that it was in any fashion inhibited from providing a proper service demanded by a customer because of this particular notice provision.

Thus, despite the majority's attempts to broaden the scope of the holding in *AWAFC*, the factual predicate for that policy pronouncement is not valid in this case, and I question whether it has any validity at all in today's intermodal environment.

As counsel for PCEC succinctly argued,

> "It is not the intent of the 'prior notice' requirement to inhibit any member line from developing new services or intermodal concepts, but only to have a *reasonable opportunity to discuss the same with a view toward adopting the proposal as a group,* exactly the same way as PCEC handles the yearly hundreds of other tariff modification requests and suggestions." (Response to Order to Show Cause, p. 3) (emphasis supplied).

I would not preclude this conference from adopting a reasonable notice period for discussion of members' proposals for new intermodal services.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–37

IN THE MATTER OF RATES APPLICABLE TO CHARITABLE SHIPMENTS BY U.S. ATLANTIC AND GULF/JAMAICA AND HISPANIOLA STEAMSHIP FREIGHT ASSOCIATION

ORDER

February 24, 1984

The United States Atlantic and Gulf/Jamaica and Hispaniola Steamship Conference (Conference or Petitioner) has petitioned the Commission pursuant to Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68, for a declaratory order to remove uncertainties concerning the refund/waiver of port charges paid to the Conference by various charitable organizations.[1]

The Petition advises as follows. By letter dated May 4, 1983, the Haitian Minister of Finance instructed the Director General of the National Port Authority of Haiti to exempt Catholic Relief Services, Church World Services, Cooperative for American Relief Everywhere, Inc. and Seventh Day Adventist Welfare Service from port charges assessed on cargo entering Haiti. The Conference learned of the exemption approximately one month later and amended its tariff to exempt the charitable organizations from the port charges shown in the tariff.

During the month between the time the Haitian authorities acted and the Conference amended its tariff, there were several shipments for the account of the charitable organizations involved. The Conference seeks a declaratory order authorizing it to waive collection of, or refund, Haitian port charges for any shipment of Public Law 480, Title II aid cargo on behalf of the aforementioned charitable organizations during the period May 4 through June 3, 1983. Petitioner believes that such an order is required to enable its members to make the necessary adjustments without violating sections 16 and 18 of the Shipping Act, 1916, 46 U.S.C. §§ 815 and 817.

Upon consideration of the Petition, the Commission determined that no action could be taken because the Petition, as filed, failed to provide certain relevant information. Accordingly, by letter dated November 29, 1983, the Commission requested Petitioners to provide the following:

1. The relevant tariff provisions involved.

[1] The Petition was published in the *Federal Register* on September 1, 1983, but elicited no replies.

2. Bills of lading and other documents evidencing the dates of shipments in question and amounts paid.
3. The statutory authority or legal theory upon which the Petition for declaratory order is based.
4. An explanation as to the precise method or procedure by which the Haitian fees at issue are assessed, *e.g.*, are they assessed against the carrier and passed on to the shipper or assessed directly against the cargo?

In response to the Commission's November 29 request, the Conference filed a supplemental brief and furnished some tariff pages and bills of lading. The tariff pages identify the charges only as "additional charges." However, Petitioner's brief states that:

> The charge in question is assessed against the cargo; collected by the carrier from the party paying the freight charges; then remitted to the Haitian Port Authority by the carrier. The carrier merely acts as the collection agent for the Haitian Port Authority. In this case the Haitian Port Authority exempted this cargo from their charge before advising the Conference. (Supplemental Brief at 3).

The supplemental brief further advises that the waiver/refund procedure of section 18(b) of the Act is inapplicable here because there is no clerical error involved. Although the original Petition cited no statutory authority for the relief sought, the supplemental brief relies on the Commission's exemption authority under section 35 of the Shipping Act, 1916, 46 U.S.C. § 833a.

Based upon the representations contained in the supplemental brief, the Commission finds that the charge at issue is a form of tax or fee which is solely within the province of the Government of Haiti. Although the charge appears in the Conference tariff, it does not appear to be a rate or charge for the transportation of freight or a "terminal or other charge . . . under the control of the carrier or conferences of carriers" within the meaning of section 18(b)(1) of the Act, 46 U.S.C. § 817(b)(1). The charge at issue is therefore not subject to the tariff filing and rate adherence requirements of section 18 and section 16.[2] Accordingly, these sections do not preclude the Conference members or the Government of Haiti from making adjustments with respect to that charge.

[2] There is therefore no need for the Commission to consider Petitioner's request for a section 35 exemption.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order filed in this proceeding is granted to the extent indicated above.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–25

BURLINGTON INDUSTRIES, INC.

v.

DART CONTAINERLINE CO., LTD.

NOTICE

February 28, 1984

Notice is given that no exceptions have been filed to the January 23, 1983 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. 83–25

BURLINGTON INDUSTRIES, INC.

v.

DART CONTAINERLINE CO., LTD.

Shipment properly classified. Reparation denied.

Ben J. Tyler for Burlington Industries, Inc.

E.C. Dickinson for Dart Containerline Co., Ltd.

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

Finalized February 28, 1984

Complainant, Burlington, claims that its shipment of "woven fiberglass piece goods" was improperly rated by respondent, Dart, with a resulting overcharge of $3,040.62.

The shipment consisting of 85 cartons stowed in one 40′ container was described on the bill of lading as "Woven Fiber Glass Piece Goods." Dart classified the shipment under item 653.8009.003 of the North Atlantic United Kingdom Freight Conference Tariff No. FMC 12. This item covered "Piece Goods, Fiberglass." Burlington challenged the classification and filed an overcharge claim with Dart arguing that the shipment should have been classified as "Fabrics, Piece Goods, viz, Cotton, Denim, Corduroy, Pocketing, or other Woven Fabrics, N.E.S." under Item 652.2305.017. Dart rejected the claim pointing out that this N.E.S. (Not Elsewhere Specified) rate could not apply since there was indeed a rate specified elsewhere which described Burlington's product exactly—"Fiberglass Piece Goods."

Burlington then went to the Conference arguing that the rejection of its overcharge claim was unreasonable since "the transportation characteristics of woven piece goods and woven fiberglass piece goods are the same." The Conference too rejected the claim and Burlington filed this complaint alleging the foregoing and claiming that it had been "subjected to the payment of rates for transportation which were, when exacted, discriminatory, unreasonable and in violation of the Shipping Act, sections 16 and 17." Burlington asked that the matter be handled under Subpart K of the Commission's Rules of Practice and Procedure (46 CFR 502.181 et

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

seq.). Notwithstanding its desire to use the Shortened Procedure of Subpart K, Burlington failed to accompany its complaint with the verified and subscribed to memorandum of fact and argument as required by Rule 182.

Dart answered the complaint saying that it agreed with the facts as stated in the complaint but failed to indicate its consent to the shortened procedure. Since the facts were not in dispute, I set up a schedule for the submission of the case pursuant to the provisions of Subpart K. In response to the schedule Burlington filed a "Memorandum of Facts" which was but a shortened version of its complaint. Dart filed a restatement of its original answer to the complaint. Burlington failed to file a reply.

Burlington says Dart has violated sections 16 and 17 of the Act by exacting rates which were "discriminatory and unreasonable." As relevant here, section 16 makes it unlawful for a common carrier:

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

Section 17, again as here relevant, makes it unlawful for a common carrier to "demand, charge or collect any rate, fare or charge which is unjustly discriminatory. . . ." Neither section speaks of rates which are fixed at unreasonable levels.[2] Instead they deal with dissimilar treatment, and "There must be at least two interests involved in any case of preference, prejudice or discrimination. . . ." *West Indies Fruit Co. et al.* v. *Flota Mercante,* 7 F.M.C. 66 (1962). Burlington fails to make mention of any other shipper who received the treatment from Dart that Burlington seeks here. This failure is fatal to Burlington's claim under sections 16 and 17. This ultimate reliance on sections 16 and 17 seems curiously out of kilter with the rest of the complaint which reads like the typical prelude to a charge of simple misclassification in violation of section 18(b)(3) of the Act. Indeed, it would appear that Burlington's overcharge claim was couched solely in terms of a tariff misclassification. It seems odd that no reliance whatsoever was placed on 18(b)(3) by Burlington in its complaint. But whatever the reason for its omission, the inclusion of an 18(b)(3) allegation would not have saved Burlington's claim. Based on the slim record before me it is clear that Dart's treatment of the shipment was correct. The classification sought by Burlington was available only for those products not specifically dealt with elsewhere in the tariffs. Fiberglass Piece Goods were so dealt with and the shipment was properly classified under that item.

[2] The only section of the Shipping Act dealing with foreign commerce which addresses the level of rates is 18(b)(5) which prohibits rates which are so unreasonably high or low as to be detrimental to the commerce of the United States.

The complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–28

IN RE AGREEMENT NOS. 10457, 10458, 10332–3, 10371–2 AND IN RE AGREEMENT NOS. 10457–1 AND 10458–1

ORDER PARTIALLY ADOPTING INITIAL DECISION

February 29, 1984

The proceeding was instituted by Order of Investigation and Hearing and Approval *Pendente Lite* served June 17, 1983 to determine whether Agreement No. 10457, an agreement between Korea Marine Transport Company (KMTC) and Nippon Yusen Kaisha (NYK) (Proponents) to cross-charter space, jointly schedule and advertise sailings, pool revenue or cargo, interchange equipment and appoint reciprocal agents, and Agreement No. 10458, an agreement between KMTC and NYK to subcharter space to Showa Line, Ltd., should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). Sea-Land Service, Inc., United States Lines, Inc., American President Lines and Lykes Bros. Steamship Co., which opposed approval of the Agreements, were named Protestants in the proceeding.

After discussions with Protestants, Proponents withdrew Agreement Nos. 10457 and 10458 and substituted Agreements Nos. 10457–1 and 10458–1, which deleted authority for revenue pooling and joint agencies, placed limitations on vessels, capacity and sailings* and restricted transshipment.

On December 30, 1983, Administrative Law Judge Seymour Glanzer (Presiding Officer) issued an Initial Decision in which he approved Agreements Nos. 10457–1 and 10458–1. In addition, he concluded that the negotiations between Protestants and Proponents which led to the filing of Agreement Nos. 10457–1 and 10458–1 were not agreements subject to the filing and approval requirements of section 15. On January 30, 1984, the Commission determined to review that portion of the Initial Decision relating to the existence and need for filing of any settlement between Proponents and Protestants. The remainder of the Initial Decision including the approval of Agreements Nos. 10457–1 and 10458–1 became administratively final in accordance with Rule 227 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.227).

* As originally filed, Agreement No. 10457 would have authorized the Proponents to operate ". . . such other vessels as they may subsequently agree to operate under this Agreement."

DISCUSSION

Upon review of the Initial Decision's treatment of the settlement negotiations between litigants under section 15, the Commission is satisfied that the Presiding Officer correctly concluded that there was no agreement between Proponents and Protestants which would be subject to the filing and approval requirements of that section. We do not agree, however, with portions of the expressed rationale underlying the Presiding Officer's conclusion.

In concluding that no agreement between litigants here need be filed, the Presiding Officer appears to draw a distinction between formal executed settlement agreements of the type present in *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82 (1970) (*Isbrandtsen*) and oral agreements. The distinction finds no support in section 15 which expressly requires oral understandings to be reduced to writing and filed for approval. In determining whether a settlement among litigants must be filed for approval pursuant to section 15, it is necessary to look at the terms of the settlement. The form of the settlement is not controlling.

The Presiding Officer distinguishes *Isbrandtsen* on other grounds. Citing *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973) (*Seatrain*) and *American Mail Line* v. *Federal Maritime Commission,* 503 F.2d 157 (D.C. Cir. 1974) (*AML*), he finds that the settlements here "involve a discrete event and do not govern ongoing relationships." The Commission is not convinced that *Seatrain* and *AML* can be applied to this case. A merger of the type in *Seatrain* and *AML* "effectively destroys one of the parties to the agreement." *Seatrain,* 411 U.S. at 732. The parties to a settlement of litigation remain separately functioning entities.

Accordingly, we are not adopting the Presiding Officer's rationale based on *Seatrain* and *AML*. We need not, however, resolve that issue conclusively here because the record otherwise does not evidence an agreement among the parties. In deciding to amend Agreements Nos. 10457 and 10458, Proponents were no doubt influenced by the discussions they had with Protestants, but those discussions with Protestants, without more, did not, however, rise to the level of an agreement which must be filed and approved pursuant to section 15.

THEREFORE, IT IS ORDERED, That the conclusion in the Initial Decision, served in this proceeding on December 30, 1983, that the negotiations between Protestants and Proponents do not result in an agreement subject to section 15 of the Shipping Act, 1916, is adopted except as indicated above; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–28

(A) IN RE AGREEMENTS NOS. 10457, 10458, 10332–3 AND 10371–2;

(B) IN RE AGREEMENT NOS. 10457–1 AND 10458–1 [1]

Publication of the revised agreements (Agreement Nos. 10457–1 and 10458–1) in the *Federal Register* as a condition precedent to consideration for approval is not required.

On this record, there is no need for section 15 approval of the "settlements" arrived at by the former Protestants, individually, and the Proponents.

Proponents have established that the revised Agreement Nos. 10457–1 and 10458–1 are required by a serious transportation need, are necessary to secure public benefits, and are in furtherance of a valid regulatory purpose.

Charles F. Warren, George A. Quadrino, David N. Dunn and *Benjamin K. Trogdon* for Proponents, Korea Marine Transport Co., Ltd., Nippon Yusen Kaisha and Showa Lines, Ltd.

Robert T. Basseches and *David B. Cook* for American President Lines, Ltd.

Edward M. Shea and *John E. Vargo* for Sea-Land Service, Inc.

J. Alton Boyer and *William H. Fort* for Lykes Bros. Steamship Co., Inc.

John Robert Ewers, Alan Jacobson and *Janet Katz* for Hearing Counsel.

INITIAL DECISION [2] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Partially Adopted February 29, 1984

This proceeding began as an investigation, instituted under the provisions of sections 15 and 22 of the Shipping Act, 1916, 46 U.S.C. 814 and 821, to determine whether Agreement Nos. 10457, 10458, 10332–3 and 10371–2 should be approved, disapproved or modified.[3]

BACKGROUND

The proceeding was initiated by Order of Investigation and Hearing and Approval Pendente Lite (Order), served June 17, 1983.[4] The Order designated Korea Marine Transport Company (KMTC) and Nippon Yusen

[1] I amended the caption by adding Part (B) to the original, which I designated Part (A), to reflect changes which occurred during the course of the proceeding. As will be seen, the Proponents of Agreement Nos. 10457 and 10458 withdrew those agreements from consideration and proffered, in place thereof, unilateral, more restrictive modifications for consideration. The modified agreements were identified by the "–1" suffix to distinguish them from the earlier versions. Agreement No. 10457–1 is set out in Appendix I. Agreement No. 10458–1 appears in Appendix II.

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

[3] Notices of filing were published in the *Federal Register* on September 20, 1982 (47 F.R. 41423–24) and on March 22, 1983 (48 F.R. 11987).

[4] The Order was published in the *Federal Register* on June 22, 1983 (48 F.R. 28550-52).

Kaisha (NYK) as Proponents with respect to all four captioned agreements and designated Showa Line, Ltd. as a Proponent with respect to Agreement Nos. 10458 and 10371–3 only. American President Lines, Ltd. (APL) was made a Protestant as to all agreements, while Lykes Bros. Steamship Co., Inc., Sea-Land Service, Inc., and United States Lines, Inc. (USL)[5] were made Protestants as to Agreement Nos. 10457 and 10458 only. Hearing Counsel was made a party to the proceeding.

Agreement No. 10457 between KMTC and NYK would permit the parties to cross-charter space, jointly schedule and advertise their sailings, have reciprocal agency representation and interchange equipment. This agreement would allow the parties to operate three or more vessels, as they might later agree, between ports in Korea, Hong Kong and Taiwan in the Far East and ports on the United States Pacific Coast, including those in Hawaii and Alaska. In addition, it would authorize the parties to pool revenue or cargo originating in or destined to Korea and to subcharter space, not to exceed 780 TEUs[6] month to Showa.

Agreement No. 10458, between KMTC, NYK and Showa, sets forth the terms upon which Showa could subcharter space from KMTC and NYK.

Agreement No. 10332–3, between KMTC and NYK, proposes to extend, until July 1, 1986, the term of previously approved Agreement No. 10332 between the same parties. Agreement No. 10332 is similar to Agreement No. 10457 but it is applicable to a direct, non-intervening ports of call service between Korea and the United States Pacific Coast.

Agreement No. 10371–2, between KMTC, NYK and Showa, proposes to extend, until July 1, 1986, the term of previously approved Agreement No. 10371. Agreement No. 10371 is an arrangement allowing NYK and KMTC to subcharter a maximum of 420 TEUs per month to Showa.

Agreement Nos. 10457 and 10458 were intended to succeed Agreement Nos. 10332, as amended, and 10371, as amended. These amendments were among the subjects of Docket No. 80–52, Agreement Nos. 10186, as amended, 10332, as amended, 10371, as amended, 10377, 10364 and 10329.[7] In that proceeding, the Commission approved Agreement No. 10371–1 and granted conditional approval to Agreement No. 10332–2. Upon findings that the record in that proceeding did not justify provisions for the use of joint agents, coordination of sailings and revenue pooling by KMTC and NYK, the Commission insisted that those provisions be deleted as conditions of approval.

[5] On June 23, 1983, USL moved to be dismissed as a party because it no longer sought to oppose approval of Agreement Nos. 10457 and 10458. The motion was granted, with prejudice, on July 19, 1983. See order entitled "Dismissal Of A Party," served July 21, 1983.

[6] Container carriage is often measured by TEUs. TEU is an acronym for trailer (container) equivalent units. The basic unit is a twenty foot container. A forty foot container is counted as two TEUs.

[7] Report And Order, served December 22, 1982, 25 F.M.C. 538; Order Of Modification, served May 13, 1983, at 22 SRR 113.

After reviewing the agreements identified in Part (A) of the caption, the statements submitted in support thereof and the comments and protests thereto, the Commission determined that an evidentiary hearing was required to resolve certain specified issues in order to ascertain whether the agreements met the so-called *Svenska* test.[8] The Commission noted that the available information was not complete enough to permit an evaluation of the scope of the agreements and the degree to which they would restrict competition. To remedy this deficiency, the Commission directed the parties to address the following issues:

> 1. Have NYK and KMTC engaged in bloc voting in the conferences to which they belong?
>
> 2. Should Agreement No. 10457 provide for a vessel or TEU limitation, or both? What should the limitation be?
>
> 3. What is the relationship between Agreements Nos. 10457 and 10458, on the one hand, and operations of Japanese-Flag vessels in the Transpacific trades, on the other?
>
> 4. What is the geographic scope of the authority of Agreement No. 10457? How, if at all, should that scope be limited?
>
> 5. What reporting provisions, if any, should be included in the Agreements to enable the Commission to perform its oversight function?

In addition to those issues, the Order directed that the following questions concerning "legitimate commercial objectives" be addressed:

> [6] Does KMTC, a carrier with several years experience in the trade, continue to require technical assistance from NYK (see Article 4, Agreement No. 10457) in order to compete in the trade?
>
> [7] Do NYK and KMTC require a joint sales force in order to adequately compete in this trade (see Article 4, Agreement No. 10457)?
>
> [8] Is the authority to coordinate sailings (see Article 1(a), Agreement No. 10457) necessary in order for the shipping public to benefit from the space chartering provisions of Agreement No. 10457 and can the space chartering provisions feasibly operate without coordinating the sailings?
>
> [9] Given Showa's historical carriage, what is the justification for authorizing Showa to charter an average of 600 TEU's per month?

[8] The Order explained the *Svenska* test this way:

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. *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).

[10] Is the U.S.-Far East trade (including the trades between the U.S., Japan, Korea, Taiwan and Hong Kong) over-tonnaged as a whole? If so, what impact will the subject agreements have on the problem?

[11] What public benefit can be expected if NYK and KMTC are authorized to enter into a space charter agreement in the U.S./Hong Kong/Taiwan trades?

[12] Is revenue sharing on Korean origin/destination cargo necessary to offset NYK's status as a third-flag carrier in the Korean trade, and is it necessary for KMTC's continued development in this trade? Is this revenue sharing necessary for the continued functioning of the entire arrangement?

Finally, the Order sought clarification of certain terms concerning agreements which might be reached in the future under Articles 1(a), 5(a) and 6 of Agreement No. 10457.

In the meantime, because of the Commission's concern for the preservation of stability in the United States/Korea trade, and a fear that a sudden cessation of approved space chartering authorities could be disruptive to that trade, the Order permitted the continuation of Agreement Nos. 10332 and 10371 on the same terms allowed in Docket No. 80–52, *supra*, pending the outcome of this proceeding.

On June 24, 1983, one week after the Order was served, APL filed a "document" embracing issues in this proceeding and Docket No. 80–52. With respect to the issues in Docket No. 80–52, the document responded to a petition filed by KMTC and NYK seeking continuance of existing joint agency arrangements for a limited period of time.[9]

With respect to this proceeding, the document was treated as a motion seeking a determination that no agreement, which might be approved, would be permitted to contain provisions authorizing revenue pooling, sailing coordination or joint agency. It was the gravamen of the motion that, in the light of the Report and Order in Docket No. 80–52, those provisions were barred under the related doctrines of collateral estoppel or res judicata.[10] This motion was overtaken by later events and may be regarded as withdrawn for all practical purposes. However, it was important because it appears to have led, in part, to the "settlements" reached by the parties, as hereinafter described.

There were three prehearing conferences. The first was held on July 6, 1983 (Prehearing I), the second on September 7, 1983 (Prehearing II),

[9] The Docket No. 80–52 issues spilled over into this proceeding. Consequently, when the petition was approved, the order of approval was issued in this proceeding. See, Docket No. 83–28, *In Re Agreements Nos. 10457, 10458, 10332–3 and 10371–2*, Order Permitting Temporary Continuance of Existing Agency Arrangements, served July 1, 1983.

[10] See, Order Severing Issues, served June 30, 1983. In support of its motion, APL urged that the justification, submitted by Proponents for approval of the agreements identified in Part (A) of the caption, relied on the same facts presented in Docket No. 80–52.

and the third on October 11, 1983. The third was converted into a hearing on the merits.

At the hearing there was introduced into evidence the sworn statement of Mr. Morisaki, Assistant General Manager, Business Division No. 1, NYK, on behalf of all Proponents. Mr. Morisaki's statement was supported by twelve appendixes. Hearing Counsel presented Bruce A. Dombrowski as a witness. Mr. Dombrowski, who now is the Assistant Secretary of the Commission, testified in his former capacity of Senior Transportation Industry Analyst, with the Commission's Bureau of Agreements and Trade Monitoring.

Mr. Morisaki's statement included an explanation of the circumstances which gave rise to the withdrawal of the agreements identified in Part (A) of the caption and the substitution therefor of the agreements shown in Part (B) of the caption. For the purpose of placing subsequent events in context, these are the pertinent passages from the statement: [11]

> 6. After initial clarification at the executive level that settlement discussions might be possible, our review of the Commission's order noted that many of the issues to be investigated were matters either that we had previously offered to withdraw or modify in our Reply to Protests last year or were matters that we had internally considered were not essential to our operations, at least over the long term. Accordingly, we instructed our attorneys to approach the Protestants, and later Hearing Counsel, to ascertain their particular concerns on the issues under investigation and to discuss whether amendments could be made to the Agreements that would make them more palatable.
>
> 7. Subsequently, meetings and discussions were held in Washington, both among attorneys for all the parties and, when appropriate, between our attorneys and the attorneys for one or another of the protestants. Our attorneys reported to us on the progress of these discussions and recommended to us the modifications they believed would be required to resolve the opposition to the Agreements. After several internal meetings and discussions, we decided it was in our best interests to accept certain of the amendments recommended to us and to amend our Agreements accordingly. On other matters, however, we concluded we could not accept an amendment without jeopardizing the basis of our service itself or the needs of our customers. Subsequently, at the Prehearing Conference held on September 7, 1983 in Washington, Agreement Nos. 10457 and 8, as originally filed, were withdrawn by our attorneys and copies of the amended Agreements were submitted and identified as Prehearing Exhibit No. 2 (Appendix 2).
>
> 8. Following the Prehearing, our attorneys met with Hearing Counsel to attempt to resolve the remaining matters Hearing Coun-

[11] APL, Sea-Land and Lykes, in separate memorandums, generally are in accord with these passages insofar as they describe the activities of the Protestants. Obviously, they cannot confirm the references to the Proponents' internal discussions and meetings.

> sel had identified on the record as concerns. As these matters were largely technical, we agreed to all of Hearing Counsel's requests. . . .

As a result of the withdrawal of the agreements, identified in Part (A) of the caption, and the substitution of Agreement Nos. 10457–1 and 10458–1, therefor, Sea-Land, Lykes and APL withdrew as Protestants. Perhaps overpedantically or overtechnically, they pointed out, individually, that since the original agreements were withdrawn, their protests ended and, inasmuch as they had no opposition to the revised agreements, they should no longer be regarded as Protestants. However, out of an abundance of caution, should I or the Commission approve the revised agreements more expansively than submitted for approval by Proponents,[12] they asked for and were given permission to remain as parties to the proceeding.

Proponents submitted a Brief, including proposed findings of fact, in support of the revised agreements. Individually, Sea-Land, APL and Lykes submitted memorandums explaining certain facts and their positions with respect to particular aspects of the proceeding.

FINDINGS OF FACT [13]

1. NYK and KMTC currently operate a two-vessel container service in the Korea-U.S. trade pursuant to Agreement No. 10332–3 as approved *pendente lite* in the Order.

2. NYK and KMTC subcharter, on Agreement No. 10332 vessels, the maximum of 420 TEUs of container space per month to Showa pursuant to Agreement No. 10371–2 as also approved *pendente lite* in the Order.

3. Agreement No. 10457, as originally filed, was a space charter arrangement between NYK and KMTC, establishing a coordinated vessel service between ports in Korea, Hong Kong and Taiwan and the U.S. Pacific Coast, including Hawaii and Alaska. The agreement provided for space charter among the parties, revenue pooling, joint scheduling and advertisement of the parties' vessels, reciprocal agency representation, and interchange of equipment. Chartering a maximum of 780 TEUs per month to Showa was also permitted.

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[12] See *Sea-Land Service, Inc.* v. *Federal Maritime Commission*, 653 F. 2d 544 (D.C. Cir. 1981), discussed, *infra*.

[13] Proponents' proposed findings of fact were not opposed by Hearing Counsel. (Hearing Tr. 30–32.) The facts may be regarded as stipulated for all practical purposes. Some editorial changes have been made by me.

> N.b. It was stipulated by APL, Sea-Land and Lykes and by Proponents that the adoption of the proposed findings of fact submitted by Proponents or any other findings and conclusions made by the Administrative Law Judge or the Commission in this proceeding would not be relied upon by Proponents as preclusive against either of them in any other pending or future litigation in this or any other forum. However, this stipulation shall not be construed to bar Proponents or any of them from establishing the same facts or conclusions derived from them based upon an independent record in any other proceeding. See Hearing Tr. 17–26.

4. Agreement No. 10458, as originally filed, was an implementing agreement by which NYK and KMTC were to charter to Showa space not to exceed 780 TEUs per month.

5. Following initial clarification at their executive level, Proponents and Protestants, through their attorneys, held meetings and discussions in Washington, D.C., following which Agreement Nos. 10457 and 10458 were withdrawn by the parties. Substitute agreements were proffered on the record at Prehearing II, and Protestants stated on the record that they did not oppose the substituted agreements. (Prehearing Ex. No. 2, Prehearing II Tr. 8–9; 27–29.)

6. Subsequent discussions with Hearing Counsel following the prehearing conference caused Proponents further to amend their agreements (Hearing Ex. 1, App. 4, Tr. 28). As a result, Hearing Counsel and the Commission's staff announced their support for the revised agreements. (Hearing Tr. 20, 30.)

7. The revised agreements, redesignated Agreement Nos. 10457–1 and 10458–1, are the only ones offered for Commission approval. The major changes from the agreements, as originally filed, are the deletion of revenue pooling and joint agency, and the limitations on vessels, capacity and sailings and the restrictions on transshipment.

8. Agreement No. 10457–1 is a space charter arrangement between NYK and KMTC establishing a three-vessel direct service between ports in Korea, Taiwan and Hong Kong and the Pacific Coast of the United States, excluding the ports in the states of Hawaii and Alaska and providing for block chartering, vessel coordination, container and equipment interchange and chartering of space to Showa.

9. Under Agreement No 10457–1, the parties will operate three vessels with a capacity not exceeding 2,923 TEUs[14] and offer not more than 28 annual sailings. The maximum amount of space which may be operated and cross-chartered during any calendar year will not exceed 27,343 TEUs eastbound or westbound.

10. NYK and KMTC will schedule and advertise their sailings in the trade so as to promote optimum vessel utilization, and charter space to and from each other on terms as they may agree and the essential details of the space charter arrangement in writing to the Commission. NYK and KMTC are authorized to subcharter up to an average of 600 TEUs per calendar month, not to exceed 780 TEUs in any single month, to Showa.

11. The parties may transship up to 3,000 TEUs of cargo originating in or destined to Alaska, the Philippines, Singapore or Malaysia in any calendar year.

12. Agreement No. 10457–1 shall terminate on the third anniversary of approval by the Commission.

[14] One vessel (Pacific Express) has a capacity of 851 TEUs. The others (Pacific Trader and Pacific Sunshine) have a capacity of 1,036 TEUs.

13. Agreement No. 10458–1 is a space charter arrangement by which NYK and KMTC agree to subcharter space to Showa up to 600 TEUs per average calendar month, not to exceed 780 TEUs in any single month on vessels operated pursuant to Agreement No. 10457–1.

14. The direct service offered by the three parties pursuant to Agreement No. 10457–1 shall be their exclusive direct service in the trades between Korea, Taiwan and Hong Kong and the Pacific Coast of the United States, excluding the states of Hawaii and Alaska.

15. Showa is authorized to transship cargo which originates in or is destined to Alaska, the Philippines, Singapore or Malaysia, subject to the 3,000 TEU limitation on all parties on transshipment of cargo imposed under Article 5(b) of Agreement No. 10457–1.

16. The vessels to be operated, initially, under Agreement No. 10457–1 are: *Pacific Trader* operated by NYK; *Pacific Sunshine* and *Pacific Express* operated by KMTC. Each vessel is a fully cellularized containership having an operating speed of 20 to 22 knots and having a turnaround time of 38 to 40 days. Vessel itineraries include calls at Kaosiung, Hong Kong, Keelung, Busan, Kobe and/or Tokyo, Los Angeles, Oakland and Seattle.

17. NYK and KMTC will continue their existing public terminal operations at Busan, Seattle, and Taiwan and will continue to use approved arrangements with Matson terminals at Los Angeles and Oakland and with Hong Kong Modern Terminals at Hong Kong. KMTC will use NYK's terminal facilities in Japan.

18. NYK and KMTC may employ common (but not joint) agents in the United States until March 1984.[15]

19. The three-vessel operation under Agreement No. 10457–1 will provide essentially the same semimonthly service as is currently being provided by two vessels under Agreement No. 10332–3, but with the addition of direct call service at Taiwan and Hong Kong.

20. Direct service to Hong Kong and Taiwan under Agreement No. 10457–1 is deemed by Proponents to be superior to their current indirect or transshipment service because it reduces losses resulting from extra handling and shipping of cargo on and off vessels at transshipment ports and absent Agreement Nos. 10457–1 and 10458–1, NYK would be forced to introduce two more vessels, KMTC one, and Showa three, in order for each to separately offer the shipping public a semimonthly service in these trades.

21. Since the agreements identified in Part (A) of the caption were filed for approval, KMTC has independently introduced its new vessel, *Pacific Express*, in the U.S.-Korea trade, and would consider continuing to operate independently of NYK if the revised agreements are not approved. Showa has planned to introduce at least one new vessel in the U.S.-

[15] See Agreement No. 10483 (Prehearing II Tr. 17–18).

Far East trades to be used in conjunction with its existing transshipment service, and NYK has internally decided to initiate its own Far East service, if Agreement Nos. 10457–1 and 10458–1 are not approved.

22. All major carriers in the Far East-U.S. trades serve Hong Kong and Taiwan directly except Proponents and two Japanese carriers.

23. In filing Agreement Nos. 10457–1 and 10458–1, requests for joint agency, solicitation, revenue sharing, and technical assistance, have been deleted.[16] In addition, the issue of bloc voting (Order: Issue No. 1) has been removed by the withdrawal of Protestants who raised it.[17]

24. The public benefits which are currently realized in the U.S.-Korea service operated under approved Agreement Nos. 10332 and 10371, as amended, are likely to flow from space chartering in the U.S.-Hong Kong/Taiwan trades. These include better capacity utilization of vessels and equipment with less total capital expenditures, a more quantifiable reduction of tonnage deployed in the trade as compared to "space available" charter agreements, and the opening of new shipping opportunities for shippers and consignees in the growing Far East markets.

25. The benefits of direct service provided under Agreement Nos. 10332 and 10371 in the Korea market, such as reduction in transit time and losses incurred in handling, should accrue to the Hong Kong/Taiwan market under Agreement Nos. 10457–1 and 10458–1.

26. Direct service to Hong Kong/Taywan is important to carriers operating in the trades because many consignees include "no transshipment" clauses in their letters of credit.

27. Agreement Nos. 10457–1 and 10458–1 should reduce shipper and consignee inventory requirements, storage and warehouse expenses, and related capital expenditures through the frequent and regular service to be offered under these agreements.

28. Fuel consumption under Agreement Nos. 10457–1 and 10458–1 should amount to about two-thirds less than that which would be consumed if NYK, KMTC and Showa each were to establish individual semimonthly service to the Far East.

29. The space charter and vessel coordination provisions of Agreement No. 10457–1 allow NYK and KMTC to use common terminal facilities. Utilizing a single berth at U.S. and foreign ports should increase the efficiency of each line's service and of terminal operations at those ports. The ability to coordinate vessel schedules in the U.S./Hong Kong trades should alleviate port and terminal congestion. Coordination should enable Proponents to operate the minimum number of vessels required to provide viable service in the trades.

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[16] The deletion of those items has the effect of satisfying the Commission's interest in having the Proponents provide answers to questions Nos. 6, 7 and 12 posed in the Order.

[17] Hearing Counsel did not independently address these matters. Moreover, this issue does not appear, facially, to involve anticompetitive restraints other than those suggested by Protestants' comments and does not, therefore, require further scrutiny under the "public interest" standard of section 15 See *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F. 2d 577 (D.C. Cir. 1969).

30. Vessel coordination is essential for space chartering and the concommitant benefits to the shipping public. It would allow NYK and KMTC to provide regular and reliable semimonthly service. None of the parties could provide competitive service without availability of the other party's vessels. Independent scheduling would adversely affect the competitive benefits expected to be derived from the services offered under Agreement Nos. 10457–1 and 10458–1. Coordination of sailing is the catalyst for the benefits to be derived from optimal employment of resources and the enhanced competitive service which is expected to result.

31. A "space available charter" arrangement would not be sufficient for the Proponents, as it would require them to operate more vessels in order to offer a complete service. It would not improve the efficiency or reliability of service, nor permit the use of joint or common terminal arrangements. Operation of an individual service obviously increases the potential for overtonnaging, an ever-present concern.

32. There is no vessel scheduling under Agreement No. 10332, as amended, and NYK and KMTC each operate one vessel on a 30-day turnaround. They have been serving Korea and the U.S. Pacific Coast pursuant to the same itineraries established and followed without variation for nearly five years.

33. Under Agreement No. 10457–1, three vessels will be operated with direct calls in Korea, Hong Kong, Taiwan and Japan. This expanded geographical scope of operation is another factor underlying the need for coordination of sailings.

34. Liner cargoes in the Korea/Hong Kong/Taiwan-U.S. Pacific Coast trades have shown strong and consistent growth for the last 15 years. Eastbound cargoes have almost tripled in the U.S. Pacific Coast-Philippines/Malaysia/Singapore/Peoples Republic of China trades from 1976 through 1982, and Japan-U.S. Pacific cargoes have grown at a compounded rate of 3 percent eastbound and 4.5 percent westbound between 1974 through 1982

35. A Commission economist has forecast growth rates of from 1 to 8 percent annually for the next two years for various non-Japanese segments of the transpacific trades.[18]

36. In 1982 cargoes remained virtually stable, although substantial additional tonnage was introduced by established carriers and newcomers in the trade.

37. NYK, KMTC, and Showa's carryings, both eastbound and westbound, improved steadily each year under Agreement Nos. 10332 and 10371. Eastbound utilizations rose to 60 percent in 1982 and to over 70 percent in the first eight months of 1983.

[18] The Commission economist testified in Docket No. 82–54. Other economists testifying in that proceeding were equally or more sanguine.

38. Capacity increases by individual lines in the trades make it difficult to predict whether overtonnaging will become a problem; however, Agreement Nos. 10457–1 and 10458–1 should ameliorate its threat.[19]

39. The combined effect of increasing turnaround times and the introduction of the *Pacific Express* result in an approximate continuation of NYK, KMTC and Showa's current annual capacity under Agreement No. 10332, as amended, as maximum annual capacity under Agreement No. 10332 is limited to 25,200 TEUs, while under 10457–1 it is 27,343 TEUs, an 8.5 percent increase. When the discontinuance of KMTC's independent operation of the *Pacific Express* under Agreement No. 10457–1 is taken into account, the overall annual capacity is decreased by 20 percent.[20]

40. The proviso contained in Agreement No. 10457–1, which allows KMTC to serve Japan, resulted from the acknowledged policy of the Korean Government requiring KMTC to carry cargo other than Korean cargo.

41. The increase in space to be chartered to Showa under Agreement No. 10458–1 reflects the expected growth in Showa's carryings based on Showa's historically higher utilizations than the other parties and its experience in the Far East trades outside of Japan and Korea.

42. The only evidence adduced, concerning a "relationship" between Agreement Nos. 10457–1 and 10458–1 and the "operations of Japanese flag vessels in the transpacific trades," indicates that none exists.[21]

43. The reporting requirements attached to Agreement Nos. 10457–1 and 10458–1 have met with the approval of the Commission's staff and appear sufficient to fulfill the Commission's needs to oversee operations under the agreements and to satisfy its interest, as set forth in Order: Issue No. 5.

44. Given the limitation on overall capacity, and on transshipment cargo which may be carried under the agreements, NYK and Showa will continue to transship some cargo via Japan as a supplementary service. Direct service under Agreement Nos. 10457–1 and 10458–1 will not be in competition with any other direct services by the parties.

45. KMTC's commencement of direct service in the Japan/U.S. trades is not likely to have a significant impact on those trades.

DISCUSSION AND CONCLUSIONS

I. PRELIMINARY MATTERS

A: Publication of the Revised Agreements in the *Federal Register* as a Condition Precedent to Consideration for Approval is Not Required

[19] Cf. Finding Nos. 31, 35 and n. 18, *supra*. Taken together, these facts and Finding No. 45, *infra*, furnish as complete an answer to Order: Issue No. 10, as could be made available.

[20] Given the withdrawal of the Protestants and Hearing Counsel's and the Commission's staff's support for the revised agreements, Findings Nos. 2, 9 and 39 appear to satisfy the Commission's interest in Order: Issue No. 2. See, also, *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission, supra*.

[21] See Hearing Ex. 1, par. 60, which addresses Issue No. 3, specified in the Order. See also Finding No. 23 and n. 17, *supra*.

As noted on September 20, 1982, the Commission published notice in the *Federal Register* that Agreement Nos. 10457 and 10458 had been filed, accompanied by a descriptive summary of those agreements. The summary included all the provisions which were later modified by Agreement Nos. 10457–1 and 10458–1.

When the revised agreements were proffered, I solicited advice whether I or the Commission could proceed to consider and process them without prior publication in the *Federal Register*. On the basis of the authorities cited by the parties, I am satisfied that such publication is not necessary in these circumstances.

Recently, a substantially identical question was presented to the court in *Sea-Land Service, Inc.* v. *Federal Maritime Commission, supra*. The section 15 issue concerned joint services to be performed by several carriers. The proposed agreement was extensively negotiated and compromised by the Proponents and Protestants therein. After that, the Commission modified the agreement on its own initiative. The issue before the court, on judicial review, concerned the Commission's modification. The Commission sought to distinguish between modifications formulated by private, interested parties which, the Commission suggested, might require new notice to allow non-parties to protect their interests, and modifications made by the Commission in the discharge of its responsibilities, which the Commission argued did not require publication.

The court addressed only the question before it—whether publication of changes made by the Commission would be required. It appears to me, however, that the standards enunciated by the court for determining whether new publication is required when the modification is made by the Commission have equal validity for privately made alterations to agreements *sub judice*.

Chief Judge McGowan, speaking for an undivided panel, stated that the distinguishing factor to examine is whether the changes expand the authority sought or restrict that authority, for expansive changes do require notice but restrictive changes do. not. He wrote, 653 F. 2d at 552–553:

> The generally accepted distinguishing factor, and one we consider applicable to this case, is whether the final agency action expands the authority proposed by the parties to the agreement. This limitation is sound from the standpoints of legal precedent and policy. Where the modification does not alter the substance of the agreement in any respect, the Commission should have every right to edit the agreement to conform with Commission practices or simple principles of organization. Similarly, any modification which serves only to restrict, not to expand, the authority of the parties to the agreement should not require notice and hearing. In that event, only the proponents will be aggrieved, and they are always free to abandon the modified agreement and to submit an amended agreement for new consideration. . . .

* * * * *

> We think, however, that "agency action *expanding proposed authority* is improper without proper findings based on substantial evidence, adequate notice, and consideration of objections." . . .

It is clear that Agreement Nos. 10457–1 and 10458–1 sharply restrict the much broader authority initially sought by Proponents in Agreement Nos. 10457 and 10458. Accordingly, under the rationale of *Sea-Land Service, Inc.* v. *Federal Maritime Commission,* I find that notice of those revised agreements need not be published in the *Federal Register.*

B: On this Record, There is No Need for Section 15 Approval of the "Settlements" Arrived at by the Former Protestants, Individually, and the Proponents

Another issue which I asked the parties to address is whether the "settlements" arrived at by Lykes, Sea-Land and APL, individually, with Proponents, whereby Proponents modified their agreements restrictively, were themselves subject to section 15 approval in the light of the *Isbrandtsen* decision, *American Export Isbrandtsen Lines, Inc.,* 14 F.M.C. 82 (1970).

I expressed a preliminary view that I saw distinctions between the "settlements" and the operative agreement in *Isbrandtsen* and suggested that, in the circumstances, it might only be necessary to explain, for the record, how the "settlements" came about. As noted, the parties complied. In addition, they noted some of the differences between the "settlements" and the *Isbrandtsen* agreement.

Factually, *Isbrandtsen* began with a subsidy application which went to hearing before the Maritime Subsidy Board of the Federal Maritime Administration. During the proceedings, some protestants and the applicant entered into a stipulation which was determined to provide for an exclusive, preferential or cooperative working arrangement; to constitute a special privilege or advantage; and to control, regulate or destroy competition. The Commission concluded that the stipulation constituted an independent section 15 agreement requiring filing for approval by the Commission.

I find that the "settlements," here, are not agreements of the *Isbrandtsen* type.

Section 15 applies to agreements between persons subject to the Shipping Act,[22] which fix or regulate transportation rates or fares; give or receive special rates, accommodations or other special privileges or advantages; control, regulate, prevent or destroy competition; pool or apportion earnings, losses, or traffic; allot, put or restrict or otherwise regulate the number or character of sailings between ports; limit or regulate in any way the volume or character of freight or passenger traffic to be carried; or in any manner provide for an exclusive, preferential or cooperative working arrangement. Under *Isbrandtsen,* a formal, executed agreement between per-

[22] The Proponents and former Protestants are such persons.

sons subject to the Act which results in conduct encompassed by any of section 15's subject matter categories becomes subject to the Commission's filing and approval requirements whether *vel non* it results from a settlement of differences between parties to a formal proceeding.

There are a number of differences between what went into these "settlements" and the *Isbrandtsen* agreement. The "settlements" are not formal, executed agreements. The "settlements" involve a discrete event and do not govern ongoing relationships—cf. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *American Mail Line* v. *Federal Maritime Commission*, 503 F. 2d 157 (D.C. Cir. 1974)—for, if the Proponents wish, they may, in the future, seek approval of an agreement or agreements containing provisions of the kind they changed or deleted from Nos. 10457 and 10458 without subjecting themselves to allegations of breach.

Arguably, it may be said that the resulting deletions and more restrictive provisions than appeared in the original agreements might subject the "settlements" to section 15 jurisdiction. I think not, at least in this case. The "settlements" were much like what the court referred to as the "agreements," which "were the product of negotiation and compromise between the parties to the agreements, on the one hand, and various independent carriers . . . who were likely to be significantly affected by the agreements on the other." *Sea-Land Service, Inc.* v. *Federal Maritime Commission*, *supra*, 653 F. 2d at 546. Those negotiations and compromises were not placed under the independent scrutiny of section 15 process. It appears that the Commission's requirements were satisfied simply by spreading those facts on the record.

But there is one thing more which tilts these "settlements" away from *Isbrandtsen*. Without belaboring the arguments made in APL's motion for a determination that the principles of collateral estoppel and res judicata govern the agreements identified in Part (A) of the caption or deciding that motion,[23] it is clear that the "settlements" resulted, in effect, in the acceptance by Proponents of the major conditions for approval enunciated in the Commission's Report and Order in Docket No. 80–52. It does not seem to me that "settlements" which are built on the foundation of a pertinent Commission decision require independent section 15 approval.

It should be made clear that I do not find, generally, that negotiations and compromises which result in "settlements" are not subject to section 15's requirements for filing and approval. I merely find that these "settlements," in the limited circumstances of this proceeding, do not require an independent filing for section 15 approval.

II. Proponents Have Established That the Revised Agreement Nos. 10457–1 and 10458–1 Are Required by a Serious Transportation Need, Are

[23] Proponents were not required to and did not reply to the motion.

Necessary to Secure Public Benefits and Are in Furtherance of a Valid Regulatory Purpose.

A: Preliminary Matters

As noted, the Order requires that the agreements identified in Part (A) of the caption be scrutinized under the *Svenska* test.[24] This mandate continues to apply to the revised agreements despite the withdrawal of the originals and the withdrawal of opposition. "[T]he Commission retains an affirmative duty to review an agreement in some detail even when proponents and opponents alike have settled their differences below, because mere acquiescence by private parties does not determine whether the agreement fosters competition in the shipping industry as a whole. *Agreement No. 9902–3 et al. (Modification of Euro-Pacific Joint Service),* [21] F.M.C. [959], 19 S.R.R. 141, 143 (1979)." *Sea-Land Service, Inc.* v. *Federal Maritime Commission, supra,* 653 F. 2d at 550.

Nevertheless, the fact that the agreements were revised has eliminated some issues from consideration as I indicated, without objection, at Prehearing II, pp. 52–57, and as I reiterated in my Findings of Fact. Thus, there will be no need further to address the issues specified in the Order as Nos. 1, 2, 3, 5, 6, 7, 10 and 12, except as they may bear upon other features of the case. In this connection, it should be noted that some of those numbered issues, such as Issue No. 2 regarding vessel or TEU limitations, seemed to be directed more at clearing up ambiguities than with concerns about substantive values. Thus, the insertion of particular vessel and TEU limitations, acceptable to the Commission's staff and Hearing Counsel, appears to satisfy the Commission's interest in Issue No. 2. For similar reasons, Issue No. 4, with respect to the geographic scope of Agreement No. 10457, may be considered removed from consideration.

Issue No. 9 presents a somewhat different problem of clarification, but one which need not be discussed under the *Svenska* test. The Commission asked for justification for authorizing Showa to charter an average of 600 TEUs per month. Mr. Morisaki's testimony demonstrates that, even though those 600 TEUs will apply to the expanded geographical scope of the agreements, they represent only a slight proportional increase over historical experience solely in the Korea/U.S. trade.

Finally, the general, unnumbered ambiguities which the Commission wanted addressed have been resolved under the terms of the reporting requirements, sought by the Commission's staff, which have been made a part of Agreement No. 10457–1.

B: The *Svenska* Considerations

When Agreement No. 10457 was filed, it contained authority for NYK and KMTC to act as one another's agents in, respectively, the U.S. and Korean trades, and to pool revenue carried in the Korea-U.S. trade. These

[24] *See n. 8, supra.*

two features, each of which had been disapproved by the Commission in Docket No. 80–52, were eliminated from Agreement No. 10457–1. There remains for consideration a straight space charter/vessel coordination agreement in which the parties compete head-to-head. By virtue of its space charter and vessel coordination features, the revised agreement dilutes some competition which might otherwise have been occasioned.

In general, Agreement No. 10457–1 should not have a serious, adverse impact on other carriers in either the Korea/U.S. trades or the Hong Kong, Taiwan/U.S. trades. With the addition of direct calls at other Far East ports, the capacity deployable in the Korea/U.S. trades may even decrease from the current level. It is unlikely that the expansion of service to the Hong Kong, Taiwan/U.S. trades would result in any anticompetitive effect in those trades, given the limitations on capacity and frequency.

Approval of Agreement No. 10457–1 should, instead, promote competition, as it will allow new services to enter the Hong Kong, Taiwan/U.S. trades. Also, it will permit KMTC to provide a direct Japan service. The agreement should enhance the commercial stability of the proposed services because fewer resources are to be committed than would be the case if each participant placed vessels in the Hong Kong, Taiwan/U.S. trades. If NYK and KMTC attempted to enter these trades independently, the capital costs and risks to each would be higher than those reasonably to be anticipated under the revised agreements.

It is perceived that the limited reach of Agreement Nos. 10457–1 and 10458–1 will have little anticompetitive effect on the relevant trades. This is reflected by the withdrawal of opposition to the revised agreements. The limited anticompetitive effect is more than balanced by the additional competition likely to flow from allowing new carriers to enter the trades on a stable economic footing.

The Commission recognizes the public benefits which flow from space charter agreements similar to the proponents amended agreements. See, e.g., *Agreement No. 9835*, 14 FMC 203 (1970); *Agreement Nos. 9718–3 and 9731–5*, 19 FMC 351 (1976); *Agreement No. 10470*, Order of Conditional Approval, served August 29, 1983 (FMC). When those benefits seem achievable without the presence of revenue pooling or joint agency, and where no protests are outstanding, the Commission has approved that kind of agreement. E.g., *Agreement No. 10459*, approved, February 23, 1983.

One of the benefits of space charter arrangements is the moderating effect on possible overtonnaging in the trade. Order Amending Order of Investigation and Conditionally Approving Certain Agreements Pendente Lite, Docket No. 82–54, served August 19, 1983. Proponents have shown that they should be able to maintain service levels which would otherwise be difficult to sustain without substantially increasing the number of vessels deployed if they are permitted to block charter and coordinate sailings. It has also been shown that NYK, KMTC and Showa are likely to introduce additional vessels into the trade if the revised agreements are not approved.

Thus, it is fair to find that the space chartering and vessel coordination provisions of the revised agreements should produce the benefit of restricting capacity in the trade.

The Hong Kong/Taiwan-U.S. trade has been volatile in recent years due to the high growth in cargo relative to other Far East countries. Carriers in the Far East trades have added substantial capacity to their services or have announced plans to do so in the near future. By introducing a service with a limited number of vessels, the parties have shown an understanding of the need to limit the potential for overtonnaging in the trades. That understanding is demonstrated further by the parties' limitations on the total vessel capacity to be deployed in the trades to vessels of the size currently operated and on the number of annual sailings. These limitations also should produce the public benefits of reduced fuel consumption and lower transportation costs to shippers which are derived from decreased fuel costs.

Another benefit to be derived of the operations under the revised agreements is a reduction of cargo transshipments from Hong Kong and Taiwan and, in the case of KMTC, Japan. By calling directly at Hong Kong and Taiwan, the parties will be able to provide more efficient and faster service, with a significant reduction in loss and damage often inherent to transshipments. Accordingly, shippers and consignees should, in the future, be provided with a better service than that currently offered by the parties.

The space charter and vessel coordination provisions should allow the parties to establish reliable service on a regular schedule. This produces the further economic benefit which shippers and consignees derive from being able better to plan their shipping schedules.

Another benefit which should be achieved is the reduction of port and terminal congestion in U.S. and foreign ports. The vessel coordination and space charter provisions allow the parties to fix their arrivals at regular intervals, thus allowing use of common terminal and berthing facilities which, in turn, reduces congestion at ports. This, in turn, allows ports better to allocate their own resources.

The revised agreements are likely to serve the valid regulatory purpose of easing the entry of three competitors, each of which has the potential to offer an individual direct service into the Hong Kong/Taiwan trades. Frequent, regular service and elimination of wasteful competition are benefits which the Commission does consider in determining whether to approve agreements. Agreement No. 10116–1, 21 FMC 775, 807–08 (1979).

The remaining particular issue to be considered is Issue No. 8. Here the Commission requested evidence showing whether the authority to coordinate sailings was necessary to achieve the benefits expected. Although there was no opposition to Proponents' revised request for such authority, Proponents furnished sufficient evidence to show that coordinated sailings are needed to obtain the expected benefits under both revised agreements.

Under Agreement No. 10457–1, the beneficial effect to be obtained by way of reducing the vessels and tonnage needed to provide regular, semi-monthly service with only three vessels would be seriously impaired, if not prevented entirely, absent vessel coordination. Moreover, the benefits of reducing port and terminal congestion and maintenance of regular, reliable service would be at risk absent vessel coördination. Without the ability to rely upon the schedule established by the other party or parties, it would be difficult to guarantee shippers or consignees regular sailing dates. In addition, Showa would be deprived of guaranteed sailing dates under Agreement No. 10458–1.

I find that the authority to coordinate sailings is a necessary part of this chartering agreement.

Accordingly, I find that Agreement Nos. 10457–1 and 10458–1 are required by a serious transportation need, are necessary to secure public benefits and are in furtherance of a valid regulatory purpose.

ORDER

It is ordered that Agreement Nos. 10457–1 and 10458–1 be approved.

It is further ordered that these agreements shall not be implemented or take effect until such time as the Federal Maritime Commission receives appropriate notice that the Korea Maritime and Port Administration has approved Agreement Nos. 10457–1 and 10458–1. These agreements, under their own terms, shall expire on the third anniversary after approval by this Commission.

(S) SEYMOUR GLANZER
Administrative Law Judge

APPENDIX I

FMC AGREEMENT NO. 10457–1

This Agreement made in Seoul, Korea the 6th day of September, 1983, by and between the undernoted parties.

Witnesseth:

WHEREAS, Korea Marine Transport Co., Ltd. (KMTC) and Nippon Yusen Kaisha (NYK) (hereafter sometimes the "parties") currently coordinate their containership services in the trade between Korea and the Pacific Coast of the United States under the terms of Agreement No. 10332 as approved by the Federal Maritime Commission; and

WHEREAS, KMTC and NYK now desire to inaugurate as their exclusive direct services in the trades between Korea, Taiwan and Hong Kong and the Pacific Coast of the United States a space chartering arrangement as hereinafter described.

NOW, THEREFORE, in consideration of the premises and of the mutual undertakings of the parties, it is hereby agreed as follows:

1. *Service and Sailings:*

(a) The parties will operate three containership vessels between ports in Korea, Taiwan and Hong Kong and the Pacific Coast of the United States, excluding ports in the States of Hawaii and Alaska. The total capacity of the said vessels shall not exceed 2923 TEU's and the parties shall offer no more than 28 sailings per annum, with the maximum amount of space which may be operated and cross-chartered on the vessels during any calendar year not exceeding 27,343 TEU's Eastbound and 27,343 TEU's Westbound. The parties shall schedule and advertise their sailings in the trades as to promote optimum vessel utilization, provided that one or more of the parties' vessels may call at a port or ports in Japan to load and discharge any KMTC cargo moving to or from Japan. All vessels operated by the parties to this Agreement or by either of them in the trades between Korea, Taiwan, and Hong Kong and the Pacific Coast of the United States shall be operated under this Agreement.

(b) In the event any vessel is lost or damaged, the parties may substitute another appropriate vessel provided that the capacity limitation stated in Article 1(a) is not exceeded. The Parties will notify the Korea Maritime and Port Administration (KMPA) and the Federal Maritime Commission (FMC) of any such substitutions.

2. *Containerized Cargo:*

The cargo subject to this Agreement is that which is placed in containers for shipment of the parties' container vessels, but nothing herein shall preclude the parties from carrying on their own container vessels other available cargo.

3. *Bills of Lading:*

The parties shall operate their own respective common carrier services, issuing their own separate bills of lading.

4. *Agents:*

Neither party shall act as the agent of the other in the trades covered by this Agreement, and the parties shall not have a common agent, except in the United States until March 31, 1984.

5. *Charterage:*

(a) The parties shall ship their loaded and empty containers (including containers which they own, lease or control) on their vessels and on each other's vessels, and shall charter space to and from each other on terms as they may agree. The parties shall report the essential terms of their space charter arrangements in writing to the FMC and shall provide the level of compensation under the charter agreement upon the request of the FMC's Director of the Bureau of Agreements and Trade Monitoring. Subject to their own priorities, the parties may also charter and/or subcharter no more than 600 TEU's per average calendar month, but not to exceed 780 TEU's in any single month, to Showa Line, Ltd. only, on terms as they may agree. KMPA and FMC shall be notified within 30 days of any and all charter arrangements agreed upon. Any continuing charter agreement with Showa Line shall not be implemented without prior FMC approval.

(b) The parties may load or discharge cargo, on or from the vessels which they employ for direct calls within the trades as referred to herein, provided that the parties will not transport in the service authorized herein any transshipment cargo except such cargo originating or terminating in Alaska, the Philippines, Singapore, or Malaysia. Not more than 3000 TEU's Eastbound and 3000 TEU's Westbound of the capacity shall be used for the carriage of such transshipment cargo during any calendar year. Any transshipment arrangements which they may individually conclude with other carriers shall be filed with the FMC as may be necessary.

6. *Force Majeure, Strikes:*

In the event of force majeure, marine casualty, or any circumstances where a carrying vessel is "off-hire" and the chartering arrangements provided for in Article 5 are frustrated, the parties shall adjust their account to the extent that services have been contracted for but not rendered. In the case of strikes, lockouts, work stoppage or slowdowns, or other labor disturbances which render it necessary to cease operation of one or more of their container vessels, the parties may utilize or operate under the terms of this Agreement such substitute vessel or vessels as they may agree, provided that the capacity limitation stated in Article 1(a) is not exceeded.

7. *Container Interchange:*

The parties may interchange their empty containers and/or related equipment as the circumstances and conditions of the trade may require, subject to such mutually acceptable terms and conditions as they may see fit. The parties shall report the essential terms of their interchange arrangements in writing to the FMC.

8. *Modifications:*

The terms of this Agreement may be modified upon mutual consent in writing of the parties. Copies of such modifications shall be promptly furnished to KMPA and FMC for whatever approvals may be required by the laws of the Republic of Korea and of the United States.

9. *Withdrawal:*

NYK may withdraw from this Agreement by giving one hundred eighty (180) days' prior written notice to the other party, KMPA and the FMC, and KMTC may withdraw from this Agreement by giving ninety (90) days' prior notice to the other party, KMPA and the FMC.

10. *Non-assignment:*

The parties hereto shall not assign or transfer this Agreement or all or any part of its rights hereunder to any person, firm or corporation without the prior written consent of the other party.

11. *Effectiveness:*

This Agreement shall become effective when approved by the KMPA and by the FMC, and upon the said effective date, Agreement No. 10332, as then in effect, shall terminate. The parties shall notify the FMC of the date of KMPA's approval.

12. *Reports:*

The parties shall submit to the FMC, on a semiannual basis, reports describing their operations under the Agreement. A copy of the form on which the reports will be filed is attached to this Agreement.

13. *Termination:*

This Agreement shall terminate on the 3rd anniversary of the FMC's approval.

IN WITNESS WHEREOF, the parties have executed this Agreement through their responsible representatives duly authorized as of the date and year hereinabove first written.

Korea Marine Transport Company, Ltd.
Nippon Yusen Kaisha

GEORGE A. QUADRINO
Attorney-in-Fact

TABLE NO. 1
AGREEMENT NOS. 10457/10458
WESTBOUND
LEVELS OF CAPACITY
FOR THE PERIOD__________ THRU __________[1]

			Capacity[4]		
Carrier	Vessel Name[2]	Vessel Type[3]	On-Deck (TEU's)	Below-Deck (TEU's)	Total Bale (Cubic Feet)
	(a)	(b)	(c)	(d)	(e)

[1] E.g., January–March, 1983. This report should be compiled quarterly and submitted semi-annually no later than 60 days after the conclusion of each semi-annual period, concluding June 30 and December 31.

[2] List each vessel deployed as part of this agreement by each participating carrier.

[3] C = Container; SC = Semi-container; and B = Breakbulk.

[4] For fully containerized vessels, it is sufficient to provide total TEU capacity rather than On-Deck TEU's, Below-Deck TEU's and Total Bale.

	Total Capacity			
No. of Sailings	On-Deck (TEU's)	Below-Deck (TEU's)	Bale (Cubic Feet)	Vessel Utilization[5]
(f)	(g) (c) × (f)	(h) (d) × (f)	(i) (e) × (f)	(j)

[5] Estimate vessel utilization at departure from last American port. Explain how capacity utilization was calculated for each type of vessel deployed.

TABLE NO. 2
AGREEMENT NOS. 10457/10458
EASTBOUND
LEVELS OF CAPACITY
FOR THE PERIOD__________ THRU __________[1]

			Capacity[4]		
Carrier	Vessel Name[2]	Vessel Type[3]	On-Deck (TEU's)	Below-Deck (TEU's)	Total Bale (Cubic Feet)
	(a)	(b)	(c)	(d)	(e)

[1] E.g., January–March, 1983. This report should be compiled quarterly and submitted semi-annually no later than 60 days after the conclusion of each semi-annual period, concluding June 30 and December 31.
[2] List each vessel deployed as part of this agreement by each participating carrier.
[3] C = Container; SC = Semi-container; and B = Breakbulk.
[4] For fully containerized vessels, it is sufficient to provide total TEU capacity rather than On-Deck TEU's, Below-Deck TEU's and Total Bale.

Total Capacity

No. of Sailings	On-Deck (TEU's)	Below-Deck (TEU's)	Bale (Cubic Feet)	Vessel Utilization [5]
(f)	(g) (c) × (f)	(h) (d) × (f)	(i) (e) × (f)	(j)

[5] Estimate vessel utilization at departure from last Far East port. Explain how capacity utilization was calculated for each type of vessel deployed.

TABLE NO. 3
AGREEMENT NOS. 10457/10458
USAGE OF SPACE CHARTER ALLOCATIONS
FOR THE PERIOD __________ THRU __________ [1]

Cargoes Booked By: [2]	On Vessels of:	Eastbound	Westbound
KMTC	KMTC NYK		
NYK	KMTC		
Showa	KMTC NYK		

[1] I.e., July–Sept. 1983. This report should be compiled quarterly and submitted semi-annually no later than 60 days after the conclusion of each semi-annual period including June 30 and December 31.

[2] If containers report in TEU's. If breakbulk report in short tons.

APPENDIX II

FMC AGREEMENT NO. 10458–1

THIS AGREEMENT made in Seoul, Korea on the 6th day of September, 1983, by and between the undernoted parties.

WITNESSETH:

WHEREAS, pursuant to the authority contained in Article 5 of Agreement No. 10457, Korea Marine Transport Company, Ltd (KMTC) and Nippon Yusen Kaisha (NYK) desire to continue to charter space to Showa Line, Ltd. (Showa) on vessels which they are authorized to operate in the trades between Korea, Taiwan and Hong Kong and the Pacific Coast of the U.S.A; and

WHEREAS, Showa desires to continue to charter space from KMTC and NYK on the said vessels.

NOW, THEREFORE, in consideration of the premises and of the mutual undertakings of the parties, it is hereby agreed as follows:

1. KMTC and NYK hereby agree to subcharter to Showa space not to exceed 600 TEU's, to be accomplished on an average monthly basis, but not to exceed 780 TEU's in any single month, on the vessels which they are authorized to operate in the said trades, and Showa hereby agrees to charter space from KMTC and NYK not to exceed the said maximum. The term of this Agreement and the charter shall commence upon the termination of Agreement No. 10332, as amended, and shall expire upon the earlier of (1) termination of Agreement No. 10457 or (2) the third anniversary of the FMC's approval of this Agreement. In the event the Agreement expires because of termination of Agreement No. 10457, the parties shall promptly notify the Commission of such event. Said charter may also include such customary terms and conditions of charter as the parties may agree not inconsistent with this Agreement regulating the relationship between charterer and vessel owners, including space allocation, stowage, charter hire, cargo claims, marine liability, vessel liens, breaches and arbitration. The parties may implement the said charter as authorized herein upon notification to Korea Maritime and Port Administration (KMPA) and Federal Maritime Commission (FMC).

2. In connection with said charter, Showa shall at all times issue its own bills of lading in respect to the cargo, including such transshipment cargo as it is permitted to carry herein, it books and shall be responsible to its customers for delivery, care and carriage of the cargo, and shall hold KMTC and NYK harmless. Showa shall not transport in the service authorized herein any transshipment cargo except such cargo originating or terminating in Alaska, the Philippines, Singapore, or Malaysia. Showa shall carry such transshipment cargo subject to the limitation as is imposed under Article 5(b) of Agreement No. 10457. Showa's direct service in the trades between Korea, Taiwan, and Hong Kong and the Pacific Coast

of the United States shall be provided exclusively on space chartered under this Agreement.

3. This Agreement shall take effect when approved by KMPA and FMC, whichever is the later. The parties shall notify the FMC of the date of KMPA's approval.

IN WITNESS WHEREOF, the parties have executed this Agreement through their responsible representatives duly authorized as of the date and year hereinabove written.

Korea Marine Transport Company, Ltd.
Nippon Yusen Kaisha
Showa Line, Ltd.

(S) GEORGE A. QUADRINO
Attorney-in-Fact

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–31

VOLUME INCENTIVE PROGRAM—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

NOTICE

February 29, 1984

Notice is given that no exceptions have been filed to the January 19, 1984 initial decision on the adjudicatory portion of 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) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–31

VOLUME INCENTIVE PROGRAM—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

Held:

1. Where two conferences published tariffs containing a novel marketing scheme called a Volume Incentive Program (VIP), wherein each conference member gives refunds to qualified enrollees based upon a portion of the freight revenues it receives during a twelve-month period, provided the total freight dollars paid by the enrollee exceed certain stated levels of revenue, and where each of the two conferences has general rate-making authority in agreements previously approved by the Commission under section 15 of the Shipping Act, 1916, the VIP, as reflected in the appropriate tariff, is interstitial to the basic agreements which themselves contain the authority to implement the VIP.
2. Where each VIP provides that it is to be administered by an independent accounting firm which is to collect funds from each carrier to pay out the refunds; and where the accountant invoices each carrier monthly and places the funds received in separate accounts for each member, which funds are also kept separate and apart from conference revenues; and where the accountant will pay refunds directly to the qualified enrollee—the operation of the VIP does not result in a pooling agreement requiring approval under section 15.
3. Where the VIPs provide for refunds ranging from 5 to 10 percent based on increments of freight dollars ranging from five hundred thousand dollars to two million dollars, the allocations are reasonable and based on recognized rate-making factors and do not violate sections 16 or 17 of the Shipping Act, 1916. Further, none of the other provisions of the VIPs are unjustly discriminatory or unduly or unreasonably preferential so as to violate section 16 or 17 of the Act.
4. Where the adjudicatory aspect of a proceeding is bifurcated from possible rulemaking so as to expedite disposition of the adjudicatory issues; and where the record establishes that disposition of the adjudicatory case warrants approval of the VIPs; and where the record indicates that approval of the VIPs will not hinder or thwart any possible rulemaking, and indeed, may aid in such rulemaking; the VIPs may be implemented as soon as possible without having to await the outcome of any rulemaking that may later ensue.

Charles F. Warren, George A. Quadrino, David N. Dunn and *Benjamin K. Trogdon* for Respondents New York Freight Bureau and Trans Pacific Freight Conference (Hong Kong).

Robert T. Basseches, Timothy K. Shuba and *David B. Cook* for Respondent American President Lines.

Edward M. Shea, John E. Vargo and *Linda J. Gyrsting* for Respondent Sea-Land Service, Inc.

Raymond P. DeMember for Intervenor International Association of NVOCCs.

John Robert Ewers and *Stuart James* for Bureau of Hearing Counsel.

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

Finalized February 29, 1984

Preliminary Matters

On July 29, 1983, the Commission served its Order of Investigation and Hearing and Notice of Rulemaking wherein it recited that, "On July 1, 1983, the members of Agreements Nos. 10107 and 10108 instituted a novel marketing scheme which they have designated the 'Volume Incentive Program' (VIP). The salient feature of this arrangement is a refund to the shipper based upon the total freight dollars received by all agreement members during a twelve month contract period." [2]

In its Order, the Commission discussed certain aspects of the VIP program in question and stated:

> THEREFORE, IT IS ORDERED, That pursuant to sections 15, 16, 17, and 22 of the Shipping Act, 1916, (46 U.S.C. §§814, 815, 816, and 821) an investigation shall be instituted to determine whether the practices of respondents named herein, as they related to their Volume Incentive Programs, are in violation of sections 15, 16 First, or 17 of the Shipping Act, 1916. This investigation will address only material factual and legal issues, including those discussed above; and
>
> IT IS FURTHER ORDERED, That as part of this investigation a determination shall be made as to whether the Commission's General Order 13 should be amended to include a rule governing volume incentive programs (refunds based on total freight revenues received). If the record developed in this proceeding demonstrates that such a rule is needed, the initial decision shall propose the promulgation of an appropriate rule; and
>
> IT IS FURTHER ORDERED, That the members of Agreements Nos. 10107 and 10108 are hereby made Respondents in this proceeding; and
>
> IT IS FURTHER ORDERED, That in accordance with the Commission's Rules (46 C.F.R. §502.42) the Bureau of Hearing Counsel is hereby made a party to this proceeding; . . .
>
> * * * * *
>
> IT IS FURTHER ORDERED, That persons other than those named herein having an appropriate interest and desiring to participate in this proceeding may petition for leave to intervene pursuant

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

[2] As will become clearer in latter portions of this decision, as of September 12, 1983, the agreements themselves were dissolved and the agreement members became members of either the Trans Pacific Freight Conference (TPFC(HK)) or the New York Freight Bureau (NYFB), whose tariffs are now in question in this proceeding.

to section 502.72 of the Commission's Rules (46 C.F.R. § 502.72); . . .

As the case progressed, several petitions to intervene were filed. The International Association of NVOCCs (NVOs) were allowed to intervene for all purposes. The Atlantic & Gulf-Indonesia Conference, et al.; the United States Atlantic & Gulf-Southeastern Caribbean Conference, et al.; the Westwood Shipping Lines, Inc.; and the North Europe Conferences (NEC) were allowed to intervene with respect to the rulemaking aspects of the proceeding. In addition to the petitions to intervene, the respondents filed a motion to sever the section 15 authority issue in the case and to expedite the hearing of that issue. The motion was denied as to section 15 alone. Instead, all parties agreed to adjudicate expeditiously all of the merit issues relating to sections 15, 16 and 17. After several prehearing conferences, the case was heard on November 18, 1983.

Before setting down any findings of fact, discussing the issues involved and reaching any decision, it must be made clear at the outset that this decision applies only to the provisions set forth in the agreements and the tariffs involved. It is an ad hoc decision which does not apply to other agreements or tariff provisions which may contain dissimilar provisions or even factual variations within the ambit of the provisions considered herein. Further, while this decision may refer to "the VIP," it means *this* VIP and no other. The temptation to lump together all VIP agreements or tariff provisions to which one might ascribe validity because of statements made within this decision is great, but such an approach would be wrong. There is no magic in the label "VIP" and, in future cases, standing alone, it should connote nothing more than a type of agreement which may or may not be approvable under section 15, and acceptable under other provisions of the Shipping Act, 1916.

Findings of Fact

1. The Trans Pacific Freight Conference, Hong Kong (TPFC(HK)), functions pursuant to Commission approved Agreement No. 14, as amended, from or via Hong Kong and ports or inland points in Macao, Taiwan, Cambodia, and Vietnam to Hawaii, Alaska and U.S. Pacific Coast ports or inland points in the United States via such ports. Ex. 1, para. 3; App. 1.

2. The New York Freight Bureau (NYFB) functions pursuant to Commission approved Agreement No. 5700, as amended, from ports in Hong Kong, Macao, and Taiwan to United States Atlantic and Gulf Coast ports. Ex. 1, para. 3; App. 1.

3. On July 1, 1983, the members of Agreements Nos. 10107 and 10108 instituted a novel marketing plan which they designated the "Volume Incen-

tive Program'' (VIP).[3] Order of Investigation and Hearing, etc., served July 29, 1983.

4. The VIP provisions, referred to in paragraph 3 above, provided that upon the cancellation of the Agreements, the obligations of the members would inure to, and be binding upon, those members of the successor conferences who might elect to join. On September 12, 1983, Agreements Nos. 10107 and 10108 were cancelled because all of their members withdrew. Those members, with the exception of Mitsui O.S.K. Lines, Ltd., which only became a member of NYFB, then became members of TPFC(HK) and NYFB, which Conferences became the successors to the VIP originally set forth in Agreements Nos. 10107 and 10108.[4] Ex. 1, para. 6; Apps. 2, 3, 4.

5. On October 19, 1983 (effective November 18, 1983), the Conferences suspended their VIP tariff rules. They now read as follows:

(I) Effective 18th November, 1983, Rules 150 and 150.1 of this Tariff are hereby temporarily suspended pending the Federal Maritime Commission's determination of Section 15 issues in FMC Docket No. 83–31. In the event said issues are decided in favour of the Bureau, the Rules shall be promptly reinstated in which event the period of suspension shall be added to the period of enrollment in computing the enrollee's twelve (12) month period.

Rule No. 150 VOLUME INCENTIVE PROGRAM (VIP)

Members of New York Freight Bureau will pay refunds as set forth below to qualified shippers and consignees who have enrolled under, and who comply with all of the terms and conditions of, the Volume Incentive Program (VIP) as described in this rule.

The VIP refund will be applied to total VIP freight dollars by all transportation modes utilized by Bureau members and shall be calculated according to the following scale for each enrollment period:

12 Month Total VIP Freight Dollars	Percentage of Refund (Note 3)
From US $500 thousand to US $999,999.99	5.0 percent
From US $1.00 million to US $1,999,999.99	7.5 percent

[3] The VIP was set forth in Rule 150, et seq., of FMC Agreement No. 10107 Common Tariff No. 2–FMC–3, and in FMC Agreement No. 10108 Common Tariff No. 1–FMC–1.

[4] As of July 1, 1983, the members of Agreement No. 10107 were American President Lines, Ltd.; Barber-Blue Sea Line J/S; The East Asiatic Company, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Korean Marine Transport Co., Ltd.; Mitsui O.S.K. Lines, Ltd.; Moller-Maersk Line, A.P.; Sea-Land Service, Inc.; United States Lines, Inc.; and the Trans Pacific Freight Conference (Hong Kong). The members of Agreement No. 10108 were Barber-Blue Sea Line J/S; Kawasaki Kisen Kaisha, Ltd.; Moller-Maersk Line, A.P.; United States Lines, Inc.; and the New York Freight Bureau.

The VIP was incorporated in TPFC(HK) and NYFB tariffs.

12 Month Total VIP Freight Dollars	Percentage of Refund (Note 3)
US $2.0 million and over	10.0 percent

Examples of application of refund are as follows:

Account A—12 months revenue dollars of 700,000 qualifies for 5% refund equal to 35,000.

Account B—12 months revenue dollars of 1.5 million qualifies for 7.5% refund equal to 112,500.

Account C—12 months revenue dollars of 3.0 million qualifies for 10% refund equal to 300,000.

Except as otherwise provided, the provisions of the VIP may be modified or cancelled subject to the following:

(a) Changes which result in a monetary benefit to the qualified enrollee under this Rule will be effective immediately.

(b) Changes which result in a reduction of monetary benefit to the qualified enrollee will apply only to new or renewed enrollments.

Note 1: VIP freight dollars will be composed only of port to port (ocean) freight charges and will exclude the following additionals and charges:

1. Macao Arbitraries
2. Heavy Lifts Charges (Rule 4)
3. Long Length Charges (Rule 5)
4. Diversion Charges (Rule 23)
5. Destination Delivery Charges (Rule 64A)
6. TRS Charges (Rule 48)
7. CFS Receiving Charges (Rule 59)
8. Container/Equipment Detention Charges at Base Loading Ports (Rule 61)
9. Container/Equipment Detention Charges at Discharging Ports (Rule 62)
10. Demurrage Charges at Discharging Ports (Rule 67)
11. Detention in Transit Charges (Rule 79)
12. Storage Charges at Base Loading Ports (Rules 80 & 80A)
13. Bunker Surcharge (if applicable)
14. Currency Surcharges (if applicable)

(C) Note 2: For purpose of calculating the quatum [sic] of the refund, all VIP freight dollars paid to all members of New York Freight Bureau for cargo moving under the Bureau tariff will be combined.

Note 3: Refunds will be paid in U.S. dollars only to the qualified enrollees.

Terms & Conditions

1. A "qualified enrollee" must be the manufacturer, seller or purchaser having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export or import cargo as applicable and who is named as a shipper or consignee on bills of lading or whose corporate affiliate is so named.
2. All enrollees must complete the enrollment form contained in Rule 150.1 and submit same to the Bureau Chairman/Secretary. The Bureau Chairman/Secretary shall assign the enrollment number which must be placed on all bills of lading covering cargo moving under VIP. Only one number may appear on a bill of lading to ensure the appropriate VIP refund. The name of the qualified enrollee or its affiliate and the applicable enrollment number must also appear on the bill of lading. All communications in connection with the VIP must be sent directly to the Bureau Chairman/Secretary's office. To assure prompt attention, each communication originating outside of Hong Kong should be sent by registered air mail and the notation "VIP" should be clearly marked on the envelope.

   Exception: On cargo shipped during the month of July, 1983 by a qualified enrollee or affiliate, any bills of lading which do not contain the enrollment number, may be submitted to the Chairman/Secretary by the enrollee or its affiliate for inclusion in the VIP.
3. Each enrollment shall run for 12 months starting from the first day of the month immediately following enrollment. The bill of lading date shall determine the month in which each shipment is to be credited.

   Exception: Initial application for enrollment during the month of July will be in effect on all shipments from 1st July, 1983.
4. VIP refunds shall become due and payable as soon as practicable, but not later than 60 days after completion of each individual 12 month enrollment period. Payment of VIP refunds shall be made by the Bureau's Independent Accountant directly to the qualified enrollee. In the event an enrollee ceases to ship with the Bureau at any time during the 12 month period, any refunds accrued for his account during the period of his participation will be paid as above.
5. All freight payments in respect of cargo originating in Hong Kong, Macao and Taiwan carried by all members of the Bureau destined to all New York Freight Bureau ports will be included in the VIP.

6. All freight payments in respect of commodities moving under the following tariff or successor or reissues thereto: New York Freight Bureau Tariff No. 27–FMC–14 will be included in the VIP.
7. Carriers will supply directly to the Bureau Chairman/Secretary and/or the party designated by the Bureau Chairman/Secretary such supporting documents as are required to ensure appropriate and timely application of the VIP refund. Any question regarding the application or administration of VIP shall be referred to the Bureau Chairman/Secretary by the enrollee with such supporting documentation as may be applicable. Decisions of the Bureau Chairman/Secretary shall be final and binding.
8. All tariff rates and conditions in effect at the time of shipment shall apply to VIP.
9. No refunds will be paid unless and until all freight and charges for the period and shipments in question, including charges for cargo in transit, have been paid to the carriers.
10. Freight revenue of a "qualified enrollee's" parent, subsidiary, or other related companies listed in the enrollment form who may engage in the shipment of commodities under this tariff and over whom the enrollee regularly exercises direction and working control in relation to shipping matters, whether the shipments are made by or in the name of the enrollee, any such related company, or an agent or shipping representative acting on the enrollee's behalf, shall be counted as revenue to the enrollee. The names of such related companies shall be listed on the VIP enrollment form. The enrollee warrants and represents that the list is true and complete, that he will promptly notify the Bureau Chairman/Secretary in writing of any future changes in the list, and that he has the authority to enroll under the VIP on behalf of the related companies so listed. To insure proper credit under the VIP, all bills of lading covering qualified shipments must contain the enrollment number.

    Exception: Bills of lading covering qualified shipments during the month of July, 1983 may be submitted to the Bureau Chairman/Secretary without the enrollment number.

    Effective 18th November, 1983, Rules 150 and 150.1 of this Tariff are hereby temporarily suspended pending the Federal Maritime Commission's determination of Section 15 issues in FMC Docket No. 83–31. In the event said issues are decided in favour of the Bureau, the Rules shall be promptly reinstated in which event the period of suspension shall be added to the period of enrollment in computing the enrollee's twelve (12) month period.

(C) Rule No. 150.1 SPECIMEN OF VOLUME INCENTIVE PROGRAM (VIP)

The following specimen enrollment form on enrollee's company letterhead shall be completed signed and forwarded to the Chairman/Secretary, New York Freight Bureau c/o Commercial Management Ltd., 801–4 Sincere Building, 173 Des Voeux Road Central, Hong Kong (Telex Number: 73701 ANSWERBACK SIGNAL: COMMAN HX, Telephone Number: 5–445077) and a copy of the form, with an enrollment number, will be promptly returned to the enrollee:

Chairman/Secretary,

New York Freight Bureau,

c/o Commercial Management Ltd.,

801–4 Sincere Building,

173 Des Voeux Road Central,

Hong Kong.

Re: New York Freight Bureau's—FMC Agreement No. 5700—Volume Incentive Program

Dear Sir:

(Name of Shipper or Consignee) hereby applies for enrollment in Volume Incentive Program (VIP) on terms and conditions as are specified in Rule 150 of FMC Agreement No. 5700 tariff as on file with the Federal Maritime Commission.

We understand that our participation in the VIP will run for a period of 12 months commencing on the first of the month immediately following enrollment, and as soon as possible after each 12 month period (but not later than 60 days therafter), a refund will be paid for shipping cargo on Bureau members' vessels in accordance with the terms and conditions of Rule 150.

Under terms of Rule 150, we further understand that refunds will be paid in U.S. dollars only to the qualified enrollee, but will not be paid unless the assigned enrollment number appears on the bills of lading covering the cargo movement.

Yours faithfully,

(S) ______________________

ENROLLEE'S NAME (PLEASE PRINT)

____

ADDRESS

____

____

____

TELEX

____

NAME AND ADDRESSES OF LEGALLY AFFILIATED COMPANIES (SEE RULE NO. 150, SECTION 10) AUTHORIZED TO USE OUR ENROLLMENT NUMBER ARE AS FOLLOWS:

____

____

____

____

(C) Enrollment Number Assigned by Chairman/Secretary of New York Freight Bureau

______________________ [5]

Ex. 1, App. 4.

[5] In essence, the TPFC(HK) tariff is exactly like that of the NYFB tariff, except that the Freight Dollars in relation to Percentage of Refunds are as follows:

12 Month Total VIP Freight Dollars	*Percentage of Refund (Note 3)*
From US $1.00 million to US $2,499,999.99	5.0 percent
From US $2.50 million to US $4,999,999.99	7.5 percent
US $5.0 million and over	10.0 percent

Examples of application of refund are as follows:

Account A—12 months revenue dollars of 1.5 million qualifies for 5% refund equal to 75,000.

Account B—12 months revenue dollars of 3.0 million qualifies for 7.5% refund equal to 225,000.

Account C—12 months revenue dollars of 7.0 million qualifies for 10% refund equal to 700,000.

6. As of October 31, 1983, 106 enrollees were participating in the TPFC(HK) VIP, and 66 of these use affiliates. The NYFB has 72 enrollees, 47 of whom list affiliates. Five enrollees have qualified for a refund in the TPFC(HK), and one enrollee has qualified in the NYFB. Ex. 1, App. 7, paras. 4, 5.

7. The difference in the range of freight dollar increments in paragraph (5) above is attributable to the substantially smaller volume of cargo moving in the NYFB trade. Ex. 1, para. 10.

8. Under Tariff Rule No. 150 as filed, a "qualified enrollee" was defined to be a manufacturer, seller or purchaser having a proprietary financial interest in the cargo and who is named as a shipper or consignee on the bill of lading, or whose corporate affiliate is so named. Ex. 1, para. 11; App. 4.

9. The enrollee, however, must have listed the names of its affiliates on the enrollment form and only then may an affiliate use the enrollee's enrollment number on the shipments it makes. Ex. 1, para. 11; App. 4.

10. The Conferences have taken action in Hong Kong, however, to revise the definition of "qualified enrollee" in Rule 150 to specifically include NVOCCs within that definition. Tr. p. 23; App. 4.

11. In order to qualify, an enrollee must complete the enrollment form contained in Rule 150.1, which is then processed by the Chairman/Secretary of the Conference for assignment and issuance of an enrollment number. Ex. 1, para. 11; App. 4.

12. It is required that the assigned number and the name of the enrollee or affiliate appear on all bills of lading covering the cargo moving under the VIP. Ex. 1; para. 11; App. 4.

13. The cargo shipped by an enrollee over 12 consecutive months is the basis the rule specifies for purposes of calculating the refund entitlement. This period commences on the first day of the month following submission of the completed enrollment form. Ex. 1, para. 11; App. 4.

14. Upon the completion of each 12 month period, but not later than 60 days thereafter, refunds are due and payable, provided all freight and charges have been paid. Ex. 1, para. 11; App. 4.

15. After the enrollment period has been completed, there is no obligation on the enrollee to do anything more in order to receive the benefit to which it is entitled. Ex. 1, para. 12; App. 4.

16. The Conferences have each appointed the international accounting firm of Peat, Marwick and Mitchell (PMM) to administer the task of paying out the refunds directly to each qualified enrollee. Ex. 1, para. 12; App. 4.

17. PMM will invoice each carrier for the amount for which it is liable under the VIP on a monthly basis, with collections within 60 days. Ex. 1, App. 7, para. 8.

18. The only Conference members who advance monies for the maintenance of accounts in their names are those which move cargo for qualified enrollees. Ex. 1, App. 7, para. 8.

19. The amount each conference member pays into its member account with PMM is based on the revenues paid to it by enrollees. Ex. 1, App. 7, para. 8.

20. PMM will notify the individual conference members of their potential VIP refund liability on a monthly basis, and the members will, in turn, submit the monies to PMM. Ex. 1, App. 7, para. 8.

21. The individual contributions to be made will be based upon each member's recent carryings plus an additional 10 percent to account for anticipated growth. Ex. 1, App. 7, para. 8.

22. All member accounts are maintained separate and apart from conference revenues, as the monies are collected by PMM and placed in a separate account for each member. Ex. 1, App. 7, para. 8.

23. The accounts will not be commingled with conference funds, and they will be maintained so that each enrollee's status can be determined at any time. Ex. 1, App. 7, para. 8.

24. No revenues derived outside of the VIP will be included in the separate member accounts. Ex. 1, App. 7, para. 8.

25. PMM will handle only monies derived from and related to the VIP. Ex. 1, App. 7, para. 8.

26. PMM will send a detailed monthly statement to each enrollee showing the calculation of the revenue generated pursuant to the VIP both on a monthly and cumulative basis. Ex. 1, App. 7, para. 9.

27. PMM will also determine the level and amount of any refund at the end of the VIP pursuant to the governing tariff rule. Ex. 1, App. 7, para. 9.

28. Any question regarding the application or administration of the VIP will be referred to the Chairman/Secretary by the enrollee with supporting documentation. Ex. 1, App. 7, para. 10.

29. Any refund earned will be paid solely to the enrollee whose VIP number must appear on the bill of lading. Ex. 1, App. 7, para. 12.

30. Since each member will pay PMM his contribution on a regular current basis, if a member should resign, there should be sufficient funds available to satisfy his obligations to an enrollee. Ex. 1, App. 7, para. 13.

31. The VIP uses "revenue" received rather than "quantity" as a basis for determining a refund because of the nature of the Hong Kong/Taiwan-U.S. trade. Ex. 1, App. 7, para. 1.

32. The trade is dominated by consignees who are major retailers and department stores who import a wide variety of consumer goods. Ex. 1, App. 7, para. 1.

33. Inherent in the importation of consumer goods for retail sale is the problem that the commodity mix of goods which is shipped varies

greatly, not only from season to season, but also from sailing to sailing. Ex. 1, App. 7, para. 1.

34. Additionally, the same consignees will use all major forms of transportation offered by the Conference including all water, mini-landbridge, and interior point intermodal. Ex. 1, App. 7, para. 1.

35. This wide range of commodities, types of shipments, and use of various forms of carriage makes it difficult to base a VIP on the "quantity" of cargo shipped. Ex. 1, App. 7, para. 1.

36. By utilizing the amount of revenue produced, variables resulting from use of different types and sizes of containers, relative cargo mix between consignees, and the difference in rates filed by individual members under independent action are all harmonized. Ex. 1, App. 7, para. 1.

37. TPFC(HK) and NYFB separately established, through conference deliberation, the refund levels in their respective tariff rules. Ex. 1, App. 7, para. 5.

38. The qualifying refund levels were established after considering various trade factors including the rates being offered by non-conference lines on an average basis. Ex. 1, App. 7, para. 5.

39. Currently, 19 non-conference carriers offer regular service with modern vessels and equipment in competition with the 11 TPFC(HK) members while 8 non-conference carriers compete with a similar number of NYFB members. Ex. 1, paras. 23–24; App. 10; Ex. 3, para. 3.

40. By 1982 competition from non-conference carriers had pushed rates below levels prevailing in 1978. Ex. 1, para. 25; App. 11.

41. As non-conference carriers have adjusted their rate schedules to attract larger shippers, the conferences believed that it was necessary to provide for increased percentage refunds in the VIP to assure that the larger shippers and consignees would continue to use their services once the initial qualifying refund level was met. Ex. 1, App. 7, para. 5.

42. It was believed by the conferences that a 10 percent maximum refund, when combined with the revenue level, was sufficient to provide adequate incentive for large volume shippers and consignees to use their services. Ex. 1, App. 7, para. 5.

43. The VIP was suspended effective November 18, 1983, in an attempt to limit any potential antitrust liability. Ex. 1, paras. 7–8; App. 4.

44. The conferences, in establishing the VIPs, relied upon the basic ratemaking authority contained in Article 6, entitled "Freight Charges," of each respective conference agreement. Ex. 1, para. 14; App. 1, Tr. pp. 32–33, 35.

45. At the present time, the Commission has in place time-volume rules. 46 CFR 536.7.

46. The Commission's current time-volume rules are based on a specific or minimum quantity of cargo moving over a specified period of time. Tr. p. 27; 46 CFR 536.7.

47. The beneficiaries of the time-volume contracts are the major importers and exporters in the foreign commerce of the United States. Tr. p. 27.

48. The effect of time-volume rules upon smaller shippers was considered by the Commission to be no different than volume rates which were in tariffs that apply on a particular sailing. Tr. p. 27.

49. The Commission stated in its final Order, regarding time-volume rules, that time-volume rate making was routine and is interstitial to most basic rate making agreements. Tr. p. 28; Docket No. 80–54.

50. The basic difference between time-volume contracts and the VIP is that one is a contract based on quantity and the other is a tariff application based upon revenue. Tr. p. 30.

51. From a shipper's perspective, there is no basic, fundamental difference between basing a refund upon the quantity of cargo carried or the amount of revenue received. Tr. p. 30.

52. The Commission's staff believes that the Commission should look favorably upon a VIP type concept. Tr. p. 31.

53. The Commission's staff does not believe that any of the provisions in the proposed VIP are inherently discriminatory. Tr. p. 31.

54. It is the Commission's staff opinion that the Conference already possesses sufficient section 15 authority to implement the VIP.

55. When dealing with multiple commodity shippers, it is easier to keep accounting records on a revenue basis as opposed to a time-volume rate that is based on the commodity or mix of commodities. Tr. p. 33.

ULTIMATE FINDINGS OF FACT

56. Both the NYFB and the TPFC(HK) possess rate-making authority in their basic Agreements, and the implementation of the VIP program is interstitial to the basic agreements. Entire record.

57. The VIP involved here does not result in a pooling agreement requiring approval under section 15. Entire record.

58. The VIP adjusts the tariffs involved pursuant to normal, recognized rate-making factors, which are includable in the Conferences' tariffs as a routine rate-making matter, not requiring approval under section 15. Entire record.

59. The VIP is neither unjustly discriminatory nor unduly or unreasonably preferential and does not violate sections 16 or 17. Entire record.

60. The provisions establishing levels of revenue which are necessary to participate in the VIP, as well as the increments of freight dollars set forth, are reasonable and do not constitute a violation of sections 16 or 17. Entire record.

61. The provisions of the VIP which include affiliated companies within the definition of "qualified enrollee" do not constitute a violation of sections 16 and 17. Entire record.

DISCUSSION AND CONCLUSIONS

Section 15 Authority

Section 15 of the Shipping Act, 1916, (46 CFR 814) provides that:

> 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 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.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether of [sic] not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Here, the question is not whether the VIP is subject to and requires section 15 approval—for clearly it is a rate-making activity coming under the statute—but rather whether the Conferences have already been granted sufficient authority to implement the VIP. We think it clear that the TPFC(HK) and NYFB both have such authority. There is no question that Article 6 of Agreement Nos. 14 and 5700 provides for comprehensive rate-making authority within the Conferences' respective geographic scopes. (F.F. 1, 2.) Under the rate-making provisions of Article 6, the Conferences have implemented conference-wide tariffs establishing rates, charges, rules and regulations applicable to all cargo moving within the scope of the Agreements. Over the years, the Conferences have published in their tariffs rates of many types and varieties, including local and OCP rates—rates based on weight alone or weight/measure, per container rates, ad valorem rates, and rates based on volume. The VIP, while a "novel" rate-making device, as the Commission's Order points out, is nevertheless a form of rate making which when analyzed is similar to other forms of rate making which the Commission has already characterized as interstitial to the basic rate-making agreement.

In Docket No. 80–54, which authorized the establishment of time-volume rates and contracts, the Commission directly considered whether conferences offering discounted rates based on time-volume concepts require separate rate-making authority. It held:

> Finally, there is the question of whether conferences, and dual rate conferences in particular, should be authorized to participate in time/volume ratemaking. Certain commentators argue that time/volume rates are not conventional or routine ratemaking and that contracts for such rates contravene section 14(b) of the Act (46 U.S.C. § 813a). The Commission disagrees. Time/volume rates are a routine form of ratemaking, interstitial to agreements approved pursuant to the Shipping Act, 1916. Docket No. 80–54, Final Rule, served July 2, 1982.[6]

Given the record made in this proceeding, where all of the parties agree that time-volume rates and the VIP are similar and differ significantly only in that one uses the quantity of cargo as a basis, while the other uses revenues, it seems clear as Hearing Counsel points out that, "The situation associated with the VIP is almost indistinguishable. . . . It is a novel rate making system, filed in the conference tariffs, by two conferences which already possess approved rate-making authority."

Prior to the time-volume ruling, the Commission, in *Investigation of Overland and OCP Rates and Absorptions*, 12 FMC 184 (1969), considered whether overland or OCP rates and absorptions which had been filed in various conference tariffs, were covered by the conferences' basic rate-making authority or whether additional section 15 approval must be sought. The Commission found that the "overland/OCP rates were the product of 'routine' activities within the cover of authority conferred by the conference agreements; therefore, there was no need for separate Commission approval of overland/OCP rates or rate-making practices." It states further that:

> [t]he Commission and its predecessors have uniformly held that the issuance of tariffs, including rules and regulations covering their application, is a routine matter authorized by an approved basic conference agreement, not requiring separate approval under section 15. [Citations omitted.] In 1961, section 15 of the Act was amended to reflect this principle, and more specifically excepts, "tariff rates, fares and charges, and classifications, rules, and regulations explanatory thereof" from the requirement of prior

[6] See *In Time Volume Rate Contracts—Tariff Filing Regulations Applicable to Carriers and Conferences in the Foreign Commerce of the United States*, 25 F.M.C. 1 (1982).

> approval where agreed upon by "approved conferences" . . . and filed and published in accordance with section 18(b), the tariff filing section of the Act. (*Id.* at 205.)

It is significant that in the above-cited case, as it has in others, the Commission recognized as a "cardinal principle" the right of conferences to compete for shippers' patronage. *Id.* at 206; *Agreement No. 134–21—Gulf Mediterranean Ports Conference,* 8 FMC 703, 709 (1965).

In discussing the question of section 15 authority, the Commission's Order of Investigation and Hearing states that the "VIP itself might be considered a *new* ratemaking arrangement requiring separate section 15 approval" (emphasis supplied), citing *Persian Gulf Outward Freight Conference,* 10 FMC 61, 65 (1966). While the inquiry is certainly valid, the record made in this proceeding places this case apart factually. In *Persian Gulf,* a unique two-tier ratemaking plan based upon the flag of a vessel was involved. The Commission characterized it factually as a ratemaking plan bearing, "no resemblance . . . to any recognized ratemaking method" and just as the Commission upheld the interstitial nature of the OCP rates and the time-volume rates, so too is the VIP interstitial and the *Persian Gulf* holding inapplicable. As the Commission stated in the *Investigation of OCP Rates, supra,* at pp. 212, 213:

> That the Commission found [the Persian Gulf scheme] to require separate approval as an entirely new scheme of rate combination and discrimination, is no more pertinent than the similar finding in the case of the exclusive patronage dual-rate system.

So here, in the final analysis, we believe that the theory of the VIP, as witnesses Dick, Gottshall, Velez and Schwarz all affirmed, is conceptionally no different from time-volume rate making. In both cases, shippers who ship a specified quantity of cargo during an agreed upon time period are entitled to a reduction in their total freight charges. In the case of time-volume rates, the quantity of cargo is variously measured in terms of weight tons, revenue tons or TEUs. Under the VIP, quantity is measured in terms of revenue paid by the shipper. In time-volume contracts, the reduction in freight charges is based on a negotiated rate applicable only if the volume commitment is met. Under the VIP, the reduction is based on published tariff levels which are also applicable only if the volume (revenue) commitment is met. Conceptually, and pragmatically, there is no real distinction in terms of the rate-making authority required under section 15.

A further issue raised by the Commission's Order of Investigation and Hearing, as it applies to section 15, is placed in focus by the Commission's statement that:

> While the VIP tariff rules do not directly address the point, it seems apparent that members of the Agreements (Conferences) who receive revenues from qualifying for a refund must somehow

> remit a portion of those revenues to the Agreement Chairman so that the refunds can be made. The process by which these payments are gathered and allocated *could* result in an agreement among common carriers to pool or apportion earnings which *might* require approval under section 15 of the Shipping Act (46 U.S.C. § 814). [Parenthesis and emphasis supplied.]

Here, the Commission's concern is again concise and appropriate. However, the record made in the proceeding clearly negates the idea that the method used in the VIP to gather and allocate funds constitutes a pooling agreement requiring section 15 approval. Such an agreement is defined as:

> An agreement which provides for the division of the cargo carryings or earnings and/or losses among the parties in accordance with a fixed formula. Part 522.2(a)(3), Commission's Rules of Practice and Procedure (46 CFR 522(a)(3)).

In this proceeding, the uncontroverted evidence supplied by all witnesses, which we have found as fact, indicates that there is no division of carryings or earnings much less a formula for doing so. The record establishes that each Conference member contributes revenue only to the extent it carries for a particular enrollee. Further, the level of the contribution is limited strictly by the level of the member's carriage for each enrollee. If a member does not carry for a particular enrollee no contribution need be made. If, for example, only one member carries for an enrollee, then the entire contribution is made by that member. As to the funds themselves, a separate account is maintained by PMM for each Conference member. Each account is kept separate and apart from all other accounts and from all Conference accounts and monies, without commingling at any time for any purpose. At the end of a twelve-month period, refunds earned by the enrollee are paid directly to that enrollee by PMM.

From all of the above, as well as the remaining evidence in the record, we hold that the process by which these VIP funds are gathered and allocated does not result in a pooling agreement requiring approval under section 15.

Another aspect of this proceeding having to do with section 15 approval is whether or not the general rate-setting authority contained in the Conference agreements under which this VIP becomes operative is limited to the adjustment of rates "as the normal economic forces which govern the establishment of such rates may require," as the Commission decision in the *Investigation of Overland/OCP Rates and Absorptions*, *supra*, requires. In other words, under the VIP, have the tariffs been adjusted pursuant to normal, recognized, rate-making factors, such as competition, so as to be includable in published tariffs as routine matters, or do the VIP provisions in the tariffs merely constitute a device having some unacceptable purpose and effect, such as the stifling of competition within the trade? We think the record here establishes clearly, without even a semblance of evidence to the contrary, that this VIP tariff provision was based on legitimate recognizable and permissible rate-making factors. The Chairman/Secretary of the NYFB and TPFC(HK) stated, and we have found as fact, that this VIP was promulgated in response to the current time-volume rules adopted by the Commission. He noted, and we have found as fact, that because of the nature of the Hong Kong/Taiwan-U.S. trade that his Conference members could not utilize the time-volume rules, citing that because of the presence of multi-commodity shippers in the trade and the various forms of carriage utilized by these shippers, a volume incentive program based upon the "quantity" of cargo carried would not be feasible. As a result, the Conferences perceived that the independent, single-commodity carriers were enjoying a competitive advantage over them by being able to utilize the Commission's time-volume rules. In answer to that competition, the VIP system was designed and based upon "revenue" received, which represented a practical common denominator, both from the point of view of the nature of the trade and the administration of the program. In addition to the Conferences' witnesses, the above facts and their effect were corroborated by the testimony of the Commission's Senior Transportation Industry analyst, who is also a member of the Tariff Compliance Review Board in the Bureau of Tariffs. So here, in view of the above, we hold that the VIP involved was filed pursuant to recognized rate-making factors, and as such is includable in the Conferences' published tariffs as a routine rate-making matter, not requiring section 15 approval.

In light of the preceding discussion and based on the entire record, we hold that the VIPs involved here are neither unjustly discriminatory or unfair as between carriers or shippers, nor do they operate to the detriment of the commerce of the United States or contrary to its public policy. Further, it is held that the Conference Agreements already contain sufficient section 15 authority to allow implementation of the VIPs contained in their tariffs.

Possible Violations of Sections 16 and 17

As to possible violations of sections 16 and 17 of the Shipping Act, 1916, the Commission's Order of Investigation, etc., states:

> A review of the VIP provisions filed with the Commission raises several areas of concern. Section 16 First of the Shipping Act makes it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any particular person or to subject any particular person to any undue or unreasonable prejudice or disadvantage (46 U.S.C. § 815). Section 17 prohibits common carriers from charging any rate which is unjustly discriminatory as between shippers (46 U.S.C. § 816). The levels of revenues necessary in order to participate in the VIP, together with the procedures for aggregating revenues from affiliated companies, may discriminate against small shippers or shippers of low value commodities *to such a degree* that sections 16 First

> and/or 17 are violated. In addition, the definition of qualified shipper, based as it is on a proprietary interest in the cargo, excludes certain categories of shippers from the VIP, including, but not necessarily limited to, non-vessel operating common carriers (NVOCCs), consolidators, deconsolidaters, warehousemen, and freight forwarders. This kind of discrimination may also violate sections 16 First and/or 17. [Emphasis supplied.]

Section 16, first, provides that it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

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

Section 17 provides:

> That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, . . .

There is no question but that the VIP involved here is discriminatory and/or preferential in that shippers who meet certain revenue prerequisites receive lower rates than do those shippers who do not meet those prerequisites. The real question, however, is whether or not the discrimination involved is "unjust" and the preference "undue or unreasonable." See, *Matson Navigation Co.*, 21 FMC 538, 540 (1978). Given the record made in this case, we hold that there was neither unjust discrimination nor undue or unreasonable preference and that the VIP does not violate either section 16 or section 17 of the Shipping Act. It is axiomatic that a common carrier ought to be able to compete for traffic. *Texas & Pac. Ry.* v. *ICC*, 162 U.S. 197 (1896); *North Atlantic Freight Conference*, 11 FMC 202, 210 (1967); *Matson Navigation, supra*. Here, the record establishes that the Conferences wished to attract to members' services shippers who are largely responsible for sustaining the Hong Kong/Taiwan-United States trades. Currently, nonconference carriers have been able to secure increasingly large portions of cargo that are being shipped by major shippers (F.F. 38–41) by use of time-volume contracts. The Conferences are now seeking to implement the VIP, which is more workable for them, in place of time-volume contracts. In so doing, they do not discriminate or establish preferences any differently than do time-volume contracts which the Commission has already approved. Further, as to the effect the VIP would have on small shippers, once again that effect is the same as what takes place in establishing time-volume rules, where the Commission has decided that the effect of the rules is no different than the volume rates which were in ordinary tariffs that apply to a particular sailing. It has been consistently held that such volume rates are not *per se* violative of any section of the Shipping Act. *In the Matter of the Carriage of Military Cargo*, 10 FMC 69, 73 (1966); *Puerto Rican Rates*, 2 U.S.M.C. 117, 121–2 (1939); *Docket No. 82–54, supra.* So here, the VIP and time-volume rules are the same in that both allow a discount based on the volume of cargo moved, which, standing alone, does not violate sections 16 or 17.

As to the levels of revenue which are necessary to participate in the VIP, the evidence establishes they are between 5 and 10 percent on increments of freight dollars ranging from $500,000.00 to $2,000,000.00. These are reasonable ranges, and the fact that a large number of qualified enrollees—178—have become members of the VIPs indicates that the system is not intended for a select group of large shippers. Also, the testimony of all witnesses, including the Commission expert, establishes that the level of refunds are not unduly preferential or discriminatory within the meaning of sections 16 and 17.

In its Order of Investigation, the Commission noted that the VIP procedure of aggregating revenues from affiliated companies might discriminate against small shippers. Once again, while the concern is valid, the facts in this case establish that as with Merchant's Contracts, the inclusion of affiliates was made to allow shippers and consignees to avail themselves of the VIP without forcing them to restructure their corporate organizations. The VIP includes only affiliates "over whom the enrollee regularly exercises direction and working control in relation to shipping matters." It thereby allows shippers and consignees the flexibility they need in maintaining their corporate structures. Excluding their controlled affiliates might unreasonably discriminate in favor of "unitary" companies that conduct their operations through unincorporated divisions or offices and might cause the rejection of the VIP by the Conferences' major consignee accounts. Finally, the Commission has recognized the use of affiliates and subsidiaries by shippers and consignees, and adopted regulations treating affiliates as parties to shipping arrangements entered into by parent corporations. The *Dual Rate Cases*, 8 FMC 16, 33 (1964). So here, the record is devoid of any evidence establishing discrimination under sections 16 and 17, by virtue of the inclusion of affiliated companies as qualified enrollees under the VIPs, and we hold that the provision does not violate those sections of the Shipping Act.

As to whether the VIP use of a revenue based discount would unjustly discriminate against shippers of low rated cargo, we hold that it does not so unjustly discriminate. The respondents argue, and we agree, that the fundamental concept behind traditional commodity pricing dictates that certain low value cargoes must be rated at relatively low levels or they otherwise would not move in the foreign commerce. In other words, it is probable that the shippers of those low valued, low rated cargoes already receive discounts as reflected in the Conferences' existing rate structure.

Thus, any shipper of such cargo who might not qualify for the VIP refund levels is not unjustly discriminated against as to the price paid for moving his cargo, since his discount has already been included in the base rate. Further, in these particular VIPs, the testimony establishes that the trades involved are dominated by large department store accounts and not by large shippers of low rated, quasi-bulk commodities, so that the danger of unjust discrimination against such shipper is less a concern than it otherwise might be.

Finally, with respect to sections 16 and 17, the Commission, in its Order, raises a question regarding the definition of a "qualified enrollee" as used in the VIPs. It notes that since the VIPs exclude those shippers who do not have a "proprietary interest" in the cargo, it excludes NVOCCs. The National Association of NVOCCs intervened in the proceeding alleging violation of sections 15, 16 and 17. However, the Conferences have now agreed to include NVOCCs within the definition of a "qualified enrollee," and the National Association of NVOCCs have withdrawn from the adjudicatory phase of the proceeding, and the issue regarding them has become moot.[7]

In light of the above, we hold that the VIP is not unjustly discriminatory nor does it give undue or unreasonable preference or advantage so as to be violative of sections 16 and 17 of the Shipping Act, 1916. We think the holding is all the more justified because no adverse party has appeared to contest the VIP or to allege harm or injury resulting from its implementation.

Bifurcation of Issues—Adjudication and Rulemaking

We have already noted that the adjudicatory phase of this proceeding having to do with violations of sections 15, 16 and 17 of the Shipping Act, 1916, has been bifurcated from the issues raised in that portion of the Commission's July 29, 1983, Order having to do with Rulemaking. We have also noted that there are several intervenors who have been allowed to intervene in the rulemaking aspect of the proceeding. We propose to schedule hearings on the rulemaking phase as soon as possible wherein we will consider whether or not rulemaking is appropriate in the first instance, and if it is, what provisions the rule should contain. There will be an initial decision on rulemaking, which, as the Commission's Order requires, "shall propose the promulgation of an appropriate rule."

In the meantime, this initial decision shall become operative as to the adjudicatory aspects of the VIP. The particular VIPs involved here need not and should not await rulemaking before being allowed to go into effect. The record made here, which occasioned the bifurcation of issues in the first instance, demonstrates a need to expedite implementation of the VIPs if this holding is to have any real, practical application. The

[7] It is our understanding that the pertinent tariffs will be or have been amended to include NVOs within the meaning of "qualified enrollee." Approval of these VIPs is predicated on that change being made.

record shows that the VIPs have already obtained many enrollees who have made qualified shipments toward a refund. Any uncertainty as to the future status of the program or any unreasonable delay, such as the need to await the outcome of possible rulemaking, is both unnecessary and, more importantly, unfair. Such uncertainty and delay can only adversely affect the respondents' good will and their ability to attract cargo from those customers who are interested in the VIP.

In addition to the above, the record in the proceeding lacks any viable reason why these VIPs should not be implemented. Indeed, Hearing Counsel's expert witness testified that:

> . . . I don't think it would be detrimental to a rulemaking to have the VIP effective, particularly because I think the experience that would be gained paralleling the time the rulemaking would be going on would probably be beneficial to the Commission in determining what rules would be applicable through that experience.

Thus, it appears, allowing the VIPs to go into effect prior to rulemaking would provide the Commission with data that could be used in promulgating any rule that might be necessary, based on the experience gained in the operation of the VIPs. Such a foundation for any necessary rule would serve to aid in the administration of the Commission's regulatory responsibility and might well allow for a more definitive approach to the implementation of VIPs generally.

Finally, it must again be stressed that this decision, including the holding that these VIPs be promptly implemented, is based on these specific VIPs and the record made in this proceeding. That record compels one to suggest that since these are the first VIPs coming before the Commission, care must be taken to properly monitor them to insure that they function as the respondents say they will and that any changes in the VIP tariff provisions are properly evaluated regarding any possible violations of sections 15, 16 and 17.[8]

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[8] The fact that this decision holds that these VIPs should be implemented expeditiously, prior to any rulemaking that may ensue, should not be taken to mean that these VIPs will not be subject to any rules the Commission may later adopt. Indeed, the import of this decision is that if the Commission adopts any rules that require changes in these VIPs, then such changes will be made by the respondents.

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]

(GENERAL ORDER 16, AMDT. 44, DOCKET NO. 82–48)

MISCELLANEOUS AMENDMENTS TO INFORMAL COMPLAINTS PROCEDURES

March 8, 1984

ACTION: Final Rules

SUMMARY: The Commission amends its Rules of Practice and Procedure to (1) increase the jurisdictional limit for the adjudication of small claims from $5,000 to $10,000; (2) provide for tariff notification of decisions of Administrative Law Judges and Settlement Officers in formal and informal docket proceedings; and (3) provide for submission of petitions for reconsideration in informal adjudications to Settlement Officers. The increase in the ceiling reflects the present-day cost of doing business. Tariff notice is necessary to ensure that all shippers are treated equally. The procedure for filing of petitions for reconsideration will remedy a defect in the rules which permits parties to file such petitions with the Commission itself even though parties in informal claims procedures have waived the right to file exceptions to Settlement Officer decisions.

DATE: Effective March 16, 1984.

SUPPLEMENTARY INFORMATION:

On October 18, 1982, the Commission published in the *Federal Register* a Notice of Proposed Rulemaking (46 F.R. 46338–46339) which would amend its Rules of Practice and Procedure to provide for revised procedures with respect to overcharge claims. Specifically, the jurisdictional limit for small claims would be raised from $5,000 to $10,000; tariff notices may be required to be published in cases involving overcharge claims; and petitions for reconsideration in small claims procedures would be submitted to Settlement Officers rather than the Commission itself.

In response to the notice, Sea-Land Service, Inc. (Sea-Land) and the Transportation Department of 3M (3M) submitted comments. Sea-Land supported the proposed rules. 3M proposed the following:

(1) Eliminate the jurisdictional limit entirely;

(2) Not require tariff notification;

(3) Permit formal proceedings only under certain circumstances and within certain limitations; and

(4) Raise the jurisdictional limit for special docket applications from 180 days to 2 years.

With respect to 3M's comments, the suggestion that the jurisdictional limit be eliminated entirely was not contemplated within this proceeding. In addition, its assertion that the $10,000 limit was set arbitrarily is not accurate. The limit was established after review of all overcharge claims filed since 1975.

3M's objection to the tariff notification requirement is that it would add another element to "already crowded and ambiguous tariffs." The purpose of the notification is to assure that all shippers are treated equally. This outweighs any problems which may be experienced with additions to tariffs.

3M's remaining two comments with respect to the conduct of formal proceedings and special docket applications are outside the scope of this proceeding. In particular, the suggestion as to special docket applications would require a legislative change.

After consideration of the comments submitted in response to the Notice of Proposed Rulemaking, the Commission has determined to adopt the rules as proposed.

List of subjects in 46 CFR 502: Administrative Practice and Procedure.

Therefore, pursuant to 5 U.S.C. 553 and sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 821 and 841a), Part 502 is amended to read as follows:

(1) Section 502.301 is amended by changing the $5,000 limitation in the first sentence to read "$10,000".

(2) Section 502.304(g) is amended by addition of the following sentence after the first sentence.

Where appropriate, the Settlement Officer may require that the carrier publish notice in its tariff of the substance of the decision.

(3) A new section 502.304(h) is added to read as follows:

Within thirty days after service of a final decision by a Settlement Officer, any party may file a petition for reconsideration. Such petition shall be directed to the Settlement Officer and shall act as a stay of the review period prescribed in section 502.304(g). A petition will be subject to summary rejection unless it: (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order; (2) identifies a substantive error in material fact contained in the decision or order; or (3) addresses a material matter in the Settlement Officer's decision upon which the petitioner has not previously had the opportunity to comment. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. Upon issuance of a decision or order on reconsideration by the Settlement Officer, the review period prescribed in section 502.304(g) will recommence.

(4) Section 502.261 is amended by addition of a new paragraph (c) to read as follows:

(c) The provisions of this section are not applicable to decisions issued pursuant to Subpart S of this Part.

(5) Section 502.225 is amended by the addition of a new sentence to read as follows:

In proceedings involving overcharge claims, the presiding officer may, where appropriate, require that the carrier publish notice in its tariff of the substance of the decision; this provision shall also apply to decisions issued pursuant to Subpart T of this Part.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–52

IN THE MATTER OF THE STATUS OF MATSON AGENCIES, INC. AND MATSON FREIGHT AGENCIES, INC.

ORDER ON PETITION FOR DECLARATORY ORDER

March 13, 1984

Matson Agencies, Inc. (Matson Agencies) and Matson Freight Agencies, Inc. (MFA) (Petitioners) have petitioned the Commission to issue a declaratory order determining that neither is a common carrier by water or other person subject to section 1 of the Shipping Act, 1916 (46 U.S.C. § 801). Matson Agencies and MFA advise that an uncertainty has arisen because of their affiliation with Matson Navigation Company, Inc. (Matson), a common carrier, and Matson Terminals, Inc. (Matson Terminals), an "other person" subject to the Act. Petitioners explain that they perform steamship agency services exclusively and submit that they are not subject to the Act unless they are so deemed because of their affiliation with Matson and Matson Terminals.

A Notice of the Matson Agencies/MFA Petition for Declaratory Order (Petition) was published in the *Federal Register* (48 *Fed. Reg.* 51978). In response to that Notice, the Association of Ship Brokers and Agents (U.S.A.), Inc. (ASBA) petitioned to intervene and filed a reply to the Petition. The Commission's Bureau of Hearing Counsel has also filed a petition to intervene and a reply. The petitions of ASBA and Hearing Counsel will be granted and their replies considered herein.

BACKGROUND

The Petition provides the following information relating to the activities and affiliations of Petitioners, Matson, and Matson Terminals.

Petitioners are both Hawaii corporations with headquarters in San Francisco, California. Matson Agencies and its predecessor, Matson Agencies Inc., have performed steamship agency services since 1973. Services are presently performed for Nippon Yusen Kaisha under FMC Agreement No. 10052 and until January 31, 1984 were performed for Korea Maritime Transport Company Ltd. under Agreement No. 10483. Since January 1, 1983, Matson Agencies has been a wholly-owned subsidiary of MFA. The officers and directors of Matson Agencies are also officers and directors of MFA. Matson Agencies has no employees of its own and the employees of MFA manage its day-to-day business.

MFA currently performs agency services for Columbus Line in Hawaii, freight traffic services for Delta Line in Los Angeles and Portland and has, in the past, provided agency services for Moore McCormack Lines and United Yugoslav Lines. In addition, it provides husbanding services for various tramp vessels. MFA is a wholly-owned subsidiary of Matson. The list of officers and directors of MFA is not identical to the list of officers and directors of Matson or Matson Terminals.[1] Certain corporate functions such as personnel, legal, purchasing, corporate accounting and treasurers' functions are performed for MFA by Matson pursuant to an agreement between the companies.

Matson operates as a common carrier in the domestic offshore commerce between the U.S. Pacific Coast and Hawaii/Johnston Atoll. In the foreign commerce of the United States, Matson serves only Kwajalein and Majuro which are part of the Pacific Islands Trust Territory administered by the United States.

Matson Terminals, a subsidiary of Matson, performs stevedoring and terminal services for Matson and other vessel operators at Oakland and Los Angeles, California, Seattle, Washington, and Honolulu, Hawaii. In addition, it performs container equipment maintenance services at Hayward, California and Portland, Oregon and operates and manages a container terminal under contract with and on behalf of the City of Richmond.

POSITIONS OF THE PARTIES

Petitioners maintain that if they were not affiliated with Matson and Matson Terminals, they would not be considered subject to Shipping Act requirements. However, Petitioners advise that, because of that affiliation, they have filed various agency agreements which they have with the carriers they serve. In those instances, the parties asked that the agreements be determined not subject to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) but if they were that they be approved. Petitioners advise that in all such instances the agreements were approved. Petitioners argue that the necessity of their obtaining section 15 approval of these agency agreements places them at a competitive disadvantage vis-a-vis other steamship agents that are not affiliated with persons subject to the Act and which need not file their agency agreements. Petitioners advise that while this filing burden has been lessened due to the exemption provisions in 46 C.F.R. § 520.12[2] there are still instances when they must file their agency agreements.

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[1] Most of MFA's officers and directors are, however, also officers of Matson. Standard & Poor's Register of Corporations, Directors and Executives 1625 (1984).

[2] 26 C.F.R. 520.12 provides, in relevant part:

> Agency agreements between persons subject to the Act except those: (a) where a common carrier is to be an agent for a competing carrier in the same trade, or (b) which permit an agent to enter into similar agreements with more than one carrier in a trade, are exempted from the filing and approval requirements of section 15.

Petitioners acknowledge that certain agency agreements entered into between competing carriers in a trade may require filing and approval pursuant to section 15. They argue, however, that the relationship of the agent's carrier-principals should not determine the status of the agent under the Act.

Petitioners claim that the purposes of section 15 are not served by concluding that they are subject to the Act. Petitioners point out that because they perform services solely for vessels operating in the foreign commerce of the United States and Matson's services are limited to domestic offshore commerce, except for a monthly barge call at Majuro and Kwajalein, they do not perform services for a Matson competitor.

Petitioners advise that they were created for corporate, not regulatory reasons and that the scope of work performed by them differs from that performed by their affiliates, Matson and Matson Terminals, which are admittedly subject to the Shipping Act, 1916. Petitioners therefore believe that the Commission should recognize the corporate distinctions. Petitioners point out that the Supreme Court has held that if the legislative purpose is not frustrated, corporate entities should not be disregarded. *Schenley Distillers Corp. v. United States,* 326 U.S. 432 (1946).

ASBA contends that companies acting as steamship agents, whether for common carriers or others subject to the Shipping Act, are not themselves persons or "other persons" subject to the Shipping Act, by virtue of their activities as agents. ASBA goes on to argue that the mere fact that a controlling stockholder, or even a sole stockholder, is itself subject to the Shipping Act, is immaterial. ASBA does not take a position as to the relief sought by Petitioners to the extent it depends upon particular facts surrounding the Petitioners' individual circumstances, or the particular manner or means in which they accomplish their agency functions.

Hearing Counsel supports the Petition. It submits that while a person subject to Commission jurisdiction may not segment its operation to make part of it subject and part of it exempt if such segmentation results in unjust discrimination, absent a showing that the segmenting of operations results in some activity which is proscribed by the Act, the entity subject to the Act may organize its operations in any fashion it chooses. *Puerto Rican Forwarding Co. Inc.—Possible Violations of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933,* No. 75–8 (F.M.C., Initial Decision served September 24, 1976), 16 S.R.R. 1433, 1451. Hearing Counsel believes that the particular facts here indicate that the performance of agency operations by Petitioners, which are corporately separate from Matson, does not result in any activity proscribed by the Shipping Act, 1916. Accordingly, Hearing Counsel believes that no regulatory purpose would be served by asserting jurisdiction over Petitioners.

DISCUSSION

Section 15 jurisdiction extends to any agreement between two or more common carriers:

> . . . 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 or 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.

An agreement which would authorize a common carrier to be an agent for a competing carrier in the same trade is an agreement "controlling, regulating, preventing or destroying competition." Such an agreement does not fall within the exemption in 46 C.F.R. § 520.12 and is fully subject to the filing and approval requirements of section 15. (*See*, for example, *Agreements Nos. 10186, As Amended, 10322, As Amended, and 10371, As Amended, Agreement No. 10377, Agreements Nos. 10364 and 10329*), Docket No. 80–52 (F.M.C., Order of Modification served May 13, 1983).

Carriers may not use the device of separately incorporated subsidiaries in order to avoid the filing and approval requirements imposed on such agreements by section 15. For example, an agreement between a steamship agent and a common carrier may be considered an agreement among two common carriers if the agent is a subsidiary of a competing carrier in the trade. It is well established that where the statutory purposes of the Shipping Act could be frustrated through the use of separate corporate entities, the Commission is entitled to look through corporate form and treat the separate entities as one and the same for purposes of regulation. *General Telephone Company* v. *United States*, 449 F.2d 846, 855 (5th Cir. 1971); *Mansfield Journal Co.* v. *F.C.C.*, 180 F.2d 28, 37 (D.C. Cir. 1950). The reasons for separate incorporation are not controlling when the fiction of corporate entity defeats a legislative purpose. *Kavanaugh* v. *Ford Motor Company*, 353 F.2d 710, 717 (7th Cir. 1965). Accordingly, the Commission may not disregard the fact that Petitioners are subsidiaries of Matson in determining their status under the Shipping Act.

To the extent the Petition seeks to have the Commission declare that under no circumstance would Petitioners be considered common carriers or other persons subject to the Act, it must be denied. However, the Commission is satisfied that the particular facts surrounding the present operations of Matson and Petitioners form a sufficient basis upon which to grant relief to Petitioners. At present, Petitioners appear to be operating solely as steamship agents for steamship lines operating in trades in which Matson does not participate. There is no evidence that the separate organization of Petitioners enables Matson to engage in activities which would otherwise be proscribed by the Shipping Act, 1916. We believe that no purpose, regulatory or otherwise, would be served by asserting jurisdiction over all agency agreements between Petitioners and their carrier principals solely on the basis of Petitioners' affiliation with Matson. Absent such a purpose, the Commission will not impute the common carrier status of Matson to Petitioners. The Petition will therefore be granted to the extent that it seeks a determination that Petitioners' agency agreements with common carriers, which are not Matson competitors, are not agreements subject to the requirements of section 15 of the Act.

It must be emphasized that our determination here is based on the particular facts set forth in the Petition and may be modified or rescinded on the basis of changed facts.

THEREFORE, IT IS ORDERED, That the petitions for intervention filed by the Association of Ship Brokers and Agents (USA), Inc. and Hearing Counsel are granted.

IT IS FURTHER ORDERED, That the Petition of Matson Agencies, Inc. and Matson Freight Agencies, Inc. for Declaratory Order is granted to the extent indicated above.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–20

RATES APPLICABLE TO OCEAN SHIPMENT OF AABCO, INC. FILING OF PETITION FOR DECLARATORY ORDER

ORDER

March 14, 1984

By Petition for Declaratory Order (Petition) filed pursuant to Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68, AABCO, Inc., requests advice as to which of two rates filed by United States Lines (USL) for the carriage of household goods applied to certain shipments of military household goods. Replies to the Petition have been submitted by USL, by the Military Traffic Management Command (MTMC) on behalf of the Department of Defense (DOD), by Sea-Land Service, Inc., which later withdrew from the proceeding, by Imperial Van Lines International, Inc. (Imperial), which requested and was granted leave to intervene, and by the Commission's Bureau of Hearing Counsel.[1]

BACKGROUND

AABCO tendered two shipments of military household goods to USL for transportation from Bremerhaven, Federal Republic of Germany, to Seattle, Washington. At the time of shipment USL had on file a tariff covering exclusively the transportation of military and United States Government household goods and personal effects, and, in its commercial tariff, a rate for household goods unrestricted against military household goods. AABCO paid ocean freight charges predicated on the military rate. It then filed the present Petition requesting that the Commission declare which rate applies when ocean carriers publish simultaneously both a rate for military household goods and a different rate for commercial household goods. The existing dual tariff situation allegedly creates an uncertainty as to whether AABCO paid the proper charges or whether it can rely on "commercial" rates for future bids and for seeking refunds from USL. Subsequently, AABCO specially requested the Commission to prohibit the application of unrestricted commercial rates on household goods to shipments of household goods for the "account of DOD" when the ocean carrier also keeps on file with the Commission separate rates or tariffs for military household goods.

[1] By Order served September 28, 1983, the Commission directed Bureau of Hearing Counsel to file a reply to the Petition and address, among other matters, the authority of ocean carriers subject to the Commission's jurisdiction to publish two separate tariffs applicable to the carriage of household goods.

DISCUSSION

Rule 68 of the Commission's Rules of Practice and Procedure provides that the Commission may in its discretion issue a declaratory order "to terminate a controversy or to remove uncertainty." 46 C.F.R. § 502.68(a). The Rule's procedures are to "be invoked solely for the purpose of obtaining declaratory rulings which will allow persons to act without peril upon their own view." 46 C.F.R. § 502.68(b). In this instance, the transportation service on the two shipments which constitute the stated basis for the Petition has been completed, both tariffs at issue have been cancelled, and freight charges have been paid. Furthermore, to the extent the order sought by AABCO is intended as a basis for a claim of reparation it is not a proper subject for a declaratory order.[2] Consequently, AABCO's Petition for Declaratory Order will be denied.

However, because valid and significant issues have been raised concerning the practice of certain vessel operating common carriers by water of publishing and maintaining separate tariffs and rates for the transportation of household goods for the account of DOD and other U.S. Government agencies, the Commission, by separate order, intends to institute a nonadjudicatory investigation, pursuant to Subpart R of the Commission's Rules (46 C.F.R. § 502.281 *et seq.*).

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order filed by AABCO, Inc. is denied and the proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[2] Rule 68 reads in part:

Controversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease and desist orders are sought, are not proper subjects of petitions under this section. Such matters must be adjudicated either by filing of a complaint under section 22 of the Shipping Act, 1916 and § 502.62, or by filing of a petition for investigation under § 502.69 (46 C.F.R. § 502.68(b)).

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–42

JONES WASHINGTON STEVEDORING CO., INC.

v.

PORT OF SEATTLE

NOTICE

March 22, 1984

Notice is given that the time within which the Commission could determine to review the February 14, 1984 discontinuance of the complaint in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–42

JONES WASHINGTON STEVEDORING CO., INC.

v.

PORT OF SEATTLE

COMPLAINT WITHDRAWN; PROCEEDING DISCONTINUED

Finalized March 22, 1984

On Wednesday, February 1, 1984, counsel for the complainant telephoned the Presiding Administrative Law Judge and advised of plans to withdraw the complaint in this proceeding. Under date of February 3, 1984 (received February 9, 1984), counsel sent the following Notice of Withdrawal of Complaint:

> The complainant, Jones Washington Stevedoring Co., Inc. (hereinafter "Jones"), filed a complaint against the Port of Seattle on September 19, 1983, regarding the indemnity provision of the Port of Seattle's tariff for use of Port of Seattle equipment. Jones withdraws the said complaint.

A complainant may withdraw its complaint. Thus the complaint is withdrawn. This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1119

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE BENEFIT OF ADM MILLING COMPANY

Application for permission to refund a portion of freight charges in the amount of $2,129,206.77 granted.

An application for waiver under section 18(b)(3) of the Shipping Act is appropriate where the agreed-upon rate was filed after the date shown on the bill of lading for the shipment in question.

Wayne E. Wegman for Lykes Bros. Steamship Co., Inc.

REPORT AND ORDER

March 27, 1984

BY THE COMMISSION: (Alan Green, *Chairman;* James J. Carey, *Vice-Chairman;* James V. Day, Thomas F. Moakley and Robert Setrakian, *Commissioners*).

This proceeding is before the Commission upon Exceptions of Lykes Bros. Steamship Co., Inc. to the Initial Decision of Administrative Law Judge William Beasley Harris discontinuing the proceeding on the grounds that there was no error in tariff filing which required the filing of an application for refund or waiver under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817).

BACKGROUND

Lykes filed the subject special docket application dated December 16, 1983 on behalf of ADM Milling Company (ADM) to waive collection of $2,129,206.77 in freight charges. The application alleges the following facts. On June 7, 1983, Lykes verbally reached an agreement with ADM on a rate of $103.75 per metric ton (2204.6 lbs.) (the agreed-upon rate) for a shipment of 11,531,932 lbs. of bagged flour moving from Lake Providence, Louisiana to Alexandria/Port Said, Egypt. The agreed-upon rate was filed and became effective on June 22, 1983.[1] On June 16, 1983, the bagged flour was loaded aboard seven Seabee barges at Lake Providence. On the same date, a bill of lading for the shipment was prepared in New Orleans showing Lake Providence as the port of loading. The applicable rate on June 16, 1983 was the General Cargo N.O.S. rate of $519.00 W/M (2240 lbs. or 40 cubic feet) (4th Revised Page 53). After

[1] The rate appears on 20th Revised Page 53–A7 of Lykes Bros. Steamship Co., Inc. World Wide Freight Tariff No. 1 (FMC–87).

moving from Lake Providence to New Orleans, the Seabee barges were placed aboard the TILLIE LYKES for ocean transportation to Alexandria/Port Said. The TILLIE LYKES sailed on June 23, 1983.

The Presiding Officer concluded that the agreed-upon rate was applicable to the shipment because it became effective prior to June 23, 1983, the sailing date of the TILLIE LYKES. Finding no error in tariff filing, he discontinued the proceeding.

DISCUSSION

Tariff Rule 3 of Lykes' World Wide Freight Tariff No. 1 (FMC–87) (3rd Rev. Page 6) provides that, in the case of a rate decrease, the rate shall be calculated as of the date shown on the bill of lading "issued at the port of loading." [2] While the bill of lading here was not, strictly speaking, issued *at* Lake Providence, it shows Lake Providence as the port of loading. Lykes explains that the bill of lading was actually prepared in New Orleans because Lake Providence has no facilities for the preparation of shipping documents and New Orleans is the closest port having such facilities. Under the circumstances, it appears that the bill of lading here could properly be construed as having been "issued at the port of loading" as that phrase is used in Rule 3. Applying Rule 3, the rate must be calculated as of June 16, 1983, the date on the bill of lading.

Because Lykes failed to file the agreed-upon rate prior to June 16, it could not properly apply the rate to the shipment in question. This is the sort of clerical or administrative error that the waiver provisions of section 18(b)(3) of the Shipping Act, 1916 were intended to remedy. Accordingly, the Commission will reverse the Presiding Officer's discontinuance of the proceeding. However, rather than remanding the case to the Presiding Officer for further proceedings, the Commission will itself address the merits of the application.

Although there is no written agreement between the parties, the facts surrounding the shipment indicate that the parties intended that the agreed-upon rate would be filed in time to be applied to the shipment at issue here. Moreover, it is inconceivable that the parties intended for a shipment of some 11 million pounds to move under the Cargo, N.O.S. rate which is typically one of the highest rates in the tariff. In view of the foregoing, the Commission has determined to grant the application.

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[2] The text of Rule 3 is as follows:

> Unless otherwise specified in the event that a rate is increase (sic), the rate, in effect the date the cargo is delivered to the vessel's (*including Seabee Barge*) loading berth, at any loading port, either alongside or on dock, shall be applicable provided that documentary evidence is supplied to substantiate cargo was delivered in shipable form. In the event that a rate is decreased, the rate or amended rule or regulation in effect *on the date Bill of Ladings issued at the port of loading* will be applicable. (Emphasis added).

As indicated above, Rule 3, in addressing situations where "a rate is increased," defines the "loading port" as including the port at which the cargo is placed aboard a Seabee barge. Although "port of loading" is not defined in connection with rate decreases, it is reasonable to assume that the term was intended to have the same meaning.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is vacated; and

IT IS FURTHER ORDERED, That Lykes Bros. Steamship Co., Inc., is granted permission to waive freight charges as requested in its special docket application, on the condition that Lykes publish the following as a supplement to its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1119, that, subject to all applicable regulations, terms and conditions of this tariff, the matter contained on 20th Revised Page 53–A7 is effective June 16, 1983 and continuing through June 22, 1983.
>
> This notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities described on 20th Revised Page 53–A7 which may have been shipped during the specified period of time.

and that Lykes shall file with the Secretary within 60 days of the date of this Order a copy of the tariff so amended; and

IT IS FURTHER ORDERED, That Lykes Bros. Steamship Co., Inc. notify the Commission of the actual waiver or refund of charges within five days of said waiver or refund; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–7

ATLANTIC & GULF/WEST COAST OF SOUTH AMERICA CONFERENCE, ET AL.

v.

EMPRESA MARITIMA DEL ESTADO

Nathan J. Bayer for Complainants.

Zoe P. Hopkins for Respondent.

ORDER ADOPTING INITIAL DECISION

April 18, 1984

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* James J. Carey, *Vice-Chairman;* James V. Day, Thomas F. Moakley and Robert Setrakian, *Commissioners*)

This proceeding was initiated by a complaint filed by the Atlantic & Gulf/West Coast of South America Conference (Conference) and its member lines,[1] alleging that Respondent, Empresa Maritima Del Estado (Empremar), violated sections 15 and 18(b)(1) of the Shipping Act, 1916 (46 U.S.C. §§814 and 817(b)(1)) and regulations contained in 46 C.F.R. Part 524, by initiating a service in the U.S./South America trade without first obtaining approval for its arrangement with other carriers. Subsequently, Complainants were granted an opportunity to amend their complaint to include allegations of violations of sections 17 and 18(b)(4) of the Shipping Act (46 U.S.C. §§816 and 817(b)(4)) and 46 C.F.R. Part 536, based on the contention that Empremar transported cargo between the U.S. and Chile pursuant to a transshipment arrangement, yet failed to have a proper transshipment rule in its tariff. Administrative Law Judge William Beasley Harris served an Initial Decision (I.D.) on November 14, 1983, finding no violations. Complainants have filed Exceptions to this decision to which Respondent has filed a Reply.

BACKGROUND

Empremar, the national flag line of Chile, sought to establish a direct, all water service between the United States and the West Coast of South

[1] The Conference serves the trade between United States Atlantic and Gulf Coast ports and ports and points on the West Coast of Colombia, Peru, and Chile pursuant to F.M.C. Agreement No. 7590. Its members are: Compania Sud Americana de Vapores; Compania Peruana de Vapores; Delta Steamship Lines, Inc.; Flota Mercante Grancolombiana S.A.; Lykes Bros. Steamship Co., Inc.; and Transportes Navieros Equatorianos.

America. Because of market conditions, it was unable to effectuate this plan on its own and instead devised a service which would rely on transshipment at Puerto Rico, with the U.S. to Puerto Rico carriage being accomplished by Puerto Rico Maritime Shipping Authority (PRMSA) pursuant to a non-exclusive transshipment arrangement. Because Empremar did not have enough vessels of its own, it attempted to engage the members of the Euroandino Group (which served the Europe/South America trade and of which Empremar was a member) to assist it in the carriage of cargo from Puerto Rico to South America. Empremar initially proposed the concept to these other carriers in August of 1982, at which time they agreed in principle to such an arrangement. During the course of further negotiations between Empremar and these carriers, Empremar's U.S. agent published an advertisement in the *Journal of Commerce* which listed vessels other than those solely belonging to Empremar. Empremar also carried cargo on three voyages between the United States and Chile without a ''routing section'' in its tariff indicating its transshipment arrangement with PRMSA.

DISCUSSION

After a recitation of the respective positions of the parties, the Presiding Officer concluded that there was no agreement or understanding between Empremar and any other person which would have been subject to the filing and approval requirements of section 15 of the Shipping Act.[2] He did note that Empremar engaged in negotiations with several other carriers concerning a portion of its proposed service. He concluded, however, that the negotiations never reached the stage of an ''agreement'' and that, in fact, the prospective co-venturers all rejected Empremar's entreaties. He found that the only agreement reached between Empremar and any other carrier was the one with PRMSA for transshipment between the United States and Puerto Rico, and that that agreement had been properly filed with the Commission for informational purposes only, since it was a non-exclusive transshipment arrangement exempt from section 15's approval requirements. The Presiding Officer refused to accord much significance to Empremar's series of advertisements which included sailings of vessels other than its own. He concluded that these advertisements alone could not justify a finding that action was taken by the involved parties pursuant to an unfiled section 15 agreement. Ultimately, the Presiding Officer found

[2] The Presiding Officer initially found as facts 11 stipulations to which the parties had agreed. He further found: that Empremar was a member of a joint service, the Euroandino Agreement, which operates a rationalized service between Europe and the West Coast of South America, Ecuador, Peru, Bolivia and Chile; that Empremar's' agent Omnium, distributed a press release describing Empremar's new service between the United States and South America, which release was erroneously printed by the *Journal of Commerce* prior to Empremar's prospective partners agreeing to participate; that two Euroandino partners chose not to participate; and that Empremar entered into a non-exclusive connecting carrier agreement with PRMSA, for that portion of its service between the United States and Puerto Rico, and that that agreement was properly filed with the Commission.

that Complainants had not met their burden of proof and thus denied their requested relief. After consideration of the respective positions of the parties and a review of the record, the Commission has decided to adopt the Initial Decision, except to the extent modified by the discussion which follows.

Without alleging any specific errors, Complainants essentially disagree with the Presiding Officer's ultimate conclusion of law—that they had not met their burden of establishing the existence of an agreement subject to the requirements of section 15. In so doing, Complainants misconstrue the basis upon which the Presiding Officer ruled. They contend that he stated that, if there was no *written* agreement, there was no agreement of any kind which would require filing and approval. However, the Presiding Officer nowhere stated that a written agreement was necessary before an agreement became subject to the Act. In fact, he specifically found, as noted by Respondent, that no agreement or *understanding* was reached between Empremar and any carrier, other than PRMSA (I.D. at 10). There is considerable evidence of record which supports this finding.

The most fundamental requirement for jurisdiction under section 15 is ". . . the requirement that there be an actual viable agreement to which all of the parties have given and continue to give their assent until approval is had." *Hong Kong Tonnage Ceiling Agreement,* 10 F.M.C. 134, 140 (1966). Such does not appear to be the case here. A review of the telexes included in Respondent's Appendix indicates that, between August 11, 1982 and February 28, 1983, Empremar conducted negotiations with three other carriers in an attempt to work out an arrangement whereby they would carry some of Empremar's cargo from Puerto Rico to Chile. These other carriers were already serving the Europe/South America trade, together with Empremar as members of the Euroandino Agreement, and could conceivably divert their vessels to Puerto Rico to assist in Empremar's service between the United States and South America. Though various of these carriers "agreed in principle" with Empremar's initial proposal, there does not appear to have been any firm agreement by any of them at any time during the course of subsequent negotiations. For a period of five months, various proposals and counter-proposals went back and forth between Empremar and these other carriers. However, because of its inability to get any agreement from these carriers, Empremar eventually abandoned its attempts to engage these carriers in its U.S./Chile service.

The only troublesome element in this scenario is the series of advertisements published in the *Journal of Commerce* on January 7, 10, 12, 13 and 14, 1983, soliciting cargo for Empremar's new service. These advertisements included the names of vessels not owned or operated by Empremar and, taken at face value, might indicate the existence of some kind of arrangement between Empremar and the other carriers mentioned therein. However, the contemporaneous negotiations among these parties indicate that no such arrangement had yet been reached. In fact, at least one prospective co-venturer wired Empremar for an explanation, upon learning of the publication of the advertisements.

Empremar offered unrebutted testimony which explained the circumstances surrounding the advertisements. Empremar's vessel, "M/V ALTAVIA", was scheduled to arrive in San Juan on January 28, 1983, and Empremar was anxious to inaugurate its new service. The advertisement had been prepared some months before, in anticipation that the other carriers would have reached an arrangement with Empremar. Empremar's agent in New York mistakenly released the advertisement which included the other carriers. Upon learning of this error, Empremar stopped the advertisements and inaugurated its service using only its own vessels. There is nothing in the record to indicate that the other carriers reviewed and concurred in these advertisements or were otherwise involved in their preparation. More than the mere publication of the advertisements would be needed to establish the existence of an unfiled section 15 agreement among these carriers. The Presiding Officer was, therefore, justified in concluding that Complainants had not met their burden of proof on this issue.

The Commission's tariff filing rules require tariffs of carriers which have entered into transshipment arrangements to contain a "routing section," which includes: 1) a description of the routing, additional charges, if any, and the participating carriers, and 2) a statement to the effect that participating carriers agree to observe the rules, regulations, rates and routings established in the tariff. 46 C.F.R. § 536(d)(13). For a period of approximately three months, Empremar conducted three sailings under its transshipment arrangement with PRMSA, but during that time did not have the requisite "routing section" in its tariff. Complainants raised this as an issue in their amended complaint, alleging that it resulted in violations of section 17, 18(b)(1), and 18(b)(4).

Empremar has explained its failure to include the transshipment rule as being the result of its original intention to provide a direct, all water service between the United States and South America. At that time, a tariff was prepared and filed by its tariff filing agent reflecting this service. When Empremar later entered into a transshipment arrangement with PRMSA, Empremar claims that its agent erroneously neglected to include a proper transshipment rule. Empremar further claims that once it learned of its omission, it immediately amended its tariff to include such a rule. In addition, Empremar notes that its bills of lading for each shipment indicated a transshipment service, as did its press release and some of its advertisements.

Empremar's conduct concerning its transshipment tariff did result in a technical violation of the Commission's tariff filing rules. However, notwithstanding Complainants' allegations, it does not appear that anyone was adversely affected by this omission. Moreover, the "offense" does not appear to have been intentional but rather to have occurred due to the negligence of Empremar's tariff filing agent. Therefore, the Commission will impose no penalty upon Empremar for this "technical violation."

THEREFORE, IT IS ORDERED, That the Initial Decision of Administrative Law Judge William Beasley Harris, served in this proceeding on November 14, 1983, is adopted, as modified by the above discussion; and

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision are denied, except to the extent noted herein; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–7

ATLANTIC AND GULF/WEST COAST OF SOUTH AMERICA CONFERENCE, ET AL.[1]

v.

EMPRESA MARITIMA DEL ESTADO

Allegations of violation of Shipping Act not proved.

Proceeding discontinued.

Nathan J. Bayer, of Freehill, Hogan & Mahar, for complainants;

Zoe P. Hopkins, of Zelby & Burstein, for respondent; and

Donald C. Greenman, of Ober, Grimes & Shriver, as co-counsel.

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

Adopted April 18, 1984

The complainants in this proceeding on March 4, 1983, served (received March 8, 1983) a motion seeking permission to amend the original complaint served January 20, 1983, which had alleged the respondent had undertaken activities and entered into arrangements with other carriers regarding transportation of cargo from the United States to Chile in violation of sections 15 and 18(b)(1) of the Shipping Act, 1916.

At the prehearing conference herein on March 8, 1983, the respondent agreed to accept the amended complaint and to the respondent having ten (10) days in which to reply (Reply received March 17, 1983). The complainants seek an order finding the respondent violated sections 15, 17, 18(b)(1) and 18(b)(4) of the Shipping Act, 1916, and 46 CFR Part 524 and 536; they requested an order be entered imposing a civil penalty on respondent; and to award reparation to the complainants in an amount equal to the freight charges allegedly unlawfully collected by respondent; requested an order enjoining respondent from continuing to operate in violation of the Act and for such other relief as the Commission shall deem just and proper.

[1] Member Lines of Conference are six: (1) Compania Sud Americana de Vapores, (2) Delta Steamship Lines, Inc., (3) Flota Mercante Grancolombiana, SA, (4) Lykes Bros. Steamship Co., Inc., (5) Compania Peruana de Vapores, (6) Transportes Navieros Equatorianos.

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

Save for the prehearing conferences on March 8, 1983 and June 21, 1983, this proceeding was conducted without oral hearing.[3]

The Commission's Office of Energy and Environmental Impact examined this Docket No. 83–7 and determined under date of March 24, 1983, that section 547.4 (a) of the Commission's Procedures for Environmental Analysis applies. No environmental analysis need to be undertaken nor environmental documents prepared in connection with this docket.

PRESENTATIONS OF THE PARTIES

The complainants presented (received July 25, 1983) as their direct case the testimony of E. W. Norberg, Chairman of the Atlantic & Gulf/West Coast of South America Conference. He has been Chairman of the Conference for nine years. Mr. Norberg's testimony consists of 80 numbered paragraphs on 23 pages and 12 attachments in addition. Among the attachments is a copy of the Empremar advertisements in the *Journal of Commerce* of January 7, 1983, announcing the inauguration of a New Independent Intermodal Liner Service between USA and Chile. Five ships are listed, the *Altavia, Monfort, Soflot, Lago Lanalhue* and the *Houssmann.*

On or about January 14, 1983, the Conference sought in the United States District Court, Southern District of New York, 83 Civil 0466, a temporary restraining order enjoining Empremar from implementation of alleged unfiled agreement with members of the Eurandino group. Before U.S. District Judge Charles E. Brieant the matter was resolved by stipulation.

The respondent presented (received July 25, 1983) as its case the affidavit of Attorney Hopkins and an appendix of 372 pages, including June 7, 1983, deposition taken by complainants of Laurence C. Rogers (copy of transcript, Page A-195-A-443); June 9, 1983 deposition taken by complainants, Attorney Karem, of Rodolfo A. Catinchi (copy of transcript, Page A-240-A-302); and June 4, 1983 deposition of Rodrigo Alloa, taken by complainants (copy of transcript, Page A-307-A-364).

Rebuttal Statements were presented. The respondent's statement was received August 8, 1983, consisting of 17 pages and attachments A-E Inc. The complainants' statement was received August 9, 1983, consisting of 10 pages and exhibit—the rebuttal testimony of E. W. Norberg.

Complainants' Opening Brief, received August 22, 1983, consisted of 28 pages. Respondent's Opening Brief, received August 22, 1983, consisted of 29 pages. Complainants' Reply Brief, received September 6, 1983, consisted of 5 pages. Respondent's Reply Brief, received September 7, 1983, consisted of 5 pages.

[3] Excerpt from July 28, 1983 letter to Presiding Judge from Attorney Hopkins, for respondent: "At the prehearing conference in the FMC proceeding No. 83–7, it was agreed that an oral hearing would be held on Wednesday, August 3, 1983. After reviewing the written direct testimony submitted simultaneously on July 21, 1983, Nathan Bayer, attorney for the Complainants, and I have agreed that rebuttal to the written direct testimony can be accomplished through further written statements without the requirement of an oral hearing."

In their opening brief, received August 22, 1983, the complainants proposed 34 findings of fact (pages 6 to 14 inc.). The respondent in its opening brief, received August 22, 1983, proposed 6 findings of fact (pages 11 and 12). Total—40 proposed findings of fact. Both sides precede the request for findings of fact with the Nature and Background of the case (by the complainants, covering pages 1 to 6 inc.) and the respondent the Nature of the Case (pages 1 to 3 inc.) and Statement of Facts (pages 3 to 11 inc.).

In their reply brief, the complainants argued as to jurisdiction of the Commission in this proceeding and application of section 15 of the Act to this proceeding, while the respondent argued there was no agreement and that the tariff for Empremar's transshipment of cargo at San Juan, Puerto Rico, pursuant to a non-exclusive connecting carrier agreement with Puerto Rico Maritime Shipping Authority ("PRMSA") does not violate the intent of the Act.

FACTS

The parties' joint prehearing statement, received June 21, 1983, contains 11 stipulations to which they agreed. The Presiding Administrative Law Judge accepts the stipulations and finds them as facts. The stipulations are:

1. Empremar is a member of the European/South Pacific and Magellan Conference, the Europe/East Coast of South America Third Pool Agreement (Europac III) and the Eurandino Agreement.

2. On or about January 7, 1983, Empremar advertised the inauguration of its service between the United States and the West Coast of South America.

3. Empremar advertised and solicited cargo for vessels owned or operated by itself and other members of the Eurandino Group.

4. At the time those advertisements were placed Empremar had not filed any agreements with the FMC concerning the chartering of space from or transshipment on vessels owned or operated by other members of the Eurandino Group.

5. On or about January 14, 1983, complainants through an Order to Show Cause filed in the United States District Court, Southern District of New York, 83 Civ. 0466, sought a temporary injunction enjoining respondent from implementation of the alleged unfiled agreements with the members of the Eurandino Group.

6. At an oral hearing held January 18, 1983, before the Hon. Charles E. Brieant, U.S.D.J., Empremar entered into a stipulation by which it caused further advertising of vessels other than those owned or operated by it.

7. Judge Brieant ordered that said stipulation had the same force and effect as if it were a preliminary injunction.

8. At a further oral hearing before Judge Brieant, held March 3, 1983, Empremar agreed to stipulate that it would not implement any agreements

without first filing them with the FMC and providing a copy to complainants two weeks prior to filing with the FMC.

9. Judge Briant ordered that said stipulation had the same force and effect as if it were a temporary injunction.

10. Complainants and respondent have agreed to stipulate as to the authenticity and admissibility of all documents provided by respondent during discovery.

11. Complainants and respondent have agreed to the authenticity and admissibility of the transcript of the oral hearings before Judge Brieant and the transcripts of the oral deposition of respondent's witnesses.

Respectfully Submitted

Zelby & Burstein	Freehill, Hogan & Mahar
By Zoe P. Hopkins	By Nathan J. Bayer
Attorneys for the respondent	Attorneys for the complainants

FACTS (CONTINUED)

Empremar is an organization owned by the Government of the Republic of Chile.

Empremar, as a member of the South America Third Pool Agreement (Europac III), shares in the net pool freight earnings derived from carrying pool cargo, which is all cargo in the trade.

Empremar is a party to Eurandino Agreement which is a joint service of Armement Deppe, SA, Compagnie Generale Maritime, Companie Peruana de Vapores, Consorcio Naviero Peruano and Empresa Maritima del Estado trading under the name Eurandino between ports of the Hamburg/Bordeaux range and the West Coast of South America, Ecuador, Peru, Bolivia and Chile.

Pursuant to the Eurandino agreement the parties coordinate and rationalize their sailings, employ common booking and loading procedures and utilize the same berths in European ports. The parties establish a rationalized sailing schedule a year in advance.

In September of 1982, Empremar's coordinating agent in the United States, Omnium Agencies, Inc. ("Omnium"), prepared a press release describing Empremar's new service which it distributed to the *Journal of Commerce.*

The *Journal of Commerce,* without Omnium's permission, printed the press release. The *Journal of Commerce* acknowledged that they issued the release in error.

Empremar communicated its concern to Omnium over the premature release because the Eurandino partners had not been signed.

Two Eurandino partners, Compania Peruana de Vapores and Consorcio Naviero Peruano, by telex of December 23, 1982, only elected not to participate in the venture.

Empremar entered into a non-exclusive connecting carrier agreement with PRMSA which was filed with the Commission as required by its regulation at 46 CFR Part 524 and assigned FMC No. 81972.

The transshipment at San Juan, Puerto Rico, was disclosed to the Commission and to the general shipping public by the filing of the PRMSA agreements in bills of lading issued for each voyage and in the press releases and advertisements of the service.

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The complainants contend that an unfiled, unapproved, illegal agreement existed among Empremar, Compagnie Generale Maritime (CGM) and Armement Deppe, SA (Deppe) (Reply Brief, p. 2). The respondent says the complainants are unable to cite one telex in support of the contention that an agreement or understanding was reached with either CGM or Deppe at any time (Reply Brief, p. 5). The respondent contends the key element necessary for Commission jurisdiction in this matter, an agreement, is lacking. There is no agreement (respondent's brief received August 22, 1983, page 15). The complainants counter that the respondent's contention is specious (Reply Brief, p. 1). And, respondent's attempts to support this theory with language from *Hong Kong Tonnage Ceiling Agreement,* Docket No. 66-29, 10 F.M.C. 134 (1966), demonstrates its inapplicability to the instant situation. In that case, say the complainants, the Commission issued an Order to Show Cause why a certain filed document should not be rejected as failing to constitute a section 15 agreement. All members of the purported agreement, save one, argued that an agreement did exist and should be approved. The party challenging this position was one of the signatories, contending that it would not subscribe to the agreement, even though earlier signing it. The Commission held that the later repudiation of the agreement after it was filed with the Commission resulted in the absence of an agreement (Reply Brief, pp. 1 and 2).

The respondent had argued (Brief received August 22, 1983, p. 14) that in *Hong Kong Tonnage Celing Agreement*, the Commission established three elements necessary for jurisdiction pursuant to section 15 of the Act. There must be: (1) an agreement among, (2) common carriers by water or other persons subject to the Act, (3) to engage in anticompetitive or cooperative activity of the types specified in section 15. If one or more of the elements is lacking, there is no jurisdiction to consider the matter under section 15. In considering each of those elements the Commission has determined that the "most fundamental of all is the requirement that there be an actual viable agreement to which all of the parties have given and continue to give their assent until approval is had." Citing *Hong Kong Tonnage Ceiling Agreement, supra.*

The complainants assert the documentary evidence presented in this matter could hardly be more supportive of a finding that an agreement, final or otherwise, existed within the meaning of section 15. Numerous telexes and other communications sent by and between Empremar and the Eurandino members refer to the "agreement," a "desire to participate," an "agreement in principal," and "intercarriage agreement," and similar language which the Commission has, on previous occasions, found to be entitled to great weight, far greater than the oral testimony by persons under investigation trying to explain away such references (Opening Brief, page 20). The respondent responds that the complainants attempt to misconstrue the nature of the negotiations by citing key words and phrases taken from the telexes out of context and sequence. A careful examination of the telexes, in sequence and in their entirety, reveals that no agreement or understanding was reached between Empremar and any other carrier (Reply Brief, p. 3).

The complainants argue, however, that it is irrelevant that Empremar never actually signed any agreement with the Eurandino members. The mere fact that the carriers agreed to, and did cooperate in attempting to reach an agreement is sufficient to find conduct prescribed in section 15, citing *Unapproved Section 15 Agreements—South African Trade,* Docket No. 882, 7 F.M.C. 159 (1962) (Opening Brief, Page 19). The complainants say the fact that some Eurandino members subsequently withdrew all participation in finalizing the agreement is likewise immaterial (*Ibid.,* page 20).

The Presiding Administrative Law Judge made a careful examination of the 41 telexes herein, covering from August 11, 1982 to August 26, 1982, November 16, 1982 to February 24, 1983, in sequence and their entirety. He found present the references made by the complainant to language. He also found that there was imploring by Empremar for acceptance of the proposal, but there was refusal instead. He agrees with the respondent that no agreement or understanding was reached between Empremar and any other carrier than PRMSA which is covered by FMC No. 81972.

The complainants refer to the repeated appearance of Empremar's advertisement in the *Journal of Commerce,* listing ports of call and sailing schedules for non-Empremar vessels and referring interested shippers to Empremar agents for freight rates and other information regarding any of the vessels or schedules as documentary evidence that work involved in preparing Empremar advertisements and schedule "bespeaks mutual understanding among the participating lines" (*Ibid.,* pages 20, 21), citing *Maatschappij "Zeetransport" N.V. (Oranje Line)* v. *Anchor Line Limited,* Docket No. 833, 6 F.M.C. 199 (1961). (*Ibid.*) The complainants assert that Empremar's contention that the publication of these advertisements was a mistake is unsupportable on any factual ground.

Complainants would have action taken in this proceeding on tacit agreements and advertising. Joint advertising by itself does not justify finding that the action was taken pursuant to agreement. Other than inferences of conspiring sought to be drawn from advertising and partial pattern of the respondents, no proof of conspiracy and actions against the complainants was produced. More than this is needed and such complaint is found to be unproved.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge, in addition to the *findings* and *conclusions* heretofore made, *finds* and *concludes* that the complainants have not proved the violations alleged.

Wherefore, it is ordered,

(A) The requested order finding that the respondent violated sections 15, 17, 18(b)(1), 18(b)(4), 46 CFR Part 524, and 46 CFR Part 536, is Denied.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 536; DOCKET NO. 84–3]

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES; INTERMODAL TARIFF FILING REQUIREMENTS—EXEMPTION FROM CERTAIN STATUTORY REQUIREMENTS AND AMENDMENT OF TARIFF FILING REGULATIONS

April 23, 1984

ACTION: Discontinuance of Proceeding

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing tariff filing requirements for intermodal rates will be addressed in future proceedings.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the Federal Register on March 1, 1984, (49 FR 7609), the Commission proposed various amendments to its rules governing the filing of intermodal rates. Time within which comments on the proposal may be made has not yet expired.

The recently enacted Shipping Act of 1984 requires the Commission to conduct a comprehensive review of its tariff filing regulations. Continuation of this proceeding, therefore, is not warranted.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 536; DOCKET NO. 81–50]

PER-CONTAINER RATES—TARIFF FILING REQUIREMENTS APPLICABLE TO CARRIERS AND CONFERENCES IN THE FOREIGN COMMERCE OF THE UNITED STATES

April 24, 1984

ACTION: Discontinuance of Proceeding

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing filing requirements for per-container rates will be addressed in a future proceeding.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the Federal Register on August 28, 1981 (46 FR 43474), the Commission instituted this proceeding to prescribe procedures for filing of per-container rates by carriers and conferences in the foreign commerce of the United States. After receipt and consideration of comments, the Commission published final rules on June 14, 1982 24 F.M.C. 1087 (1982). Subsequently, the effective date of the rules was postponed pending decision on various petitions for reconsideration (47 FR 45883).

The recently enacted Shipping Act of 1984 has made it necessary for the Commission to review all of its tariff filing requirements. The issues raised herein, therefore, are better addressed in a future rulemaking proceeding.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[DOCKET NO. 83–16]

TERRY MARLER AND JAMES BEASLEY D/B/A TITANIC STEAMSHIP LINE—POSSIBLE VIOLATIONS OF SECTION 3(A) OF PUBLIC LAW 89–777

ORDER ADOPTING INITIAL DECISION

April 24, 1984

This proceeding was instituted by Order of Investigation and Hearing issued on March 16, 1982 to determine whether Terry Marler and James Beasley D/B/A Titanic Steamship Line (Respondents), violated section 3(a) of Public Law 89–777 (4 USC § 1817e) by advertising or offering passage from United States ports on a vessel having accommodations for fifty or more passengers without having first obtained a certificate of financial responsibility from the Commission.

Chief Administrative Law Judge John E. Cograve (Presiding Officer) issued an Initial Decision finding that no violations of P.L. 89–777 had been proven.[1] Exceptions to the Initial Decision have been filed by the Commission's Bureau of Hearing Counsel.

BACKGROUND

The facts, as set forth in the Initial Decision may be summarized as follows.

In January of 1981 Respondents registered the "Titanic Steamship Line, Inc." as the "fictitious business name" of a general partnership in San Diego County, California. On February 3, 1981 Federal Maritime Commission (FMC) personnel were provided an unsigned letter which had been sent to a travel agent in Palm Springs, California announcing plans to build a new American flag passenger ship called the "Titanic II". The letter advised of a maiden voyage date of April 10, 1985, and a "starting price" of $1,000 per day per person (double occupancy), with reservations to be taken commencing September 19, 1981. No mention was made of advance payment or deposits.

On March 16, 1981 an editor of a travel magazine forwarded to FMC personnel a copy of a "press release" announcing that reservations on the "Titanic II" were being accepted. The "press release" contained the same basic information as the letter provided to FMC personnel on February

[1] Because no party made a showing that oral testimony and cross-examination were necessary, the Presiding Officer limited the hearing to memoranda of law and affidavits of fact.

3, 1981 as well as further information on the ship and future sailing schedules.

On March 17, 1981 FMC personnel were provided another letter addressed to "Dear Travel Agent" advising that reservations were being accepted on the "Titanic II". This notice specifically stated that deposits would not be accepted until 1984. FMC investigators then called the "reservation number" stated on the notice and spoke with one of the Respondents who confirmed that reservations were being accepted but not deposits.

On June 26, 1981 Commission investigators placed another call to the "Titanic II" reservation number and, under an alias, asked for printed materials. These materials were received on July 1, 1981. They generally promoted the "Titanic II" venture and stated the need to make "reservations" but made no mention of accepting deposits or other payments.

DISCUSSION

The Presiding Officer concluded that Respondents had not violated P.L. 89–777 or Commission regulations because it was not proven that they had "advertised" cruises aboard the "Titanic II". He based this conclusion partly on the finding that Respondents' promotional materials did not contemplate the payment of deposits and Respondents had not otherwise attempted to collect or accept any money from interested persons.

Hearing Counsel excepts to the Presiding Officer construction of the term "advertising" in P.L. 89–777, but does not except to his "ultimate finding" or insist on the assessment of civil penalties. Hearing Counsel submits that the statute's ban on advertising was intended to be absolute. Hearing Counsel argues that the decision of the Presiding Officer on this essential issue, if upheld, would significantly erode the effectiveness of the statute. Hearing Counsel concede, however, that Respondents have discontinued their activities. It therefore advises that the Commission could discontinue the proceeding without further action.

The Commission will adopt the Initial Decision issued by the Presiding Officer and dismiss this proceeding. However, we wish to make clear that this determination is strictly limited to the particular facts of this case. We find no violation in this case on the basis of the objective content of the promotional materials at issue and the manner in which they were published. Respondents' activities simply do not rise to the level of "advertising" within the meaning of P.L. 89–777. In our opinion, they were only intended to gauge the traveling public's interest in the Titanic project.

Hearing Counsel advances the position that virtually any public promotional activities, regardless of surrounding circumstances, constitute "advertising", citing *Wall Street Cruises, Inc.*, 15 F.M.C. 140 (1972). We find, however, that *Wall Street Cruises, Inc.*, is not only distinguishable from this case but generally supports the Presiding Officer's decision.

The respondent in *Wall Street Cruises, Inc.* argued that its "notices" in the *New York Times* were only a "market test" and, because it collected no money as a result thereof, P.L. 89–777 had not been violated. The Commission rejected this argument and found that the "notices, which respondent had caused to appear in the Sunday editions of the *New York Times* on several occasions during the months of May, June and July 1971, constituted 'advertisements' within the real meaning of the word rather than merely reflecting a 'market test.'" 15 F.M.C. at 142. The Commission explained:

> At the outset, we find Respondent's characterization of the advertisements in question as "market tests" to be unconvincing. As Hearing Counsel have pointed out, the advertisements which appeared in the *New York Times* quote specific fares and name specific dates and purport to solicit business for actual cruises. These advertisements are similar to regular advertisements published by established passenger lines, and clearly invite response by the public to either Respondent or travel agents. The advertisements which Respondent published in the *New York Times* do not indicate that their purpose was merely to determine the potential traveling public's reaction to the proposed cruise program. *Id.*

Thus, while *Wall Street Cruises, Inc.* indicates that the collection of money is not essential to finding a violation of the statute, it also recognizes that "market tests" might not violate P.L. 89–777 if conducted in a manner that does not do violence to the statute's legislative purposes.

The Initial Decision here holds that Respondents' promotional publications do not constitute "advertising" within the meaning of P.L. 89–777 because, "based on all the circumstances of the case", they do not convey to the public an immediate intent to book passage or collect money.[2] This finding is supported by the totality of circumstances presented by the record. These include the fact that Respondents did not place standard ads in newspapers and trade publications and only circulated brochures to travel agents and issued press releases to trade publications, the fact that the materials were interpreted by a trade publication as a form of a "market test" (I.D. at 25); and, the disclaimer concerning the collection of deposits in the March 17, 1981 letter to travel agents. While Respondents might have more clearly indicated that they were conducting a "market test", their promotional efforts do not do violence to the legislative purpose of P.L. 89–777.

[2] Although the Presiding Officer failed to rule on whether the activities engaged in by these Respondents constituted "arranging" or "offering" passage pursuant to P.L. 89–777, we also find, based upon the totality of the circumstances, that these activities did no violence to legislative intent.

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

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision filed by the Commission's Bureau of Hearing Counsel are denied; and

IT IS FURTHER ORDERED, That this proceeding is dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–16

TERRY MARLER AND JAMES BEASLEY D/B/A TITANIC STEAMSHIP LINE—POSSIBLE VIOLATIONS OF SECTION 3(A) OF PUBLIC LAW 89–777

James M. Beasley and *Terry E. Marler pro se.*

John Robert Ewers and *Janet Katz* as Hearing Counsel.

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

Adopted April 24, 1984

This is the story of two very unfortunate gentlemen who would return "to those glorious days of yesteryear" when "beautiful goddesses of the ocean" carried "the very best people . . . between one side of the world and another." It begins in San Diego, California, at a meeting of the Board of Directors of Transit Risk Corporation. The Chairman of the Board, James M. Beasley, was complaining of the "lack of superior first class accommodations and first class passenger ships" and about "the lack of speed and beauty." The Board, having heard all this before, suggested that if Chairman Beasley "thought he could do better" he should "build a ship and operate it."[2] With this the "Titanic Project was born," and in January 1981, the "Titanic Steamship Line, Inc." was registered by Mr. Terry E. Marler and Beasley as a "fictitious business name" with the San Diego County Clerk. It was registered as a General Partnership. The registration form contains no information on the kind of business to be conducted by the partnership or its purpose.

The Titanic project came to the Commission's attention just a few weeks later on March 17, 1981, when Lyndon Berezowsky, then a District Investigator with the Commission's Pacific District Office, was given a copy of a letter announcing plans to build a seventy-five thousand ton liner with three hundred suites and a crew of twelve hundred.[3] The ship was to fly the American flag and be called the "*Titanic II.*" The letter was

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

[2] The membership of the Board is not identified by name, number or otherwise. Its role here appears somewhat akin to that of the chorus in the plays of Aristophanes.

[3] The letter was addressed to Ms. Ellen Matthews of Gadabout Tours, Palm Springs, California, and was unsigned. The letter was given to Berezowsky by Ron Lord, General Manager of the Pacific Cruise Conference.

unsigned but bore the heading "*S.S. Titanic II.*" The virtues of the new *Titanic* were extolled in a series of one sentence paragraphs such as:

> Not "deluxe" but elegant, grand and graceful.
> No "disco", no "junk," no "ugly" people pretending they are in their backyard standing over their barbecue pit.
> A liner.
> Average voyage: twenty-eight days, nine voyages a year, one of them around the world.

The *Titanic II* was to be built by "Harland & Wolff of Belfast, Ireland," at an expected cost of "Four hundred and Ninety-Five million Dollars."[4] The ship would cruise at thirty-one knots and be one thousand eighty-three feet in length with a one hundred foot beam. There were to be ten passenger decks and like the original, the *Titanic II* was to be crowned with four stacks. The "starting price" for the three hundred passenger suites was "one thousand dollars a day per person double occupancy." The "maiden voyage" was some four years away, scheduled for April 10, 1985, but reservations could be made for it beginning September 19, 1981. No mention was made of any requirement for any advance payment or deposit of any kind.[5]

Mr. Berezowsky's reaction to the letter was that, "Since no mention was made of sailings from United States ports and given the tone and content of the letter, the matter was treated as a crank letter by the Pacific District Office and no official action was taken." About a month later, however, two new documents surfaced.

On March 16, 1981, Ms, Barbara Sturken, Associate Editor of *Travel Magazine,* a Division of the *Official Airlines Guide,* sent to Mr. Frank Bartak, Chief, Office of Certification and Licensing, a copy of a "press release" under cover of a note:

> Dear Mr. Bartak:
>
> Here's the release on the "*Titanic*" I told you about. This has to be one of the weirder things to come out of California in a long time.
>
> I'll call you later, so we can compare notes on this mysterious company.

The release announced that the "Super Deluxe passenger Liner, S.S. *Titanic II* is now accepting reservations for space on Maiden Voyage, April 10, 1985, as well as regular Trans-Atlantic crossings, Caribbean Cruises and WORLD CRUISE." A number was given to call for booking

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[4] "We have found that the original builders of the *Titanic*, Harland & Wolff in Belfast, Ireland, are alive and well and fully capable of building three more *Titanics*." Considering that the original *Titanic* went down in 1912, it seems a minor medical miracle that the original builders are alive.

[5] Except for a telephone number appearing in the letterhead as a part of the business address no reference was made as to how one would obtain a "reservation." Subsequently it was announced that deposits would be asked for beginning sometime in 1984.

information and sailing dates for the ship that was "already being called the 'Wonder Liner of the Future.' " Prospective passengers were advised to "be sure and start saving your pennies as [suites] start out at $1,000 per day, per person, double occupancy, and go skyward."

In a letter which accompanied the release the *Titanic II* showed a tendency which if protracted could prove alarming—a tendency to shrink in length and beam but grow in height. The *Titanic II* was now to be 943 feet in length (down from 1,083 feet); 94 feet in the beam (down from 100 feet), but it was to have 12 passenger decks (up from 10).

Other noteworthy features of the "Wonder Liner of the Future" were listed as: "fully air conditioned, individual cabin controls; 10 elevators; 1 indoor, 1 outdoor swimming pool; 8 cocktail lounges; Specialty shops; Beauty/Barber shops; men's and women's health club; laundry/valet service; 1 library; medical and dental services; 20 public rooms. . . ." Two other matters were thought worthy of mention:

> Dining: 1 dining room. All one sitting. Reservations when booking recommended. Continental Gourmet Cuisine and very lavish.
>
> Tipping: This liner is super deluxe and passengers are expected to tip accordingly as they would in any first class hotel.

Finally the whole thing was summed up as:

> *Titanic II* is unique in every aspect. Super, Glamorous. Breathtakingly beautiful, both inside and out. Extremely fast, cruising at 33 knots.[6]
>
> Per square inch, the most expensive passenger liner ever.[7]

Under the enclosed sailing schedule the maiden voyage was scheduled to leave Southampton on April 10, 1985, and arrive in New York on April 14, 1985.[8] The schedule began with the maiden voyage and ended with a New York-Bermuda-Le Havre-Southampton voyage in March of 1986. Included in the schedule was a "World Cruise" which was to begin on January 1, 1986, and end on February 28, 1986.[9] Of the 42 voyages listed in the schedule only four appear to be cruises as they are generally understood. These four leave New York go to Bermuda and return to New York. The remainder of the voyages, except for the "World Cruise"

[6] Along with the addition of two more passenger decks, the *Titanic* picked up two more knots of cruising speed.

[7] In view of the daily rates for the "suites" I am not sure whether this refers to the cost of building the *Titanic II* or the expense of passage aboard her.

[8] The daily rates for the maiden voyage were '$2,000, $3,000 and $5,000 per day per person double occupancy.

[9] A couple going "first class" on this one could look forward to spending about a quarter of a million dollars if one allowed for "generous tips."

are one-way passages from New York to Southampton by way of Le Havre or from Southampton to New York by way of Le Havre.[10]

The day after Barbara Sturken sent Mr. Bartak the press release, Ron Lord gave Lyndon Berezowsky a second letter which read:

> Dear Travel Agent:
>
> Enclosed is information on the first of three ships of our line, *Titanic II*.
>
> Our reservation lines are now open, and a first year schedule and reservation form is enclosed.
>
> No deposit telephone reservations are being taken on all sailings listed. Deposits will not be required until 1984, but space is limited and going fast.

Among the hitherto unmentioned amenities, putative passengers could look forward to "4 orchestras; first run movies daily; Cabaret shows; casinos."

On the same day that Ron Lord gave Lyndon Berezowsky copies of the second letter, March 17, 1981, Berezowsky called the "reservation number" for the *Titanic II* and spoke to Mr. Terry Marler who "confirmed that the line was accepting reservations but said that deposits were not required at this time."

The record contains no evidence of any further investigation or contact with respondents until a month later on April 17, 1981, when the Commission's Director of the Bureau of Certification and Licensing informed Messrs. Marler and Beasley that their "advertising and promotion" were in violation of section 3 of P.L. 89–777 and section 540.3 of General Order 20.[11] The respondents were urgently advised to discontinue their activities and comply with P.L. 89–777 and General Order 20. The Bureau offered aid in helping the respondents obtain the necessary Certificate of Financial Responsibility for Indemnification of Passengers for Non-performance of Transportation. On April 27, 1981, Messrs. Marler and Beasley by telex to the Assistant Secretary of the Commission advised that:

> . . . the Board of Directors of the Titanic Steamship Line have decided that no vessel of the line shall for any reason embark any passengers at any United States Port.

Messrs. Marler and Beasley went on to deny the allegations contained in the letter from the Bureau and said that the action of the Board of Directors was taken "because the moral conscience of the line would prohibit it from agreeing to your gag-order regarding the press of the world."[12]

[10] Throughout the short life of the Titanic project the respondents could not seem to make up their mind whether it was going to be a cruise operation or a transatlantic passenger service.

[11] P.L. 89–777 makes it unlawful for any person to advertise or offer passage on certain vessels embarking passengers from U.S. ports unless the operator has established financial responsibility with the Commission.

[12] The "gag order" apparently refers to the Bureau's advice that the respondents cease all "advertising" and "promotional activities" which respondents apparently thought included "interviews" with reporters.

On June 26, 1981, Lyndon Berezowsky placed a second call to the Titanic Steamship Line Inc. "and a woman answered as Titanic." Berezowsky told the woman[13] that he was interested in taking a cruise on the *Titanic*. According to Berezowsky, "The woman told me that the company was still going forward with plans to begin cruise service in 1985." Berezowsky then requested that he be mailed copies of all printed materials describing the proposed service. Berezowsky gave the name of "Dave Wilson" and his "real" home address. Dave Wilson A.K.A. Lyndon Berezowsky received the requested material on July 1, 1981.

The material received by Berezowsky revealed that putative *Titanic II* had spawned a couple of offspring. After "tedious examination" of current "so-called first-class ships" and "evaluation and financial studies" and "studies regarding the travel industry" it was decided that three of the "fastest, most glamorous, most beautiful liners ever sent to sea" would be built. These ships would "win prizes for speed," "be talked about" and "become legends in their own time." Passengers would "return in time back to the days when crossing an ocean was an event of excitement and social prestige (excepting perhaps any immigrants in steerage) a thrilling interlude between one side of the world and another."

Seen in the "moonlight" the ships would look like the "*Titanic* of bygone days." However, lest the identification with the "*Titanic* of bygone days" become too complete, the literature goes on to point out "behind the beauty lie the most modern safety devices that any liner has ever possessed." These are to be more than "just the electronic toys of today and tomorrow, but the design of the human beings who will backstop every safety device." As but an example, every deck "will be served by a constantly walking human being" who will 24 hours a day "examine every space for the slightest possibility of fire."[14] "Also four human beings will be in the galley 24 hours a day and armed with fire extinguishers."[15]

As one might surmise, a good deal of money would be involved in realizing the Titanic Project. Indeed, then "current estimates" put the cost at a "billion and a half dollars." However, if the three vessels were to sail regularly at close to capacity, an expected "gross of one billion per operating year" would be realized. The dream was not of "cruise ships." "Oh, no." It was of "fast and sleek liners, for the very best people who are able to afford these very beautiful goddesses of the ocean."

On June 29, 1981, some three days before Berezowsky received the material requested in his phone call, the then Bureau of Investigation and

[13] Apparently District Investigator Berezowsky either failed to ask the "woman's" name or if he did he failed to make a record of it and could not recall it when he gave his affidavit.

[14] This "constantly walking human being" is either possessed of truly extraordinary stamina or more than one human is contemplated for the duty.

[15] No mention is made of any special equipment for the detection of hazardous objects which might cross the path of the *Titanic II*.

Enforcement sent the respondents a "Notice of Claim for Civil Penalty." The claim, for $5,000[16] was based upon the assertion that:

> Titanic Steamship Line, Inc. (Titanic) advertised passage on a vessel without first having been issued a Certificate (Performance) by the Commission. Titanic sent letters along with sailing schedules and reservation forms to travel agents to describe a new ship the *Titanic II*, that would begin service on April 10, 1985.

The Commission's rules for the compromise of claims were sent along with the letter and the respondents were told that, "Failure to respond or to settle this claim will result in consideration of other courses of action by this Commission, including but not limited to the institution of formal proceedings."

On July 8, 1981, in letter addressed to the Bureau, "Attn. Janet F. Katz," Mr. Terry E. Marler responded to the Notice of Claim in part as follows:

> I. No such ship *Titanic II* currently exists.
>
> II. No deposits, funds, or any other consideration has ever been asked or collected by Titanic Steamship Line.
>
> III. The Titanic Steamship Line has no bank account.
>
> IV. As per our April 20, 1981, Telex to the Federal Maritime Commission (copy attached)—"NO VESSEL OF THE LINE SHALL FOR ANY REASON EMBARK ANY PASSENGER AT ANY UNITED STATES PORT."
>
> V. Furthermore, Titanic Steamship Line has not "arranged, offered, advertised, or provided" passage for any person—only taken names and addresses for future reservation lists.
>
> VI. All claimed "advertising material" was withdrawn pursuant to the request of the Federal Maritime Commission.
>
> VII. All radio interviews, national or international, were refused even though not initiated by this line pursuant to the instructions of the Federal Maritime Commission.
>
> VIII. Notice has been sent to every and all known persons throughout the world who have contacted this line for information regarding the *Titanic II* that pursuant to the wishes of the Federal Maritime Commission no further information will be made available regarding the projected liner.
>
> IX. At the present time, Titanic Steamship Line is a dormant entity and has no ongoing program of any kind and does not anticipate any for the next five years.
>
> PETITION: Due to the above nine statements and due to the fact that this projected liner will not embark or project embarkation

[16] Five thousand dollars is the maximum penalty provided in section 3(c) unless the respondent has actually collected fares in which case there is a penalty of $200 for each passage sold.

of passengers at United States ports, petition is made for Notice of Claim dated June 29, 1981, be withdrawn.

Some five months later, on December 3, 1981, the Bureau by letter told respondents that a "review" of its files revealed that the claim had not been resolved. The Bureau said it would not withdraw its claim but was "willing to pursue negotiations," adding that it would like to hear from the respondents in 30 days.

On December 11, 1981, after a phone conversation with Mr. Marler, the Bureau again declined to withdraw the claim and indicated its willingness to negotiate. The Bureau went on to add that refusal to negotiate would require the Commission "to resort to formal proceedings which would include an Order of Investigation and a possible hearing before an Administrative Law Judge." In a letter dated December 15, 1981, Mr. Marler replied to the Bureau suggesting, among other things, that the Bureau (Commission) if it were interested in settling the matter, should decide on "the dollar value that they wish to negotiate."

The Bureau replied on January 27, 1982, that the amount of the claim, $5,000, was the maximum specified by statute, and it was up to respondents "to explain any mitigating or extenuating circumstances" and that the information supplied would "be considered in determining the amount for which the claim may be settled." Apparently nothing more was heard from respondents and on April 5, 1982, the Bureau told the respondents that unless something was forthcoming by April 23, 1982, they "would be forced to institute a proceeding."

In a letter received on April 19, 1982, Mr. Marler told the Bureau, that from his review of the correspondence to the Bureau it appeared to him that "a rather thorough explanation of why the 'alleged violation' was in actuality no violation at all has been forwarded in this matter."[17] Mr. Marler, however, offered to supply any additional information the Bureau would need "to clear up this matter." On April 23, 1982, the Bureau notified the respondents, that it remained firm in its belief that they had violated the law but that it was still willing to negotiate the amount of the claim.

At this point something seems to have snapped. In a rambling reply to the Bureau, Mr. Beasley speaks of the Commission's "threats" and finds the "papers" in his file on the *Titanic II* "identical to the pieces of paper issued by the McCarthy Commission." "Threats and more threats." With allusions to penalties such as "forty years at hard labor and loss of citizenship" Mr. Beasley decries the attempts to abridge "the freedom of the press" and the "right of free enterprise" and says "it is now time to allow private citizens in open court to make a judgement

[17] From the letters of Beasley and Marler to the Bureau the argument is that no deposits for passenger fares were accepted, that any interviews given the media were at the request of reporters and were not arranged by the respondents and that on the "matter of the printed material that went to a few travel agents . . . again we are talking about requested information."

on this matter." On this note the correspondence ends and the order instituting this proceeding was issued on March 16, 1983.

DISCUSSION AND CONCLUSIONS

Before dealing with the merits of this case it is necessary to dispose of Hearing Counsel's pending "Motion to Have Evidence Withheld from Public Disclosure." The "evidence" which Hearing Counsel would withhold from the public was submitted in compliance with my order of June 23, 1983. Some review of the course of this proceeding is necessary to place the order and motion in their proper context.

The Commission's order instituting this proceeding called for an oral or full trial-type hearing only if there were presented "genuine issues of fact which could not be resolved upon the basis of sworn statements, affidavits, depositions or other documents." On March 21, 1983 I required the parties to tell me whether they wanted an oral hearing. Any party requesting such a hearing had to provide (1) a clear statement of the issues involved, (2) an explanation of the need for an oral hearing to resolve those issues, and (3) the names of the witnesses to be called and an outline of their testimony. Hearing Counsel in a letter dated March 31, 1983, stated that they were "not yet in a position to determine whether there are contested material facts [and] . . . we need discovery to determine whether Respondents collected any fares, which fact will bear upon the amount of civil penalties to be assessed." [18]

Pursuant to my order of April 6, 1983, Hearing Counsel submitted their discovery requests for my approval.[19] In a cover letter accompanying their discovery requests Hearing Counsel said, "We believe it is our duty to develop facts in support of mitigation and aggravation in addition to the facts we already have." [20] The interrogatories demanded among other things identification of all persons the respondents dealt with concerning the *S.S. Titanic II* whether in writing, by phone or in person. No time period is specified for these interrogatories. In addition, respondents were to identify all "documents, discussions and/or meetings" which related to any passenger vessel they had planned to purchase, charter or build. The period covered by this request was June 1981 through the present. In their cover letter, Hearing Counsel also said, "It is possible on the basis of the answers

[18] It would appear that in the two years since the *Titanic II* first came to the attention of Lyndon Berezowsky, no investigation was conducted to establish with any reasonable degree of certainty just what the respondents had been doing. The Bureau did not seem interested in whether any fares had been collected when the claim letter was sent to respondents. See page 9 *supra*.

[19] My order was prompted by an inability to understand why Hearing Counsel after the institution of a formal proceeding in which their role is that of a prosecutor, should find it necessary to engage in what can only be called preliminary investigation. Whether the respondents had in fact collected passage money is it seems to me one of the first inquiries to be made in any investigation leading to a prosecution under this statute.

[20] This is in contrast to Hearing Counsel's unwavering insistence throughout their correspondence with respondents that it was up to the respondents to submit any matters in mitigation.

received to these interrogatories we will need a second round of discovery, not excluding the possibility of depositions."

The breadth and scope of these discovery requests led me to the conclusion, stated in my order of April 21, 1983, that the discovery was not concerned only, or even primarily, with the amount of civil penalties or mitigation; but rather they were "designed to supply the prima facie case which should have been in hand prior to the institution of this proceeding." I then withheld my ruling on the discovery requests pending Hearing Counsel's submission "of a statement of the specific violations they intend to prove together with a summary of the supporting evidence in their possession."

Hearing Counsel's response stated that they intended to prove that respondents "advertised or offered passage from United States ports on a 600 passenger vessel in violation of section 3(a) of Public Law 89–777 . . . and section 540.3 of the Commission's General Order No. 20. . . ." According to Hearing Counsel their evidence "included a letter sent to a travel agent with a reservation form and a sailing schedule." They also intended to introduce an affidavit from an investigator (Berezowsky) showing that in response to a telephone call "information [on the *Titanic*] was sent which also included a reservations number."[21] Hearing Counsel also expanded on their need for discovery:

> The evidence we have now or that we could get through discovery would still only equal one violation of section 3(a) for a maximum penalty of $5,000. The responses to our discovery, however, would give a picture of the current status of the project, and, because under oath, would be more probative. It would also provide us with evidence that could bear on aggravation or mitigation of the penalty. We would also intend to introduce the responses into evidence, which, if there were nothing more, could institute [sic] the entire record for adjudication.

Hearing Counsel have now dropped the amount of civil penalty as a justification for their discovery requests. This left only (1) a suggested need to know the current status of the project and (2) the duty to provide evidence in mitigation and aggravation.[22]

I denied Hearing Counsel's request because, as Hearing Counsel themselves had earlier maintained, matters in mitigation were the special province of the respondents and the question of the aggravation of any penalties was ancillary to the primary question of whether the Act had been violated. I set a procedural schedule and Hearing Counsel filed their opening brief and a set of exhibits. The respondents did not file an answering brief

[21] Hearing Counsel also indicated that they would ask for judicial notice, or introduce evidence, of previous settlement(s) of civil penalty claims for similar violations.

[22] Hearing Counsel did not at any time say that the documents sought by discovery were needed to establish the violation itself. Had they done so a quite different question would have been presented.

so there was no need for a reply brief by Hearing Counsel. The case was then before me for decision on Hearing Counsel's brief and exhibits.

On June 7, 1983, I directed Hearing Counsel to submit certain documents which although referred to in the exhibits offered as evidence by Hearing Counsel had not themselves been submitted for inclusion in the record. For example, one of the exhibits offered by Hearing Counsel was a letter from Mr. Marler entitled "In Response To Notice of Claim." The "Notice of Claim" was not, however, offered by Hearing Counsel as an exhibit for the record. Still further review of the record led me, on June 23, 1983, to order Hearing Counsel to submit other documents which I felt necessary to afford a complete record for decision. The documents submitted in response to my June 23rd order are the subject of Hearing Counsel's "Motion To Withhold Evidence From Public Disclosure."

The documents are, according to Hearing Counsel, "all of the correspondence from [their] files between Hearing Counsel and Respondents during the period June 29, 1981 through May 3, 1982. . . ." It is Hearing Counsel's position that because the documents contain "offers of compromise" from Hearing Counsel to the respondents, certain portions of the documents should be kept confidential. Hearing Counsel argues:

> Contained in these documents are offers of compromise to the respondents and their responses. We believe that besides inhibiting compromise negotiations under Part 505 of 46 C.F.R., disclosure of amounts in this case would impede our flexibility in future cases. At the conclusion of this proceeding, Hearing Counsel will make available for release under the Freedom of Information Act, copies of the documents with the confidential portions excised.[23]

A careful review of the documents in issue fails to reveal a single "amount," assuming that Hearing Counsel is using that word in its generally accepted sense and which in this case can only refer to the "amount" of the penalty suggested or offered as a compromise to the original claim. There are simply no such "amounts" anywhere mentioned in the documents Hearing Counsel seeks to withhold from the public.[24] The most charitable view that can be taken of this argument is that it is the result of a lapse of memory. In any event it is argument on a nonexistent ground.

I am not sure whether the "offers of compromise" referred to by Hearing Counsel in the quote above are different from "amounts." If they are not then the "offers of compromise" can only refer to those statements of Hearing Counsel in which they express a willingness to negotiate the amount of the penalty. Just how making these statements of willingness public would either "inhibit compromise negotiations under Part 505" or

[23] Hearing Counsel did not afford the courtesy of specifying those portions of the documents they considered inhibiting or impediments and which they would excise if forced to release the documents under the FOIA.

[24] The $5,000 penalty amount appears only in the Notice of Claim for which Hearing Council sought no confidentiality.

would "impede [their] flexibility in future cases" is never explained. Not a single example in which such a disclosure could work either result is offered by Hearing Counsel. Contrary to Hearing Counsel's "belief" I can find nothing in the documents in question which would in any way hinder future negotiations for compromise. The motion is denied.

The denial of the motion does not, however, lay the matter completely to rest. In a cover letter to the motion Hearing Counsel says that they did not submit the correspondence with respondent because they believed that "either they were inadmissible under Rule 408 of the Federal Rules of Evidence or they were irrelevant." Rule 408 provides basically that evidence of attempts to compromise a claim which is disputed as to either validity or amount is not admissable to prove liability for or invalidity of the claim or its amount. The rule is intended primarily to protect the respondent in a proceeding to impose a penalty. The documents which I ordered Hearing Counsel to produce were needed to explain a hiatus in the proceeding, i.e., the period between June 26, 1981 and May 2, 1982. A period during which it appeared from the record before me that the matter had just languished or found its way into some sort of administrative limbo. As already explained, there is nothing in the documents which could be used to prove or invalidate the claim with perhaps the possible exception of two exhibits which Hearing Counsel argues contain "evidence of conduct," a ground for exclusion under 408.[25] Hearing Counsel did not cast their discussion of Rule 408 in the form of a motion so no ruling is needed. However, it may be necessary to make note of the fact that nothing contained in the material submitted pursuant to my order has been used to dispose of the merits of this case.

Section 3(a) of Public Law 89–777 makes it unlawful for any person to "arrange, offer, advertise, or provide passage on a vessel having . . . accommodations for fifty or more passengers and which is to embark passengers from United States ports" without first having established his "financial responsibility" with the Commission. Once this financial responsibility has been established under the requirements of the Commission's General Order 20 (46 C.F.R. 540) a Certificate (Performance) is issued by the Commission. Respondents are charged by Hearing Counsel with having "advertised" cruises aboard the *Titanic II* without having established their financial responsibility or obtaining the required Certificate (Performance).

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[25] An indication of the care and attention given to the drafting of the motion is found in the specific reference to Exhibits 16 and 22 as containing "evidence of conduct" by respondents which Hearing Counsel believe would warrant the exclusion of those exhibits under Rule 408. The reference to Exhibit 22 is surprising to say the least for it is the same document that Hearing Counsel designated Exhibit 10 and submitted as evidence in support of its brief and for which Hearing Counsel claimed no confidentiality. Either Hearing Counsel was unaware that they had already submitted the letter now designated Exhibit 22 or they came late to the idea that Rule 400 presented problems for its admission in evidence. But in neither event have they explained the discrepancy.

To Hearing Counsel, it is clear that the two letters given to the Pacific Investigator, Lyndon Berezowsky, and the press release sent to Mr. Frank Bartak were "advertisements" designed to "draw attention to the *Titanic II*" so that respondents "could sell cruises."[26] They were sent to "travel agents who would be selling cruises to the public." As for the press release, Hearing Counsel says it "was not just about the building of a new ship but about cruises on this ship." All of this according to Hearing Counsel, "is compatible with the definition of advertising: drawing attention to something to be sold."

"Advertising" is one of those words the meaning of which we are all comfortably certain—until called upon to define it. A price tag on an article of clothing, a notice nailed to a tree and the fondly remembered sandwich board are and have all been found to be advertisements. There is no prescribed form, language or content for an "ad". Advertisement is a word the definition of which is peculiarly dependent upon the context and situation in which it is used.

Hearing Counsel approves of one of the Supreme Court's definitions of advertising as "merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase." *Rast v. Van Deman & Lewis*, 240 U.S. 342, 365 (1911). Equally appealing to Hearing Counsel are definitions like "to give notice; to inform; to make known to." *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*, 140 F. Supp. 165, 173 (D. Md. 1956). Finally, Hearing Counsel urges the advertisement need only "include the traditional notice for the selling of goods and services designed and generally circulated to attract public attention." *Garza v. Chicago Health Clubs*, 329 F. Supp. 936 (N.D. Ill. 1971). That the actions of Messrs. Marler and Beasley constituted advertising, Hearing Counsel says:

> It is clear that Titanic was sending letters and press releases to draw attention to the *Titanic II* so that they could sell cruises. The information was disseminated to travel agents who would be selling cruises to the public. The press release was not just about the building of the new ship but about the cruises that could be taken and paid for.

From the definitions quoted by Hearing Counsel and from the argument quoted above, it is clear that Hearing Counsel defines the general purpose of an advertisement as being the sale of a specified commodity or service. An advertisement calls one's attention to an item that is for sale, tells one how much it will cost and tells the prospective purchaser where he can find the item. As an abstract proposition and with some very important

[26] These three exhibits constitute Hearing Counsel's case on the merits. There is a fourth exhibit comprising the material which Lyndon Berezowsky received as a result of his phone call to Titanic's office which is discussed later.

qualifications, the material on the *Titanic II* can be called "advertisements." The letters and the press release "identified," "described," and "apprised of the quality" of the "Titanic Project." Indeed, it did all of these with unequaled panache. But we are dealing with a statute not an abstraction and it is from the purpose and context of the statute that the meaning must be drawn. The operative language is:

> No person shall arrange, offer, advertise, or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports without first having filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish financial responsibility of the Person arranging, offering, advertising or providing such transportation . . . (Public Law 89–777, sec. 3(a)).

The purpose of section 3(a) is "to prevent financial loss and hardship to the American traveling public, who, after payment of cruise passage money are stranded by the abandonment or cancellation of a cruise." Clearly within the ambit of the statute then is that kind of advertisement with which we are all familiar: An "ad" which offers for reasonably immediate sale a particular thing or service and for which payment is expected at purchase. If the advertisement specifies the price for a specific cruise to take place at a certain time and place and the manner or method of booking passage is explained then the chances are that the advertiser or cruise operator will expect to collect the passage money or a deposit at the first response to the ad. And the prospective passenger will in all probability read the ad in just that way. If an operator runs this kind of ad before he obtains a Certificate from the Commission, then he. will be in a position to collect money without first establishing his financial ability to make any refunds necessary. And this the statute is designed to prevent. But what if no money is actually collected or if the "advertisemcnt" specifies that no payment is to be made by the prospective buyer or passenger. Hearing Counsel says that the Commission has dealt with just this situation in *Wall Street Cruises, Inc.*, 15 F.M.C. 140, 142 (1972) where Hearing Counsel says the Commission held that the statute is preventative in nature and "bars all advertising prior to the establishment of a person's financial responsibility."

In *Wall Street*, the respondent ran "notices" in Sunday editions of *The New York Times* on several occasions during the months of May, June and July. These "notices" quoted specific fares, gave specific dates and, the Commission found, were designed "to solicit business for actual cruises." The Commission rejected the respondent's argument that the notices were "market tests." This argument was based upon the inclusion in the notices of a statement that the "offer of the above program is based on an Option Agreement." The Commission concluded that the notices did not "clearly condition the sailing of the cruises offered upon the exercise of the option agreement or otherwise effectively serve notice on prospective passengers of the uncertain status of the cruises.'' From this it would seem to follow that where the prospective passengers are clearly informed of the existence of a condition precedent to a cruise the ''notice'' would not have been an advertisement within the meaning of section 3(a). It could have then been the ''market test'' argued for by respondent. It is clear from *Wall Street* that not all ''material'' calling the public's attention to a commercial cruise need be deemed ''advertisements'' within the ambit of section 3(a). For example, if there were an association of cruise operators and the association took a page in the Sunday Travel Section and filled the page with pictures of tropical isles but included only the message: ''Take a cruise for health'' or some equally moving non-sequitur, this would not constitute an advertisement prohibited by section 3(a) even though its ultimate aim is to sell cruises.

If the purpose of section 3(a) is to prevent potential financial loss and hardship to the traveling public who have paid passage money only to have the cruise cancelled, ''advertise'' as used in that section must refer to those advertisements which solicit or contemplate, even if only by silence, the payment of money by the traveling public when it responds to the advertisement. This squares with the rationale of *Wall Street Cruises* where respondent's failure to clearly inform prospective passengers of the ''uncertain status of the cruises,'' left no doubt that the ''notices'' in question were advertisements within the meaning of section 3(a). Such a construction of the statutory language would, in my view, be in furtherance of the purposes of the Act. The advertisements banned by section 3(a) are those which seek or contemplate the reasonably immediate payment of money—the kind at issue in the *Wall Street* case. A very different situation is presented here.

The respondents did not use the newspaper or any of the other ''mass media.'' The ''ads'' were not ''generally circulated to attract the attention of the public.'' *Garza v. Chicago Health Club, supra.* The letters were, as far as this record shows, sent only to travel agents, a particular class of persons knowledgeable in the cruise business.[27] The ''press release'' was sent by respondents to Don Langley of *Travel Age West,* self-styled as ''The weekly newspaper of the travel agency sales forces in the West, the world's fastest growing travel market.'' *Travel Age West* did indeed run a story on the *Titanic II* in March of 1981 in which, interestingly enough, it specifically referred to the company's statement that it was accepting ''reservations'' for the maiden voyage from Southampton to New York on April 10, 1985. About these reservations the story said, ''The

[27] The record contains only two letters sent by respondents to travel agents. Exhibit 3 is the letter sent to Ellen Matthews of Gadabout Tours. This letter was given Lyndon Berezowsky by Ron Lord. Exhibit 4 is a letter also given Berezowsky by Lord but the addressee is not shown in the record. It might have been sent to Ellen Matthews. The record does not show how many travel agents respondents sent their material to. Indeed, both letters in the record could have been sent to Ellen Matthews.

'reservations' are really only a show of interest since the company does not have a performance bond filed with the Federal Maritime Commission it does not have a certificate and cannot accept money." Indeed, the record establishes that throughout their endeavors on behalf of the Titanic Project, the respondents made it clear that they would not accept deposits or passage money. And of course no money was collected.[28]

Since "advertise," "advertisement," and "advertising" are susceptible to such a wide range of definitions or meanings, a decision under section 3(a) must depend upon all the circumstances surrounding the alleged violation. For example, the act of advertising contemplates some distribution of the material to the people from whom a reaction to the material is sought.[29] Respondents sent the letters in the record to travel agents only. None were sent to the traveling public. The only other document said to be an advertisement, the press release, was sent to a magazine for travel agents. The material stated that if the travel agents took "reservations" for the cruises no deposits were to be taken. It is clear that respondents were not at this time attempting to "sell" cruises to the traveling public—the people protected by the statute. Just as the article in *Travel Age West* said, the "reservations" were no more than "expressions" of interest.

Whether you call respondents' efforts test-marketing, interest-sampling or merely "testing the waters,"[30] I don't think you can call it advertising within the meaning of section 3(a). My conclusion that the respondents did not advertise cruises within the meaning of the statute is based on all of the circumstances of the case and not just the content of the documents in question.

But even if the respondents' actions were found to be in violation of the law, I cannot agree with Hearing Counsel that the maximum penalty is called for here. Hearing Counsel's case for the imposition of the full $5,000 penalty rests not on the extent or gravity of respondents' total conduct, but on the single allegation that respondents "continued to advertise the passenger vessel *S.S. Titanic II* after receiving a letter" telling them to stop. Hearing Counsel's argument is best presented in their own words:

> Since the evidence shows that the respondents violated section 3(a) of Public Law 89–777 and 46 C.F.R. sec. 540.3, Hearing Counsel submit that the statutory penalty of $5,000 be assessed.

[28] Hearing Counsel is correct when they say that respondents' failure to collect money does not of itself relieve them of liability under section 3(a). And *Wall Street* is quite clear on this point. However, my reading of *Wall Street* leads me to the view that the Commission's holding in that case was based upon the fact that the "notices" published by respondent clearly contemplated the collection of passage money and the fact that none had been collected was therefore irrelevant.

[29] If I were to draft a proposal offering a sensational new mousetrap for sale and then show it only to a friend whose reaction prompts me to tear it up, it certainly can't be said that I had "advertised" my mousetrap.

[30] *Some temptations are simply irresistible.*

> The maximum penalty should be assessed against the respondents since they continued to advertise the passenger vessel *S.S. Titanic II* after receiving a letter from the Commission telling them that their actions could be in violation of Public Law 89–777. The only possible evidence of mitigation are the letters the respondents to [sic] potential customers and the Commission in early July asserting that there would no longer be any communication regarding the *S.S. Titanic II*. Hearing Counsel has no verification of these statements, but even if they were true the aggravation of the penalty through the continued violation after a warning would negate any mitigation available to the Respondents. For these reasons we believe $5,000 is a proper penalty and would deter the respondents from engaging in any schemes without establishing the necessary financial responsibility.

Since Hearing Counsel did not choose to specify which acts of record by respondents constitute this "continued advertising" after the Commission's warning, reconstruction of the chronology of events is necessary.

There are only four exhibits to which Hearing Counsel would characterize "advertising": (1) Exhibit 3, the January 23, 1981 letter to Ellen Matthews; (2) Exhibit 4, the undated letter addressed "Dear Travel Agent" which was given to Lyndon Berezowsky by Ron Lord on March 17, 1981; (3) Exhibit 7, the undated "Press Release" which was sent to *Travel Age West* on or prior to March 16, 1981; and (4) Exhibit 5, the material sent to "Dave Wilson" a.k.a. Lyndon Berezowsky, as a result of his phone call to Titanic. This material was received by Wilson/Berezowsky on July 1, 1981. Since, the Commission's letter "telling them [respondents] that their actions could be in violation of Public Law 89–777" was dated April 17, 1981, the only evidence Hearing Counsel can support their allegation of continued violation with is the material received by Berezowsky on July 1, 1981. In an affidavit prepared for this case Lyndon Berezowsky tells how he obtained this "advertising" material:

> 5. On June 26, 1981, I called the reservation number of the Titanic Steamship Line Inc. and a woman answered as Titanic. I told this person that I was interested in taking a cruise on the *Titanic II*.
>
> 6. The woman told me that the company was still going forward with plans to begin the cruise service in 1985. I requested that Titanic mail copies of all printed materials describing the proposed service and she agreed. I gave the name Dave Wilson and my real home address.
>
> 7. I received the requested material on July 1, 1981.

Thus, Hearing Counsel's case for respondents' continued advertising after they had been warned to stop is based solely upon actions of some unidentified woman who at the specific request of a Commission investigator using a phony name mailed him some "printed material."[31] Questions of the law of agency aside for the moment, the record fails to establish the identity of the woman, her position in the company, or her authority to act in any capacity for the company. Moreover, Hearing Counsel offers no argument on the basic question of whether this response to a specific request, as distinguished from the unsolicited dissemination of material, itself constitutes "advertising." Finally, Hearing Counsel after raising the question of mitigation immediately dismiss it because they have "no verification of these statements" by respondents concerning the alleged mititgating circumstances. The statements by respondents referred to by Hearing Counsel are found in the letter of July 3, 1981 from Terry Marler to Hearing Counsel, paragraph VIII of which states:

> Notice has been sent to every and all known persons throughout the world who have contacted this line for information regarding the *Titanic II*, that pursuant to the wishes of the Federal Maritime Commission, no further information will be made available regarding the projected liner.

That Hearing Counsel say they have "*no* verification of these statements" (emphasis mine) I find ingenuous at best. The affidavit of Lyndon Berezowsky, submitted by Hearing Counsel, concludes:

> 8. On July 8, 1981, I received a letter from Titanic addressed to Dave Wilson which stated that there would be no further announcements regarding the *Titanic II* until such permission had been granted by the United States Government.

A copy of the letter referred to Berezowsky is included in the record as Exhibit 6.[32] Presumably it is the one sent to "Dave Wilson." In view of this Hearing Counsel's lack of verification must go to the assertion that the same letter was sent to "every and all known persons." If Hearing Counsel challenges that statement, it is up to them to prove it false. Absent that proof, the inference to be drawn from the record is that respondents' statement is correct.

But Hearing Counsel believe that even if the statements of respondents were true "the aggravation of the penalty through the *continued* violation after a warning, would negate any mitigation of the penalty available to

[31] At my direction Hearing Counsel briefed the question of whether Berezowsky's actions constituted entrapment. They have convinced me that technically they do not.

[32] The letter reads:

To Whom It May Concern:

> Please be advised that in compliance with United States Government regulations, there will be no further announcements regarding the proposed liner, "*Titanic II*," until such time as permission has been granted, by the United States Government in this matter.
>
> We regret any inconvenience or any confusion in this matter, and ask your understanding for our ignorance.
>
> If and when the liner should ever be constructed, you will be advised in the proper, approved fashion.

Respondents''; and, that the maximum penalty of $5,000 is ''proper'' and would ''deter the Respondents from engaging in any schemes to advertise a vessel without establishing the necessary financial responsibility.'' Despite the fact that the record affords no basis for it, Hearing Counsel do not believe respondents when they say that they will not revive the Titanic Project until they have the required governmental approval. I do not share this disbelief and had the actions of respondents in fact constituted a violation, I would not find grounds for the imposition of any money penalty let alone the maximum of $5,000.

The case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 510; DOCKET NO. 83–35]

LICENSING OF INDEPENDENT OCEAN FREIGHT FORWARDERS

April 24, 1984

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing the licensing of independent ocean freight forwarders will be addressed in a future proceeding.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on August 26, 1983 (46 FR 38856), the Commission instituted this proceeding to prescribe certain rules governing the licensing of independent ocean freight forwarders. Comments have been received in response to the Notice.

The recently-enacted Shipping Act of 1984 has made it necessary for the Commission to review all of its rules pertaining to freight forwarders. The issues raised herein, therefore, are better addressed in a future rulemaking proceeding.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 524, 531, 536; DOCKET NO. 83–43]

EXEMPTION OF NONEXCLUSIVE TRANSSHIPMENT AGREEMENTS FROM THE FILING REQUIREMENTS OF SECTION 15 OF THE SHIPPING ACT, 1916 AND CLARIFICATION OF PART 524

April 24, 1984

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing exemptions of agreements will be addressed in future proceedings.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on October 4, 1983 (48 FR 45270), the Commission proposed to exempt nonexclusive transshipment agreements from the filing requirements of section 15 of the Shipping Act, 1916. In addition, the Notice contained a clarification of the scope of existing exemptions.

The recently enacted Shipping Act of 1984 has made it necessary for the Commission to review all of its existing exemptions inasmuch as the new statute's treatment of exemptions is somewhat different from the 1916 Act. The issues in this proceeding, therefore, are better addressed in a further rulemaking proceeding.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 528; DOCKET NO. 83–55]

MODIFICATION OF SELF-POLICING REQUIREMENTS FOR SECTION 15 AGREEMENTS

April 24, 1984

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing self-policing of agreements will be addressed in a future proceeding.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on December 9, 1983 (48 FR 55144), the Commission proposed to amend its procedures with respect to self-policing under section 15 of the Shipping Act, 1916. In response to numerous requests, the Commission stayed this proceeding indefinitely before the date of submission of comments (49 FR 3838).

The recently enacted Shipping Act of 1984 alters radically the statutory scheme with respect to self-policing. Continuation of this proceeding, therefore, is not warranted.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–23

CENTRAL NATIONAL CORPORATION, NANTUCKET NAVIGATION INC., AND T. SMITH & SON (TEXAS) INC.

v.

PORT OF HOUSTON AUTHORITY

ORDER ADOPTING INITIAL DECISION

April 30, 1984

This is a complaint proceeding initiated by Central National Corporation, Nantucket Navigation Inc., and T. Smith & Son (Texas), Inc. (Complainants) against the Port of Houston Authority (Respondent or Port) alleging that certain exculpatory provisions in the Port's tariff are unjust and unreasonable in violation of section 17 of the Shipping Act, 1916, 46 U.S.C. §816. The complaint was filed pursuant to an order of the U.S. District Court for the Southern District of Texas-Houston Division, staying its proceeding involving the same parties in order for them to obtain a ruling from the Commission on the validity of the tariff provisions in question. *Central National Corporation v. S.S. HOLSTENBEK, her engines, appurtenances, etc. and Nantucket Navigation Inc., her charterers and/or owners, and Port of Houston Authority,* C.A. No. H–80–1362 (S.D. Tex.). The Commission's Bureau of Hearing Counsel intervened in the proceeding before this Commission. The parties agreed to the use of the Commission's shortened procedure, 46 C.F.R. §502.181, *et seq.*

Chief Administrative Law Judge John E. Cograve (Presiding Officer) issued an Initial Decision finding the challenged Port tariff provisions in violation of the Shipping Act, 1916, as alleged. Respondent filed Exceptions to the Initial Decision to which Hearing Counsel and Complainants replied. We find the Initial Decision to be well reasoned and comprehensive in its disposition of the issues. We therefore adopt the Initial Decision, with one minor correction.

BACKGROUND

This case arose as a result of water damage to a cargo of newsprint belonging to Central National Corporation which allegedly occurred while the cargo was in the Port warehouse or terminal facilities. Complainants Nantucket Navigation Inc. and T. Smith & Son (Texas), Inc. are the operator of the vessel which delivered the cargo and the stevedoring company, respectively, and are parties in the District Court litigation against whom the Port filed counterclaims for indemnification and costs, based upon its tariff.

Respondent pleaded the terms of its tariff in its defense and counterclaims in the District Court litigation. The specific terminal tariff provision relied upon by Respondent is Item No. 4 of the Port's FMC Tariff No. 8 which provides, in pertinent part:

> (a) The Port Authority shall not be responsible for injury to or loss of any freight being loaded or unloaded at the public wharves nor for injury to or loss of freight on its wharves or in its sheds by fire, leakage or discharge of water from fire protection sprinkler system; . . .
>
> * * * * *
>
> (d) Users of its facilities agree to indemnify and save harmless the Port Authority from and against all losses, claims, demands and suits for damages . . . including court costs and attorneys' fees, incident to or resulting from their operation on the property of the Port Authority.

The complaint alleges that Tariff Item Nos. 4 (a) and (d) constitute unjust or unreasonable regulations or practices in violation of section 17 of the Shipping Act, 1916.

DISCUSSION

The Presiding Officer concluded that the Port's Tariff Item 4(a) is violative of section 17 to the extent that it would relieve Respondent of liability for its own negligence. He found this provision to be similar to that determined to be unlawful in *Lucidi Packing Co.* v. *Stockton Port District*, 22 F.M.C. 19 (1979). The Presiding Officer further found tariff Item 4(d), the indemnity provision, similar to that held unlawful in *West Gulf Maritime Association* v. *The City of Galveston*, 22 F.M.C. 101 (1979). He noted that "the fact that the Port of Galveston is a 'political subdivision' of the State of Texas does not exempt the Port from regulation by the Commission under the Shipping Act." [1]

The Initial Decision is well-reasoned and fully dispositive of the issues in this proceeding. The language of the challenged tariff provisions is broad and can be read to apply to exculpate the Port even in situations in which damage may result from its own negligence. To the extent that these provisions may be read to exculpate the Port from liability for its own negligence, we agree with the Presiding Officer that they are unreasonable within the meaning of section 17 of the Shipping Act. Respondent's Exceptions object to the Initial Decision's characterization of its arguments and ask that its tariff provisions be found lawful. Respondent's Exceptions

[1] As discussed below, this reference to the Port of Galveston appears to have been inadvertent.

are, for the most part, re-arguments of points properly and correctly decided by the Presiding Officer.

Respondent's "first" exception is devoted to argument concerning the political status of the Port of Galveston, apparently in response to the reference to that port in the Initial Decision. Respondent notes both that the "Port of Galveston is not a political subdivision of the State of Texas . . ." but a creature of the City of Galveston which is a political subdivision, and that the decision wrongly infers that the Port of Houston claims that it is not subject to the Act because it is a political subdivision. Respondent specifically "acknowledges that it is an 'other person' under the Shipping Act." Respondent's Exceptions at 4.

The reference in the Initial Decision to the Port of Galveston appears to have been inadvertent, and should have been a reference to the Port of Houston Authority, respondent here. The reference to the Port of Galveston in the Initial Decision was harmless error.

The discussion in the Initial Decision of the political status of the Port of Galveston was obviously meant to respond to Respondent's argument before the Presiding Officer that the Port of Houston Authority "is a political subdivision of the state, acting only in a governmental capacity and, unless specifically excepted, [is] immune from liability resulting from its operations." (footnotes omitted). Respondent's Memorandum of Law at 4. This argument may be a matter for determination by the District Court in the proceeding before it, but has no bearing on the question of the lawfulness of the Port's tariff provisions under the Shipping Act. The latter is the sole question raised in the complaint before the Commission. The Presiding Officer correctly ruled that the Port is not exempt from regulation by the Commission under the Shipping Act by reason of its status as a political subdivision, citing *West Gulf Maritime Association* v. *Port of Houston Authority*, 21 F.M.C. 244 (1978).

Respondent's argument that the reasonableness of its tariff provisions should be judged on the basis of its practices in implementation of those provisions is also without merit. That argument was adequately dealt with in the Initial Decision. Respondent cites language from *Investigation of Free Time Practices, supra*, 9 F.M.C. at 547, that:

> . . . it is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning. As used in section 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.

The only question raised and ruled on here is the validity of the Port's tariff provisions. Its practices in implementation of those provisions cannot validate tariff provisions which are otherwise unlawful. *Investigation of Free Time Practices, supra.*, 9 F.M.C. at 543.

The fact that the Port's practices do not comport with the description set forth in its tariff is, moreover, as the Presiding Officer found, not evidence of the reasonableness of the tariff provisions, but might well be taken as an indication of their unreasonableness.

Respondent expresses the belief that its practices with regard to the exculpatory and indemnity provisions of its tariff "would be better memorialized in its tariff" if Items 4 (a) and (d) were prefaced with language excepting their application in instances where damage or injury results from negligence of the Port which "could be established as a matter of Law." Respondent's Exceptions at 6. The Port's tariff provisions cannot be found lawful on the basis of such an amended reading.

As Hearing Counsel points out in its Reply to Exceptions, Respondent's arguments are inconsistent with its counterclaims for indemnity filed in the District Court. In response to the complaint in the District Court, the Port, in its answer and counterclaim to the original complaint, cited Items 4 (a) and (d) of its tariff, and alleged that it "has been sued in the above-entitled and numbered cause contrary to the provisions of its tariff." It further sought to recover from cross-plaintiff Nantucket Navigation Inc. all costs of the litigation incurred or to be incurred by the Port, which it claimed it "is entitled to recover from Cross-Plaintiff, the Cross-Plaintiff being a user of the facilities of the Port of Houston, and accordingly governed by the tariff quoted above." [2] Contrary to its statements regarding its practices, the Port thus sought to rely upon the terms of its tariff to avoid and to indemnify itself against liability for damages and costs of litigation based upon its tariff, without regard to its own possible negligence or non-liability therefore under state law.

Respondent also argues, as it did below, that the Commission's cases finding similar exculpatory and indemnity provisions unlawful should not apply in this case because it does not perform the functions of "handling, storing or delivering of property." Respondent objects to characterization of its arguments as being based on a distinction between "operating ports" and "non-operating ports," but states that:

> . . . when respondent is not performing the 'receiving, handling, storing and/or delivering of cargo,' and promulgates tariff provisions which govern those particular, non-performing situations, said tariff items should not be compared with those governing situations in which 'receiving, handling storing and/or delivering' does occur. (Footnotes omitted). Respondent's Exceptions at 5.

Respondent's charge that the Presiding Officer's distinction between operating and non-operating ports mischaracterizes its argument appears to us

[2] Pleadings in the District Court filed in this proceeding pursuant to the Presiding Officer's Procedural Notice of May 27, 1983 are: (1) Answer and Counter Claim of the Port of Houston Authority to the Original Complaint, and (2) Answer and Counter Claim of the Port of Houston Authority to the Cross Claim of Nantucket Navigation Inc.

to be a distinction without a difference. The Port is involved in those functions by virtue of the fact that it furnishes the facilities at which such functions may be performed by others.

THEREFORE, IT IS ORDERED, That the Exceptions of Respondent are denied; and

IT IS FURTHER ORDERED, That the Initial Decision served November 28, 1983 is adopted except to the extent indicated above.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–23

CENTRAL NATIONAL CORPORATION, NANTUCKET NAVIGATION, INC. AND T. SMITH & SON (TEXAS), INC.

v.

PORT OF HOUSTON AUTHORITY

Exculpatory provisions of respondent's tariff found unjust and unreasonable under section 17 of the Shipping Act, 1916.

Douglas R. Wight for Central Navigation Corporation.

Stuart B. Collins for Nantucket Navigation, Inc.

James B. Warren for T. Smith & Son (Texas), Inc.

Algenita Scott Davis for Port of Houston Authority.

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

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

Adopted April 30, 1984

The United States District Court for the Southern District of Texas-Houston has stayed its proceedings involving the parties here [2] to afford the Commission an opportunity to rule on the validity of two provisions of the Port of Houston Authority Tariff No. 8.[3] The following findings of fact proposed by Hearing Counsel are fully supported by the record and are adopted for the purposes of the decision in this case:

1. Respondent Port of Houston Authority carries on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water.
2. Complainants are users of the Port of Houston Authority marine terminal facilities.
3. Item No. 4 of Port of Houston Authority Tariff No. 8, as filed with the Commission, contains the following provisions:

   (a) The Port Authority shall not be responsible for injury to or loss of any freight being loaded or unloaded at the

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

[2] *Central National Corporation v. S.S. Holstenbeck, her engines and appurtenances, etc. and Nantucket Navigation Inc., her charterers and/or owners, and Port of Houston Authority,* C.A. H–80–1362.

[3] The parties agreed to try this case under the Shortened Procedure of Subpart K, 46 CFR 502.181, *et. seq.*

public wharves . . . nor for injury to or loss of freight on its wharves or in its sheds by fire, leakage or discharge of water from fire protection sprinkler system; . . .

(d) Users of its facilities agree to indemnify and save harmless the Port Authority from and against all losses, claims, demands and suits for damages . . . including court costs and attorney's fees, incident to or resulting from their operation on the property of the Port Authority.

4. A lawsuit styled *Central National Corporation v. S.S. Holstenbek, her engines, appurtenances, etc. and Nantuckect Navigation, Inc., her charterers and/or owners, and Port of Houston Authority,* C.A. No. H–80–1362, is currently pending in the United States District Court for the Southern District of Texas, Houston Division. Proceedings in that action have been stayed pursuant to Court Order pending a determination by the Commission of the validity of Item 4, paragraphs (a) and (d) of the Port of Houston Authority tariff.

5. In the U.S. District Court proceeding, The Port of Houston Authority has pleaded the tariff provisions at issue here as a defense and as a basis for affirmative relief. Specifically, Respondent contends:

   The Port Authority has been sued in the above entitled case contrary to the provisions of its tariff.

   . . . all of which constitute costs and expense which the Port Authority is entitled to recover from Cross-Plaintiff, the Cross-Complainant being a user of the facilities of the Port of Houston, and accordingly governed by the tariff quoted above.

6. Over the past ten years, approximately twenty percent of all property and/or damage claims were resolved by payment of appropriate sums of money to claimants where there was some appearance of responsibility for damage by the Port Authority.

The issue presented here is whether the following provisions of Item No. 4 in the Port of Houston's tariff are just and reasonable as required by section 17 of the Shipping Act, 1916:[4]

Item No. 4

(a) The Port Authority shall not be responsible for injury to or loss of any freight being loaded or unloaded at the public wharves . . . nor for injury to or loss of freight on its wharves or in its sheds by fire, leakage or discharge of water from fire protection sprinkler system; . . .

[4] Section 17, Shipping Act, 1916 (46 U.S.C. 816), provides, in pertinent part:
Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

> (d) Users of its facilities agree to indemnify and save harmless the Port Authority from and against all losses, claims, demands and suits for damages . . . including court costs and attorneys fees, incident to or resulting from their operation on the property of the Port Authority.

Exculpatory clauses which purport to relieve a port of liability for damage or injury to property which is caused in whole or in part by the negligence of the port are unjust and unreasonable in violation of section 17, of the Act. *I. Charles Lucidi v. The Stockton Port District,* 22 F.M.C. 19 (1979).[5] The Commission stated the rationale against such clauses saying:

> To the extent that the provisions of Item 85 would relieve the Port from damage for liability (sic) to property caused in whole or in part by fault of the Port, and without a *quid pro quo* of any kind, such provisions are unjust and unreasonable, in violation of section 17 of the Act.
>
> * * * * *
>
> The provisions of Item 85 are against public policy insofar as such policy required businesses affected with public interest be precluded from taking unfair advantage of those who by necessity must use the facilities of such businesses. To permit the Port to isolate itself from liability, if such liability accrued by reason of the Port's negligence by the mere publication of an exculpatory provision, is unjust and unreasonable in violation of section 17 of the Act. (22 F.M.C. at 27.)

The language of Item 4(a) attempts to relieve the respondent of all liability for damage or injury to cargo and to the extent that 4(a) would relieve respondent of liability for its own negligence, it is an unjust and unreasonable regulation and in violation of section 17 of the Shipping Act.

The other provision in issue, Item 4(d), is an indemnity provision of the kind already found unlawful by the Commission. In *West Gulf Maritime Assn. v. The City of Galveston,* 22 F.M.C. 101 (1979), the Commission struck down a provision of the Port of Galveston's tariff which sought to indemnify the Port against all "claims, actions, damages, liability and expense including . . . attorneys and litigation expenses" in connection

[5] The tariff provision at issue in the *Lucidi* case was quite similar and of the same import as Houston's Item 4(a). It provided:

> The Port of Stockton shall not be responsible for any injury to freight on or in its facilities, by fire, leakage, evaporation, natural shrinkage, wastage, decay, animals, rats, mice, other rodents, moths, weevils, other insects, weather conditions, sweat moisture, the elements or discharge of water from breakdown of plant, machinery, other equipment, collapse of building or structure, insurrection, war, or shortage of labor; for delay, loss or damage arising from riots, strikes, labor or other disturbances of any persons or of any character beyond the control of the Port of Stockton.

with loss of life, bodily injury or property damage.[6] An indemnification clause which would relieve respondent from all liability in situations even where it was partly responsible is unlawful under section 17. See *West Gulf, supra,* at 104.

Respondent would distinguish its situation from those that the Commission has condemned on several grounds, none of which withstand analysis. The fact that the Port of Galveston is a "political subdivision" of the State of Texas does not exempt the Port from regulation by the Commission under the Shipping Act. See *West Gulf Maritime Assn. v. Port of Houston Authority,* 21 F.M.C. 244 (1978). Respondent says that a review of claims related to the operation of its public wharves revealed that it had consistently paid claims for which it appeared negligent. From this respondent argues that there are no regulations or practices that can be deemed unjust or unreasonable. All that this shows is that respondent does not adhere to its own rules and regulations. It does not show that the tariff provisions at issue are valid.

Respondents would first set up a distinction between "operating ports" and non-operating ports.[7] Then respondents argue that as a non-operating port a different standard should be applied to its tariff. Neither the statute nor the Commission has made such a distinction. It is the act of *furnishing* terminal facilities which makes one an "other person" subject to the Shipping Act. And as an "other person" furnishing terminal facilities, respondent is required to establish just and reasonable regulations for the receiving, handling, storing, or delivering of property. So long as the regulations established would avoid liability even for the Port's own negligence or seek to indemnify the Port against claims based on its own negligence, they are unlawful under section 17 of the Act.

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[6] The Galveston tariff provided:

INDEMNITY: Each User of the facilities of the Board of Trustees of the Galveston Wharves shall indemnify and save harmless the Board of Trustees of the Galveston Wharves and the City of Galveston from and against any and all claims, actions, damages, liability and expense, including reasonable Attorneys' fees and litigation expenses, in connection with loss of life, bodily injury and damage to property (including the property of such User), occurring in connection with the use of or arising from the use of any of the facilities of the Board of Trustees of the Galveston Wharves caused in whole or in part by any such User, such User's employees (including loaned employees), agents, contractors and invitees (other than those steamship agencies and stevedoring companies subject to Item No. 98.3), or arising from or incidental to such User's operations on the facilities of the Board of Trustees of the Galveston Wharves. Each User of the facilities of the Board of Trustees of the Galveston Wharves waives all claims such User may have against the Board of Trustees of the Galveston Wharves and/or the City of Galveston for loss or damage covered by any insurance policy or policies covering in whole or in part such Users' doing business on or in connection with the facilities of the Galveston Wharves, and each such User shall cause its insurance carrier or carriers to waive any right of subrogation with respect thereto and to so notify the Board of Trustees of the Galveston Wharves of such waiver.

[7] At operating ports, terminal services are performed by the ports' employees. Non-operating ports do not perform terminal services but furnish terminal services for "users" such as stevedores, vessels, etc.

Item 4(a) and (d) of respondent's tariff are found unjust and unreasonable under section 17 of the Shipping Act, 1916.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–31

VOLUME INCENTIVE PROGRAM—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

NOTICE

May 7, 1984

Notice is given that no exceptions have been filed to the March 28, 1984 initial decision on the rulemaking portion of 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. 83–31

VOLUME INCENTIVE PROGRAM—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

Charles F. Warren, George A. Quadrino, David N. Dunn and Benjamin K. Trogdon for Respondents New York Freight Bureau and Trans Pacific Freight Conference (Hong Kong).

Robert T. Basseches, Timothy K. Shuba and *David B. Cook* for Respondent American President Lines.

Edward M. Shea, John E. Vargo and *Linda J. Gyrsting* for Respondent Sea-Land Service, Inc.

Raymond P. DeMember for Intervnor International Association of NVOCCs.

Howard A. Levy for Intervenor North European Conferences.

Wade S. Hooker, Jr., for Intervenors Atlantic and Gulf-Indonesia Conference, Atlantic and Gulf-Singapore, Malaysia and Thailand Conference, and Inter-American Freight Conference.

Nathan J. Bayer for Intervenors United States Atlantic & Gulf /Southeastern Caribbean Conference and United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Conference.

Elmer C. Maddy for Intervenor Westwood Shipping Lines, Inc.

John Robert Ewers and *Stuart James* for Bureau of Hearing Counsel.

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

Finalized May 7, 1984

This decision is issued in accordance with and should be read in conjunction with the Initial Decision served on January 19, 1984, which is incorporated herein by reference, regarding the adjudicatory aspects of this proceeding. There were no exceptions filed to the aforementioned Initial Decision and, by Notice served on February 29, 1984, the Federal Maritime Commission (the "Commission") declined to review the decision so that it became administratively final.

In the previous Initial Decision, it was noted that the issues were being bifurcated so that the issue regarding rulemaking would be deferred until the other issues had been decided. It was stated that there would be scheduled hearings on the rulemaking phase as soon as possible, "wherein we will consider whether or not rulemaking is appropriate in the first instance, and if it is, what provisions the rule should contain."

On March 6, 1984, a Procedural Order was served wherein all the parties, including those who had been allowed to intervene regarding the

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

rulemaking aspects of this proceeding, were "directed to file a report as soon as possible, but no later than March 19, 1984, as to whether or not they believe rulemaking is necessary in light of the holding in the Initial Decision."[2] All of the parties have responded either in writing or orally and each agrees that rulemaking is not warranted or necessary *within the ambit of this proceeding*. While some believe rulemaking is not necessary or is premature, or have simply withdrawn from the proceeding, and others believe there should be rulemaking, all agree that if there is rulemaking, it should be broad enough to encompass consideration of pertinent provisions of the Shipping Act of 1984.

We believe and hold that given the limited parameters of this proceeding and the likelihood that broader and more comprehensive regulations may be required by the Shipping Act of 1984, there is no need for rulemaking in this proceeding. However, we respectfully suggest to the Commission that rulemaking is in order regarding the operation of Volume Incentive Programs generally and call attention to the Time-Volume regulations that are now in effect,[3] as well as to the provision of the Shipping Act of 1984 that allows for the use of "service contracts."[4] Such rulemaking would best be accomplished in accordance with the Commission's rules than are now in effect,[5] rather than by rulemaking arrived at from consideration of the narrow issues presented in this proceeding. In this way the Commission will have the flexibility, time and broad input necessary to the promulgation of a good, practical rule, perhaps of broader application and scope.

In light of the above, it is held that no rulemaking is necessary *in this proceeding*, and it is, therefore, discontinued. Further, we would be remiss if we did not compliment all the parties involved in this proceeding for their diligence and cooperation, which allowed an expeditious and reasoned disposition of the issues involved.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

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[2] The parties are:

1. New York Freight Bureau and Trans-Pacific Freight Conference (Hong Kong).
2. American President Lines.
3. Sea-Land Service, Inc.
4. International Association of NVOCCs.
5. Bureau of Hearing Counsel.
6. U.S. Atlantic & Gulf/Southeastern Caribbean Conference, et al.
7. Atlantic & Gulf-Indonesia Conference, et al.
8. Westwood Shipping Lines, Inc.
9. North European Conferences.

[3] 46 CFR 536.7.

[4] Section 8(c) of the Act.

[5] 46 CFR 502.51 et seq.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–57

CLARK INTERNATIONAL MARKETING S.A., A DIVISION OF CLARK EQUIPMENT COMPANY

v.

VENEZUELAN LINE

NOTICE

May 21, 1984

Notice is given that the time within which the Commission could determine to review the April 11, 1984 ruling in this proceeding styled "Ruling on Receipt of Affidavit Filed March 15, 1984," which approved the proposed settlement, has expired. No such determination has been made and accordingly, that ruling has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO 82–57

CLARK INTERNATIONAL MARKETING S.A., A DIVISION OF CLARK EQUIPMENT COMPANY

v.

VENEZUELAN LINE

RULING ON RECEIPT OF AFFIDAVIT FILED MARCH 15, 1984

Finalized May 21, 1984

By order of the Commission served October 5, 1983, in this proceeding, it was ordered that the June 24, 1983, Order approving settlement and granting the motion to dismiss and discontinuing the proceeding be vacated. It was further ordered that the proceeding be remanded to the Presiding Officer for further action, and for supplemental ruling within 60 days.

By Ruling on Remand served November 14, 1983, it was concluded that the parties had not answered certain questions posed by the Commission, and therefore that the proposed settlement could not be approved on the existing record. Further the parties were advised that an oral hearing would be necessary to resolve the matter.

At the request of the parties, the oral hearing set for December 15, 1983, was converted to a further prehearing conference, at which the parties requested time to submit an affidavit to answer the questions posed by the Commission in its order of remand. The time for submission of such affidavit was extended to March 15, 1984, and such affidavit now has been submitted. This affidavit hereby is received as part of the record in this proceeding.

In the complaint, the complainant had alleged that there were overcharges on cargo carried under 58 bills of lading, dated from December 10, 1980, through July 27, 1981. The respondent charged the shipments at the rate for Road Machinery, N.O.S., whereas the complainant sought the rate for Tractors N.O.S.

The Tractors N.O.S., class 19 rate, was $63 per ton of 40 cubic feet (M), or per ton of 2,000 pounds (W), and the Road Making Machinery, N.O.S., class 9 rate, was $99 per ton of 40 cubic feet (M), or per ton of 2,000 pounds (W), both ratings effective August 18, 1980. The affiant, respondent's traffic manager, states that these were the applicable rates for the period in issue herein, and that there were *no changes in these rates* for the carriage of either tractors or road making machinery from December, 1980, through July, 1981.

Effective August 15, 1981, there were increases of $10 per ton in the above class 19 and class 9 rates, respectively making such increased rates $73 and $109 per ton. Exhibits 1 and 2 and attachments to the March 15, 1984, affidavit show all the above rates. The above increased rates were effective *after* the shipments in issue were made.

The shipments actually consisted of "Bobcat skid steer machines," or the attachments for such machines, which attachments were the dirt digging buckets, loaders, etc., for such machines. These buckets, etc., were front loader attachments to the steer machines, which essentially were tractors when viewed without their attachments.

The pertinent applicable tariff did not prescribe a specific rate for skid steer machines. The respondent assessed the $99 rate for Road Making Machinery, N.O.S., believing that the articles shipped were mechanical shovels, or excavating machinery. Respondent further believed that when the attachments like buckets are attached to a tractor, the tractor changes its characteristic and falls within the category of road building machinery.

The major portion of the commodities shipped were skid steer machines with attachments such as dirt buckets. The complainant itself in its advertising brochures consisting of 111 pages used the word "tractor" in only two instances.

On September 28, 1982, the complainant requested the United States Atlantic and Gulf Venezuela Conference to insert in the tariff a separate and new classification and description under the heading of Road Making Machinery, N.O.S., namely, *skid steer-19.*

Complainant's position was that the commodities shipped were tractors, and not road making machinery, that the basic Bobcat series machine is a tractor, and that when attachments such as buckets are attached to the Bobcat machine, it then can perform various functions, as a loader, drill or roller.

The bills of lading show that the attachments were shipped (a) separately, and (b) with the Bobcat machines.

Respondent believed that in all instances the attachments were shipped independently or were shipped separately from the steer machine. This fact remains in dispute between the parties.

Respondent relied on the export declarations and other documents then available in rating the shipments as Road Making Machinery, N.O.S.

Nevertheless, both complainant and respondent now feel that in order to reach a reasonable accommodation in this matter, that a settlement could be reached, thereby eliminating a protracted hearing at a great cost and expense to the parties and to the government.

The settlement agreed on is the payment of $35,000 by the respondent to the complainant, in view of the fact that the alleged overcharge was $54,650.57, which amount was computed by classifying the majority of the shipments as tractors, but classifying the attachments (buckets and loaders, etc.) as road building equipment. When shipped separately, the attachments were viewed by respondent as road building machinery only.

In all of the circumstances above, including the explanation in the affidavit received March 15, 1984, it appears that the proposed settlement is reasonable based on the further statement in the affidavit that the parties agreed to the proposed settlement by following the guidelines laid down by the Commission in Docket No. 78–3, *Organic Chemicals (Glidden-Durkee) Division of SCM Corp.* v. *Farrell Lines, Inc.*, 18 SRR 1536a (January 25, 1979), 21 F.M.C. 859, March 14, 1959.

The proposed settlement is approved.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–32

PACIFIC WESTBOUND CONFERENCE—EQUALIZATION AND ABSORPTION RULES AND PRACTICES

ORDER ADOPTING INITIAL DECISION

May 25, 1984

The Commission instituted this proceeding to determine whether the equalization and absorption practices of the Pacific Westbound Conference (PWC), insofar as they affect the Port of Portland, are lawful under section 205 of the Merchant Marine Act of 1936, 46 U.S.C. § 1115, and sections 15, 16 and 17 of the Shipping Act, 1916, 46 U.S.C. §§ 814–816. In addition to the specific issues relevant to Portland, certain of the parties before us have raised important questions regarding the general status of port equalization practices and the continued viability of the concept of "naturally tributary" cargo under the statutes enforced by the Commission.

The PWC practices take the form of tariff rules that are designed to allow the Conference member lines that call at Seattle,[1] but not at Portland, to compete for cargo with carriers that do call at Portland (including other PWC lines). In the context of this case, "equalization" is the practice whereby a shipper with a smaller inland transportation cost to Portland than to Seattle trucks his cargo to Seattle, and a PWC line refunds to him the verified difference between the Seattle and Portland trucking costs. "Absorption" occurs when a shipper pays the cost of moving his cargo from its origin point to Portland, and a PWC line then pays the cost of moving the cargo from Portland to Seattle.[2] The two terms were used interchangeably by the parties and, as in past Commission cases involving such practices there appears to be no legal significance in the choice of terminology. *E.g., North Carolina State Ports Authority* v. *Dart Containerline Company, Ltd.*, 21 F.M.C. 1125, 1128, n. 13 (1979) *aff'd sub nom. Dart Containerline Company, Ltd. v. FMC,* 639 F.2d 808 (D.C. Cir. 1981) ("*Dart*").

Administrative Law Judge Seymour Glanzer (Presiding Officer) served an Initial Decision (I.D.) on April 22, 1983, finding no violation of law. Portland filed Exceptions to the I.D.'s conclusions concerning sections 15, 16 and 17 of the Shipping Act, 1916,[3] to which other parties replied.

[1] There is some evidence in the record of cargo being equalized to Oakland, but the amount is very slight.

[2] Exhibit (Ex.) 1.

[3] Portland did not except to the I.D.'s conclusion that there was no showing of violation of section 205 of the Merchant Marine Act of 1936, which prohibits collective action by ocean carriers preventing service

Continued

Certain parties, led by American President Lines, Ltd., a PWC member, filed self-styled "conditional" exceptions that raise the broad issues mentioned above. The Commission heard oral argument.

THE PROCEEDINGS

The history of this proceeding is exceptionally long and complex, and can best be described by dividing it into two distinct parts.

I. *Preliminary Proceedings*

On February 21, 1975, Portland petitioned the Commission to conduct an investigation into PWC's absorption and equalization practices, complaining that those practices constituted an unlawful diversion to Seattle of cargo "naturally tributary" to Portland. PWC is a steamship conference acting pursuant to FMC-approved Agreement No. 57. The geographic scope of the trade served by PWC's member lines is from U.S. and Canadian Pacific Coast ports westward to Japan, Korea, Taiwan and other Far East destinations.

In addition to its general allegation against PWC's absorption and equalization practices, Portland's petition contended that those practices were unlawful in certain particulars, *i.e.*, that the PWC Agreement was limited in its application to rail or coastal steamer movements and that motor carrier absorptions were not authorized (motor carriage was the inland transportation mode primarily attacked by Portland); that the equalization rules in PWC's tariff should be construed to bar their application to shipments carried by motor carriers exempt from the jurisdiction of the Interstate Commerce Commission; and that PWC's rules were *per se* unlawful because they permitted equalization and absorption of cargo away from Portland where there was direct ocean carrier service sufficient to handle that cargo.

Portland's petition engendered a series of informal and formal (under section 21 of the Shipping Act, 46 U.S.C. § 820) procedures intended to resolve the issues raised without the necessity of a formal proceeding.[4] When those procedures failed to accomplish their purpose, the Commission instituted this proceeding by Order of Investigation and Hearing served September 11, 1978.

The Order of Investigation directed that the proceeding would be governed by the precedents then recently established in *Council of North Atlantic Shipping Associations v. American Mail Lines, Ltd.*, 21 F.M.C. 91 (1978) ("*CONASA*"), and *Board of Directors of the Port of New Orleans v. Seatrain International, S.A.*, 21 F.M.C. 147 (1978) ("*Port of New Orleans*").[5] Under the authority of those decisions, the Order rejected Portland's

to a port at the same rates as those applicable to the next regularly served port. Portland apparently did not actively pursue this question during the evidentiary hearings.

[4] *See Pacific Westbound Conference—Equalization Rules and Practices*, 21 F.M.C. 937, 938, n. 2 (1979).

[5] These decisions were issued simultaneously on August 8, 1978, long after Portland's petition was first filed. They upheld the lawfulness of through intermodal services offered by ocean carriers. The port and labor interests protesting those services had contended, as Portland does here, that they were being deprived of cargo "naturally tributary" to their geographic bases. The Commission emphasized its obligation to regulate

request that section 8 of the Merchant Marine Act of 1920, 46 U.S.C. § 867, be included in the proceeding.[6] The Commission stated that section 8:

> . . . does not require the Commission to incorporate any specific concept of naturally tributary cargo into its Shipping Act considerations, nor does it otherwise create substantive rights in Shipping Act proceedings.[7]

The Order contemplated that trial-type proceedings would be avoided if possible and that the record for decision would consist of new affidavits and memoranda of law, as well as the material submitted under the earlier procedures. In addition to Portland, PWC and the Commission's Bureau of Hearing Counsel, various ports participated as intervenors on a limited basis.[8] Following the submission by the parties of new material as directed by the Order of Investigation, the Commission served on March 30, 1979 a Report and Order of Further Investigation and Hearing (Interim Report). *Pacific Westbound Conference—Equalization Rules and Practices,* 21 F.M.C. 937 (1979).

II. *The Commission's Interim Report*

The Commission concluded that the submissions by the parties had not resulted in a fully developed record on all the issues and that a further

in an enlightened and progressive manner, so as to encourage modernization of shipping services and expansion of transportation alternatives for shippers. *CONASA*, 21 F.M.C. at 135–136. It concluded that the ports and labor unions had failed to show that the cargo in question had originated in locally tributary areas, or that the ports' viability was threatened by the carriers' practices. *Id.* at 138.

[6] That statute states:

> It shall be the duty of the Secretary of Commerce, in cooperation with the Secretary of the Army, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which he has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided,* That if after such investigation the Secretary of Commerce shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the Secretary may submit his findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law.

[7] As discussed *infra,* that action by the Commission is relevant to the "conditional exceptions" filed by APL.

[8] The U.S. Department of Transportation intervened but did not participate.

hearing therefore was necessary.[9] The Commission could only resolve as a matter of law certain of the particular issues raised by Portland. We held that the PWC Agreement did allow equalization or absorption of inland motor carrier rates and cargo; that the rules in PWC's tariffs could apply to transportation of cargo by ICC-exempt motor carriers; and that such rules were not unlawful *per se.*[10]

Portland had argued that *any* absorption of inland freight charges on cargo that would move more cheaply to Portland than to any other port constituted an illegal diversion of cargo "naturally tributary" to Portland, unless it could be shown that Portland's facilities or level of direct ocean service were inadequate.[11] In response, the Commission stated that Portland was relying too heavily on *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106 (1973) and ignoring the more expansive guidelines enunciated in the 1978 *CONASA* decision.[12] The Commission reemphasized that the following principles first stated in *CONASA* would control the disposition of the general issue of the lawfulness of PWC's practices:

> 1. Certain cargo may be naturally tributary to a port, but any "naturally tributary zone" surrounding a port is constantly changing. In a particular case, this zone is determined by consideration of: (a) the flow of traffic through the port prior to the conduct in question, including points of cargo origin or destination; (b) relevant inland transportation rates; (c) natural or geographical transportation patterns and efficiencies; and (d) shipper needs and cargo characteristics.
>
> 2. A carrier or port may not *unreasonably* divert cargo which is naturally tributary to another port. When diversion of naturally tributary cargo occurs, the reasonableness of the practice must be determined. The reasonableness of the particular practice is determined by consideration of: (a) the quantity and quality of cargo being diverted (is there substantial injury?); (b) the cost to the carrier of providing direct service to the port; (c) any operational difficulties or other transportation factors that bear

[9] Most significantly, Portland failed to describe the area it considered to be "naturally tributary" to it. 21 F.M.C. at 938, n. 3.

[10] We stated (21 F.M.C. at 941):

> Equalization, as such, is not illegal and a tariff that allows for equalization therefore is not *per se* illegal. It is only the *application* of the tariff in a particular manner that can be illegal. The legality of PWC's Tariff No. 3 apart from its application does not present a separate legal issue in this case. Additionally, the question of adequacy of Portland's service is only *one* of the factors to be considered under the CONASA guidelines, and is not dispositive by itself of the legality of an equalization. For the foregoing reasons, the Commission concludes that PWC's Rule 16, Tariff No. 3, does not, in and of itself, violate sections 15, 16 or 17 of the Shipping Act, 1916, or contravene section 205 of the Merchant Marine Act of 1936. The question of the legal application of the Rule still remains . . . (emphases in original; footnote omitted).

[11] In the subsequent proceedings before the Presiding Officer, Portland continued to define "naturally tributary" by a comparison of inland freight rates.

[12] In the 1973 *Portland* decision, the Commission relied primarily on a comparison of inland mileages in determining that certain cargo was "naturally tributary" to Portland. 17 F.M.C. at 127. To a significant degree, the Commission based its resolution of the issues before it in that case on section 8 of the Merchant Marine Act of 1920. *Id.* at 125–27, 133–35.

> upon the carrier's ability to provide direct service (*e.g.*, lack of cargo volume, inadequate facilities); (d) the competitive conditions existing in the trade; and (e) the fairness of the diversionary method or methods employed (*e.g.*, absorption, solicitation). 21 F.M.C. at 939–40.[13]

The Commission restricted the further hearing to consideration of the following components of the ultimate issue (21 F.M.C. at 942):

> (1) Whether and to what extent the equalization and absorption practices of the Pacific Westbound Conference cause cargo which would ordinarily move through the Port of Portland to move through ports other than Portland?;
>
> (2) Does the diversion of cargo described in issue (1), if any, cause *significant* economic harm to the Port and the local economy of Portland?; and
>
> (3) If the equalization and absorption practices of the Pacific Westbound Conference do cause significant economic harm to Portland, are they nonetheless reasonable and justified? (Emphasis in original).

Acknowledging that the evidentiary record could become unmanageably large without further guidelines, the Commission structured the proceeding by limiting the introduction of additional evidence primarily to information regarding the ten most important cargo commodities (measured in terms of gross revenue to the Port of Portland) carried by PWC in 1977 and 1978.

Portland did not seek court review of the conclusions of law stated in the Interim Report. Also, Portland did not and does not take exception to the Report's limitation of the scope of the further proceedings as described above.

Altogether, there were 39 days of hearings that produced 5,374 pages of transcript and 161 exhibits. There were 25 witnesses, including three economists. Briefs were filed by Portland, PWC, Hearing Counsel, APL and Sea-Land Service, Inc., which are members of PWC, and by intervenors Delaware River Port Authority, the Port Authority of New York and New Jersey and the Port of Seattle (Seattle).

III. *The Initial Decision*

A. *Findings of Fact*

The Initial Decision examined 214 findings of fact proposed jointly by PWC and Seattle. In all important respects, the Presiding Officer found that those findings were supported by the record and should be adopted. Some of the most critical findings are as follows:

[13] The Commission also rejected the argument that the *CONASA* guidelines should be restricted to through intermodal movements such as "minibridge" and were not applicable to movements between adjacent ports through absorption.

The ten most important commodities equalized or absorbed by PWC member lines in 1977 and 1978 were apples, canned corn, dried peas and beans, frozen corn, hides, lumber, meat and bone meal, metal scrap, onions and wastepaper. In 1977, these commodities accounted for 87% of the total tonnage equalized by PWC carriers. All of this cargo was containerized.[14]

Between 1977 and 1979, Portland was susceptible to shortages in both refrigerated and dry cargo containers because of an imbalance in its inbound/outbound container trade. Far fewer containers were received at Portland inbound than were needed for outbound movements.

Bulk and bulk-type cargo, such as grain, lumber, steel and automobiles make up most of Portland's tonnage, both inbound and outbound. The tonnage volume at Portland increased steadily since fiscal 1971–72. Fiscal 1978-79 was the best year in Portland's history, with non-grain cargo tonnage exceeding mid-range forecasted tonnage for 1980 and 1985.[15]

Portland did not enter the container business until 1971,[16] well after Seattle had already become established as the leading container port in the Pacific Northwest and a container "load center." Seattle made the decision in the 1960's, anticipating the growth of containerization, to make the necessary investments.[17] As a result, Seattle handled 2,400,000 short tons of containerized cargo in 1977 and 2,774,000 short tons of such cargo in 1978, which figures represent ratios of better than 4 to 1 and 3.6 to 1 over Portland's results.[18] Nevertheless, despite its late start, Portland's container business improved substantially during the period of record. Export container tonnage increased from 381,000 in 1975 to 639,000 in 1979 (an increase of 68%), and total container tonnage increased from 521,000 in 1975 to 867,000 in 1979 (an increase of 67%).[19]

To a greater extent than was true of the PWC trade in general, or the PWC Pacific Northwest trade in particular, vessels sailing from Portland to PWC destinations reached operating weight capacity before exhausting their TEU (or container) capacity. Thus, the existence of unused TEU capacity on ships leaving Portland for PWC destinations in 1977 and 1978 does not mean that those ships could have carried any additional cargoes.[20] On the contrary, PWC's chief witness with respect to the capacity of the "Japanese Six" member lines testified that in 1977 and 1978, those lines' vessels calling at Portland operated at or near their actual carrying capacities, even though design capacity may not have been reached. This testimony was credible and significant.

[14] Ex. 95, Schs. 1 and 3.
[15] Ex. 46, p. 6–8; Ex. 54; Ex. 72; Tr. 1315–16.
[16] Tr. 1202.
[17] Ex. 134, p. 2, 11–16.
[18] Id., p. 3; Ex. 54.
[19] Ex. 54; Ex. 46, p. 9.
[20] Ex. 139, p. 18; Ex. 142; Ex. 143; Tr. 4894–95.

Portland engaged in various competitive pricing activities designed to attract cargo to it and away from competing ports such as Seattle. Portland attributed its growth in container cargo from 1977–79 in part to these practices.[21] Portland's witness Mowat could offer no economic or policy reason why these practices should be distinguished from PWC lines competing for cargo via Seattle by equalizing or absorbing inland transportation costs.[22]

Portland is closer than Seattle to the inland origin points places of most, if not all, of the equalized "top ten" commodities. But via ocean navigation routes, Seattle is closer than Portland to many of the principal PWC destinations (particularly Japan).[23] Existing trade routes and traffic patterns make Portland even more distant from PWC destinations. Carriers considering calls at other ports, such as Portland, in the same region as Seattle, the load center, must view the call as an *additional* port call with the attendant additional expenses and scheduling problems. An additional call at Portland would require a vessel to travel many more water miles (including more than 200 miles up and down the Columbia River) than the mere difference in ocean distances, or the overland motor carrier distance from Portland to Seattle (about 172 miles).[24]

It is unlikely that any of the equalizing PWC carriers could have earned a profit by adding a Portland call instead of equalizing.[25]

A port's longshore labor productivity in handling containers is measured by the number of containers that can be loaded per crane, per hour. For a carrier, this productivity affects the unit cost per container and the carrier's ability to adhere to fixed scheduling. Compared to other West Coast ports, including Seattle, Portland was the lowest labor productive port in 1978 and 1979.[26] As late as October, 1979, Portland recognized that berth conflicts and ship queuing were significant problems at its major container terminal.[27]

During 1977 and 1978, export shippers of the "top ten" commodities using Portland encountered recurrent difficulty in obtaining cargo space on vessels making direct calls, particularly during fall and winter months when seasonal cargo flow is high.

A fast transit time and sailing frequency is important to shippers of refrigerated or perishable cargo, as well as to shippers of high-value cargo where the daily interest charge has significance,[28] and for shippers of "spot market" cargo such as wastepaper and metal scrap.[29] The fastest

[21] Tr. 1191–92, 1195.
[22] Tr. 1579–80.
[23] *See* Tr. 705.
[24] Ex. 136, p. 12–13, 18.
[25] Ex. 139, p. 23–33.
[26] Tr. 4994–97.
[27] Ex. 45.
[28] Ex. 136, p. 6.
[29] Tr. 2620–21, 4304–4305.

transit times (measured by sailing days) to PWC destinations from Portland and Seattle in 1978 were as follows:

	Seattle	*Portland*
Japan	9	11
Korea	11	15
Taiwan	12	18
Hong Kong	15	19
Philippines	21	21

Portland's definition of its naturally tributary territory was based almost exclusively on comparative inland freight rates.[30] Since inland freight rates change constantly, so would Portland's naturally tributary territory as Portland defines it.[31] Portland acknowledged that it was obliged to provide adequate service and facilities for shippers and carriers. However, Portland also took the position that adequacy of service for any shipper of a particular commodity was established by a showing that some quantity of that commodity had, at some time, been loaded aboard a vessel sailing from Portland.[32]

All three economists who testified in the proceeding—including Portland's witness Krekorian—agreed that equalization and absorption were market-enhancing, not market-distorting, practices. Krekorian testified that such carrier practices were equivalent to price competition among ports and thus normal marketplace behavior.[33]

Based on exporters' testimony as to their transportation needs, the routing they would apply and their inability to obtain service from Portland, Hearing Counsel's economist Copan concluded that the least costly and most efficient system for ocean carriage of the "top ten" commodities was the movement of those cargoes pursuant to equalized service through Seattle. He concluded that none of the top ten commodities was naturally tributary to Portland because each moves with greater transportation efficiency through Seattle.

There is no showing that any of the "top ten" commodities which were shipped from Seattle pursuant to equalized service would otherwise have been loaded aboard vessels at Portland. No shipper witness was called by Portland.[34] The shipper witnesses who testified were called by Hearing Counsel. Many were Oregonians who expressed a preference, out of loyalty to their state, to ship from Portland. Nevertheless, they used equalized service out of Seattle because that was the only way they could effectively compete with other shippers, foreign and domestic, and get their goods to the marketplace. The other shipper witnesses gave the same or similar reasons for using Seattle. If PWC equalized service were not available,

[30] Ex. 79; Tr. 1250, 1252.

[31] Tr. 395–97.

[32] Tr. 1750–51, 1759–63.

[33] Tr. 2192–99.

[34] *See* Tr. 1100–1101, 1728.

some shippers would be shut out of export markets,[35] some would have used non-conference equalized service out of Seattle[36] and others would have paid the inland charges to Seattle without equalization or absorption.[37]

Portland's evidence purporting to show the extent of the economic harm suffered by it due to diversion of cargo to Seattle was based on an assumption that all of the PWC equalized cargo in 1977–78 would otherwise have been loaded at Portland.[38] There is no basis in the record for that assumption.

Even assuming that all of the PWC-equalized cargo in 1977–78 would otherwise have moved through Portland, the economic harm to Portland and its metropolitan area was not significant.

PWC equalized service provides the means for Conference members to be price competitive at rate levels which enhance the ability of the cargo to be exported.[39] The PWC lines would be at a competitive disadvantage with independent carriers were it not for the PWC equalization and absorption practices. The non-conference carriers could continue to compete for Oregon, Washington and Idaho cargo, without calling at Portland, by means of substituted service or other pricing mechanisms.

The PWC equalization and absorption practices promote transportation efficiency by enhancing both shipper transportation alternatives and carrier competition.

B. *Ultimate Findings and Conclusions*

In light of the findings of fact summarized above, the Presiding Officer concluded under the *CONASA* standards that none of the "top ten" commodities were "naturally tributary" to Portland. He found that Portland, which bore the burden of proof on this issue, failed to show that those commodities moved primarily through it prior to the institution of PWC's equalization and absorption rules, or prior to the key years of 1977 and 1978. While inland transportation rates obviously favor Portland (or there would be no equalization and absorption), the Presiding Officer held that ocean distances and routes generally favor Seattle. Shipper needs and the special characteristics of the cargo (*e.g.*, the importance of quick and regular service for time-sensitive commodities such as agricultural products and those sold in spot markets) also were found to weigh against any finding that the commodities were tributary to Portland.

Although his conclusion that none of the commodities in issue was naturally tributary to Portland essentially ends the inquiry, the Presiding Officer also found that PWC's practices did not harm Portland or its local economy, that PWC's practices were justified by any reasonable oper-

[35] *See* Tr. 2309–2311.
[36] Tr. 821–22.
[37] Tr. 2387, 2390, 4381–82.
[38] Tr. 949, 1714–15.
[39] Tr. 1605, 2195–99.

ational or economic test and that there was no showing of violation of sections 15, 16 First or 17 of the Shipping Act.

POSITIONS OF THE PARTIES

I. *Exceptions*

A. *Portland*

With respect to the "naturally tributary" issue, Portland reiterates that if a commodity moved through a port in any quantity in spite of practices intended to direct the commodity elsewhere, then it is reasonable to infer that the commodity is naturally tributary to that port. Portland concedes that one of the "top ten" commodities, apples, has not moved through it, but contends that the other nine commodities "regularly moved through Portland in significant volumes" prior to and including 1977 and 1978.[40] It argues that the Presiding Officer should have ended his analysis after considering inland distances and routes in weighing geographic and transportation efficiencies, and erred in proceeding to consider also Seattle's advantage in ocean distances and routes. Portland also claims that Seattle's advantage is not significant, particularly when the inland distance from Portland to Seattle is factored into the equation, and that, in any event, Portland had equal or faster transit times to most of the PWC destinations during the period of record[41] (though this is based on the same vessel calling at Portland *after* calling at Seattle).

Portland asserts that it meets shipper needs by virtue of its competitive terminal charges and facilities, equal ocean rates,[42] efficient inland transportation and other services.[43] It takes exception to the Presiding Officer's focus on whether there was sufficient cargo space available at Portland to accept the tonnage actually equalized, and claims that its ability to meet shipper needs is proven by the "continued large volumes" of the commodities that move through Portland to PWC destinations.[44]

Portland also argues that unused capacity allegedly experienced by the "Japanese Six" lines calling at Portland and the entry of other carriers into the Portland market show that market forces, when unimpaired by such devices as equalization and absorption, have and will continue to respond to shipper needs.[45] It protests the Presiding Officer's findings concerning berth congestion and labor inefficiency, contending that these problems have been alleviated. With regard to the issue of economic harm, Portland abandons its previous attempt to quantify the monetary loss it

[40] Portland Exceptions at 7.

[41] Id. at 11–12.

[42] This confirms the I.D.'s conclusion that no issue remains regarding section 205 of the Merchant Marine Act of 1936.

[43] Portland Exceptions at 13–14.

[44] *Id.* at 17.

[45] Portland does not state when the specified carriers began service from Portland, but we assume that it took place after the close of the record.

allegedly suffered, but instead claims that it lost ten percent of its total export container tons in 1978 and that the diversion of such a percentage threatens its viability as a container port and justifies remedial action by the Commission.[46]

Portland contends that the I.D.'s findings that an additional call at Portland would be unprofitable is in error, and that the real choice confronting carriers such as APL and Sea-Land is between the profitable service they offered from Seattle, and a somewhat less (but still) profitable service featuring an additional call at Portland. Having so phrased the options, Portland states that the carriers' refusal to serve Portland is "inherently unreasonable."[47] It further states that the question of fair competition between PWC lines and non-conference independents is less important than fairness to ports such as itself. Portland also accuses the PWC lines of concentrating their equalized service on high-rated cargoes that "prejudices shippers and carriers alike that would attempt to move these higher rated commodities through Portland."[48] Portland admits that the applicable PWC tariff rule makes no distinction between high-rated and low-rated commodities, but insists that the rule is applied in a discriminatory manner.

B. *APL'S "Conditional" Exceptions*

APL's Exceptions are to the Presiding Officer's refusal to consider its arguments that equalization and absorption practices cannot in themselves violate sections 16 First or 17 of the Shipping Act.[49] The Presiding Officer considered himself bound by the *CONASA* standards and the Commission's Interim Report in this case.

APL looks first to the language of sections 16 and 17, which forbid a carrier from creating undue or unjust preference, advantage, prejudice or discrimination. The statutes do not forbid the carrier, according to APL, "from creating *equality*, by eliminating the inequality of transport cost otherwise giving advantage to the port geographically closer to the shipper."[50] The carrier asserts that the legislative history of the Shipping Act shows that Congress was at least aware of port equalization practices by carriers and did nothing to condemn them. APL traces the development of the "naturally tributary" doctrine from section 8 of the Merchant Marine Act of 1920 to the *CONASA* guidelines. It then argues that the *CONASA* rules are wrong because (a) there is no true statutory basis for the "naturally tributary" doctrine; (b) the easy intermodal movement of containerized cargo means that it is tributary to no port; (c) the *CONASA* factor of "shipper needs and cargo characteristics" is contrary to the notion behind the "naturally tributary" doctrine that a port has an inherent right to

[46] Portland Exceptions at 27–28.

[47] *Id.* at 31.

[48] *Id.* at 33.

[49] APL's Exceptions are "conditional" in that the carrier wished the Commissiori to consider them only if the I.D. was reviewed on the merits. APL is joined by Sea-Land and PWC.

[50] APL Exceptions at 4 (emphasis in original).

certain cargo; (d) the *CONASA* test of the "reasonableness" of the carrier practice requires the Commission to intrude to an unlawful degree into carrier and shipper business decisions; (e) there is no statutory foundation for protection by the Commission of ports from competition; and (f) rather than providing clear decisional guidelines, the *CONASA* rules have caused only further contradictions and anomalies.[51]

APL also contends that section 205 of the Merchant Marine Act of 1936, and Commission decisions thereunder, *require* conferences to maintain "port equality" in constructing their tariffs, and that a conference cannot at the same time be forbidden to publish a tariff rule that allegedly creates such equality. Finally, APL summarizes various aspects of transportation policy that support the result it urges, including the avoidance of enforced port monopolies, widening of transportation flexibility and encouragement of intermodalism and containerization.[52]

C. *The Port Authority of New York and New Jersey*

The Port Authority of New York and New Jersey ("Port Authority") filed Exceptions similar to APL's. The Port Authority argues that:

> [W]hether or not traffic is being diverted from a particular port's "naturally tributary" area begs the question. The *real* question is whether or not a particular carrier's equalization/absorption practices are reasonable under the relevant circumstances. In other words, the normal analysis under sections 16, First and 17 should be employed, without reference to a doctrine of "naturally tributary traffic.[53]

The Port Authority interprets the *CONASA* decision as recognizing that a case involving equalization and absorption practices "is really no different from any other case arising under sections 16 First and 17."[54] However, it then says that the Commission resurrected the "naturally tributary" doctrine in the subsequent *Dart* decision, and "eased the burden of proof for complaining port interests."[55] The Port Authority urges that the doctrine of "naturally tributary" cargo be abandoned and the Commission hold that equalization and absorption practices cannot, by themselves, violate the Shipping Act.

II. *Replies to Exceptions*

Replies to Exceptions were filed by PWC, the Port Authority, Seattle, Hearing Counsel and APL. The Port Authority's Reply restates the arguments made in its Exceptions and will not be discussed further.

[51] The alleged contradictions and anomalies are recited at page 17 of APL's Exceptions, n. 42.
[52] *Id.* at 23–24.
[53] Port Authority Exceptions at 4.
[54] *Id.* at 11–12.
[55] *Id.* at 12.

A. *Seattle*

Seattle's Reply is an amalgam, in that in great part it attacks the "naturally tributary" doctrine essentially as APL did, and only in minor part discusses the *CONASA* standards and the lawfulness of the PWC practices. Seattle distinguishes its position from APL by stating that it does not contend that equalization and absorption can never violate the Shipping Act.[56] It contends that the record in this case demonstrates that the Commission should abandon the "naturally tributary" concept as applied to containerized cargo. Seattle argues that if any geographic area or cargoes could, at one time, have been considered "naturally tributary" to a port, containerization "and an everchanging inland transportation infrastructure have resulted in a continuous change in those areas and cargoes." [57] Referring to Portland's claim before the Presiding Officer that it could have as many as 60 naturally tributary territories for the "top ten" commodities at any one time, Seattle states that the actual number could be as high as 240 territories, depending on the number of different inland rates available per commodity, and that these zones could change as often as the rates did (perhaps daily). Seattle contends that it is impossible to base a meaningful regulatory regime on such a malleable concept.

B. *PWC*

PWC first points out that while Portland took exception to 24 findings of fact (and 12 "conclusions") stated by the Presiding Officer in the I.D., 11 of those findings refer to proposed findings submitted jointly by PWC and Seattle but adopted by the Presiding Officer only insofar as they are supportive of other findings. PWC notes that, in substance then, Portland has excepted to only 14 of the 184 findings contained in the I.D. PWC states that the remaining undisputed 170 findings are "more than sufficient to compel adoption of the ALJ's decision."[58]

With respect to Portland's specific exceptions, PWC argues that there is no evidence that supports Portland's contention that actual vessel capacity existed to move the cargoes at issue from Portland during the times the cargoes actually moved during 1977 and 1978. According to PWC, the record shows instead that what little *annual* capacity may have existed among the "Japanese Six" lines was not available at the times and in the amount needed by the shippers of the equalized cargoes, and could not have accommodated the tonnages in question. With regard to the issue of relative transportation efficiencies, PWC stresses that any carrier considering adding a Portland call to pick up the potential additional cargo represented by the "top ten" commodities would face incremental and highly expensive vessel miles (including but not limited to 200 miles of the

[56] Seattle Reply at 3.
[57] *Id.* at 37.
[58] PWC Reply at 1; footnotes omitted. The same argument is made by APL at p. 1–3 and 10 of its Reply to Exceptions. The remainder of APL's Reply makes no arguments not also made by PWC.

Columbia River), which would exceed substantially the total overland distance under the equalization/absorption alternative. The Presiding Officer's consideration of the entire efficiency equation (including relative ocean transit miles) was, in PWC's view, proper and required by the Commission's Interim Report.

PWC states that Portland's contentions that it has cured its labor productivity and congestion problems are either irrelevant to the test years of 1977 and 1978, or were not raised below and are thus improper now.[59] It notes Portland's failure to challenge the I.D.'s finding regarding a structural shortage of containers at the port. PWC defends as fully supported by the record the I.D.'s finding that a weekly service interval by carriers calling at Seattle (which makes an additional call at Portland unfeasible) is necessary to permit them to compete. It attacks as unsupported by the record Portland's "attempts to create a new test" of historical cargo flow by the standard of whether a commodity has ever passed through the port to any destination under any conditions,[60] and Portland's similar contention that because it has provided service to other shippers at other times, it presumably could have served also the needs of the shippers of record, regardless of the shippers' testimony to the contrary. With regard to the question of economic harm, PWC terms Portland's claim of a ten percent loss of containerized cargo as a "straw man" and points out that Portland failed to except to the I.D.'s finding that, even under Portland's definition of "diversion" (*i.e.*, that the equalized cargo would have and could have moved via direct service at Portland), there was in fact no evidence of such diversion.[61] PWC states that if the correct comparison is made between the equalized tonnages and Portland's overall export tonnages, then the equalized tonnage in 1978 (the year of the largest movement of such tonnage) amounted to less than one percent of Portland's export tonnage.[62]

Concerning the effect on carrier profitability of a direct call at Portland, PWC contends that the analysis accepted by the I.D. assumed that all the equalized cargo moved through Portland and found that even in such theoretical circumstances, losses to the carriers nevertheless would occur.[63] Finally, PWC states that Portland's charge of discriminatory application of PWC's equalization rule is unsupported by the record and "directly contrary to the Port's own voluntary withdrawal of any allegations of 'unlawful implementation' of the PWC tariff."[64]

[59] PWC Reply at 25–26.

[60] *Id.* at 42. PWC notes that Seattle historically has handled far greater volumes of the commodities in issue than Portland. *Id.* at 64.

[61] *Id.* at 54, 52.

[62] *Id.* at 56.

[63] *Id.* at 70.

[64] *Id.* at 74.

C. *Hearing Counsel*

Hearing Counsel's Reply focuses primarily on the broad legal arguments made by APL and the Port Authority of New York and New Jersey. They stress that the language of the Shipping Act forbids only unreasonable discrimination and consequently requires an examination of the particular circumstances under which equalization or absorption is employed, before a determination can be made as to the lawfulness of the practice. Hearing Counsel state that "APL's request for blanket preapproval for all port equalization schemes would preclude the Commission from judging each particular practice on its own merits."[65]

DISCUSSION

I. *The Initial Decision*

The I.D. is fully supported by the record and applicable case law and, except as indicated in our discussion below, is hereby adopted. PWC and APL are correct in their claim that the Presiding Officer's findings of fact that have gone unchallenged by Portland are entirely sufficient, by themselves, to support a conclusion that the PWC practices are lawful under the *CONASA* standards. To make this clear, it is worth summarizing some of those findings. During the period of record, Portland experienced recurrent shortages of containers available for export cargo. During 1977 and 1978, shippers of the "top ten" commodities encountered recurrent difficulty in obtaining cargo space on vessels calling at Portland, particularly during fall and winter months when seasonal cargo flow is high. It is unlikely that any of the equalizing PWC lines could have earned a profit by adding a Portland call instead of equalizing. There is no difference in economic terms between Portland's pricing practices that are designed to draw cargo away from Seattle and the equalization practices of the PWC lines; both are normal competitive behavior and thus are market-enhancing rather than market-distorting. Despite Portland's late entry into the container business, the amount of container tonnage it handled increased substantially during the period of record. Even assuming that all of the PWC-equalized cargo in 1977 and 1978 would otherwise have moved through Portland, there was no significant economic harm caused to Portland and its local economy by the PWC practices. The PWC equalization and absorption practices promote transportation efficiency by enhancing both shipper transportation and carrier competition.

When these and other findings are integrated into the *CONASA* standards, they compel a conclusion that the PWC equalization practices do not violate the Shipping Act. Portland failed to show that the "top ten" commodities were "naturally tributary" to it. The concept of "naturally tributary" has been applied in Commission case law to both geographic *territory*[66] and

[65] Hearing Counsel Reply at 3.

[66] *E.g., Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12 (1965).

to particular *commodities*.[67] The broad notion of a geographic territory tributary to a particular port clearly implies that all commodities exported from (or imported to) that territory are also tributary to the port. Throughout this proceeding, Portland has declined to define the boundaries of the territory that it claimed as tributary to it on any basis other than that area in which any inland freight rate was lower to Portland than to Seattle. Such an area is virtually limitless in size and can certainly include the Middle West of the United States as easily as it does Portland's immediate neighborhood. This approach was specifically rejected in *Port of New Orleans*, the companion case to *CONASA*, for reasons equally applicable to the present case:

> Naturally tributary cargo is basically cargo from a geographic area local to a given port. A naturally tributary zone does not describe a general territory which may be served competitively by a range of ports and it specifically does not include cargo originating from or destined to the central United States. * * * Regardless of historical movement patterns and comparative geographic proximity, the term "naturally tributary cargo" cannot be extended to the point where a port or range of ports can claim a multi-state inland region as its exclusive "territory." 21 F.M.C. at 153.

Although it claimed to rely on inland freight rates, Portland offered virtually no evidence of any actual freight rates because it assumed that if there was equalization or absorption, then the rates favored Portland and no further inquiry with respect to the "naturally tributary" issue was necessary. In other words, Portland's position is that once it has been found that freight rate differentials are being reimbursed by the PWC carriers pursuant to the conference tariffs, then the commodities carried come from within Portland's tributary (but undefined) territory.[68] This is essentially a repetition of Portland's argument during the preliminary stage of this proceeding that any absorption or equalization of inland freight charges on cargo that would move most cheaply to Portland constituted illegal diversion, unless the defending carriers could show that Portland's shoreside facilities or level of direct ocean service were inadequate.[69] Again, however, Portland's position is contradicted by established precedent. In the Commission's Interim Report, which Portland has never challenged, we found that argument to be inconsistent with the *CONASA* principles, which state clearly that inland rates are only one of several factors that must be considered in resolving the "naturally tributary" issue. As discussed below, the factor

[67] *E.g., Proportional Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960).

[68] This is the gist of Portland's argument in its Exceptions that the Presiding Officer "was not required to go further" than determining that inland rates were lower to Portland than to Seattle (Portland Exceptions at 10).

[69] Text accompanying n. 11, *supra*.

of inland rates may favor Portland but the other *CONASA* factors—most notably shipper' needs—strongly disfavor it.

Thus, Portland's efforts to define its "naturally tributary" territory failed on the evidence, the law and as a matter of logic. When the focus is narrowed to the specific *commodities* in issue in this case—the "top ten" commodities equalized in 1977 and 1978—the weakness of Portland's case becomes even more obvious.

It must first be stated that the literal letter of the *CONASA* test, *i.e.*, how the commodities were exported before the carriers began equalizing or absorbing, cannot be followed in this case because the PWC practices have been in place for as long as any witness could remember. Under such circumstances, Portland's resort to a test of whether the commodities have continued to pass through Portland in some quantity during the period of record is not in itself unreasonable. However, such an argument must be supported by evidence that the commodities continued to pass through Portland—despite the availability of equalized service through Seattle—because of some cargo characteristic or transportation factor that made Portland the "natural" port of exit for those commodities. But Portland failed to adduce such evidence. Despite the fact that the investigative focus on the "top ten" commodities made specific shipper testimony vitally important to the "naturally tributary" issue, Portland made no effort to produce any such testimony. The shipper testimony in this case was brought forward by Hearing Counsel. Collectively, that testimony is the most compelling evidence in the record before us. The shippers testified—and Portland does not challenge their statements—that were it not for the equalized service from Seattle offered by the PWC carriers, they would not have been able to export their goods. It should be noted that the shippers did not emphasize inland rates more significantly than other factors; the evidence revealed, in fact, that even without equalization and absorption, some shippers were prepared to pay the inland freight cost themselves in order to ship through Seattle. In the face of such testimony, we have no basis for accepting Portland's assertion that those shippers *could* use Portland because Portland has sometimes been used by shippers of the same commodities and, further, that because those shippers could use Portland, then they *must* use Portland regardless of the impact on their ability to enter export markets. On this record, an order by the Commission forbidding or substantially altering the PWC service could be harmful to U.S. foreign commerce.

In sum, there is no reliable evidence that any of the "top ten" commodities equalized by the PWC carriers in 1977 and 1978 were "naturally tributary" to Portland. That conclusion essentially disposes of this case. However, it should be noted that Portland's contentions regarding adequacy of service and facilities are contradicted by the Presiding Officer's unchallenged finding that it suffered recurrent shortages of export containers during 1977 and 1978; we also agree with PWC that Portland's attempt to rebut the Presiding Officer's findings regarding poor labor productivity and berth congestion is irrelevant to the test years. It is clear that requiring the equalizing PWC carriers instead to add a direct call at Portland after calling at Seattle would be unreasonable; Portland offers no evidence against the Presiding Officer's finding that it is unlikely that any of the PWC carriers could earn a profit by adding a Portland call.[70] Further, there is no substantial evidence that Portland has been significantly harmed by PWC's practices; on the contrary, it is more likely that the increased motor carrier and export activity caused by the PWC service resulted in a net gain for Portland.[71]

Only one small part of the I.D. appears to be unsubstantiated by the record. In dictum, the Presiding Officer suggests that the Commission consider requiring an amendment to the PWC Agreement and/or to the PWC dual rate contract to excuse shipper obligations under the contract if there should be no PWC direct service available at Portland or other Columbia River ports in the future. The Presiding Officer states without citation to the record[72] that "[t]here is evidence that PWC contract shippers . . . did not consider utilizing independent liner services which might have been available at [Portland] out of fear of being deemed in violation of their contracts."[73] One shipper apparently so testified, but even that fragment of evidence is unclear.[74] The Presiding Officer's concern about "a possibility of substantial harm" to Portland is based on an elaborate set of hypothetical circumstances, none of which are present here. If *present* shippers (it should be borne in mind that this record is nearly three years old) are experiencing difficulties with the PWC dual rate contract, they are free to pursue a remedy under Shipping Act complaint procedures or otherwise bring the matter directly to the Commission's attention.

Any arguments advanced by Portland but not specifically discussed above have been considered and rejected.

II. *The Broader Legal Issues*

As APL recognizes, the Commission is under no obligation to go beyond the facts of this case and address the broader legal issues the carrier poses in its Exceptions. Although the Commission may fashion broad new rules in adjudicatory proceedings, *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), a revision as radical and broad as that requested by APL might have been more suitable for a rulemaking, in which all affected interests

[70] Portland's argument in its Exceptions that an additional call at Portland would be profitable has no support in the record. The relevant testimony assumed that *all* the equalized cargo moved through Portland (despite shipper testimony to the contrary) and found that even in such theoretical circumstances, losses to the carriers nevertheless would occur (Ex. 139, p. 23–33; Ex. 136, p. 10–20). Portland also suggests that there would be *additional* container traffic in the absence of equalization, but there is no evidence on this point.

[71] Ex. 139, p. 68–73.

[72] The I.D. makes no findings of fact relevant to this discussion.

[73] The Presiding Officer also states that there is no evidence that PWC or any of its members caused this concern in any way.

[74] Tr. 4261–62.

(including federal agencies) had an opportunity to participate. APL requests a ruling that would be of considerable importance to all U.S. ports. Although Seattle and New York generally support APL, there might well be other ports (besides Portland) that did not participate in this case but would have opposed APL's position. "Notice-and-comment procedures . . . are especially suited to determining legislative facts and policy of general, prospective applicability." *National Small Shipments Traffic Conference, Inc., et al.* v. *ICC,* 725 F.2d 1442, 1447–48 (D.C. Cir. 1984) *See also Intermodal Service to Portland, Oregon,* 17 F.M.C. 106, 125, n. 10 (1973).

Nevertheless, APL's arguments have considerable force and, to the extent appropriate, deserve a response. One matter can be addressed specifically. APL and Seattle attack the role of section 8 of the Merchant Marine Act of 1920 in the development of the "naturally tributary" doctrine. The Commission at one time explicitly stated that the doctrine is based on section 8. *Investigation of Overland/OCP Rates and Absorptions,* 12 F.M.C. 184, 224 (1969). However, in recent years, the Commission has moved away from section 8, to the point of explicitly refusing to include it in orders of investigation. This was done even in cases where the Commission ultimately found in favor of the complaining port. *North Carolina State Ports Authority* v. *Dart Containerline Company, Ltd.,* 21 F.M.C. 1125, 1126, n. 3 (1979) , *aff'd sub nom. Dart Containerline Company, Ltd.* v. *FMC,* 639 F. 2d 808 (D.C. Cir. 1981). As previously mentioned in this Order, that approach was taken in this case.[75] We reiterate now that section 8 will not be the basis for Commission investigations of carrier equalization practices.

APL faults the "naturally tributary" doctrine for its implication that ports have a "natural right" to certain cargo. But ports are a class specifically protected by sections 16 and 17 of the Shipping Act, 1916, and those sections' prohibitions against unreasonable preference and discrimination are carried forward in essentially identical terms in subsections (b) (6) , (10) , (11) and (12) of section 10, "Prohibited Acts," of the Shipping Act of 1984, Pub. L. No. 98–237. Under those circumstances, the Commission is constrained from concluding on this adjudicative record that ports do *not* have a "natural right" to certain cargo. For the same reason, we decline to adopt APL's argument that equalization practices can never be illegal.[76] Our further comments perforce must be restricted to generalized guidance for the shipping industry.

Like most recent cases involving port challenges to equalized service, this investigation involved containerized cargo. In the 1978 *Port of New Orleans* decision, the Commission discussed at length the possible impact

[75] P. 5–6, *supra.*

[76] That argument was opposed by Hearing Counsel in their Exceptions and during the Oral Argument, where they suggested factual situations in which equalization could be unjustly discriminatory (Oral Argument Tr. 62–65) . Seattle also opposed APL in part (Seattle Reply to Exceptions at 36, footnote marked by asterisk; *see* Oral Argument Tr. 58–59).

of containerization and intermodalism on historical traffic patterns. We recognized that the container revolution might mean the development of regional port "load centers" that would minimize time in port for large containerships and enhance frequency and regularity of service for shippers. 21 F.M.C. at 174. This in turn might cause a territory that had been naturally tributary to a port for breakbulk cargo to not be tributary for containerized cargo. *Id.* at 174–75. We emphasized the Commission's responsibility to avoid rigid regulation based on outmoded concepts that would stifle advances in ocean transportation to the detriment of the public interest. *Id.* at 175.

In examining the record of this case six years after *CONASA* and *Port of New Orleans* were decided, it is clear that the regulatory approach taken in those cases and followed again now was and is appropriate. The expert testimony in this case is unanimous that the equalization practices of the PWC carriers are identical in economic terms to price and service competition between Portland and Seattle or any other two points. In the absence of substantial evidence that such practices are unjustly discriminatory, they should be encouraged rather than discouraged. If ports, as well as carriers, are obliged to compete, then the competition must necessarily redound in improved service to shippers and U.S. foreign commerce. If a port directs its energies to attracting shippers and carriers by improved facilities and services and by reduced traffic congestion—in short, by making it desirable to utilize that port—then the public interest as well as the port's are advanced. On the other hand, if the port's interest is artificially protected by unnecessary regulation so that competition and alternative services are eliminated, the port may benefit temporarily but the public interest will surely suffer.

Given Portland's complete failure of proof as described in this Order, the lesson of this case may be that the "naturally tributary" doctrine has become obsolete insofar as it would apply to a geographic *territory* surrounding a port. The development of containerization and the related phenomena of intermodal services and load centers may mean that no particular geographic point is always tributary to a particular port, no matter how close the port and the point may be.[77] Concomitantly, it may also be that broad investigations like this one into general tariff provisions providing for facially nondiscriminatory equalized service have become obsolete. That situation, however, should be distinguished from one involving a specific *commodity* that appears to have been targeted by a carrier. Simply because a commodity can be placed in a container, it nevertheless may remain best suited to a particular port. *Intermodal Service to Portland,*

[77] The Commission is aware that the concept of a regional "load center" is controversial and still in its developing stage. *See* "Is 'Superport' Needed for Atlantic Coast?" *Journal of Commerce*, April 23, 1984, p. 1; "A Superport for Containers," *Handling and Shipping Management*, February 1984, P. 54. Seattle has no right in law to be the load center in the Pacific Northwest, and Portland must have every fair opportunity to continue the growth in container traffic that the record here shows it achieved in the 1970's.

Oregon, supra, 17 F.M.C. at 127. In at least such a case, the "naturally tributary" doctrine could apply.

In that regard, the Commission wishes to address the suggestion of the Port Authority of New York and New Jersey that our 1979 *Dart* decision represented a "retreat" from *CONASA. Dart* represented an application of *CONASA* principles to specific factual circumstances. The true significance of the Commission's decision lies in two facts. First, the carrier's practice of avoiding a direct call at Wilmington and instead moving the tobacco overland to Norfolk was held operationally and economically inefficient. 21 F.M.C. at 1129–30; *see Dart Containerline Co., Ltd.* v. *F.M.C.,* 639 F.2d at 817–18. In the present case, there is overwhelming evidence that the carrier practices represent economic efficiency. Second, Dart's practices were targeted at a single commodity, tobacco, and thereby raised the issue of whether the equalized service was unjustly discriminatory as between shippers, as well as ports. No evidence of such discrimination exists in this record. Application of the *Dart* rationale to this record must therefore lead to a result preserving PWC's practice.[78]

THEREFORE, IT IS ORDERED, That the Initial Decision is hereby adopted except to the extent indicated;

IT IS FURTHER ORDERED, That Portland's Exceptions are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

[78] It should be noted that APL agrees that *Dart* was correctly decided. Oral Argument Tr. 73–74.

*Chairman Alan Green, Jr. and Commissioner James V. Day did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–32

PACIFIC WESTBOUND CONFERENCE—EQUALIZATION RULES AND PRACTICES

Pacific Westbound Conference's equalization and absorption rules and practices, to the extent they affect the Port of Portland, Oregon, found not to be in violation of sections 15, 16 First, or 17 of the Shipping Act, 1916, or section 205 of the Merchant Marine Act of 1936.

The "top ten" commodities equalized and absorbed by members of the Pacific Westbound Conference during the period from January 1, 1977, through December 21, 1978, found not to be naturally tributary to the Port of Portland.

Equalization and absorption, as practiced by members of the Pacific Westbound Conference, found not to have resulted in substantial ham to the Port of Portland or the Portland community.

The practice of serving the Port of Portland indirectly, by substituted service and not by direct call, by members of the PWC, found to be reasonable and justified.

Patrick F. Boileau, Norman E. Sutherland, Marybeth Ormsby, and *Thomas P. White* for Petitioner, Port of Portland.

R. Frederic Fisher, Eric C. Bettelheim and *Harry Pfeifer* for Respondent, Pacific Westbound Conference.

Warner W. Gardner for Respondent, American President Lines, Ltd.

Edward M. Shea for Respondent, Sea-Land Service, Inc.

Jonathan Blank, Carol Doherty, and *John W. Angus, III,* for Intervenor, The Port of Seattle.

Patrick J. Falvey, F.A. Mulhern, Arthur L. Winn, Jr., Samuel H. Moerman, Paul M. Donovan and *Gerald L. Richman* for Intervenor, The Port Authority of New York and New Jersey.

Martin A. Heckscher for Intervenor, Delaware River Port Authority.

John Robert Ewers and *Paul J. Kaller* for Bureau of Hearings and Field Operations.

Alan J. Jacobson for Hearing Counsel.

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

Adopted May 25, 1984

This is an investigation into the equalization and absorption practices of the Pacific Westbound Conference. The legality of those practices, only insofar as they affect the Port of Portland, Oregon, is to be determined under the provisions of section 205 of the Merchant Marine Act of 1936,

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

46 U.S.C. 1115, and sections 15, 16 and 17 of the Shipping Act, 1916, 46 U.S.C. 814, 815 and 816.

THE NATURE AND BACKGROUND OF THE PROCEEDING

On February 21, 1975, the Port of Portland (hereafter, The Port or POP), an Oregon municipal corporation, petitioned the Federal Maritime Commission to conduct an investigation into the equalization and absorption rules and practices of the Pacific Westbound Conference (PWC or the Conference), claiming and complaining that those practices did constitute an unlawful diversion of ''naturally tributary'' freight traffic from The Port in violation of sections 15, 16 and 17 of the Shipping Act and were contrary to the policy expressed in section 205 of the Merchant Marine Act.

The respondent, PWC, is a steamship conference acting pursuant to Agreement No. 57, an agreement approved by the Commission under section 15 of the Shipping Act. The geographic scope of the traffic served by PWC and its carrier member lines is from United States and Canadian Pacific Coast ports to Japan, Korea, Taiwan, Siberia, China, Hong Kong, Thailand, Indo-China and the Philippines. PWC relies upon Article 3 of Agreement No. 57 as its authorization to equalize and absorb. As relevant, Article 3 provides:

> [There shall be] no absorption at loading or discharging ports of rail or coastal steamer freights or other charges. . . . except as may be agreed to. . . .

The petition focused on PWC's authority to engage in equalization and absorption practices, in particular, and the manner in which PWC conducted those practices, in general.

In particular, POP contended that: Article 3 is limited in its application to rail or coastal steamer absorptions and that motor carrier absorptions are not authorized (an important distinction, because motor carriage is the inland transportation mode under primary attack by The Port); the equalization rules in PWC's tariff should be construed to bar their application to shipments carried by motor carriers ''exempt'' from the jurisdiction of the Interstate Commerce Commission; and that such equalization rules are, in effect, per se unlawful because they permit equalization and absorption of cargo away from POP where there is direct service adequate to handle that cargo. Generally, POP alleged that PWC's equalization and absorption practices cause an unlawful and harmful diversion of traffic, that would normally move through The Port, to other ports in California and Washington.[2]

[2] POP raised another facet of unlawful implementation at the hearing. It contended that PWC was implementing the equalization rules of the Conference's tariff improperly, either by way of making overpayments

Continued

PWC's tariff rules generally provide for equalization and absorption of inland freight costs by PWC's member lines. The rules permit those members which do not serve a port, either on a particular voyage or at all, to compete with other members and independent lines providing direct service to that port and with independent lines which equalize and absorb in like manner. When transportation costs from an inland point to a port not directly served by a member line are less than the costs of carriage from the inland point to the port at which the member line calls, the equalization rules are likely to come into play.

A typical equalization rule in PWC's tariffs contained the following language: [3]

> Equalization is the absorption by the ocean carrier of the difference between the shipper's cost of delivery to the ship's tackle at dock and port at which the lowest applicable common carrier or contract carrier Rates, excluding rates on any time basis apply and cost of delivery to ship's tackle at terminal dock and port of equalizing line. Shipper's cost for inland transportation is to be an amount that is not in excess of the cost computed at the lowest applicable common carrier or contract carrier rates.

* * * * *

Before going on with the narrative of events, I believe it will be helpful to pause, as briefly as clarity permits, to make some observations concerning terms which are central to the issues in the proceeding. Those terms, of course, are "equalization" (and its other forms—equalize, equalized, equalizing) and "absorption" (and, similarly, its other forms).

In the past, when there was no need to distinguish between those terms, both the Commission and the Courts used one to mean the other or to include the other. *See, e.g., North Carolina State Ports Authority* v. *Dart Containerline Company, Limited,* 21 F.M.C. 1125, 1128 n. 13 (1979), *aff'd sub nom., Dart Containerline Co.* v. *Federal Maritime Commission,* 639 F.2d 808 (D.C. Cir. 1981) (hereafter *Dart*), where the Commission said:

> The terms "absorption" and "equalization" tend to be used interchangeably to describe diversionary activities. The choice of terminology has little, if any, substantive significance in such matters,

for equalization or by other noncompliance with those rules, thus further influencing the flow of traffic away from The Port. POP asked for a continued hearing to be devoted especially to the introduction of evidence of this malpractice. Although not entirely free from doubt, I construed the order instituting this proceeding to allow POP to address that issue and authorized POP to take depositions and examine PWC documents by way of additional discovery well after the hearing commenced. After it conducted the additional discovery, POP orally requested that the special hearing be canceled. I informed POP that if it formally made that request, in writing, I would issue an order ruling that the question of PWC's compliance with its tariff's equalization rules was no longer an issue to be litigated in this proceeding. Aware of my intent, POP made the request formally. My order containing the indicated ruling ensued. See, Hearing Canceled; Other Matters, served July 11, 1980.

[3] The language appeared in Rule 16 of PWC's Freight Tariff No. 3. Virtually the same rule appears in PWC's Local and Overland Freight Tariff No. 11, F.M.C. No. 19, which superseded and canceled Freight Tariff No. 3, effective January 1, 1979, at p. 69, Rule 13.3.3. See, also, Rule 13.3.2. relating to transshipment.

> each of which must be examined on its own particular facts. See *Intermodal Service to Portland, Oregon* [17 F.M.C. 106, 132 (1973)].

However, in *Intermodal Service to Portland, Oregon,* at p. 132, there is no reference to "absorption" vis-a-vis "equalization." Instead of "absorption," another term is introduced—"transshipment." In describing the relationship of those two terms, the Commission said:

> The distinction between "transshipment" and "equalization" is one without a difference, insofar as this proceeding is concerned. As we observed in *Sea-Land Service, Inc.* v. *S. Atlantic & Caribbean Line, Inc.,* [9 F.M.C. 338, 344-346 (1966)], "equalization" and "transshipment" are merely variations on the common theme of serving a port without directly calling there.

It seems clear, then, that the Commission considers "absorption," "transshipment" and "equalization" to be mutually interchangeable terms. Yet, there are distinctions, as the Commission noted in *Sea-Land Service, Inc.* v. *S. Atlantic & Caribbean Line, Inc.* (hereafter, *SACL*), *supra,* at p. 345:

> Port equalization is accomplished in various ways. In its simplist form (sometimes called "equalization" in contradistinction to . . . "transshipment"), the carrier pays to the shipper or, sometimes, to the inland carrier directly, the amount by which the cost to the shipper of overland transportation to the port of loading exceeds the cost of overland transportation from the same point of origin to the nearest port;
>
> Port equalization may also be effected through "transshipment" [marginal note omitted]. As used here transshipment refers to the movement of cargo, usually by land carrier, in the water carrier's name and at its expense, from a dock or terminal at the port where it is originally delivered by the shipper to the water carrier, to the dock or terminal at another port where it is loaded aboard a vessel of the water carrier.

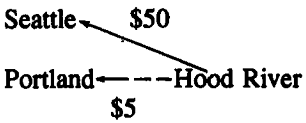
Heretofore, in the narrative, I used the terms "equalization and absorption," "equalization," and "absorption" interchangeably. For the most part, and except where otherwise specified, I will continue using those words and another term—"substituted service"—synonymously.[4] But this explanation does not exhaust the digression from the narrative because along the way, further refinements in terminology were introduced in the record.

It became apparent at the outset of testimony at the hearing that without a working definition distinguishing the terms "equalization," "absorption," and "transshipment," the record would become a mass of confusion. Therefore, I required POP to furnish an exhibit showing how it meant those

[4] Also, previously, I used the terms "rules" and "practices" interchangeably. Inasmuch as PWC's practices follow its tariff rules, see n. 2, *supra,* this usage will continue.

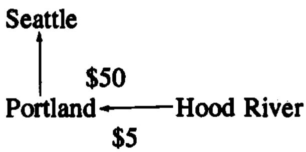
terms to be understood when they were used in testimony and exhibits proffered by The Port. Exhibit (Ex.) 1 contains POP's definitions and illustrations of the application of those terms. Although PWC was not entirely satisfied with the accuracy of Ex. 1, it abided by the contents and the hearing proceeded on that basis. These, then, are the working definitions of those terms when technical distinctions are made:[5]

"Equalization" is defined as the process whereby the ocean carrier assumes the difference in the shipper's inland transportation cost from the origin of the cargo to the port where the lowest common or contract carrier rates apply, and the ocean carrier's port of loading. Equalization is illustrated in this way:



Shipper pays inland carrier freight charges of $50 for actual transportation to Seattle from Hood River. Ocean carrier remits $45—the difference between the amount the shipper paid and the amount the shipper would have paid ($5) had the shipper used an inland carrier to carry the cargo to Portland.

"Transshipment" is defined as the assumption by an ocean carrier of the inland transportation cost from the port the shipper has delivered his cargo, which is served directly by the ocean carrier, to another port, due to an unusual occurrence requiring the ocean carrier to deviate from the originally scheduled route which would have included the direct vessel call to the first port. Illustration:



Shipper pays $5 for inland transportation from Hood River to Portland. Ocean carrier, which makes direct vessel calls at Portland, elects not to do so because of operational or other difficulty and transships the cargo overland via inland carrier, from Portland to Seattle at its own expense, instead.

Note: "Transshipment" is not under attack by POP in this proceeding.

"Absorption" is defined as the assumption by an ocean carrier of the inland transportation cost from the port area the shipper delivered his cargo,

[5] I have not altered the language of the definitions, but I have made some editorial and other changes in the illustrations. For example, I have substituted Seattle for Oakland. N.b., the dollar amounts in the illustrations are arbitrary and do not purport to show actual or proportionate values.

which is not served directly by the absorbing ocean carrier, to a port the ocean carrier does serve directly. Illustration:

$$\begin{array}{lll} \text{Seattle} & & \\ \uparrow & & \\ | & \$50 & \\ \text{Portland} & \longleftarrow & \text{Hood River} \\ & \$5 & \end{array}$$

Shipper pays $5 for inland transportation from Hood River to Portland. Ocean carrier, which does not make direct vessel calls at Portland, has inland carrier transport cargo to Seattle where it does call. Ocean carrier pays inland freight charges from Portland to Seattle.

* * * * *

The petition engendered a series of informal and formal (under section 21 orders) procedures intended to resolve the issues raised by POP without the necessity of a formal proceeding. When those procedures failed to accomplish their purpose, the Commission instituted this proceeding by Order of Investigation and Hearing (Order), served September 11, 1978.

Among other things, the Order directed that the proceeding "will be governed by the precedents and guidelines established and set forth in [*Council of North Atlantic Shipping Associations* v. *American Mail Lines, Ltd.*, 21 F.M.C. 91 (1978) (hereafter *CONASA*), and *Board of Commissioners of the Port of New Orleans* v. *Seatrain International* (*Port of New Orleans*), 21 F.M.C. 147 (1978)]." Under the authority of those decisions, the Order rejected POP's suggestion that section 8 of the Merchant Marine Act of 1920, 46 U.S.C. 867, be specified as a statutory section, the violation of which would be made an issue in the proceeding.[6] The Order contemplated a hearing but without the necessity of a trial-type hearing. Instead, the record for decision would consist of new affidavits and memoranda of law, as well as the material submitted earlier under the informal and formal procedures.

The Order designated the following as the issues under investigation:

(1) Whether article 3 of PWC's basic agreement No. 57 permits equalization and absorption of motor carrier inland freight rates and charges;

(2) whether PWC's equalization and absorption practices, as they affect Portland, are unlawful and detrimental to the commerce of the United States and the general public interest, or unduly preju-

[6] The Commission explained its action as follows:

> While certain cargo may be naturally tributary to a port, any "naturally tributary zone" surrounding the Port is constantly changing and is determined by various factors including shipper needs and cargo characteristics. *CONASA, supra*, [21 F.M.C. 94]. But §8 ". . . does not require the Commission to incorporate any specific concept of naturally tributary cargo into its Shipping Act considerations, nor does it otherwise create substantive rights in Shipping Act proceedings." *Port of New Orleans, supra* [21 F.M.C. 152].

dicial or unjustly discriminatory to Portland or to businesses and individuals which depend on Portland's economic viability pursuant to section 205 of the Merchant Marine Act, 1936, and sections 15, 16 and 17 of the Shipping Act, 1916;

(3) whether PWC freight tariff No. 3, rule 16 violates section 205 of the Merchant Marine Act of 1936, and sections 15, 16 and 17 of the Shipping Act, 1916, by permitting equalization and absorption of cargo away from Portland where direct service is adequate to handle such cargo; and,

(4) Whether PWC freight tariff No. 3, rule 16 permits cargo being equalized and absorbed to move on ICC exempt carriers.

The Order designated POP as Petitioner, PWC and its member lines as Respondents, and Hearing Counsel as a party. Pursuant to provision therefor in the Order, Massachusetts Port Authority, Delaware River Port Authority, Board of Commissioners of the Port of New Orleans, and New Orleans Traffic and Transportation Bureau, Inc., became intervenors on a limited basis.[7]

Pursuant to the Order, affidavits and memoranda of law were filed. After examining the new documents and reviewing the earlier submissions, the Commission issued a Report and Order of Further Investigation and Hearing[8] (Further Order). In it, the Commission concluded that the record was not fully developed on all the issues and that a further hearing was necessary.

The particular issues raised by POP were resolved by the Further Order as a matter of law. The Commission determined that Article 3 of Agreement No. 57 does allow equalization of inland motor carrier rates and cargo;[9] that the equalization rules in PWC's tariffs are not unlawful, per se;[10] and that such equalization rules do authorize the transportation of equalized cargo by Interstate Commerce Commission "exempt" motor carriers.[11]

The general (ultimate) issue, expressed as a question, "Do PWC's Equalization and Absorption Practices, as Applied to Portland, Violate Sections

[7] The Department of Transportation of the United States intervened but did not participate.

[8] *Pacific Westbound Conference—Equalization Rules and Practices*, 21 F.M.C. 937 (1979).

[9] *Id.*, 21 F.M.C. 939, 942.

[10] *Id.*, 21 F.M.C. 940–941, 942. The Commission explained, at 941:

> Equalization, as such, is not illegal[11] and a tariff that allows for equalization therefore is not *per se* illegal. It is only the *application* of the tariff in a particular manner that can be illegal. The legality of PWC's Tariff No. 3 apart from its application does not present a separate legal issue in this case. Additionally, the question of adequacy of Portland's service is only *one* of the factors to be considered under the CONASA guidelines, and is not dispositive by itself of the legality of an equalization. For the foregoing reasons, the Commission concludes that PWC's Rule 16, Tariff No. 3, does not, in and of itself, violate sections 15, 16 or 17 of the Shipping Act, 1916, or contravene section 205 of the Merchant Marine Act of 1936. The question of the legal *application* of the Rule still remains within Issue (B), *supra*. If an illegal implementation of PWC's tariff were proved, then modification of the tariff to prohibit such implementation could be required.
>
> [11] *See* CONASA, 18 S.R.R. at 779, *Port of New Orleans*, 18 S.R.R. at 770–772, *Stockton Port District* v. *Pacific Westbound Conference*, 9 F.M.C. 12, 20 (1965), and *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 (1941).

[11] *Id.*, 21 F.M.C. 941, 942.

15, 16 or 17 of the Shipping Act, 1916 or Section 205 of the Merchant Marine Act of 1936?"[12] could not be resolved on the existing limited record.

From the outset, POP's position on this issue was that any cargo as to which The Port becomes the base port for an equalization to a "more distant" port is naturally tributary to POP.[13] Thus, relying upon its perception of an earlier Commission decision, *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106 (1973), POP contended that any absorption of inland freight charges on cargo which would otherwise move more cheaply to POP than to any other port constitutes an unlawful diversion, per se, unless it can be shown that The Port's facilities or service are inadequate.[14] Although the order instituting this proceeding specifically directed POP to describe the area which should be considered naturally tributary to POP,[15] POP's submission, in the form of an affidavit/memorandum from Mr. Mowat, again did not address this question. POP maintained, instead, that PWC has the burden of proving its practices to be legal.[16]

Recognizing that POP was taking its position on very narrow ground in relying on *Intermodal Service to Portland, Oregon, supra,* and was ignoring "the fact that this case was substantially expanded in the Commission's *CONASA* decision,"[17] the Commission stressed that the ultimate issue would continue to be governed by the concept of "naturally tributary" cargo which the Commission enunciated in *CONASA, supra,* and *Port of New Orleans, supra.*[18] Accordingly, the Further Order restricted the hearing to consideration of the following components of the ultimate issue:[19]

(1) Whether and to what extent the equalization and absorption practices of the Pacific Westbound Conference cause cargo which would ordinarily move through the Port of Portland to move through ports other than Portland?

(2) Does the diversion of cargo described in issue (1), if any, cause *significant* economic harm to the Port and the local economy of Portland?; and

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[12] *Id.,* 21 F.M.C. 939-940. In n. 10, *supra,* this issue was identified in shortened form as "Issue (B), *supra.*"

[13] *Id.,* 21 F.M.C. 939, n. 4. POP was required by a section 21 Order issued after POP's petition was filed, to describe, in detail, the area it believed to be "naturally tributary." POP did not describe a specific area but made the assertion that "naturally tributary" usually was a function of distance, instead. Under POP's theory, see n. 14, *infra,* the function of distance is reflected by the difference between the lower cost of inland transportation from point of origin to base port, on the one hand, and the higher cost of that transportation from point of origin to port of loading, on the other hand. See, e.g., Transcript (Tr.) p. 1106.

[14] *Id.,* 21 F.M.C. 939. See, Testimony of Milton A. Mowat, POP's Traffic and Regulatory Affairs Manager, at Tr. 395. There, Mr. Mowat defined naturally tributary territory as ". . . the territory or area where the inland freight rates from origin to Portland are less than the inland freight rates from origin to where the equalization or absorption is being made . . ." and, see, also, POP opening brief at p. 13, for a reaffirmation by POP of the contention referred to in the text, above.

[15] Order, p. 6, par. 1, Item No. 1.

[16] Further Order, 21 F.M.C. 938 n. 3.

[17] *Id.,* 21 F.M.C. 939.

[18] *Id.,* 21 F.M.C. 938, 939-940.

[19] *Id.,* 21 F.M.C. 942.

(3) If the equalization and absorption practices of the Pacific Westbound Conference do cause significant economic harm to Portland, are they nonetheless reasonable and justified?

Acknowledging that these elements could result in a massive record, which might become unmanageable unless further perimeters were established, the Commission structured the proceeding by limiting the 201 introduction of additional evidence to the following: [20]

A. For the years 1977 [marginal note omitted] and 1978, the information described in the first ordering paragraph of the Commission's April 14, 1978 section 21 order, but only as to the ten most important cargo commodities (in terms of gross revenue to the Port of Portland) carried by the Pacific Westbound Conference in 1978;

B. For the years 1977 and 1978, as to the ten commodities described in paragraph A, the amount of equalization paid by the Pacific Westbound Conference and the basis for such equalization payments [marginal note omitted]; and

C. Affidavits or, if considered necessary by the Administrative Law Judge, depositions, concerning the following matters, but only to the extent that these affidavits or depositions relate to the ten commodities described in paragraph A, and then only to the extent that they relate to shipments occurring in 1977 or 1978:

1. Natural, geographical or economic conditions of inland transportation which favor or impede movements through the Port of Portland;

2. The ability of the Port of Portland to meet the needs of shippers, such as timeliness of shipments and special cargo handling facilities;

3. The extent to which equalization payments, as opposed to other factors, induced shippers to move their cargo through a port other than Portland;

4. The extent, if any, to which Portland's ability to meet shipper demand was limited by the level of port calls of members of the Pacific Westbound Conference;

5. The amount of net revenue lost by the Port of Portland as a result of cargo diversion caused by equalization payments, and the effect of such loss on the local economy of Portland; and

6. The methods and scope of cargo solicitation employed by Portland, Seattle, Los Angeles-Long Beach and the Pacific Westbound Conference, to the extent considered relevant by the Administrative Law Judge.

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[20] 21 F.M.C. 942–943.

D. Affidavits or, if considered necessary by the Administrative Law Judge, depositions concerning the following matters, but only to the extent that they address time periods after December 31, 1976:

1. The cost to member lines, or the Pacific Westbound Conference as a whole, of providing direct service to Portland with various amounts of frequency;
2. Operational difficulties or other transportation factors bearing upon the ability of the Pacific Westbound Conference to provide increased direct service to Portland;
3. Competitive conditions of carriers in the westbound trade affecting the ability of the Pacific Westbound Conference to increase its direct service to Portland; and
4. The economic feasibility to the Pacific Westbound Conference of serving Portland via feeder vessels to other ports; . . .

In addition, the Further Order continued to limit intervenors to the submission of memoranda of law at the close of the evidentiary hearing. The Port Authority of New York and New Jersey intervened on this basis. However, another intervenor, the Port of Seattle (POS), was given permission to participate fully.

After extensive prehearing discovery and after a two-day prehearing conference at Washington, D.C., on June 19 and 20, 1979, the hearing commenced in Portland, Oregon, on January 22, 1980, and it continued until adjournment on February 1, 1980. The hearing resumed at Portland and continued there from March 11 through March 27, 1980, when it adjourned again. Thereafter, there were sessions at Washington, D.C., from May 13 through May 22, 1980; at San Francisco, California, from October 14 through October 22, 1980; and, again, at Portland on March 24 and March 25, 1981. Altogether, there were 39 days of hearing. The hearing produced 5,374 pages of transcript (Tr.) and 161 numbered exhibits.[21] There were twenty-five witnesses.[22]

The briefing schedule called for the filing of opening and reply briefs by POP and Hearing Counsel and opening briefs (memoranda of law) by all intervenors except POS. Answering briefs were to be filed by respondents and POS. Under that schedule, POP filed an opening brief of 194 pages and a reply brief of 11 pages; Hearing Counsel filed an opening brief of 63 pages and a reply brief of 18 pages; Delaware River Port Authority filed a brief of 5 pages; The Port Authority of New York and New Jersey filed a brief of 16 pages; PWC filed a brief of 339 pages; American President Lines, Ltd. (APL), a member of PWC, filed a brief of 66 pages; Sea-Land Service, Inc., another PWC member, filed a brief of 16 pages; POS filed a brief of 64 pages.

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[21] Not all numbered exhibits were received in evidence. E.g., Ex. 133 for identification was rejected. See Hearing Canceled; Other Matters, *supra*, at n. 1.

[22] A list and description of witnesses appears in Appendix A.

FACTS

Separate proposed findings of fact were submitted by POP and Hearing Counsel in their opening briefs and by APL and Sea-Land in their answering briefs. PWC's answering brief contains its own and POS' joint proposed findings of fact. Generally, my findings have been organized to follow the numerical sequence of the PWC/POS joint proposal.[23] To the extent that the findings do not explicitly incorporate particular proposed findings, the latter have been rejected as incorrect, immaterial, argumentative or conclusory, or otherwise not required for full consideration and complete disposition of this case.[24]

A: GENERAL

1. The trade served by PWC is served also by independent, nonconference lines which compete in the trades with each other and with PWC members. According to a United States Department of Commerce statistical study, of all the regions examined, the North Pacific Region trade, of which the PWC trade is a part, shows the most significant overall growth in recent years, and this growth is expected to increase.[25] To meet this anticipated growth, at least one carrier, Sea-Land, intends to increase its 1981 and 1983 carrying capacity by 20% over 1979 levels. The competition in the PWC trade continues to be as intense as it was in 1977 and 1978, although some carriers have left the trade[26] while others have curtailed service, as of the close of the record.[27]

2. Using POP as the basing port for the application of equalization or absorption, the ten most important commodities equalized or absorbed by PWC members in 1977 and 1978 were apples, canned corn, dried peas and beans, frozen corn, hides, lumber, meat and bone meal, metal scrap, onions and wastepaper. In 1977, these commodities accounted for 87% of the total tonnage equalized by PWC carriers. All of this cargo was containerized. See Appendix C showing the number of tons and the

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[23] The joint proposal is the most extensive and detailed, numbering 214 items spread over 206 pages. APL's has 71 items, contained in 20 pages of type smaller in size than the type used by the other parties. Sea-Land's 7 items appear on 7 pages. Hearing Counsel's number 103, covering 27 pages. POP presented 22 proposals, in 13 pages, preceded by 136 pages of a "Summary of Evidence." The process must start somewhere, and the joint proposal is the most useful tool for the task.

[24] PWC requests that each of the joint PWC/POS proposed findings be adopted or that a reason be given and record references cited as to why a proposal is not adopted or why it is amended. It invokes the Administrative Procedure Act, 5 U.S.C. 557(c), and the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.225, as authority for their request. Neither of those authorities support PWC's broad assertion. PWC does not suggest that the same consideration be given to the proposals of the other parties. Even if they had, good decision making scarcely requires a grain-by-grain sifting of so massive a record as exists in this proceeding. All that is required is a determination unmistakeably informing the parties of the rulings. See, *Mediterranean Pools Investigation*, 9 F.M.C. 264, 267 (1966).

[25] Tonnage is expected to increase from 70 million in 1975 to 199 million in 1990.

[26] States Steamship Co., Knutsen Line, Phoenix Container Line (PCL), Ro-Lo Pacific and Asia-America Line.

[27] Far East Shipping Co. (FESCO), Yang Ming Line and Evergreen Marine Line.

number of containers equalized and absorbed by PWC members in 1977 and 1978.

3. Whatever may have been the case in the past,[28] the PWC trade is a weight trade rather than a measurement trade. In a measurement trade, vessels tend to exhaust their cubic capacity before reaching their deadweight limit. Because it is just the opposite in a weight trade, weight capacity of a vessel is usually of more concern than space utilization. As a general rule, then, container slot capacity is not the appropriate yardstick for actual vessel carrying capacity in the PWC trade. This means that a carrier which is engaged in a weight trade may have actual carrying capacity lower than the designed container slot capacity. Each of the ten most important commodities, except onions, runs to weight rather than measurement.

4. A vast number of commodities are carried outbound from the Pacific Northwest in breakbulk or quasi-breakbulk vessels. Nevertheless, some of these low-rated commodities, like woodpulp, lumber and woodchips, are capable of being containerized. Consequently, container ship operators view these commodities as being opportunity cargo and will compete for them if their ships have not reached capacity. Most outbound container cargo is carried in 35- or 40-foot containers. Very little of the ten most important commodities is carried in 20-foot containers.[29]

5. Agricultural cargos moving from Southern Washington and from Oregon are subject to seasonal variations, causing peaks and valleys in shipper demand for cargo space. This is mostly true for onions[30] and apples, but there are also cyclical movements of wastepaper, metal scrap, and dried peas and beans. Because apples require refrigerated containers, the seasonal demands[31] strain the supply of available containers and shortages result throughout the Pacific Northwest. POP is particularly susceptible to shortages in both refrigerated and dry cargo containers because of an imbalance in its inbound/outbound container trade. Far fewer containers are received at POP inbound than are needed for outbound movements.

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[28] *Cf. Pacific Westbound Conference—Wastepaper and Woodpulp From United States West Coast to Far East*, 17 SRR 929, 959–960 (I.D. 1977), *rev.* 21 F.M.C. 834 (1979), *rev. sub nom.; National Association of Recycling Industries, Inc. v. Federal Maritime Commission*, 658 F. 2d 816 (D.C. Cir. 1980).

[29] Hearing Counsel's witness, Mr. Jay Copan, showed that of the 4855 containers equalizers by PWC members in 1977 and 1978, only 121 were 20 footers. Of that number, 44 carried peas and beans and 77 carried hides. See Ex. 37 rev. (identical to Ex. 95 sehed. 3). Mr. Copan is an economist on the Commission's staff.

[30] In 1977 and 1978, the Japanese Six Lines were forced to refuse cargo because of extensive onion carriage.

[31] Improving technology has extended the apple-shipping season but, because the earliest shipments after harvest command the highest prices, shippers try to rush to market, causing a peak demand for space.

B: THE PARTIES

I. POP

a: Geographic and Physical Details

6. POP's municipal district is comprised of Oregon's Multnomah, Clackamas and Washington Counties. In addition to marine terminals, The Port operates Portland International Airport (a commercial airport), two general aviation airports, a ship repair yard, a dredge, a tugboat, and two industrial parks as a single integrated economic unit.[32]

7. POP is located, geographically, at the confluence of the Columbia and Willamette Rivers, about 101 miles upstream from the Columbia River bar near Astoria, Oregon.

8. POP operates five marine terminals, which, in 1978, had twenty-nine berths (perhaps thirty, but a tally of those shown in Ex. 23, pp. 6–10, comes to twenty-nine), including seven container berths. The principal container terminal is the John M. Fulton Terminal 6, which is situated on the Columbia River.[33] It has three berths, two for containers and one for automobiles. Terminal 6 is a sixty-six acre facility with an 1800 foot dock housing the two container berths. Supporting equipment includes three 50 ton capacity container cranes, four 45 ton capacity transtainers, sixteen tractors, forty-eight chassis, one 40 ton top loader mobile container handler and one 15 ton mobile empty container side loader. Terminal 6 has a 60,000 square foot container freight station and immediately adjacent to this terminal is a 200,000 square foot warehouse. One-fifth of the warehouse's space is available for United States Customs bonding. Plans to expand Terminal 6 to include a 1050 foot berth extension, additional paving in the container yard and additional support equipment were approved by The Port's Commission. Completion was scheduled for October 1981.

Terminal 1 is a six berth complex on the west bank of the Willamette, designed primarily for breakbulk container combination vessels and ocean barges. It has more than 200,000 square feet of warehouse space for storage of breakbulk cargo.

Terminal 2 lies on the west bank, downstream from Terminal 1. It has six berths, two for container vessesl, one for ro-ro ships and three for breakbulk and combination vessels. It has a 450,000 cubic foot cold storage warehouse which can hold 50,000 boxes of fresh fruits and vegetables at 32 °F. Support for the container ship operation includes two Hitachi container cranes of 40 and 50 ton capacity, a 50 ton capacity gate/truck scale, a 90,651 square foot container freight station and 15 acres of container yard area.

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[32] E.g., funding for POP's John M. Fulton Terminal 6, a recently built marine container complex, came from airport revenues.

[33] The Japanese Six Lines operate from Terminal 6.

Terminal 4 has thirteen berths. It is located on the east bank of the Willamette, five miles downstream from Terminal 2. Terminal 4 has a two berth container facility, preferentially assigned,[34] equipped with a 33 ton capacity Hitachi container crane and 109,921 square feet of intransit space. The other berths are for automobile, grain, breakbulk ships and tankers.

Terminal 5 is POP's newest one and is located on the east bank of the Willamette, two miles downstream from Terminal 4. It has one berth to service a grain elevator.

POP is served by three railroads, about 34 motor carriers and by Columbia River barges.

b: Traffic and Cargo at POP

9. Measured by tonnage (short tons) moving through United States West Coast ports annually, POP is the third largest Pacific Coast port and the largest in the Pacific Northwest. In export tonnage, POP is the largest port, handling about one-third more than its nearest competitor. As is true of the entire Portland harbor area, including facilities other than POP, bulk and bulk-type cargo make up most of POP's tonnage, both inbound and outbound. Grain, automobiles, steel and lumber are some of the leading examples of bulk and bulktype cargo moving through POP.

The tonnage volume at POP has been increasing since POP's fiscal year 1971–1972. In that year, 1,456,917 tons of commodities, other than grain, were handled; in fiscal 1978–1979, 2,579,471 tons were handled. In the earlier fiscal year, grain[35] tonnage was 956,948, and in 1978–1979 grain tonnage reached 2,691,932 tons.[36] In 1978, overall tonnage was the greatest in POP's history until that time, even exceeding mid-range forecasts, made by POP, through 1985.

10. The other facilities in the Portland harbor area, combined, handle far more tonnage than does POP, individually.

11. A comparison of statistics compiled by the Bureau of Census shows that in 1978, foreign commerce dry tonnage moving through Portland harbor area facilities exceeded similar tonnage moving through Seattle harbor area (including POS) facilities by more than 4,000,000 tons.

12. Export grain tonnage at POP shows an increase from 1,169,000 tons in 1975 to 3,526,000 tons in 1979. POP's 1978 grain tonnage was about half of that flowing through the other Portland harbor area ports.

13. POP handles almost all the import automobile tonnage in the Portland harbor area. From 63,000 tons in 1975 and 254,000 tons in 1978, automobile

[34] It is assigned to Matson Navigation Co., a carrier primarily engaged in the Pacific Coast/Hawaii Trade. POP intends to have Matson use Terminal 6 when the planned expansion is completed.

[35] Grain includes wheat and barley.

[36] Portland harbor area tonnage in that year was nearly double that of POP.

tonnage increased to 274,000 tons in 1979. POP forecasts still more increases by 1985.

14. POP is a major forestry product[37] export port. Two of those products, lumber and logs, are expected to decline markedly in tonnage in the 1980's because of a variety of economic, competitive and regulatory reasons. Tonnage declined from 1975 to 1978, but increased in 1979 above 1975's level.

15. POP's import steel tonnage increased from 263,000 in 1975 to 431,000 in 1978 and 443,000 in 1979. This amounted to about 80 percent of Portland harbor area tonnage.

16. Non-grain bulk dry and liquid tonnage increased from 346,000 tons in 1975 to 389,000 tons in 1978 and 542,000 in 1979. POP forecasts further increases in this tonnage by 1985.

17. POP is a major breakbulk general cargo port.[38] Despite the trend to containerization of many commodities formerly carried as breakbulk cargo by common carriers by water, inbound and outbound breakbulk tonnage increased at POP from 1975 to 1979 by about one-third, but there was an outbound tonnage decrease below 1975 levels in 1978.

18. This finding merits emphasis. *POP did not enter the container business to any great extent until about 1970–1971, well after POP's Northwest rival port, POS, had established itself as that region's container "load center."* (In stressing this finding, I am mindful that in *Dart, supra,* the Court of Appeals criticized the finding of the Administrative Law Judge which focused upon a commodity movement prior to the institution of container service at Wilmington, the complaining port in that case. The historical details in the case at bar are much different than those in *Dart,* involving, as they do, the traffic patterns of inland and ocean carriers which load centers spawn, rather than the movement of a single commodity at a relatively small port.) Anticipating the growth potential of containers, POS committed itself to make the investments in capital improvements necessary for container operation in the 1960's. As a result, Seattle, which in 1959 was handling half the tonnage which flowed through that port

[37] Forestry products include lumber, logs and plywood, among other commodities.

[38] In its "Overview of This Proceeding," PWC's answering brief, pp. 12–26, PWC warns of factual errors in POP's opening brief which PWC characterizes as lacking in integrity. In the same breath, PWC assures that its own brief does not distort the record. Unquestionably, the process of fact finding is aided, measurably, by particularizing errors to be found in statements made by another party. It is regrettable that POP disdained from doing so, although it was given the opportunity by way of reply brief. POP preferred, instead, to "except generally to the proposed findings and conclusions opposed to those enunciated in its opening brief." POP reply brief, p. 2. Nevertheless, PWC's characterization serves no useful purpose in the process. Moreover, despite finical attention to detail, PWC is not, itself, immune from making factual mistakes. For example, in its proposed finding 17, PWC says "Portland is the largest breakbulk general cargo port on the West Coast (Mowat, Tr. 1189)." This may be true of POP, but the testimony at Tr. 1189 does not support the PWC claim. Tr. 1189 shows this:

Line 16: Q. [by PWC] Is Port of Portland the biggest breakbulk port on the U.S. West Coast?
Line 18: A. [Mowat] I don't know.
Line 19: Q. Do you know of any port with a larger breakbulk tonnage?
Line 21: A. I don't know.

in the 1920's, handled 2,400,000 short tons of container cargo in 1977 and 2,774,000 tons of such cargo in 1978. This was a proportion of more than 4 to 1 and 3.6 to 1 better than POP in those respective years.

Nevertheless, as that ratio shows, despite its late entry into the field, POP's container operations are increasing, absolutely, as well as relatively. From its infancy in 1970–1971, POP's container business was described by POP witnesses as a "banner year" in 1979 and as a "thriving" business. These figures show why:

POP Container Tonnage

	1975	*1977*	*1978*	*1979*
Outbound	380,940	486,557	558,886	639,366
Inbound	139,867	176,825	210,761	228,043
Total	520,807	663,382	769,647	867,409

19. PWC's proposed finding 19 is rejected. Without belaboring the accuracy of some of the statistics therein, most of what PWC says is strained speculation. A conclusion which PWC proposes—that 19.1 percent is about the same proportion as 14.6 percent—is unacceptable.

20. The value of cargo moving across POP docks increased by 44.8 percent in fiscal 1978–1979 over the previous fiscal year. This was the greatest dollar value increase among the nation's leading ports.

c: Service at POP in the Trade Served by PWC

21. At varying times and with varying frequency, in 1977, ten PWC carriers[39] and three non-conference independents loaded outbound containers at POP. Similarly, in 1978, ten PWC carriers and six independents performed that service at POP. Of the PWC members, only the Japanese Six, and of the independents, only Far East Shipping Co. (FESCO) and Orient Overseas Container Line (OOCL) were major container carriers in the export trade.[40]

In 1977, the Janese Six made 71 vessel calls at POP, loading 21,750 TEUs, of which 18,639 were full or loaded. In that year FESCO made 36 calls loading 2,661 TEUs, 2,535 loaded, and OOCL made 27 calls, loading 3,557 TEUs, 3,176 loaded. In 1978, the Japanese Six made 70 calls, loading 23,258 TEUs, 22,210 loaded; FESCO made 44 calls, loading 4,160 TEUs, 4,109 loaded; OOCL made 23 calls, loading 2,848 containers, 2,822 loaded.[41]

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[39] Six of the ten were the Japanese Six Lines, made up of Kawasaki Kisen Kaisha (K Line), Japan Line, Yamashita-Shinnihon (Y-S), Mitsui O.S.K. (OSK), Showa Line, and Nippon Yusen Kaisha (NYK).

[40] Container carriage is often measured by TEUs. TEU is an acronym for trailer (container) equivalent units. The basic unit is a 20-foot container. A 40-foot container is counted as 2 TEUs.

[41] Comparable statistics for other carriers during those years were:

1977: For PWC, APL made 5 vessel calls, loading 12 TEUs, East Asiatic Company (EAC) made 11 calls, loading 334 TEUs, including some empty containers, Knutsen made 23 calls, loading 127

Continued

Altogether in 1977, 339,056 container tons of cargo were loaded at POP. The PWC carriers loaded 262,464 tons, including the Japanese Six's 229,992 tons. FESCO carried 34,130 tons, and OOCL carried 40,884 tons. In 1978 the total tonnage at POP was 371,759. The Japanese Six carried 265,555 of the 277,666 loaded by PWC members. FESCO carried 50,101 tons, and OOCL carried 33,931 tons.

The Japanese Six call at POS and Vancouver before they call at Portland in the outbound PWC trade.[42] The Japanese Six ships are full containerships, which sail about every 4 or 5 days and call directly at Japanese ports, only. They do provide transshipment (or feeder) services, on other vessels, to Hong Kong, Manila, Busan and Taiwan. They averaged 319 TEUs, loaded and unloaded, per vessel call for the years 1977–1978. The Japanese Six provided virtually all of the refrigerated container service at POP in 1978. Neither Evergreen, OOCL nor FESCO carried refrigerated containers in that year. However, the Japanese Six provided "basically no refrigerated service between Portland and Hong Kong" via their feeder services.[43]

EAC (PWC member) called at both POP and POS every 14 days during 1978, serving Manila and Bangkok. Its vessels are semi-containerships having a slot capacity of 400–600 TEUs, including 88 refrigerated TEUs per vessel.

Knutsen (PWC member) also served POP and POS fortnightly, calling at Hong Kong and Manila with semi-containerships having TEU capacities ranging from 276 to 804.[44]

States Line (PWC member until June 20, 1978, independent thereafter) called at POS and POP, providing 3 sailings a month to Keelung and Manila in semi-containerships with a capacity of 214 TEUs each. It also served POS with ro/ro vessels having capacities of 830 TEUs. The ro/ro vessels off-loaded at Kobe, Kaohsiung, Hong Kong and Busan.

Among the independents, in 1978, FESCO provided two 10-day services from POP and POS to Japan and Hong Kong, loading, first, at POS. Its vessels were semi-containerships (368 TEUs) or full containerships (800 TEUs).

TEUs, including empties, and States Line made 24 calls, loading 353 TEUs, including empties; the other independent, Scindia, made 12 calls, loading 10 TEUs.

1978: For PWC, APL made 3 calls, loading 29 TEUs, EAC made 19 calls, loading 406 TEUs, including empties, Knutsen made 24 calls, loading 555 TEUs, including empties, and States Line (first half of year) made 12 calls, loading 251 TEUs, mostly empties; for the independents, Evergreen made 6 calls, loading 689 TEUs (685 loaded), while the remainder Scindia, Shipping Corporation of India (SCI) and States Line (second half of year) made a total of 18 calls and loaded 203 containers.

Note: The containers lifted by EAC in 1977 and 1978 went to non-PWC as well as PWC destinations.

[42] POP in its proposed finding 7 states that most of the carriers serving both POS and POP had faster transit times crossing the Pacific to the Far East, as POP was the last port of call for those carriers. To the extent that POP implies that direct transit time to Far East destinations is less from POP than from POS, POP's proposed finding is misleading. To most Far East ports, the transit time directly from POS is less than it is directly from POP.

[43] Copan, Ex. 95, p. 46.

[44] Knutsen also served non-PWC destinations with these vessels.

OOCL, in 1978, had fortnightly sailings from POS and POP to Japan, Taiwan, Korea, Manila and Hong Kong. Its vessels had a capacity of 373 TEUs each.[45]

Evergreen, which was serving POS, started to serve POP in October 1978, making six sailings that year. Its 866 TEU capacity vessels called at Osaka, Busan, Keelung, Kaohsiung and Hong Kong.

For FESCO and the Japanese Six, POP was the last West Coast port of call for vessels going to the Far East.

22. To a greater extent than is true of the PWC trade, in general,[46] or the PWC Northwest trade, in particular, ships sailing from POP to PWC destinations tend to reach operating weight capacity before exhausting their TEU (or slot) capacity. For example, APL's "Pacesetter" class of containerships, which operate between POS and the Far East,[47] have a design capacity of 1,482 TEUs. Yet, their average inbound capacity was about 1,364 TEUs, and their average outbound capacity was only about 1,016 TEUs because of stowage and other limitations and factors—weight usually being the primary one. Sea-Land's experience is similar. Its containerships call at POS and Oakland on Far East voyages[48] and reached inbound capacity at 1,184 TEUs and outbound capacity at 1,050 TEUs. Thus, the mere fact that some vessels, including those of the Japanese Six Lines, may sail from POP to PWC destinations with unused slot capacity, fails to establish that additional containers could have been carried on those vessels.

POP's "Summary of Facts," at p. 103, *et seq.*, contains an extended presentation concerning the "Japanese Consortium Capacity at Portland," presumably as support for POP's proposed finding No. 8. Together, the presentation and proposed finding imply that, but for equalization and absorption by Sea-Land and APL via POS (e.g., in 1977 and 1978, of 69,000 tons of "top ten" cargo equalized away from the POP base by APL, all but 550 tons of apples sailed from POS), most, if not all, of the equalized cargo would have been accommodated at POP by vessels, mainly those of the Japanese Six Lines, sailing from there with unused TEU capacity. This finding rejects POP's suggestion.

Mr. Seiichi Hirano was PWC's chief witness with respect to the cargo carrying capacity of the Japanese Six Lines. He is the West Coast general manager of one of those lines and testified on behalf of all of them. Mr. Hirano is a well qualified witness with many years of experience in managing and supervising carrier operations. The upshot of his testimony is that during the years 1977 and 1978, even though design capacity may not have been reached, the Japanese Six Lines' vessels operated at or near their actual carrying capacities, giving consideration to the various

[45] OOCL was providing substituted service from POP to POS when Mr. Copan testified.

[46] See No. 3, *supra*.

[47] APL has other services in the PWC trade which operate between California ports and the Far East.

[48] Sea-Land also has another service, solely between Calfiornia ports and the Far East.

factors affecting the relationship between design and realistic capacity. Included in this consideration, in addition to the weight factor, were matters of cyclical and peak demand, deck stowage, trim and stability, over stowage, equipment availability, booking and cargo readiness and transshipment.

On cross-examination and through its own witnesses, Mr. Mowat and an employee supervised by him, a transportation and pricing specialist, POP sought to discredit Mr. Hirano and his testimony. POP succeeded in showing that on occasion hatch cover limitations may have been exceeded by a Japanese carrier and it made some other minor points in regard to Mr. Hirano's testimony, but neither on cross-examination nor through its own witnesses (who were not qualified in vessel operation and stowage) did POP succeed in detracting from Mr. Hirano's credibility or the worth of his testimony.

d: POP's Revenues

23. The following shows POP's gross revenues from all operations conducted by the Port and from marine operations, only, during recent fiscal years.[49]

	1974[50]	*1975*	*1976*	*1977*	*1978*
Marine (000 omitted)	18,596	18,698	24,736	26,533	26,704
All (000 omitted)	27,580	29,617	36,522	39,133	40,224

Correspondingly, gross revenues from marine terminal operations (a part of marine operations) also increased during those years, as follows:

	1974	*1975*	*1976*	*1977*	*1978*
Marine Terminal (000 omitted)	11,686	12,115	16,651	18,147	20,486

24. The portion of marine terminal revenues derived by POP from container operations (from available full fiscal year statistics) were:

	1976	*1977*	*1978*
Container operation revenues (000 omitted)	6,956	6,332	8,212

[49] The Port's fiscal year begins on July 1 and ends on June 30. E.g., fiscal year 1974 begins July 1, 1974, and ends June 30, 1975.

[50] PWC/POS proposed finding No. 23 cites Exs. 56–61 as authority. They propose that, for 1974, POP had gross marine revenues of $18,596,825 and gross revenues from all operations of $32,100,710. PWC/POS are inconsistent in their references. Ex. 57 shows the comparable respective figures to be $20,701,394 and $32,100,710. Ex. 58 shows them to be $18,596,825 and $27,580,144. I have relied on Ex. 58, the Port's annual report because all other statistics in this finding came from other POP annual reports.

25 and 26. Through fiscal 1978, POP's gross revenues from all operations, from all marine operations, from marine terminal operations, and from marine terminal container operations were on the increase.

e: The Impact of POP's Marine Terminals on the Portland Economic Community

27. Back in 1976, POP was considering additional improvements to insure maintenance of a competitive position with respect to other West Coast ports. To assist it in the overall evaluation of proposed capital projects, POP retained an economic consulting firm, Economic Research Associates (ERA), to analyze the community economic impact of the Port's marine terminals. ERA described the analysis it performed in these terms: "The intent of the impact analysis has been to quantitatively, as well as qualitatively, assess the importance of the Port's Marine Terminals operations to the Portland region during 1975." [51] The area under study included all of the State of Oregon, but it also focused on the Portland-Vancouver Standard Metropolitan Statistical Area (SMSA) comprised of Clark County, Washington, and the Oregon Counties of Clackamas, Multnomah and Washington.

The testimony of Messrs. Lyon and Krekorian, including an updated version of the ERA analysis, prepared for this proceeding, and testimony given by Dr. Ernest Nadel of Manalytics, Inc., an economic consulting firm hired by PWC and POS, constitute the expert evidence concerning the economic effects of the PWC equalization and absorption rules on the business community and economy of the Portland area.

28. ERA's analysis is based upon the concept that there are three types of economic impact on the community due to marine terminal operations. The three are direct, indirect, and induced impact. Generally, despite wide disagreement concerning methods, details, omissions and the like, the PWC/POS economic exercise utilizes ERA's assumptions about impact, although it reaches different conclusions. It would be helpful to explain certain aspects of the three types.

29. Under the ERA analysis, direct impact consists of the value added portion of gross revenues directly generated in the study area. Gross revenues include those received by POP, other vessel expenditures, and gross revenues paid to inland carriers moving cargo to and from the Port. Value added consists of those gross revenues less the cost of goods sold, federal taxes and savings.[52] The shipping activity related categories included in the 1976 study were vessel disbursement, crew expenditures, marine insurance and international banking, inland transportation and miscellaneous port

[51] Ex. 90, Community Economic Impact Of The Marine Terminals Of The Port Of Portland, Volume I: Impact Analysis, Prepared For The Port Of Portland, May 1976, Forward, p. ii. The analysis was conducted under the supervision of Messrs. Richard K. Lyon and Gene P. Krekorian. They were assisted by a POP coordinator, Donald Grigg, on a day-to-day basis.

[52] This is a simplified picture, according to Mr. Lyon. Tr. 2076.

services. The vessel disbursement category is the one which covers POP's claim of lost revenues due to PWC's tariff rules. Overall vessel disbursements constituted 43 percent of direct economic impact. Inland transportation accounted for 39 percent of economic impact. But those two percentages concern all kinds of cargo. For containerized cargo, vessel disbursements amounted to 29 percent of direct economic impact while inland transportation amounted to 50 percent of direct economic impact.[53]

It is fair to mention, at this time, that in preparing its updated analysis for this proceeding, ERA was instructed by Mr. Grigg to "factor out inland transportation" and other items which POP considered to be "economic impacts not applicable in this case."[54] ERA's witnesses complied with POP's instructions.

30.[55] The 1976 analysis showed the direct impact on the entire study area (Oregon and Clark County, Washington) to be $47,586,000. It would be consistent with Mr. Krekorian's testimony to update that amount for 1978 by reflecting a 66 percent cargo increase and a 25 percent inflation increase. Thus, in 1978, the direct impact for the entire study area would be $98,740,000, of which $38,508,000 (39 percent) would constitute the direct impact of inland transportation for all cargo moving through the Port. But, because ERA allocated only 85.3 percent of direct impact to SMSA, the impact on the SMSA would be $84,225,000, of which $32,848,000 would be attributed to inland transportation for all cargo.

31. The second type of impact is indirect and is measured by two components. One is represented by port users and is expressed in terms of value added, employment and payroll. Value added is defined by ERA as the difference between the value of goods and the cost of materials necessary to produce them. The other component is represented by government agencies whose services are port related. Unlike value added, the level of the government agencies' component does not vary with tonnages handled by the Port. According to the 1976 study, 98 percent of indirect impact is attributable to the first component. In 1975, $130,190,000 was apportioned to value added, and the total was $133,070,000. Using the same updating factors applied in No. 30, *supra,* for 1978, indirect impact would amount to $276,120,000. In 1975, ERA allocated 50.4 percent to SMSA or $67,060,000. The comparable SMSA amount for 1978 would then be $139,164,000. By applying the 98 percent factor, port user, value added indirect impact for 1978 would be $136,381,000.

[53] PWC implies that all of the 50 percent derives from motor carrier operations, citing Ex. 90, Table III-12. My own calculations of relevant material in Chapter III of that exhibit lead me to find that motor carrier revenues are 84 percent of inland transportation. Thus, motor carrier revenues would constitute 42 percent of direct economic impact.

[54] Ex. 77. Letter dated December 18, 1979, from Mr. Grigg to Mr. Lyon.

[55] In this finding, I substituted the amount shown in Ex. 90, p. VI-3 (Table VI-1) for the amount proposed by PWC/POS as the base figure to be used in making calculations. Thus, I used 47,586,000 instead of 65,344,000.

32. The third type is induced impact. It is a calculation based upon a mathematical technique designed to approximate the effects of secondary, tertiary and further rounds of spending (respending), in the study area and the SMSA, of portions of gross revenue in determining direct and indirect economic impact. The 1976 study found the induced impact to be $229,706,000 in 1975.

33. For the Port's marine terminal activities as a whole, the total of the three types of economic impact on the entire study area for 1975 was found by ERA to be $410,400,000, of which $233,800,000 was allocable to SMSA.[56] Updating these figures to 1978 to reflect cargo growth of 66 percent and inflation of 25 percent, the total 1978 economic impact of the Port's marine terminal activities under the ERA methodology would be $485,135,000 for SMSA and $851,580,000 for the entire study area. The application of the ERA economic impact analysis to the findings in this proceeding will appear later.

34. For 1978 the total gross personal income for SMSA was $10,420,000,000.

f: Pricing of POP's Services

35. POP is an operating port. This means that it does not allow others to perform port services as a landlord port would, but performs those services, such as stevedoring, terminal services, container freight station operations and the like, itself. POP performs those services under rates and charges contained in tariffs which it files with the Commission. As pertinent, those tariffs are the Port of Portland, Portland, Oregon, Container Tariff No. 1 and the Port of Portland, Portland, Oregon, Terminal Tariff No. 3–A.[57]

POP's tariff charges which bear on this inquiry are those for throughput, extra ins and outs and wharfage. The throughput charge is a per container charge. While the rate may vary under differing conditions, it applies against any container, regardless of size. It covers container movements from terminal gate to vessel stowage.[58] As the name implies, the extra ins and outs charges, also assessed against containers, cover movement of containers over and above those included in the throughput charge. These charges apply almost entirely to movements of a full or loaded container between POP's container yard and its container freight station.[59] Wharfage is levied

[56] The portion of the total impact allocable to SMSA is 56.9 percent of the total under ERA's methodology. But, there has been a certain amount of rounding off which must yield to the actual figure shown in Ex. 90, p. VI–10, Table VI–4.

[57] Ex. 33 contains relevant excerpts from those tariffs, hereafter referred to, individually, as Container Tariff and Terminal Tariff.

[58] Container Tariff, pp. 13, 14, 15, 15–A, B.

[59] Container Tariff, pp. 10, 15–A, B.

against all cargo passing over the wharf and is based on the weight of the cargo.[60]

36. Under an Agreement, approved by the Commission pursuant to section 15 of the Shipping Act, various competing Pacific Northwest ports, which are members of the Agreement, are permitted to discuss and agree on port charges and tariff rates. POP, like POS, is a member of that Agreement. The Agreement authorizes independent action.

Either, by way of independent action, or because certain rates and charges are not within the coverage of the agreement, POP has engaged in competitive pricing actions designed to attract cargo from competing ports to the Port. POP has been successful in attracting cargo by means of competitive pricing, although not in every case. For example, in 1978, POP established a lower throughput rate for minilandbridge containers than the rate applicable to other containers. This tariff action did not succeed in its purpose. (In principle, however, there is no difference between this type of pricing practice and PWC's equalizing and absorption practices.) For another example, POP works with inland carriers to create lower combinations of inland freight rates to POP than to other ports. For yet another example, POP *absorbs* Columbia River barge unloading costs on through shipments to attract traffic from Idaho and Washington. (There is no difference in principle between this pricing practice and PWC's practices.)

The following exchange sums up Mr. Mowat's views concerning the difference between what POP does to meet competition and what PWC may do to meet competition:[61]

> Q. [BY MR. ANGUS.] Mr. Mowat, this morning I believe it was your testimony that it is the Port of Portland's position that it is not unlawful for ports to engage in price competition and in that fashion divert cargo from its normal routing patterns to a new normal pattern, a new routing pattern, is that correct?
>
> A. Yes.
>
> Q. By the same token when an ocean carrier or conference of ocean carriers engages in similar pricing practices, that does result in diversion of naturally tributary cargo from a port and should be declared unlawful, is that correct?
>
> A. That is what we propose today.
>
> Q. What is your basis, either in policy or as a transportation man, to justify such a distinction?
>
> A. It would be the history of regulatory law insofar as the Federal Maritime Commission is concerned, the cases that have dealt with tributary areas that pertain to steamship lines and conferences and not the port, although the tributary area would be a tributary area to a port.
>
> Q. My question was what is your basis in policy or in a transportation sense so that it can make sense to us as operators in

[60] Terminal Tariff, pp. 700–A, AA, B.

[61] Tr. 1579–1580.

the transportation field. Your answer seems to indicate that you rely exclusively on legal precedent, is that correct?
A. Yes.
Q. So you have no either economic policy or rationale or transportation policy or rationale for the Maritime Commission to declare that carriers cannot do certain things, but ports can, is that correct?
A. Yes.

g: Advantages and Disadvantages of Location

37. POP's geographical location is both beneficial and detrimental to the Port in its quest for cargo. It has the obvious advantage of being nearer than POS to the inland places of origin of most, if not all, of the equalized commodities. But, via great circle ocean navigation routes, POP is further than POS from many of the principal PWC destinations. For example, Yokohama is about 165 nautical miles (189 linear miles) closer to POS than to POP.[62]

Existing trade routes and traffic patterns make POP even more distant from PWC destinations. All common carriers, PWC members and independents, in the Northwest/PWC trade call at POS, but, not one calls only at POP. Thus, an additional call at POP would require a vessel to travel many more water miles than the mere difference in great circle distances—roughly 400 miles in the case of Yokohama.[63]

The overland motor carrier distance between POP and POS is about 172 miles.

38. POP was the beneficiary of navigational improvements which opened up the upper reaches of the Columbia River and tributaries in Washington and Idaho to barge traffic. In 1977 and 1978, respectively, POP handled 8,419 TEUs and 14,411 TEUs of barged container cargo.[64]

39. The degree of POP's inland transportation advantage diminishes as the disparity between the distance from origin and POP, on the one hand, and the distance from origin and POS, on the other hand, decreases. Usually, that decrease occurs, insofar as motor carrier transportation is concerned, as the origin point moves northerly toward the approximate line Raymond,

[62] However, POP may be closer to some southern PWC destinations, such as Manila.

[63] My calculation is based on these factors, one of which is inexact, as follows:

(1) Great circle difference (inexact because it does not measure Puget Sound mileage to POS) .... 189 miles.
(2) Cape Flattery, at head of straits leading to Puget Sound to Columbia River Lightship at mouth of that River .... 113 miles.
(3) Columbia River Bar to POP .... 101 miles.

[64] Cf. the barged TEUs in 1977–78 with the equalized and absorbed TEUs of the top ten commodities during those two years by the three PWC members which participated in that practice (from Ex. 37 Rev.):

	1977	*1978*
APL	2708	3709
Sea-Land	1180	1072
Pacific Container Line (PCL)	370	550
Total	4258	5331

Washington—Toppenish, Washington—Lewiston, Idaho—Drummond, Idaho. (See Ex. 13.) It costs only $17.00 more to move a container of canned corn from Toppenish to POS than from Toppenish to POP.

40. It is evident, from PWC's equalization and absorption practices and POP's absorption practices, that common carrier rates are not necessarily proportionate to common carrier costs. Competition is not the only reason for this anomaly. Sometimes, rate levels are influenced by laws designed to relieve perceived inequality of the effect of other laws. A pertinent illustration is section 205 of the Merchant Marine Act of 1936, which, in effect, has been interpreted by the Commission to prohibit conferences to set rates and charges at one port which vary from equivalent rates and charges at neighboring ports.[65] Applied to the facts of this case, this means that PWC carriers calling at POS and POP cannot charge more for containers lifted at POP even though there may be far greater operational and overhead costs involved in the additional call at POP.

41. The record is sparse with respect to evidence of rail rates pertinent to this inquiry.

42 and 43. Ocean containership common carriers, which do not make calls at POP, but which do so at POS, regard the additional expense of making a POP call as one of the two most important factors militating against the call. The cost of an additional call will, of course, vary from operation to operation depending upon a mix of factors.[66]

Dr. Nadel presented an analysis, based on 1978 costs, of the cost of an additional POP call for three PWC members and one independent operator in the PWC trade. The study took into account direct costs (analogous to "out-of-pocket" costs) and "opportunity costs," which he defined, broadly, as those costs incurred by a carrier in making ship capacity available for a call. The analysis was not contradicted or challenged and correlates well with cost estimates testified to by Douglas A. Pfaff, an APL witness. As set forth herein, I find it to be accurate.

Dr. Nadel determined that the individual carrier's total cost (direct and opportunity) for an additional POP call would be as follows:

Sea-Land	APL	OSK	OOCL
$44,338	$46,265	$38,940	$15,397

On a projected basis, assuming Sea-Land and APL made one call a week, it would mean additional annual costs of $2,305,576 and $2,405,780, respectively. For OOCL on a projected biweekly service, its annual cost would be an additional $400,322.

[65] See *Far East Conference Amended Tariff Rule*, 20 F.M.C. 772, 774 (1978), and cases cited therein.

[66] E.g., Sea-Land's Northwest service includes calls at POS and California ports. Thus, a POP call would not be proportionately as great for Sea-Land as it would be to APL or Hapag-Lloyd, a German flag independent, which do not steam south along the coast, but go directly to the Far East.

44. Dr. Nadel's analysis also considered the additional cost to APL due to lost revenue arising from the fact that, if a POP call were not made, a vessel would have been otherwise productively employed. He calculated the loss to be $83,000 per day per call.[67] This cost could be lessened by speeding up the vessels. However, the increased fuel costs associated with higher speeds would cost an additional $19,000 per day.[68]

45. A vessel calling at POP is required to engage a bar pilot to cross the sandy bar at the mouth of the Columbia and a river pilot to navigate that river and the Willamette. In adverse weather the bar cannot be crossed. On the rivers, fog may cause delay and, sometimes, groundings. Delays in crossing the bar or on the rivers are costly in their own right, but they may become even more costly if they result in schedule disruption. Although carrier concerns about Columbia River and bar delays are legitimate factors to be considered by management in determining whether to serve POP, the quantification of the delay factor is too speculative to deal with on this record.[69]

h: The Effect of POP's Belated Decision to Compete for Container Vessel Traffic

Capital intensive containership operations have high fixed costs. When prevailing rates are highly competitive, as they are in the PWC trade, these high costs can be recouped and a profit turned, only if sailings are kept at or near optimum level. In order to maintain that level, turnarounds must be of short duration and must be kept to a minimum. These needs led to "load centers," a load center being a single regional port of call to meet those needs.

POS, much the smaller port, and one that was in the decline in the 1950's, invested heavily in containerization in the early 1960's and, as a container port, leaped ahead of POP, which did not commit to containerization until late 1970 or 1971. Thus, POS became the Pacific Northwest Region's load center and it continues to maintain that position, as is evidenced by the fact that all the containership carriers serving the Pacific Northwest call at POS.[70]

It follows that, in considering whether to retain or add another load center in the same region, carrier management must weigh the additional vessel costs and scheduling problems associated with another port of call

[67] There are 1.5 days per call, additional, assuming no delays.

[68] This figure does not include some of the other debits of high speed, such as more maintenance and less cargo space because of the additional fuel weight.

[69] See, e.g., Ex. 136, prepared testimony of Mr. Pfaff, at p. 13. "If we had a weekly service to Portland, a few of our ships would, on an unpredictable basis, be held up at the bar by weather." PWC/POS references to the Mt. St. Helen's eruption and silting of the river channel as disadvantages to POP seem to me to be overreaching, particularly as the likelihood of the occurrence was not shown to have been a management consideration, when, years before that unique event, APL and Sea-Land decided not to call at POP.

[70] For these purposes, it is appropriate to include the proximate Puget Sound port of Tacoma, a separate port, within the POS load center complex.

against the potential for additional cargo at the second port in order to maintain or ensure a profit balance in the ratio that optimum vessel utilization bears to high fixed vessel costs. The major carriers in the trade consider a weekly northwest sailing essential. OOCL, which had biweekly sailings, recognized that its frequency was inadequate.

47. It is evident that the various carrier decisions not to add a POP call were based on those criteria. For APL and Sea-Land, among others, the cost of making the additional call (see Nos. 42 and 43, *supra*) compared unfavorably to the revenues to be gained from carrying additional cargo inbound and outbound. Equally, and, perhaps more important, were the scheduling problems occasioned by the additional distance and time spent both in traveling that distance and in protracted stays at POP's docks.[71] Given the carriers' need for optimum voyages and the shippers' need for regular, rapid service, neither APL's nor Sea-Land's management could justify the additional call for the limited number of containers available at POP,[72] see *infra*.

i: Availability of Container Cargo at POP and Its Effect on POP's Ability to Meet Shippers' and Carriers' Needs

48. In examining port usage, it is essential to consider the relationship between outbound and inbound movements. At POP, for all trades, outbound container cargo movements outweigh inbound movements by about 2.76 to 1. The ratio for the pertinent transpacific movements is about 4 to 1.[73] APL's experience of equalized cargo was that it "weighed out" heavier than other cargo at POS because it amounted to 6 percent of weight capacity but provided only 4½ percent of gross revenues. One of those weight commodities is lumber, which tends to move via bulk carrier. It is opportunity cargo for containership carriage. Consequently, this cargo is economically attractive only when there is excess or otherwise unused vessel capacity, because, as opportunity cargo, it is low rated due to competition.

49. On this record, it is hardly likely that any of the equalizing PWC carriers could have earned a profit by adding a POP call during 1977 or 1978 instead of equalizing. Mr. Mowat understood this to be true from his own experience. Mr. Mowat maintained that POP was not trying to attract those equalizing carriers to call at POP. (In *Intermodal Service to Portland, Oregon, supra,* 17 F.M.C. at 129, the Commission made it

[71] APL's experience in 1974 and 1975, when it called at POP, shows that the average time at the dock was 13½ hours. The minimum was 6 hours, and the maximum was 39¾ hours.

[72] Another PWC carrier, Knutsen Line, could no longer justify serving POP and transferred its Columbia River service to Longview about 45 miles closer to the coast. An independent carrier, OOCL, dropped POP in favor of a call at Oakland.

[73] This finding is based upon Mr. Mowat's informed guess. Contrary to what PWC/POS propose, Captain Paul Mead, a former OOCL employee, did not testify that it was 4 to 1. He testified that the proportion of inbound POP to inbound POS container traffic was "one-quarter." He did add, however, that the amount of inbound to POP was not sufficient to justify OOCL vessel calls at POP.

clear that it is not empowered to require a carrier to call or to continue to call at a particular port.) He recognized that POP calls by the PWC equalizing carriers would not create a greater flow of cargo at POP (except for equalized cargo, which he believes would otherwise sail from POP). Thus, the introduction of additional direct call carrier competition at POP could give impetus to a struggle for existing container cargo. In the opinion of the major containership operators at POP, the Japanese Six, Sea-Land or APL would not compete at POP because, even if they made some market penetration, they could not get sufficient shipper support to draw cargo away from the Japanese Six and thus couldn't justify a call. There is, then, sufficient record support to find that, at least through March 1980, when the above testimony was given by Mr. Mowat, there was no likelihood of additional container traffic moving through POP were APL, Sea-Land or PCL to have called there.[74]

In 1978 PWC carriers equalized an average of 17.5 containers per vessel call at POS. APL had the highest average, 36.8, and PCL the lowest, 5.3. At POP, PWC carriers averaged 31.3 per call, independents averaged 57.4. The average for all carriers was 35.4. OOCL had the highest average, 83.7, and Scindia the lowest, 1.0. But, these figures are based on a container count, not a TEU count. Those averages are based upon the following totals of loaded containers of all sizes handled during 1978 by the leading carriers:

	Containers Loaded to PWC Destination
At POP:	
PWC	
Japanese Six	14,309
Independent	
FESCO	2,598
OOCL	1,924
Evergreen	374
Total of all carriers (including those shown)	19,976
Equalized and Absorbed*	
APL	1,915
Sea-Land	536
PCL	275
Total	2,726

*Does not include independents.

[74] Mr. Mowat, an experienced practitioner before this Commission and an extremely cautious witness (he protested giving yes or no answers to questions calling for either response because of "connotations" he perceived), also recognized that had they called at POP, neither of those equalizing PWC carriers could have attracted the containerized cargo, equalized by independent carriers, to any appreciable extent.

50. In 1978, FESCO, OOCL and Evergreen, the leading independents serving POP that year, averaged 70 westbound containers per call to PWC destinations,[75] but none of them continues to serve POP by direct call.

51. In 1978, APL paid out $505,182[76] to motor carriers by way of equalization and absorption, or an average of $269.00 per container. Inasmuch as it would have cost APL about $46,000 to make an additional POP call and that about 20 percent of that cost may be attributable to inbound containers, APL's allocation for outbound containers would be about $37,000. Thus, APL would have needed about 137 containers per call (weekly) to make POP calls less costly than equalization in 1978. Assuming APL would have been able to load all 2,665 containers equalized by PWC carriers in 1978,[77] it could have loaded only 51.25 containers per call.

It should be noted, again, that POP neither encourages nor insists upon equalizing PWC carriers calling at POP. POP simply wants them to forego equalization so that carriers calling at POP will handle that cargo. But, it has already been seen that the Japanese Six could not have carried any appreciable amount of additional containers from POP in 1978 and POP made no valid showing that other PWC carriers or independents serving POP, by direct call, could have carried additional outbound containers in 1978. It is left to speculation whether, but for APL's, Sea-Land's and PCL's equalization, another carrier would have tested POP's competitive waters. On the other hand, as will be seen, *infra,* there is a good deal of evidence that, but for equalization, shippers might not have been able to get their goods and wares to market.

52. OOCL, which, except for the Japanese Six, had the largest market share of POP cargo in 1977, and vessel costs per Portland call about one-third those of APL, withdrew from direct service at POP in 1978. Withdrawal was due to scheduling problems. OOCL had to choose between an Oakland call and a POP call. It chose Oakland because there was a lack of sufficient cargo at POP, and what was available was mainly low rated cargo.

53. Sea-Land had, from time to time, considered POP calls, and had in the past called at Portland in its Alaska and Puerto Rico service. Sea-Land still has an unused leased facility at POP. Nevertheless, Sea-Land cannot justify a business decision to serve POP. The amount of available cargo does not warrant the capital and other expenditures needed to reinstitute a service at this facility.

54. In 1979, APL had gross revenues of $1,329 per equalized container, carrying an average of 27 such containers per voyage. Therefore, it received $35,883 gross revenues per 1979 voyage from equalized containers. At

[75] Per No. 48, *supra,* inbound is estimated at 17 containers.

[76] This figure does not include apple shipments, which, in 1978, amounted to 37 containers.

[77] The 121 20-foot containers were treated as 60 forty footers. Thus calculated, there were 2,665 containers equalized in 1978 by PWC carriers.

the indicated cost of $46,000 per additional call at POP, APL would have lost $10,000 per voyage, had it made that call.[78]

55. A port's longshore labor productivity in handling containers is measured by the number of containers which can be loaded per crane, per hour. In terms of cost to a carrier, this productivity not only affects the unit cost per container, it affects the ability to adhere to fixed scheduling. The evidence shows that compared to other West Coast ports, Oakland and POS, POP was the least efficient labor productive port in 1978 and 1979.[79]

56. As late as October 25, 1979, POP recognized that berth conflicts and ship queuing were an immediate problem at POP's major container terminal—Terminal 6—and that additional construction would be needed to alleviate that problem. This recognition is contained in a study undertaken by POP. It is sufficient to note only this one conclusion from the study, based upon simulations made by the Port:—if one new line were added to those then serving POP "(the equivalent of a replacement for OOCL with 13-day service) [it] would result in queuing about 15 ships a year."[80] This congestion factor was exclusive of "the total congestion problem compounded by [labor] gang shortages."[81]

57. The imbalance (4 to 1 ratio) of outbound to inbound container cargo at POP creates equipment shortage problems at that Port, causing carriers to turn away cargo or undergo the additional expense of repositioning equipment to serve its shippers.[82]

j: POP's Ability to Meet Shipper Needs

58. The primary market for Hood River, Oregon, apples, one of the top ten commodities, is Hong Kong. Shipments are seasonal and are made in 40-foot refrigerated containers. There is virtually no scheduled direct liner refrigerated container service from POP to Hong Kong.

59. Hood River grown apples might not move at all to PWC destinations were it not for equalization. Without equalization, Hood River shippers could experience a decline in exports because of competition from foreign and domestic growers in other states. Prior to the growth of containerization, there was less than half the current demand for these apples at PWC destinations. Volume apple movements coincided with both the expansion

[78] For this finding, I do not find it necessary to take into account other expenses which APL would incur, such as greater fuel costs occasioned by the need to maintain APL's schedule of calling once a week at Northwest ports. This finding subsumes that APL's loadings would have remained nearly constant whether it called at POP or equalized.

[79] In 1978, OOCL averaged 8 TEUs per hour at POP, 12 TEUs at POS and 20 TEUs at Oakland. The 1979 figures were: 10 at POP, 13 at POS and 20 at Oakland.

[80] Ex. 45, p. 1.

[81] *Id.*, Table 2.

[82] Japanese Six Lines turned away about 50 containers per month during the winter months of 1978. Repositioning costs in 1980 (no earlier figures were furnished) cost the Japanese Six Lines between $150.00–$200.00 per container.

of refrigerated containerization and the emergence of POS as a load center, and were aided by equalization. In 1977 and 1978, respectively, apples constituted about 12.1 percent (5,257 tons) and 4.8 percent (2,745 tons) of equalized cargo.[83] With respect to apples, historical events, which dictated the traffic pattern through POS, overtook the desirability of a competing service from POP. Moreover, a shift to POP, solely because it is closer to the orchards, did not occur when POP improved its container facilities because the inadequate refrigerated container capacity at POP was a deterrent.

60 through 62. From an industry economist's standpoint, the preferred method to be used to determine adequacy of service of a port, which in turn is used to resolve the question of whether cargo is naturally tributary, is not an aggregate capacity analysis (broadly, slot capacity), but an analysis seeking to ascertain whether a commodity would have entered the export market if a shipper only had the options of shipping through a nearby port or paying the additional cost of inland transportation to a more distant port. Using the preferred analysis, if the commodity would not have moved under either of those options, but would have moved by equalizing the inland transportation costs to the more distant port, then the nearby port is an inefficient port and, consequently, not a naturally tributary port for that commodity. Under the preferred test, particular shipper experience in getting goods to a market may be used in reasoning to the general.[84]

63. PWC/POS proposed finding No. 63 is rejected, except as otherwise specifically found elsewhere herein.

64. Yuasa Trading Company was the shipper of 75 percent of the equalized frozen corn shipments made in 1978. Yuasa experienced difficulties in getting the needed refrigerated containers from the Japanese Six Lines at POP (at POS, as well, at times) and in getting vessel space at POP. In that year, at least 30 percent of the equalized frozen corn shipped by Yuasa came from the area of Salem, Oregon. Salem is located about 47 miles south of POP and is about 219 miles from POS. Because Yuasa must meet shipping date requirements established by the overseas customer, if it cannot ship from POP, it must ship from POS, pursuant to equalization, or not at all, "because growers in the Salem area will permanently lose the chance to sell their products if we are forced to pay transportation charges from here to Seattle."[85] In 1977 and 1978, respectively, there

[83] During those years only 16 tons of apples moved outbound from POP to a PWC destination (Thailand) in liner service. During the years 1974 through 1978, inclusive, only about 600 tons of apples left POP for PWC destinations. Assuming that one 40-foot container will hold 40,000 pounds, only 30 containers of apples were handled at POP in those five years.

[84] Copan, Ex. 102, Tr. 3238–3253. He explained why he was compelled to use the aggregate method in the testimony he prepared before the hearing began, but later was able to make the transition to the preferred method. Under the preferred method, not one of the top ten commodities is naturally tributary to POP.

[85] Tr. 2324. In fact, for reasons immaterial to this proceeding, Yuasa stopped selling Salem corn and began to sell Central Washington corn to its customers in 1979. It was shipped via POS without equalization.

were 26 TEUs and 134 TEUs of frozen corn equalized by APL (158 TEUs) and Sea-Land (2 TEUs).

65. Historically, lumber destined for Japan, the major importing nation of that commodity, has moved via POP and POS. By far, the larger volume has moved and still moves through POP. But the POP movements are primarily bulk shipments on non-liner vessels. For example, in the years 1974 through 1978, non-liner movements from POP accounted for 93.5 to 98.8 percent of the tonnage. In 1977 and 1978, respectively, there were 15,296 tons and 19,671 tons of liner shipments compared to 713,630 tons and 1,687,261 tons of non-liner shipments. At POS, in 1974, non-liner shipments accounted for 78.2 percent of lumber shipments. This dwindled to 10.1 percent in 1977 and rose from there to 21.8 percent in 1978. On the basis of available data, Mr. Copan correctly reasoned "In the export of lumber therefore, there are factors other than geographical proximity and inland freight costs that are causing most shippers seeking a liner service to Japan, to utilize Seattle rather than Portland."[86]

Virtually all of the equalized lumber originates in the Willamette Valley from POP south to Eugene, Oregon, about 110 miles from POP. Caffall Bros. Forest Products is a major lumber exporter, shipping both breakbulk and in containers. In 1977 and 1978, respectively, Caffall's shipments to Japan constituted 39 percent and 52.2 percent of all equalized lumber. Most of these shipments originated at Molalla and Estacada, Oregon, about 35 miles southeast and 25 miles east of POP, respectively. The lumber is trucked to a container freight station in the Portland area, not a POP facility, where it is containerized and sent overland by truck to POS.[87] Based on 1979 rates, the cost of inland transportation to POS was almost four times greater than the cost to POP.[88] Caffall also used State Line's roll on/roll off service at POP, but primarily it used APL at POS.

There were several reasons for Caffall to ship via APL out of POS. In 1977 and 1978 the APL rate was lower than the rate of any carrier serving POP. The rate was then so much lower that Caffall would have paid the entire cost of inland transportation rather than ship via POP. Although neither Caffall nor another Oregon lumber shipper, Avison Lumber Company, now use APL, they still ship out of POS via Lykes Bros. roll on/roll off, and pay the entire cost of inland transportation because the sum of the inland and ocean charges is less than the cost of shipping by liner from POP. Moreover, Caffall and Avison, from 1977 on, have had difficulty in obtaining vessel space and 40-foot containers at POP.

The export of lumber is a substantial portion of Caffall's and Avison's business. Together they ship about 15 to 20 percent of Pacific Northwest

[86] Ex. 95, p. 21.

[87] This was true of APL shipments. Sea-Land shipments were sent to POS to be containerized. More than 99 percent went via APL.

[88] The 1979 cost to POP was $88.00; to POS it was $340.00. These figures and the ratio mentioned in the text, above, correlate well with APL's equalization average of $254.00 per container in 1977 and of $269.00 per container in 1978.

lumber to Japan. Canadian shippers are extremely competitive. If the cost of inland transportation had increased because equalization had not been permitted, sales would have been lost to the Canadian shippers in 1977 and 1978.

There were 7,342 tons of equalized lumber in 1977, amounting to about 17 percent of the top ten in that year and 21,641 tons in 1978, or about 38 percent of the top ten equalized commodities in the latter year.

66. There were 11,462 tons of wastepaper absorbed in 1977 and 11,015 tons in 1978. Respectively, those tonnages amounted to 26 percent and 19 percent of equalized cargo in those years.

The experience of two wastepaper shippers were similar in that both had difficulty in obtaining space on carriers calling at POP.

Most of the equalized paper is collected in the POP SMSA area and is exported to Korea. Vessel space at POP is never certain because wastepaper is lower rated than many other commodities carried to Korea. For example, Evergreen Line canceled a shipper's confirmed wastepaper bookings at POP in favor of cotton, a higher rated cargo, which it loaded at Oakland. Wastepaper moves most efficiently in 40-foot containers, but these are generally in short supply or simply not available at POP. Shippers are unable to wait for containers or vessel space because wastepaper is a time and price sensitive commodity and it must move rapidly from collection point to the dock. Therefore, without equalization, it is likely that export sales could not be consummated and this means that wastepaper collected in the POP area would not be exported.

The problem of container shortage is particularly acute for one shipper which must coordinate multiple container shipments, on a single bill of lading, with wastepaper containers exported from Long Beach, California. There is no PWC carrier which provides the direct service to Korea from both POP and Long Beach,[89] although there are carriers that stop at both POS and Long Beach. One of the latter is PCL, which was frequently used by this shipper for that reason.

67. Historically, dried peas and beans (referred to in the trade as "pulses") have moved through both POP and POS. Although some pulses originate at Salem, Oregon, the most significant volume comes from the Palouse area of Washington. Pasco, which may be considered in this area, is just about equidistant from POP (211 miles) and POS (215 miles).

There is no intramodal (rail or motor carrier) freight rate difference to the two ports from Moscow, Idaho or Spokane, Washington, both of which are in the Palouse area.

[89] Evergreen, an independent, once provided that service, but it no longer serves POP. As seen, it was not a reliable carrier for that shipper. Moreover, the use of an independent, such as Evergreen, might have affected the shipper's right to ship via PWC carriers at low contract rates under applicable provisions of exclusive patronage contracts. Several shippers feared that their use of an equalizing PWC carrier might preclude them from using non-conference carriers at POP. In its opening brief, at p. 174, POP expressed a particular concern about the fairness of this practice with respect to equalized cargo. See discussion, *infra*.

For example, according to a September 1979 study submitted by Mr. Mowat,[90] it would cost $497.25 by truck from Spokane or Moscow to either port. By rail, depending upon the number of containers which could be loaded on a flat car, the charges would range from a low of $333.25 to a high of $428.50 per container. But the per container charge would be the same to either port in the same circumstances. By barge, however, the charge to POP[91] would be $206.24 from Moscow and $344.40 from Spokane. However, in 1977 and 1978, barging was not an effective mode of export transportation for pulses and was not widely used.

Why, then, were pulses equalized in 1977 and 1978, when the cost of intramodal rail or truck carriage to POS and POP was equal? In 1977 and 1978, respectively, there were 158 containers (3,284 tons) and 363 containers (7,660 tons) of pulses equalized.[92] North Pacific International, a shipper of 39 percent of pulses equalized in 1977 and 31 percent in 1978,[93] explained that, for quality control purposes, the shipments were routed from Palouse through the Portland area to POS. Pulses are not containerized at the point of origin. They are either bagged or placed in hopper cars or trucks at origin and sent to a container loading facility. The shipper found that an off-dock facility in the Portland area was more efficient than the one in Seattle. This off-dock facility was also closer to the shipper's offices, making it easier for officials to oversee the loading process, from time to time, to make certain that the commodity was not damaged.

However, service from POP was inadequate. A Taiwanese customer needed a direct service. The Japanese Six provided a transshipment service which was unsatisfactory. Evergreen did have a direct service, but space was often difficult to get from Evergreen. (This shipper was closed out when Evergreen was transporting cotton out of California ports.) This shipper would have lost its customer in Taiwan to foreign competitors had it not been for equalization in 1977 and 1978.

68. Metal scrap includes both ferrous and non-ferrous metals. In 1977 and 1978, respectively, 3,228 tons (171 containers) and 2,777 tons (154 containers) were equalized.[94] Most were carried by Sea-Land to Taiwan. A major shipper, Cascade, generated about one-fourth of all equalized containers in those years. The shipments originated in the Portland SMSA

[90] Ex. 14.

[91] There is no comparable service to POS. However, barging in the export trades is "commercially prohibitive." Tr. 2744. This is so because pulses cannot be booked out of POP due to lack of available service. Yet, if barged, the containers would be subject to POP's port charges even if they had to be sent on to another port for loading. POP absorbs port charges for barged containers only if the containers are loaded on outbound vessels at POP.

[92] The containers were 35 and 40 footers. All but two containers were carried by APL. Almost all went to Taiwan.

[93] Ex. 95, schedule 15.

[94] Cascade Steel Metal Scrap prefers to ship this high density cargo in the more economical 20-foot containers, but all the equalized containers in 1977 and 1978 were 35 and 40 footers.

and the McMinnville, Oregon area. McMinnville is about 35 miles south of POP and 210 miles from POS.

Historically, beginning in 1974, POS has been the major export port to PWC destinations for metal scrap. For destination Taiwan, the ratio was almost 6 to 1 in favor of POS. By 1978, the ratio dwindled to 3.6 to 1. These statistics correlate with Cascade's use, during the critical two years, of Evergreen from POP and Sea-Land from POS.

Metal scrap is a time sensitive spot market commodity. This means that Cascade customers, which in 1977 and 1978 controlled the transportation beyond Portland, needed to get the cargo to destination rapidly, without transshipment through Japan.[95] During peak periods (roughly for half the shipments), it is difficult, if not impossible, to obtain direct service to Kaohsiung, the preferred Taiwanese port, because vessel space is inadequate at POP. It is Cascade's business judgment that absent equalization, it could very easily be relegated to the domestic market, and it would have to forego the more profitable export market for metal scrap.

69. Onions accounted for about 2 percent of all equalized cargo in 1977 and 1978. These onions originate at Brooks, Oregon,[96] about 35 miles from POP and 210 miles from POS. Fast and specialized handling (ventilation)[97] are essential to prevent spoilage while the onions are in route in 40-foot containers. The shipping season extends, primarily, from October through February.

Most of these onions are loaded at POP. During the peak season it is not unusual for the Japanese Six Lines to carry between 500 to 1,000 tons per vessel (note—in all of 1977 and 1978, less than 2,100 tons were equalized), often displacing other cargo, such as wastepaper, metal scrap and lumber. Yet there was insufficient space on vessels calling at POP, even with this displacement, to transport all the onions during peak season. In the main, it was this overflow which was equalized. Without PWC equalization (one onion shipper had excess spoilage on two independents and could no longer use them), the overflow would not have entered the stream of foreign commerce to PWC destinations.

70. In 1977 and 1978, respectively, 2,243 tons (121 containers) and 121 tons (6 containers) of canned corn were equalized.[98] Most of the

[95] The Japanese Six transship to Taiwan via Japan. N.b., however, that in 1977, of 9,960 tons of metal scrap destined for Taiwan, only 1,730 tons were shipped direct. Nevertheless, lending credibility to the Cascade witness testimony is the fact that this was greatly altered in 1978 when 7,750 tons, out of 9,925 tons, went direct.

[96] Some onions came from Sherwood, Oregon, about 16 miles from POP. The Brooks and Sherwood onions are of a variety particularly favored in the Far East, primarily Japan and Hong Kong, where most are shipped. This variety does not compete with onions grown in Washington.

[97] Onions are shipped in containers from which the rear door is removed. They are carried above deck, if possible, although some shippers prefer below deck stowage, especially in the colder months.

[98] Mr. Copan performed the research which yielded the statistics (accepted as accurate by all parties) for tonnage and containers which were equalized by PWC. Appendix C, annexed hereto, is a restatement of Exhibits 16 revised and 37 revised, which he prepared. Table I = Ex. 16 revised; Table II = Ex. 37 revised. Mr. Copan believes, however, that the 1978 canned corn statistics may be understated due to possible

1977 movements went to Hong Kong. In 1978 most moved to Japan. Del Monte Corporation is the major shipper of canned corn. The corn is packed in Toppenish, Washington, a site about equidistant from POP and POS. There is no historical data concerning the movement of the commodity.

Del Monte ships canned corn from both POP and POS. Truck charges to POP were about $17.00 less than they were to POS in 1977 and 1978. Consequently, Del Monte prefers to ship from POP to most destinations. However, the APL service from POS to Hong Kong was more desirable because it was conducted as part of a relay system (direct transfer between two line haul type vessels) and not as part of a feeder system (used by the Japanese Six Lines from Japan to Hong Kong). Del Monte found the relay to be more efficient and safer than the feeder service.

The $17.00 difference is considered to be "a very significant factor" by Del Monte. Thus, despite its belief that the APL/POS service to Hong Kong was more desirable than the feeder service from POP, if absorption were not available Del Monte would ship from POP.

71. There is very little evidence of probative value concerning the transportation of meat and bone meal other than the facts that 4,924 tons (225 containers) and 3,786 tons (178 containers) were equalized in 1977 and 1978, respectively. From the fact that equalization took place, it must be assumed that this commodity, which is a by-product of packing plants, originated at locations nearer to POP than to POS. Most of this equalized cargo was carried by APL to Taiwan. The commodity was used there as a high protein feed additive. There is no evidence that any amount of this commodity was shipped from POP to PWC destinations.[99]

Similarly, there is scant evidence of cattlehide movements. In 1977 and 1978, respectively, 4,619 tons (474 TEUs) and 4,823 tons (419 TEUs) were equalized. This cargo originates at slaughterhouses, mostly in Texas and the Midwest, but some cattlehides originate at Yakima and Boise. The product is usually salt cured and containerized at the point of origin. Yakima hides move through POS and Boise hides move through POP, both without equalization. It is assumed that, because equalized hides were loaded at POS, they originated at locations nearer to POP. Hides, historically, have moved in quantity from both POP and POS. POS hides usually go to Korea, directly, or by a transshipment service from Japan. Most of the equalized hides (more than 80 percent) had a Korean destination. This product is used in the manufacture of footwear.

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misclassification of canned corn under the description "canned goods." This belief does not rule out other causes.

[99] Ex. 83 shows that in the two critical years, about 1,100 tons of a product described as Meat N.O.S. was exported from POP. Assuming that Meat N.O.S. may be included in the description meat and bone meal, there is no evidence to indicate the destination of the former.

72. PWC/POS proposed finding No. 72 is not rejected. It is essentially accurate, but because it represents a recapitulation of findings previously proposed and accepted, I need not include it here.

73. In determining the capacity of a liner service to carry cargo, theoretical capacity based on design concepts is not the proper standard in this proceeding. The criteria to be used is the service's actual ability (slot) to handle cargo, at a particular time (voyage), at a particular port, with the particular container equipment required to move the cargo to destination, at the time the shipper requires the cargo to be so moved.[100]

74. The Japanese carriers' allocated deadweight capacity limitation is an operational guideline. It may be exceeded only with the master's permission. The master's determination is based on the particular circumstances of the sailing, such as where the weight cargo is loaded, anticipated weather conditions, etc. The master also may exercise discretion to accept less weight than the guidelines depending on the same circumstances. In 1977, 21 of the Japanese Six Lines' 72 voyages from the Pacific Northwest sailed at 90 percent or more of the guideline limit (including 8 sailings above the guideline limit). In 1978, 55 of their 72 voyages sailed at 90 percent or more of the limit (including 34 sailings above the limit).[101]

75. PWC/POS proposed finding No. 75 is not rejected. It is generally accurate. Boiled down, it proposes a finding that POP did not meet its burden of persuasion which it needed to overcome the testimony of Mr. Hirano concerning the individual voyage capacity of the Japanese Six Lines. I made this finding earlier.

76. By 1980 the Japanese Six Lines made hatch corrections to some of their vessels and substituted one vessel for another, which had stability problems. These changes increased the services' actual carrying capacity. Yet, by the end of 1980, the Japanese Six Lines were sailing to PWC destinations with capacity loads.[102]

77. PWC/POS proposed conjectural finding No. 77 is rejected.

78. In 1977 a total of 339,056 tons of containerized cargo, in 17,098 containers, was loaded at POP on vessels engaged in whole, or in part, in service to PWC destinations. Most of this cargo was carried to PWC destination ports, although some of the vessels in question also served and carried cargo to non-PWC destinations in Australia, Singapore, Malaysia, India and Indonesia. The chart below summarizes the 1977 tonnage percentage and number of TEUs carried, by carrier:

[100] See, Tr. 4852–4855.

[101] Ex. 142.

[102] POP, itself, is the source of this data. Because the Japanese Six lifted about 71 percent of the container cargo going from POP to PWC destinations in 1978, and because the carriers which lifted most of the remainder had left the trade from POP, PWC/POS posit that from "this fact," the 1979/1980 actual vessel capacity at POP "to handle export needs on cargo equalized or absorbed via Seattle, at the time the shippers needed to ship the cargo, was below 1977–1978 levels." Contrary to PWC/POS belief, "this fact," alone, does not "make the proposed conclusion inevitable."

Carrier	Percent By Tons	TEUs
*OOCL (Ind.)	12.1	3,176
Japanese Six (PWC)	67.7	18,639
*FESCO (Ind.)	10.1	2,535
*States** (PWC)	4.8	202
*Knutsen** (PWC)	2.2	115
EAC** (PWC)	1.5	297
APL** (PWC)	1.1	12
Scindia** (Ind.)	.5	10

*Indicates carrier which withdrew from direct POP service at time hearing ended. EAC added about 10 POP vessel calls per annum but its vessel calls now include Australia.

**Indicates primarily a breakbulk, bulk or neo-bulk service.

79. In 1978 a total of 371,759 tons of containerized cargo, in 19,976 containers, was loaded at POP on vessels engaged in whole, or in part, in service to PWC destinations. The chart below summarizes the 1978 tonnage percentage and number of TEUs carried, by carrier:

Carrier	Percent By Tons	TEUs
*FESCO (Ind.)	13.5	4,109
Japanese Six (PWC)	71.4	22,210
*OOCL (Ind.)	9.1	2,822
*Evergreen (Ind.)	2.2	685
*Knutsen** (PWC)	1.8	533
EAC** (PWC)	.9	288
*States** (PWC/Ind.)	.7	160
APL** (PWC)	.2	29
SCI** (Ind.)	.2	31
Scindia** (Ind.)	.0	4

*Indicates carrier which withdrew from direct POP service at time hearing ended. EAC added about 10 POP vessel calls per annum but its vessel calls now include Australia.

**Indicates primarily a breakbulk, bulk or neo-bulk service.

80 and 81. The only carrier adding a POP call to PWC destinations after 1978 was Lykes. Lykes was using breakbulk vessels which had a small capacity for containers. It is not possible to determine what portion of the cargo, previously lifted by carriers who stopped calling at POP, devolved upon the Japanese Six Lines. As of the close of hearings, the only carriers serving POP, directly, in the PWC trade with full container service were the Japanese Six Lines, even though overall export movements from POP were increasing.

82. In 1977 and 1978, APL carried the largest quantity of PWC equalized or absorbed cargo. In 1979, APL's volume of equalized cargo decreased below 1978 levels.

II. POS [103]

83. POS is a municipal corporation, organized and existing under the laws of the State of Washington. It is an all weather, deep harbor port which serves virtually all classes of ocean carriers. POS owns substantial marine terminal facilities and warehouses which it either operates or leases to ocean carriers.

84. POS is a member of the same rate agreement as POP. Rates for services at POS are established to generate sufficient revenue to cover operating costs, but those rates need to be competitive with other ports offering the same services. POS, POP and other ports on the West Coast have competed keenly over the years in terms of rates and service and continue to do so. There is some evidence to indicate that in 1977 and 1978, containership stevedoring and terminal service rates at POS were lower than those at POP. Ex. 109, pp. 4, 5.

85. POS is a container load center in competition with all other ports in the United States, but mostly with West Coast, particularly Northwest ports, in the Far East trade.[104] It maintains fully staffed marketing offices at many cities, foreign and domestic, and it solicits cargo wherever it can, including the Willamette Valley and Hood River areas. There is no evidence in the record to support a finding that POS' solicitation of cargo in Oregon includes an explanation of the equalization and absorption practices of PWC—". . . It is not a selling tool that we can use to get cargo out of the Portland area" (McQuigg, Tr. 4119).

86. POS enjoys a geographical advantage in the Far East container trade because it is the closest port, in terms of distance and sailing time, to Japanese, Taiwanese, Korean, and other ports served by the PWC.

87. POS invested early in containerization and is heavily dependent on container cargo moving in the Far East trade. Exports to nations served by the PWC represented 75 percent of the export containerized cargo handled by POS in 1977 and 1978. Cargo carried to PWC destinations by the PWC carriers represented a substantial portion of all the export cargo which moved through POS in those years. POS has served as an historical port of export for many of the "top ten" commodities.

POS' 1978 volume of more than half a million tons of PWC "top ten" commodities (including equalized and non-equalized cargo) represented

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[103] PWC/POS proposed findings 83–94 relate to POS. My findings do not include the vast array of detail proposed by PWC/POS, not because of inaccuracy, but because so much is irrelevant to the issue of PWC's absorption practices. Only by broadening the scope of this proceeding would any of that irrelevant detail become germane.

[104] POS also competes intermodally with East Coast and Gulf Coast ports for cargo destined to the Far East.

about 19 percent of all the containerized cargo handled by POS.[105] Containerized cargo represented about 31 percent of POS' foreign dry cargo tonnage for that year. By contrast containerized cargo amounted to less than 7 percent of POP's similar tonnage for that year.

POS is the third largest American container port. On the West Coast it is second to Los Angeles, but it is the dominant container load center in the Northwest, where, in 1978, it handled about 650,000 containers compared to POP's 80,000.

88. POS is perceived as a container load center in the trade. POP is not so regarded. POS' position as a load center arose out of its capital investment program in the 1960's, which was designed specifically to attract container vessel traffic.[106] As found earlier, calling at a single regional load center is a far more efficient operation for containerships. The load center also makes for an efficient interchange of cargo between inland carriers and ocean carriers.[107]

89. See Appendix D for a description of the extensive facilities at POS and Seattle harbor.

90. The Seattle area is served by two major railroads and 37 motor carriers. It is also served by the various ancillary services and businesses associated with a major port. There are foreign and domestic freight forwarders, customhouse brokers, stevedoring contractors, marine employees, adjusters and insurance brokers, ship chandlers and suppliers, bankers, foreign consulates, public warehouses, cold storage plants, etc. The availability of these services influences the decision of shippers as to cargo routing. In this respect, POS is not appreciably different than POP, which also has ancillary services available.

91. As found earlier, all liner services calling at POP in 1977 and 1978 also called at POS (or nearby Tacoma). PWC carriers calling only at the latter were Sea-Land, APL, Knutsen, Korea Marine Transport, Galleon, PCL and Hanjin. Independents calling only at the latter were OOCL, FESCO, Hapag-Lloyd, Neptune-Orient, Evergreen, Ro-Lo Pacific, Korea Shipping and Yang Ming.

92. From POS, APL's container vessels have the shortest advertised transit time from the Pacific Coast to Japan and Taiwan of any similar

[105] In 1977 POS handled 2,143,000 tons of containerized cargo. In 1978 it handled 2,477,000 tons, an increase of 16 percent over the previous year. POP showed a 12 percent increase for the same period.

[106] POS seeks a finding that "A loss of volume of cargo would affect the ability of the port to amortize its facilities." Assuming, but not finding, this to be true, how could this fact affect any of the enumerated issues in this proceeding? To deal with the effect on POS of a finding or conclusion concerning the lawfulness of PWG equalization and absorption tariff provisions would be to expand the investigation far beyond the terms of the Order and Further Order.

[107] Because of the high cost of serving a second port in a region, both in terms of the expense of an additional sailing and the effect upon maintaining an optimum voyage schedule, two carriers, APL and Sea-Land, testified that regardless of the outcome of this proceeding, they would not add a POP call. A former OOCL employee who testified indicated that this would be OOCL's decision also. I can find, only, that they so testified, but I also find that, on this record, their managements could not justify an additional call at POP.

service (though Lykes' irregularly scheduled Ro-Ro service from POS is a day faster to Japan). APL's days in transit from POS and the two shortest times (days) advertised by its competitors, as well as the shortest time from POS, as of 1980, were:

To	APL	Advertised in Pac. Shipper	
Japan	10	Neptune	10 (POS)
		Hapag-Lloyd	12 (POS)
		Japanese Six	13 (POP)
Taiwan	13	Neptune	16 (POS)
		Hapag-Lloyd	17 (POS)
		Japanese Six	21 (POP)
Korea	19	Neptune	13 (POS)
		Japanese Six	17 (POP)
		Hapag-Lloyd	17 (POS)
Hong Kong	25	Neptune	18 (POS)
		Sea-Land	19 (POS)
		Hapag-Lloyd	19 (POS)
		Phoenix	19 (POS)
		Japanese Six	21 (POP)
Philippines	29	Sea-Land	24 (POS)
		Hapag-Lloyd	26 (POS)
		Japanese Six	23 (POP)

In 1980, service by the above carriers was faster from POS than from POP to all PWC destinations except the Philippines. A fast transit time and sailing frequency is important to shippers of refrigerated or perishable cargo, as well as to shippers of high-value cargo where the daily interest charge has significance, and for shippers of "spot market" cargo such as wastepaper and metal scrap. The fastest transit times (measured by sailing days) to PWC destinations from POP and POS in 1978 were as follows:

	POS	POP
Japan	9	11
Korea	11	15
Taiwan	12	18
Hong Kong	15	19
Philippines	21	21

93. In 1980, the fifteen conference and independent carriers serving PWC destinations from POS offered 440 more sailings to PWC destinations than were available at POP.

94. During 1978, among the independent carriers, FESCO provided two regular services from POP and POS to the Far East. These services called directly at ports in Japan and Hong Kong. Hapag-Lloyd, which offers a substituted service from POP, provided a regular independent container service between POS and the Far East. Hapag-Lloyd calls directly at Tokyo,

Kobe, Taiwan and Hong Kong and provides feeder services to Korea, the Philippines and Thailand.

III: APL and Sea-Land [108]

The emergence of POS as a container load center, before POP made its commitment to container terminals, had far-reaching effects upon the operations of ocean carriers. APL and Sea-Land, in particular, had to make arrangements and undertakings which tied them to POS as a single regional port of call, lest they fall by the competitive wayside. In so doing, they opened up previously unpenetrated export markets which could be exploited by shippers only if those and similarly situated carriers could employ inland substituted service through equalization and absorption.

95. APL operates four individual transpacific services, with 17 line-haul containerships and five combination breakbulk/container shippers. All the ships receive operating-differential subsidy under the Merchant Marine Act, 1936, 46 U.S.C. 1101 *et seq.* The five breakbulk ships are in an irregular service, with flexible itineraries, between the U.S. Pacific Coast, the Far East, Southeast Asia and India/Pakistan. They occasionally call at POP.

APL's service from POS to the Far East is weekly, calling POS/Japan/Taiwan/Japan/POS. Each port city is served on the same day of every week. APL's weekly service from POS to the Far East uses an integrated relay system with APL vessels in the Far East. This requires an exact 28-day turnaround [109] and coordination in the Far East with APL's California service vessels with which the Northwest service vessels exchange cargo. Hong Kong, Korea and Taiwan containers are relayed at Kobe, but APL sometimes uses a feeder service to Korea. APL now conducts its Northwest service [110] with the "Pacesetter" class of vessels, the *SS President's Jefferson, Madison, Pierce* and *Johnson.* They were built in 1973–74 and have a design speed of 23 knots and design capacity of 1,482 TEUs (excluding nonrevenue slots used for the convenience of the vessel), of which 174 slots are usable only for 20-foot boxes. Reefer capacity is 150 TEUs.

96. In 1978 Sea-Land provided an almost weekly service from POS. The full containerships utilized by Sea-Land have a capacity of about 2,000 TEUs and a refrigerated capacity of 315 TEUs each. Sea-Land is a U.S. flag ocean common carrier, with worldwide operations serving 130 ports throughout the world with 51 container vessels. Sixty to seventy of the ports are served by direct vessel call; the remainder are served

[108] PCL, another PWC carrier, offered fortnightly sailings from POS to Busan (Korea), Hong Kong, Keelung and Kaohsiung (Taiwan). The record does not require a detailed examination of PCL.

[109] During the fish and crab seasons, aggregating about two-thirds of the year, APL calls in the Aleutians for westbound cargo. The Aleutian ports are so close to the great circle route that very little time is wasted on the voyage to Yokohama.

[110] The Northwest service is the only APL container service which has the necessary subsidy contract authority to serve POP.

by land transportation or local ferry. Five linehaul vessels provide a weekly service between the California ports of Long Beach and Oakland and the Far East; and five other linehaul vessels provide a separate weekly service between POS and Oakland and the Far East. In 1980 Sea-Land's mini-bridge service was conducted half from Oakland and half from POS. In 1979 Sea-Land handled 18,086 containers from POS. They were laden with cargo from the Seattle, Portland and Vancouver, British Columbia area; a small proportion was land-bridge cargo from the northeast United States. Sea-Land anticipates that in 1981 the 18,000 figure will increase to 29,000 containers with the bulk being land-bridge and increased penetration of the Canadian market. Sea-Land's land-bridge service from the East Coast is based on railroad service which goes directly to POS and does not pass through Portland. Sea-Land's weekly services are necessary in terms of making connections with other Sea-Land vessels in the Far East and connecting with the United States railroads used for connecting its mini-landbridge and micro-landbridge services to ports and points all over the continental United States.

97. APL's Linertrain has for the past five years been very heavily engaged in the intermodal movement of Far East cargo to and from the Atlantic Coast ports and for the last three years in such movement to and from the interior points of the United States. In October 1979 APL inaugurated its weekly Linertrain service which operates with precision. APL by agreement with Burlington Northern railroad has two flatcar trains of 50 cars each which are in constant movement over the circuit Seattle/New York/Oakland/Seattle. In effect, if not in fact, APL has a guaranteed schedule under this arrangement.

The Linertrain [111] arrives in Seattle every Friday, the same day as APL's inbound vessel. It leaves on Saturday with the eastbound cargo for New York and the vessel sails on Sunday with the westbound cargo for the Far East. Thus, a regular vessel arrival at Seattle is essential lest APL's precision service between the Far East and New York be impaired. (Ex. 136, p. 9.) In addition, this arrangement enables APL to locate any container consigned to it, whether in transit or at rest, in one minute or less.

98. APL acknowledges that, although POP may be a difficult port for a large containership to serve, there is no physical barrier to service. It couches its inability to serve POP in more realistic and valid managerial concerns. "The incapacity of APL arises from the impact upon its regular, weekly service of the length and unpredictability of the time required for a Portland call." [112]

The overriding objective of APL's and Sea-Land's managements is to have their respective containership services operate with a fixed day of the week regularity like most of their competitors. Regularity of service,

[111] APL also moves a "block train" from POS each weekend to deliver APL containers to sites other than New York. Unlike the Linertrain's schedule, this schedule is not guaranteed by the railroad.

[112] APL's proposed finding No. 43.

and in the case of the PWC trade-weekly service, is of paramount importance to many shippers and to carriers. Shippers can manage production schedules, warehouse space, letters of credit financing, and drayage, and consignees who know that cargo will be unloaded on a day certain can similarly manage their own reciprocal affairs on fixed schedules when service is regular. Weekly service is necessary for carriers to compete with other lines.

99.[113] As found, earlier, containership operations are expensive. In addition to the cost of the vessel,[114] APL maintains an 800 unit inventory of "on board" containers per ship. They are valued at $6,855,000 per ship—$27,422,000 for the four Pacesetter vessels. For the service, there is an additional pool of containers valued at about $12,000,000. APL has invested another $22,000,000 in support equipment. Pier rental at POS, based on use, averages about $2,000,000 per year.

100. Sea-Land also has a high capital investment in the transpacific trade.[115] For similar reasons to those applicable to APL, Sea-Land must also operate on a weekly schedule. It estimates that its break-even point may be achieved on a round-trip voyage space utilization rate of 75 percent to 80 percent. To do this, Sea-Land must limit the number of Northwest calls to POS.

101 through 103. PWC/POS proposed findings 101, 102 and 103 are not adopted because of redundancy, a lack of materiality or relevancy.

104. PWC/POS proposed finding 104 is rejected.

C: NATURALLY TRIBUTARY TERRITORY

I. DEFINITIONS OR DESCRIPTION

a: POP's Description

105. As noted earlier, from the beginning of this proceeding, the Commission viewed POP's perception of its naturally tributary territory to be a factual issue.[116] To find out what POP considered its proprietary territory to be, the Commission asked this question of POP in the section 21 Order:

> 5. Describe in detail the area you believe is "naturally tributary" to the Port of Portland. Explain. If you believe that the area "naturally tributary" to the Port of Portland changes depending upon a comparison to other ports, e.g., Seattle, Oakland, explain in detail; [117]

[113] PWC/POS proposed finding No. 99 is not rejected, but parts are duplicative of other findings herein.

[114] An APL vessel, then in construction, was expected to cost about $113 million ($57 million after subsidy).

[115] It was expected to reach $672,000,000 by 1982.

[116] See THE NATURE AND BACKGROUND OF THE PROCEEDING, n. 13 and related text, *supra*.

[117] Ex. 79, par. 5.

> POP gave this answer:
>
> The simplest and most direct test to determine whether a particular cargo movement is naturally tributary to Portland is to ask this question: Was Portland the basis for the equalization on the movement to a more distant port? If the answer is "yes," the cargo is obviously tributary to Portland.
>
> Inland freight rates by the various modes of inland transportation, rail, truck and barge, are not constant, and in fact change periodically. To establish and maintain a map or maps showing the geographical boundaries of the interior area naturally tributary to Portland as compared to other Pacific Northwest and California ports for each commodity shipped would be a Herculean task. The subject of the existence of Portland's naturally tributary area was discussed by the Commission on pages 30 through 32 in the mimeo order on F.M.C. Docket No. 70–19, "Intermodal Service to Portland, Oregon," served on October 29, 1973.[118]

Later on, during direct examination, Mr. Mowat amplified POP's description of its perceived proprietary territory as follows: [119]

> Q. [Mr. Boileau.] Can you describe Portland's Natural Tributary Territory?
>
> A. [Mr. Mowat.] Yes.
>
> Q. Would you describe Portland's Natural Tributary Territory?
>
> A. It is at the territory or area where the inland freight rates from origin to Portland are less than the inland freight rates from origin to the Port to where the equalization or absorption is being made.
>
> Q. Are you saying that inland freight rate is the only consideration?
>
> A. No. It would be incumbent upon in this case Portland to have adequate steamship service for the needs of the shippers and adequate marine terminal facilities and services for the ocean carriers and the shippers.
>
> Q. With reference to your definition of the Portland Natural Tributary Territory, would you be able to define that on a map?
>
> A. That would be most difficult in that it is a constantly changing thing insofar as inland freight rates change.
>
> Q. Have you attempted to define Portland's Tributary Territories on a map?
>
> A. I attempted to but gave up the effort in that insofar as I realized that a map would be required for each commodity that has, is or could be equalized or absorbed and it would be a separate map for the Puget Sound area and Portland versus the San Francisco Bay area and Portland and for each mode of transportation, rail, truck and truck-barge.

[118] *Id.*

[119] Tr. 395–397.

Q. Just concerning the 10 top commodities principally considered here, could you estimate how many possible tributary territories Portland has?
A. I would say 60.

* * * * *

THE WITNESS: Yes, ten times three times two. It would be ten times three modes.

* * * * *

JUDGE: . . . Now, ten stands for what?
THE WITNESS: The 10 would be for the 10 top commodities.
JUDGE: And the three stands for?
THE WITNESS: The three major modes of transportation, rail, truck and truck-barge.
JUDGE: And the two stands for Seattle and Oakland and San Francisco?
THE WITNESS: Seattle-Tacoma, Puget Sound.

106. Although Mr. Mowat, on direct examination,[120] amplified the description of naturally tributary territory, areas of ambiguity remained. In order to meet the charges levied against them, the respondents sought more particulars from Mr. Mowat during extensive cross-examination.[121]

Before going forward with the information elicited, I believe that, in addition to those comments which appear in the marginal notes accompanying this finding and n. 74, *supra,* some other observations concerning Mr. Mowat are appropriate. It should be made clear at the outset that none of these comments is intended to reflect adversely on Mr. Mowat's competence or credibility. Mr. Mowat is an intelligent and skillful witness.

It is fair to find that the position taken by POP with respect to the critical issue in this proceeding is derived from Mr. Mowat's thoughts

[120] When appearances were made at the hearing, I ruled that Mr. Mowat, who was scheduled to testify as a witness, could not occupy the roles of witness and practitioner. He was authorized, except when on the witness stand, to remain at counsel table and to assist POP's counsel, but he was restricted from asking questions of witnesses and from participating in colloquies and motions, except as a witness under oath. (Tr. 7–8.)

[121] At its request at the prehearing conference, POP was given the option of serving prepared testimony of witnesses in advance of the hearing or proceeding by question and answer at the hearing. For its economic witnesses, POP opted for prepared testimony, but it elected to have Mr. Mowat testify by way of Q. and A. Early on, at the hearing, this presented a problem. Mr. Mowat took the stand with a handful of papers, referring to some of them as he answered some initial questions posed by POP's counsel. At first, when the matter of these papers was brought to my attention, I assumed that the papers simply contained material to refresh Mr. Mowat's recollection. I was wrong. Mr. Mowat was holding 27 pages (in fact, 28 pages, including insert, p. 20A) of typewritten questions, organized according to subject matter. In the space provided after each question, there were handwritten answers to all, save the ones on p. 20A. Those papers became Ex. 2. See Tr. 96–107. I refrained, at the time, from calling Ex. 2 "prepared testimony." Tr. 101. Nevertheless, it did smack of just that. I mention this sequence of events not as a belated rebuke, but to explain why PWC was placed at a disadvantage in organizing its defense and why the record contains what otherwise might be considered repetitious references to POP's definition of naturally tributary territory and other matters.

on the subject. It is evident that he has a preoccupied conception of what constitutes naturally tributary territory. Consequently, despite acknowledging some of CONASA's criteria (see Finding No. 105). Mr. Mowat obstinately returns to another, more simplistic test to describe what he and POP consider to be proprietary territory,[122] i.e., if the cargo which sailed from another port was equalized or absorbed over POP, as the base port, then there was an unlawful diversion from POP's naturally tributary territory.

On cross-examination Mr. Mowat again emphasized that the primary test to determine naturally tributary territory invoked by him (and, therefore, the test which he believed the Commission should apply) is whether the inland freight was equalized or absorbed. Under this test Mr. Mowat claimed for POP all cargo originating at any point in Idaho, Washington, or Oregon[123] for which there was a lower inland freight rate to POP than to POS.[124] Mr. Mowat also reiterated, on cross-examination, that adequacy of facilities and service was a factor to be considered, but when pressed, he returned to his primary test as the sole test, because he deemed adequacy of service to be conclusively established by a showing that a quantity of a particular commodity had been loaded aboard a vessel sailing from POP. Examples abound in the record. These are a few:

> Q. [Mr. Fisher]. Can you give me an instance, Mr. Mowat, of a situation in which the inland freight rate differential favored Portland where the origin point and commodity would be outside Portland's naturally tributary territory as you define it? You can refer to any exhibit, all those cargo statistics you have there. Just give me one.
>
> * * * * *
>
> [Objection Overruled.]
>
> A. No, we haven't developed that type of evidence.
>
> JUDGE: Well, isn't your evidence in this case of the top ten commodities that you claim are naturally tributary to Portland, simply the fact that movement of this particular cargo took place through Portland and the fact that there was a diversion that was paid for by way of equalization or absorption? Isn't [that really] the only evidence you have concerning why the cargo moving from the various points shown on Exhibit 13 are naturally to the Port of Portland?

[122] I do not mean to imply that these views, or the views of any party, concerning naturally tributary territory, may substitute for the Commission's judgment. My purpose is to place my findings in perspective in the light of POP's theory of the case, and the evidence, as presented.

[123] Some cargo may have originated in other states, but sites in these three are the only ones that are pertinent on this record.

[124] There is some evidence of equalized cargo sailing from Oakland, but the amount is too slight to be considered on this record.

THE WITNESS: Yes.[125]

After admitting that he had no knowledge of apple shippers' transportation requirements in the PWC trade or whether the Japanese Six Lines serving POP held out a service to carry apples to Hong Kong or why apples that are shipped to PWC destinations do not sail from POP, this occurred: [126]

> JUDGE: You have answered a prior question of Mr. Fisher's to the effect that you do not know whether it is the equalization and absorption rules or some other reason why the apples do not go through—the apples that go to PWC destinations do not originate at the Port of Portland. Are you suggesting that insofar as apples alone are concerned that it may not be the equalization and absorption that causes the movement of apples through the Port of Seattle?
> THE WITNESS: No, I am not suggesting that.
> JUDGE: You are suggesting that you don't know why it is?
> THE WITNESS: That is correct. I do not know.
> JUDGE: If you do not know, does that mean you do not know whether or not these apples are naturally tributary to the Port of Portland under your own view of what naturally tributary means?
> THE WITNESS: Yes, they are naturally tributary to Portland.
> JUDGE: Under what definition?
> THE WITNESS: That the freight costs to Portland are less than the freight costs to Puget Sound or to Oakland.

When Mr. Mowat testified, he offered no evidence of probative value concerning the adequacy of carrier service at POP. Indeed, POP would offer none on its direct case. At the time he testified, Mr. Mowat had no knowledge of shipper needs (a reciprocal of adequacy of service). The importance which POP attached to adequacy of service may be seen from the following: [127]

> Q. [Mr. Fisher.] . . . Can you give us, from any source, your own knowledge, an instance, actual location, actual commodity, in which freight rate differential as between Portland and Seattle favored Portland, inland freight rate differential, favored Portland, as to which that commodity and origin point fell outside Portland's naturally tributary territory?
>
> A. No, I know of no instance.
>
> Q. Could there even be such an instance?
>
> A. Possibly.
>
> Q. But you can't think of one?
>
> A. No, I cannot.

[125] Tr. 1750–1751.
[126] Tr. 1105–1106.
[127] Tr. 1759–1763.

Q. As to any commodity?

A. Correct.

Q. And that's because, as to most commodities, you can show, as a result of the Port of Portland's considerable success. some movement through the port, can't you?

A. That and that there is unused capacity among your member vessels to the Orient.

* * * * *

Q. So we're down to adequacy of service and facilities at Portland, inland freight rates favoring Portland as compared to the other port, Seattle, and some cargo moving via Portland from the origin point, isn't that it?

A. And then, of course, we must have covered the shipper's needs or he wouldn't have shipped through Portland.

Q. Yes, but I'm saying that the shipper's needs, under your theory, are wrapped into the fact that some cargo of that particular commodity classification is moving from the origin point through Portland?

A. Yes, in part.

* * * * *

JUDGE: Aren't you saying then that if you can establish that Portland handled a shipment for a particular shipper out of Portland wherever it went, that establishes the shipper's need is fulfilled by the Port of Portland for all time?

THE WITNESS: No, Your Honor. I think I mentioned there should be a preponderance of movement to, a large movement, not just one shipment. I don't think one shipment will do the job.

* * * * *

JUDGE: But if we had shown that 100 containers of apples from that particular shipper went to Hong Kong through the Port of Portland, would that establish that every shipment of that shipper, if there were 1,000 of them, would have to go through the Port of Portland to Hong Kong?

THE WITNESS: No.

JUDGE: Why?

THE WITNESS: There may be reasons why they would want to use a different port, that that other port might fulfill their needs better—

JUDGE (interrupting): Suppose there's no other evidence in the case?

THE WITNESS: Oh, then it's Portland because there's every opportunity to bring that evidence into the case.[128]

107 through 111. PWC/POS proposed findings Nos. 107 through 111, inclusive, are not rejected. They are, however, largely redundant and need not be included herein.

b: *CONASA* Guidelines

The *CONASA* guidelines are set forth in the Further Order and appear, in detail, *infra.*[129]

112. POP did not apply the historical flow test in any way in attempting to prove that the commodities are naturally tributary to POP. It offered no evidence concerning movements of any of the top ten commodities prior to the first usage of equalization and absorption by PWC members.[130] Neither did Hearing Counsel, although it did introduce some historical evidence of cargo movements before 1977. It is clear, from the testimony of Mr. Mowat, that POP is well aware of this criterion as one of *CONASA's* standards.[131]

c: Transportation Efficiency: The Economist's Approach

113 and 114. Economists agree, generally, that pursuant to sound principles of economics, a definition of naturally tributary territory must be derived from an analysis of economic efficiency among many alternatives, including substituted service. Under this theory, the relative cost of inland transport is only one of the elements to be considered. Thus, to measure transportation efficiency and costs in the system, the cost applicable to each land and water portion from origin to destination should be examined and compared. Mr. Copan paraphrased the process this way: [132]

> Theoretically, in analyzing various courses of action an economist is essentially concerned that the optimal solution be one that results in the most efficient allocation of scarce resources. The general well-being of the public is maximized if resources are allocated most efficiently.

Each of the economists—Mr. Copan for Hearing Counsel, Dr. Nadel for PWC/POS, and Mr. Krekorian for POP—agreed that substituted service was a market enhancing but not market distorting practice. Market distorting practices create inefficiencies, whereas market enhancing practices promote efficiency.

[128] N.b. POP failed to meet its burden of persuasion irrespective of whether *vel non* it had the burden of proof to show adequacy of service. POP simply offered little or no worthwhile evidence beyond the fact that the top ten commodities were carried in substituted service.

[129] Further Order, *supra*, 21 F.M.C. at 940; see, Discussion and Conclusion B.

[130] The PWC rules predate Mr. Mowat's experience at POP.

[131] Tr. 1756–1757.

[132] Ex. 95, p. 5.

115 through 123. Applying that economic approach to the evidence of record, including the testimony of export shippers concerning the transportation requirements, routings and adequacy of service, Mr. Copan offered his opinion that the least costly and most efficient of the available transportation systems for ocean carriage of the top ten commodities was the movement of those cargoes pursuant to substituted service through POS. He concluded that under this approach and the preferred methodology, none of the top ten commodities was naturally tributary to POP because each moves with greater transportation efficiency through POS via substituted service.[133] He based this upon the evidence of record which showed that a wide variety of market factors (testified to by shipper witnesses) outweighed both geographical proximity of POP to the port of origin and lower rated freight rates to POP in the selection of carriers and the port of export.[134]

Among the reasons given by the shippers for using substituted service out of POS were these: [135] (a) they could not obtain space or equipment from carriers calling at POP; (b) they were required to ship from POS in order to avoid transshipment by water in the Far East; (c) on open rated cargo, the rates and capacity were more favorable at POS; (d) there was greater frequency of service at POS; (e) sales would have been lost with the substituted service at POS; (f) Oregon and Southern Washington and Idaho products could not have been sold in the export market.

124. A study of transport effiency must also include cost factors relevant to carriers. Substituted service saves the cost of additional fuel expenditures and those other costs associated with scheduling charges arising from an additional call. But because section 205 of the Merchant Marine Act of 1936 has been interpreted to require equality of rates for adjoining West Coast ports, these additional costs may not be reflected in the carrier's charges under PWC's tariffs.

II. Shippers and Their Requirements

125 through 135. The twenty-four pages of PWC/POS proposed findings Nos. 125 through 135 are not rejected for reasons of accuracy, relevancy or materiality. They contain extensive evidentiary record references supporting a showing that each of the top ten equalized commodities either would not have moved at all in the export market from POP or would have moved through another port with or without equalization aboard the vessels of PWC members or independents. However, I believe that the findings made or yet to be made (primarily those appearing in Part B.I.j., generally,

[133] Mr. Krekorian viewed substituted service as equivalent to competition between ports and, thus, as normal competitive marketplace behavior.

[134] Predictably, Dr. Nadel came to the same conclusion as Mr. Copan based upon the same and other considerations.

[135] This finding is somewhat redundant. However, I repeat some of the reasons given by shippers merely to place the parenthetical reference in the previous paragraph in context.

and Nos. 58 through 71, in particular) sufficiently show the gist of what PWC/POS propose in their Nos. 125 through 135, i.e., that POP could not meet the ocean transportation needs of the shippers of the top ten commodities who availed themselves of substituted service.

D: DIVERSION FROM OR HARM TO POP AND ITS SMSA

136 through 139. There is no clear showing that any of the commodities which were shipped from POS pursuant to substituted service would have been loaded aboard vessels at POP. No shipper witness was called by POP. The shipper witnesses who testified were called by Hearing Counsel. Many were Oregonians who expressed a preference, out of loyalty to their state, to ship from POP. Nevertheless, they used substituted service out of POS because that was the only way they could effectively compete with other shippers, foreign and domestic, and get their goods to the market-place. The other shipper witnesses gave the same or similar reasons for using PWC substituted service out of POS. If PWC substituted service were not available, some shippers could not have shipped at all from POP, some would have used non-conference substituted service out of POS, and others would have paid the inland charges to POS without equalization or absorption. There is some evidence that on occasion there was unused capacity on Japanese Six Lines' vessels when they sailed from POP, but there has been no showing that this unused capacity was available (or, if available, was relevant) to satisfy the needs of any of the shippers who testified. Indeed, Mr. Mowat testified that POP had no evidence to present concerning the needs of any shippers of the equalized ten commodities.[136] However, it is fair to find there is some indication that some of the equalized cargo would or could have been loaded at POP in the absence of PWC substituted service. Yet, there is no evidence of record to permit a more specific quantification, other than that the amount which could have been accommodated at POP was slight.

140 through 142. POP presented evidence purporting to show the extent of its harm and the extent of harm to its SMSA due to diversion of cargo to POS. The presentation, which underwent several revisions,[137] was based on an unfounded assumption that all of the PWC equalized cargo would have been loaded at POP.

143. PWC/POS proposed finding No. 143 is adopted. It appears as Appendix C, Tables I and II.

144. In its brief, POP uses the word "diversion" to mean that the cargo which moved pursuant to PWC substituted service would have and

[136] Tr. 1100–1101, 1728.

[137] See, e.g., Exs. 29, 29 revised, 29 2nd revised, 88 and 89. The several Exs. 29 represent POP's calculation of revenues lost due to PWC's substituted service. Ex. 89 is, in effect, a revision of Ex. 88. Both 88 and 89 were prepared by POP's economic witnesses. They purport to calculate the Direct Revenue and Total Value Impact of Diversions on the SMSA (see Nos. 27–34, *supra*) and are based upon figures shown in Exs. 29 and 29 revised. When offered for identification, Ex. 89 did not reflect changes shown in Ex. 29 2nd revised. The last named exhibit, itself, reflects changes made in Ex. 16 by Ex. 16 revised.

could have been shipped aboard vessels calling at POP. I find there has been no evidence of diversion from POP under that definition, except for the indication mentioned in the last two sentences of Nos. 136 through 139, above.

145 through 149. PWC/POS proposed findings 145 through 149 are not rejected. The material contained therein is generally accurate, but it involves matters concerning shippers and cargo movements previously explicitly found or inherent in earlier findings.

E: QUANTIFYING THE LOSS TO POP AND TO PORTLAND'S SMSA

I. Harm to POP

150 through 155. Despite the title of this portion of my findings, I must caution that, having found there was a failure of proof to establish that the top ten commodities would have sailed from POP absent PWC substituted service, I must find, perforce, there was no showing of monetary harm to The Port.[138]

Nevertheless, it is useful to examine POP's contention that it was harmed because the evidence discloses how grossly overstated was POP's claim of harm.

Manifestly, POP's contention that it suffered harm is grounded on the assumption that all the equalized containers would have sailed from POP and would have generated revenues for The Port under tariff provisions calling for "wharfage," "throughput," and "extra ins and outs" charges.

From the beginning of this proceeding, even before the hearing commenced, POP exaggerated the claim of monetary harm. Whatever the underlying reasons for hyperbole, Mr. Mowat's affidavit of October 31, 1978,[139] and other nearly contemporaneous writings,[140] claimed revenue losses of $858,225.00 for 1977. By January 1980, when Mr. Mowat testified, POP's claim was reduced to $536,686.00 for 1977, and its revenue loss for 1978 was stated to be $603,198.00. By the time Mr. Mowat left the stand, POP's supportable claim was revised downward to $300,785.00 for 1977 and to $390,462.00 for 1978.[141]

To be sure, the Further Order directed POP to furnish additional evidence of "net revenue lost by [POP] as a result of cargo diversion caused by equalization payments." This, POP did not do. It furnished no evidence

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[138] Inasmuch as this decision also determines that the top ten commodities are not naturally tributary to POP and that there was no diversion of cargo away from POP, this finding should not be construed as being limited to the cited failure of proof.

[139] Ex. 34.

[140] Exs. 35 and 36.

[141] For the chronology of downward revision, see Exs. 29 revised, 29 2nd revised, 48 and 49 and related testimony. PWC/POS would reduce the claim still more by deleting extra ins and outs, amounting to about $3,000.00 in 1977 and $8,000.00 in 1978, contending there is no support therefor in the record. However, for the stated purpose of this finding, it is not necessary to rule on those relatively minor adjustments.

of variable costs (let alone, fully distributed costs) needed to produce the gross revenues to which it laid claim.

II. Harm to SMSA

155 through 169.[142] For background, see Findings Nos. 27 through 34, inclusive, in which I explained some of the theories employed by expert economic witnesses to determine the impact of PWC substituted service on the SMSA composed of Clark County (Vancouver), Washington, and Clackamas, Multnomah and Washington Counties, Oregon.

The ERA witnesses proffered by POP were directed to make certain assumptions in preparing for this proceeding. As pertinent, they were told to assume that all the cargo equalized or absorbed would have sailed from POP, absent PWC's rules; to assume the accuracy of POP's calculations of the amount of revenues which The Port would have collected if the cargo had sailed from POP; and to factor out any offsetting economic impact on SMSA of motor carrier revenues connected with inland movements to other ports. Consequently, their critical conclusions suffer not only from the same impairments found in Nos. 150–155, inclusive, but the additional infirmity of factoring out a significant positive economic impact on SMSA.

Nevertheless, I will go through the economists' exercises, in an abbreviated way, to determine a worst case scenario. I start by assuming that POP would have received all the traffic that was carried by PWC members by way of substituted service. I also assume the accuracy of Exs. 48 and 49 with respect to POP's claim of lost revenues, i.e., $300,785.00 in 1977 and $390,462.00 in 1978.[143] Applying ERA's approach to these figures, the total value-added impact on SMSA was $337,678.00 in 1977 and $438,354.00 in 1978. Based on undisputed evidence,[144] provided by Dr. Nadel, concerning the positive impact of inland motor carriers, it is fair to conclude that the residual impact (a balance of the positive and negative impacts) upon SMSA was about $66,000.00 in 1977 and $57,000.00 in 1978.[145]

A factor not included in the ERA analysis was the potential impact on SMSA due to the inability of some shippers within that SMSA to export at all because PWC substituted service was denied to them. Without attempting to quantify this impact, the very fact that exporting did occur must be viewed as a positive impact and a further dilution of the residual

[142] PWC/POS proposed finding No. 165 is rejected as it involves matters beyond the scope of this proceeding.

[143] According to economic theory, direct impact is a subset of lost gross revenues and should not be counted twice by adding total economic impact on SMSA to the gross losses claimed by POP.

[144] Although seeking and being given the opportunity, POP chose not to rebut Dr. Nadel's testimony because "it was mutually agreed between [POP] and Gene Krekorian of ERA that the things that he could attest to were probably not worth the effort involved." Tr. 5086.

[145] In arriving at those results, it was assumed that apples would not have moved through POP. Virtually *all apple shipments were equalized and not absorbed.*

impact on the SMSA to a level lower than the figures shown in the preceding paragraph.

Accordingly, I find that, even if all of the cargo were wrongfully diverted away from POP, there would have been a negligible negative impact (harm) to the SMSA.

F: JUSTIFICATION OF PWC SUBSTITUTED SERVICE[146]

I. Carrier Competition

170 through 184. The two principal American flag carriers in the PWC trade are APL and Sea-Land. In the aggregate, they carried, from POS, about 90 percent of the cargo equalized or absorbed over the base of POP.

After studying the problem of serving POP, directly, the respective managements of Sea-Land and APL determined that they cannot call at POP as a matter of good business practice. An additional call at POP would disrupt their vessel schedules on which their entire transpacific service depends. For example, APL's weekly POS service is integrated into domestic rail movements between POS and East Coast and Midwest points; its Far East relay system requires coordination for a cargo exchange in Japan between the POP service and the California service vessels. In addition, both Sea-Land and APL must provide a weekly regularity of service to be competitive with other carriers, but a POP call would either preclude that regularity or would make a regular service unprofitable.

These facts are recognized by POP, which is not seeking to induce Sea-Land or APL to call at POP. Indeed, Mr. Mowat is aware how pointless it would be for either of them to call there.[147]

In the PWC trade, APL competes with Hapag-Lloyd's weekly non-conference service. Like APL, Hapag-Lloyd makes POS its last West Coast port of call for Tokyo, Kobe, Hong Kong and Taiwan. Hapag-Lloyd, a German flag containership carrier, commenced its service in the trade in 1978. It does not call at POP, but it also serves POP by substituted service. Also, like APL, Hapag-Lloyd coordinates its Puget Sound sailings with railroad timetables.

In October 1980, ten foreign flag, non-conference containership operators competed in the trade with PWC carriers. Each of them offered similar substituted service for the same Oregon, Washington and Idaho area to POS. Among them were OOCL, Evergreen, Neptune Orient, Korea Shipping and FESCO.

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[146] The justification of PWC's practice was made an enumerated component of the ultimate issue by the Further Order. Therefore, in this portion of the findings, it is necessary to reiterate some earlier findings in order to provide continuity of context. In proceeding in this way, I do not intend to exclude other earlier findings which bear on this component.

[147] Mr. Mowat testified at Tr. 731, "They would not generate any greater cargo than the equalized or absorbed amount, probably."

Obviously, those non-conference carriers would not be subject to any order issued in this proceeding. But, even if they were ordered to stop providing equalization and absorption, they would still be able to attract cargo from POP to POS by means of competitive devices not available to PWC, e.g., special commodity rates applicable to POS.

The primary reason for PWC substituted service is that equalization and absorption provide the means for Conference members to be price competitive at rate levels which enhance the ability of the cargo to be exported.

Clearly, APL and Sea-Land, or any other PWC member, would be at a competitive disadvantage with independent carriers were it not for the PWC equalization and absorption practices. This disability would not affect non-conference carriers which could continue to compete for Oregon, Washington and Idaho cargo, without calling at POP, by means of substituted service or other pricing mechanisms. Non-conference carriers may compete for cargo of the Conference's domestic contract shippers, as well, because the designation of carrier is often made by a foreign non-contract consignee.

II. Effect of Substituted Service on Shippers

185 through 194. It is useful to preface the findings in this portion with the following responses of Mr. Mowat to hypothetical questions asked of him:[148]

> Q. [Mr. Fisher]: Let's assume there were no steamship lines providing refrigerated containers in adequate numbers or of adequate size or whatever out of the Port of Portland to Hongkong. There are slots on the vessel in this hypothetical, but no refrigerated containers which the carriers would be willing to supply. Are you saying under those circumstances that equalization or absorption of Hood River apples up to the Port of Seattle where they are carried by Sea-Land and APL to Hongkong should be outlawed?
> A. Yes.
> Q. And that means in turn that the shippers under my hypothetical would have to pay the inland freight charges, right?
> A. The additional inland freight charges, yes.

Despite these answers and the leading role played by Mr. Mowat in this proceeding, I am reluctant to find that POP shares the punitive (to shippers) views expressed by him in his replies to the hypotheticals. His answers, however, do reinforce the findings in Nos. 105 and 106, *supra*, because they are further evidence that Mr. Mowat perceives APL's and Sea-Land's substituted service to be unlawful under his theory of the law, a theory which begins and ends with a comparison of inland freight rates

[148] Tr. 828–829.

and rejects shippers' needs and transportation efficiencies and other components of *CONASA's* guidelines.

In 1977 the Japanese Six Lines carried more than two-thirds of their container tonnage (lifted at POP) to the Far East. In 1977 that proportion rose to more than 70 percent. Thereafter, when the non-conference lines stopped calling at POP, the proportion rose to about 95 percent. The Japanese Six Lines do not provide a sufficient service for all of the shippers of the top ten commodities which export their cargo to the Far East.

Substituted service gives the exporters in Oregon, Washington and Idaho the necessary expanded transportation alternatives to market their products without extra inland transportation costs. See Appendix E for a calculation of additional sailings available to shippers because of equalization and absorption in 1977. A further advantage of substituted service is that on occasions, it offers total transit time savings to shippers, which, in turn, serves to reduce the inventory cost to shippers.[149]

But those benefits are incidental. The primary benefit to shippers is that substituted service provides them with the means to place their goods in the export trade to the Far East. The evidence of record is massive in showing that, but for the economics of substituted service, many of the shippers could not sell to Far East consignees.[150] The loss to shippers and to the four county SMSA, were the shippers unable to export to the Far East, cannot be calculated with accuracy on this record, but it is fair to find that if only a tiny portion could not reach the overseas market, that loss would be greater than all of the revenues which might have been gained by POP had all of the top ten commodities been lifted at The Port.

III. Transportation Efficiency

195 through 202. The essence of substituted service is that in terms of transportation costs it is not more expensive for shippers to use than a transportation system which does not incorporate equalization and absorption. From the shippers' standpoint, it is more efficient to have a system which permits substituted service because of beneficial elements other than the fact that it costs no more. As seen, substituted service allows shippers to get their goods to market, and, on time—results which were not always

[149] On cross-examination by PWC, Mr. Copan agreed that some of his initial prepared testimony concerning transportation efficiencies might have been deficient in that it compared only inland transportation costs from point of origin to export ports and ignored other costs at destination. The cross-questioning implied that PWC would show that the overall cost from point of origin to point of destination was lower because the cargo sailed from POS rather than from POP. With due regard for the finding that PWC must charge the same for ocean freight from POS as it does from POP, I note that PWC does not propose a finding matching the implied promise to performance. Nevertheless, I do not believe this omission detracts from the showing that overall transportation efficiency is served by substituted service.

[150] The fact that some shippers would or did pay the cost of inland transportation to POS, without reimbursement from APL or PWC, in order to get their goods to market, not only shows benefits from substituted service-it is strong evidence of inadequate service or facilities at POP.

possible without substituted service. Substituted service also permits shippers to get their goods to market quicker due to the availability of faster transits, a result which may actually save money for shippers in the form of reduced financing charges, warehouse charges, etc.

Manifestly, substituted service is a more efficient system for APL and Sea-Land. It enables them to compete with non-conference carriers, which also offer substituted service, for Oregon, Washington and Idaho traffic. Without substituted service, neither APL nor Sea-Land could engage in such competition because there is, on this record, simply not enough container traffic available at POP to warrant the enormous expense of an additional call there. The cargo obtained by Sea-Land and APL, which is only a small proportion of the cargo they load at POS, helps to make their overall operations more cost efficient.

IV. Effect on Trade Stability and Flag Vessels

203. Clearly, if substituted service is available to non-conference carriers but is forbidden to conference carriers, this would tend to destabilize the conference system in two ways. It could constitute a disincentive for non-conference carriers to join conferences, and it could act as an incentive for conference carriers to withdraw from conferences.

On this record, the prohibition of substituted service to PWC would impair the ability of APL and Sea-Land, American flag carriers, to compete against non-conference foreign flag carriers.[151]

V. Economic Feasiblity to PWC of Serving POP Via Feeder Vessels

205 through 214.[152] Feeder vessel service from POP to Oakland or POP to POS is economically not feasible. Without considering other costs which may be attendant upon a feeder service, it is certain that the charges to shippers for loading and unloading containers at two ports would be nearly triple what they are when only one port is involved. E.g., there would be throughput and wharfage at POP, throughput and wharfage inbound at POS, and throughput and wharfage outbound at POS. Inasmuch as those charges are about the same at the two ports, this would mean that the charges for a loaded container would increase from about $140.00 (POP's charges)[153] to about $425.00. Subtracting the cost of loading at POS (a charge that would be incurred, in any event), this would result

[151] I have made this finding that the two are "American flag carriers" because the record warrants it and PWC/POS, Sea-Land and APL have requested that it be made. However, I have not treated it as a compelling factor in arriving at the conclusions reached in this decision. Neither have I given weight to evidence that some shippers "prefer" to use United States flag carriers.

[152] PWC/POS request that official notice be taken of a voluntary petition for bankruptcy filed by American Pacific Container Line, Inc. (Am-Pac) in October 1980, a carrier which had just commenced a coastwise container service between California and Northwest ports, including one stop at POP. The request is denied on the grounds of relevancy and materiality.

[153] POP would not be inclined to reduce its charge to provide encouragement for a feeder service. Tr. 694.

in extra costs of about $285.00, or about $11.00 more than the cost of substituted inland carrier service (about $274.00).

Evidence of the actual cost of establishing a feeder service is sparse, as is any evidence of an existing service.[154] However, it would be foolish to expect that if APL or Sea-Land were to establish a feeder service there would be no cost at all. Given the reality that the carriers' out-of-pocket costs for port charges must be about the same for a feeder service as for substituted motor carrier service, it is evident that the necessary capital outlays and ordinary expenses attendant upon a water feeder service would make such service economically unfeasible.

THE STATUTES INVOLVED

Section 205 of the Merchant Marine Act of 1936 provides:

> Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.

Section 15 of the Shipping Act, 1916, provides, in pertinent part:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued. . . .

Section 16 of the Shipping Act, 1916, provides, in pertinent part:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic in any respect whatsoever, or to subject any particular

[154] A single call by Am-Pac at POP can hardly be viewed as an existing service.

> person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . .

Section 17 of the Shipping Act, 1916, provides, in pertinent part:

> That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

DISCUSSION AND CONCLUSIONS

A: Preliminary Matter

One thing needs to be set at rest before I can proceed to the issues placed under investigation by the Order and Further Order.

For its first point of argument, APL advances the proposition that "Equalization or absorption as between ports cannot violate sections 16, First, or 17 of the Shipping Act." [155] Underlying this elaborate argument is APL's conviction that the *CONASA* decision is wrong and *CONASA's* guidelines are defective. APL concedes that this "issue"—the validity of *CONASA* and its guidelines—"was not specifically set for hearing in this case." Consequently, APL reasons that it is "incumbent upon [me] to decide this issue. . . ." [156] Having instructed me in my duties, APL urges me to reexamine *CONASA's* foundations, find them to be flawed, and deny the application of *CONASA's* guidelines to the facts of this case.[157]

The portion of the first point which seeks to confer upon me the authority to revisit *CONASA* tantalizes and the portion allotted to *CONASA's* substantive underpinnings is alluring, but I must decline APL's seductive invitation to enter upon and explore the exotic terrain, because acceptance would be improper. Briefly, my reasons follow.

APL is right in saying that the Commission did not specifically set the issue of *CONASA's* validity for hearing in this case. But, it is absurd to reason that this means the issue is now before me. Contrary to what APL says the omission implies, the Order and Further Order, directing that this case be tried under *CONASA's* precedents and guidelines, barred my reentry into *CONASA* and its guidelines. I do not construe Rule 147(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.147(a) [158] to have the meaning which APL ascribes to it. That rule simply does not explicitly (or even implicitly) empower me to overrule the Commission

[155] APL Brief, p. 21.

[156] *Id.*, p. 22.

[157] *Id.*

[158] As pertinent, Rule 147(a) provides:

> The officer designated to hear a case shall have authority to . . . delineate the scope of a proceeding instituted by order of the Commission by amending, modifying, clarifying or interpreting said order. . . .

by restructuring an investigation, ordered by the Commission, to include issues "wall[ed] off" from me under the precise terms of a Commission order.

Moreover, I do not interpret n. 13 in *Dart*, 639 F.2d at 813, to have the effect of placing the validity of *CONASA* before me. That note was inserted at the request of APL and Sea-Land in the memorandum they filed with the court as *amici curiae* in February 1980.[159] N. 13 states:

> *Amici curiae* have summarily urged that the *CONASA* guidelines are not within the Commission's statutory authority. Such a contention has not been briefed or argued by the parties and we therefore intimate no view on its merits.

As I read the memorandum, *amici curiae* advised the court that the issue was "being raised before the Commission" in Docket No. 78–32.[160] I am certain that this may well have been what APL and Sea-Land intended. The infirmity of APL's first point is that APL failed to carry out this intent by requesting an enabling amendment to the Order before the hearing was closed and before briefs were filed. Elsewhere, in brief, APL shows an awareness that its initial argument does not lie before me for this precise reason.[161]

Accordingly, APL's first point of argument is rejected.[162]

B: CONASA'S GUIDELINES

The *CONASA* guidelines are not precise rules of conduct under which a particular practice may be judged valid or invalid by the simple process of matching a particular practice against the language of a rule. Nevertheless, the Commission enunciated and established the following standards as the general principles to be considered in all future proceedings in which violation of sections 16, First, and 17 of the Shipping Act are alleged based upon diversion of cargo from a port.[163]

> 1. Certain cargo may be naturally tributary to a port, but any "naturally tributary zone" surrounding a port is constantly chang-

[159] The memorandum was distributed to the parties to this proceeding and to me about that time.

[160] Memorandum, *amici curiae*, p. 4.

[161] See APL Brief, p. 48, n. 55, where APL comments:

If the *CONASA* and *Dart* cases were as opposed as Hearing Counsel sometimes believes, the presiding officer would still have to look to CONASA alone. The Commission's 1979 direction, in this proceeding, to apply the CONASA standards is the law of the case, the "controlling legal rule of decision between the same parties in the same case." 21 CJS § 195(a), p. 330. While the Commission itself *could* change the law of the case, it is "the practice of courts generally to refuse to reopen what has already been decided * * *." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). What APL sees as governing in its n. 55 also controls its opening argument.]

[162] The Port Authority of New York and New Jersey made a similar argument, independent of APL. POS, PWC and Sea-Land, in one way or another, adopted APL's first point of argument. All of those arguments which state that equalization and absorption cannot violate sections 16, First, or 17 of the Shipping Act are rejected.

[163] *CONASA* 21 F.M.C. at 93–94.

ing.[11] In a particular case, this zone is determined by consideration of: (a) the flow of traffic through the port prior to the conduct in question, including points of cargo origin or destination; (b) relevant inland transportation rates; (c) natural or geographical transportation patterns and efficiencies, and (d) shipper needs and cargo characteristics.

2. A carrier or port may not *unreasonably* divert cargo which is naturally tributary to another port. When diversion of naturally tributary cargo occurs, the reasonableness of the practice must be determined. The reasonableness of the particular practice is determined by consideration of: (a) the quantity and quality of cargo being diverted (is there substantial injury?), (b) the cost to the carrier of providing direct service to the port; (c) any operational difficulties or other transportation factors that bear upon the carrier's ability to provide direct service (*e.g.*, lack of cargo volume, inadequate facilities); (d) the competitive conditions existing in the trade; and (e) the fairness of the diversionary method or methods employed (*e.g.*, absorption, solicitation).

[11] A port's locally tributary zone will not only vary over time, but with the nature of the commodity shipped. The tributary zone for cotton may differ from that for apples or for computer parts.

In order to keep these guidelines in proper perspective, it is important to recall some aspects of their development, procedures, application and areas of impact.

The guidelines do not treat the concept of naturally tributary territory in the abstract. "They are to be considered in all future proceedings wherein violations of sections 16, First, and 17 of the Act are alleged based upon the diversion of cargo from a port." *CONASA*, 21 F.M.C. at 94. The reason for this, as Chief Judge John E. Cograve explained in his initial decision, which the Commission adopted, in *CONASA*, "is the fact that the sections of the Shipping Act alleged to have been violated are sections 16, First, and 17 and that it is undue preference or prejudice to ports and unjust discrimination against ports, not diversion of cargo, which those sections proscribe." *CONASA*, 21 F.M.C. at 122. Section 15 of the Shipping Act was not at issue in *CONASA*, but remedies thereunder may be available in appropriate circumstances, in cases involving such things as adequacy of carrier service. *CONASA*, 21 F.M.C. at 122.

In establishing *CONASA's* guidelines, the Commission assigned no relative weight to any of the individual components making up those guidelines. They are general principles of future decision making pursuant to which the Commission will undertake to strike the delicate balance between shippers', carriers' and ports' needs and benefits in a given factual context. *Dart* represents a particular application of that weighing process. *Dart* is not in conflict with *CONASA*; it is entirely compatible, for, in *Dart*, the Commission weighed the competing interests under *CONASA's* principles and, on the discrete facts of that case, found the diversion of traffic to be unlawful. *Dart*, 639 F. 2d at 814. This process of weighing competing interests and arriving at a balance in judging and applying terms not defined by statute (as is true of "naturally tributary") has often met with approval by the Supreme Court. See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974). That precept is fitting where Congress has entrusted this Commission with the power to determine whether certain conduct conforms to or is in violation of sections 16, First, or 17 of the Shipping Act, a delegation which affords administrative discretion to the Commission "to draw its conclusion from the infinite variety of circumstances which may occur in specific instances." *Cf., Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 (1945).

The allocation of evidentiary burdens falls on the competing parties to the dispute, seriatim. First, the complaining party (here, in effect, Hearing Counsel[164] and POP may be so considered) has the particularized burden of proof of establishing that the diverted cargo originated in territory naturally tributary to it. Second, the complaining port must show it was harmed. The respondent then assumes the burden of establishing the reasonableness (or justification) of the practice. *Dart*, 639 F.2d at 814–815.

The particularized burden of the complaining party needs some clarification because its meaning seems to have been blurred during the proceeding by loose usage of key terms. For example, "diversion of traffic" was occasionally used as a code word substitute for equalization or absorption in order to symbolize unlawful conduct.[165] For the purposes of the particularized burden, it should be emphasized that the burden cannot be met by a mere showing that the cargo originates at a point nearer to the basing port or that the inland rates to the basing port are lower (or both) and that there is adequate service at the basing port. *CONASA* stands for the proposition that there can be no culpable diversion unless it has been established that the cargo originated in a naturally tributary zone. This zone, in turn, cannot be determined until all of the components set forth in 1(a) through 1(d) of the guidelines are measured.

With those principles in mind, I turn to the issues under investigation, beginning with the seminal question whether any of the top ten commodities is naturally tributary to POP under *CONASA's* guidelines.

C: THE TOP TEN COMMODITIES ARE NOT NATURALLY TRIBUTARY TO POP

In my judgment, none of the top ten commodities has been shown to be naturally tributary to POP. The reasons follow.

[164] Of course, in urging, on brief, that there be no finding of violation of sections 16, First, or 17, Hearing Counsel later departed from the role of complainant.

[165] Diversion (meaning substituted service) is not synonymous with wrongdoing. What is unlawful is undue preference or prejudice to a port caused by diversion.

The first of *CONASA's* standards to be considered is the flow of traffic through the port prior to the conduct in question, including points of cargo origin and destination.

It is undisputed that the practices under investigation have been going on for a very long time. For at least as far back as Mr. Mowat can remember—in 1969 or 1970[166]—PWC had equalization and absorption rules in its tariff, and it applied those rules to POP base cargo transported inland to POS and other ports in substituted service.

There is a paucity of evidence concerning movements of any of the top ten commodities, except for apples, to PWC destinations prior to the events of 1977–1978.[167]

Apples never moved in substantial quantities from POP. The burgeoning export market for Hood River apples was occasioned by the development of direct refrigerated container service from POS to Hong Kong. There is, even now, no scheduled direct liner refrigerated container service to Hong Kong.[168]

With respect to the other five commodities which POP contends historically flowed through the Port, POP relies on Mr. Copan's testimony.[169] But Mr. Copan's testimony is not helpful to POP's position. For example, POP says that metal scrap historically moved through POP. However, Mr. Copan demonstrated that while metal scrap moved through POP, it also moved through POS. More to the point, Mr. Copan showed that historically, POS was the major PWC export port for metal scrap. Neither historically, nor through 1978, did scrap metal destined for Taiwan move through POP, except for a "very limited amount."[170] In 1977, more than 75 percent of equalized scrap metal went to Taiwan. In 1978, that figure rose to nearly 90 percent.

For another example, POP claims that the evidence shows that historically, lumber was shipped from POP. This is true, but it is also true that, historically, lumber was shipped from POS, as well. In addition, there are other

[166] Mr. Mowat was employed by POP before then, but his memory of PWC's equalization and absorption practices does not antedate that period.

[167] POP concedes that there is scant evidence of record concerning historical movements. (And most of that was introduced through Mr. Copan.) To compensate for this inattention to its burden and concomitant lack of proof, POP asks that it be inferred "from the tonnage figures of what was equalized and absorbed and what went out of Portland to the PWC destinations in 1977 and 1978," that there was an historical flow through POP for five of those commodities. An inference drawn from evidence so meager would be unreasonable.

[168] POP contends that cargo does not cease to be naturally tributary to an area merely because it is containerized. It cites no authority for this proposition. Nevertheless, a statement to that effect does appear in the Commission decision in *Intermodal Service to Portland,* 17 F.M.C. 106, 127 (1973). Yet, having made this point, POP rests on it and offers nothing more, perhaps in recognition that the statement can have only limited application and is generally inapposite to the facts of this case. Obviously, it cannot apply to apples or other commodities whose transportation characteristics are altered by containerizing. *See, e.g., Pacific Westbound Conference, Wastepaper and Woodpulp, etc., supra.* In any event, that statement cannot substitute for POP's failure to introduce any evidence of historical flow.

[169] POP concedes there is no historical evidence in the record with respect to canned or frozen corn, onions or meat and bone meal.

[170] Ex. 95, p. 37.

historical facts which POP's claim ignores. Most of the POP-exported lumber—a constant of about 95 percent—was and is carried in non-liner service. On the other hand, since 1974, POS-exported lumber carried in non-liner service declined from about 78 percent to about 22 percent in 1978.[171] In 1974 only slightly more liner-borne lumber was carried from POP than from POS to PWC destinations. POP's tonnage of liner-carried lumber has remained nearly constant, but POS' tonnage has increased substantially. Equalized lumber amounted to less than 10 percent of the liner lumber exported from POS in 1977 and 1978. Therefore, separate and apart from equalization, it is apparent that, insofar as containerized liner carriage of lumber is concerned, history and trend favor POS over POP.[172]

In the past, both POP and POS were exporters of wastepaper to Korea, where most of the equalized wastepaper goes.

Historically, POP and POS were large exporters of pulses to Taiwan, the destination of most of the equalized pulses, although in 1974, more was shipped from POS. In 1978, POP's share was only about 20 percent of what it was in 1974.[173] POS' exports of pulses to Taiwan increased tenfold in that same period. Only a tiny fraction of 1 percent of POS' exports of pulses to Taiwan was equalized in 1978.

Historically, cattlehides moved to Korea from both POS and POP, although the greater proportion—about 4½ to 1—was shipped from POS. POP's share of this market has been increasing since 1974. Equalized cattlehides are a minute fraction of the exports of this commodity from either port.

To summarize, POP failed to meet its burden of proof with respect to the historical flow of any of the top ten commodities, although this infirmity was partially remedied by evidence adduced by Hearing Counsel. But this evidence establishes that, with respect to the particular predominant destinations of equalized apples, metal scrap, and lumber, POP was not the historical port of export. With respect to the major destinations of equalized pulses, wastepaper and cattle-hides, there is insufficient evidence to show that historically, POP was favored over POS as the principal port of export. With respect to the remaining commodities, there was a failure of proof. Over and above the evidence concerning particular commodities, it is manifest that with the advent of containerization in the 1960's, POS emerged as the container load center in the Pacific Northwest and, as a consequence, it attracted a great deal of cargo which, in the past, was not exported to PWC destinations from POP. POS's eminence as a container load center has resulted in the continuance of the flow pattern which began in the 1960's.

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[171] In 1976, only 7 percent was carried by non-liners. Ex. 95, pp. 19–20.

[172] The total tonnage of lumber exported from POP far exceeds the total for POS.

[173] Apparently, at least for Taiwan-bound pulses, the Columbia River barge service is not attractive to shippers, even though it may be less expensive than other modes of carriage. This is due to the fact that the lack of adequate service at POP makes the slower moving barge service more costly in the long run, because the containers would still have to be moved inland to POS after having incurred POP's charges.

Relevant inland transportation rates is the second of the *CONASA* factors to be considered in determining whether cargo is naturally tributary to a particular point. As seen, the substituted service in this case is provided almost exclusively by inland motor carriers. Obviously, those inland motor carrier rates favor POP or there would have been no equalization or absorption. The evidence of inland rate disparity between the two ports is not very specific, but this is no great defect. It is sufficient to note that, generally, the difference ranges from about $17.00 to about $270.00 per truckload, depending on the commodity and point of origin. Overwhelmingly, except for instances of slight difference in rates, this factor must be balanced on the side of POP. (Note, however, the Del Monte witness did not consider $17.00 to be slight.)

Geographical or natural transportation patterns and efficiencies is the next factor. An analysis of this factor, as the case was presented, is more complicated than measuring distances or drawing lines through contour maps to determine the shortest or fastest inland routes. Of course, the shortest or fastest inland routes, as reflected by the freight rates, are those which go to POP. However, this reckoning does not take into account the transpacific or Far East geographical and natural transportation patterns and efficiencies. Neither does it measure the effect of the load center on those patterns and efficiencies.

The transpacific elements are not favorable to POP. First, measured by way of time or distance, most of the more significant PWC destinations are nearer to POS than to POP. Second, because POS became the load center, the more numerous transportation options and liner services are available there. Those elements, together, make it more natural and efficient to coordinate the several requisite transshipment services in the Far East with the liners which sail from POS. Were APL or Sea-Land to call at POP, either as a sole or supplemental port of call, these efficiencies would be lost and the ability of those carriers to compete in the trade would be adversely affected.

Moreover, because it is the Pacific Northwest load center,[174] POS is the more natural and efficient of the two ports in terms of least costly availability of containers and least expensive container support activity. It is also the naturally more efficient port of the two because there is no river bar to cross and no narrow river channel to navigate.

Thus, a balancing of those natural and geographic patterns and efficiencies leaves the two ports nearly even. POP has the advantage, at origin, of inland distances and routes, but the oceanic and Far East distances and routes are more advantageous to POS. The latter advantage and the derived benefits from being the container load center make POS a more efficient port in terms of options available to shippers whose shipments originate

[174] It should be recognized that POS is the load center for both local and intermodal movements, and the enhanced activity of the whole benefits the efficiencies of the component parts.

at points more proximate to POP. Although the balance is about even, I believe the scales tilt slightly toward POS because more and better tailored service is available there.

The final factor to be considered involves shipper needs and cargo characteristics.[175] It will be recalled that POP offered no proof concerning the transportation requirements of shippers and perceived no effect of cargo characteristics upon those requirements. The evidence concerning those needs and characteristics was elicited from witnesses produced by Hearing Counsel. Their testimony clearly and convincingly established that substituted service was a *sine qua non* for them to stay in the export ball game because of disincentives or disadvantages of various kinds at POP. Those shippers found the options and efficiencies of substituted service essential for them to get their goods to market in a timely manner, without damage and in accordance with their special needs, including special characteristics of certain cargo (e.g., need for refrigerated containers for apples). Overwhelmingly, those shippers established that if not for substituted service, they could not compete against foreign or domestic competitors in the export trade.[176]

Weighing the four factors, I find that the balance lies heavily in favor of the conclusion that none of the top ten commodities is naturally tributary to POP. I deem the factors of historical flow, transportation efficiencies, shippers' needs, and cargo characteristics to be controlling. When POS got the jump on POP, first as a container facility port, and then as a container load center, it created export markets not previously available to shippers. As POP's role of load center enlarged, it drew more container traffic going from east to west and west to east. APL and Sea-Land expanded their operations because of the increased options and efficiencies created by POS as a local and intermodal port of choice in the Pacific Northwest. In turn, those carriers were able to pass on the efficiencies[177]

[175] The inclusion of the term cargo characteristics in the *CONASA* guidelines would indicate a retreat from the statement which appeared in *Intermodal Service to Portland, Oregon, supra. Cf.* n. 168, *supra.*

[176] POP makes an argument, in its brief, p. 155, that it was not required "to prove that the traffic which was diverted from Portland to Seattle and California ports would have moved through Portland *but for* the Respondents having equalized and absorbed the inland freight differential," citing the Commission's rejection of the "but for" test in *Sea-Land Services, Inc.* v. *South Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338, 350 (1966). POP misses the mark with this argument. It was proved here that the vast majority of the equalized shipments would not have moved in the export trade at all if substituted service did not exist as an available option.

[177] Although "adequacy of service" is not explicitly mentioned in the *CONASA* guidelines, it does survive. See Further Order, *supra*, 21 F.M.C. at 941, 943; *Dart*, 21 F.M.C. 1129 n. 16; *Dart*, 639 F.2d 817. Briefly, insofar as the issue of naturally tributary territory was concerned in pre-*CONASA* days, the adequacy-of-service test meant this—a cargo diversion could be justified only if there was inadequate service at the complaining port. Heretofore, I found that there was inadequate service at POP: (a) historically, in the development of container transport, it did not provide the necessary facilities for container service; (b) afterwards, when it was expanding its container facilities, it could not attract or keep the liner services. Clearly, those components of adequacy of service are subsumed in the findings and discussion of historical flow, efficiencies, shipper needs, and cargo characteristics.

and options to the shippers who, thereby, found new or greater markets for their goods.

I am unable to find on this record what POP implies in claiming that the top ten commodities are naturally tributary to it. It is POP's implicit suggestion that PWC and its equalizing member lines, together, or in combination with POS, are stealing traffic from POP. There is no evidence to support that kind of conclusion. I do find that, even though POP is steadily improving its facilities and is becoming a more significant container port, on the basis of their requirements in 1977 and 1978, shippers needed the options and efficiencies of substituted service to reach their overseas markets.[178]

D: NEITHER POP NOR POP'S SMSA HAVE BEEN HARMED BY SUBSTITUTED SERVICE

Having found that the top ten commodities are not naturally tributary to POP, I must find that neither POP nor POP's SMSA was harmed by PWC's equalization rules and practices.[179]

Assuming, however, that all of that cargo was naturally tributary to POP, I must still find that the harm to POP was insubstantial and the harm to SMSA was imperceptible.

At best, POP would have received about $300,000 more in 1977 and $390,000 more in 1978 if all of the equalized cargo had been loaded at the Port. Those figures represent less than 5 percent, per each of those years, of POP's total container revenues, and less than 2 percent, for each of those years, of POP's total marine terminal operation. (N.b., no one of the top ten commodities would contribute to more than 37½ percent of the 5 percent or 2 percent in either of those two years. The 37½ percent figure is not a refined estimate. It is based solely upon the particular 1978 statistics for lumber which appear in Appendix C, Table II.) On this record, I can find no basis for concluding that these small percentages of revenue, which POP did not earn in 1977 and 1978, would have caused substantial injury to POP in 1977 and 1978.[180]

As seen, the residual impact to SMSA from equalization was about $66,000 and $57,000 in the years 1977 and 1978, respectively. In a community which had gross personal income of more than $10 billion, this was infinitesimal. It certainly cannot be regarded as substantial harm.

[178] In the discussion leading to my conclusion that the top ten commodities are not naturally tributary to POP, I attempted to avoid a duplication of the detailed findings of fact. For example, I made no further mention of the queuing delays at POP, a fact which goes to adequacy of service, transportation efficiency, and shipper needs and cargo characteristics. In addition, except where I believed it to be appropriate, I tried not to rely on facts not specifically found in the Fact section of this decision. These approaches will apply to other portions of the discussion which follow.

[179] See, Finding Nos. 150 through 155.

[180] I might add that POP offers nothing in its brief to aid in the process of quantifying the extent of harm. Indeed, it cannot on this record, which is lacking in probative evidence of both the cost to service the additional containers and the real, as opposed to imagined, repercussions of losing them to substituted service.

E: PWC'S SUBSTITUTED SERVICE IS JUSTIFIED

Having found that the traffic was not naturally tributary to POP and that neither POP nor its SMSA was harmed, it would seem to follow that the issue of justification is moot. But this would be an oversimplification.

Under *CONASA's* guidelines, the issue of justification, like the issue of harm, seems to come into play only when a diversion of naturally tributary traffic is established. However, there is an obvious overlap between the issues of diversion from a tributary zone and justification, at least to the extent that evidence relevant to one issue may also be germane to the other. For example, evidence of the extra time and expenses caused by queuing delays and gang deficiencies at POP serves to justify APL's and Sea-Land's decisions not to call at POP and also establishes certain inadequacies of service and inefficiencies at POP.

Whether in recognition of this overlap, or out of an abundance of caution, the respondents introduced evidence which establishes, clearly and convincingly, that the cost to APL and Sea-Land, severally, of providing direct service at POP was not warranted by any transportation need or by any operational or economic test. An examination of all the evidence plainly shows that the cost of making a call at POP [181] would far exceed the revenue that could be expected or received from the amount of cargo available at POP.

Another factor involved in the question of reasonableness is the fairness of the methods employed in obtaining the equalized cargo. Before dealing with this factor directly, a separate aspect of fairness should be explained.

It should be manifest that despite comparisons necessarily made between POP and POS, this case is not a contest between those ports, nor was it my intention, in this judgmental exercise, to compare their relative values. Any findings in this respect are intended solely for the purpose of making a determination of the issues with which this investigation is concerned. A further indication of the fact that this is not a challenge between two ports lies in the fairness of their competition. POS does not use equalization or absorption as an inducement in its solicitation of traffic in the Hood River or Willamette Valley areas.

There are two aspects to the question of the fairness of the equalization and absorption methods employed by Sea-Land and APL. First, it is evident that they are not drawing any substantial amount of traffic away from POP that would otherwise have been shipped from there, and there is no indication that they are doing anything different in providing substituted service than the independent liner services are doing in providing a similar and competing service. Indeed, it would be unfair to permit the non-conference competition to continue to provide substituted service and, at the same time, to proscribe such activity by members of PWC. Viewed

[181] Including a feeder service.

in this light, and there is no evidence to the contrary, I find that PWC's methods comport with acceptable standards of fairness.

There is another approach to fairness, and that is the relationship between substituted service and the PWC exclusive patronage agreement and the effect thereof on POP.

There is evidence that PWC contract shippers, who used Sea-Land's or APL's substituted service, did not consider utilizing independent liner services which might have been available at POP out of fear of being deemed in violation of their contracts.[182]

On the basis of that evidence, I am unable to conclude, or even infer, that this represents an unfair practice by PWC or its members. Nevertheless, I do foresee a potential for harm to POP,[183] if, in fact, PWC would, under its approved section 15 agreement, be authorized to deem a contract shipper to have acted in contravention thereof and be authorized to take appropriate action against that shipper because it used a non-conference carrier, serving POP directly, when the only other PWC service available was substituted service at another port.

During the critical years scrutinized in this proceeding, POP did not have sufficient traffic or adequacy of service to warrant more calls by PWC members, or by independents in the PWC trades. However, POP did have more nearby cargo than could be handled by the PWC carriers which did call there. Should that nearby container traffic increase, under ordinary marketplace conditions, a currently disinterested liner operator might reconsider and wish to institute or reinstate a direct service at POP. However, should that operator be an independent, the fear of a threatened contract violation might serve as a disincentive to the shipper and, consequently, a disincentive to the independent operator. This inhibiting factor could prove harmful to POP's growth as a container port as its facilities are expanded and improved.

Because I do not find a violation of law in these circumstances—rather a possibility of substantial harm to POP—I am not certain that the Order or Further Order empowers me to issue an order under section 15 requiring a modification of Agreement No. 57. On the assumption that I am not authorized to do so, in lieu of an order, I do recommend that the Commission consider a modification of the PWC agreement to remove the potential for harm to POP. This kind of modification would enhance the transportation options available to shippers, a cause fervently espoused by respondents

[182] There is no evidence that this concern was occasioned by any warning from PWC.

It is assumed that none of the Japanese Six Lines offered the particular service which the shipper needed or had space available on its vessels at that time.

[183] *Dart*, 639 F.2d at 817, teaches that, after a complaining port has established a diversion of naturally tributary cargo, it need only show the possibility of substantial harm rather than loss of cargo to place the burden of demonstrating reasonableness upon the offending carrier. Although the complaining port has not made the requisite showing in this case, it is, nevertheless, appropriate to consider the question of fairness to determine whether a remedy may lie under section 15. *CONASA*, 21 F.M.C. at 122. Unlike *Dart*, this proceeding is conducted, in part, under section 15.

throughout this proceeding, without interfering with the ability of PWC members to compete with independents which also offer substituted service.[184]

With respect to section 15, I find that PWC's substituted service rules and practices are required by and meet a serious transportation need, necessary to secure important public benefits, and are in furtherance of a valid regulatory purpose of the Shipping Act. See *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien (Swedish American Line)*, 390 U.S. 238, 243–246 (1968). I also find, on balance, that future public benefits and transportation needs would be better served by the kind of modification proposed in n. 184.

This modification would also comport with the concept that naturally tributary territory may vary over time. I do not construe this to mean that the tributary zone may change from week to week or, necessarily, from year to year, or with any pendulum-like precision. I interpret it to mean that as reality requires and the efficiencies of transportation dictate, cargo will tend to go through the port which offers the most efficient service—witness POS' resurgence as a port of choice when it created a climate favorable to container traffic.

Accordingly, for all of the foregoing reasons, I find that there has been no showing of violation of sections 15, 16 First, or 17 of the Shipping Act, 1916, and there has been no showing of violation of section 205 of the Merchant Marine Act of 1936.[185]

ORDER

It is ordered that the above proceeding be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

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[184] I do not recommend that the modification permit shippers the option of using non-conference substituted service. I do suggest a clause in the exclusive patronage contract which provides that a shipper is not in violation only if it uses a non-conference carrier offering direct service at POP when there is no PWC direct service available at POP, or another port, which may be considered an integral part of the Columbia River Basin complex. See *Stockton Port District* v. *Pacific Westbound Conference, supra*, 9 F.M.C. at 21.

[185] Other than making passing reference to it in the conclusionary portion of its brief, POP does not deal with section 205 in this proceeding at all. The purpose of section 205 was explained by the Commission in *Pacific Coast European Conference—Rules 10 and 12*, 14 F.M.C. 266, 284 (1971). It is to:

> prevent collective action designed to create discrimination in the form of a difference in rates at which federally improved ports are served, but more importantly to forbid conferences to impose restrictions on their member lines which would interfere with the free exercise of the lines' discretion in the determination of which ports they choose to serve.

Section 205 absolutely prohibits collective action preventing service to a port at the same rates as those applicable to the next regularly served port. *Intermodal Service to Portland, Oregon, supra*, 17 F.M.C. at 135. This kind of situation might occur if there were a conference imposed rate differential between direct water service and indirect overland service. There is no evidence of that or of anything else which might invoke the reach of section 205 in this proceeding.

APPENDIX A
LIST OF WITNESSES

A: Called by POP

1. Milton A. Mowat, Manager, Traffic and Regulatory Affairs, POP.
2. Doris Elaine Lycan, Transportation Pricing Specialist, POP.
3. Glenn Russell Morris, Senior Dispatcher, POP.
4. Richard K. Lyon, Senior Vice President, Economics Research Associates.
5. Gene P. Krekorian, Principal Economist, Economics Research Associates.

B: Called by Hearing Counsel

6. Jay Copan, Industry Economist, Office of Economic Analysis, Federal Maritime Commission.
7. Shigeto Uchida, Yuasa Trading Company, Inc., a shipper of frozen corn.
8. Laurence Arthur Kromer, Avison Lumber Co., a shipper of lumber.
9. Emil Cahen, Cahen Trading Co., a shipper of hides and onions.
10. Harriet Clothier, K-C International, Ltd., a shipper of wastepaper.
11. Ron Hendrick, Phil A. Livesley Co., a shipper of onions.
12. Carroll Kirk, Cascade Steel Rolling Mills, Inc., a shipper of metal scrap.
13. Allan Spencer Gordon, North Pacific International, a shipper of dried peas and beans.
14. William B. Wagstaffe, Del Monte Corporation, a shipper of canned corn.
15. George Hajime Noda, Kasho Company, a shipper of wastepaper.
16. Franklin Battat, Liberty Gold Fruit Co., a shipper of apples.
17. Ted I. Coleman, W. M. Dickerson Co., a shipper of apples.
18. Delbert Larry Pearson, Manager of Marketing Projects, POP.

C: Called by PWC or its member lines

*19. Dr. Ernest Nadel, Economist-Senior Analyst, Manalytics, Inc.
20. Seiichi Hirano, General Manager, Pacific Coast, U.S.A. and Canada, Yamashita-Shinnihon Steamship Company (on behalf of all six Japanese containership operators).
21. Ronald B. Gottshall, Director of Pricing, Sea-Land Service, Inc.
22. Douglas A. Pfaff, Managing Director, Pacific Northwest Region, American President Lines.

* Dr. Nadel was co-sponsored by POS.

23. Capt. Herman Tobiassen, Vice President, Operation, Bakke Steamship Corporation, agent for Knutsen Line.
24. Capt. Paul Sather Mead, former Vice President of Eckert Overseas Agency, Inc., a subsidiary of Orient Overseas Container Line.

D: Called by POS:

25. Robert C. McQuigg, Director of Marketing Department, POS.

APPENDIX B
CARRIERS IN THE PWC TRADE

I. A:

PWC Member Lines 1977

American President Lines, Ltd. (APL) [R][1]

East Asiatic Company, Inc. (EAC) [R]

Japan Line, Ltd. [R]

Kawasaki Kisen Kaisha, Ltd. (K Line) [R]

Knutsen Line [R]

Maritime Company of the Philippines, Inc. [R]

Mitsui O.S.K. Lines, Ltd. (OSK) [R]

Moller-Maersk Line [R]

Nippon Yusen Kaisha (NYK) [R]

Pacific Far East Line, Inc. (PFEL)

Phoenix Container Lines (1976), Ltd. (PCL) [R]

Sea-Land Service, Inc. [R]

Seatrain International, S.A.

Showa Line, Ltd. [R]

States Steamship Co.

United States Lines, Inc. [R]

Yamashita-Shinnihon Steamship Company, Ltd. (Y-S) [R]

Zim Container Service [R]

I. B:

PWC Associate Members

Barber Blue Sea Line [R]

Waterman Steamship Corporation [R]

[1] [R] stands for a line named as a Respondent in the Order of Investigation and Hearing.

II. A:

Changes in PWC Membership During 1978

Withdrawn

States Steamship Co.
Seatrain International, S.A.
Pacific Far East Line, Inc.

New Members

Korea Maritime Transport Co., Ltd.
Seatrain Pacific Services, S.A. [R]
Galleon Shipping Corporation [R]

III.

Non-Conference Lines in the PWC Trade 1977–1980
Hapag-Lloyd A.G.
Orient Overseas Container Line, Inc. (OOCL)
Evergreen Marine Line
Far Eastern Shipping Co. (FESCO)
Yang Ming Line
Neptune Orient Lines
Asia-America Line
Ro-Lo Pacific Lines
Korea Shipping Corp.
Lykes Bros. Steamship Co., Inc.
States Steamship Co. (last half, 1978)
Scindia Steam Navigation Co. [R][2]

IV.

When the record was closed in 1981, neither Evergreen, FESCO nor OOCL.was serving POP, directly.

[2] The Order of Investigation and Hearing names Scindia and the Shipping Corporation of India (SCI) as PWC members and respondents. Marginal note No. 1 of PWC's proposed findings of fact shows Scindia as an independent during 1977–1980 and does not mention SCI as a PWC member or as having been in the trade at all. POP's proposed finding of fact No. 6 states only that Scindia was a member of PWC when POP's petition was filed in 1975. However, POP agrees that from 1977 through 1980 neither of them was a container carrier or a PWC member. See, Tr. 401. There is some testimony that in 1981 Scindia might have converted to containerships which call at Portland, but the testimony was sketchy and inconclusive. Tr. 5331, 5339.

APPENDIX C
EQUALIZATION AND ABSORPTION
TABLE I—QUANTITY—SHORT TONS

	APL		Sea-Land		PCL		Total	
	'77	'78	'77	'78	'77	'78	'77	'78
Apples	2,048	666	2,369.2	2,078.8	840	—	5,257.2	2,744.8
Wastepaper	3,254	1,365	4,647.3	3,342.3	3,561	6,308	11,462	11,015.3
Onions	99	218	814.7	949.4	—	—	913.7	1,167.4
Cattlehides	4,535	4,710	84	112.6	—	—	4,619	4,822.6
Canned Corn	2,135	103	108	17.9	—	—	2,243	120.9
Meat & Bone Meal	4,660	3,786	264.2	—	—	—	4,924.2	3,786
Lumber	7,187	20,719	514.6	921.7	—	—	7,341.6	21,640.7
Metal Scrap	429	—	2,638	2,776.5	161	—	3,228	2,776.5
Dried Peas & Beans	3,213	7,660	70.7	—	—	—	3,283.7	7,660
Frozen Corn	248	1,376	18	—	—	—	266	1,376
Total These Commodities	27,808	40,603	11,168.7	10,199.2	4,562	6,308	43,538.7	57,110.2
Total All Commodities	31,768	(*)	13,672.9	11,994.4	4,562	(*)	50,002.9	(*)

* N.A. indicates the information is not available in the record.

TABLE II—QUANTITY—CONTAINERS

		APL		Sea-Land			PCL		Total		
		20′	40′	20′	35′	40′	20′	40′	20′	35′	40′
Apples	'77	—	111	—	96	67	—	45	—	96	223
	'78	—	37	—	132	1	—	—	—	132	38
Wastepaper	'77	—	156	—	85	135	—	132	—	85	423
	'78	—	62	—	22	134	—	275	—	22	471
Onions	'77	—	5	—	—	42	—	—	—	—	7
	'78	—	11	—	—	49	—	—	—	—	60
Cattlehides	'77	—	223	—	4	—	—	—	—	4	223
	'78	77	164	—	7	—	—	—	77	7	164
Canned Corn	'77	—	115	—	5	1	—	—	—	5	116
	'78	—	5	—	1	—	—	—	—	1	5
Meat & Bone Meal	'77	—	213	—	12	—	—	—	—	5	116
	'78	—	178	—	—	—	—	—	—	1	5
Lumber	'77	—	327	—	3	—	—	—	—	3	327
	'78	—	951	—	28	18	—	—	—	28	969
Metal Scrap	'77	—	26	—	71	66	—	8	—	71	100
	'78	—	—	—	69	75	—	—	—	69	75
Dried Peas & Beans	'77	—	156	—	2	—	—	—	—	2	156
	'78	44	319	—	—	—	—	—	44	—	319
Frozen Corn	'77	—	12	—	1	—	—	—	—	1	12
	'78	—	67	—	—	—	—	—	—	—	67
Total These Commodities	'77	1,354	—	—	279	311	—	—	185	279	1,850
	'78	1,794	—	—	259	277	—	275	121	259	2,346

APPENDIX D
(Finding No. 89)

The facilities of the Seattle harbor include 16 modern terminals and 46 berths ranging from 350 to 1,000 feet in length with a MLLW depth ranging from 18 to 73 feet. There are over 1,066,000 square feet of transit shed space. In terms of container facilities, POS currently operates 11 berths with over 10,000 feet of berthage space and, with the completion of another terminal, Terminal 37, will have 14 containership berths, served by 17 container cranes. At present, nearly 300 acres at POS are committed to container facilities at a total initial investment cost of $150 million. (In comparison, in 1978 POP possessed facilities covering about 100 acres, approximately 5,000 continuous feet of container berths, and 7 container cranes.) POS owns 17 container cranes, 11 of 45-ton lifting capacity and six of 33-ton capacity. Additionally, there are eight Whirley cranes, five of which are 50-ton capacity, one of 45-ton capacity, and two of 35-ton capacity. There are two 25-ton mobile truck-mounted cranes and ten 45-ton container yard cranes. POS also has available one shearleg derrick, heavy-lift crane with a 200-ton lifting capacity. There are currently five container freight stations located at POS. There are seven public warehouse facilities available in the Seattle metropolitan area and two private container storage companies. There are six private packing, crating, and lashing service companies and three private enterprises which provide container repair services. The warehouse space available at Terminals 25 and 91 can accommodate over 290,000 cases of fresh fruit, and at Terminals 20 and 91 POS operates 275,000 cubic feet of transit freezer facilities. The chill facilities are used predominantly for apples, pears and a small percentage of cherries and citrus fruit. An additional 6,800,000 cubic feet of privately operated general purpose cold storage facilities are available on POS property as well. There are about 850 "plug-in" spaces available for "reefer" containers. POS has the largest amount of freeze and chill space in the Northwest and its reefer plug-in spaces exceed those of POP. The Terminal 106 complex includes 56.6 acres with a total space for warehouse/office buildings of 1,222,427 square feet. This area is used primarily for the short-term storage of container cargo destined for OCP (inland) territory. Eight acres at Terminal 102–W are allocated for the storage of empty containers. POS has a new export tracing system which enables exporters to track their cargo from points of inland origin to loading on the vessel at POS.

APPENDIX E

ADDITIONAL SAILINGS CONTRIBUTED BY[1] EQUALIZATION AND ABSORPTION

	Direct Service Via Portland	Substitute Service Via Seattle	
Destination	Total	Total	Increase (%)
Japan			
—Direct	12	8	67
Korea			
—Direct	0	3	(cannot be calculated arithmetically)
—Transshipped	7	8	114
Total (Korea)	7	11	157
Taiwan			
—Direct	6	5	83
—Transshipped	6	6	100
Total (Taiwan)	12	11	92
Hong Kong			
—Direct	13	7	54
—Transshipped	6	4	67
Total (Hong Kong)	19	11	58
Manila			
—Direct	8	0	0
—Transshipped	6	4	67
Total (Manila)	14	4	29
Bangkok			
—Direct	2	0	0
—Transshipped	1	6	600
Total (Bangkok)	3	6	200

[1] Ex. 139, Table 1.

APPENDIX F
CONTENTIONS OF THE PARTIES
A: POP
I: Opening Brief

Under *CONASA's* guidelines and the particular adoption of those guidelines to the practice of absorption of inland freight rates to divert local traffic from a port in *Dart,* it should be found that POP has assumed and carried the burden of proving that, by the practice of absorbing inland freight charges, respondents diverted cargo which originated from points within POP's naturally tributary territory, to its damage and prejudice, and that respondents failed to carry their burden of proving that the diversion under their practices is reasonable under the circumstances; the ten commodities which respondents diverted from Portland by equalization and absorption of inland freight rates all originated in a zone naturally tributary to POP; there is substantial harm to POP and Portland's SMSA arising from respondents' diversionary practices and respondents did not prove otherwise; respondents did not prove the existence of any operational difficulties precluding direct service; respondents did not prove the fairness of their diversionary practices; respondents have failed to prove the reasonableness of their practices through preference of customers for certain carriers; respondents did not prove that the port facilities or steamship service at POP were inadequate; respondents have failed to prove that POP provided inadequate steamship service; and that PWC's agreement and rules and practices violate the following Acts and declared policies of the Congress: sections 15, 16 and 17 of the Shipping Act, 1916, section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936.

II: Reply Brief

The concept of naturally tributary territory has not been abandoned; reasonableness is not shown by analysis of costs to serve POP; and existing precedent for decision has not and should not be abandoned.

B: HEARING COUNSEL

I: Opening Brief

PWC's equalization and absorption practices, as they affect POP, are not unlawful and detrimental to the commerce of the United States and the general public interest, or unduly prejudicial or unjustly discriminatory to POP or to business and individuals which depend on POP's economic viability pursuant to section 205 of the Merchant Marine Act, 1936, and sections 15, 16 and 17 of the Shipping Act, 1916; the equalization and absorption practices of the PWC do not cause cargo which would ordinarily move through the POP to move through ports other than POP; if the Commission determines that PWC carriers are diverting cargo away from POP, that diversion causes significant economic harm to the Port and the local economy of Portland; if the Commission determines that PWC carriers are diverting cargo away from POP and that diversion has caused substantial harm, the equalization and absorption practices of the PWC have not been shown to be reasonable and justified.

II: Reply Brief

Equalization and absorption as between ports may violate sections 16, First, and 17 of the Shipping Act, 1916; the Commission should not prohibit PWC equalization and absorption while allowing non-conference lines to equalize and absorb; PWC overstretched their arguments concerning competition; and the distinctions which respondents draw between the facts in *Dart* and those present here are not significant, but *Dart* does not compel a finding against respondents.

C: PWC

Equalization or absorption as between ports cannot violate sections 16, First, or 17 of the Shipping Act; cargo was not shown to be naturally tributary to POP; there was no diversion; there was no harm and therefore no significant harm; competitive considerations give PWC the right to equalize and absorb; POP's proposed relief would constitute severe flag discrimination; containership service patterns and elementary economics justify equalization and absorption; water feeder service is utterly uneconomic; adequacy of service must be shown by POP as part of POP's burden of proof that cargo is naturally tributary; and *Dart* does not overrule *CONASA*, but it is factually distinguishable from the present case.

D: POS

The Shipping Act has been interpreted to imply that a port has a right to "naturally tributary cargo"; that interpretation results from section 8 of the Merchant Marine Act, 1920; section 8 was not intended to build walls between ports, but rather to encourage the flow of commerce; the *CONASA* standard is based on a misinterpretation of section 8 and thus should be abandoned; containerization has rendered the concept of "naturally tributary" meaningless; the development and maintenance of POP does not "depend upon traffic from inland areas naturally tributary . . ." to the Port because POP is a large business enterprise with various functions and POP uses revenues from other business activities for the maintenance and development of marine facilities and POP does not depend on local cargoes for its maintenance and development; if guidelines must be applied, the *CONASA* guidelines are applicable; and the record shows the practices of the PWC are lawful under *CONASA* standard.

E: APL

Equalization or absorption as between ports cannot violate sections 16, First, or 17 of the Shipping Act; APL's absorption practices are valid under the *CONASA* guidelines; *Dart* and *CONASA* are compatible; there is no naturally tributary zone and POP has shown none; absorption practices are of long standing; shippers need substituted service; shipper preferences are relevant; the boundaries of a naturally tributary zone cannot be determined by inland freight costs alone; container transport is tributary to no port; the criteria of inadequacy of service is not among the *CONASA* standards; the substituted service practices are reasonable because APL cannot call at POP; APL must compete for cargo; shippers need it; and water feeder service feasibility evidence was not required to be addressed by APL in the absence of some showing by proponent or Hearing Counsel.

F: SEA-LAND

Neither equalization nor absorption as between ports can be found to violate sections 16, First, or 17; competitive conditions in the trade would make a finding of unlawfulness discriminatory; and that feeder service to POP is not feasible.

G: DELAWARE RIVER PORT AUTHORITY

POP should be protected against diversion of cargo because if it is not, other carriers will be encouraged to divert other cargo from other ports by the same means as those used by PWC.

H: THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

The doctrine of naturally tributary traffic should be abandoned as a rationale for invalidating carrier absorption and equalization practices and the sole inquiry in any case should be whether those practices are unduly preferential or unjustly discriminatory; and absorption or equalization of inland rates by an ocean carrier does not, standing alone, constitute undue prejudice, preference or unjust discrimination among ports.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–12

CERES GULF, INC.

v.

BATON ROUGE MARINE CONTRACTORS, INC., ET AL.

ORDER

May 25, 1984

By ruling served May 10, 1984, Administrative Law Judge Charles Morgan granted complainant's request to withdraw complaint and motion to dismiss with prejudice in this proceeding. The Commission's 30-day period to request review of this ruling, pursuant to 46 CFR 502.227, is currently scheduled to expire with June 11, 1984.

Complainant has now filed a motion to reduce the Commission's 30-day review period so as to permit Judge Morgan's ruling to become effective immediately. This immediate effectiveness is sought to hasten the dismissal of a court proceeding whose dismissal will become effective only after this Commission proceeding is dismissed with prejudice, and to expedite implementation of a terminal lease between complainant and the Port of New Orleans. Complainant states that respondent will not appeal Judge Morgan's ruling and concurs in complainant's motion.

Complainant has established just cause for the requested reduction of time in this instance. The subject proceeding is only in its initial stages, the motion is unopposed and granting it will facilitate resolution of the disputed issues without adversely affecting any party. Therefore, the Commission has determined to grant this motion and also has determined that it will not review Judge Morgan's May 10, 1984, ruling.

THEREFORE, IT IS ORDERED, that the motion of Ceres Gulf, Inc. to reduce time is granted; and

IT IS FURTHER ORDERED, that the May 10, 1984, ruling in this proceeding styled "Withdrawal of Complaint and Dismissal with Prejudice" has become administratively final.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–12

CERES GULF, INC.

v.

BATON ROUGE MARINE CONTRACTORS, INC., ET AL.

WITHDRAWAL OF COMPLAINT AND DISMISSAL WITH PREJUDICE

Finalized May 25, 1984

On May 4, 1984, the complainant submitted the withdrawal of its complaint in the above proceeding, and requested the dismissal of its complaint with prejudice.

The respondents do not oppose this withdrawal and motion to dismiss. There are no other parties to the proceeding.

On May 2, 1984, Judge Thomas A. Early, Jr., Civil District Court for the Parish of Orleans, State of Lousiana, Division A, in Case No. 84–3462, entitled *Baton Rouge Marine Contractors, Inc.* v. *The Board of Commissioners of the Port of New Orleans,* in which Ceres Gulf, Inc., had been admitted as a party intervener, issued an order providing:

> . . . that, upon the dismissal with prejudice and at its cost by intervener Ceres Gulf, Inc. of its complaint in the proceeding entitled "Ceres Gulf, Inc. v. Baton Rouge Marine Contractors, Inc., et al.", No. 84–12 on the docket of the Federal Maritime Commission, the petition herein of plaintiff Baton Rouge Marine Contractors, Inc. shall, without further action by this Court, be dismissed with prejudice and at plaintiff's cost. Also that, upon dismissal of the said FMC proceeding, Baton Rouge Marine Contractors, Inc., its officers, directors, shareholders, agents and employees be and they are directed not to oppose the implementation of the lease agreement between Ceres Gulf, Inc. and the Board of Commissioners of the Port of New Orleans pertaining to the Jourdan Road Terminal, Berths 4 and 5.

Based solely upon the terms of the said Court Order, the complainant now seeks withdrawal of its complaint and its dismissal with prejudice in No. 84–12.

Good cause appearing, the request to withdraw the complaint in No. 84–12 and motion to dismiss it with prejudice hereby are granted.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–2

AGREEMENT NO. 10293

DOCKET NO. 79–3

AGREEMENT NO. 10295

ORDER PARTIALLY ADOPTING INITIAL DECISION

May 30, 1984

These proceedings were initiated by separate Orders of Investigation and Hearing[1] to determine whether Agreement No. 10293, a space chartering agreement between Flota Mercante Grancolombiana S.A., (Flota) and Andino Chemical Shipping Company (Andino), in the United States Gulf/ Atlantic Coast of Colombia trade, and Agreement No. 10295, between Flota and Maritima Transligra S.A. (Transligra), a similar space chartering arrangement in the United States Gulf/Pacific Coast of Colombia trade[2] should be approved, disapproved, or modified pursuant to section 15, Shipping Act, 1916 (46 U.S.C. § 814).[3] The Orders of Investigation were subsequently amended to include two "private agreements" between Flota and Andino, and Flota and Transligra, supplementing the Agreements.[4]

On May 27, 1983, Administrative Law Judge Charles E. Morgan issued an Initial Decision (I.D.) finding that: (1) Andino, Transligra, and Flota (Proponents) are common carriers by water within the meaning of section 1 of the Shipping Act, 1916 (46 U.S.C. § 801), (2) the Agreements, including the "private agreements," had been implemented prior to Commission approval, and (3) the Agreements are now presently contrary to the public interest and detrimental to the commerce of the United States and should therefore be disapproved.[5] Exceptions to the Initial Decision and Replies to Exceptions were filed by the Commission's Bureau of Hearing Counsel,[6]

[1] Although these proceedings were not formally consolidated they were considered together at the parties' request. This Order addresses both proceedings.

[2] The space chartering authority in both agreements is limited to liquid bulk commodities, such as chemicals and fats.

[3] Agreement No. 10293 and Agreement No. 10295 are collectively referred to herein as "the Agreements".

[4] These "private agreements" were filed for approval on May 20, 1980, and designated as Agreement No. 10293 (Sub.-1) and Agreement No. 10295 (Sub.-1), respectively (hereinafter, the private agreements will be included in the term "the Agreements" unless otherwise specified). Notice of their filing in the *Federal Register* elicited no protest or comment.

[5] Although the Presiding Officer found that the Agreements had been implemented prior to the Commission's approval, he further found that the Agreements had been "in the public interest." (I.D. at 1, 75 & 76.)

[6] Hearing Counsel's Exceptions challenge only the finding that the Agreements were previously in the public interest (See Note 4, *supra.*)

Flota, Andino and Transligra. O.N.E. Shipping Company, Ltd., a party opposed to the Agreements, filed a Reply to Proponents' Exceptions.[7] The Commission heard oral argument.

BACKGROUND

This section summarizes the facts relevant to the disposition of the issues raised on exception. A more thorough factual exposition is set out in the Initial Decision, which we incorporate by reference.

Flota is a Colombian corporation that provides regular liner service for general cargo in Colombia's import and export trades. Flota does not own or operate any specially equipped parcel tankers designed for the carriage of liquid bulk cargoes.[8] On occasion, Flota carries liquid bulk cargoes in the deep tanks of its general cargo vessels. (Transcript (TR) at 419, 420, and 569; Exhibit (Ex.) 20, at 3.)

Andino charters and operates parcel tankers for the carriage of liquid bulk commodities. Andino uses these vessels to meet its obligations to Flota under Agreement No. 10293 and to provide liquid bulk service in its own name to other South American ports. Andino is a wholly-owned subsidiary of Holland Chemical International (HCI), a holding company that purchases chemicals and resells them to HCI-affiliated companies and other companies in South America. (Ex. 61 at 3, 9; Ex. 14, 18; Tr. at 486, 711–1712, 1713–1760.)

Transligra, an Ecuadorian company, is owned by HCI, Flota, and Ecuadorian interests. Transligra owns and charters parcel tankers for the carriage of liquid bulk commodities in the United States Gulf/Pacific Coast of Colombian trade. Transligra also offers liquid bulk service to other South American Pacific Coast ports. (Tr. at 427–433, 962, 1659, 1698.)

O.N.E. Shipping Company, Ltd. offers a liquid bulk service from the United States Gulf to Venezuela, Ecuador, and other Caribbean, Central and South American ports. O.N.E. also makes occasional calls to Colombian ports for liquid bulk commodities. O.N.E., which was established in 1973, is the successor of Overseas Liquid Gas, Inc., a liquid bulk carrier that began to serve the Colombian market in 1963. (Ex. 79 at 2; Ex. 85 at 3; and Tr. at 1062 and 1072.)

The Agreements provide that Andino and Transligra will make available to Flota the necessary space on vessels owned or operated by them in their respective trade areas. Flota agrees to commit itself to a service

[7] Esso Chemical Supply Co., Inc., Dow Chemical International of Delaware, and Shell Chemical Company, a Division of Shell Oil Company, were named Protestants in the Order of Investigation in Docket No. 79–2. However, these parties withdrew prior to the hearing.

On August 12, 1982, the Commission granted the Government of the Republic of Colombia leave to file an *amicus curiae* statement on "the operation of its [Colombia's maritime laws and the policy underlying them." (*See* Order of August 12, 1982.)

[8] Parcel tanker vessels generally contain several tanks that are lined with either epoxy or zinc, or are made of stainless steel. The tanks can be heated to facilitate discharge, and, with the exception of older vessels, each tank generally has its own pump.

frequency of 15 days in the Colombia Atlantic trade and to a 35-day service frequency in the Colombia Pacific trade. Flota fixes the freight rate to the shipper and contracts for the cargo, while Andino and Transligra quote the space charter hire to Flota.

Andino and Transligra also signed individual so-called "private agreements" with Flota that supplement their basic Agreements. These "private agreements" provide that the shippers will be issued Flota's bills of lading, that Flota will canvass and contract in Colombia for the movement of bulk liquid cargo, that Andino/Transligra will be the sole coordinator of all shipments originating in the United States Gulf, that Andino/Transligra will take responsibility for the freight in accordance with the Tanker Bills of Lading or other contracts, and that Andino/Transligra will supply Flota with itineraries for "regular shipments" and establish the space charter hire for various liquid bulk commodities.[9]

DISCUSSION

The Exceptions[10] and Replies to Exceptions raise two major issues:

(1) Whether Andino and Transligra act as common carriers by water within the meaning of section 1, Shipping Act, 1916 by carrying liquid bulk commodities in the United States/Colombian trades pursuant to their arrangements with Flota? If so,

(2) Should Andino's and Transligra's respective arrangements with Flota be approved, disapproved, or modified pursuant to section 15, Shipping Act, 1916?

Jurisdiction

Proponents except to the Presiding Officer's common carrier finding. They argue that the Agreements are essentially arrangements between a vessel owner and a charterer wherein the owner furnishes the vessel and the charterer attends to all details in connection with obtaining cargo, issuing bills of lading and collecting freight. Proponents maintain that Andino and Transligra themselves lack any of the characteristics that are generally attributable to common carriers by water. They point out that Andino and Transligra do not offer or advertise a regular service for the carriage of bulk liquid commodities in the trade between the United States Gulf and

[9] The Agreements are successors to a 1973 arrangement between Flota and Andino. The 1973 arrangement established a space chartering arrangement for the transportation of liquid bulk commodities between the United States Gulf Coast and the Atlantic and Pacific Coast of Colombia. (Ex. 26, 27; I.D. at 10).

[10] Andino and Flota, without explanation, seek to have their Exceptions afforded confidential treatment. Andino likewise labels its Reply to Exceptions as confidential. These pleadings for the most part, contain arguments of counsel without direct reference to the confidential business data included within the Presiding Officer's Confidentiality Order. (Order of Confidentiality, served June 22, 1981). Legal argument is not entitled to confidential treatment under the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.167 (1983). Accordingly, the requests for confidential treatment are therefore denied. The pleadings for which confidentiality was sought will be included in the public docket book, but the Commission Secretary is directed to sanitize the few pages that refer directly to sensitive business data.

Colombia.[11] Andino and Transligra have allegedly agreed only to offer Flota, their sole Colombian customer, space on their vessels for the carriage of liquid bulk commodities.[12] Proponents point out that since 1973 they have not carried any commodity in the Colombia trades for their own account but rather only have carried cargo in the trade pursuant to the Agreements with Flota. Accordingly, the Commission is urged to reverse the Presiding Officer's jurisdictional finding.

The Commission finds that the Presiding Officer properly decided the jurisdictional issue. Section 1 of the Shipping Act, 1916 defines a common carrier by water in the foreign commerce of the United States as a:

> . . . common carrier . . . running on regular routes, engaged in the transportation by water of passengers or property between the United States . . . and a foreign country in the import or export trade. . . .

The Commission has determined that the common carrier described in section 1 is one that:

> . . . holds himself out to accept goods from whomever offered to the extent of his ability to carry. *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 62 (1965) (*Containerships*).

It is not necessary, however, for a carrier to hold himself out to transport *all* commodities for *all* shippers. A line may be a common carrier of certain commodities as long as it is willing to carry those commodities for all who wish to ship with them. Other indicia of common carrier status are regularity of service, solicitation of cargo, advertised sailings, issuance of bills of lading, responsibility of the carrier toward the cargo, establishment of rates and charges, and the number of shippers served per voyage. *Containerships, supra.* The absence of one or more of these factors does not, however, negate common carrier status. As the Commission explained in *Puget Sound Tug and Barge* v. *Foss Launch and Tug Co.*, 7 F.M.C. 43, 48 (1962), the term common carrier is not a rigid and unyielding dictionary definition but rather a flexible regulatory concept.[13]

When this "regulatory concept" is applied to the facts presented here, there can be little, if any, doubt that the parties to the Agreements are

[11] Andino and Transligra do not dispute that they carry bulk liquid commodities under their own bills of lading from U.S. Gulf Coast ports to countries adjacent to Colombia.

[12] The Agreements commit Andino and Transligra to provide Flota with all its space requirements. (Exs. 2, 2A, 28 and 29.)

[13] The facts in *Puget Sound* are nearly identical to those present in these proceedings. In *Puget Sound*, Foss, a contract barge operator, entered into an arrangement with Northland for the transportation of cargoes between Alaska and Washington. Northland, a non-vessel operating common carrier (NVOCC), did not own or have an interest in the cargo but rather solicited it from the general shipping public which received a Northland bill of lading. The goods tendered by Northland were towed by Foss in the same tow as its contract cargo. The Commission rejected Foss' claim that it was not a common carrier with regard to the cargo tendered by Northland. *See infra*, at 9–13.

acting as common carriers by water with regard to liquid bulk commodities in the United States Gulf/Colombia trades. Andino and Transligra take responsibility for the cargo and its transportation, provide the ship, control the loading and navigation, publish sailing schedules in conjunction with Flota, provide regular service at regular intervals from the United States Gulf to Colombia, and in general serve the entire shipping public in the trade.[14]

Some of the evidence disputing Proponents' arguments to the contrary is contained in Exhibits 30 through 40 and Exhibit 76. These documents, which are captioned, respectively "Sailing Schedule and Fleet Information" (Ex. 30–40) and "Weekly Vessel Position Schedule" (Ex. 76) are regularly published and distributed to the liquid bulk shipping public at large. They clearly indicate that Flota, Andino and Transligra are *offering* regular liquid bulk service. For example, Exhibit 37, dated February, 1977, describes a regular service of approximately 15 days frequency from the United States Gulf to Colombia or Venezuela with a range of loading dates for each voyage.

The record indicates further that Andino and Transligra are in fact carrying cargoes belonging to more than one shipper per voyage.[15] Although the cargo is carried for Flota's account pursuant to Andino's and Transligra's respective arrangements with Flota, the individual parcels are actually owned by the manufacturer or purchaser of the liquid bulk commodity. These cargo interests must, because of the restrictions of Colombia's cargo preference laws,[16] book their shipments with Flota, which in turn has prearranged with Andino and Transligra for the ocean transportation to Colombia. Because Colombian law prevents the actual shipper from negotiating freely for ocean transportation, the Commission believes it particularly inappropriate to view Flota as an ordinary shipper vis-a-vis Andino and Transligra, as Proponents argue. On the contrary, the Commission believes that the common carrier responsibilities that Flota has assumed should be imputed to Transligra and Andino who actually provide the ocean transportation and are ultimately responsible for cargo losses.[17]

As the Commission explained in *Puget Sound:*

> [W]here, as here, the holding out to carry cargo for the public is *indirect,* this holding out will nevertheless be attributed to the [actual] carrier, and considered to bring it within the scope of

[14] I.D. at 69; Ex. 2, 28; *See also* Confidential Ex. 2B, 29. Confidential Exhibits 2B and 29 are the "private agreements". Because they are part of the Agreements which have been found subject to the Shipping Act, 1916 these "private agreements" must be made available to the public pursuant to 46 C.F.R. Part 503 (1983).

[15] Andino and Transligra also appear to carry Venezuelan and Ecuadorian cargoes respectively on their voyages from the United States Gulf to Colombia. (Ex. 119, Tr. at 998.)

[16] The Colombian cargo preference laws require that at least the first 50% of a shipment be transported by a Colombian-flag vessel. (Exs. 3, 4, 20, 41; Tr. at 45, 404, 406; I.D. at 10–12, 28–32.) Because liquid bulk commodities in the Colombian trades are shipped in small lots, it is not efficient to divide a shipment among two or more lines.

[17] Flota pays cargo claims for Andino's and Transligra's account after obtaining their approval of the claim. (Ex. 2B, Article 11; Ex. 29, Article 8).

> the ancient phrase saying that a common carrier is a carrier "*which holds itself*" out as *willing to carry for the public.* [T]he Supreme Court has held that common carrier status cannot be avoided by the device of acting as *agent* for a common carrier. Where . . . the service is essentially the carriage of cargo for the general public; *it is nonetheless common carriage* because the [actual] carrier adopts a device . . . to make it appear that the vessels are serving one shipper, whereas they actually are serving many.
> 7 F.M.C. at 48. (Emphasis in original, citations omitted).[18]

The rationale expressed in *Puget Sound,* has been followed by the Interstate Commerce Commission in *Transamerica Freight Line, Inc.—Petition For Declaratory Order,* 335 I.C.C. 46 (1969), *aff'd sub nom. Locust Cartaqe Company* v. *Transamerica Freight Lines, Inc.,* 430 F.2d 334 (lst Cir. 1970). In *Transamerica,* the ICC determined that a motor common carrier, acting as an agent for another common carrier, does not lose its status, nor can it avoid its common carrier obligations, by virtue of its agency arrangement with that other carrier.

Transamerica had an arrangement with Locust Cartage Co.[19] which required Locust to perform certain transportation services on Transamerica's behalf. Transamerica solicited the cargoes, collected the freight, and issued its own bill of lading to the shippers, but tendered the cargo to Locust for delivery. Transamerica paid Locust a fixed fee for its transportation services. The court affirmed the ICC's finding that Locust was a common carrier vis-a-vis Transamerica. In so doing, the court agreed with the ICC that Locust's independent "control" of the handling and the routing of the cargo, its overall "responsibility" for safe delivery, as well as the carriage of other shippers' cargoes on the same truck supported the Commission's finding that Locust was a common carrier in its relationship with Transamerica.

Andino and Transligra, like Locust Cartage, serve more than one shipper per voyage, control the routing, manning and operation of their vessels, and assume through their respective agreements the ultimate financial responsibility for any shipper claims against Flota. In addition, as noted above, Andino and Transligra hold themselves out to the public by publishing and distributing their sailing schedules to liquid bulk shippers and brokers. All of these factors support the Presiding Officer's finding that both are common carriers by water within the meaning of section 1 of the Act.

This finding is not undermined, as Proponents argue, by the fact that the Agreements do not require Flota to share its freight receipts with

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[18] *See also Agreement No. 9597 Between Flota Mercante Gran Centroamericana S.A., Continental Lines, S.A. and Jan C. Uiterwyk Co.,* 12 F.M.C. 87, 1968.

[19] Locust did not have operating authority as a common carrier when it originally entered into its arrangement with Transamerica. Locust subsequently purchased common carrier operating authority from another carrier.

Andino and Transligra.[20] The *Transamerica* decision makes clear that a division of fees is not determinative of common carrier status. The parties there were held to be common carriers even though Locust Cartage was being paid a fixed fee, as are Andino and Transligra, for its transportation services. While the fee splitting arrangement in *Puget Sound* was a factor which the Commission considered, the Commission's jurisdictional finding there was not premised on the fee arrangement. The Commission found the underlying vessel operator in *Puget Sound* to be a common carrier because it was holding itself out, albeit indirectly, to carry cargoes for the general shipping public. *Puget Sound, supra* at 48. There is nothing in the *Puget Sound* decision to suggest that the Commission's holding turned on the fee splitting provision. The absence of a fee sharing provision here does not therefore mandate a different result. Accordingly Proponents' exceptions are denied and the Commission adopts, with the explanation provided above, the Presiding Officer's jurisdictional finding.[21]

Merits of Agreements Nos. 10293 and 10295

Should jurisdiction be found, Proponents urge the Agreements' approval.[22] Proponents take exception to the finding that the Agreements, in combination with Colombia's preference laws, have resulted in a monopoly in the trade, to the exclusion of other carriers, and that this monopoly has caused Colombian freight rates to be higher than the rates for comparable transportation to countries adjacent to Colombia. First, Proponents point out that Colombia's preference laws restrict only the shipment of the first fifty percent of a consignment; shippers are free to offer, and other carriers are free to carry, the remaining fifty percent of a consignment. They also note that Colombian law allows waivers from its cargo reservation requirements when a Colombian-flag vessel is unable to lift the cargo or when the Colombian-flag freight rate is not competitive.

Proponents argue further that the parcel carriers which had operated in the trade prior to 1973, Stolt Nielsen, Vee Marine, O.N.E., and A.S. Rederiet Odfjell, were no longer interested in serving the trade for commercial or operational reasons. Proponents allege that these parties are only interested in serving the trade on a spot basis because of other commitments and the limited draft that is available in some Colombian ports.[23]

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[20] Proponents argue that because Flota sets and collects for itself the freight rate to the underlying shipper, the Presiding Officer should not have applied the rationale expressed in *Puget Sound Tug & Barge* v. *Foss Launch and Tug Company*, 7 F.M.C. 43 (1962).

[21] This determination also disposes of Proponents' argument on exception that the Presiding Officer erred in finding that the Agreements had been implemented prior to approval because the Commission has no jurisdiction over the Agreements.

[22] Proponents also except to the Presiding Officer's finding that the Agreements are cooperative working arrangements within the meaning of section 15. They argue that the Agreements do not obligate Flota to charter space on their vessels. The Agreements, they contend, merely offer Flota the right to charter space if Flota is satisfied with the cost of the charter hire. We disagree. The Agreements clearly provide for a cooperative working arrangement between two common carriers by water by allocating, *inter alia*, Flota's service between the Atlantic and Pacific Coasts, coordinating sailing, and committing cargo space to Flota.

[23] See Flota's Exceptions at 32; Exs. 96, 99.

Proponents also contend that the Agreements have not resulted in higher freight rates. They point out that the trade is essentially a "drug store trade" where the shipments are in smaller lots. These small shipments allegedly do not qualify for the lower rates that are available to volume shippers under contracts of affreightment. As a result, Proponents explain that Flota generally offers rates on a per shipment basis which are higher than the rates available to high volume shippers in adjacent trades under contracts of affreightment. Proponents state that if their rates are not competitive, shippers could take advantage of lower rates offered by other carriers by seeking a waiver from Colombia's cargo preference laws.

Proponents believe that the Agreements are in the public interest and should be approved. Proponents explain that prior to 1973 the liquid bulk trade between the United States and Colombia was served sporadically by tramp carriers. Since that time Flota, through its arrangements with Andino, and subsequently Transligra, has allegedly provided regular efficient service which has resulted in a significant increase in the movement of liquid bulk commodities between the United States and Colombia. Moreover, the Agreements are said to be in the public interest because they avoid international conflict between United States and Colombian law and therefore should be approved under the rationale expressed in *Agreement No. 10066—Cooperative Working Arrangement*, 21 F.M.C. 462 (1978).

Finally, Proponents argue that Hearing Counsel has failed to prove that the Agreements are *per se* violative of the antitrust laws or otherwise have significant anticompetitive effects so as to trigger the *Svenska* doctrine.[24] They therefore, submit that Hearing Counsel had the burden of establishing and proving a basis for the Agreements' disapproval. Proponents conclude that they have failed to do so.

The Commission finds that the Presiding Officer's disapproval of the Agreements is supportable both in law and fact.[25] Section 15 requires the Commission to:

> . . . disapprove, cancel, or modify any agreement, . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this

[24] 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.

[25] We do not, however, adopt the Presiding Officer's finding that the Agreements were previously in the public interest. Section 15 makes clear that an agreement is not lawful unless it has been approved by the Commission. An unlawful agreement cannot, therefore, be in the public interest within the meaning of section 15. Accordingly, we will grant Hearing Counsel's exception and vacate the Presiding Officer's finding to the contrary.

> Act, . . . and approve all other agreements, modifications, or cancellations.

Agreements that are *per se* violative of the antitrust laws or which have been shown to have significant anticompetitive effects must be disapproved under the standards of section 15 unless the agreements' proponents demonstrate that the agreements are required by serious transportation needs, necessary to secure important public benefits or serve valid regulatory purposes. The burden is on the proponents of such agreements to come forward with the supporting evidence.[26]

The Commission agrees with the Presiding Officer that the Agreements have significant anticompetitive effects and, as a result, are not only contrary to the public interest but also detrimental to the commerce of the United States. The Presiding Officer also correctly found that Proponents have failed to demonstrate any benefits flowing from the Agreements that outweigh these adverse consequences.

Because the Agreements, or their predecessor, have been implemented since 1973, the Commission need not speculate about their effect. The impact of these Agreements on the United States/Colombian liquid bulk trade was fully developed on the record in these proceedings. That record clearly establishes that the implementation of these Agreements under the restrictive umbrella of Colombia's cargo preference system has resulted in a restraint of trade that has led to Flota's near monopolization of the United States/Colombia liquid bulk market.[27]

Prior to the application of Colombia's preference laws to the liquid bulk trade, and Flota's 1973 arrangement with Andino, at least four other carriers, including Andino, served the United States Gulf/Colombian market. These carriers all withdrew after Flota executed its first agreement with Andino. Although Proponents argue that these withdrawals were by choice and for commercial reasons, the record suggests that the reservation laws and the Agreements were a major consideration. First, the record establishes that at least 50% of the trade is reserved to Colombian-flag vessels and that it is inefficient to divide the small lots that are characteristic in the trade. Second, the record demonstrates that these factors enabled the Flota-Andino-Transligra service to capture 83% of the market in 1977, the first full year the Agreements were implemented.[28] Andino admitted that without its chartering arrangement it "could not move reserved cargo on its own behalf in this trade."[29] In addition, although Flota's arrangements are characterized by Proponents as being non-exclusive, Flota with very few excep-

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[26] *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *United States Lines* v. *Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978); *Agreement No. 10066—Cooperative Working Arrangement*, 21 F.M.C. 462 (1978).

[27] The Sherman Antitrust Act, 15 U.S.C. 1 makes "[e]very contract, combination in the form of trust . . . in restraint of trade, or commerce among the several states or with foreign nations . . . illegal."

[28] The record indicates a market share of 83% in 1977, 78% in 1978, and 89% in 1979, the most recent years for which statistics are available. (Ex. 148, Table 1; Ex. 168.)

[29] Andino's Exceptions, at 43, 55.

tions, has shipped exclusively with Andino and Transligra. The anticompetitive nature of these Agreements under the Colombian cargo reservation scheme is further evidenced by Andino's and Transligra's unwillingness or inability to independently solicit and carry Colombian cargoes for their own account in the space that is not committed to Flota. In short, the substantial market power exercised by Flota gives it, as well as Transligra and Andino the leverage to induce, if not compel, shippers to give them preference, to the exclusion of other competitors, in the transportation of liquid bulk commodities.[30] Although there is a procedure for obtaining waivers from the effects of Colombia's cargo reservation laws, that procedure has not prevented the Flota service from dominating the trade insofar as the carriage of liquid bulk commodities are concerned.

This restraint on competition also appears to have artificially increased transportation rates in the trade to the detriment of the commerce of the United States. Liquid bulk commodities destined for South America generally move under contracts of affreightment. These contracts, which are offered by the carriers that serve countries adjacent to Colombia, generally provide a lower rate than the spot rates that Flota offers its shippers.[31] Because the carriers that provide liquid bulk service to other South American trades cannot freely compete in the Colombian trade, shippers which move similar liquid bulk commodities to South America have higher transportation costs for their cargoes destined for Colombia. This results from the shippers' inability to use a contract rate to move the same product from the United States Gulf to Colombia and other South American countries on the same movement.[32] For instance, Shell, which in 1980 had a contract of affreightment with a carrier to move certain liquid bulk chemicals from the United States Gulf to Venezuela, paid Flota a much higher amount for moving the same commodity to Colombia, which is closer than Venezuela to the Gulf.

Proponents have argued that the adverse consequences flowing from the Agreements are justified by the Commission's "international harmony" policy[33] and evidence of increased cargo tonnage and service regularity. This argument is without merit. First, the Commission's international harmony policy would not appear to apply here. That policy has only been applied to agreements that ameliorate the restrictive features of cargo pref-

[30] *See Northern Pacific Railway Co., et al.* v. *United States*, 356 U.S. 1 (1957); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3rd Cir. 1975).

[31] Ex. 149.

[32] Shell, Dow, and Esso which ship liquid bulk commodities to Colombia also ship the same or similar commodities to other South American countries.

[33] Agreement No. 9939–1—Modification and Extension of a Pooling, Sailing and Equal Access Agreement, 21 F.M.C. 702, 18 S.R.R. 1623 (1979); *Agreement No. 9932—Equal Access to Government Controlled Cargo and Interim Cooperative Working Arrangement*, 16 F.M.C. 293 (1973); *Agreement Nos. 10386, as Amended and 10382, as Amended—Cargo Revenue Pooling/Equal Access Agreements in the United States/Argentine Trade*, 24 F.M.C. 660 (1982); *Agreements Nos. 10349 and 10346—Cargo Revenue Pooling Agreements in the United States/Argentine Trade*, 21 F.M.C. 1100 (1979); *Agreement Nos. 9847 and 9848—Revenue Pools, U.S. Brazil Trade*, 14 F.M.C. 149 (1970); *Malpractices—Brazil/United States Trade*, 15 F.M.C. 55 (1970).

erence laws by granting carriers equal access to government reserved cargo. The Agreements do not provide for Andino's or Transligra's equal access to liquid bulk cargoes reserved by Colombian law, nor do these parties independently compete for such cargoes. In fact, because Andino discontinued its independent Colombian service when Flota entered the trade, the Agreements appear to restrict Andino's ability to compete or have access to reserved commodities.

Secondly, there is no support in the record for Proponents' argument that the Agreements' disapproval would frustrate the intent of the sovereign state of Colombia by preventing Flota from providing a Colombian-flag liquid bulk service. Clearly, disapproval would not preclude Flota from making *ad hoc* arrangements with any carrier or vessel owner desiring to compete for Flota's cargo.

Finally, while the evidence does indicate that cargo tonnages have increased since the Agreements were first implemented, this increase cannot clearly and solely be attributed to the Agreements' operation. Economic progress and industrial growth would appear to be responsible for at least some of the increase. The Commission therefore believes that Proponents have failed to demonstrate a sufficient nexus between the increased cargo tonnages and the Agreements to justify their approval given the anticompetitive effects flowing from the Agreements under Colombian law.

THEREFORE, IT IS ORDERED, That the Initial Decision served in these proceedings is adopted except to the extent indicated above, and,

IT IS FURTHER ORDERED, That Andino's and Transligra's Exceptions are denied, and,

IT IS FURTHER ORDERED, That Hearing Counsel's Exception is granted, and,

IT IS FURTHER ORDERED, That Agreement Nos. 10293 and 10295 as supplemented by their respective "private agreements" are disapproved pursuant to section 15 of the Shipping Act, 1916, and,

IT IS FURTHER ORDERED, That Flota, Andino and Transligra shall, within 30 days of the date of this Order, cease and desist implementing Agreement Nos. 10293 and 10295 as supplemented by their respective "private agreements";[34] and,

[34] To avoid the disruption to shippers and the trade that the abrupt cessation of the service provided for by these Agreements might occasion, the Commission is allowing the parties 30 days to fulfill existing transportation obligations and wind down their operations.

FINALLY, IT IS ORDERED, That these proceedings are discontinued.

(S) FRANCIS C. HURNEY
Secretary

By the Commission.*

Commissioner Moakley, dissenting.

I do not concur with the majority's conclusion that Agreements No. 10293 and No. 10295 are subject to our jurisdiction under section 15 of the Shipping Act 1916, because I cannot find that Andino and Transligra are operating as common carriers in this trade.

The facts that I rely upon in arriving at this position are as follows:

1. Andino and Transligra hold themselves out to no one except Flota in the Colombian trade;
2. Flota alone issues the bills of lading to shippers;
3. Flota alone establishes the rates paid by shippers;
4. Flota alone solicits the cargo from shippers in the Colombian trade; [1] and
5. Andino and Transligra are paid in accordance with their contractual arrangements with Flota. The freight revenues collected by Flota are not shared.

Under this set of facts, it seems clear to me that Flota is the only common carrier to be found in these arrangements. Andino and Transligra are contracting their services solely to Flota and do not hold themselves out to perform services for the general public in the Colombian trade.

This conclusion requires the perception of the Colombian trade as separate and legally distinct from other South American Trades. Otherwise, the apparent status of Andino and Transligra as common carriers in trades between the United States and other South American countries would require finding that they are common carriers for the purpose of these agreements.

The Commission and the industry have traditionally viewed each South American country as a separate trade destination and there doesn't appear to be anything in this record that would warrant a departure from that approach. Colombia, like most South American nations, has its own, unique set of cargo preference laws and its own national flag carrier who is the primary beneficiary of those laws. Equal access and/or pooling agreements exist in most of these trades, which tend to reenforce the distinctions established by the various cargo preference laws. There are even separate

* Commissioner Thomas F. Moakley's dissenting opinion is attached.

[1] The record does contain joint advertisements by Flota and Andino and Transligra of the sailing schedules of the relevant bulk vessels in this trade but these sailing schedules apply to other South American trades also, where Andino and Transligra are dealing directly with the shipping public. It is clear that liquid bulk shippers in the Colombian trade must tender their cargo only to Flota.

government-to-government agreements relating to the carriage of bilateral cargo in two of the South American trades.[2]

These distinct laws and related government and commercial agreements combine to establish different sets of rules for trade with each South American country which tend to prevent a carrier from freely moving from one trade to another. The record in this case supports the conclusion that Colombia is no exception to this rule. For these reasons, I would continue to treat the Colombian trade separately from other South American trades and would not stretch the long arm of regulation to impute any common carrier status that Andino or Transligra may have in other trades to their liquid bulk activities in the Colombian trade.

Without jurisdiction over Andino and Transligra, there is no jurisdiction over the agreements under investigation here. I would therefore discontinue these proceedings for lack of jurisdiction.

[2] Argentina and Brazil.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–2

AGREEMENT NO. 10293

DOCKET NO. 79–3

AGREEMENT NO. 10295

Found, (1) that Flota Mercante Grancolombiana, S.A., Andino Chemical Shipping Co., Inc., and Maritima Transligra, S.A., are common carriers by water subject to section 15 of the Shipping Act; (2) that Agreement Nos. 10293 and 10293 Sub-1 are the complete agreement of Flota and Andino; that Agreements Nos. 10295 and 10295 Sub-1 are the complete agreement of Flota and Transligra; and that these four agreements were implemented without Commission approval; (3) that these agreements are unlawful, not in the past, but for the present and the future, under section 15 of the Shipping Act, because they are cooperative working arrangements which control, regulate, prevent and destroy competition in the two trades herein (U.S. Gulf/Atlantic Colombia; and U.S. Gulf/Pacific Colombia), because these agreements operate to the detriment of the commerce of the United States, and because these agreements are contrary to the public interest; and (4) that the proponents of these agreements have failed to demonstrate that the benefits of these agreements outweigh their anticompetitive consequences.

Agreements disapproved.

Renato C. Giallorenzi for proponents Flota Mercante Grancolombiana, S.A., in No. 79–2; and for proponents Maritima Transligra, S.A., and Flota Mercante Grancolombiana, S.A., in No. 79–3.

Zachary B. Schwal, Myra Platt and *Neal R. Platt* for proponent Andino Chemical Shipping Co., Inc., in No. 79–2.

Caspar F. Ewig for intervener O.N.E. Shipping, Ltd.

Laurence G. Cohen for protestant Esso Chemical Supply Company, Inc.

Pedro A. Freyre for protestant Dow Chemical International, Inc., of Delaware.

Alan M. Grimaldi for protestant Shell Chemical Company, a division of Shell Oil Company.

Edward Schmeltzer and *George Weiner* for the Government of the Republic of Colombia, as *amicus curiae.*

John Robert Ewers, Joseph B. Slunt and *Deana E. Rose* as Hearing Counsel.

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

Partially adopted May 30, 1984

THE ISSUES AND ORDERS OF INVESTIGATION

The subject two proceedings are concerned with agreements establishing space chartering arrangements for the transportation of liquid bulk cargoes in two trades, one trade between the United States Gulf ports and ports of Colombia on the Atlantic coast of Colombia (Atlantic trade or A trade), and the other trade between the United States Gulf ports and ports of Colombia on the Pacific coast of Colombia (Pacific trade or P trade). Transit through the Panama Canal is necessary in the P trade.

The space chartering arrangements are between Flota Mercante Grancolombiana (Flota or Granco), a non-vessel operating common carrier in these two trades, on the one hand, and on the other, vessel operating common carriers, Andino Chemical Shipping Co., Inc. (Andino), in the A trade, and Maritime Transligra, S.A. (Transligra), in the P trade.

Briefly under the agreements in issue Flota offers regular services in the two trades, solicits cargoes from any shipper or consignee, and issues the bills of lading in its name. Andino and Transligra provide the ships, crews, control the navigation, and charter parts of their ships' spaces to Flota. Andino and Transligra attempt to fill out, or succeed in filling out, the rest of their ships' spaces not chartered to Flota, by soliciting and carrying liquid bulk cargoes destined to non-Colombian ports.

At the agreement of, and for the convenience of, the parties, these two proceedings were heard together. Docket No. 79–2 concerns the A trade; Docket No. 79–3 concerns the P trade. Principal Colombian ports are Barranquilla and Cartagena in the A trade, and Buenaventura in the P trade.

The two original orders served January 4, 1979, placed under investigation Agreement No. 10293 (A trade) and Agreement No. 10295 (P trade), so-called "Public Agreements."

Two subsequent orders of the Commission, both served September 26, 1980, amended the original orders to include the two so-called "Private Agreements," i.e., Agreement No. 10293 Sub-1 in the A trade, and Agreement No. 10295 Sub-1 in the P trade, respectively, Docket Nos. 79–2 and 79–3.

The original "public" agreements, both dated and signed December 22, 1976, were filed with the Commission in April 1977 (No. 10293—April 4, 1977; and No. 10295—April 25, 1977).

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

The above two "Private Agreements" were filed with the Commission on May 20, 1980. These two private agreements were produced as a result of the discovery process relative to the original orders of investigation.

Agreement No. 10293 Sub-1, the "Private Agreement" between Flota and Andino signed on December 22, 1976, incorporates certain annexes and addendums thereto. Included as addendum No. 2 is a reference to an agreement between these parties signed February 16, 1973.

This 1973 agreement between Flota and Andino covered the trade between the U.S. Gulf ports and *all* Colombian ports, both Atlantic and Pacific. As in the case of the 1976 agreements, also in 1973 there were both a public and a "Private" agreement of the same date.

In other words, by the 1973 agreements Flota chartered space on Andino's ships both in the A and P trades. But, by the 1976 agreements here in issue Andino's operations were reduced to the A trade only, as of January 1, 1977. This was a consequence of the agreement of Flota with Transligra for Transligra's operation in the P trade, beginning in 1977.

Generally, the respondents have produced numerous statistics referring to the 10293 trade (A trade) and to the 10295 trade (P trade), but the captions on these statistics sometimes are not literally true, insofar as they refer to the years 1973, 1974 and 1975, because Agreement Nos. 10293 and 10295 were not filed and numbered until April, 1977. For example, Exhibit No. 168, Table O, page 18, lists the years 1974, 1975, and 1976, but the freight revenues collected for those years covered both the A and P trades in total. For the years 1977, 1978, 1979, and 1980, the freight revenues collected for these years are for the A trade only.

All tonnage figures set out in this decision are *metric* tons.

To recap, by the combination of the original orders served on January 4, 1979, and the amended orders served on September 26, 1980, the Commission instituted these two investigations, pursuant to sections 15 and 22 of the Shipping Act, 1916 (the Act), to determine whether, in No. 79–2, Agreement No. 10293 and Agreement No. 10293 Sub-1, and, in No. 79–3, Agreement No. 10295 and Agreement No. 10295 Sub-1, shall be approved, disapproved, or modified, under the provisions of section 15 of the Act.

COMMODITIES CARRIED IN THE TRADES

Liquid bulk cargoes in the two trades herein consist of two general categories, one category being chemicals, and the other category being vegetable oils and animal fats.

Major commodities carried in the trade to and from Colombian Atlantic coast ports have included vegetable oils and fats (such as soybean oil, cottonseed oil, fish oil, hog greases, lard, tallow and pig fat), and chemicals (such as phosphoric acid, styrene, caustic soda, vinyl acetate monomer and monoethylene glycol).

Major commodities in the trade to and from Colombian Pacific coast ports have included vegetable oils, animal fats, caustic soda, methanol and vinyl acetate monomer.

Specially equipped parcel tankers generally are required to handle these chemicals, and fats and oils.

Most of the liquid bulk cargoes in the trades herein are carried southbound from U.S. Gulf ports to Colombian ports. The agreements in issue also cover backhaul, or northbound movements, from Colombian ports to U.S. Gulf ports. Since 1971, the backhaul movement peaked in 1973 with 44,331 tons, and steadily declined until 1979 with 2,681 tons. Over 90 percent of the backhaul tonnage carried since 1971 was loaded in Barranquilla, with the rest loaded in Cartagena. Aromatics accounted for about 92 percent of the backhaul tonnage from 1971 to 1979, and the backhaul dwindled to practically zero when local Colombian consumption could absorb the aromatics. Presently from the West Coast of Colombia, the Flota/Transligra service backhauls some molasses.

The record statistics, and this decision, relate primarily to the southbound trade to Colombia.

TARIFFS NOT REQUIRED FOR THESE TRADES

Section 18(b)(1) of the Act provides for the filing of tariffs of rates and charges of common carriers by water in the foreign commerce. This section provides, in part, that "*this section shall not be applicable to cargo* loaded and carried *in bulk* without mark or count." Thus, the liquid *bulk* carriers in this trade are not required to file tariffs.

TWO METHODS OF SETTING FREIGHT CHARGES

In practice, there are two methods of setting freight charges in these trades. One, there are long-term (usually one-year) contracts of affreightment (c.o.a.'s) entered into between the carrier and a Colombian importer; and two, there are published freight rates, which may be used for single shipments or otherwise.

The parties stipulated that, "Rates under contracts of affreightment are usually lower than the published rates of Flota Mercante Grancolombiana."

THE AGREEMENTS

Agreements Nos. 10293 and Sub-1 in No. 79–2 provide for the establishment of a space chartering arrangement for the transportation of liquid bulk cargo in the A trade, whereby Andino would provide Flota with the necessary space on vessels owned or operated by Andino.

The *issues in No. 79–2* include whether Agreements 10293 and Sub-1 should be approved, disapproved, or modified, whether section 15 of the Act has been violated by the implementation of an unapproved agreement or agreements, whether the "Private Agreement," No. 10293 Sub-1, represents the true agreement of the parties, and whether Agreement No. 10293 represents the complete agreement.

An order served February 1, 1980, issued in response to the motion of Hearing Counsel, provided for the addition of certain of the above issues to the proceeding in No. 79–2. A similar order in No. 79–3 also similarly expanded the issues in that proceeding.

The agreements in No. 79–3 are similar to those in No. 79–2, except that *Agreements Nos. 10295 and Sub-1* in No. 79–3 provide for the establishment of a space chartering arrangement for the transportation of liquid bulk cargo in the P trade whereby Transligra would provide Flota with the necessary space on vessels owned or operated by Transligra.

The *issues in No. 79–3,* similar to those in No. 79–2, include whether Agreements Nos. 10295 and Sub-1 should be approved, disapproved, or modified, whether section 15 of the Act has been violated by the implementation of an unapproved agreement or agreements, whether the "Private Agreement," No. 10295 Sub-1, represents the true agreement of the parties, and whether Agreement No. 10295 represents the complete agreement.

In addition to the above issues, the proponents raise *the issue of jurisdiction* of the Federal Maritime Commission.

Agreement No. 10293 (Exhibit No. 2–A) was signed in Bogota, Colombia, on December 22, 1976, providing Flota's intention to "open its service" for the transportation of liquid bulk cargo between the ports of the U.S. Gulf and the ports of the Colombia Atlantic. With *service provided in the name of Flota and with vessels provided by Andino,* space on these vessels would be chartered by Flota. Andino committed itself to providing such space to Flota as of January 1, 1977, as Flota would require in the trade. Andino would provide space to Flota for a quoted space charter hire. Flota would fix the rates charged to importers and exporters. Flota would contract the cargo with the consignees in Colombia and exporters from Colombia. Flota can make long term contracts with its clients (importers and exporters).

Flota expressed its intent to give "*a regular service, with an approximate frequency of 15 days,* * * *; this frequency could be increased according to the volume of cargo available." The agreement could be terminated by either party on not less than 90 days notice.

Agreement No. 10293 Sub-1, besides incorporating the 1973 agreements, also covers various matters governing the operation of the charter arrangement which are not contained in Agreement No. 10293. In other words, this private (Sub-1) agreement is an essential part of the entire agreement between Flota and Andino.

This Sub-1 "Private Agreement" provides that Flota will canvass and contract in Colombia for the movement of liquid bulk cargo in the Atlantic Colombia ports trade, that Andino will be the sole coordinator of all shipments originating in U.S. Gulf ports, that Andino will execute transportation contracts, will take responsibility in accordance with Tanker Bills of Lading or contracts, and will be responsible for the carrying of the cargo to Colombian ports. Andino will supply Flota with itineraries for "regular shipments," for which Flota will canvass and contract the cargo to use at a maximum the carrying capacity of Andino. For "sporadic shipments," Flota will try to use the "regular vessels" of Andino and will communicate with Andino to obtain additional capacity. In case Andino cannot provide the additional capacity or tonnage required, Flota will be free to look for other transportation.

Flota's tanker bills of lading will be issued and signed by Andino as Flota's agent in the New Orleans and Baton Rouge areas. In the Houston and Galveston area, Flota's bills of lading are signed by the Texas Star Shipping Company acting for Andino as Flota's agent.

Flota will collect the freight and other charges in Colombia. Andino, as agents of Flota at U.S. Gulf ports, will be responsible for the operations of the vessels and for all commercial matters which derive from the agreement. Flota will take care of all agency matters regarding Andino's vessels in Colombia.

The *"Private Agreement," No. 10293 Sub-1,* also provides that Andino will pay Flota as Andino's agent in Colombia 2.5 percent on space charter hire of import cargo, and 5.0 percent of total freight on export cargo to U.S. Gulf ports, except on molasses or export products of Ecopetrol or Holland Chemical International, Flota would receive a commission of 2.5 percent of the total freight to U.S. Gulf ports and destinations other than to Europe.

Many other details are provided in this "Private Agreement," including payments by Andino to Flota of Colombian port fees, telex, mail, local telephone calls, crew repatriation, and demurrage collection fees. Flota will receive all claim notices, make investigations, and process the claims. Claims will be paid by Flota for the account of Andino, only after authorization by Andino. If Flota were to use its own specialized vessels in the trade or charter vessels not from Andino, Flota and Andino will decide jointly the participation of Andino in those activities for the coordination of the shipments.

The 1973 agreements between Flota and Andino differed somewhat from the 1976 agreements in that Andino (not Flota) set the ocean freight rates, and Flota contracted with the Colombian importers and exporters at the rates set by Andino. The 1973 agreements between Flota and Andino were the same as the 1976 agreements in that Andino agreed to provide vessel space to Flota.

Agreement No. 10295 (Exhibit 28) was signed in Bogota on December 22, 1976, providing Flota's intention to "open its services" for the transportation of liquid bulk cargo between the ports of the U.S. Gulf and ports of the West' (Pacific) Coast of Colombia. *With service provided in the name of Flota and with vessels provided by Transligra,* space on the vessels would be chartered by Flota. Transligra committed itself to providing such space to Flota as of January 26, 1977 (with the first sailing of the *MT Thomona* estimated time of leaving the U.S. Gulf), as would be required by Flota in the trade. Transligra will quote to Flota the space charter hire. Flota will fix the rates charged to importers and exporters. Flota would contract the cargo with the consignees in Colombia and the exporters from Colombia. Flota can make long term contracts with its clients (importers and exporters).

Flota expressed its intent to give "a regular service, with an approximate frequency of 35 days, * * *; this frequency could be increased according to the volume of cargo * * *." The agreement could be terminated by either party on not less than 90 days notice.

Agreement No. 10295, Sub-1, the "Private Agreement" between Flota and Transligra (Exhibit No. 29) was signed on December 22, 1976. It has one addendum. This 10295 Sub-1 Private Agreement provides that Flota will canvass and contract in Colombia for the movement of liquid bulk cargo in the Pacific Colombia ports trade, that Transligra, through its U.S. Gulf agents, will be the sole coordinator of all shipments originating in the U.S. Gulf ports, that Transligra will execute transportation contracts, will take responsibility in accordance with Tanker Bills of Lading or contracts, and will be responsible for the carrying of the cargo to Colombian ports. Transligra will provide Flota with itineraries for "regular shipments," for which Flota will canvass and contract the cargo to use at a maximum the carrying capacity of Transligra. For "sporadic shipments," Flota will try to use the "regular vessels" of Transligra and will communicate with Transligra to obtain additional capacity. In case Transligra cannot provide the additional capacity or tonnage required, Flota will be free to carry the goods with other carriers on its own risk.

Transligra will give Flota the space charter hire, and Flota will fix the rates charged Colombian importers and exporters. When the space charter hire given by Transligra does not correspond to levels applied by the competition, Flota will be free to carry goods with other carriers at its own risk. Flota's bills of lading will be used. Flota will collect the freight and other charges in Colombia. Transligra's agents will be Flota's agents in the U.S. Gulf ports and will be responsible for the operation of the vessels and all commercial matters. Flota's agents in Colombia will take care of all agency matters regarding Transligra's vessels in Colombian Pacific ports. Fees and commission arrangements provide that Transligra will pay Flota, similarly to the Flota-Andino Agreement No. 10293 Sub-1.

As in the case of the A trade, so also in the P trade, the so-called "Private Agreement" (10295 Sub-1) is an essential part of the entire agreement between Flota and Transligra.

SHIPPER TESTIMONY AND LETTERS

The two major importers of phosphoric acid, Abocol and Monomeros, whose plants are in Cartagena and Barranquilla, respectively, have found the service of Flota/Andino to be satisfactory.

Certain other shippers and importers by letter support the continuance of the Flota services from the U.S. Gulf to both Atlantic and Pacific ports of Colombia. One of these letters is from Union Carbide Colombia, S.A., an importer of substantial amounts of liquid chemical bulk products into Colombia. Another letter is from a group of five Colombian companies (Grasco, Gracetales, Prograł, Detergentes, and Jaboneria Central) which together import a total of about 30,000 tons of edible oils and tallows yearly.

THE PARTIES AND A NON-PARTY (LYKES)

The parties to these proceedings include the three proponents, an intervener, the Colombian government as *amicus curiae,* and Hearing Counsel.

The proponent *Flota* is a Colombian corporation established in 1946 to provide regular liner service for general cargo in the Colombian import and export trades. Flota is owned by the Colombian Coffee Growers Association (78 percent), by Banco de Fomento of Ecuador (20 percent) and by other Colombians (2 percent). Flota operates 29 owned vessels and about 30 to 40 chartered vessels monthly in its general cargo and dry bulk cargo services. Occasionally Flota has carried liquid bulk cargo in the deep tanks of its general cargo vessels. However, *Flota does not own nor operate any specialty parcel tankers* designed for the carriage of liquid bulk cargoes in the trades herein.

Specialty parcel tankers or chemical parcel tankers usually contain several lined tanks. Some tanks are stainless steel, others are lined with epoxy, zinc or other coatings. Generally each tank can be heated and has its own pump. Older tankers may have common pumps, which makes the possibility of accident or contamination more likely.

The proponent *Andino* is a company incorporated in Panama. It is engaged in the chartering and operation of parcel tankers for the carriage of liquid bulk cargo. The vessels operated by Andino fly third flags (i.e., neither Colombian flag nor American flag). Such flags include Liberian, Japanese, British, Panamanian/Singapore, Panamanian, and Norwegian. Andino used some 19 vessels during the years 1976 through 1979 in the U.S. Gulf-Atlantic ports of Colombia trade, serving the ports of Barranquilla and Cartagena, Colombia. For 1976, Andino lists 31 voyages from Houston, Texas City, Baton Rouge, Beaumont, Uncle Sam and New Orleans. Other listed origins include Bayport, Freeport, Taft, and Baytown which are sometimes grouped with Houston or with Texas City; also Plaquemines is sometimes grouped with Baton Rouge. For 1977, Andino lists 35 voyages from U.S. Gulf ports to Atlantic Colombian ports. For 1978, Andino lists 34 such voyages. (Exhibit No. 61–C). The *Fuji Andina* (Japanese flag) and the *Chemie Carrier* (Liberian flag) were used in all of the years 1976 through 1979 by Andino.

Andino is a wholly owned subsidiary of Holland Chemical International (HCI), a holding company which buys chemicals and sells them to HCI affiliates and to other companies in South America. The president and vice-president of HCI are president and vice president, respectively, of Andino.

The proponent *Transligra* is a company incorporated in Ecuador. Transligra is owned by Flota (33⅓ percent), by Holland Chemical International (33⅓ percent), and by Ecuadorian interests (33⅓ percent). Flota is Transligra's agent in Colombia. Andino is Transligra's agent in the U.S. Gulf. Transligra owns the parcel tanker, *Chimborazo* (formerly named the *Thomona,* then an Andino-operated vessel) registered under the Ecuadorian flag. Transligra operates additional vessels, not owned, in the U.S. Gulf-Pacific Colombia trade. Transligra serves Buenaventura on the Pacific West Coast of Colombia in the trade in No. 79–3. Transligra usually operates two vessels in this trade, sailing twice a month. Transligra's statistics and other documents including bills of lading are maintained by Andino.

Intervener *O.N.E.* Shipping Ltd. (O.N.E.), is the successor company to Overseas Liquid Gas, Inc. The latter offered regular service from the United States to Colombia and Venezuela since 1963, and O.N.E. was established in 1973 to continue the prior service of Overseas Liquid Gas. O.N.E. presently serves U.S. ports and ports in the Caribbean, Central and South America in the liquid bulk trades. Due to the proximity of Colombia and Venezuela, the ability of O.N.E. to carry cargoes to Atlantic Colombia would be a natural addition to O.N.E.'s present regular service to Venezuela. The major shippers of liquid bulk cargoes in the U.S./Venezuela trade are the same in the U.S./Colombia trade. O.N.E. also now serves the U.S. Gulf/Ecuador liquid bulk trade, and the ability of O.N.E. to carry cargoes to Buenaventura, Colombia, would be a natural adjunct of O.N.E.'s service to Guayaquil, Ecuador.

Since the implementation of the 1973 Flota/Andino agreements, despite the fact that O.N.E. continued to advertise its U.S. Gulf/Colombia service and continued to contact brokers and agents for the solicitation of cargo, O.N.E. found that it could no longer call at Colombian ports.

O.N.E. sought to provide service to Colombia through arrangements with Flota, and with *Lykes Bros. Steamship Co., Inc.* (Lykes). O.N.E. also had some preliminary discussions with NAVENAL, another Colombian line, which is no longer in business.

Andino and Flota stress that O.N.E. sought to take Andino's place in its agreement with Flota. But, regardless of this effort by O.N.E., and regardless of O.N.E.'s later position that the Flota/Andino agreement is unlawful, these two circumstances have no bearing on the lawfulness of the Flota/Andino agreements.

Lykes sought to enter the U.S. Gulf/Colombia liquid bulk trades herein, by certain proposed arrangements with O.N.E., similar to those between Flota and Andino.

The Lykes/O.N.E agreement, No. 10183, was approved by the Federal Maritime Commission (Exhibit No. 44) on June 2, 1976. Thereby, Lykes would have issued its bills of lading for cargo transported on vessels owned or controlled by O.N.E. Ostensibly this agreement would have paralleled the agreement between Flota and Andino.

O.N.E. understood and agreed that Lykes, by entering this agreement would have exerted its best efforts to make its present equal access agreement with Flota available to O.N.E., but Lykes offered no guarantee on which O.N.E. relied.

Lykes and Flota made an agreement, which is still in effect, No. 10064, approved by the Federal Maritime Commission (Exhibit No. 43) on January 24, 1974, which granted Lykes and Flota free access to total import and export cargoes available without restrictions as a result of any governmental regulations, with regard to the trade between U.S. Gulf ports and ports in Colombia.

Flota objected to the Lykes/O.N.E. agreement, and opposed the entry of O.N.E. into the trade upon the ground that such entry was in violation of Colombian law. Article 80 of Colombian Decree 2349 of 1971 stated:

> It is understood that the associated flags may have at their services ships of its own flags and third country flags. (Exhibit No. 4–A, English translation.)

Flota's interpretation of the law was that it did not extend to Lykes the benefit of using foreign flag vessels in the liquid bulk trade herein, unless Lykes placed at least one American-flag parcel tanker in this service. By contrast Flota has no Colombian flag parcel tanker in the trades, and by its agreement with Andino uses third flag vessels exclusively.

No explanation was given by Flota why Lykes' vessels in the liner trade, capable of carrying liquid bulk cargoes in these vessels' deep tanks would not qualify as American flag vessels for the purposes of Lykes' agreement with O.N.E. in this liquid bulk trade.

In any event, Lykes did not pursue the matter of its agreement with O.N.E., presumably in deference to its relations with Flota with regard to the general cargo liner trade. Lykes filed comments on both Agreements No. 10293 and No. 10295, but was not named a party to either of these proceedings. Such comments of Lykes occurred prior to the institution of the two subject proceedings, and have not been entered into the present record.

Hearing Counsel contend that the agreements in issue are unlawful, in that the proponents have not shown a need for their agreements which outweighs their anticompetitive consequences; that the proponents are common carriers; that the agreements are exclusive, preferential, cooperative working arrangements, subject to section 15 of the Act; that both the agreements and the "sub" agreements ("private agreements") when taken together constitute the complete agreements of the proponents; and that the agreements have been implemented without Commission approval in violation of section 15.

THE GOVERNMENT OF COLOMBIA

The Government of the Republic of Colombia was denied permission to intervene after the close of the hearings as a party to these proceedings, but was granted leave to proceed as *amicus curiae* to the extent that certain pages of its brief were accepted to explain the operation of the national maritime laws of Colombia and the policy underlying them.

THE FORMER PROTESTANTS

The background of these proceedings is not complete without the story of the former protestants, who have since withdrawn from the proceedings. Hearing Counsel, by subpoenas, obtained the testimony of two witnesses for Esso (or Exxon) and one witness for Shell. In addition there are exhibits in the record, resulting from responses to discovery requests, which relate to the problems which beset the three protestants in these trades.

In No. 79–2, *Dow Chemical International, Inc.,* of Delaware (Dow); and *Shell Chemical Company,* a division of Shell Oil Company (Shell), protested Agreement No. 10293 and requested that a hearing be held. *Esso Chemical Supply Company, Inc.* (Esso), filed general comments and later advised that it supported Dow's and Shell's requests for a hearing. These three, Dow, Shell, and Esso, were named protestants in the Commission's original order in No. 79–2. In time, these protestants withdrew from this proceeding. These same three, Dow, Shell, and Esso, also filed comments in No. 79–3, but were not named parties therein. The most detailed comments of these three in No. 79–3 came from Esso, which stated that it was dissatisfied with the quality of the service offered by Flota/Transligra, and that it feared the Loss of its markets in Colombia should Agreement No. 10295 be approved.

Esso, by notice of withdrawal in No. 79–2, dated October 10, 1979, moved to withdraw from that proceeding. Previously in Esso's view, the *de facto* implementation of Agreement No. 10293 since 1973, the Colombian Cargo Reserve Law (Decree 1208 of July 21, 1969) and the interpretation of said Law, precluded shippers from transporting liquid bulk chemical/specialty cargoes from the U.S. Gulf to Colombia on any vessels other than those of Flota/Andino, and that Flota's freight rates were not competitive with rates being offered by other carriers, which could not be used because of the Colombian Laws and regulations. Esso also objected to Agreement No. 10293 because of its dissatisfaction with the quality and nature of the Flota (Andino) service.

Esso in its withdrawal notice pointed out that Flota/Andino improved the quality of their service to a minimally acceptable basis, and was advised that Flota would not object to the shipment by Esso and will facilitate Esso in obtaining the waivers required to permit unrestricted shipment by Esso on United States or Third Nation Flag vessels of certain cargoes originating from Baton Rouge, Louisiana, and further because the Republic of Colombia on August 29, 1979, substantially increased the number of Liquid chemical/specialty products on the Free Import List which Esso and others import from the U.S. Gulf into Colombia. Esso said the effect of this amendment of the Free Import List was to enable Esso and others to ship about 50 percent of their customers' semi-annual requirements of said products on U.S. flag or third nation flag liquid bulk product carriers.

In addition, said Esso, the Republic of Colombia, which had previously required import licenses issued for all imports to be stamped requiring shipment of 100 percent of said imports on Colombian flag or associated vessels, had recently amended its stamp to require shipment of only 50 percent of said imports on Colombian flag or associated vessels.

Esso also referred to Diplomatic Note No. 3211/E 179 dated July 6, 1979, by which the Republic of Colombia guarantees that 50 percent of all liquid bulk products may be carried to Colombia without any vessel flag restrictions.

Esso reserved the right, among others, to reenter this proceeding, should the conditions, assurances or guarantees above be rescinded or modified to affect Esso detrimentally.[2]

The overall impression received from studying the record and listening to the oral testimony leads to the conclusion that these trades between U.S. Gulf ports and ports in Colombia for the carriage of liquid bulk cargoes in parcel tankers were and most likely remain in near monopoly situations, with the Flota/Andino and the Flota/Transligra services enjoying the near monopolies; and the further related conclusion is reached that to any extent that these services may not be complete monopoly situations, this is in large part due to the institution and pendency of these proceedings, with the regulation of agreements of the nature of those herein by the Federal Maritime Commission.

Under such circumstances, whatever conclusions are reached by the Federal Maritime Commission, it is believed that it would be well to continue to monitor the trades herein, and should the subject agreements be approved it appears advisable that time limits be placed on the duration of these agreements. Thereby, if and when renewals of the agreements are sought, it would be incumbent on the proponents to state how the agreements are affecting the ability of Colombian importers to obtain competitive services consistent with the public interest.

[2] Esso's withdrawal notice is Exhibit No. 89, copy of which is appended to this decision.

Dow based its protest on its view that the Flota Andino space chartering agreement in conjunction with existing Colombian flag restrictions provisions would result in a monopoly position for Flota-Andino in the Colombian Atlantic trade herein. Dow stated in a motion to withdraw dated November 21, 1979, that starting in 1979, there was a change in the implementation of the Colombian Flag Restrictions Provisions, and that there was a Diplomatic Note from the Republic of Colombia dated July 6, 1979, which changed Dow's views. Accordingly, subject to the right to re-enter the proceeding should the Colombian governmental positions be changed, Dow moved to withdraw.

Hearing Counsel submitted statistics prepared by Esso, regarding its shipments of liquid bulk cargoes from the U.S. Gulf to Colombia for the years 1970 through 1980, inclusive, with a projection for all of 1980 based upon statistics through December 1, 1980. These statistics (Exhibit 110) show that in each of the years 1970, 1971, and 1972, prior to the subject agreements, Esso's shipments far exceeded Esso's tonnages for certain of the years 1974 through 1980, when Esso used only the services of Flota (years 1974, 1975, 1976, 1978, 1979). In 1977, Flota handled 3,792 tons, and Odfjell 388 tons; in 1980, Flota handled 3173 tons, and O.N.E. 394 tons. For 1973, Stolt-Nielsen handled 2,894 tons, Andino handled 149 tons on its own, and the Flota/Andino service handled 975 tons.

These Esso statistics show 5,465 tons in 1970; 6,079 tons in 1971, and 6,153 tons in 1972 all handled by Stolt-Nielsen. Compared with the above are the lesser tonnages ranging from a low of 1,753 tons in 1976, to a high of 3,978 tons in 1975 handled by Flota during the years 1974 to 1980.

These statistics clearly refute the contentions of Flota and Andino that only "irregular" or "tramp" parcel tanker carriers served the trade from the U.S. Gulf to Colombia prior to the 1973 agreements. In other words, if Stolt-Nielsen were to be considered only a "tramp' service in 1970, 1971, and 1972, then so would the Flota service in 1973 to 1980, inclusive, also be considered only a "tramp" service, based on its lesser yearly tonnages transported for Esso.

Esso made a cost comparison (Exhibit 109) showing the differences between its freight costs, comparing what its Colombia affiliates were charged·by the Flota/Andino service, with the charges which Esso's affiliates might have been assessed by O.N.E. if O.N.E. had been able to provide the same services for the years 1973 to 1980 inclusive.

Flota's rates for the years 1974 through 1980, ranged from $24.56 to $53.30 a metric ton, or an average of $35.33 a ton for the years 1973–1980. The year 1973 is not shown but by deduction it would be $19.00 a ton for the 975 tons handled by Flota in that year for Esso.

The deemed freight costs to Esso from O.N.E., based upon Esso's c.o.a.'s for the same type ships used by Flota average $25.50 per metric ton for the years 1973 through 1980, or a cost difference under Flota's average of $9.83 per ton.

Based upon a total of 23,105 metric tons for the years 1973–1980 inclusive handled by Flota, Esso computes total cost savings of $226,861 if it had used O.N.E. rather than Flota/Andino.

Because Flota at times had not offered service from origins such as Baton Rouge, resulting in Esso paying inland U.S. charges from Baton Rouge to Houston, where Flota picked up the cargoes, Esso estimates that it paid additional (inland) freight costs for 1978, 1979, and 1980 of $38,942.

Adding the above $226,861 computed extra cost, plus the inland extra cost of $38,942, Esso computes a grand total of extra costs of $265,803.

ENVIRONMENTAL ANALYSIS AND CONSOLIDATED RECORD

The Commission's Office of Environmental Analysis has determined that the environmental issues herein do not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, and that preparation of an environmental impact statement is not required.

In accordance with the parties' wishes, the two subject proceedings were not requested to be consolidated under Rule 148 of the Commission's Rules of Practice and Procedure, 46 CFR 502.148. Nevertheless, at the behest of the parties, a consolidated evidentiary hearing procedure was followed, and the parties stipulated that the testimony and data developed in the hearing for the No. 79–2 Colombian Atlantic trade, where applicable, also would be applied and considered as evidence in No. 79–3 for the Colombian Pacific trade. Consolidated briefs covering both Nos. 79–2 and 79–3 were filed by the parties, except that Andino is not a party to the agreements in the Pacific Coast Colombia trade (No. 79–3), and its briefs relate only to the Atlantic Coast Colombia trade (No. 79–2).

IMPORT LICENSES

All imports into Colombia need a license. Licenses are issued by the Colombian Institute of Foreign Trade, known as *Incomex.*

Incomex stamps the import licenses with appropriate stamps *reserving* the *cargo in whole or in part to Colombian ocean carrier lines and/or associated lines.*

Colombian cargo reservation laws, discussed in detail below, apply on all imported cargoes. At the time of the hearing the general practice was to use the Incomex import stamp covering the first 50 percent of the cargo specified in the license.

Ex. 89, Attachment B–1, Incomex Import Register No. G–069017–A, shows that on occasion as late as February 14, 1979, one of Incomex's stamps showed 100 percent of the total of 150 tons of cargo licensed was reserved as follows, English translation:

> Assets or goods covered by this Register must only be transported on vessels or ships of Colombian registry or on vessels of United States of America registry belonging to firms affiliated with Colombian registry or on other [vessels] of lines affiliated with our registry/flag. (Decree 1208 of July 21, 1969).

At times, a stamp, such as the above 100-percenter, might have been placed in error. Witness Dowling for Esso stated that mistakes are made down there, and even now (December, 1980) some of them are stamped 100 percent, and Esso goes back and asks Incomex to stamp them 50 percent for liquid bulk.

Exhibit 89, Attachment B–2, Incomex Import Register No. G–104549–A, shows that as of March 21, 1979, an Incomex stamp showed the first 50% of the total of 150 tons of cargo licensed was reserved as follows, English translation:

> First shipments, corresponding to 50%, the equivalent of 75 tons of the goods covered by this Register, must be transported on vessels or ships of Colombian or Ecuadorian registry or on other [vessels] of lines affiliated with our registry when dealing with bulk liquid or solid cargo. (Decree 1208 of July 21, 1969.) Once the foregoing has been complied with, the remaining 50% may be transported on board vessels of independent registry.

COLOMBIAN LAWS, DECREES, ETC

Colombian cargo reservation laws and procedures are set largely by certain decrees and resolutions.

Decree #994, dated April 29, 1966, provided that the Colombian Government could fix the percentage of import and export cargo reserved for vessels of Colombian flag.

Decree #1208, dated July 21, 1969, implemented Decree #994, and provided that *no less than 50 percent* of import and export cargo was reserved to vessels of Colombian registry on trade routes served by these vessels. Under this decree it was clear that if Colombia desired, it could reserve 100 percent of import and export cargoes for vessels of Colombian flag.

Decree #2349, dated December 3, 1971, allowed foreign flag companies to participate in the carrying of cargo reserved for the Colombian flag. As shown in Exhibit 4, Article 3, paragraph 12, the Colombian Director General of Maritime and Port Matters could authorize "Colombian shipowners to obtain under lease or charge temporarily vessels of Colombian and foreign flag." Under paragraph 13 of that article, the Director General could approve or disapprove agreements between Colombian shipowners and transportation associations and agreements, based on equality or reciprocity of treatment for Colombian shipowners, etc.

Resolution #0097 of June 8, 1973, recites that Flota requested authorization to apply the cargo reserve law to liquid bulk cargo in special ships from U.S. Gulf ports to Colombian ports, and Flota was so authorized as of March 1, 1973, to sail and to apply the reserve law.

Decree #1208 of July 21, 1969, has been interpreted by Incomex, the Colombian Institute of Foreign Trade, as follows, as shown in Exhibit 19, page 2:

> The goods or merchandise covered by this Registration must be transported on vessels flying the Colombian flag, or on vessels of the Ecuadorian flag, or the flag of the USA, belonging to companies associated with the Colombian flag, or on vessels of other lines associated with our flag (Decree 1208 of July 21, 1968.)

As seen *the cargo reservation decrees date back to 1966, 1969 and 1971, whereas it was not until later, that is, sometime late in 1973,* that *Flota began its service,* which resulted in due time in these proceedings. *So, it was not the Colombian decrees or laws alone* which caused the problem or main issue herein, *but rather these decrees and laws, together with the implementation of the Flota/Andino and Flota/Transligra services,* resulted in the virtual *de facto* shut-out of independent liquid bulk carriers from these trades, from about late in 1973 until about late in 1979, and maybe or likely even later than 1979. Statistics below for 1980 show the continued growth of the Flota services in the two trades herein.

ANDINO'S SERVICES PRIOR TO AND AFTER 1973

Prior to initiating service in the trades herein pursuant to the 1973 Flota-Andino agreement, Andino independently provided service in the trades beginning in 1971, using Andino bills of lading. Following its agreement with Flota, Andino ceased offering services to Colombian importers and exporters under Andino's own bills of lading, and then transported such Colombian cargo only under Flota's bills of lading.

Since February 16, 1973, when the first Flota/Andino agreement was signed, Flota and Andino have implemented the terms of the 1973 and 1976 agreements in the same manner, that is, in the Atlantic trade Flota has chartered space only from Andino, except in one instance in early October, 1980, or just prior thereto, Flota chartered space on a Colombian flag barge to carry lubricant bases to an Atlantic Colombian port for Esso. This was done simply because Flota wanted to help a small Colombian company to get into business.

In the Pacific Colombia trade from 1973 through 1976, Flota chartered space only from Andino, and from 1977 onward Flota chartered space only from Transligra.

CONFLICTING PROPOSED FINDINGS

There is considerable conflicting testimony in this proceeding, and as a result opposing counsel come up with considerable conflicting proposed findings of facts, or interpretations of what the record shows. Also, some counsel have accused others of retroactively bringing in alleged ''evidence'' not found in the record, nor supported by the record. Some of the witnesses were fluent in both the Spanish and English languages, but at times experienced troubles in converting Spanish to English.

For example, one proposed finding of fact concerns whether or not a Colombian importer obtains a license for each shipment. Hearing Counsel correctly conclude that this is the ''procedure used'' by the Colombian importer. Counsel for Andino argues otherwise. Perhaps, the parties' differences lie in the differences between the practices actually extant, and the procedures which technically may be possible under Colombian laws and decrees. Pertinent record facts follow.

Carlos Lleras De La Fuente, the Managing Director of Flota Mercante Grancolombiana, S.A. (Flota) for many years, and also an attorney licensed in Colombia, submitted his direct testimony in the form of an exhibit (No. 20).

Witness Lleras stated in paragraph 25 of Exhibit 20, ''If the license covers several shipments, the first 50% are required to be carried by a Colombian company and the remainder is free and available to other carriers.''

On cross-examination, at page 404 of the transcript, Lleras testified:

> Q. Now, the license is valid for you say six to nine months. If I take out a license, for argument's sake, of vegetable oils for a thousand tons, is it your testimony that I can make the first—and I take this out, let's say on October 1st. Is it your testimony now that I can ship the first shipment of let's say 300 tons on October 10th, the next shipment of let's say 200 tons on February 2nd, and the third shipment of the balance 500 tons on March 5th?
>
> A. Yes.

On page 410, Lleras testified:

> Q. Was that always the case that an import license was valid for any number of shipments made during a six-month period now or nine-month period or is even the six-month period a recent development?
>
> A. I think I cannot answer very precisely your question. But I think six months has been the time or the valid period for quite some time.

At page 406, Lleras explained that we, meaning Flota, are not involved in imports, but in transportation; that Flota transports imports, but does not import. In other words, Lleras appears to say that the Colombian importer is the expert on obtaining licenses for imports into that country.

Also, on further cross-examination, transcript page 413, witness Lleras amended his statement in Exhibit 20 as follows:

> Q. No, I'm just asking you your use of the word "shipments." Forget the license for a moment.
>
> A. Oh, no, no, no, I cannot. I am sorry, I cannot forget it because probably I expressed wrongly myself in this statement. The license covers cargo. The license is for allowing an importer to bringing certain tonnage into the country. The license doesn't mention shipments. Probably—I'm sorry, I made a mistake in the use of the English language when writing this statement. (Exhibit 20).
>
> The importer is the one to decide if he loads in one ship or in several.
>
> Q. Then he also gets a license when he decides to put all his tonnage on one ship.
>
> A. Correct.
>
> Q. Now, in the event he puts all his tonnage on one ship, its obvious that the whole 100 percent has to go via Colombian flag, is it not?
>
> A. If he decides to put all his cargo on one ship and having to ship the first 50 percent with a Colombian company, of course 100 percent will be shipped with a Colombian company.

Elisso Restreppo, General Manager of Monomeros Colombo Venezolanos, S.A., also known as Monomeros, a corporation, producing fertilizers, and importing raw materials into Colombia, including phosphoric acid from the United States Gulf ports, testified:

> Q. Now, is it your understanding that for obtaining an import license for phosphoric acid, that you have to obtain a separate import license for each shipment of each parcel of 3,000 tons, or that you could obtain one license to cover the entire 6,000 tons, 10,000 tons or whatever number of tons you want?
>
> A. *The procedure we use in Colombia is that we have a license for each shipment.* (Emphasis supplied.)
>
> Q. And each shipment, you're talking about each amount of cargo that arrives on one ship?
>
> Do you understand what I'm saying? In other words, if I do a purchase of let's say 6,000 tons but I have it brought in by three ships, over 2,000 tons each ship, and your use of the word shipment, are we talking about one shipment or two shipments?
>
> A. Again, I'm not an expert on these matters, but as I understand it, it would have been per shipment, in other words, that *one has to obtain an import license for each load, simply because it is easier* in terms of the import taxes that we must pay, the

> tariffs, the documents, bills of lading, and the overall movement. (Emphasis supplied.) (Transcript pages 160, 161).

Ivan Amaya, formerly president of Abonos Colombianos, S.A., also known as Abocol, another Colombian corporation which manufactures fertilizer and imports phosphoric acid, testified on page 75:

> Q. Now, how many import licenses do you file during the course of a year in importing phosphoric acid? Do you file one covering the entire year, do you file one for each shipment, one for each six months, each two months?
> A. *In practice in generally this is what is done, is that one obtains an import license for each shipment.* In other words, that is what happens in practice. However you can obtain licenses, import licenses, for more than one shipment. (Emphasis supplied.)
> Q. Is there any particular reason that you only get one license for each shipment rather than a license to cover a number of shipments.
> A. *Yes, it has to do with a problem of red tape. To obtain a license of a larger amount of phosphoric acid might take a longer period than it would to get a normal shipment, in other words a shipment for a smaller amount.* (Emphasis supplied.)
> Q. When you say a normal shipment you are talking about this quantity of approximately 2,300 metric tons that would come on board one ship arriving at Cartagena?
> A. Correct.

Counsel for Andino in his reply brief refers to Exhibit 113 as showing an import license for two products, i.e., "150 tons of Solvesso 100, Nafta Disolvente, a granel," and "150 tons of Solvesso 150, Nafta Disolvente, a granel," in support of his argument that Hearing Counsel are incorrect in proposing a finding that "the procedure used is for the Colombian importer to request and obtain a license for each shipment." Exhibit 113 merely shows that Productor Quimicos Esso, Inc., a Colombian importer, got one import license covering two similar products, both carrying the same import classification number 27.07.02.03.

Exhibit 113 shows little to establish what was the actual *practice* regarding the issuance of import licenses, particularly as to whether any one license in practice covered shipments made on two or more ships. No example was shown or testimony given, naming two or more ships used for one license. In other words, all the evidence shows is that all cargo on one license went on one ship, and such licensed cargo was not split between two or more ships.

Counsel for Andino also in reply brief refer to the testimony of William G. Dowling, Vice President of Exxon Chemical International Supply, S.A., a shipper of chemicals from the U.S. Gulf ports to Colombia. This company's affiliate in Colombia is Productos Quimicos Esso, Inc., and the latter is responsible for obtaining import licenses. At page 1541 of the transcript, Mr. Dowling *speculated* that if two products (MEK and MBIK) came under the same import license, authorizing 250 tons of MEK and 250 tons of MBIK, then you *might be able to ship* 250 tons of MEK first (apparently meaning on a Colombian associated ship) and then the 250 tons of the MBIK second (apparently meaning on a third flag ship). This speculative statement does nothing to show what the actual practice was or is.

FINDING MADE AS TO THE ACTUAL PRACTICE USED IN OBTAINING IMPORT LICENSES

From the above facts of record, and from the overall entire record, including the nature of the trade, referred to as a "drug store" trade, requiring a continuing supply of relatively small tonnages because of storage problems in Colombia, as well as because of storage problems of at least one supplier in the United States, it is concluded and found that *the actual practice* used was for the consignee importer to obtain one license for each shipment, and that each lot of licensed cargo would be loaded and brought to Colombia on a single ship under a separate license.

The significance of the above finding relates to the fact that in the Atlantic trade, the Flota/Andino service had a near monopoly since late in 1973, when the Flota/Andino agreement was effectuated. Similarly, in the Pacific trade, Flota/Transligra had a near monopoly since its service was instituted in early 1977, following the discontinuance of the Flota/Andino service to the Pacific (West) Coast Colombian ports. It also appears that Flota/Andino had a near monopoly in the service to the Pacific Coast Colombian ports from some time in 1973 through the end of 1976.

SERVICES OF PARCEL TANK CARRIERS OTHER THAN FLOTA

Prior to 1973, the foremost carrier in the United States Gulf/Colombia trade was Stolt-Nielsen. Since the implementation of the agreements here in issue, Stolt-Nielsen withdrew from the trade. A/S Rederiet Odfjell (Odfjell) and Vee-Marine served the trade prior to 1973, but subsequent to the agreements herein discontinued that service. O.N.E. offered a regular service prior to 1973, but discontinued that service subsequently. Presently O.N.E. has four vessels devoted to the movement of liquid bulk cargo from the U.S. Gulf to the Atlantic Coast of South America, and it appears that O.N.E. could (if conditions permitted) offer service to Colombia in conjunction with its U.S. Gulf/South American service.

Currently, Shell has a two year contract with Vee-Marine for the transportation of chemicals from the U.S. Gulf to Brazil. Shell has a contract with Pan-American Tankers for the transportation of liquid bulk chemicals from the U.S. Gulf to Venezuela. Shell has a contract with Stolt-Nielsen for the transportation of chemicals to Chile and Peru.

During the period November 1977 through October 1978, Odfjell, a Norwegian Flag line, transported 100 percent of the imports of phosphoric acid from the U.S. Gulf to Cartagena for ABOCOL, a fertilizer manufacturer. This service was very satisfactory. The Flota/Andino service was equally satisfactory in Abocol's view to that of Odfjell. Odfjell contracted with NAVENAL, a Colombian shipping company, in order to provide its service to Abacol. Odfjell during the above 1977 to 1978 period had offered $3.00 per metric ton lower than the rate offered by Flota/Andino. Both Abocol and its phosphoric acid supplier, Freeport Chemical and Minerals Company, have storage problems for phosphoric acid, and therefore shipments of parcels of 1,800 to 2,300 tons must be made to Abocol on a regular basis. Abocol's imports between 1973 and 1980 were between about 15,000 to 25,000 tons of phosphoric acid a year.

Odfjell proposed to Abocol to continue its c.o.a. from November 1978 through October 1979, but the rate offered by Odfjell was too high in Abocol's view. Flota then provided the service. During 1977, Odfjell also transported 7,000 metric tons of phosphoric acid for Monomeros, another manufacturer of fertilizer and the only other Colombian importer of phosphoric acid.

Odfjell was able to transport these cargoes because it entered into an arrangement with Navenal, a Colombian shipping company. Navenal had obtained permission to serve the U.S. Gulf/Colombian trade herein through an agreement with Flota approved by the Colombian Maritime Administration. In time Navenal went out of business.

Monomeros arranged for 1980 with Pan American Tankers for it to carry 6,000 to 12,000 metric tons of phosphoric acid from the U.S. Gulf to Barranquilla. The same contract also "considers" the transportation of cyclohexane from the U.S. Gulf or from Puerto Rico. This 1980 contract between Monomeros and Pan American Tankers is for 50 percent of Monomeros' 1980 tonnage of phosphoric acid to be carried by Pan American Tankers; with the other 50 percent to be carried by Flota/Andino. The 50 percent allocated to Pan American was because its bid was better than the bids of other parcel tanker carriers.

The above 50 percent (Flota)-50 percent (Pan American)-arrangement for 1980 is consistent with the changes in the Colombian cargo reservation laws, said to have been implemented sometime in 1979.

Prior to 1973, there were several major parcel tank operators which served the liquid bulk cargo trades herein. These were Stolt-Nielsen, VeeMarine, Odfjell, Andino, O.N.E., and Bamar Marine. Since February, 1973, generally, the only liquid bulk service offered U.S. shippers in these trades has been the Flota/Andino service and the Flota/Transligra service, bearing in mind that Abocol and Monomeros (Colombian fertilizer manufacturers) are not considered to be U.S. shippers.

FLOTA'S "MONOPOLY" SHARES

In 1977, Flota attained an 83 percent market share in the movement of liquid bulk cargoes from the U.S. Gulf to Colombia (total A and P trades). In 1978, Flota had a 78 percent share. The liquid bulk cargoes transported by other carriers in these years (Exhibit 58) include commodities, such as anhydrous ammonia, which cannot be transported in vessels owned or operated by Andino or Transligra. In 1979, Flota had an 89 percent market share, as listed in Exhibit 148, Table I. That is, out of a total of 318,347 metric tons handled by all carriers in 1979, Flota carried 283,300 tons to Colombian A and P ports. It is not clear from Exhibit 148, where the 1979 figures were obtained, but they were referred to in testimony, and are generally confirmed by Exhibit 168. Exhibit 168, Table U, shows a slightly different figure of 286,458 tons, as Flota's share for 1979, total of the A and P trades. There are no figures in Exhibit 168 for the total metric tons carried in 1979 by all carriers in the A and P trades.

A copy of Exhibit 168, Table U, is attached as an appendix to this decision.

CONTRACTS OF AFFREIGHTMENT AND RATES IN THE TRADES

Rates of Flota under contracts of affreightment were and are lower than the published rates of Flota. Flota has c.o.a.'s with Abocol and with Monomeros, the only two Colombian importers of phosphoric acid from the U.S. Gulf. For all other importers including the Dow, Shell and Esso customers or affiliates in Colombia, Flota does not enter into c.o.a.'s, but its rates on liquid bulk cargoes are assessed on a shipment by shipment basis according to circulated rate schedules.

U.S. shippers prefer entering into c.o.a.'s with carriers, because the carriers then can assure the U.S. shippers of service on a regular continuing and efficient basis. U.S. shippers also prefer c.o.a.'s because one shipper can arrange with one carrier to cover all its transportation needs over a large geographic area.

Contracts of affreightment covering the carriage of liquid bulk cargoes from the U.S. Gulf to Colombia and other Latin American countries are general characteristics of these other trades.

Prior to 1973, Esso freely made arrangements for the delivery of liquid bulk cargoes to Esso's terminals in Cartagena. From 1969 to 1973, Esso had a c.o.a. with Stolt-Nielsen for the transportation of liquid bulk chemicals from the U.S. Gulf to the Colombian ports of Barranquilla, Cartagena and Buenaventura. This contract included various Latin American ports, including Venezuela and others. From about March 1974, when the Stolt-Nielsen contract terminated, Esso has had a contract with O.N.E. for the transportation of liquid bulk chemicals from the U.S. Gulf to the Caribbean area, including the north coast of South America, the west coast of South

America including as far south as Peru, and the west coast of Central America.

Esso's contract with O.N.E. has included optional discharge at ports in Colombia, but from 1974 through 1979, O.N.E. did not discharge Esso's cargo in Colombia. In 1980, O.N.E. made one discharge of Esso's cargo in Colombia. From 1974 to 1979, nearly 100 percent of Esso's cargo from the U.S. Gulf to Colombia was carried by Flota/Andino.

Shell Chemical Company exports liquid bulk chemicals to South American countries including Colombia, Venezuela, Peru, Chile and Brazil. Prior to the Flota/Andino agreement, Shell had a c.o.a. with Vee-Marine for carriage of liquid bulk chemicals to Colombia and to other South American countries.

Colombian importer-consignees of liquid bulk cargoes, such as Shell's customer or affiliate, usually purchase in large quantities, but take delivery in numerous small parcel quantities, precluding full shipload shipments. Most parcels are in the range of 200 metric tons, but even a shipment of 400 to 600 metric tons represents a small parcel.

When Vee-Marine carried such parcels to Colombia for Shell, Vee-Marine also carried the same generic chemicals to importers in other South American countries. Shell exports several of the same generic chemicals to Colombia, which Shell also exports to Brazil, Venezuela and Chile.

It is more economical to a parcel carrier to carry large quantities of cargo on the same southbound voyage to both Colombia and its neighbors.

Because other parcel tanker operators, such as Vee-Marine, no longer carry chemicals to Colombia for Shell, these other operators are unable, as previously to carry as many parcels on the same voyage, thus resulting in Shell's paying higher overall freight charges, than before the implementation of the Flota/Andino agreement.

When Vee-Marine carried chemicals for Shell, it loaded in the U.S. Gulf for discharge in Colombia, used the same space in Loading again at Curacao, discharged again in Venezuela, returned to Curacao to use the same space for Brazil, and on the northbound leg again loaded in Curacao for discharge in the U.S. Gulf. Vee-Marine's inability to call in Colombia prevents it from making the above efficient use of its space, which ultimately influence the rates Vee-Marine must charge for non-Co lombian shipments.

Shell now has a two-year contract with Vee-Marine to transport Shell's chemicals from the U.S. Gulf to Brazil. Prior to 1975 Shell's contract with Vee-Marine combined transportation of liquid bulk chemicals from the U.S. Gulf to Colombia and Brazil.

The service offered by Vee-Marine to Shell has been excellent for the 8 or 9 years up to about November 15, 1980, when witness Gallagher prepared his written statement.

In November 1980, Shell also had a contract with Pan American Tankers for the transportation of liquid bulk chemicals from the U.S. Gulf to Venezuela.

The same generic chemicals carried by Flota/Andino for Shell from the U.S. Gulf to Colombia bear a rate of from $40 to $45 a metric ton, plus bunker surcharge. Although Venezuela is further distant from the U.S. Gulf, the rate charged by Flota/Andino to Colombia is much higher than the comparable rate charged to Shell by Pan American Tankers to Venezuela.

Shell also at the same time as above had a contract with Stolt-Nielsen for the carriage of Shell's liquid bulk chemicals to Chile and Peru. The chemicals to Peru are the same as those to Colombia, but Stolt-Nielsen is, or was, unable to call at Colombia.

Although Shell's Colombian imports have increased, Shell Chemical's exports from the U.S. Gulf to Colombia have decreased significantly in the eighteen months prior to November 15, 1980.

Stolt-Nielsen, Vee-Marine and Odfjell all have expressed their interests in carrying liquid bulk chemicals from the U.S. Gulf to Colombia for Shell but in Shell's opinion, the Colombian laws in conjunction with the Flota/Andino service have precluded these three carriers from transporting Shell's cargo in the trade.

Shell insists that Colombian importers must request an import license to cover each individual shipment, for the U.S. Gulf to Colombia; and that the requirement that the first 50 percent of a shipment must be carried on a Colombian line or associated line dictates that Flota get the whole of each shipment because it is not economically feasible to split a small parcel of a few metric tons between Flota and another parcel tanker operator.

From 1973 through the first quarter of 1979 (Exhibit 47), as far as the statistics offered go, the Flota service transported all of Shell's liquid bulk cargo from the U.S. Gulf to Colombia. Similar statistics showed the same for Dow's liquid bulk cargo.

FLOTA'S, ANDINO'S AND TRANSLIGRA'S OPERATIONS

On a normal voyage Andino carries parcels belonging to four to sixteen different shippers. On the same southbound voyage Andino loads liquid bulk cargoes at U.S. Gulf ports, and discharges in the Caribbean area en route to Colombia. The same vessel after calling at Atlantic Colombian ports on an unspecified number of occasions also discharges cargo at Venezuela, and then returns northbound to the U.S. Gulf.

For cargo carried by Andino pursuant to the Flota/Andino agreements and solicited by Flota, Flota issues the bills of lading.

But, for cargo destined to other Caribbean or South American ports, *Andino issues the bills of lading.* For example, Andino issues the bills of lading on cargoes to Venezuela.

Andino's witness admitted on cross-examination that serving Venezuela in the trade from U.S. Gulf ports "would help in the flexibility of serving the Colombian trade."

Andino carries cargo in its vessels in the space not chartered by Flota. In 1977, out of 35 voyages in the U.S. Gulf/Colombia trade, Flota chartered the full vessel for 23 voyages. On a 24th voyage, Flota space chartered 92 percent of the vessel. On the other 11 voyages Flota chartered only a part of the vessel space. Andino's other shippers using the excess space not chartered by Flota have included Dow prior to July 25, 1979, but to a port not in Colombia. Andino and Dow entered into a c.o.a. with regard to this cargo of Dow.

The space on Andino's vessels not chartered by Flota is on a first come, first served basis, subject to the proviso that the products transported outside of Colombia be compatible with those destined to Colombia. Andino adheres to U.S. Coast Guard and IMCO[3] regulations for the carriage of dangerous liquid bulk chemicals. Andino always tries and usually succeeds in having its vessels leave U.S. Gulf ports fully loaded, subject of course to deadweight and stowage limitations.

Flota issues bills of lading for more than one shipper for each voyage in which Flota charters space from Andino or Transligra in the trade herein. There appears to be no question that Flota acts as a common carrier by water in the foreign commerce of the United States, considering Flota's issuance of bills of lading, and other facts of record, including its regularly scheduled service, solicitation of cargoes, number of shippers served, and variety of cargo transported. Flota also circulates advertising schedules listing dates on which vessels call at specified ports. Flota also distributes published rate circulars setting forth freight rates to be paid depending upon the sizes of the parcels shipped.

Flota exercises no control over the vessels' navigation, Flota does not hire the crews, nor pay the crews, nor arrange the vessels' stowage. These functions are those of Andino in the Atlantic Colombia trade, and Transligra in the Pacific Colombia trade.

Flota more precisely is a non-vessel operating common carrier (NVOCC) in these trades for the transportation of liquid bulk cargoes.

Andino and Transligra carry liquid bulk cargoes belonging to the general public, but tendered to Andino and Transligra by Flota.

Andino publishes and circulates sailing schedules advertising its service between the U.S. Gulf and Latin America, including Colombia.

Andino regularly serves the Caribbean area, Venezuela, Chile and Ecuador.

Flota and Andino jointly circulate advertising schedules listing dates on which vessels call at specified ports.

[3] Inter-Governmental Maritime Consultative Organization.

Flota, Andino, and Transligra jointly circulate advertising schedules listing dates on which vessels call at specified ports (Exhibit 40), with Andino acting as agent for the Flota/Andino and Flota/Transligra cargoes destined, respectively, to the Atlantic coast of Colombia, and the Pacific coast of Colombia, after loading in the U.S. Gulf.

Transligra and Andino, both in connection with Flota, provide regularly scheduled services.

Andino and Transligra are the underlying vessel-operating common carriers (VOCC's) in the trades herein. Andino and Transligra carry cargo for the shipping public, after such cargo is assembled by Flota, and with the agreements of Andino and Transligra to carry such cargoes as Flota may obtain from the shipping public.

"ACS (Andino) will be the sole coordinator of shipments of all cargo shipped from U.S. Gulf ports and consequently, takes over the execution of transportation contracts and the corresponding *responsibility* in accordance with Tanker Bills of Lading and/or contracts that cover the shipments and will be responsible for the carrying of such cargo from the above mentioned ports to Colombian ports." Such ports are defined as Atlantic Colombian ports in the public agreement, which the private agreement implements. (Private Agreement December 22, 1976, between Flota and Andino, Exhibit 2B).

A like provision sets out Transligra's undertaking to be sole coordinator of all cargo, etc., in connection with the U.S Gulf/Colombian Pacific ports (Exhibit 29).

WAIVERS OF DECREE 1208

A procedure exists for obtaining waivers from the requirements of Decree 1208. When a trade route is not covered by a Colombian company, the Incomex stamp is not applied to import licenses. *Where, as in the present proceedings, Flota, a Colombian company, serves the trades, waivers may be granted* when Flota or its foreign associates (Andino or Transligra in these trades) cannot provide vessels or space on the vessels used in the trades.

To obtain a waiver, the Colombian consignee-importer must address a letter to the Colombian shipping company holding the right to serve the trades (Flota in the present proceedings), asking Flota to certify whether it has a vessel in position for a certain period of time and has enough space to accommodate the cargo. If the shipping company (Flota) cannot carry the cargo, Flota will issue a letter to Incomex certifying the fact, and Incomex will issue the waiver.

Exhibit 11 contains twelve waivers, all that were found by Flota, purportedly granted for the transportation of liquid bulk cargo shipments between the period March 23, 1976, to about July 15, 1980. In fact, Exhibit 11 contains another waiver, but it is not for liquids, and relates in large part to origins in foreign countries, such as "Urea in bulk in sacks, 20,000/

30,000 tons, to be loaded in the Black Sea or Baltic.'' Insofar as this waiver for Monomeros Colombo Venezolanos is concerned with the United States, it refers to solids, such as potash salts and phosphates.

In each of the above twelve instances, Flota gave consent to the waiver requests on the basis that Flota did not have a vessel available to carry the tonnage. At the time of the hearing Flota was the only Colombian carrier with the right to carry liquid bulk cargoes in the trades herein. Navenal once had such rights, but never got established in the trades, and went bankrupt on or about June of 1980. Navenal was owned by the Colombian government, and had attempted to serve the trade with chartered vessels, and by agreement with Flota. When Flota signed the agreement with Navenal Flota intended that Navenal only have rights for dry bulk cargoes.

The above twelve Flota waivers included waivers for phenol, fish oil, monoethylene glycol, monomere acetate vinyl, hog grease, caustic soda, styrene monomere, cottonseed oil and soybean oil, in lots as small as 178 tons (monomere acetate vinyl) and as large as 4,000 tons (caustic soda).

In reference to the years 1976, 1977, and 1978, Dow responded to discovery requests, that only one formal (written) application for waiver was made during this period by its customer in Colombia, with the result that such waiver was granted in December 1978; also, Dow stated that to its best knowledge ''formal'' waiver applications have never been refused; and that Dow itself never has officially applied for a waiver. Dow also responded that it lost local sales to its Colombian customers because of delays of vessel arrival; and that a plant was ''shut down again March 13, 1979 due to delay of *La Selva* 7 vessel from ETA end February to ETA March 20.'' ''This situation meaning again Dow loss of local sales of Styrene.'' (Exhibit No. 107). Exhibit No. 60–C shows that the *La Selva* apparently sailed from the U.S. Gulf coast loading ports on February 19, 1979, and returned on April 7, 1979, taking much longer than its usual 4 weeks or so round trip.

From the above information on Exhibit No. 107, it is apparent that at least some waiver requests are made orally or informally, whereas other waiver requests are made in writing, or officially, or formally. It is fair to assume, at least in some instances, that if a waiver request is refused informally, that in such instance, or instances, no written or official request is made, because it would be vain to do so.

Witness, Terence A. Gallagher, International Distribution Manager for *Shell* Chemical Company, stated (Exhibit No. 96) that it is common knowledge that *it would be futile, at least up until this proceeding was brought to the attention of the Federal Maritime Commission, to make a request for waivers* to permit the carriage of liquid bulk chemicals on non-Colombian flag vessels. In 1973, Shell was advised by Bruno Le Hocque, in his then capacity as general manager of Flota, that Shell would have to use Flota's service to ship 100 percent of Shell's liquid bulk chemicals out of the U.S. Gulf to Colombia, using Andino's vessels. Mr. Le Hocque further advised Shell in 1973 that waivers would be granted if the Flota/Andino service did not have space on its vessels.

Shell reached the conclusion on August 29, 1973, that Mr. Le Hocque "was evasive at times, using veiled threats regarding his influence over import licensing and stalling for time in order that Andino could bring in enough tonnage to handle virtually all liquid bulk cargo into Colombia and Granco[4] would be in a position to get a 'lock' on all inbound cargo." Exhibit No. 99.

At the same time, August 29, 1973, a Mr. Parody of Cia Transportada S.A. (shipping agents for both Flota and Shell Colombia) stated that he could obtain waivers for Shell within 24 hours whenever needed. However, a group of Shell representatives concluded that "comments made by Lehoucq and Parody must be taken with a 'grain of salt' until experience, if any, proves otherwise."

In response to discovery requests propounded by Andino, *Esso* Chemical Supply Company, Inc., responded on March 30, 1979, in part, Exhibit No. 116:

> The cooperative working agreement contemplated by Agreement No. 10293 could operate to the detriment of the commerce of the United States in general due to the artifically high freight rates for carriage of bulk liquid chemical cargoes, the cost of which must be reflected in the price of the products exported to Colombia thereby making them less competitive with the same products exported from areas not subject to the effect of Agreement No. 10293. Secondly, the refusal of proponents to load at ports where Esso's shipper has cargo for shipment causes extra expense in transporting the products to alternate ports. Such expense must necessarily be reflected in the price of the products, thereby providing a competitive edge to producers who are not under the restraints of said Agreement. Finally, the scheduling of proponents' vessel often does not coincide with the requirements of Esso's customers and thus such customers often do not receive product at the desired time.
>
> Mr. Andres Umana of Productos Chemicos Esso was informed by Mr. Bruno Le Hocque of Flota that no waivers would be granted. The statement is also based upon trade rumors that Dow Chemical and Shell Chemical were never granted any waivers and Union Carbide Colombiana S.A. was granted only one waiver since 1973.
>
> *Esso has not applied for such waivers because of the Colombian law * * * which requires a letter from the Colombian shipping company (Flota) to accompany said application* indicating that said company can not carry the product in question.

[4] Flota.

P&E (Productos Quimicos Esso) made one application for waiver in January 1979. Said waiver was granted but there was no carrier available to transport the product.
Said tanker operators (Parcel Tankers Inc. and O.N.E. Enterprises Ltd.) do not maintain a "regular" service between the U.S. Gulf and Atlantic ports of Colombia because of the Colombian Cargo Reserve Law and its present interpretation. However, *O.N.E. Enterprises Ltd. is presently capable of carrying Esso's products to Colombia at substantially lower rates and is presently carrying similar bulk liquid chemical products to the adjacent countries of Panama and Venezuela at such lower rates.*

IMPORTERS SELECT CARRIERS

The Colombian importer-consignee buys the liquid bulk cargo which it imports from the U.S. Gulf on a F.O.B. basis at the U.S. Gulf port. Thus *the ocean freight charges are paid by the importer-consignee, and he determines and controls which liquid parcel tanker will be selected.* In other words the shipper located in the United States when shipping via a U.S. Gulf port in the trades herein, has no say-so, and no control over the selection of the liquid bulk carrier used to carry his cargo to Colombia. This requirement is by Colombian law and decree which also requires the Colombian importer-consignee to obtain import licenses for the cargo in these trades.

BARRANQUILLA'S SAND BAR

There was some testimony in the record that a sand bar in the River Magdalena impeded the safe delivery of liquid bulk cargo at the port of Barranquilla (Exhibits 61 and 99). The statement in one letter gives the superficial impression that only Andino's vessels were small enough to cross the sand bar. The facts are that Andino's vessels have a draft of about 21 feet, and O.N.E.'s vessels, the *Onestar, Onesky, Broad Atlantic, Broad Pacific,* have the same draft, and can pass the same sand bar. Vee-Marine's vessels in 1973 had drafts of more than 28 feet, and consequently *at that time* were willing to unload only into barges outside the sand bar. From time to time other shipping companies have served Colombia since 1973, and in more recent years, Andino, for one, has upgraded the quality of its parcel tankers. Presumably other carriers have done the same over the passing years. In any event, the sand bar near Barranquilla has little relevance to the merits of the proceeding in No. 79–2.

VESSEL PUMPS

Prior to 1979 and 1980, Andino chartered quite a number of vessels with common pumps for more than one tank, which vessels were used in the trade herein. It is preferable to have one pump per tank. When one pump services more than one tank on a vessel, the risk of accidents or contamination is greater, and there is more expense in cleaning the lines handling the cargoes.

Apparently, from at least 1980 on, Andino has chartered modern vessels with separate pumps for separate tanks. The record does not disclose whether other parcel tank carriers also have chartered or owned modern parcel tankers, but various other such carriers are active in serving countries other than Colombia, and presumably also have used modern-style tankers.

GENERAL STATISTICS

In the year 1971, Andino on its own made six voyages, carrying 7,590 metric tons of cargo in the Atlantic trade. In 1972, Andino on its own made eleven voyages carrying 10,560 metric tons in this trade. (Exhibits 64 and 78).

The year 1973 totalled 25 voyages in this trade, with Andino on its own making four of these voyages, and Flota/Andino making 21 voyages after the Flota/Andino agreement was made. Total cargo carried by Andino alone (4 voyages) end by Flota/Andino (21 voyages) in 1973 was 55,195 metric tons in this A trade.

The tonnage figures for the Flota/Andino service were 96,633 tons in 1974; 85,319 in 1975; 86,139 in 1976; 121,013 in 1977; 137,477 in 1978; 187,379 in 1979; and 127,789 for the first half of 1980, as shown in Exhibits 78 and 64.

In the years 1971, 1972, 1973, there were other carriers in the U.S. Gulf/Colombia trades besides Andino and Andino/Flota. The tonnages of these other carriers are not shown in Exhibits 78 and 64 which are-limited to tonnages carried on Andino's vessels.

Andino carried additional cargo besides that destined to Atlantic Colombian ports, on the same vessels, which additional cargo was destined to other ports en route to Atlantic Colombian ports. None of such additional cargo as shown in Exhibit No. 78 was destined to Pacific Colomblan ports. For instance for the year 1973, 44,018 tons went to these other ports en route. For 1974, the cargo to such other ports was 28,498 tons; for 1975 it was 41,879 tons; for 1976 it was 40,069 tons; for 1977 it was 28,507 tons; for 1978 it was 25,818 tons.

Andino issued its own bill of lading to these other ports, such as ports in Venezuela, showing, together with its regular service, sailing schedules, etc., that Andino was providing common carrier service to the Latin American area generally. Exhibit 37, for example, lists "Sailing Schedule & Fleet Information," showing three voyages, in February, three in March and two in April, 1977, from the U.S. Gulf to the North Coast of South America, with some voyages showing the discharging area of Colombia only, but with other voyages showing the discharging area of Colombia/Caribbean/Mexico or Colombia/Venezuela.

Exhibit 47, pages 4 and 5, lists "Graneles Liquidos" (liquid bulk) shipments of Dow, Shell and Esso imported from the U.S. Gulf into Colombia for the years 1971 through 1978, separating tonnages handled by Flota from tonnages handled by other liquid bulk carriers. The information in Exhibit 47 was obtained by counsel for Flota, and was received without objection by the counsel for the other parties. Somewhat different figures are shown for these three importers in Confidential Exhibit No. 70, data provided by Andino, limited to the years 1976, 1977, and 1978. To get a complete picture of the trade it is advisable to use the figures for more years (1970 through 1978) found in Exhibit No. 47.

Exhibit 47 shows for *Dow,* 4,602 tons in 1970; 3,818 tons in 1971; and 5,553 tons in 1972, all handled by carriers other than Flota. For Dow in 1973, there were 5,157 tons by Flota and 2,595 tons by other carriers. From 1974 through 1978, the carriage was all by Flota, being 13,228 tons in 1974; 5,828 tons in 1975; 8,004 tons in 1976; 12,304 tons in 1977; and 16,460 tons in 1978. These figures appear to show that Dow generally enjoyed increased tonnages in the trade with the use of the Flota service, but other factors than the use of Flota's service may have affected these tonnages.

Exhibit 47 shows for *Shell* 7,507 tons in 1970; 2,257 tons in 1971; 5,572 tons in 1972, all handled by carriers other than Flota. In 1973 for Shell there were 3,963 tons by Flota, and 3,593 tons by other carriers. For 1974 through 1978, all Shell's liquid bulk cargo in this U.S. Gulf/Colombia trade was carried by Flota. There were 4,468 tons in 1974; 1,594 tons in 1975; 1,990 tons in 1976; 2,406 tons in 1977; and 4,180 tons in 1978.

For Shell, for the period 1970 through 1978, the total handled by other carriers was 18,929 tons (1970–1973), which slightly exceeded the total handled by Flota of 18,601 tons (1973–1978). Of course, these figures do not include imports by Shell from Europe. However, even if one adds the 2,890 tons shipped from Europe in 1978, to the 4,180 tons shipped from the United States, the total for 1978, of 7,070 tons remains less than the total imported by Shell from the United States in 1970, of 7,507 tons, using carriers other than Flota. Of course, there can be many reasons for changes in tonnages imported into Colombia, other than the carriers used, such as competition with other importers.

From the above figures, one can see that Shell had reason to protest.

Exhibit 47 shows for *Esso,* 1,469 tons in 1970; 1,922 tons in 1971; and 1,267 fans in 1973, all handled by carriers other than Flota. For the years following through 1978, Flota handled most of Esso's cargo in this trade, including 497 tons in 1974; 3,347 tons in 1975; 384 tons in 1976; 7,112 tons in 1977; and 9,220 tons in 1978. Other carriers handled for Esso, 388 tons in 1977 and 500 tons in 1978, according to Exhibit No. 47.

From all of the above figures shown in Exhibit 47 for Dow, Shell, and Esso, no clear conclusions are evident as to the effects of Flota's service on the businesses of Dow, Shell, and Esso in regard to the U.S. Gulf/Colombia trade. Thus, one must turn to the testimony of the witnesses. No witness for Dow testified, but those for Shell and Esso clearly favored having the ability to be served by at least two or more liquid bulk parcel carriers in this trade.

In the U.S. Gulf to the west (Pacific) coast of Colombia trade, Flota/Transligra made about two trips a month using two vessels regularly. At times Transligra has used a third vessel in this trade. Each vessel completes a round trip in about a month. Andino kept records for Transligra in this trade, and Exhibit 75 shows tonnages from January 1, 1976 through June 30, 1980, which were compiled from bills of ladings. The leading category of liquid bulk cargoes in this trade was vegetable oils and animal fats, and caustic soda was the principal chemical transported. Total metric tons were 16,174 in 1976; 19,879 tons in 1977; 45,597 tons in 1978; 91,219 tons in 1979; and 56,198 tons for six months of 1980. These figures show a steady and substantial increase over the years from 1976 to 1980.

These figures apparently have been updated by those found in Exhibit 168, Table U, which is attached as an appendix to this decision.

Exhibit 168, Table O, page 18, states, "C. For the years 1974–76, Agreement 10293, between Flota Mercante Grancolombiana, S.A. and Andino Chemical Shipping Company, Inc., covered the trade in liquid bulk chemicals and fats and oils between the U.S. Gulf and *both the Atlantic and Pacific Coasts* of Colombia." (Emphasis supplied.)

That was not literally true since Agreement 10293 was not filed until April 1977, but apparently it was the intent of the respondents' witness in compiling his statistics to treat Agreement 10293 as if it had been effective prior to 1977.

In any event, where there are conflicts in the statistics in the various exhibits, such as between those in Exhibit 149 and Exhibit 168, the statistics in the latter were prepared last and should be used.

Also, some statistics of record were based on the records of Flota, and some on the records of Andino, and they differ in some instances even though ostensibly both records cover shipments of the same cargoes for the same periods. Exhibit 58, compiled from Flota's records, shows tonnages for 1977 and 1978, which differ from the tonnages shown in Table U of Exhibit 168, compiled from Andino's records.

However, all the statistics are useful in showing general trends in the trades here in issue.

Exhibit 168, Table U, page 24, gives a broad picture of Flota's participation in these U.S. Gulf-Colombian liquid bulk cargoes trades for the years 1974–1980, inclusive. Table U is a significant presentation of data.

Total cargoes grew from 98,789 tons in 1974, to 204,067 tons in 1980, in the Atlantic trade. Total cargoes grew from 15,409 tons in 1974, to 101,926 tons in 1980, in the Pacific trade.

Grand totals for these *two trades* grew from 114,198 tons in 1974 to 305,993 tons in 1980. In other words, the total tonnage in 1980 was more than two and two-thirds as much as it was in 1974.

Cargoes in 1980 were 66.7 percent in the Atlantic trade, and 33.3 percent in the Pacific trade.

Respondents generally attribute the growth in tonnages in the two trades to the quality and regularity of the Flota services, but this is only speculation. One may speculate, also, that these growths in tonnage were the result in the growths of the businesses of Colombian industries during the seven-year period 1974–1980. In other words, did the ships bring the tons, or did the tons bring the ships?

Table U shows 305,993 tons of liquid bulk cargoes were handled by Flota in 1980, and Table A of Exhibit 168, page 3, and Table 1 of Exhibit 149, together, show a total of 592 parcels for both trades in 1980. Dividing the above figures shows an average parcel size for the two trades combined of about 524 tons per parcel in 1980 handled by Flota. In 1977, total cargoes in both trades were 154,634 tons. Total parcels in both trades in 1977 were 324.

In 1977 in the Atlantic trade there were 268 parcels, total of chemicals and of fats and oils. This total grew to 368 in 1980 for the Atlantic trade.

In 1977 in the Pacific trade there were 56 parcels, total of chemicals and of fats and oils. This total grew to 124 in 1980 for the Pacific trade.

With a total of 592 parcels for both trades, in 1980 and with 305,993 tons, the question remains is there only enough business essentially for one principal carrier in each trade? Or, is there enough business for more carriers?

Exhibit 168, Table O, page 18, shows the "collected freight revenues" paid by importer-consignees; the so-called "cancelled freight revenues" (the amounts paid by Flota to Andino for chartered space); and the "gross profits" of Flota, the differences between the first two figures for the years 1974–1976 inclusive for both the Atlantic (79–2) and Pacific (79–3) trades, and for the years 1977–1980, inclusive, for the Atlantic (79–2) trade only.

Flota's collected freight revenues in the A trade grew from $4,301,059 in 1977 to $7,299,032 in 1980, and Flota's gross profits before taxes grew in the same years from $467,151 to $687,207.

Exhibit 168, Table P, page 19, shows similar collected freight revenues, cancelled freight revenues (paid to Transligra), and gross profits of Flota for the years 1977–1980 inclusive for the Pacific (79–3) trade only. Cancelled freight revenues in this table are those paid by Flota to Transligra.

Flota's collected freight revenues in the P trade grew from $1,245,603 in 1977 to $4,515,294 in 1980, and Flota's gross profits grew in the same years from $184,735 to $550,777 in 1980.

For the years prior to 1977, Flota's collected freight revenues and gross profits are shown as combinations of its services in both the A and P trades in Table O.

A compilation of Flota's total yearly collected freight revenues, obtained from data in Exhibit 168, Tables O and P, and Exhibit 149, Table 20, shows how Flota's cargo carryings in the trades herein grew greatly from 1974 through 1980, with a "?" inserted where the tables do not show data broken down as between the Atlantic and Pacific trades:

Years	From Exhibit 168 Table O Alantic Trade	From Exhibit 168 Table P Pacific Trade	From Exhibit 149 Table 20 Totals: Alantic and Pacific Trades
1974	?	?	$3,736,895
1975	?	?	3,271,142
1976	?	?	3,779,104
1977	$4,301,059.25	$1,245,603.25	5,546,663
1978	4,332,035.04	1,823,872.07	6,155,907
1979	5,843,632.41	4,070,969.17	9,914,602
1980	7,299,032.62	4,515,294.09	11,814,327

As seen, from the above compilation, Flota's freight revenues, as a total of both the Atlantic and Pacific trades, much more than tripled from 1974 ($3,736,895) to 1980 ($11,814,327).

The individual trades also greatly increased, from 1977 to 1980, for the Atlantic from $4.3 million to $7.3 million, and for the Pacific from $1.2 million to $4.5 million.

Both the Atlantic and Pacific trades of Flota increased in 1979 over 1978, and in 1980 over 1979, leading to the conclusion that the Colombian diplomatic note of July 6, 1979, and the change in the Incomex stamp in the same year from 100 to 50 percent did not result in inhibiting the growth of Flota's cargoes in these trades.

The record, as seen, discloses the "cancelled freight revenues" paid by Flota, to Andino in the A trade, 1977–1980, and in the A and P trades totals 1974–1976; as well as paid by Flota to Transligra in the P trade, 1977–1980.

What is not shown, are the gross profits of Andino and Transligra. From this record, it cannot be determined whether Andino and Transligra profited or lost in these trades, nor the extent, nor the reasonableness of such profits if they profited.

While Flota's rates may have been reasonable in relation to what Flota paid Andino and Transligra the record as a whole indicates that Flota's rates were high, in view of comparable rates to Venezuela, and in view of the testimony of a witness for Esso that over the years from 1973 through 1980, Flota's charges were higher than those Esso could have provided to its Colombian importer-affiliate under existing contracts of affreightment with the parcel tank carriers including Stolt-Nielsen and O.N.E. Esso believes that it suffered additional costs totalling about $266,000 for these years because of Esso's being compelled to use Flota's service in the A trade, including costs of inland freight caused by Flota/Andino in declining to load IPA (a liquid bulk chemical) at Baton Rouge.

Flota's charges to Esso (Exhibit 109) increased from $19 a ton in 1973 ($18,525 for 975 tons) to $53.30 a ton in 1980 ($169,113 for 3,173 tons).

For the years 1974 through 1980, in the U.S. Gulf/Atlantic trade (No. 79–2), Flota/Andino transported a total of 690,132 tons of chemicals, and 239,304 tons of fats and oils, or a grand total of 929,436 tons. Of this amount a total of 237,484 tons, or 25.55 percent, was handled under contracts of affreightment. Such c.o.a. shipments totalled 187,276 tons of chemicals, or 27.14 percent, of the chemical total, and 50,208 tons of fats and oils, or 20.98 percent, of the fats and oils total. (Exhibit 149, tables 8 and 9).

For the same years, 502,856 tons of chemicals, or 72.86 percent of the chemical total, were handled by Flota/Andino in this Atlantic trade as non-c.o.a. shipments. Also 189,096 tons of fats and oils, or 79.02 percent of the fats and oils total were handled by Flota/Andino as non-c.o.a. shipments.

Non-c.o.a. rates often apply to smaller parcels under single-voyage arrangements, whereas c.o.a.'s apply for multiple voyages. The smaller the parcel, generally the higher is the non-c.o.a. rate. Flota's non-c.o.a. rates, of course, were higher than its terms under c.o.a.'s.

Exhibit 149, Table 1, shows that Flota/Andino's cargo in the Atlantic trade, chemicals plus fats and oils, totalled 98,861 tons in 1974, and grew to 204,240 tons in 1980. (Computed by multiplying average parcel size by number of parcels.)

Average parcel sizes were 487 tons in 1974 and 555 tons in 1980. Average chemical parcel sizes were 458 tons in 1974 and 487 tons in 1980, and average fats and oil parcel sizes were 800 tons in 1974 and 847 tons in 1980.

Table 2 of Exhibit 149 shows that for the years 1974–1980, inclusive, the average parcel size for all chemicals was 464 tons, but for c.o.a. shipments of chemicals was 2,256 tons, and for non-c.o.a. shipments of chemicals was 358 tons.

The similar story for fats and oils for 1974–1980, shows an average parcel size of 652 tons for all fats and oils, 688 tons for c.o.a.'s and 643 tons for non-c.o.a.'s.

Table 3 of Exhibit 149 breaks down the number of parcels by parcel size, again for the years 1974–1980. For chemicals, out of a total of 1,487 parcels, in the 150 ton or less category were 463 parcels or 31.1 percent, and in the 151–250 ton category were 429 parcels or 28.9 percent.

These two categories total 60 percent, indicating the "drug-store" nature of the chemical trade.

Exhibit 149, table 4, shows parcel sizes for fats and oils, shipped by Flota/Andino in this Atlantic trade. Out of a total of 367 parcels of fats and oils, 168 parcels or 45.8 percent were in the 300–500 ton category; and 138 parcels or 37.6 percent were in the 501–1,000 ton category. These two categories together made up 83.4 percent of the fats and oils total.

As seen, there were fewer total parcels of fats and oils (367) than parcels of chemicals (1,487), but the fats and oils parcels generally were larger (mostly 301–1000 tons) than the chemical parcels (mostly 250 tons or less).

The average number of parcels (including chemicals, and fats and oils) for Flota/Andino for 1974–1980 (table 5) was seven parcels per voyage. Over these years 265 voyages were made, or an average of nearly 38 per year. Table 6 of the same exhibit shows the average number of shippers was 4.2 per voyage.

Andino found it necessary to carry cargo for other parties than Flota on the above voyages, and the statistics for these other shippers, and how many other shippers there were are not included in the above tables, which were derived from Flota's bills of lading, and did not include Andino's bills of lading for these other shippers to other destinations such as to Venezuela.

In other words, the tables in Exhibit 149 referred to above pertained only to cargo shipped on Andino vessels under its Agreements with Flota.

Table 7 in the above category shows that the number of U.S. Customs' Districts (port areas) in the U.S. Gulf called on by the Flota/Andino service in the years 1974–1980 averaged 2.2 per voyage. This number would add to vessel time and vessel expenses, depending upon how many port areas of origin of the shipments in excess of one were involved in a voyage.

The statistics in tables 1 to 7 above generally confirm the "drug store" nature of the trade.

Table 1 on page 17 of Exhibit 148, shows Flota's shares of liquid bulk cargoes from the U.S. Gulf to Colombia for the years 1977, 1978, and 1979.

Out of a total of 199,056 tons in 1977, Flota carried 165,561 tons, or 83 percent.

Out of a total of 206,320 tons in 1978, Flota carried 160,426 tons, or 78 percent.

Out of a total of 318,347 tons in 1979, Flota carried 283,300 tons, or 89 percent.

The latter figure is significant, in that it shows Flota's large share persisted even following the guarantee dated July 6, 1979, by the Government of the Republic of Colombia that 50 percent of all liquid bulk products may be carried to Colombia without any vessel flag restrictions (Diplomatic Note No. 3211/E 179).

Witness Schmitt, called by Hearing Counsel, concluded that the anti-competitive impact of the subject agreements is large. He also concluded that Flota's overwhelming market share occurred in these trades since the inception of Flota's space chartered services between the U.S. Gulf and Colombia.

When queried about whether Flota's high rate of participation in the trades in 1977, 1978, and 1979 would carry over to 1980, 1981, and 1982, witness Schmitt said he had no reason to think such participation would not carry over.

Mr. Schmitt on cross-examination (transcript 2066) stated that the total cargo carried by all parcel tanker carriers from the U.S. Gulf to Colombian ports in 1977 was roughly 200,000 tons (199,056 tons in Exhibit 148, table 1), and went to 318,000 tons (318,347 tons in Exhibit 148, table 1) in 1979, and that where an outsider, Pan American Tankers, had a contract to move 6,000 to 12,000 tons in 1980 (transcript 129), that isolated amount of tonnage did not indicate that there was no monopoly in the trade.

According to respondents' witness French, the Pacific trade yet does not have a sufficient volume of cargo to utilize fully the chemical parcel tankers operated by Transligra under the Flota/Transligra agreement 10295. Exhibit 168, Table Y, shows an average vessel percentage of utilization to capacity over the years 1974 through 1980 (Flota/Andino 1974–1976; and Flota/Transligra 1977–1980) in the Pacific trade of 40.9 percent, for a total of 102 voyages. The remaining cargo capacity of the vessels was used largely to transport parcels to Ecuador.

Exhibit 168, Table Y, does not break down the statistics year by year, and no doubt the vessel utilization to capacity percentage in 1980 was much higher than the comparable percentage for 1974. This conclusion is reached of necessity from the tonnages shown in Exhibit 168, Table U. That table shows 15,409 tons of cargo in 1974 and 101,926 tons of cargo in 1980 in this U.S. Gulf/Pacific Colombia trade. Exhibit 168, Table E, shows 9 voyages in 1974 and 27 voyages in 1980 in this Pacific trade, which equate to about averages of 1,712 tons per voyage in 1974 and 3,775 tons per voyage in 1980, for cargo to Pacific Colombia (Buenaventura).

Of course, the percentage of utilization depends upon the sizes of the vessels used. The vessels used in the Pacific trade, from 1974 through 1980, ranged in cargo capacity from 2,900 tons (*Chemie Carrier*) to 14,000 tons (*Espoir*), each of which made only three voyages in the Pacific trade in these years. (Exhibit 168, Table Y). The four vessels which made the most voyages were the Chimborazo, cargo capacity 7,200 tons and 17 voyages; the *Fuji Andina*, 7,200 tons and 16 voyages; the *Silver Magpie*, 10,500 tons and 16 voyages; and the *Thomona*, 6,900 tons and 27 voyages. (Exhibit 168, Table Y).

Exhibit 168, Table A, shows 22 parcels were shipped on the nine voyages in 1974 in the Pacific trade, compared with 124 parcels on 27 voyages in 1980. For all of the years 1974–1980 together in the Pacific trade the average number of parcels per voyage was 3.8, and the average number of shippers per voyage was 3.3. (Exhibit 168, Tables E and F). For 1980, as seen, there was an average of 4.6 parcels per voyage, and the same or less of an average of shippers per voyage for cargo in the Pacific trade, compared with 2.4 parcels per voyage in 1974, and that number or less average shippers in 1974.

Overall from the statistics above, it is clear that the Atlantic is a larger volume trade than the Pacific, but the latter trade has been growing at a greater rate. (Exhibit 168, Table U).

Further, it is clear that Flota has profited from these trades, having gross profits, exclusive of agency and port fees, of $467,151 in the A trade, and of $184,735 in the P trade, in 1977. These gross profits of Flota grew to $687,207 in the A trade, and to $550,777 in the P trade, in 1980.

The gross profits of the underlying vessel operating common carriers, Andino and Transligra, are not shown, but presumably they would have terminated their agreements with Flota sometime between 1973 and 1980 (Andino) or sometime between 1977 and 1980 (Transligra) if these agreements were either unprofitable or showed little likelihood of profits.

Witness Cina, for intervener O.N.E., made a total market analysis for the liquid bulk cargo in these A and P trades, from the U.S. Gulf to Colombia for the years from 1974 through the first six months of 1980. (Exhibit 81–A). He determined the total profit potential for O.N.E. based on a total capture of the market by O.N.E.

He uses an average freight rate for the years 1974–1980 of $38.74 a ton, and an average O.N.E. operating cost of $27.35 a ton. For a total of 1,176,795 tons of cargo for these years, Mr. Cina computes gross revenues of $45,586,487 for O.N.E., and O.N.E. operating costs of $32,181,236. The difference would have been $13,405,251 of net potential revenue for O.N.E. total for 1974 through first six months of 1980. (Exhibit 81–A, page II–8).

Witness French for the respondents criticizes the Cina study for a number of reasons, including that O.N.E. in no way is entitled to capture the entire market in these A and P trades, because the Colombian cargo reservation law ostensibly would permit O.N.E. to compete only for 50 percent of the tonnage in the trades, and that the only way O.N.E. would be able to capture the market would be for O.N.E. to displace Andino and Transligra as parties to the space chartering agreements with Flota.

Mr. French criticizes Cina's use of average freight rates, each, for all chemicals, and for all fats and oils, without allegedly proper reference to the variances of rates by parcel sizes. Mr. French criticizes the use by Cina of the costs of the vessels *Onesky* and *Onestar*, because of their design and capabilities the failure to include downtime of vessels for repairs, delays because of heavy weather and port congestion, and the charter hire rate not stated for O.N.E.'s two newer vessels, the *Brage Atlantic* and the *Brage Pacific*.

Mr. French points out that Andino cannot always make full use of its vessels in the A trade with only Colombian cargo, that on an average for 1974–1980 about 20.5 percent of the Andino vessels' capacities had cargoes bound for destinations other than Colombian ports. Also, that if cargo destined to ports in Venezuela were added to the Cina voyage patterns, there would be more voyage time and resulting increased operating costs. Andino is able to fill its ships only through aggressive efforts to obtain cargo other than cargo carried under Agreement No. 10293.

Mr. Cina used as a typical voyage in his calculations, the route, New Orleans-Houston-Barranquilla-Cartagena-New Orleans. Mr. French insists that this is not typical of Andino's voyages and rather that this Cina voyage pattern is based on the "cream" of the A trade; and that the addition of other ports and their berths would increase voyage time and port costs. Mr. French also insists that the Cina calculations contain errors regarding commissions, and errors regarding the P trade, including transit time of the Panama Canal.

Mr. French contends that Mr. Cina overestimated gross revenues and underestimated operating costs in both the A and P trades.

In lieu of the Cina calculations, Mr. French refers to his Exhibit 149, table 11, where he computes that the weighted average of Flota's rates for chemicals increased from $27.03 per ton on July 1, 1975, to $45.28 per ton on July 1, 1980. Tables 12 and 13 of the same Exhibit 149 show Flota's weighted average rate for fats and oils increased from $42.37 per ton on July 1, 1975 to $49.85 on July 1, 1980. Excluded from Mr. French's analysis were rates charged under contracts of affreightment, which c.o.a. rates are negotiated individually with a few large volume shippers.

Mr. French also points out that besides the factors considered by Mr. Cina, consideration also must be given to such factors as gross national product in Colombia, relative prices in Colombia and the United States and other variables which may influence the "demand" side of the trades, as opposed to the supply and costs side of the market.

Mr. French states that, an inescapable conclusion, from the statistics of record, is that the demand for liquid bulk cargo imports in Colombia has increased.

Any rates of Flota in the trades, it is concluded by Mr. French, "must consider both the demand for and supply of transportation services in the market."

Without the costs of Andino and Transligra, there is no way of ascertaining whether the rates, published in tariff style or in contracts of affreightment, were reasonably related to the costs of the services in the A and P trades. At least some of the shippers in the trades believed that the Flota near monopolies resulted in higher costs to them than would have obtained if other carriers could have operated in the trades. These shippers' views are bolstered by the rates available to Venezuela, which were lower than those to Colombia.

GENERAL DISCUSSION AND CONCLUSIONS

1. JURISDICTION OVER THE PARTIES

Are Andino and Transligra common carriers by water subject to the jurisdiction of the Commission?

Andino argues that while its service in the A trade is frequent, that its service is not regular, because its vessel schedules change according to the requirements of its "sole customer, Flota," and the composition of the cargo. Also, Andino argues that while it constantly serves Cartagena and Barranquilla, the precise point of loading at the U.S. Gulf is not specified in Andino's statements of sailing positions. Andino concludes therefrom that its service is irregular between unspecified ports.

Andino also argues that it does not solicit cargo in the A trade, does not advertise sailings, and does not carry general cargo, but instead carries specialized bulk parcel tanker cargoes. Andino says it serves only one shipper in the A trade, does not issue bills of lading, and that without the charter of Andino's space by Flota, Andino could not move reserved cargo in this trade.

Exhibits 37, 38, and 39 show "Sailing Schedules & Fleet Information," listing Andino Chemical Shipping Co., Inc., Flota Mercante Grancolombiana S.A., Maritima Transligra, S.A., and others. Pages 2 of these exhibits shows 4 sailing schedules, one of which is "U.S. Gulf/North Coast South America Service" listing "Sailing Schedules" for three-month periods. The loading Area is "Gulf," the Loading Date is a range of dates, and the "Discharging Area" is Colombia or Colombia Venezuela. Another sailing schedule on pages 2 lists "U.S. Gulf/West Coast South American Service," showing the discharging area of Colombia/Ecuador. These schedules are specific enough to show a regularly scheduled service. These schedules were regularly sent to shipping brokers for the U.S. Gulf/Colombian/Venezuelan/Caribbean trade. In addition, Exhibit 76 shows Andino's "Weekly Vessel Position Schedules" and these were sent to shipping brokers. For example, one small part of the first page of some 284 pages of Exhibit 76 shows the vessel, *Fuji Andina,* voyage 42, in 1979 as follows:

New Orleans, Houston,	October 30, November 5.
Cartagena,	November 11/12.
Barranquilla,	November 13.
Gulf,	November 18.

The same page shows for the vessel, *La Selva*, voyage 45, in 1979:

Gulf,	November 20, 25.
Colombia,	December 2, 4.
Venezuela,	December 7, 9.
Gulf,	December 16/17.

The same page of Exhibit 76 shows the vessel, *Chimborazo*, voyage 420, in 1979 (in the P trade) as follows:

New Orleans,	October 3.
Buenaventura,	October 12/13.
Manta,	October 15.
Guayaquil,	October 16/20.
Gulf,	October 29/31.

Andino is the agent for Transligra in this service in the P trade. Exhibit 76 shows that the public was given notice of Andino's and Transligra's services from the U.S. Gulf to Colombia and to other South American and Caribbean destinations.

Andino does not charter its entire vessel space to Flota in the A trade, nor does Transligra charter it entire vessel space to Flota in the P trade. Andino solicits and carries cargo in spaces not used by Flota to fill up its vessels. There is no doubt at all that Andino acts as a common carrier by water to destinations such as Venezuela in connection with its service in the A trade, and the same is true for Transligra in its services to Ecuador in the P trade.

Flota exercises no control over the navigation of the vessels. Such control is exercised by Andino in the A trade and by Transligra in the P trade. Both Andino and Transligra provide regularly scheduled services between specified ports, which are more particularly named in Exhibit 76, the weekly position schedules.

It is true that Andino and Transligra in their services to Colombia only, do not issue bills of lading in their own names, but this fact alone does not negate their status as common carriers respectively in the A and P trades to Colombia, where any and all shippers are served by the Flota/Andino and Flota/Transligra services.

Flota in these trades operates no vessels itself, and must be classed as a non-vessel-operating common carrier.

Further, Agreement No. 10293 Sub-1 between Flota and Andino provides that Andino will take "responsibility in accordance with Tanker Bills of Lading and/or contracts that cover the shipments and will be responsible for the carrying of such cargo" to Colombian ports. "The claims will be paid by FMG[5] for the account of ACS,[5] only after duly[5] authorization by ACS." (Exhibit 2B). Agreement No. 10295 Sub-1 between Flota and Transligra, similarly to the agreement of Flota and Andino, provides that

[5] FMG is Flota; and ACS is Andino. "Duly" is the language of Exhibit 2B.

Transligra will take "responsibility in accordance with Tanker Bills of Lading and/or contracts that cover the shipments, and will be responsible for the carrying of such cargo to Colombian ports."

As seen, Andino and Transligra take the "responsibility" for the shipping contracts, they provide the ships, control the loading, navigation, etc., issue sailing schedules, provide regular service at regular intervals, and in general serve the entire shipping public in the A and P trades. Accordingly it is concluded and found that Andino and Transligra are common carriers by water in the foreign commerce of the United States in the A and P trades, respectively.

2. JURISDICTION UNDER SECTION 15 NOT AFFECTED BY SECTIONS 18(b)(1) AND 14b(8) OF THE ACT

As discussed previously, liquid bulk cargo rates are not required to be filed. Section 18(b)(1) of the Act provides an exemption for cargo carried in bulk without mark or count. Legislative history suggests that it was intended that common carriers be free to change their rates on bulk cargoes so as to compete for such cargoes with unregulated "tramp" carriers in the foreign commerce. Section 18(b)(1) so far as here pertinent provided a tariff exemption, but did not give up jurisdiction over common carriers of liquid bulk cargoes under other provisions of the Shipping Act.

Flota contends that the liquid bulk parcel tanker industry is not within the reach of section 15 of the Act, as a consequence of section 14b(8) of the Act, which provides that approved dual rate contracts of common carriers or conferences of such carriers must "exclude cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots." In other words, a dual rate contract may include some liquid bulk cargoes in less than full shipload lots, but not liquid bulk *chemical* cargoes in less than full shipload lots.

Again, as in the case of the provisions of section 18(b)(1), the provisions of section 14b(8) do not affect the jurisdiction over common carriers in the foreign commerce of the United States of liquid bulk cargoes under other provisions of the Act, such as section 15. If such carriers are to be exempted from the provisions of section 15 of the Act, that section must so provide, and it does not.

3. THE SUBJECT AGREEMENTS AS COOPERATE WORKING AGREEMENTS

Andino once operated on its own in the A and P trades prior to its 1973 agreement with Flota. Transligra might very well operate on its own in the P trade were it not for its agreement with Flota. The subject agreements surely limit competition between Andino and Flota, and between Transligra and Flota, and even also between Transligra and Andino.

The main question under section 15 is whether the agreements in issue herein are cooperative working arrangements. It must be concluded that they are. They have allocated the U.S. Gulf/Colombia liquid bulk cargo trade into two services, the Flota/Andino service in the A trade, and the Flota/Transligra service in the P trade. The agreements dictate the frequency and number of sailings in these two trades. The agreements have resulted in Flota's obtaining near monopolies in these two trades since 1973, through Flota's space charters with Andino and Transligra.

Andino and Transligra have committed themselves to provide Flota with all the vessel space needed to serve both trades. Flota will space charter only from Andino and Transligra, except when Andino and Transligra cannot provide the necessary space to Flota, in which event Flota will be free to use other carriers to transport the cargoes. In fact, Flota has not obtained vessel space on any carriers other than Andino and Transligra. In sum, the subject agreements control nearly all of the freight carried in these two trades, and they provide for two exclusive preferential working arrangements within the language of section 15 of the Act. Such agreements require approval by the Commission.

In general, section 15 of the Act requires common carriers by water in the foreign commerce of the United States to obtain Commission approval of any agreements limiting competition between such carriers.

4. THE LAWFULNESS OF THE NEAR MONOPOLIES

Flota admits or concedes that it has a dominant position in these A and P trades, but argues that such position cannot be attributed to the subject agreements, and that its position cannot be attributed to anything done by Flota itself, or by Andino or by Transligra. Rather, Flota argues that its dominant position results from the Colombian Cargo Reservation Decrees, which reserve to Flota or to other Colombian or to U.S. flag vessels the first fifty percent of the cargo to be moved under each import license. Flota argues that should the subject agreements be disapproved the Commission would involve itself in the exercise of assuming to overrule the lawful and valid acts of a friendly, sovereign foreign government.

Flota insists that if the subject agreements were to be canceled, Flota's dominant share of the trade would remain the same. This may be true in theory, but would not be true in practice, because Flota has no liquid parcel tank carriers of its own and has not shown that it can serve these trades on its own. Without the subject agreements it appears that there would be no near monopolies, or "dominant" position, of Flota in these trades. This would remain true unless, for example, Flota were to make similar exclusive agreements with some other carrier or carriers, such as O.N.E., to take the place of its exclusive agreements with Andino and Transligra. Of course, Flota conceivably might acquire its own vessels.

The Colombian Cargo Reservation decrees preceded the subject agreements herein. Decree #994 was dated April 29, 1966; Decree #1208 was dated July 21, 1969; and Decree #2349 was dated December 3, 1971.

Prior to March 1, 1973, although these Colombian decrees authorized the fixing of import and export cargo reserved to Colombian-flag vessels, in actual practice there were no restrictions on the entry of independent carriers of any flag in these trades. Numerous foreign flag carriers plied these trades prior to 1973. This was true because there was no Colombian flag carrier in these trades.

So, it must be concluded, that *the decrees alone* did not cause the near monopoly situations in these trades.

Nor, did the *subject agreements alone* cause the near monopoly situations.

It is the *combination of the* Colombian Cargo Reservation *decrees and the subject agreements* which has caused the near monopoly situation in these trades.

All parties agree that the lawfulness of the Cargo Reservation decrees is not in issue herein. But, in issue is the lawfulness of the subject agreements.

Not all monopolies are unlawful. A trade may be of such a nature that its economic features may justify only one dominant carrier, or only one carrier with a near monopoly.

Flota contends that the subject agreements have been most beneficial to the public interest of the United States and have caused no detriment to its foreign commerce.

Respondents' witness French stated that the absence of purely competitive conditions may be in the public interest in some situations; and that if more than one carrier were in a trade, shippers may have to pay a higher price than if one principal carrier operated in the trade. He stated that "the trade in question is characterized by decreasing average costs and so can best be served by once principal carrier."

Mr. French believes that one principal carrier (Flota) can provide frequently scheduled service at a lower cost than two or more competing carriers because of the one carrier's ability to place and commingle cargoes and use its capacity more efficiently.

But, the question remains, would not some competition stimulate improved services and more competitive, and thus lower, rates in these trades?

5. THE PUBLIC INTEREST IN THE AVAILABILITY OF THE SERVICES OF TWO OR MORE PARCEL CARRIERS IN THESE TRADES

The only certain way to find out what would best serve the public interest of the shippers, consignees, carriers and others concerned with these A and P trades is to provide a way that permits the services of two or more parcel tank carriers in each of these trades.

It may be true that the near-monopoly services of Flota have been in the public interest, but that is less likely now than it may have been in 1973, or 1974 or in 1976.

The statistics of record show very substantial growths in both the A and P trades between 1974 and 1980 (Exhibit 168, Table U, attached to this decision.)

The statistics from 1977 through 1980 as to freight revenues, and gross profits show the true picture as to these elements trade by trade, because in 1976 and prior thereto, these statistics were a combination of both trades because Andino together with Flota then served both trades.

From 1977 to 1980, Flota's collected revenues in the A trade grew from $4.3 million to $7.3 million, and its gross profits grew from $467 thousand to $687 thousand. (Exhibit 168, Table 0.)

From 1977 to 1980, Flota's collected revenues in the P trade grew from $1.2 million to $4.5 million, and its gross profits grew from $185 thousand to $551,000. (Exhibit 168, Table P).

The above growths in these A & P trades, no doubt, resulted at least in part from the very satisfactory services of Flota/Andino and Flota/Transligra. Many shippers attested to their services.

The above growths in these two trades also, no doubt, resulted from the general progress and growth of the industries of Colombia.

It is concluded and found, principally from the above statistics, that there is enough business and industry in Colombia to support at least two or more principal parcel tankers in each of these two A and P trades, and that it is in the public interest to provide a way that permits such services. The testimony of record is that shippers would welcome the introduction of more principal carriers, and that some believe their shipping costs would be less as a result of more competition in the trades.

ULTIMATE CONCLUSIONS AND FINDINGS

It is concluded and found that generally in the past the services of Flota/Andino and Flota/Transligra have been near monopolies, but have been largely in the public interest, particularly in earlier years.

But, it is concluded and found also that for the present and for the future, these near-monopoly services are contrary to the public interest.

In view of the record as a whole, and in particular the growths of the tonnages in these trades, and the growths of the gross profits of Flota, it further is concluded and found that for the present and foreseeable future, the subject agreements herein between Flota/Andino in No. 79–2 and between Flota/Transligra in No. 79–3 are unlawful under section 15 of the Shipping Act, because they are cooperative working arrangements which control, regulate, prevent and destroy competition in these A and P trades, because these agreements now operate and will operate to the detriment of the commerce of the United States, and because these agreements are contrary to the public interest.

It is further concluded and found that Flota, Andino, and Transligra are common carriers by water subject to section 15 of the Act.

It is further concluded and found that Agreement No. 10293 and Agreement No. 10293 Sub-1 constitute the complete agreement of Flota and Andino; that Agreement No. 10295 and Agreement No. 10295 Sub-1 constitute the complete agreement of Flota and Transligra; that these agreements were implemented without Commission approval.

It is further concluded and found that the proponents of these agreements have failed to demonstrate that the benefits of these agreements outweigh their anticompetitive consequences.

These subject agreements are disapproved.

(S) CHARLES E. MORGAN
Administrative Law Judge

Attachments (2):

Notice of withdrawal of Esso
Exhibit No. 168—Table U

APPENDIX I

BEFORE THE FEDERAL MARITIME COMMISSION

AGREEMENT NO. 10293

DOCKET NO. 79–2

NOTICE OF WITHDRAWAL

Pursuant to Rule 5(m) of the Commission's Rules of Practice and Procedure, 46 CFR § 502.73, Esso Chemical Supply Company Inc. hereby moves to withdraw from this proceeding for the reasons set forth hereunder:

On or about June 7, 1977 Esso Chemical Supply Company Inc. (hereinafter "Esso") filed with the Federal Maritime Commission a letter setting forth its reasons for protesting the approval of Agreement No. 10293, submitted to the Federal Maritime Commission on April 14, 1977, by Flota Mercante Grancolombiana S.A. (hereinafter "Flota") and Andino Chemical Shipping Inc. (hereinafter "Andino"). A copy of said letter is attached hereto as Exhibit A.

The primary objection of Esso to Agreement No. 10293 focused upon the fact that the Agreement did not reflect that, under Colombian law, United States shippers had the unconditional right to transport a minimum of 50 percent of bulk liquid chemicals/specialty cargoes from the United States Gulf to Colombia on chemical/specialty tankers registered under United States or Third Nation flags.

Further objection to Agreement No. 10293 was raised by Esso on the ground that the de facto implementation of Agreement No. 10293 since 1973, the Colombian Cargo Reserve Law (Decree 1208 of July 21, 1969) and the interpretation of said law precluded shippers from transporting bulk liquid chemical/specialty cargoes from the U.S. Gulf to Colombia on any vessels other than those of Flota/Andino at freight rates which were not competitive with rates being offered by other carriers who could not be used because of the aforesaid laws and regulations.

Esso raised further objections to Agreement No. 10293 on the grounds that the quality of the Flota/Andino service had been unsatisfactory; Flota/Andino vessels often being incapable of carrying Esso's products in tanks separate from those of other shippers, and often being unable to heat Esso's cargoes sufficiently to permit efficient discharge. Esso also objected to the fact that Flota/Andino vessels were not willing to call at all ports where Esso had cargoes for transport thereby requiring Esso to incur substantial additional costs to transport these products overland to ports where Flota/Andino vessels would call, in order to obtain transport of its cargoes from the U.S. Gulf to Colombia. In addition Esso objected to Flota/Andino's inefficient scheduling of vessels which prevented Esso from providing an orderly supply of products to its customers.

In the penultimate paragraph of its letter to the Federal Maritime Commission dated June 7, 1977 Esso, however, stated that it would take no exception to Agreement No. 10293 if suitable guarantees were presented enabling any interested party to import a minimum of 50 percent of its bulk liquid chemical/specialty cargoes from the U.S. Gulf to Colombia on chemical/specialty tankers having United States or Third Nation flags as provided in Decree 1208.

During the pendency of these proceedings before the Federal Maritime Commission, Flota/Andino have improved the quality of their transport to a level which Esso presently deems minimally acceptable. Further, Esso has recently been advised by Flota that Flota will not object to the shipment by Esso, and will facilitate Esso in obtaining waivers required to permit unrestricted shipment by Esso, on United States or Third Nation flag vessels, of IPA cargoes originating from Baton Rouge, Louisiana.

Furthermore, the Republic of Colombia has on August 29, 1979 substantially increased the number of liquid chemical/specialty products on the Free Import List which Esso and others import from the U.S. Gulf into Colombia. The effect of this amendment of the Free Import List is to enable Esso and others to ship approximately 50 percent of their customers' semi-annual requirements of said products on United States flag or Third Nation flag bulk liquid chemical/specialty product carriers.

In addition, the Republic of Colombia, which had previously required import licenses issued for all imports to be stamped requiring shipment of 100 percent of said imports on Colombian flag or associated vessels, (See Exhibit B(1)), recently amended its stamp to require shipment of only 50 percent of said imports on Colombian flag or associated vessels, (See Exhibit B(2)). A translation of the INCOMEX stamp is attached as Exhibit B(3).

Moreover, it now appears that by virtue of Diplomatic Note No. 3211/E179 dated July 6, 1979, attached hereto as Exhibit C, the Government of the Republic of Colombia guarantees that 50% of all bulk liquid products may be carried to Colombia without any vessel flag restrictions.

Given the conditions, assurances and guarantees aforementioned which are the material and sole inducement for this Notice of Withdrawal, Esso respectfully advises the Federal Maritime Commission and the parties to Federal Maritime Commission Docket No. 79–2 of its withdrawal from said proceedings, the objections set forth in its letter dated June 7, 1977 having been substantially eliminated. In the event, however, that any of the conditions, assurances or guarantees described herein should be rescinded, modified or in any way altered to detrimentally effect Esso or other shippers front the U.S. Gulf to Colombia, Esso reserves its right to take such measures as it deems necessary including, but not limited to, the right to reenter the aforesaid proceeding.

Furthermore, said withdrawal is without prejudice to Esso's right to commence a new proceeding before the Federal Maritime Commission pursuant to Sections 15 and/or 17 of the Shipping Act, 1916 (46 USC §814, §816) should the facts and circumstances at any time so warrant, for example, on the grounds that the rates charged by Flota/Andino are unjustly prejudicial to exporters of the United States as compared with their foreign competitors or on the grounds that Agreement No. 10293 is unfair as between exporters from the United States and their foreign competitors or detrimental to the commerce of the United States or contrary to the public interest.

In view of all of the foregoing Esso respectfully requests this Court to issue its Order approving Esso's withdrawal from the proceeding herein.

Dated: New York, New York, October 10, 1979

ESSO CHEMICAL SUPPLY COMPANY, INC.

(S) ________________________________

KIRLIN, CAMPBELL & KEATING

(S) LAWRENCE G. COHEN

Attorneys for Protestant Esso Chemical Supply Company, Inc.

APPENDIX II
EXHIBIT NO. 168

TABLE U.[a]—U.S. GULF-COLOMBIAN CARGO, 79–2 (ATCOL) CARGO, AND 79–3 (PACOL) CARGO TRANSPORTED BY FLOTA MERCANTE GRANCOLOMBIANA, 1974–80

Year	Atlantic Colombia			Pacific Colombia	
	Total 79–2 and 79–3 cargo (metric tons)	79–2 cargo (metric tons)	79–2 cargo as a percent of total cargo	79–3 cargo (metric tons)	79–3 cargo as a percent of total cargo (metric tons)
1974	114,198	98,789	86.5	15,409	13.5
1975	109,042	92,752	85.1	16,290	14.9
1976	108,462	86,751	80.0	21,711	20.0
1977	154,634	122,589	79.3	32,045	20.7
1978	178,350	137,473	77.1	40,877	22.9
1979	286,458	187,015	65.3	99,443	34.7
1980	305,993	204,067	66.7	101,926	33.3
Total	1,257,137	929,436	73.9	327,701	26.1

[a] Replaces Exhibit 165 and Table 26, Exhibit 149.
Source: Bill of lading data compiled by Andino Chemical Shipping Company, Inc.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–83

INVESTIGATION OF UNFILED AGREEMENTS IN THE U.S. NORTH ATLANTIC TRADES

ORDER OF CONDITIONAL DISCONTINUANCE

May 30, 1984

This proceeding was instituted by Order of Investigation served August 14, 1979 (August 1979 Order). On December 30, 1983, Respondents[1] filed a Motion to Dismiss the proceeding on the ground that no useful regulatory purpose would be served by continuing it. The Commission's Bureau of Hearing Counsel filed a Reply supporting the Motion. On March 14, 1984, Administrative Law Judge Seymour N. Glanzer (Presiding Officer) certified the Motion and Reply to the Commission.

BACKGROUND

The August 1979 Order noted the filing by the Department of Justice on June 1, 1979 of criminal antitrust indictments in U.S. District Court in Washington, D.C. The indictments charged certain ocean common carriers in the North Atlantic foreign trades with conspiring to fix rates outside the scope of agreements approved by the Commission pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. §814. The charges concerned events that allegedly occurred from 1971 to 1975. The Order further noted the acceptance by a United States District Judge of *nolo contendere* pleas to those charges.

The August 1970 Order pointed out that if the allegations in the indictments were accurate, the defendants had also violated section 15 and were subject to civil penalties. The Order further stressed that the Commission is required by section 15 to oversee the operation of agreements previously approved by it and to disapprove, cancel or modify agreements that it finds to be operating in a manner contrary to the public interest or in violation of the Shipping Act. The Commission stated that:

[1] Atlantic Container Line, Ltd., Dart Containerline Company Limited, Hapag-Lloyd A.G., Sea-Land Service, Inc., United States Lines, Inc., Continental North Atlantic Westbound Freight Conference, Germany-North Atlantic Port Rate Agreement, North Atlantic Baltic Freight conference, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, North Atlantic Westbound Freight Association, North Atlantic/West Europe Rate Agreement, Scandinavia Baltic U.S. North Atlantic Westbound Freight Conference, South Atlantic North Europe Rate Agreement and Associated North Atlantic Freight Conferences. Certain other respondents were dismissed during the proceeding.

> In the fulfillment of its statutory responsibilities, the Commission must focus its attention on remedial matters raised by the indictments and subsequent *nolo contendere* pleas, in order to insure that the actions alleged in the indictments will not and cannot occur in the future. Accordingly, the Commission believes an investigation is necessary . . . both to adjudicate past violations while at the same time to develop an evidentiary basis for remedial action to prevent such occurrences in the future.

Because the Commission was attempting to obtain from the District Court the record of the grand jury proceedings, further proceedings in Docket No. 79–83 were deferred.

On May 26, 1982, the Commission issued a second Order of Investigation (May 1982 Order], which recited that following the entry of the *nolo contendere* pleas, a private treble damage action was brought on behalf of a class of shippers against the major carriers operating in the North Atlantic trades. The parties to that action had recently entered into a settlement agreement that provided for a total payment of over $50 million to the shippers. The Order also noted that the Commission's efforts to obtain the record of the grand jury proceedings had been unsuccessful.[2] Recognizing that the monies paid under the settlement and the fines previously imposed by the District Court in the criminal proceedings were likely to provide sufficient deterrence, the Commission deleted civil penalties as an issue to be considered in this proceeding. The other issues described by the August 1979 Order remained intact. In this regard, the May 1992 Order reaffirmed the Commission's responsibility to monitor the implementation of agreements, to investigate alleged violations of the Shipping Act and to take remedial action as warranted.

Following the issuance of the May 1982 Order and pursuant to discovery procedures negotiated by Hearing Counsel and Respondents and approved by the Presiding Officer, Respondents made available to Hearing Counsel several hundred thousand pages of documents that had been produced pursuant to grand jury subpoenas. Hearing Counsel, with the assistance of the Commission's Bureau of Investigations,[3] reviewed the material supplied to determine whether a formal hearing was necessary. Those prehearing procedures culminated in Respondent's Motion to Dismiss and Hearing Counsel's Reply in support of the Motion.

DISCUSSION

The only remedy now possible in this proceeding, assuming violations were found, is the cancellation or modification of relevant section 15 agreements. The alleged activities that led to the indictments were primarily unapproved inter-conference rate-fixing. Respondents point out that many of the inter-conference discussion agreements approved by the Commission

[2] *United States* v. Bates, 627 F.2d 349 (D.C. Cir. 1980) (*per curiam*).

[3] At that time, the Office of Investigations of the Bureau of Hearings and Field Operations.

(that *arguendo* facilitated Respondents' alleged unlawful rate-fixing) already have been cancelled voluntarily by the parties[4] Other discussion agreements that were in effect during the relevant period have been modified substantially to limit their scope to matters such as self-policing.

In addition, since 1975, procedures for the conduct of conference business have been restructured in each of the seven North Atlantic conferences on the basis of advice from special antitrust counsel in order to insure strict compliance with all requirements of law. These procedures are described in detail by Bruce A. McAllister, chief officer of the seven conferences, in an affidavit attached to Respondents' Motion.[5] They include:

(1) Strict demarcation of business conducted within any one conference from that conducted in any other conference;

(2) Monitoring of conference activities by conference and carrier counsel;

(3) Promulgation and implementation of guidelines for the preparation and conducting of conference meetings;

(4) Review of minutes of conference meetings to insure their accuracy before they are filed with the Commission; and

(5) Adoption and filing with the Commission of guidelines for dealing with shippers and shipper groups.

In their Reply to Respondents' Motion, Hearing Counsel state that the Commission's staff now has sufficient information regarding the activities of Respondents to meet any regulatory need. Obviously, it is impossible to be certain that Respondents will never engage in unlawful concerted activity in the future. However, given the substantial monetary fines and settlements already paid by Respondents, the cancellation or modification of most of the discussion agreements previously in effect, the adoption of the new conference procedures described above, the information obtained by the Commission's staff and the renewed emphasis by the staff on trade monitoring, we believe that the original purposes of this investigation have been substantially achieved and that the cost of further proceedings would not be justified.

An evidentiary hearing would be exceptionally costly and time-consuming, given that the unlawful rate-fixing described in the indictments allegedly occurred from nine to thirteen years ago. The age of the alleged violations also makes it unlikely that, even assuming the Commission could determine the precise extent of Respondents' malfeasance, such information would be useful in constructing a remedy relevant to present-day conference oper-

[4] Those include: the North Atlantic Discussion Agreement, FMC No. 9899; the North Atlantic Talking Agreement, FMC No. 9R09; the All Coasts Agreement, FMC No. 10022; the Canadian American Discussion Agreement, FMC No. 10057; the Canadian American Working Agreement, FMC No. 10090; and the South Atlantic North Europe Rate Agreement, FMC No. 9984.

[5] In addition to his affidavit, Mr. McAllister was interviewed concerning conference procedures by representatives of the Commission's staff, including the Director, Bureau of Agreements and T'ade Monitoring.

ations which, as noted above, are substantially different from their predecessors.

Respondent's Motion therefore will be granted. However, the Commission's action is conditioned upon the resignations of the Continental North Atlantic Westbound Freight Conference from Agreement No. 9427 and the North Atlantic Continental Freight Conference from Agreement No. 9552. These Agreements are "48-hour rate agreements" between the Conferences and independent lines. While the Agreements currently have only one independent party (Polish Ocean Line), other independents are free to apply for membership. Because these Agreements provide the means by which the Conference lines may meet with and engage in limited rate collaboration with independent lines, it is at least arguable that if the Conference lines did in fact engage in rate-fixing outside the bounds of their approved authority, these Agreements may have also facilitated such activities. For that reason, the Commission is unwilling to discontinue this investigation unless the Conferences resign from Agreements Nos. 9427 and 9552 and thereby render them nullities.

THEREFORE, IT IS ORDERED, That Respondents' Motion to Dismiss this proceeding is hereby granted on condition that, within 30 days from the date of this Order, Respondents Continental North Atlantic Westbound Freight Conference and North Atlantic Continental Freight Conference submit to the Commission appropriate notices of resignation from Agreements Nos. 9427 and 9552, respectively.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–54

PETITION FOR EXEMPTION FROM TARIFF FILING REQUIREMENTS PREVIOUSLY GRANTED BY COMMISSION ORDER AND CROSS-PETITION FOR REVOCATION OF EXEMPTION

ORDER GRANTING TRADE-WIDE EXEMPTION

June 5, 1984

Kugkaktlik, Ltd. (Kugkaktlik or Proponent) petitioned the Federal Maritime Commission (Commission or FMC) for a declaratory order extending the exemption from the tariff filing requirements of the Shipping Act, 1916 (46 U.S.C. § 801 *et seq.*) and the Intercoastal Shipping Act of 1933 (46 U.S.C. § 843 *et seq.* granted it in Docket No. 80–30, *In The Matter of Exemption of Kugkaktlik, Limited, From Tariff Filing Requirements,* 23 F.M.C. 70 (1980). In its petition, Kugkaktlik requested that the geographic scope and operating limits of the previously granted exemption be expanded. A reply to the petition and cross-petition for revocation of the exemption was filed by Kuskokwim Transportation Company (Kuskokwim or Protestant). Kugkaktlik filed a reply to the cross-petition.

Upon consideration of the petition and cross-petition, the Commission by Order served November 25, 1983 (November Order) instituted an investigation and hearing pursuant to section 35 of the Shipping Act, 1916, (the Act)[1], to determine whether the existing exemption and the requested expansion should be allowed or denied, or whether all common carrier service to the area of Western Alaska surrounding the Kuskokwim River should generally be exempt from the tariff filing requirements of the Shipping Acts.[2] The November Order also noted other material issues of fact raised by the petition and cross-petition: the degree of actual competition between Kugkaktlik and Kuskokwim, the relative size of the two operations, the existence and degree of integration between Kuskokwim and Crowley Maritime Corporation (Crowley), and the level of common carrier service in the Kuskokwim Bay area.

[1] Section 35 of the Act, 46 U.S.C. § 833a, provides in relevant part that:

> The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act or any specified activity of such persons from any requirement of the Shipping Act, 1916, or Intercoastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.

[2] In its November Order, the Commission treated Kugkaktlik's Petition for Declaratory Order as a general petition pursuant to Rule 69 (46 C.F.R. § 502.69).

The hearing was limited to simultaneous filing of affidavits, memoranda of law and replies. Intervention was sought by, and granted to, Tariff and Printing Services, Inc. Memoranda of law and affidavits were filed by Proponent and the Commission's Bureau of Hearing Counsel. Protestant filed an opening statement and a reply. Hearing Counsel filed a reply memorandum. Tariff and Printing Services, Inc. did not participate in the proceeding.

BACKGROUND

Kugkaktik is a native corporation organized under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, *et seq.* It operates a tugboat and barge service from Bethel, Alaska to eight native villages in Western Alaska north of the Kuskokwim River. In 1980, the Commission exempted Kugkaktlik from the tariff filing requirements, at Kugkaktlik's request. Docket No. 80–30, *supra.* The Commission found that the exemption would not be detrimental to commerce or unjustly discriminatory in view of the limited size and geographically remote nature of Kugkaktlik's services, the relatively large expense of filing a tariff, and the absence of protest from the only known competitor serving the area, United Transportation, Inc. The exemption granted was limited to service from Bethel to the eight villages named, by a tug and barge of a specified size.[3] Kugkaktlik now requests expansion of the exemption to include four additional villages and service by two additional vessels.[4]

Protestant Kuskokwim, formerly United Transportation, Inc., serves Western Alaska under tariffs filed with the FMC and the Interstate Commerce Commission. Kuskokwim operates six tugs and eight barges. Its tariff "applies to" all of the villages which Kugkaktlik presently serves and proposes to serve, and the two carriers allegedly "compete to carry the same type of cargo." Opening Statement of Kuskokwim Transportation Company, 1. Kuskokwim's ICC Certificates of Convenience and Necessity cover a broader area, covering the Kuskokwim River, its tributaries from its mouth to Tuluksak and continuing north, including the villages of Medfra and Nikolai. Kuskokwim's service to the twelve villages within the requested exemption totalled 1,260 short tons of dry cargo and 1,577 short tons of bulk petroleum in 1983. *Id.*, 1–2.

Kuskokwim is a joint venture of Kuskokwim Transportation Services Corporation, a wholly owned subsidiary of The Kuskokwim Corporation,

[3] The eight villages are: Tuntutuliak, Kongiganak, Kwigillingok, Kipnuk (Kugakaktlik's home village), Chefornak, Tooksook Bay, Nightmute and Tununak. The vessels specified are "a sixty-foot all steel tugboat with tonnage 73 gross and 49 net and two 500 horsepower diesel engines; and a steel combination deck cargo and oil barge with dimensions of 120′ x 30′ x 7′ and a cargo fuel capacity of approximately 3,000 barrels."

[4] Kugkaktlik wishes to add service to the villages of Quinahagak, Goodnews Bay, Platinum and Mekoryuk as well as use of a steel oil tanker barge with dimensions of 80 feet by 30′ by 6.5′, with a cargo fuel capacity of approximately 71,000 gallons, and a power barge, "LCM"-type, with dimensions 68′ by 20′ by 5.5′, gross tonnage 107.4 and net tonnage 36.9.

and Puget Sound Tug and Barge Company, a wholly owned subsidiary of Crowley. A majority interest in Kuskokwim (51 percent) is owned by Kuskokwim Transportation Services Corporation. Its parent company is, like Kugkaktlik, a native corporation organized under the Alaska Native Claims Settlement Act, *supra.* The Crowley subsidiary was responsible for daily operations of the joint venture at start-up but such responsibility now rests with an employee of Kuskokwim.[5]

The Kuskokwim Bay area is apparently served by three carriers,[6] in addition to those serving Bethel from the Pacific Northwest.

DISCUSSION

Proponent requests that the Commission extend the existing exemption from the tariff filing requirements to permit service to four additional villages with two additional vessels or, in the alternative, grant a trade-wide exemption for all common carrier service to villages in Western Alaska from Platinum to Mekoryuk.

Protestant opposes the requested extension of Kugkaktlik's exemption and asks that the existing exemption be revoked. Kuskokwim also opposes a trade-wide exemption.

Section 35 of the Act requires the Commission to determine, after opportunity for hearing, that an exemption of a specified activity will not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce.

The trade factors which underlay the Commission's decision in Docket No. 80–30 have not changed substantially since Kugkaktlik was granted an exemption in that proceeding. The area served by Kugkaktlik is geographically remote and limited in scope: the four additional villages Kugkaktlik proposes to serve are within the same Kuskokwim River area and are all within 100 miles of the area presently being served.

Proponent states that only a small portion of its tug and barge business is common carriage, involving only 240,900 gallons of fuel, and deck cargo freight gross receipts of $71,065 in 1983. Proponent's Memorandum, 2. Most of its operation involves transport of fuel oil which it owns for itself and for sale to the other native village corporations. Kugkaktlik is a Native Corporation providing services to other Native village corporations and Native individuals in addition to serving the needs of its own Native stockholders.

[5] In an Amendment to its opening statement, Protestant advises that its opening statement "correctly described" Puget Sound Tug & Barge as being responsible for Kuskokwim's daily operations, but goes on to say that Puget Sound's responsibility was on an interim basis, that Puget Sound has "no management responsibilities" and that responsibility for daily operations rests with an employee of Kuskokwim, its general manager.

[6] In addition to Kugkaktlik and Kuskokwim, Protestant identified Northwest Navigation as serving the area. Kuskokwim Opening Statement, 2. While the Commission's files do not reflect a tariff on file for Northwest Navigation, they do reflect one for Arctic Lighterage Company for service from Bethel to points on the Kuskokwim River. Affidavit of Mamie H. Black, FMC Transportation Industry Analyst.

The affidavit of FMC Transportation Industry Analyst Mamie H. Black of the Bureau of Tariffs, and Maritime Administration statistics for the Alaska trade submitted by Hearing Counsel indicate that the number of carriers serving the Kuskokwim Bay region is limited and the volume of cargo moving in the trade is small. The cost of preparing and filing a tariff is disproportionate to the amount of revenue which may be earned in the trade. The size of Kugkaktlik's operation, despite a 100 percent increase in vessels employed, remains very small. The addition of four villages of a similar nature in the same area, and two additional barges, will not substantially affect the size or nature of Kugkaktlik's operation.

Protestant has brought forth no evidence which shows substantial change in any of these factors. Protestant argues that circumstances in the trade have substantially changed since 1980 in that: it now offers services comparable to Kugkaktlik's; it opposes continuation or expansion of the exemption; and Kugkaktlik has made no present showing of strong customer support and has increased the number of vessels it employs. Kuskokwim's arguments that circumstances have changed substantially are not persuasive.

The mere existence of opposition by a competitor, without specific allegation of commercial harm, does not indicate that the exemption would be detrimental to commerce or impair effective regulation. Protestant has offered no evidence that its own operations are adversely affected by Kugkaktlik's exemption. In fact, although the Commission requested information as to the level of service being offered in the area, and the degree of competition between Proponent and Protestant, Kuskokwim's submissions indicate only that its tariff "applies to" the villages Kugkaktlik serves and proposes to serve and that it carried a specific tonnage to those villages: no evidence as to the number or frequency of calls has been provided by either party. On this record, neither continuation of the existing exemption, or grant of the requested expansion, appears to be detrimental to commerce.

Protestant's allegation that the exemption will impair effective regulation is based solely on its assertion that serious danger of undetectable rebating exists. This allegation is speculative and is totally unsupported by any evidence—or even allegation—that Kugkaktlik has engaged in rebating since the original exemption was granted in 1980 or will do so in the future. It does not appear that continuation of the existing exemption, or grant of the requested expansion, will substantially impair effective regulation.

Protestant argues that continued exemption of Kugkaktlik from the tariff filing requirements is discriminatory because Kuskokwim and Northwest Navigation file tariffs and because the exemption makes it possible for Kugkaktlik to engage in unlawful rebating without a means of detection. No other competitor has commented on the requested exemption and no finding of possible discriminatory impact as to other competitors is justified on this record.

Protestant's operation of six tugs and eight barges over a wider area of Western Alaska than that served by Kugkaktlik does not alone appear to be sufficiently dissimilar in size or nature to Kugkaktlik's operation to justify requiring one to file tariffs while the other does not. Protestant's cargo statistics for the villages in question would seem to indicate that it is also a small operation. (Kuskokwim Opening Statement at 1). Although no cargo figures are provided for the remainder of its service in the region, we see no reason to suppose that Protestant's operation is substantially larger than Kugkaktlik's, so as to render the two operations dissimilar in nature. To the contrary, the Maritime Administration cargo statistics indicate that cargo volume for the entire region is small. Protestant is affiliated with a much larger common carrier operator—Crowley, parent company of one of the joint venturers with a 49 percent interest in Kuskokwim. Some 40% of Kuskokwim's 1983 cargo was transshipped to or from other points via other Crowley subsidiaries. This relationship renders it dissimilar to Proponent. We believe that they are, nevertheless, both Native corporations serving Native villages with operations having minimal common carrier impact.

Grant of a trade-wide exemption obviates the possibility of any discriminatory impact on Kuskokwim of an exemption for Kugkaktlik. Moreover, a trade-wide exemption appears to be justified by the small total volume of common carrier business available and the personal relationships between the present carriers and their customers. Protestant's sole basis for "vigorously" opposing a trade-wide exemption is its allegation that serious danger of undetectable rebating exists. Reply of Kuskokwim Transportation Company, 2. This allegation is as speculative and unsupported with respect to a trade-wide exemption as it is with respect to the exemption of Kugkaktlik.

THEREFORE, IT IS ORDERED, That a trade-wide exemption from the tariff filing requirements of section 18(a) of the Shipping Act, 1916 (46 U.S.C. §817(a)) and section 2 of the Intercoastal Shipping Act of 1933 (46 U.S.C. §844) is granted to all common carriers by water for service between Bethel, Alaska and villages in the Kuskokwim Bay region in the range from Platinum to Mekoryuk; and

IT IS FURTHER ORDERED, That The Petition for Exemption From Tariff Filing Requirements is granted to the extent indicated above; and

IT IS FURTHER ORDERED, That the Cross-Petition for Revocation of Exemption is denied; and

IT IS FURTHER ORDERED, That 46 C.F.R. Part 531,* Publishing, Filing and Posting of Tariffs In Domestic Offshore Commerce, is amended to add a new paragraph (g) to section 531.1, Exemptions, to read as follows:

* Part 531 is being redesignated as Part 550 as of June 18, 1984.

"(g) Transportation between Bethel, Alaska and points in the Kuskowim Bay region in the range from Platinum to Mekoryuk." and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–53

U.S. ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE

(AGREEMENT NO. 6200–24—APPLICATION FOR U.S. INTERMODAL AUTHORITY)

ORDER

June 6, 1984

By Order served November 15, 1983 (November Order), the Commission instituted this proceeding to determine whether Agreement No. 6200–24, an application for U.S. intermodal authority filed by the U.S. Atlantic & Gulf/Australia-New Zealand Conference (Conference), should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). Proponents of Agreement No. 6200–24 had submitted substantial supporting information which specifically addressed the Commission's standards applicable to requests for intermodal ratemaking authority[1] Nevertheless, a protest filed by KKL (Kangaroo Line) Pty., Ltd. (KKL), an independent competitor in the trade, was deemed by the Commission to require further hearing under *Marine Space Enclosures*.[2] Among other arguments, KKL alleged that the Conference's purpose for obtaining intermodal authority was to engage in collective action to eliminate KKL as a competitor. The principal issue, as set forth in the November Order, was whether the Commission's standards applicable to requests for intermodal ratemaking authority have been met.[3] Included within the general inquiry under the *Agreement No. 6200–20* standards was the issue of predation raised by KKL. The November Order urged the Presiding Officer to use all appropriate procedures to direct this proceeding to an expeditious conclusion.

Subsequently, the Conference and KKL undertook efforts to resolve their differences which resulted in the filing of a proposed settlement agreement

[1] *See U.S. Atlantic & Gulf/Australia—New Zealand Conference (Agreement No. 6200–20—Intermodal Authority)*, 21 S.R.R. 89 (1981) *(Agreement No. 6200–20)*.

[2] *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F.2d 577 (D.C. Cir. 1969).

[3] Two other issues were noted in the November Order. Article 2(c) of the proposed agreement would require Conference members to give the Conference 15 days' advance notice before offering an intermodal service that is within the scope of the agreement but is not covered by a Conference tariff. The November Order stated that Proponents must explain why some period of notice is necessary with respect to such offerings. In addition, the November Order noted a technical deficiency in the proposed agreement's use of the term "point" which required clarification.

(Agreement No. 6200–24A).[4] The settlement agreement provides that KKL shall withdraw its protest and all objections to the approval of Agreement No. 6200–24, and that the Conference shall refrain from utilizing a dual rate or loyalty contract for a period of five years, with respect to whatever intermodal service which it might be authorized to provide.[5] The parties filed a joint letter, dated December 9, 1983, in support of Agreement No. 6200–24A. Because Agreement No. 6200–24A related directly to and arose out of the subject matter of this proceeding, the Commission, on February 6, 1984, amended its November Order to include as an issue whether Agreement No. 6200–24A should be approved, disapproved or modified pursuant to section 15.

On March 8, 1984, the Presiding Officer in a ruling entitled "(A) Procedural Schedule (B) Restatement of Ruling Concerning Severance of Settlement Agreement From Application For Intermodal Authority For Purposes of Initial Decision" (Ruling), held that the settlement agreement embodied in Agreement No. 6200–24A could not be considered apart from Agreement No. 6200–24. The effect of the ruling would have been to postpone consideration of the settlement agreement until further hearing was conducted on Agreement No. 6200–24.

On March 14, 1984, KKL filed a document entitled "Motion For Waiver of Rule 73 and Amendment or Revocation of Commission Order, Dated February 6, 1984" (Motion).[6] Hearing Counsel filed a Reply to the Motion.[7] The Conference filed a Reply and a Supplemental Reply to the Motion.[8]

[4] Notice of filing of Agreement No. 6200-24A was published in the *Federal Register* on December 20, 1983 (48 *Fed. Reg.* 56272–56273).

[5] As originally filed, Agreement No. 6200–24A also contained a provision authorizing each party to the settlement agreement to enforce its provisions in a court of competent jurisdiction. The Presiding Officer questioned this provision and the parties subsequently deleted it.

[6] KKL argued that the Presiding Officer's Ruling was inconsistent with the Commission's policy favoring settlement of litigation and did not observe the specific suggestion in the November Order that the Presiding Officer use all appropriate procedures to bring this proceeding to an expeditious conclusion. KKL also argued that the reasons advanced in the Ruling did not support the refusal to decide a settlement agreement prior to further hearing. KKL stated that the settlement agreement had a different purpose than the underlying intermodal agreement (Agreement No. 6200–24) and may be considered apart from it. KKL asked the Commission to waive Rule 73, to consider its Motion, and either to amend the Order of February 6, 1984 (February Order) and instruct the Presiding Officer to issue an Initial Decision on Agreement No. 6200–24A prior to further hearing, or to revoke its February Order and approve Agreement No. 6200–24A.

[7] Hearing Counsel stated that the purpose of Agreement No. 6200–24A is not to avoid litigation but to prevent the Conference from implementing a dual rate contract system. Hearing Counsel stated that there is not a sufficient factual basis for separate consideration of Agreement No. 6200–24A, and that Agreement No. 6200–24A is linked to Agreement No. 6200–24. Considering Agreement No. 6200–24A alone, Hearing Counsel opposed approval of the agreement, absent additional justification. However, if considered in connection with Agreement No. 6200–24, Hearing Counsel stated that it did not support or oppose approval of Agreement No. 6200–24A.

[8] The Conference filed a Reply to the Motion which merely stated that the Conference is a proponent of Agreement No. 6200–24A and supports its approval. Subsequently, the Conference filed a Supplemental Reply in which it supported KKL's second option, i.e., that the Commission revoke its February Order and grant approval of Agreement No. 6200–24A. The Conference stated that no further evidence regarding Agreement No. 6200–24A would be presented and that no purpose would be served by referring Agreement No. 6200–24A to the Presiding Officer for disposition. The Conference contended that the settlement agreement is reasonable and that a grant of approval had been justified.

Prior to the filing of the various replies, the Presiding Officer certified the KKL Motion to the Commission.

Upon consideration of the KKL Motion, the Commission on April 11, 1984, decided to set aside its February Order and approve the settlement agreement (Agreement No. 6200–24A). The Commission also determined to have the entire record certified to the Commission by the Presiding Officer. On April 16, 1984, the Commission received a letter from counsel for KKL, in which KKL withdrew its protest. On May 11, 1984, the Commission directed the Presiding Officer to certify the record in this proceeding to the Commission. On May 14, 1984, the record was certified to the Commission. The Commission has now considered the entire record in this proceeding and, for reasons set forth below, determined to approve Agreement No. 6200–24, subject to certain conditions.

DISCUSSION

A. Agreement No. 6200–24A (Settlement Agreement)

The Ruling of the Presiding Officer raises a question as to whether Agreement No. 6200–24A may be considered apart from, and prior to, further hearing on Agreement No. 6200–24. The Ruling interpreted the November Order as not permitting a separate consideration of the settlement agreement because it raised a question of predation.

The purpose of the November Order was to define the scope of this proceeding as clearly and narrowly as possible and thereby avoid protracted hearing. The November Order stated that a full exploration of tangentially related issues would be unduly burdensome and was unnecessary inasmuch as the dispositive question was whether Agreement No. 6200–24 had been justified under the *Agreement No. 6200–20* standards. The November Order further explained that a separate inquiry into issues of predation would not be necessary because this factor is already included in the criteria to be considered under the *Agreement No. 6200–20* standards. It was not the intention of the November Order to preclude consideration of any settlement agreement which might be entered into by the parties. Agreement No. 6200–24A, therefore, may be considered on its own merits apart from any further hearing on Agreement No. 6200–24.

The Commission concludes that the restriction on the use of a dual rate contract on intermodal services for a five year period is not violative of the antitrust laws or otherwise anticompetitive so as to invoke the application of the *Svenska* standard.[9] Agreement No. 6200–24A would not for that reason appear to be contrary to the public interest within the

[9] 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.

meaning of section 15. Nor does the agreement otherwise appear to contravene the standards of section 15. Moreover, the benefits of settlement are supportive of approval of Agreement No. 6200–24A. The Commission will therefore approve Agreement No. 6200–24A.

B. Agreement 6200–24 (U.S. Intermodal Authority)

The remaining issue to be resolved is whether Agreement No. 6200–24, an application for U.S. intermodal authority should be approved, disapproved, or modified, pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). Proponents of Agreement No. 6200–24 in their original submission provided trade data and other information which specifically addressed the *Agreement No. 6200–20* standards. Agreement No. 6200–24 was set down for investigation and hearing because of a protest filed by KKL. KKL has now withdrawn its protest. The question, therefore, is whether the record established by the Conference is sufficient to meet the *Agreement No. 6200–20* standards. The Commission concludes that approval of Agreement No. 6200–24 is warranted. Such approval, however, is conditioned upon three modifications to Agreement No. 6200–24.

First, as noted in the Order of Investigation and Hearing, Article 2(c) contains language which requires a Conference member to give the Conference 15 days advance notice before offering an intermodal service that is within the scope of the Agreement but is not covered by a Conference tariff. Such a provision is contrary to current Commission policy unless adequately explained or justified.[10] Proponents have provided no explanation as to why some period of notice is necessary. Approval of Agreement No. 6200–24, therefore, shall be conditioned upon the addition of language which clearly indicates that the advance notice provision does not apply to such intermodal offerings.

Second, as indicated in the Order of Investigation and Hearing, the use of the term "points" in the Preamble does not accurately reflect the authority actually sought by Proponents and is not consistent with the Commission's use of that term. A technical amendment to the Preamble changing the term "points" to "inland points" will remove any ambiguity as to the intended geographic scope of Agreement No. 6200–24 and would be consistent with Proponents' use of the term "inland points" in Article 2. The Commission therefore will require such a change as a condition of approval of Agreement No. 6200–24.

Third, Article 2(b) of Agreement No. 6200–24 contains language which would authorize the parties collectively to make arrangements with other modes of transportation for the movement of cargo to and/or from inland points moving in the trade covered by the agreement. It is questionable whether such language could be approved under the 1916 Shipping Act,

[10] *Pacific Coast European Conference Agreement No. 5200*, 26 F.M.C. 172 (1984); *Application for Approval of an Amendment to the American West African Freight Conference Agreement No. 7680–36*, 18 S.R.R. 339 (1978).

even if the Proponents had offered justification for this provision.[11] No such justification, however, has been provided by the Proponents in this proceeding. The Commission, therefore, shall require as a further condition of approval that the cited language in Article 2(b) be deleted from the Agreement.

THEREFORE, IT IS ORDERED, That the relief requested in KKL's Motion is granted and the Commission hereby sets aside its Order of February 6, 1984 in Docket No. 83–53; and

IT IS FURTHER ORDERED, That Agreement No. 6200–24A is approved pursuant to section 15 of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That Agreement No. 6200–24 is approved on the conditions that:

(1) Article 2(c) of Agreement No. 6200–24 be amended by adding the following language:

> "And provided further that nothing in this Article shall be construed to require any period of notice by a member line which desires to offer an intermodal service within the scope of this Agreement, but not being offered by the Conference."

(2) The Preamble of Agreement No. 6200–24 be amended by deleting the word "points" and in its place inserting the words "inland points";

(3) Article 2(b) of Agreement No. 6200–24 be amended by deleting the following language:

> "(1) with other modes of transportation for the movement of cargo to and/or from inland points moving in the trade covered by this agreement, whether moving under through bills of lading or otherwise";

(4) The Commission receives on or before June 15, 1984 a complete, accurate copy of Agreement No. 6200–24, modified in accordance with the above-ordering language and signed by the parties or their duly authorized representatives; and

IT IS FURTHER ORDERED, That the approval of Agreement No. 6200–24 shall be effective on the date all of the above conditions are met.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

[11] Such activity is specifically prohibited under the Shipping Act of 1984. *See* section 10(c)(4) of the 1984 Act. 46 U.S.C. app. 1709(c)(4). In addition, section 7(b) of that Act (46 U.S.C. app. 1706(b)) specifically exempts from antitrust immunity such agreements with inland carriers and any discussions or agreements among ocean carriers regarding the amounts paid to inland carriers for the inland U.S. portion of a through intermodal service.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–14

PRUDENTIAL LINES, INC.

v.

FARRELL LINES, INC., ZIM CONTAINER SERVICE AND ZIM ISRAEL NAVIGATION CO., LTD.

NOTICE

June 7, 1984

Notice is given that no exceptions were filed to the April 30, 1984 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) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–14

PRUDENTIAL LINES, INC.

v.

FARRELL LINES, INC., ZIM CONTAINER SERVICE AND ZIM ISRAEL NAVIGATION CO., LTD.

Complainant, a U.S.-flag carrier, alleges that respondent Farrell Lines, Inc, another U.S.-flag carrier, and Zim Israel Navigation Co., Ltd., an Israeli carrier, entered into and carried out a transshipment agreement whereby Zim provided Farrell with a feeder service at Haifa, Israel for on-carriage of Farrell's cargo to Alexandria, Egypt. Complainant alleges that the agreement was not approved by the Commission nor timely filed under General Order 23, 46 CFR 524, and that respondents have therefore violated section 15 of the Shipping Act, 1916. Complainant seeks damages for alleged injury resulting from the unfiled agreement, penalties, and a cease and desist order. It is held:

(1) The arrangement between respondents is not a simple booking arrangement but a type of non-exclusive transshipment agreement which was not filed under General Order 23 until long after the agreement was carried out, and respondents have therefore violated section 15 of the 1916 Act.

(2) The arrangement, by which Zim gave Farrell fixed rates to enable Farrell to complete its through service to Alexandria, Egypt, gave special advantages to Farrell and constituted a cooperative working arrangement under section 15 of the 1916 Act.

(3) The agreement may have been pro-competitive by enabling Farrell to reenter the trade and may have had minimal anticompetitive consequences but these facts are relevant to its approvability, not to jurisdiction under section 15.

(4) Although respondents delayed in filing a memorandum of their agreement under General Order 23, the nature of the violation of law, the doubtful existence of legal and equitable factors warranting an award of reparation under section 22 of the 1916 Act, such as a reasonable relationship between the type of violation and the damages alleged, and furthermore, serious legal deficiencies in complainant's theories of recovery indicate that further proceedings for the purpose of determining whether complainant should be awarded reparation would not be warranted.

Terence J. Ingrao for complainant.

Edward Aptaker for respondent Farrell Lines, Inc.

William Karas and *Dale C. Andrews* for respondent Zim Israel Navigation Co., Ltd.

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

Finalized June 7, 1984

This proceeding began with the filing of a complaint by Prudential Lines, Inc. on March 8, 1983, which complaint was served on the following day. Complainant is a U.S. flag vessel-operating common carrier providing service from U.S. Atlantic ports to ports in the Mediterranean Sea. Complainant alleged that two vessel-operating carriers, respondents Farrell Lines, Inc. and Zim Israel Navigation Co., Ltd.,[2] who had operated from U.S. Atlantic ports to ports in the Mediterranean, had entered into a cooperative working agreement in the form of a transshipment agreement by which cargo carried by respondent Farrell and restricted by law to U.S. flag vessels would be transported from U.S. ports to Haifa, Israel, and thence by Zim feeder vessel to ports not directly served by Farrell's vessels. Complainant alleged that respondents had entered into such an agreement without obtaining approval of the Commission, in violation of section 15 of the Shipping Act, 1916, 46 U.S.C. §814, asked for an order directing respondents to cease and desist from carrying out the alleged agreement, and for an award of $1,000,000 or such other sum as the Commission might determine as reparation for alleged injury suffered by Prudential. Furthermore, complainant alleged that respondents had engaged in other unlawful practices, allegedly by agreeing to rates, rules, and other terms for the carriage of cargo via transshipment while participating as members in various agreements approved by the Commission, by engaging in predatory pricing, by allocating, regulating, or pooling their services, and by utilizing misleading advertisements to shippers.

On July 25, 1983, after the parties had been engaging in the Commission's prehearing inspection and discovery processes commencing in March, and after several prehearing conferences had been conducted, the issues in the proceeding were narrowed by the filing of an amended complaint by Prudential. In this complaint, Prudential confined its allegations to those alleging that respondents Farrell and Zim had entered into and carried out a transshipment agreement by which cargo, including U.S.-flag-preference cargo, was carried from U.S. East Coast ports to Mediterranean ports, more specifically to the port of Alexandria, Egypt via Haifa or Ashdod, Israel, by means of Zim feeder vessels. This alleged agreement, described as a transshipment agreement, cooperative arrangement, or understanding, was entered into and carried out without requisite approval as

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

[2] Prudential named Zim Container Service as a respondent in addition to Farrell and Zim Israel Navigation Co., Ltd. However, as respondent Zim Israel stated several times, Zim Container Service is merely a division of Zim Israel and is not a separate legal entity subject to a complaint proceeding under the Commission Rule 62, 46 CFR 502.62 or section 22(a) of the Shipping Act, 1916, 46 U.S.C. §821(a). I will therefore treat only Farrell and Zim Israel as the proper respondents.

required by section 15 of the Act and without complying with the filing requirements of the Commission's regulation, General Order 23, 46 CFR 524. Prudential further alleged that by reason of the violation of section 15 and the regulation, respondents had captured certain U.S.-flag-preference cargo and had thereby caused Prudential to sustain damages. Prudential therefore asked for the issuance of a cease and desist order, sanctions against respondents, and "reparations" in an amount equivalent to the quantum of damages which Prudential allegedly sustained and for any other relief which the Commission might deem just and proper.

Respondents, while admitting certain facts regarding their services, denied the material allegations regarding violations of section 15 or General Order 23.

As mentioned, the parties utilized the Commission's discovery devices, i.e. depositions, interrogatories, and requests for production of documents, from the inception of the proceeding and several conferences were held in an effort to obtain evidence and bring the proceeding to as prompt a conclusion as possible. A final prehearing conference was held telephonically on October 12, 1983, and discovery concluded the following month. An oral hearing was held in New York City on January 4, 1984, during which two witnesses testified, Mr. John L. Morris, Prudential's Director of Marketing and Pricing, and Mr. Thomas R. Tarbox, Farrell's Senior Vice President in charge of Farrell's Mediterranean and West African Services. Their testimony plus various documents obtained during discovery (Farrell and Zim bills of lading, correspondence of Farrell and Zim relating to the Farrell/Zim arrangement, various tariffs of Farrell or Zim, and Farrell's filing under General Order 23) constitute the evidentiary record.

Because of the undue length of time which was consumed during the prehearing phase of the proceeding caused by complications arising out of the discovery process, the complaints of respondents regarding the unnecessary complexity of the litigation, and complainant's own request, I ruled that the issue of reparation, i.e., damages, would be deferred until the question of violations had been determined. (See Notice of Rulings Made at Informal Conference, October 17, 1983, pp. 3–4; Confirmation of Ruling on Bifurcation of the Issue of Reparation, November 29, 1983.) This ruling was made in order to move the proceeding along to a prompt determination of the question of violations and to save litigation expenses in the event that complainant could not prove its allegations regarding the issue of violations. However, if complainant were to succeed in proving its allegations, complainant, not having abandoned its claim to reparation, would normally be entitled to an opportunity to prove its entitlement and the extent of its damages. Because of the possibility that violations of the kind involved in this case, especially a violation of General Order 23, might not entitle a complainant to an award of reparation because of equitable considerations or the absence of a nexus between the type of violation and the injury alleged, I invited the parties to present arguments in their briefs on these questions. The purpose obviously was to avoid an unnecessary remand and further litigation if it appeared that there was an insurmountable legal impediment to an award of reparation even if violations were proven. As I discuss below, I find that complainant has proven that respondents have violated section 15 and General Order 23 by entering into and carrying out a cooperative working, transshipment arrangement. However, even the limited record developed indicates serious deficiencies in Prudential's claim for reparation because of an indication that the requisite factors warranting the exercise of the Commission's discretion to award monetary damages enunciated by the courts and the Commission are lacking. More significantly, however, Prudential's inconsistent and confusing theories of recovery of damages appear to suffer from insuperable legal infirmities. Therefore, I conclude that a remand for the purpose of taking evidence on the question of Prudential's alleged financial injury would lead to an inexcusable waste of time and money for all parties involved.

BASIC FACTUAL FINDINGS

The basic facts relating to the origin and carrying out of the arrangement between respondents Farrell and Zim and the competitive status of each of the three carriers (Prudential, Farrell, and Zim) are essentially not in dispute, since the issues concerning respondents' alleged violations of section 15 and General Order 23 turn on interpretations of these facts. The following basic findings therefore are drawn mainly from those submitted by respondents in their brief, with certain supplementations. When appropriate, furthermore, additional factual findings appear in the following sections of this decision pertinent to the discussion of applicable law.

1. Complainant is Prudential Lines Inc., which provides common carrier service operating U.S. Flag LASH (Lighter-Aboard-Ship) vessels between certain U.S. Atlantic Ports and certain ports in the Mediterranean, including Alexandria, Egypt.

2. Respondent Farrell provides common carrier service operating U.S. Flag container ships between U.S. North Atlantic and South Atlantic ports and ports in the Mediterranean. Respondent Zim offers a service from North Atlantic ports to ports in the Mediterranean.

3. Until December of 1981 Farrell called directly at Alexandria with vessels equipped with cargo gear. Thereafter Farrell discontinued operation of vessels equipped with cargo gear in its Mediterranean service, and instead performed its Mediterranean service only with non-self-sustaining containerships (i.e., containerships not carrying cargo gear and therefore dependent upon shore-based container cranes).

4. Shore-based container cranes are not available at the Port of Alexandria. In consequence, Farrell's Mediterranean service discontinued its direct calls at Alexandria.

5. In the spring of 1982, Farrell concluded that cargo offerings justified the resumption of service to Alexandria. Farrell instructed its office in Genoa to investigate the availability of feeder services which Farrell could use to reestablish a service to Alexandria.

6. After evaluating several possible feeder services, Farrell's Genoa office concluded that the best proposal for feeder service was that of ZEMS, an intra-Mediterranean service which is a division of respondent Zim. ZEMS' quotation to Farrell of its rate for the carriage of full containers from Haifa to Alexandria, and returned empty from Alexandria to Haifa, was $850 per 20-foot container and $1,600 per 40-foot container.

7. Farrell's New York office then advised the Genoa office that the ZEMS feeder rate of $850 per 20-foot container could be utilized to solicit cargo on a pre-paid basis. On June 17, 1982, Farrell's Genoa office advised ZEMS in Haifa of the acceptance of its feeder service quotation of $850 per 20-foot container and $1,600 per 40-foot container, full from Haifa to Alexandria and return of empty from Alexandria to Haifa, on liner terms at both ports. At the same time, Farrell's Genoa office advised its agents in Alexandria that Farrell would re-commence service to Alexandria, with Farrell shipping its containers from Haifa to Alexandria aboard ZEMS feeder vessels.

8. On July 19, 1982, Farrell accepted ZEMS' quotation of rates of $1,250 for 20-foot and $2,200 for 40-foot containers where carriage was to be of full containers in both directions between Haifa and Alexandria.

9. Farrell advised all its branch offices that commencing with sailing of the EXPORT FREEDOM, Voyage 94, full container cargo for Alexandria would be acceptable for delivery via feeder from Haifa to Alexandria with a total transit of 21 days; that only freight pre-paid cargo would be accepted; and that any cargo from ports other than New York, Baltimore, Philadelphia and Norfolk would have to be cleared by Farrell's New York office prior to booking.

10. With respect to each shipment made by Farrell using the ZEMS feeder service, Farrell's Haifa agents, Aaron Rosenfeld and Sons, Ltd., were named as shipper, and Farrell's Alexandria agents, Memphis Shipping Agency, were named as consignee on the ZEMS bills of lading.

11. In accepting cargo from Farrell's Haifa agent for carriage to Alexandria, ZEMS undertook no obligation vis-a-vis Farrell's underlying shippers. It had no way in the normal course of business of knowing who such shipper might be, or what rate might be paid by such shipper to Farrell for the transportation from U.S. ports of origin to Alexandria undertaken by Farrell.

12. The rates charged to shippers by Farrell for transportation from U.S. to Alexandria were those in Farrell's published tariff, either as a participant in the North Atlantic Mediterranean Freight Conference Freight Tariff No. 13, FMC No. 8 through February 8, 1983 (when Farrell was a member of that conference), and thereafter, in Farrell's Freight Tariff

No. 1, FMC No. 135. The rates which Farrell's Genoa, Italy, office had negotiated with ZEMS in June and July 1982, which Farrell would pay to ZEMS for the use of the ZEMS feeder service between Haifa and Alexandria were lump sum rates per container regardless of commodities carried. These rates remained constant from the inception of the arrangement through at least April 1983.

13. The terms of the arrangement between Farrell and ZEMS, which had been negotiated between Farrell's Genoa office and ZEMS in Haifa during June and July 1982, were later, in effect, reduced to writing when Farrell, as a precautionary measure, filed a memorandum with the Commission's Secretary by letter dated September 12, 1983. The only feature in this memorandum which did not reflect the terms of the arrangement related to a provision that either party could terminate the arrangement by giving the other party thirty-day's notice. Farrell also filed a notation concerning the feeder-service arrangement with ZEMS (and with another carrier out of Naples) in its North Atlantic tariff (FMC 135), effective October 27, 1983, and filed a similar notation in its South Atlantic tariff (FMC 136) on January 10, 1984, effective February 8, 1984.[3]

14. The Farrell/ZEMS arrangement, when it was used, was nonexclusive both with respect to Farrell and ZEMS; i.e., Farrell was free to employ other feeder services during the period of time when it was shipping via ZEMS, and ZEMS was free to carry cargo for shippers other than Farrell. Farrell's use of the ZEMS feeder service was on a space-available basis. On occasion, Farrell was unable to ship via ZEMS because its vessels were already full, but Farrell's containers were carried on later sailings on ZEMS vessels.

15. Since April 1983, Farrell has utilized a feeder service other than that of ZEMS. That service operates from Italy to Alexandria and is more suitable to Farrell's needs than was the ZEMS service.

16. Farrell's failure to file any memorandum concerning its acceptance of ZEMS' quotation of feeder service rates was based upon Farrell's belief that a carrier's use of a feeder service does not constitute a transshipment agreement within the scope of 46 CFR 524, and that a carrier's use of another carrier's feeder service does not constitute any other type of agreement within the scope of section 15 of the Shipping Act, 1916.

17. While Farrell was using the ZEMS feeder service via Haifa to Alexandria on or after August 1982 through April 1983, it carried at least 45 shipments of various commodities for various shippers. The record does

[3] These filings appear to have been made as precautionary measures to comply with the Commission's regulation, General Order 23, 46 CFR 524, although respondents do not concede that the regulation applied to the arrangement. The filing in the South Atlantic tariff, incidentally, can be verified by inspection of that tariff in the Commission's tariff-filing office, and I take official notice of the filing. 46 CFR 502.226(a). The notations in the tariff do not show an agreement number as is customary with such filings' nor does the record show how the Commission's staff may have processed the filing of the memorandum under General Order 23. (Tr. 145, 146).

not show how many of these shipments were required by law to move on U.S. flag vessels.

DISCUSSION AND CONCLUSIONS

The issue to be determined is simply whether the evidence presented shows that respondents Farrell and Zim entered into and carried out a transshipment or other type of agreement subject to the provisions of section 15 of the Act without filing that agreement for approval as required by that law, or, at least, without filing that agreement with the Commission and obtaining exemption from the approval requirement, as provided by General Order 23, 46 CFR 524. The second basic issue is whether, if it is found that there has been a violation of section 15 or General Order 23, there is any legal impediment to an award of reparation to Prudential so that a remand or other proceeding designed to augment the record on the question of Prudential's alleged financial injuries would not be warranted.

CONTENTIONS OF THE PARTIES

Prudential contends that the evidence presented shows that Farrell and Zim entered into and carried out a cooperative working arrangement some time after June 1982, by which Farrell would tender cargo carried on Farrell's vessels from U.S. East Coast ports to ZEMS at the port of Haifa, Israel, where the cargo would be transshipped onto ZEMS feeder vessels for subsequent carriage to Alexandria, Egypt. Prudential contends that the correspondence between Farrell and ZEMS and relevant bills of lading show at least 45 instances of transshipment at Haifa pursuant to an agreement between Farrell and ZEMS, under which agreement rates charged by ZEMS to Farrell for the oncarriage of Farrell's containers remained constant throughout the entire period of approximately ten months. Prudential further contends that both Farrell and Zim published their own independent tariffs as of February 8, 1983, offering service from U.S. Atlantic Coast ports to Mediterranean ports in Egypt and are thus in competition with each other as well as with Prudential, and that both resigned from various conferences prior to filing their independent tariffs. Prudential contends that this evidence shows, contrary to respondents' contentions, that ZEMS had merely quoted rates to Farrell upon Farrell's inquiry to ZEMS in the event Farrell wished to book cargo on ZEMS' feeder vessels, that Farrell and ZEMS had an understanding that ZEMS would complete Farrell's service from U.S. East Coast ports to Alexandria by a transshipment arrangement at Haifa at agreed-upon rates. Prudential cites several leading decisions holding that section 15 is to be broadly construed, that carriers must file memoranda of agreements reached with other carriers, that a transshipment agreement is well recognized as falling within the scope of section 15, and that section 15 includes a variety of relatively informal arrangements, whether oral or written.[4] Prudential argues that the Farrell/ZEMS agreement constitutes one fixing or regulating rates, controlling or regulating competition, or, at the very least, a cooperative working arrangement, which are three of the seven types of agreements specified by section 15. Even if the agreement were not one subject to section 15 as an understanding between two competing carriers falling under one of the three specified categories set forth in that law, Prudential argues that the agreement was at the very least a non-exclusive transshipment agreement which is required to be filed with the Commission in order to be exempted from the normal approval requirements applicable to most other agreements between carriers. The filing requirement is set forth in General Order 23, 46 CFR 524, but, according to Prudential, no such filing was made until September 12, 1983, although Farrell and ZEMS were transshipping Egypt-bound cargo in July of 1982. Accordingly, since the filing requirement is made mandatory if the exemption is to be granted under the regulation (46 CFR 524.1(b)), Prudential argues that respondents have violated both the regulation and the underlying statute, section 15. Therefore, Prudential argues that since respondents only filed their memorandum in an attempt to comply with the regulation after having carried out their agreement without approval, the Commission should subject the agreement to the approval process under section 15 and declare the filing and exemption to be nullities.

On the question of Prudential's entitlement to reparation (i.e., damages) for loss of net revenue which it would have earned on the 45 shipments carried by respondents under the alleged agreement, Prudential argues that there is no legal impediment precluding it from proving their injury. Prudential cites *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, 24 F.M.C. 934 (1982), a case in which reparation was awarded for injuries arising out of violations of section 15 and other decisions recognizing that carriers have standing to seek reparation under the Shipping Act, 1916, if injured by other carriers who have violated that Act. Prudential argues that but for the alleged agreement, Zim and consequently Farrell would not have been able to carry the 45 shipments of record to Alexandria because Zim, an Israeli carrier, would have been barred from carrying U.S.-flag-preference cargo, and Farrell, without a direct vessel call at Alexandria would not have been able to carry the cargo. Therefore, argues Prudential, Prudential was deprived of an opportunity to participate in the transportation of U.S.-flag-preference cargo and was directly affected by the alleged violation. Furthermore, it argues, an award of reparation is within the discretion

[4] Prudential cites, among others, *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261 (1968); *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82 (1970) (section 15 is to be broadly construed; memoranda and informal oral agreements are to be filed for approval); *Transshipment Agreement Between S. Thailand and U.S.*, 10 F.M.C. 199 (1966) (transshipment agreements have long been held to require filing under section 15); *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962); *Spanish Portuguese Trade—Unapproved Section 15 Agreements*, 8 F.M.C. 596 (1965) (section 15 applies to informal oral arrangements and understandings).

of the Commission which can consider factors such as culpability of respondents, enforcement of the Act, whether there was compensable injury, and whether an award of reparation would be consistent with previous application of the Act, citing *Consolo* v. *F.M.C.*, 383 U.S. 607 (1966); and *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 486 (1932). Finally, Prudential asks the Commission to assess penalties against respondents.

Respondents counter the above arguments as follows. Essentially, they argue that there was no agreement between Farrell and Zim, but merely a request for and receipt of a rate quotation in the event that Farrell wished to book cargo on ZEMS feeder vessels operating between Haifa and Alexandria. Thus, they argue that Farrell merely constituted a shipper when it booked cargo at Haifa on ZEMS feeder vessels or a "bailee" of the cargo when it tendered it to ZEMS at Haifa, and the only "agreement" consisted of ZEMS' bill of lading which it issued to Farrell at Haifa as it would do for any shipper. Thus, the booking of cargo carried by Farrell to Haifa on ZEMS feeder vessels was merely a contract of affreightment shown in the ZEMS bills of lading and ZEMS had no undertaking toward Farrell's original shippers nor did ZEMS hold out in any way to those shippers regarding this transportation. Respondents argue that a simple booking by one carrier or another cannot rise to the level of a section 15 agreement citing *Isbrandtsen Co.* v. *States Marine*, 6 F.M.B. 422 (1961), and as the second carrier, ZEMS, has no responsibility under Farrell's bill of lading as regards Farrell's shippers, there was no joint undertaking between the two carriers and no joint through service.[5] Respondents also argue that there was no special treatment accorded to Farrell by ZEMS, thereby taking the arrangement out of any of the seven categories set forth in section 15, that the arrangement between the two carriers promoted competition rather than destroyed it by making possible Farrell's reentry into the trade, and that there would be no regulatory purpose in requiring containerized carriers to file non-exclusive booking arrangements with feeder vessels, a requirement which would subject containership operations to unnecessary burdens when they were attempting to promote efficiencies by limiting port calls for oceangoing vessels.

As to the possibility that their arrangement might have constituted a non-exclusive transshipment agreement within the scope of General Order 23, respondents argue that even if it was such, these types of agreements are considered to be *de minimis* by the Commission, which exempts them from approval if they are filed with the Commission because of their minimal anticompetitive effects. Furthermore, the subject agreement is so

[5] Respondents distinguish their arrangement from the joint holding out by the carriers in *Sea-Land Service, Inc.* v. *F.M.C.*, 404 F. 2d 824 (D.C. Cir. 1968) and *Alaska Steamship Co.* v. *F.M.C.*, 399 F. 2d 623 (9th Cir. 1968). Respondents also cite *IML Sea Transit Ltd.* v. *U.S.*, 343 F. Supp. 32 (N.D. Cal. 1972), aff'd 409 U.S. 1002 (1973), a case involving an F.M.C. non-vessel operating common carrier utilizing the services of a vessel-operating carrier that held that the former carrier was not subject to the Interstate Commerce Act although indirectly utilizing motor carriers certificated by the I.C.C.

inconsequential, argue respondents, that respondents had difficulty even filing a memorandum with the Commission under the regulation because their arrangement was too simple to be included in the form set forth in the regulation, which required explanations of apportionments of rates and other features of intercarrier cooperation which are missing from the subject arrangement between respondents.

Finally, respondents argue that even if it could be found that respondents have technically violated the informational filing requirements of General Order 23 (which they stoutly deny), there would nevertheless be no need for further evidentiary proceedings because reparation could not be awarded as a result of such a violation. This is because reparation can be awarded only if: 1) there is shown to be a violation of law; 2) the violation caused direct injury; and 3) the equities of the case supported the exercise of the Commission's discretion in making such an award. But respondents argue that there has been no violation of law, and even if there occurred a technical failure to file under General Order 23, that would not constitute a violation of law under section 22 of the Act. Next respondents argue that if Prudential has been harmed at all, it is because of Farrell's reentry as a competing carrier in the U.S./Alexandria trade, not because of a failure to file an agreement or a memorandum of such agreement, comparing this situation to that in *Puget Sound Tug & Barge Co.* v. *Foss Launch & Tug Co.*, 5 SRR 67, 77 (I.D. 1964), in which the presiding officer had found that complainant had suffered as a result of respondents' rates which were found to be lawful, not because of respondents' failure to file their agreement. Respondents contend that their failure to file an informational memorandum about a feeder service did not cause Prudential to lose business because Farrell's service would have operated with or without the filing. The cause of Prudential's losses, if any, would be that carrier's lack of ability to compete successfully. If complainant in *Puget Sound* was found not entitled to reparation when respondents had failed to file and obtain approval of their agreement for 2½ years, then there is even less reason to consider awarding reparation to Prudential on account of an innocuous non-exclusive transshipment agreement which does not even need approval to go into effect. Respondents cite a decision of the Supreme Court in *Brunswick Corp.* v. *Pueblo-Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), in which plaintiffs alleging antitrust violations were held not entitled to damages on account of antitrust violations which had resulted in increased competition. Respondents analogize that case to the present one in which they view their arrangement as restoring Farrell to the trade and providing additional service in competition with Prudential. Respondents contend further that Prudential's reliance on decisions holding that carriers have standing to seek reparation or to file complaints fails to acknowledge that there are stringent requirements of proof in reparation cases and that the decision to award reparation in *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, cited by Prudential, was based upon "an incredibly intricate and convoluted network of conspiracies and unfiled agreements aimed directly at making it impossible for the complainant to serve the relevant trade.'' (Respondents' brief, p. 26). That case in no way resembles the relatively simple one here, argue respondents, and furthermore, awarding reparation in a case of this kind would lack equity and not be supportable under the criteria enunciated by the Supreme Court in *Consolo* v. *F.M.C.*, 383 U.S. 607, cited above. This is so, say respondents, because awarding reparation for failure to file a memorandum of a non-exclusive transshipment agreement (which their arrangement does not even constitute) which agreements are considered to be competitively inconsequential, not even requiring approval by the Commission, would not enhance enforcement of the Act, there is no compensable injury to Prudential, its injury, if any, being caused by Farrell's open competition, an award would not be consistent with previous application of the Act, and there is lacking culpability on the part of respondents in regard to their simple arrangement.

In its final brief, Prudential counters the above arguments. Prudential sees no merit to the contention that Farrell is merely a shipper *vis a vis* ZEMS since the question is whether there is an agreement between the carrier Farrell and the carrier ZEMS, which Prudential claims to be the case, as shown by telexes between the two carriers prior to the first sailing which included transshipment at Haifa. Prudential sees no relevance to the arguments regarding ZEMS' privity of contract or lack of same with Farrell's shippers or merit to any suggestion that ZEMS might be immune from some type of liability for its carriage of cargo for Farrell if shippers sued Farrell for loss or damage. Prudential contends again that competition was reduced, not increased because instead of having three carriers competing, Farrell, Zim, and Prudential, the agreement resulted in only two, Farrell and Prudential competing. Prudential replies further that even if the agreement was merely a non-exclusive transshipment agreement of less regulatory significance, it still was required to be filed under the Commission's regulation in order to enjoy the exemption from the approval requirement. Prudential argues again that the inability of respondents to comply with the form prescribed in General Order 23 only illustrates their failure to comply with that regulation in a timely fashion and further underscores a violation of section 15. Prudential counters respondents' arguments that they did not hold out jointly by contending that they had established, in effect, a through route and through rate, albeit not a joint rate, and agreed to share the revenue by allocating fixed payments to Zim's feeder service.

As to the question of its entitlement to reparation, Prudential refutes respondents' contentions that Prudential is precluded by various legal impedimenta. Prudential cites the *Saipan Shipping* case once again as showing that an award of reparation is permissible for violations of section 15 and distinguishes the decision in *Puget Sound*, 5 SRR 67, cited by respondents, as denying reparation only after all the peculiar facts were considered, not as a matter of per se denial of such an award. Prudential also sees no bar to an award because of antitrust doctrines enunciated in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, cited above, 429 U.S. 477, and indeed quotes language from the Court's decision which it believes supports its contention that respondents committed acts which caused Prudential injury, which acts were made possible by respondents' violations of section 15 and General Order 23. Prudential sees no legal impediment to its seeking to prove its entitlement to damages based upon any case cited by respondents and does not read the decision in *Consolo* v. *F.M.C.*, cited above, as denying its entitlement on equitable grounds especially if Prudential can show loss of its expected profits resulting from violations of law. Nor does Prudential see that respondents were unaware of their status as competing carriers subject to filing requirements or that they had no way of knowing that they should have filed their transshipment agreement, especially in view of a previous transshipment agreement which Farrell's predecessor carrier (AEL) had filed with Zim, which agreement Prudential states to be similar to the alleged unfiled agreement in this case. Therefore, Prudential concludes that there is no automatic bar preventing it from proving its quantum of damages on account of respondents' confusion or their good-faith misunderstandings as to the filing requirements established by law.

APPLICABLE PRINCIPLES OF LAW

Since the basic issue to be determined is whether a particular agreement, understanding, or arrangement between respondents Farrell and Zim, whether substantial or inconsequential, is subject to the requirements of section 15 of the Act, I begin by quoting the statute by which such agreement must be evaluated. In pertinent part, section 15 of the Act states:

> 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, (1) fixing or regulating transportation rates or fares; (2) giving or receiving special rates, accommodations, or other special privileges or advantages; (3) controlling, regulating, preventing, or destroying competition; (4) pooling or apportioning earnings, losses, or traffic; (5) allotting ports or restricting or otherwise regulating the number and character of sailings between ports; (6) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; (7) 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. . . . (arabic numerals added.)

The above statute has been held to be broadly drafted and therefore not to be given unduly narrow interpretations. *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261, 273 (1968) ("The Commission thus took an extremely narrow view of a statute that uses expansive language."); *Federal Maritime Commission* v. *Pacific Maritime Association*, 435 U.S. 40, 54 (1978) ("It is appropriate, therefore, that the Court has recognized the broad reach of section 15 and resisted improvident attempts to narrow it.") *Id.*, at 55–56 (". . . but the Court [in *Volkswagenwerk*] did emphasize the breadth of the statutory language and the determination of Congress, reflected in section 15, to 'subject to the scrutiny of a specialized governmental agency the myriad of restrictive agreements in the maritime industry'.").

In evaluating agreements under the broadly-drafted expansive statute quoted above, furthermore, the Commission is not strictly bound by what the parties claim to be their intent, any ambiguities in agreements are construed against the parties who drafted them, and the Commission looks to the effects and consequences of such agreements, not merely the words which the parties insert into them. See discussion in *Armada/GLTL East Africa Service*, 26 F.M.C. 147 (1984) and cases cited therein.

Clearly the scope of section 15 extends beyond written agreements and covers oral, informal tacit or general agreements, understandings and arrangements. This is seen by the language of the statute itself as well as by previous decisions of the Commission. See, e.g., *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 182, 188 (1962). Furthermore, the reach of section 15 into such informal agreements or understandings does not depend upon how detailed and explicit an agreement is. Informal agreements sometimes may have greater anticompetitive effects than those reduced to detailed, written instruments. In *Unapproved Section 15 Agreements—South African Trade*, cited above, the Commission went to great pains to explain that "oral, tacit or general agreements, understandings and arrangements" are within the scope of section 15 and that "Section 15 is not concerned with formality but with the actual effect of the arrangement." 7 F.M.C. at 188–189. The Commission stated that oral, informal tacit or general arrangements or understandings may be "even more effective anti-competitive vehicles than formal, detailed and legally-binding agreements." 7 F.M.C. at 188. The Commission stated that Congress had enacted section 15 with provisions for exemptions from antitrust laws but with the understanding that the Commission would maintain "some form of effective government supervision," which objective would be frustrated "unless the Act were made broadly applicable to all agreements, understandings and arrangements including particularly the kind of informal arrangement which existed among the respondents here." 7 F.M.C. at 189–190. The Commission cited the Alexander Report, the basic document to the legislative history of the 1916 Act, which commented on the "tendency toward oral understandings, instead of written agreements, between the lines operating to and from ports of the United States," which oral understandings were utilized by carriers because they were considered to be "safer" than written agreements and could be concealed from the public. 7 F.M.C. at 190. The Commission emphasized the broad scope of section 15 as follows:

> Accordingly, section 15 requires—as it has for the 45 years since enacted—the filing of a copy, or "if oral" a true and complete memorandum, of "every agreement" covering any of the wide range of anticompetitive activities therein mentioned, "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The word "agreement" is specifically defined to include "conferences, understandings, and other arrangements." (footnote omitted.) The language of the section thus clearly embraces every agreement, understanding, or arrangement, whether formal or informal, written or oral, detailed or general. The section has been applied in other cases to informal working arrangements not nearly so conspicuous as this one. 7 F.M.C. at 190–191.

The importance of filing memoranda of agreements or understandings was also emphasized by the Commission which stated that "failure immediately to file an anticompetitive agreement was intended by Congress to be a distinct violation of section 15." 7 F.M.C. at 191–192. The Commission stated that as to the language of section 15 that "[t]here is nothing perfunctory about the language in question. It does not say file if and when you plan to effectuate, nor does it indulge in the fantasy that an anticompetitive arrangement will be kept on ice and not effectuated . . . Effective government supervision, which was the cornerstone of the whole regulatory plan Congress embodied in section 15, would be greatly handicapped if not defeated were parties to anticompetitive agreements allowed to file them at their convenience, which could be never. Supervision cannot be effective, and may well be nonexistent, if the supervisor is uninformed." 7 F.M.C. at 192.

The Commission commented on respondents' arguments which had been raised as defenses or contentions favoring extenuation or mitigation of the violations of section 15. To respondents' contentions that their unfiled agreements promoted stability, aided the subsidy program, were in the public interest, and were not objectionable under section 15, the Commission responded that all of these arguments were "quite beside the point." This was because "[s]uch matters were for the [Commission], the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves. Respondents prevented any [Commission] consideration by ignoring the eminently clear requirements of section 15 and thus frustrated it for years. We think it impossible for anyone now to state that what transpired between respondents was all well and good but even if this were not so, the impact of the statute manifestly cannot be made to depend on the *ex post facto* chance that the violation was not harmful. Section 15 may as well be scrapped as to attempt to administer it in this fashion.'' 7 F.M.C. at 196–197.

Section 15 is therefore broadly drafted, it covers oral, informal understandings and arrangements, and it is not an excuse for failure to file that the agreement was beneficial, approvable, or not harmful under the standards of section 15. These matters may bear upon the approvability of such agreements or perhaps on the question of assessing penalties but the violation of section 15 for failure to file stands.[6]

As for proving the existence of an agreement, understanding, or arrangement, the Commission has recognized that it is not necessary to pile up clear and convincing documentary evidence and testimony. By the nature of many such agreements, they often are created in secrecy with no intention of public disclosure. Thus, an agreement may be proven merely by a few contemporaneous documents notwithstanding later oral testimony disavowing any such agreement. As the Commission stated in *Unapproved Section 15 Agreement—North Atlantic Spanish Trade*, 7 F.M.C. 337, 342–343 (1962):

> Considering 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 and of necessity must be entitled weight, and 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 . . . In two other recent cases involving unlawful section 15 activity, we have had occasion to rule on the acceptance of testimony which is contradicted by contemporaneous documents or by logic. (Case citations omitted.) We cannot regard such testimony as credible.

Proof of an unfiled agreement may sometimes require ''the putting together of numerous individual evidentiary items so as to construct an integrated whole that will provide the basis for a conclusion.'' *Unapproved Section 15 Agreements—South African Trade*, cited above, 7 F.M.C. at 182–183 (1962). Actual conduct may also be used to prove the existence of an underlying or preceding agreement or understanding. *Maatschappij ''Zeetransport'' N.V. (Oranje Line)* v. *Anchor Line Limited*, 6 F.M.C. 199,

[6] Similarly, it is no excuse for failure to file to contend that the violation was merely a ''technical'' one or that respondents' motives were good. The Commission has often held that section 15 ''affords little room for so called 'technical' violations'' and that ''it is not necessary under section 15 to impute an evil motive. For the purposes of this statute nonfeasance is as objectionable as malfeasance. There is little, if any, excuse for failing to file . . . We cannot view such failure lightly no matter what the parties' state of mind might have been especially when . . . easy and safe courses are available to them.'' *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295, 303–304 (1962); *Investigation, Practices, Etc. N. Atlantic Range Trade*, 10 F.M.C. 95, 110–111 (1966).

207–210 (1961). Proof of the existence of an unfiled agreement may be shown by circumstantial evidence and reasonable inferences to be drawn therefrom. *Saipan Shipping Co., Inc.* v. *Island Navigation Co., Ltd.*, cited above, 24 F.M.C. at 980 ("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'. . . .") Indeed, the Commission has even found the existence of an agreement on the basis of two interoffice memoranda and surrounding circumstances, e.g., resignation of a carrier from a conference which continued to consult with the carrier on rate changes, notwithstanding testimony denying the existence of any such agreement. *Unapproved Section 15 Agreement—North Atlantic Spanish Trade*, cited above, 7 F.M.C. at 340–341. Interestingly, the same standards regarding use of circumstantial evidence and inferences to be drawn therefrom prevails in the antitrust field to prove the existence of concerted action. See II Kintner, *Federal Antitrust Law*, section 9.17; *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); *American Tobacco Co.* v. *U.S.*, 328 U.S. 781, 809–810 (1946).

It cannot be seriously disputed that the evidence in this case shows that respondents Farrell and Zim had discussions leading to an arrangement by which Farrell would book cargo for re-loading at Haifa on Zim's feeder service known as ZEMS for subsequent carriage to Alexandria. Contemporaneous telexes between Farrell's New York and Genoa offices and between Farrell and ZEMS show that negotiations with Zim began in the spring of 1982 and culminated in an arrangement. The contemporaneous correspondence shows that on June 17, 1982, there had been an acceptance by Farrell of ZEMS' offer to carry Farrell's containers at the lumpsum rates of $850 per 20-foot container and $1,600 per 40-foot container, full from Haifa to Alexandria and return of empty containers from Alexandria to Haifa on liner terms at both ports. At the same time, furthermore, Farrell's Genoa office advised its agents in Alexandria that Farrell would re-commence service to Alexandria with Farrell shipping its containers from Haifa to Alexandria aboard ZEMS feeder vessels. On July 19, 1982, moreover, Farrell accepted ZEMS' quotation of rates of $1,250 for 20-foot and $2,200 for 40-foot containers where carriage was to be of full containers in both directions between Haifa and Alexandria. The record also shows that following the consummation of the negotiations, Farrell advised all its branch offices that commencing with the sailing of the EXPORT FREEDOM, Voyage 94, full container cargo for Alexandria would be acceptable for delivery via feeder vessels from Haifa to Alexandria, that only freight pre-paid cargo would be accepted, and that cargo from ports other than New York, Baltimore, Philadelphia and Norfolk would have to be cleared by Farrell's New York office prior to booking. Thereafter the record shows at least 45 shipments to Alexandria carried by Farrell with re-loading at Haifa and at the rates quoted and accepted by Farrell for a period of

10 months or so. The record also shows that Farrell's agents were shown on ZEMS' bills of lading whenever Farrell's cargoes were re-loaded at Haifa for carriage to Alexandria and there is no evidence that ZEMS undertook any obligation directly with Farrell's shippers or that ZEMS ever knew in advance who Farrell's American shippers might be or what rates Farrell would be charging those shippers under Farrell's tariff which offered the through service from U.S. ports to Alexandria. This arrangement was also nonexclusive, i.e., Farrell was not required to employ ZEMS exclusively and ZEMS was similarly free to carry cargo for shippers other than Farrell. Furthermore, Farrell's use of ZEMS' feeder vessels appears to have been on a space-available basis and on occasion Farrell's cargo might not have been carried on a particular ZEMS vessel which was full. Since April 1983, furthermore, Farrell has utilized a feeder service other than ZEMS, which service operates from Italy to Alexandria and is considered more suitable to Farrell's needs than was the ZEMS service. The record also shows that the purpose of the arrangement with ZEMS was to enable Farrell to return to the U.S.-to-Alexandria trade after Farrell had been forced to discontinue service to Alexandria after December 1981 when Farrell ceased using self-sustaining containerships, i.e., ships which could load and unload containers at ports like Alexandria which did not possess shore-based container cranes. There is no evidence that either respondent Farrell or Zim intentionally conspired to violate either section 15 of the Act or the requirements of General Order 23 requiring an informational filing of non-exclusive transshipment agreements. Farrell and Zim apparently believed that a carrier's use of another carrier's feeder service did not constitute a transshipment agreement under General Order 23 or any other type of agreement within the scope of section 15. However, after this litigation was underway for some time, on September 12, 1983, Farrell did file a copy of a Memorandum of Rates and Terms regarding the non-exclusive feeder service arrangement with ZEMS as compliance with General Order 23, 46 CFR 524(b), and inserted a notice concerning the feeder service with ZEMS and another carrier in its North Atlantic tariff, effective October 27, 1983.

Very basically, to constitute an agreement falling within the scope of section 15, the above agreement, understanding, or arrangement, needs three elements: "(1) an agreement among (2) common carriers by water or other persons subject to the Act (3) to engage in anticompetitive or cooperative activity of the types specified in section 15." *Hong Kong Tonnage Ceiling Agreement,* 10 F.M.C. 134, 140 (1966).

In this case, the focus of contention appears to be not so much on the parties to the above understanding or arrangement between Farrell and ZEMS but on the type of activity involved. Thus, there appears to have been some type of agreement, whether it is characterized as informal understanding, a non-exclusive feeder service, or merely a series of contracts of affreightment by which Farrell merely booked cargo on ZEMS. Nevertheless, respondents suggest that their arrangement is simply one of booking in which Farrell acts as a shipper *vis a vis* ZEMS' feeder service and thus lies outside the scope of section 15.

As I explain more fully below, I find the arrangement to be a non-exclusive transshipment agreement and, furthermore, one that is even less complicated than the relatively innocuous agreements defined by General Order 23, which merely requires informational filing and exempts such agreements from the normal approval requirements of section 15. As the Commission's discussions in *Transshipment Agreement Between S. Thailand and U.S.*, 10 F.M.C. 199 (1966), and *Transshipment Agreement, Indonesia/United States*, 10 F.M.C. 183 (1966) show, transshipment agreements have long been held to be subject to the requirements of section 15. Moreover, even though the cited cases involved transshipment agreements with exclusivity features, unlike the one in this case, the Commission made clear that such agreements have always been subject to section 15 even if they are non-exclusive, citing a decision of the Commission in 1935 (*Intercoastal Rates From Berkeley,* 1 U.S.S.B.B. 365, 367), cited in 10 F.M.C. at 211. The Commission specifically rejected the arguments of one carrier which had contended that no transshipment agreement is a section 15 agreement, commenting that "[t]he transportation of property to and from the United States by means of transshipment arrangements is, in fact, a major element in the foreign commerce of the United States" and "[t]o remove it from regulatory control would obviously have a profound impact on our foreign commerce." 10 F.M.C. at 211. Furthermore, the Commission stated that although "some transshipment agreements contain exclusive features which prohibit either side dealing with other carriers in through shipments in the particular trade . . . [o]thers do not contain the exclusive feature" and "[c]ontrary to the contention of Holland-America, all such agreements have been held to fall within section 15," since "such agreements are invariably 'cooperative working arrangements' under section 15" which frequently deal with rate fixing and exclusive dealings. 10 F.M.C. at 211. The answer to the contention that some transshipment agreements have minimal competitive impacts (such as non-exclusive agreements) was provided in the same decision. Thus, the Commission suggested that although the innocuous types of agreements might fall under section 15, they could enioy some type of exemption or exclusion from the normal requirements following an appropriate rulemaking proceeding. 10 F.M.C. at 221. The Commission followed this suggestion with just such a rulemaking proceeding, Docket No. 68–4, *Exemption of Nonexclusive Transshipment Agreements From the Approval Requirements of Section 15,* Shipping Act, 1916, 10 SRR 148 (1968). Of course, the very issuance of General Order 23, which relaxed requirements for non-exclusive transshipment agreements from full filing and approval to informational filing in a memorandum and in tariffs only, illustrates that the Commission has jurisdiction over such agreements under section 15.

It is clear, then, that the statute is broadly drafted and that if the subject agreement falls within one of the seven enumerated categories set forth in section 15, as quoted above, it is subject to the requirements of that law. Furthermore, it is clear that a nonexclusive transshipment agreement is at the very least considered to be a "cooperative working arrangement," category number 7 in the statutory list. This is not to say that every agreement between carriers falls within section 15. For example, the Commission has found simple landlord-tenant leases, occasional bookings by one carrier with others, joint sharing of office space, one-shot settlements, and strictly routine day-to-day transactions among carrier members of conferences not to be subject to section 15.[7] However, transshipment agreements, even non-exclusive ones, have been held subject to that law regardless of their minimal anticompetitive effects, although because of such slight effects, they are relieved of the normal approval requirements.

Faced with a history of regulation and filing of non-exclusive transshipment agreements under section 15 and General Order 23, respondents present arguments, which I have summarized above, attempting to distinguish their agreement from other non-exclusive transshipment agreements by describing it as merely a booking arrangement in which Farrell was the shipper or "bailee" of cargo and ZEMS the carrier, the latter having no privity with or responsibility to Farrell's American shippers and therefore no joint undertaking toward Farrell's shippers. Respondents go on to argue, furthermore, that their arrangement gave no special privileges to Farrell, was pro-competitive, had little impact on competition, and that even if it should have been filed under General Order 23, it is so simple an agreement that respondents had trouble completing the informational filing form set forth in that regulation. I find these arguments to be rather weak and non-persuasive.

As to the argument that as to ZEMS, Farrell was merely a shipper or "bailee" of cargo and that the bills of lading issued by ZEMS reflect this situation, this argument fails to impress for a number of reasons. In other contexts, carriers attempt to find their operations exempt from regulation by calling themselves by other names. For example, non-vessel operating common carriers by water have designated themselves as shippers' "agents" rather than carriers and have even disavowed cargo liability for cargo loss or damage or they have called themselves some other thing rather than what they truly are. The reason for these erroneous self-designa-

[7] See *Levatino & Sons, Inc.* v. *Prudential-Grace Lines, Inc.*, 18 F.M.C. 82, 108–112 (1984) (carrier's simple lease or other arrangement with warehouse company for additional terminal space); *Agreement No. 9955–1*, 18 F.M.C. 426, 483 (1975) (occasional, ad hoc bookings by one carrier on vessels of another without repetitive, through-movement patterns); *Crown Steel Sales, Inc. et al* v. *Port of Chicago*, 12 F.M.C. 353, 359, 376–377 (1967) (sharing of office space and administrative services); *Continental Nut Company* v. *Pacific Coast River Plate Brazil Conference*, 9 F.M.C. 563, 570 (1966) (routine, day-to-day rate adjustments or other transactions by conference members do not require separate approval under section 15); Docket No. 83–28, *In Re Agreement Nos. 10457 etc.*, Order Partially Adopting Initial Decision 26 F.M.C. 191 (February 29, 1984) (modifications of proposed agreement in response to protests in formal proceeding not a section 15 agreement).

tions is usually to avoid some requirement of law, e.g., tariff-filing, avoidance of liability as a carrier or amenability to suit under section 22 of the 1916 Act, or avoidance of section 15 consequences. Thus, in *Possible Violations of Section 18(a) of the Shipping Act, 1916,* 19 F.M.C. 44 (1975), respondent claimed that it was not a carrier but a "shipper's agent" not subject to tariff-filing requirements. However, respondent was found to be a carrier by virtue of what it actually did, not what it named itself, and liability as a carrier was found to be imposed on respondent as a matter of law. Similarly, in *Capitol Transportation, Inc.* v. *United States,* 612 F. 2d 1312 (1st Cir. 1979), Capitol, a nonvessel operating common carrier, argued that it was not amenable to suit under section 22 of the Act and that it was really only a "trucker" and "household mover" rather than a consignee *vis a vis* the underlying vessel-operating carriers who were holding Capitol liable for unpaid demurrage bills. The Court upheld the Commission's decision that Capitol was a carrier as well as a consignee subject to liability for payment of demurrage under the underlying vessel-operating carriers' tariffs. This case illustrates not only that a carrier's status is determined by what it does and how it holds itself out and not by what it claims to be or names itself, but also that a common carrier may be a common carrier for some purposes and a shipper or consignee for other limited purposes. In this regard it has long been recognized that a non-vessel operating common carrier by water and sometimes a vessel-operating carrier may take the position of shipper *vis a vis* another carrier, although maintaining its basic nature as a common carrier towards its own shippers. See, e.g., *Puget Sound Tug and Barge* v. *Foss Launch and Tug Co.,* 7 F.M.C. 43, 47 (1962); *Bernhard Ulmann Co., Inc.* v. *Porto Rican Express Co.,* 3 F.M.B. 771, 775–776 (1952); cf. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* v. *Acme Fast Freit, Inc.,* 336 U.S. 465, 468, 476–477 (1949), for similar holdings as to comparable non-equipment operating carriers under the Interstate Commerce Act; see also *Isbrandtsen Co.* v. *States Marine,* 6 F.M.B. 422 (1961), a case illustrating how a vessel-operating carrier needing space to carry out its carrier obligations to its own shippers, can become a shipper itself when it books cargo on another carrier's vessels. The fact that a carrier may be shown as shipper or consignee on another carrier's bill of lading may determine the relationship between the two carriers but does not change the first carrier's status as a common carrier *vis a vis* the first carrier's shippers. Indeed, in some transshipment agreements, one of the carriers transporting the through movement on a relatively short leg of the through transportation route may not even issue a bill of lading. *Transshipment Agreement Between S. Thailand and U.S.,* cited above, 10 F.M.C. at 205, 209.

Nevertheless, respondents maintain that Farrell was merely a shipper or "bailee" of its shipper's cargo when it tendered the shipment to ZEMS at Haifa, an argument which, I find, does not render Farrell something other than a common carrier as regards its own shippers to whom it holds out to provide through transportation from U.S. ports to Alexandria under Farrell's own bill of lading and rates. However, respondents also contend that ZEMS has no privity with Farrell's shippers and has no joint undertaking with Farrell toward Farrell's shippers. This argument, too, fails to persuade. In some transshipment agreements, one of the carriers handling a short leg of the voyage issues no bill of lading at all, merely some type of dock receipt. The only bill of lading issued to cover the through transportation and to establish the carrier's through liability as a carrier is that of the carrier transporting the cargo over the longer leg of the through route. That is precisely what happened in *Transshipment Agreement Between S. Thailand and U.S.*, cited above, 10 F.M.C. at 205, 209. As the Commission stated:

> In most, if not all transshipment agreements either the originating carrier or the oncarrier issues a through bill of lading for the whole trip, but this has never been held to prevent the agreement being subject to section 15. 10 F.M.C. at 209.

So, too, the arguments that Farrell is somehow only a shipper or "bailee" of cargo in its relationship with ZEMS and that, therefore, there is no transshipment agreement between two carriers as far as Farrell's shippers are concerned is extremely unpersuasive. Not only is the through transportation from U.S. East Coast ports to Alexandria carried under Farrell's bills of lading and under Farrell's rates but respondents themselves proclaim that their agreement was beneficial because it restored Farrell to the Alexandria trade, obviously not as a shipper or "bailee" but as a carrier. Thus, in their own brief, respondents refer to "Farrell's use of ZEMS' feeder vessels to complete its undertaking to shippers" (brief, p. 2), state that "the simple arrangement promoted competition by making possible Farrell's reentry into the relevant trade" (brief, p. 7), reiterate that "Farrell's use of ZEMS' feeder service increased competition by bringing Farrell back into the Alexandria trade a year after it had discontinued its direct service" (brief, p. 11), that "Farrell alone assumed the sole responsibility for the carriage of the subject shipments from U.S. ports of origin to Alexandria" (brief, pp. 11 and 15) and that "Farrell has every right to compete with Prudential in the U.S. to Alexandria trades and that Farrell has the right, if it chooses, to compete by serving Alexandria by feeder vessels" (brief, p. 20). All of these arguments would seem to indicate that it is a carrier, not a shipper or "bailee" which has reentered the Alexandria trade and that it has done so by means of an arrangement entered into with ZEMS, making use of the ZEMS feeder vessels.[8]

[8] Nor does respondents' argument that Farrell became a mere "bailee" of cargo when it tendered the cargo to ZEMS' feeder vessels at Haifa sound plausible in view of respondent's reiteration of the point that Farrell reentered the trade to provide services to Alexandria and undertook "sole responsibility for the carriage of

Continued

Similarly, respondents' argument that Farrell had no joint undertaking with ZEMS, joint rate, or joint through service because ZEMS acted merely as a carrier toward Farrell, a shipper on the Haifa-to-Alexandria leg of the transportation, doesn't persuade. As seen, in *Transshipment Agreement Between S. Thailand and U.S.*, cited above, 10 F.M.C. at 205, 209, one carrier to a transshipment arrangement may not even issue a bill of lading and it may operate solely between two foreign ports as part of its contribution toward the other carrier's holding out to provide a through service, yet the foreign carrier has been found to be a carrier operating in U.S. foreign commerce and to be a party to a transshipment agreement. The determination that two carriers had entered into an agreement that a second carrier would complete the service and voyage of the first carrier does not rest on the need to find that the second carrier has direct obligations under a bill of lading or otherwise towards the first carrier's shippers. Nor does respondents' contention that there was no through route, joint through service, or joint rate show that respondents had no agreement subject to section 15. Carriers may enter into a variety of arrangements, establishing joint rates, explicit through routes, single-factor rates, or make other arrangements. Thus, in the cases cited by respondents, *Sea-Land Service Inc.* v. *F.M.C.*, 404 F. 2d 824 (D.C. Cir. 1968); and *Alaska Steamship Co.* v. *F.M.C.*, 399 F. 2d 623 (9th Cir. 1968), the courts held that two carriers had lawfully established through routes and joint rates under the Interstate Commerce Act and could therefore file their tariffs with the I.C.C. under a particular section of that Act dealing with Alaska. The case had nothing to do with section 15 of the Shipping Act, and in each instance one of the carriers was a motor carrier. In another case cited by respondents, *IML Sea Transit Ltd.* v. *U.S.*, 343 F. Supp. 32 (N.D. Cal. 1972), aff'd 409 U.S. 1002 (1973), an F.M.C.-regulated non-vessel operating common carrier (NVOCC) chose to utilize an underlying service provided by a water carrier which included inland pickup and delivery. The court found that the NVOCC was not subject to the Interstate Commerce Act. The point is that two carriers may establish a through service, directly or indirectly, expressly or impliedly, and may offer shippers joint rates, single-factor rates, or combinations of local rates. See, e.g., discussion in *U.S.A.* v. *F.M.C. (Gulf-U.K. Rate Agreement et al.)*, 15 SRR 851, 875–877 (D.C. Cir. 1980); *Intercoastal Investiation*, 1 U.S.S.B.B. 400, 445–446 (1935); *Inland Waterways Corp.*, 2 U.S.M.C. 458, 463 (1940); *Thomp-*

the subject shipments from U.S. ports of origin to Alexandria." One wonders what Farrell's American shippers would think if, in case of loss or damage between Haifa and Alexandria, they were told by Farrell that Farrell had acted only as another shipper or a "bailee" for their cargo and could only be held liable if found negligent under the law of bailments. As I note later, furthermore, Farrell has published notice in both its North Atlantic and South Atlantic tariffs (FMC 135 and 136) that it has an arrangement with ZEMS for a feeder service out of Haifa as well as an arrangement with another carrier out of Naples. Such tariff publishing constitutes a public holding out as a carrier providing a through service with through liability to Alexandria. If Farrell believed it really was only a shipper out of Haifa and ZEMS had no agreement under Farrell's tariff, perhaps it would have been better not to file the notice in Farrell's tariff section entitled "Transshipment Agreements," since a carrier is supposed to publish accurate information in its tariff.

son v. *U.S.*, 343 U.S. 549, 557 (1952) ("A through route is a continuous line of carriage formed by an arrangement express or implied between connecting carriers.")

Finally, although respondents contend that their filing of a memorandum of their arrangement and a notation in Farrell's tariff was done as a precautionary measure without conceding that the arrangement constituted a non-exclusive transshipment agreement within the meaning of General Order 23, as of October 27, 1983, Farrell's North Atlantic tariff (FMC 135) contains the standard language concerning transshipment agreements set forth in the regulation and refers to its feeder services with ZEMS out of Haifa and another carrier out of Naples. (Ex. 4). The language in the tariff states:

> The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating connecting or feeder carrier. Participating connecting or feeder carriers, party to transshipment arrangements, have agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement on file with the Federal Maritime Commission. (Tariff, 1st rev. page 22–A).

Similar language and reference to the two carriers appear in Farrell's South Atlantic tariff (FMC 136) effective February 8, 1984, filed January 10, 1984, a fact of which I take official notice. 46 CFR 502.226(a).

Whether filed as a precautionary measure or without prejudice to respondents' position, the fact is that a tariff represents a public holding out and it has long been considered to have the force and effect of law. *Penna. R.R. Co.* v. *International Coal Co.*, 213 U.S. 184, 187 (1913); *Farr Co.* v. *Seatrain*, 20 F.M.C. 411, 414, 417 n. 8 (1978). Thus, although normally a belated compliance with law or similar adjustment is not taken as evidence of guilt, a filing in a tariff has special significance. Thus, it is difficult to argue that there is no transshipment agreement involving ZEMS' participation and willingness to observe rules and routings established in Farrell's tariffs while at the same time Farrell publicly announces an agreement in its tariffs on which shippers are entitled to rely. If respondents really believed that their arrangement did not constitute a nonexclusive transshipment agreement, perhaps it would have been better for them not to file tariff notations and references so that the public would not be misled. If proven wrong, they would be no worse off since they did not file anything under General Order 23 anyway until September 12, 1983, apparently, and have in any case operated without filing or approval.

But, argue respondents, their agreement confers no special privileges or advantages, is non-exclusive, and pro-competitive, and has little outside anticompetitive impact. These arguments fail to persuade that respondents had no agreement. In reality, they bear more on the question of approvability of their agreement rather than on jurisdiction over the agreement under section 15. It would be well to recall briefly what I discussed earlier about section 15, namely, that it is a broadly drafted statute that should not be narrowly construed. Moreover, as the Supreme Court admonished the Commission in *Volkswagenwerk* v. *F.M.C.*, cited above, 390 U.S. at 276, Congress intended the Commission to scrutinize a "myriad of restrictive agreements in the maritime industry" and also cautioned the Commission not to read into the statute language that these agreements must somehow always affect competition. In other words, one determines whether an agreement falls within the scope of section 15 by evaluating that agreement under the seven categories set forth in that law and not by determining that the agreement is anticompetitive or violates antitrust laws, etc. As the Court stated (390 U.S. at 275):

> To limit section 15 to agreements that "affect competition," as the Commission used that phrase in the present case, simply does not square with the structure of the statute.

Furthermore, the Court quoted language from the legislative history to the 1916 Act (the Alexander Report), as I have previously noted, showing that Congress was motivated in enacting section 15 by the near unanimous support for the idea that the Commission would be maintaining supervision of contracts, agreements, and arrangements and "the general supervision of all conditions of water transportation which vitally affect the interests of shippers." 390 U.S. at 275. Similarly, it has been recognized that although there are many agreements subject to section 15 which obviously violate antitrust laws (e.g., rate-fixing, pooling, restricting service) and indeed may be per se violations of those laws, section 15 stands on its own feet and must he read in the light of its own words and purposes. See, e.g., *Transshipment Agreement Between S. Thailand and U.S.*, cited above, 10 F.M.C. at 213 n. 8 ("To the extent that the antitrust laws might not be applicable [to certain described conduct]. If they are considered to be applicable, this does not solve the problem since Congress intended the section 15 standards to apply to situations falling within its coverage, rather than the antitrust laws."); *Agreement Nos. 9718–3 and 9731–5*, 16 SRR 1087, 1112–1113 n. 26; (I.D. reversed on other grounds, 19 F.M.C. 351 (1976)). The question of how anticompetitive an agreement may be or how serious are the inroads made upon antitrust laws may, however, be relevant to the question of the degree of proof and justification necessary for approval. See *Agreement 9951–1*, cited above, 18 F.M.C. at 462.

In any event the point here is that it does not matter for purposes of determining whether respondents' non-exclusive transshipment agreement is a cooperative working arrangement falling within section 15 of the Act that the purpose or effect of the agreement was pro-competitive. That fact may be relevant to the question of approvability, however. Moreover, as discussed earlier, the Commission has already found that even non-exclusive transshipment agreements fall under section 15, innocuous though some of them may be, and that the proper course for carriers is not to ignore the jurisdiction of section 15 but to take advantage of any relaxation in law which the Commission may grant and has granted under General Order 23 as regards such agreements. *Transshipment Agreement Between S. Thailand and U.S.*, cited above, 10 F.M.C. at 211, 221.[9] Indeed, following the decision in the case cited, the Commission did issue the regulation which relaxed the requirements of section 15 as to non-exclusive transshipment agreements. Significantly, in the rulemaking proceeding which culminated in the issuance of General Order 23, 46 CFR 524, the Commission specifically rejected arguments similar to those now made by respondents, namely, that the Commission lacks jurisdiction over non-exclusive transshipment agreements because they are not "anticompetitive." The Commission responded by finding that these agreements, while not anticompetitive in the same sense as exclusive transshipment agreements, nevertheless conferred an "advantage" on carriers entering into them because the agreements, if approved, enabled the carriers to provide a service that they would not otherwise be able to provide lawfully. In this regard the Commission stated: [10]

> Although nonexclusive transshipment agreements may not be "anticompetitive" in the same sense as exclusive transshipment agreements, they nevertheless have an impact upon competition to the extent that those entering into such agreements have an advantage inasmuch as they are able to provide a service which those not entering into such agreements could not lawfully provide in the absence of an approved agreement. The Supreme Court of the United States has recently stated that the Commission's scope of authority under section 15 of the Shipping Act extends to all agreements between carriers falling within the literal language of section 15 and not exempted by the Commission (see *Volkswagenwerk* v. *FMC*, decided March 6, 1968, slip opinion pages 11–15).
>
> Therefore, the suggestion by the parties of the deletion of language in section 524.1 which indicates that nonexclusive transshipment agreements are subject to section 15 unless exempted must be rejected.

[9] This refutes another argument of respondents, namely, that to require carriers to file non-exclusive transshipment agreements which may include arrangements with feeder vessels assisting containerized lines to offer efficient services from certain ports designated "load centers" would seriously hamper the development of modern services. All that the carriers need do under the present regulation is file memoranda and notices in their tariffs. The Commission is even considering relaxing that requirement further under current law. See Docket No. 83–43, *Exemption of Nonexclusive Transshipment Agreements, etc.*, Notice of Proposed Rulemaking, 48 Fed. Reg. 45270; October 4, 1983. The Commission may even consider exempting such agreements from informational filing under the new Shipping Act of 1984. Incidentally, I may officially notice that there are well over 1,000 non-exclusive transshipment agreements filed with the Commission under General Order 23. Apparently these filings have not prevented carriers from improving their services.

[10] Docket No. 68–4, *Exemption of Nonexclusive Transshipment Agreements From the Approval Requirements of Section 15, Shipping Act, 1916*, 33 Fed. Reg. 7116 (May 14, 1968), 10 SRR 148, 149.

Therefore, respondents' argument that their agreement is procompetitive is irrelevant to the question of jurisdiction under section 15. Moreover, their argument that the agreement confers no special privileges or advantages because it is non-exclusive and because Farrell was treated like any other shipper by ZEMS on a space-available basis would seem to have been refuted by the Commission in the many decisions cited above. However, regardless of those decisions, examination of the subject agreement reveals "special privileges or advantages" (category no. 2 in the list of the types of agreements set forth in section 15). That is because Farrell and ZEMS negotiated special lumpsum rates per container and Farrell enjoyed the benefit of those rates for a considerable length of time (10 months or more of actual shipments) without change. Not only did the rates remain constant but they did so regardless of the commodities involved, a situation that one knowledgeable witness (Morris of Prudential) considered to be unusual in the subject trade. (Tr. 53–54).[11] Indeed, in a non-exclusive transshipment agreement once in effect between Zim and a predecessor carrier of Farrell's, American Export Lines, Inc., by which AEL offered service from U.S. ports to ports in Italy and Yugoslávia via transshipment at Israeli ports on Zim vessels, which agreement was filed for approval by the parties, AEL did not even enjoy the right to have fixed rates during the life of the agreement but paid Zim "at rates to be agreed upon by the parties." [12]

I conclude, therefore, that the subject agreement is at least a cooperative working arrangement (category no. 7) and that it confers special privileges or advantages (category no. 2) as the Commission has held in its rulemaking proceeding leading to the issuance of General Order 23, and on the basis of evidence showing that Farrell enjoyed fixed lumpsum rates which ZEMS had charged it over a considerable length of time.

Finally, respondents contend that even though they ultimately filed a memorandum of their arrangement (and a notation in the Farrell tariff) as required by General Order 23, this was done only as a precautionary step and not because they believed that their agreement really constituted a non-exclusive transshipment agreement within the meaning of that regulation. Respondents point out the difficulty they encountered in trying to comply with the reporting form set forth in the regulation. For example, the form requires that the connecting carrier must concur in the publishing carrier's tariff and calls for an explanation of how the through rate is apportioned or shared between the publishing and connecting carrier. As

[11] "Tr." refers to the pages of the stenographic transcript of the hearing.

[12] The agreement was designated as No. 10254, and was designated a "Slot Charter Agreement." In addition to providing for rates to be negotiated from time to time, it did not require Zim or AEL to use each other's services and Zim would carry for AEL only on a space-available basis. It specified that cargo moving under the agreement was to be carried pursuant to AEL's tariffs and bills of lading but that Zim would be responsible for loss or damage for such cargo occurring on Zim's vessels. Agreement No. 10254 was approved by the Commission on January 25, 1977, and was cancelled by Farrell on August 27, 1982. 47 Fed. Reg. 39612 (September 8, 1982). A copy of the agreement is attached as an appendix to this decision.

mentioned earlier, furthermore, respondents claim that they had established no through route or joint responsibility anyway so that there was not even an agreement under section 15 at all, only a single responsibility by Farrell to carry to Alexandria with the use of ZEMS' feeder vessels to complete Farrell's through undertaking. Prudential, on the other hand, as discussed earlier, contends that respondents' difficulties in complying with the regulation only illustrate their violation of that regulation and hence a violation of section 15 since they operated without even filing anything with the Commission and therefore could not enjoy the exemption from the normal approval requirements granted to parties complying with General Order 23.

I have already found that an agreement existed between Farrell and ZEMS which is generically a non-exclusive transshipment agreement, even if it does not have all the classic features set forth in General Order 23, and that the agreement by Zim to assist Farrell by completing its service to Alexandria and charging Farrell unchanging lumpsum rates constitutes a transshipment agreement notwithstanding Zim's remoteness from Farrell's American shippers. It does not really matter whether the subject agreement qualified under General Order 23 as a classic agreement with all the features set forth in that regulation for purposes of determining past violations of law by respondents. If their agreement did not have all the features of General Order 23 agreements, then respondents should have filed it for approval under section 15, as did AFL and Zim with respect to Agreement No. 10254. Not having done so and having carried out this agreement, respondents have therefore violated section 15. If their agreement did qualify under General Order 23, then that regulation makes it mandatory that they file it for informational purposes in order to obtain the exemption from the normal approval requirements of section 15. As the regulation states in no uncertain terms:

> Compliance is mandatory and failure to meet these filing requirements will result in the party desiring exemption remaining bound by the approval requirements of section 15 of the Shipping Act, 1916. 46 CFR 524.1(b).

Prudential is therefore correct in arguing that failure to file the agreement under the regulation subjects the agreement to the same standard as any other unfiled agreement, i.e., it must be filed for approval and the parties cannot carry it out prior to obtaining approval. Hence, whether the subject agreement was or was not subject to General Order 23, the failure to file anything until September 12, 1983, when respondents filed an informational memorandum with the Commission's Secretary, constituted a violation of section 15. (Furthermore, it is not strictly correct to argue, as do respondents, that a violation of a regulation cannot constitute a violation of the Act for purposes of reparation. The Commission has held to the contrary in *Tractor and Farm Equipment Ltd.* v. *Waterman Steamship Corp. and*

Cosmos Shipping Co., Order on Appeal, 25 F.M.C. 375 (1982).) That the subject agreement might not have qualified for exemption from approval requirements under General Order 23 because it was even simpler than the type of agreements defined in that regulation does not mean that the agreement assumed significantly more anticompetitive consequences and that it was more likely to cause greater injury to Prudential in its operation. It might have been even less consequential than the typical General Order 23 agreement. The only practical significance to a determination whether respondents have now met the requirements of General Order 23 is whether they should be allowed to carry out their agreement even after making their information filing in an attempt to satisfy that regulation without seeking formal approval of their agreement now. However, there is a pending proposal to relax General Order 23, and a new regulation to supplant General Order 23 will no doubt be forthcoming in the very near future, pursuant to the new law, secs. 16, 17, and 21, Shipping Act of 1984.[13] It is possible therefore that parties may be able to carry out such agreements as the one in question by simple informational filing in tariffs, as the proposed revision to current General Order 23 would require, or perhaps by no filing at all under a new interim regulation issued under the new law. Or if the agreement is not deemed to fall under the present or interim regulation dealing with non-exclusive transshipment agreements, the parties may simply effectuate the agreement within 45 days after filing pursuant to section 6 of the new law. However, the question of past violations and reparation for such violations will not disappear.[14]

The Reparation Issue and Subsequent Proceedings

As I mentioned earlier, I attempted to shorten this proceeding by avoiding what might have been unnecessary litigation. I did this by confining the hearing to the question of whether respondents have violated law so that if no violations were proven by Prudential, there would be no need to

[13] According to a recent press release (84–22, April 9, 1984) the Commission plans to issue interim regulations concerning exemptions of agreements from the filing requirements not later than mid-May.

[14] Prudential argues that if the subject agreement is a non-exclusive transshipment agreement, respondents still violated law by failing to file something under General Order 23 until September 12, 1983, when it appears that a memorandum was mailed to the Commission's Secretary (Ex. 7). Prudential argues, however, that the filing should be regarded as a nullity and that the agreement should go through the approval process anyway. (Prudential Opening Brief, p. 25). This argument would be valid if Prudential had proven that respondents had not complied with General Order 23 or that General Order 23 did not cover the subject agreement at all. However, a memorandum does appear to have been mailed and a notation was made in Farrell's tariff (FMC 135) from North Atlantic ports in the U.S. regarding the subject feeder service with ZEMS as well as with another carrier via Naples, effective October 27, 1983. (Ex. 4). I officially notice that in Farrell's South Atlantic tariff (FMC 136), such a notation was not filed until January 10, 1984, effective February 8, 1984 (1st Rev. page 30). The memorandum does not strictly conform to the form set forth in General Order 23 since it appears to be less complicated than the form. This does not necessarily prove that the subject agreement does not fall within the scope of General Order 23. Incidentally, the tariff notations cited comply with the regulation and expressly state that "[p]articipating, connecting, or feeder carriers, party to transshipment arrangements, have agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement on file with the Federal Maritime Commission."

fill the record with evidence as to Prudential's alleged financial injury. In addition, because of the possibility, now the reality, that Prudential could prove violations, I again attempted to avoid unnecessary expense of litigation by having the parties in their briefs focus on the question of Prudential's entitlement to prove injury on the basis of such violations as had been alleged and proven. If, as a matter of law, there would be no way in which Prudential could recover money damages as a result of the violations in question, it would obviously be a monumental waste of time and money to remand this proceeding for the purpose of hearing evidence on this matter.

As discussed above, respondents argue that Prudential is barred as a matter of law from seeking to prove damages in this type of case essentially because any violation was merely technical, it caused no direct injury to Prudential, and there were no equities in favor of awarding damages to Prudential. Respondents argue that if Prudential suffered any financial losses, they were not caused by respondents technical failure to file informational memoranda of a non-exclusive transshipment agreement (if respondents' arrangement could even be considered to be such an agreement) but rather by Prudential's own lack of ability to compete successfully with Farrell. Respondents see no nexus between the failure to file an informational memorandum and tariff notation and Prudential's lost profits and distinguish the one case in which respondents who had operated under section 15 agreements without approval of the Commission were ordered to pay reparation by contending that the case involved intricate conspiracies deliberately designed to harm the competing carrier. Finally, respondents do not believe that the factors, which the court in *Consolo* v. *F.M.C.*, cited above, 383 U.S. 607, authorized the Commission to consider before awarding reparation under section 22 of the Act, are present in this case and cite a leading case in the antitrust law of damages, *Brunswick Corp.* v. *Pueblo Bowl-O-Matic,* cited above, 429 U.S. 477, holding that the mere unlawful market presence of a competitor is not enough to support an award of damages under antitrust law.

Prudential, of course, argues that there is no legal impediment barring it from an opportunity to prove the extent of its alleged monetary losses caused by the violations of section 15 and argues that equities do not lie with respondents who knew or should have known that they had to file their agreement with the Commission before carrying it out.

I conclude that the present record is understandably incomplete as to the factors which the Commission may consider according to the decision of the Supreme Court in *Consolo* v. *F.M.C.*, cited above, 383 U.S. 607. I find also that I have considerable doubt that as a matter of law the nature of the violations shown meets the requirements of proximate cause and essential relationship to the type of injury claimed to justify an award of reparation. For these reasons and others, I cannot recommend a remand to develop full evidence on these matters. Although the record, being confined almost exclusively to the question of whether violation of section 15 or General Order 23 had occurred may be incomplete on these matters, it is nevertheless important not to prolong a proceeding and inflict on parties unnecessary expenses of continued litigation if, as a matter of law, there is no basis on which the Commission could award reparation. On this latter point, in view of the somewhat inconsistent theories of recovery which Prudential has confirmed only recently in its last brief (reply brief, p. 24), it appears that, as a matter of law, its theories of recovery have no validity, and I cannot recommend a remand on such theories. I now explain.

Applicable Principles of Law

There is nothing in section 22 of the 1916 Act which sets a violation of section 15 apart from any other violation of that Act and states that reparation cannot be awarded. Section 22(a) simply states:

> That any person may file with the Commission a sworn complaint setting forth any violation of this Act by a common carrier by water . . . and asking reparation for the injury, if any, caused thereby . . . The Commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment . . . of full reparation to the complainant for the injury caused by such violation. 46 U.S.C. sec. 821(a).

Although not common, the Commission has awarded reparation in a case involving respondents' carrying out of unfiled agreements in violation of section 15. This was *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, 24 F.M.C. 934 614 (I.D., F.M.C. notice of finality, May 5, 1982). That the decision to award reparation in cases involving violations of section 15 turns on the facts of each case is illustrated by another case involving violation of section 15, *Puget Sound Tug & Barge Co.* v. *Foss Launch & Tug Co.*, 5 SRR 67 (I.D. 1964, subsequently discontinued following withdrawal of complaint). In the latter case reparation was not awarded because it was found that respondents' lower rates, not the fact that they had failed to file their agreement, had been the proximate cause of complainant's injury and furthermore because the equities favored respondents who had relied on decisions later reversed and otherwise had operated in good faith. 5 SRR at 75–77.

The decision to award reparation is discretionary with the Commission and concerns not only considerations of proximate causation and traditional evaluations utilized by courts of law in damage cases but peculiar equitable and other factors. Thus, the Supreme Court in *Consolo* v. *F.M.C.*, cited above, 383 U.S. at 622, identified certain factors for the Commission to consider when determining whether to grant reparation as follows:

> (1) whether a reparation award would enhance the enforcement of the Act, (2) whether the shipper had suffered compensable

> injury and (3) whether the award of reparations would be consistent with the previous application of the Act, as well as the factors of culpability of the carriers.

In addition to considering these factors, the Commission has also held that more traditional concepts of proximate cause and other such doctrines utilized by courts of law must also be considered. Thus, although the Commission's authority to award reparation for financial injury is discretionary, the Commission does operate under certain limiting standards, and it has been held that something more than a finding of violation of the Act is necessary before the Commission will exercise its discretion. *Consolo* v. *F.M.C.*, cited above, 383 U.S. at 621; *Ballmill Lumber & Sales Corp.* v. *The Port of New York Authority, et al.*, 11 F.M.C. 494, 510–511 (1968); *Parson and Whittemore, Inc.* v. *Fred Olsen & Co.*, 7 F.M.C. 721, 731 (1964).

More specifically, an award of reparation in many respects follows the law of damages in court cases and restricts damages to those which are reasonably foreseeable or proximately caused by the violation proven, not to remote, consequential damages. The Commission has stated, furthermore, that a complainant must show actual injury and show that such injury is essentially related to the type of violation proven. For example, the Commission has stated:

> It has long been established by the courts and Government agencies having jurisdiction in such matters that (a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation. (Citations omitted.) *West Indies Fruit Co.* v. *Flota Mercante Grancolombiana*, 7 F.M.C. 66, 70 (1962).

Even if a complainant shows that it has been injured by a respondent's violations of the Act, the Commission has refused to award reparation if the above principles have not been found to apply. Thus, in *Ballmill Lumber & Sales Corp.* v. *The Port of New York Authority, et al.*, cited above, 11 F.M.C. at 510–511, despite finding violations, the Commission declined to award reparation, stating:

> As the Examiner correctly pointed out, the awarding of reparation is a matter of discretion by the Commission. Section 22 of this Act states that we "may" direct the payment of reparation. The language is permissive and hence the mere fact of a violation of the statute does not necessitate the grant of a reparation award. (Citation omitted.) In the instant proceeding, we feed that a reparation award is unwarranted. We have recognized that Ballmill has been disadvantaged. . . . However, we are not convinced that the nature of the violations is such as would warrant the requested reparation award. Furthermore, we are not satisfied that the dam-

> ages alleged by Ballmill are real or whether the alleged damages are sufficiently related to the violations of the Act. . . . [T]o award damages alleged to have been incurred by reason of unjust discrimination, there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Board as would be deemed necessary under the well-established principles of law in such cases as a basis for a judgment in Court.

In addition to the above considerations, respondents have called my attention to a leading case in the field of antitrust damages, namely, *Brunswick Corp.* v. *Pueblo Bowl-O-Matic,* cited above, 429 U.S. 477. This case is worth considering not only because the Commission in the above quotation stated that it would be guided by principles similar to those followed by courts of law in damages cases but also because section 15 has an obvious relationship to antitrust laws. See, e.g., *Carnation Co.* v. *Pacific Westbound Conference et al.*, 383 U.S. 213 (1966); *F.M.C.* v. *Pacific Maritime Association et al.*, 435 U.S. 40 (1978). Indeed, as the Court stated in *Carnation,* the 1916 Act was the "end product of an extensive investigation of the shipping industry that was conducted by the Congress which enacted the Clayton Act" (383 U.S. at 218), the latter Act being the very law involved in the *Brunswick* case and further held that plaintiff in *Carnation* had rights under the Shipping Act which were "collateral" to those under the antitrust laws and could have sought damages under either the Shipping Act or the antitrust laws but not both. 383 U.S. at 224. In *PMA,* furthermore, the Court described the duty of the Commission to consider antitrust implications under section 15 of the 1916 Act. 435 U.S. at 53. Furthermore, in *F.M.C.* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 737–738 (1973), the Court specifically recited legislative history to the 1916 Act showing that Congress enacted section 15 in order to forestall the development of monopolies which would result from open competition in the shipping industry. Therefore, I commend the *Brunswick Corp.* decision to the Commission's attention.

In *Brunswick,* plaintiffs, who operated bowling centers, sought treble damages for injuries allegedly resulting from Brunswick's acquisition of bowling centers that would have gone out of business absent Brunswick's acquisitions. The acquisitions were held to have violated section 7 of the Clayton Act under the so-called "deep pocket" theory enunciated in previous decisions. Plaintiffs argued that but for Brunswick's acquisitions, the acquired centers would have gone out of business and the plaintiffs would have gained customers and increased profits. Hence plaintiffs claimed that they were injured by reason of Brunswick's section 7 acquisitions. However, the Supreme Court rejected this theory of recovery holding that plaintiffs must prove more than a section 7 violation and a causal link between that violation and the alleged injury. The Court noted that plaintiffs' real complaint was that Brunswick's acquisitions of the bowling centers preserved competition, thereby depriving plaintiffs of the increased profits they would have realized had the acquired bowling centers gone out of business. The Court stated:

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violations. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." (Case citation omitted.) 429 U.S. at 489.

Elsewhere the Court commented on plaintiffs' theory of recovery in *Brunswick,* namely, that increased competition resulting from the acquisitions by the financially-sound Brunswick Corporation deprived plaintiffs of benefits they expected would result to them if the acquired competitors had been allowed to go out of business. The Court rejected the theory, stating:

> The antitrust laws, however, were enacted for "the protection of competition not competitors." . . . It is inimical to the purposes of these laws to award damages for the type of injury claimed here. 429 U.S. at 488.

Since the plaintiffs in *Brunswick* had offered no alternative theory to support their damage award, the Court directed judgment in favor of defendant *Brunswick* notwithstanding the verdict in the lower court in favor of plaintiffs. 429 U.S. at 490. The *Brunswick* doctrine has been extended to other provisions of the antitrust laws. See, e.g., *Chrysler Corp.* v. *Fedders Corp.,* 643 F. 2d 1229 (6th Cir. 1981); Shepard's *Antitrust Adviser* (2nd Ed.) Carla Anderson Hills, Ed., (1983 cumulative supplement, section 1.49A.)

As to the factors to be considered by the Commission according to *Consolo* v. *F.M.C.,* cited above, 383 U.S. 607, namely, enhancement of enforcement of the Act, compensable injury, consistency with previous application of the Act and culpability, the record leans toward respondents. Thus, the type of agreement which respondents carried out is not the classic non-exclusive transshipment agreement as defined in General Order 23 but is of a type that is even less complicated than the classic type which the regulation determined to have "inconsequential effect[s] upon the commerce of the United States" when determining to exempt them from the normal approval requirements of section 15. Docket No. 68–4, *Exemption of Nonexclusive Transshipment Agreements,* cited above, 10 SRR at 150. The Commission is even considering relaxing the already relaxed filing requirements as to non-exclusive transshipment agreements, as noted earlier, a further indication that such agreements are considered to have minimal anticompetitive consequences. See Docket No. 83–43, *Exemption of Nonexclusive Transshipment Agreements, etc.,* cited above, 48 Fed. Reg. 45270. It is difficult to see how the Commission could award substantial reparation as a result of the failure to file a memorandum of such agreement on a finding that the agreement directly caused significant financial injury to a competitor after the Commission has for years determined that such agreements have minimal effects. It is also difficult to see how such an award would be consistent with previous application of the Act, when the Commission had never awarded reparation merely on the basis of a technical lack of filing as opposed to the carrying out of a section 15 agreement specifically designed to eliminate competition, as was the case in *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, cited above, 24 F.M.C. 934. There is also doubt as to the effectiveness of such an award for a technical type of violation when the parties involved had no clear precedent that the type of agreement they had carried out did in fact qualify under General Order 23 and may not have even risen to the level of a simple non-exclusive transshipment agreement since the agreement did not even have all the features of the simple agreement defined in that regulation.

As to the question of compensable injury, there is no doubt that a violation of section 15, such as that which occurred in *Saipan Shipping*, cited above, i.e., forced elimination from a trade or destruction of competition by concerted design, has such a nexus with the victim carrier that the injury, the victim's loss of profits, is compensable. But this is not a *Saipan Shipping* type of case. Instead, there are indications that any harm suffered by Prudential was only the result of Farrell's reentry into the trade and the open competition offered by Farrell.[15]

Finally, as to the question of culpability on the part of respondents, there is no indication on the record that respondents entered into their arrangement with nefarious plans to eliminate Prudential or that they believed that their otherwise innocuous looking transshipment agreement at Haifa would have substantial anticompetitive consequences. All that the record indicates thus far is that Farrell wished to reenter the Alexandria trade after having been forced to leave it temporarily because of a change in the ships it operated. (Tr. 107, 134–136, 156).

Admittedly the record may not be as fully developed on these *Consolo* factors as it could be. However, even the limited record tends in a direction which does not favor Prudential as far as seeking a reparation award is concerned and because of the nature of the type of violation involved, a remand would not be warranted for other reasons.

As I stated, I have serious doubts as to whether, as a matter of law, Prudential would be able to justify an award of reparation for other reasons.

[15] It perhaps bears noting that Prudential's witness Morris testified that Prudential had acquired notice some time ago of the subject agreement of which they complain even though it had not been filed. (Tr. 22). Furthermore, it nowhere appears that Prudential was driven from the trade as was Saipan Shipping but rather it appears that Prudential remained as an active competitor against Farrell and had itself unsuccessfully negotiated with the shipper of bakery equipment which Farrell attracted for its through service to Alexandria. (Tr. 23, 73–80).

These have to do with the question of proximate cause and the essential relationship of the type of injury alleged to the type of violation involved. This is because the type of damages alleged does not appear to be "sufficiently related to the violations of the Act." *Ballmill Lumber & Sales Corp.* v. *The Port of New York Authority et al.*, cited above, 11 F.M.C. at 510. This is another way of saying that the failure to file a memorandum of an agreement was not the proximate cause of Prudential's loss of business but rather the cause was Farrell's competition, as assisted by ZEMS' feeder service. Because the failure to file and obtain approval was not the proximate cause of damage to complainant but it was rather respondent's lower rates which caused the complainant to lose business, no reparation was found to be warranted despite a section 15 violation in *Puget Sound Tug & Barge Co.* v. *Foss Launch & Tug Co.*, cited above, 5 SRR 67.

But even if a remand for the purpose of taking further evidence could somehow show that an award of substantial moneys to Prudential would enhance enforcement of the 1916 Act, would relate to compensable injury, would be consistent with previous application of the Act and deal with culpability, and even if such further evidence could show a reasonable nexus between the failure to file a memorandum and Prudential's loss of business, Prudential's inconsistent theories of recovery seem to present an insuperable obstacle as a matter of law. Although not always clear and seemingly inconsistent, Prudential's arguments seem to run as follows. Prudential was the only other U.S.-flag carrier operating from Atlantic Coast ports to Alexandria in addition to Farrell and thus was eligible to carry U.S.-flag-preference cargo. Prudential would have carried the 45 shipments of record but for the subject transshipment agreement which enabled Farrell to carry the shipments instead.[16] The other respondent, Zim, being an Israeli carrier, was not eligible to carry such cargo, from U.S. ports at least. This argument can only mean that Prudential contends that the failure to file a memorandum of the agreement and the unapproved carrying out of the transshipment agreement enabled Farrell to take business away from Prudential which no other competitor was eligible to carry. (Prudential's Opening Brief, pp. 29–30). As Prudential states, "[w]ithout the agreement or arrangement, Farrell would not be able to provide a service of any kind to Alexandria although entitled to carry the cargo. Since PLI operated the only alternative ocean service between U.S. Atlantic coast ports and Alexandria, it was deprived of an opportunity to participate in the transportation of this cargo." (Prudential's Opening Brief, p. 30.) I leave aside the question of whether it was Farrell's failure to file a memorandum or Farrell's open competition and possibly preferable rates which caused Prudential to lose the shipments and whether Prudential, which had the right to compete with Farrell, could really have been deprived

[16] This assumes that all 45 shipments were required to be carried by U.S.-flag vessels, a fact not established on the present record.

of any opportunity to bid for the cargo since Prudential nowhere alleges that Prudential was forced to leave the marketplace because of the resumption of Farrell's service. However, after seemingly arguing that the restoration of Farrell to the trade by means of the unfiled agreement took business away from Prudential, Prudential confuses the argument by also contending that it was not increased competition that caused its injury but *reduced* competition! Thus, Prudential argues that the transshipment agreement reduced the number of competing carriers from three (Farrell, Zim, and Prudential) to two (Farrell and Prudential). This seemingly inconsistent argument is perplexing. It is difficult to discern how Prudential could suffer harm if the number of its competitors was reduced from three to two. One would assume that Prudential, facing only one competitor, would be in a better position to gain business at least by attracting the business abandoned by the departed carrier. What makes the argument even more inscrutable is the fact that Prudential itself contends that Zim, the supposed third competing carrier, was presumably never eligible to carry the 45 shipments in the first place, not being U.S. flag. Thus, in reality, it appears that at one time there were two carriers competing for U.S.-flag-preference cargo in the subject trade, Farrell and Prudential, that Farrell left for a while at the end of 1981, leaving only Prudential, and that Farrell returned in the summer of 1982, restoring the number of competing carriers to two. Therefore, Prudential has merely returned to a previous situation wherein it apparently faces Farrell as its only competitor for U.S.-flag-preference cargo in the subject trade.

Hence, while Prudential seems partially to argue increased competition of Farrell (resulting from the unapproved agreement) as the cause of its injury, it nevertheless later seems to argue that reduced competition caused its injury. In reality, however, it appears that it began with one competitor and ended with the same one competitor (Farrell). However, as a matter of law, neither the increased competition argument nor the reduced-competition argument seems to have merit. In *Brunswick Corp.* v. *Pueblo Bowl-O-Matic*, cited above, 429 U.S. 477, the Court held that increased competition resulting from the preservation of competitors in the marketplace accomplished by Brunswick through illegal means did not justify an award of damages to the plaintiff competitors who had hoped to face fewer competitors prior to the Brunswick acquisitions. The Court in *Brunswick* found that awarding damages on plaintiffs' theory that the violations had increased competition and deprived plaintiffs of anticipated benefits which would have flowed from the departure of their competitors was "inimical to the purposes of [the antitrust laws]." 429 U.S. at 488.[17]

[17] In previous decisions under section 15, the Commission has held that it is not grounds to disapprove an agreement under the standards of section 15 merely because protesting carriers "face greater competition for cargo than they would in the absence of an agreement. This, standing alone, is not grounds for disapproving the agreements." *Agreements Nos. 10186, 10332*, 25 F.M.C. 538, 548 (1983), and cases cited therein. If the Commission cannot find that an agreement would harm competing carriers merely because it creates more competition, it is difficult to see how the Commission would exercise its discretion to award money

On the other hand, if Prudential is claiming that the subject agreement resulted in the departure of a competing line, i.e., Zim, from the marketplace (although as regards U.S-flag-preference cargo, it does not appear that Zim was really in the marketplace), the courts reject this theory of recovery as well. Thus, in *California Computer Products* v. *IBM*, 613 F. 2d 727 (9th Cir. 1979), the Court followed the *Brunswick* decision in holding that the injury complained of must be some type of antitrust injury, i.e., an injury which the antitrust laws were enacted to prevent, but also held that to obtain an award of damages, plaintiffs must show more than loss of business or departure of a competitor from the marketplace. In this regard the court stated as to antitrust injury:

> Satisfying the latter burden is dependent on a showing that the injury was caused by a reduction, rather than an increase in competition flowing from the defendant's acts since "[t]he antitrust laws . . . were enacted for the protection of competition not competitors." '(Citations omitted.) Accordingly, *the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor*. 613 F. 2d at 732. (Emphasis added.)

I conclude, therefore, that if Prudential's theory of recovery is that the subject agreement enabled Farrell to compete with Prudential and deprive Prudential of business, there could be no recovery as a matter of law since neither the antitrust laws nor the Shipping Act were designed to stifle competition and something more, such as intention to monopolize or destroy competition, would be necessary to warrant an award of reparation, as in *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, cited above. However, if Prudential's theory of recovery is that the subject agreement reduced competition from three to two, this is incorrect on the facts since, as Prudential itself asserts, one competitor, Zim, was not eligible for the cargo in question. But even if so, mere loss of business or the departure of another competitor from the marketplace is insufficient to justify an award of damages absent some type of predatory, monopolistic or other objectionable intent or effect cognizable under the antitrust laws and the Shipping Act, as found in *Saipan Shipping*. The latter type of situation is not involved in this case.

I therefore conclude that although respondents violated section 15 and General Order 23 by failing to file their memorandum of agreement and appropriate tariff notations, the violation was technical and inconsequential and that there is no basis to prolong the proceeding and expend time and money in further litigation by remanding for the purpose of developing

damages to competing carriers when operation under the agreement had not been preceded by the filing of a memorandum and tariff notation, the competing carriers had become aware of the operation notwithstanding the failure to file, and there was neither allegation nor evidence of deliberate evasion of the filing requirement for the purpose of harming competitors.

evidence on the question of reparation for Prudential. As to the question of assessment of penalties for the violation, which Prudential also requests, the Commission has recently held that this is a matter solely for the Commission to decide and that private complainants have no standing in the matter. See *East Coast Colombia Conference and Agropecuaria y Maritima, etc.*, Petition for Investigation, 22 SRR 723 (1984).[18]

ULTIMATE CONCLUSIONS

In conclusion, I find that Prudential has shown that respondents Farrell and Zim carried out a cooperative working arrangement sometime after June 1982 through April 1983, by which ZEMS, a division of Zim, transshipped Farrell's cargo at Haifa to enable Farrell to restore a through service from U.S. ports to Alexandria that Farrell had temporarily discontinued. The arrangement constituted a type of nonexclusive transshipment agreement, and a memorandum and tariff notation should have been filed with the Commission under General Order 23, but were not until September 12, 1983, and thereafter. I find, however, that although a violation of the regulation and underlying statute, such failure to file a memorandum and tariff notation is not the type of violation inherently likely to be the direct cause of substantial financial injury to a competing carrier like Prudential. Unlike a case in which an unfiled agreement is deliberately designed to eliminate competition and succeeds in that objective, the facts in this case shows that the non-exclusive transshipment merely enabled a U.S.-flag carrier, Farrell, to return to the marketplace and compete with the only other U.S.-flag carrier there and that the other carrier, Prudential, although it again faced competition, was not disabled from competing.

Prudential's argument that three competing carriers (Prudential, Farrell, Zim) were reduced to two (Prudential, Farrell) and that this caused Prudential harm makes little sense since the facts show that, as far as U.S.-flag-preference cargo is concerned, the non-exclusive transshipment agreement re-established the status quo by re-enabling a second U.S. flag carrier, Farrell, to compete with the only other such carrier, Prudential. Prudential's argument that the number of competing carriers was reduced, as far as any cargo is concerned, presumably by Zim's departure from the trade, is also not supported by the facts since Prudential has furnished no probative evidence that Zim ceased competing from U.S. ports to Alexandria for any cargo it could carry before, during, and after its local division, ZEMS, carried Farrell's cargo from Haifa to Alexandria pursuant to the subject transshipment agreement.

Given the type of case that this is, as outlined above, a remand for the purpose of developing evidence on the quantum of Prudential's alleged

[18] In Docket No. 83–7, *Atlantic & Gulf/West Coast of South America Conference, et al.* v. *Empresa Maritime del Estado*, 26 F.M.C. 258, April 18, 1984, the Commission found a technical failure to file a tariff notation of a transshipment agreement and discontinued the proceeding without assessing penalties or remanding to determine damages.

injury would be a wasteful and costly exercise of the resources of all parties since it appears by the very nature of this case that an award of reparation would not enhance enforcement of the Act, be consistent with previous application of the Act, or be based upon a violation as to which there was any significant degree of culpability or any meaningful relationship or nexus between the type of technical violation involved and any loss of business in the marketplace by a competing carrier.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX

SLOT CHARTER AGREEMENT

THIS AGREEMENT is enterėd into this 6th day of January 1976, between AMERICAN EXPORT LINES, INC. ("AEL") ZIM ISRAEL NAVIGATION CO., LIMITED ("Zim"), both of whom are common carriers by water offering services between the United States and the Mediterranean ports "Trade").

The parties agree as follows:

1. From time to time, AEL shall, for its cargo moving in the Trade, charter space on vessels owned or operated by Zim (or related entities) for carriage of AEL containers between Israeli ports on the one hand and Koper, Trieste and Venice on the other, i.e., eastbound and westbound, provided that transshipment shall take place only at Israeli ports. AEL shall compensate Zim for each TEU carried at liner terms at rate(s) to be agreed upon by the parties. All transshipment expenses including delivery to and/or removal of said containers from Zim's terminal facilities shall be borne by AEL.

2. AEL shall be under no obligation to use Zim's service (as described in paragraph in 1 above) and Zim shall be under no obligation to offer such service or to reserve space for AEL's cargo. It is the intent of the parties that AEL shall from time to time use such service but only to the extent it desires to do so, and that Zim shall carry such cargo to the extent it offers such service and has space available, but shall be under no obligation to offer such service or reserve space for AEL.

3. Zim shall be responsible for any loss or damage for such cargo occurring from the time it is loaded aboard its vessels until discharged.

4. AEL shall file semi-annual reports with the Federal Maritime Commission during the months of July and January covering the preceding six-month period or fraction thereof for the duration of the agreement showing with respect to each instance cargo moves pursuant to this agreement, the voyage number, the date of sailing, the origin and destination ports, and the number of containers transported in 20-foot equivalents.

5. Cargo moving under this Agreement shall be carried pursuant to AEL's applicable tariffs and bills of lading on file with the Federal Maritime Commission.

6. AEL shall immediately notify the Federal Maritime Commission of the cessation of further operations under this Agreement.

AMERICAN EXPORT LINES, INC.

(S) ______________________________

JOHN A. SMITH
Director of Conferences

ZIM ISRAEL NAVIGATION CO., LIMITED

Re-executed January 3, 1977
to Comply with FMC Order of 12/22/76.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–47

AGREEMENT NO. 10467: LATIN AMERICAN CHARTER AGREEMENT; AGREEMENT NO. 10468: LATIN AMERICAN DISCUSSION AGREEMENT

NOTICE

June 12, 1984

Notice is given that no exceptions were filed to the May 10, 1984, 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.

Proponents of Agreement No. 10467 shall amend this agreement as set forth in the initial decision, and shall ensure that the Commission receives this modified agreement, appropriately signed by all parties, no later than June 15, 1984. The modified agreement will be deemed approved as of the date the agreement, appropriately modified, is received by the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–47

AGREEMENT NO. 10467: LATIN AMERICAN CHARTER AGREEMENT; AGREEMENT NO. 10468: LATIN AMERICAN DISCUSSION AGREEMENT

Five carriers operating between U.S. Atlantic and Gulf ports and ports and points in five South American countries filed a space-charter Agreement and a discussion Agreement seeking approval under section 15 of the Shipping Act, 1916. The Agreements generated four protests on the grounds that they were not necessary and were not justified and could be harmful in connection with South American cargo reservation laws. Proponents withdrew the discussion Agreement but contended that the space-charter Agreement was justified by trade conditions and would benefit shippers and carriers. Proponents also agreed to amend the space-charter Agreement by adding certain clarifying language, following which all active protests were withdrawn and Hearing Counsel expressed support for the Agreement. It is held:

(1) The space-charter Agreement is a simple, voluntary, open arrangement which does not authorize rate-fixing or joint activities of any kind and would have minimal anticompetitive effects.

(2) There is evidence that the Agreement would benefit shippers and carriers by enabling the parties to provide service to shippers which would otherwise be disrupted and by enabling carriers to make better utilization of unused vessel space.

(3) There is no countervailing evidence showing that the Agreement would harm any interest or would work in conjunction with South American cargo reservation laws to harm anyone and it appears that the protests were based upon misunderstandings and fears that the Agreement would operate with the withdrawn discussion Agreement to cause harm.

(4) The Agreement is approved provided that proponents file certain clarifying amendments and furnish periodic reports which they have already agreed to do.

Nathan J. Bayer for proponents.

Richard W. Kurrus and *Paul G. Kirchner* for protestants Ecuadorian Line and CCT.

Andrew M. Parish and *Beth Ring* for protestant Florida Customs Brokers and Forwarders Association, Inc.

Arturo J. Abascal for protestant Navicon.

John Robert Ewers and *William D. Weiswasser* for Hearing Counsel.

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

Adopted June 12, 1984

This proceeding began with the issuance of an Order of Investigation and Hearing by the Commission on October 5, 1983, in order to determine whether two agreements should be approved under the standards of section 15 of the Shipping Act, 1916, 46 U.S.C. §814. Both agreements had originally been filed with the Commission on January 31, 1983. The first agreement (No. 10467) was a relatively simple space-charter arrangement among five carriers operating in the trade between U.S. Atlantic/Gulf ports (and U.S. points) and ports and points in Bolivia, Chile, Peru, Ecuador, and Columbia. The five carriers were prominent operators in the trade, consisting of two U.S.-flag carriers, Delta Steamship Lines, Inc. (Delta) and Lykes Bros. Steamship Co., Inc. (Lykes), and three leading national-flag carriers of the South American countries involved, Compania Peruana de Vapores (Peruvian-flag), Transportes Navieros Equatorianos (Ecuadorian flag), and Compania Sud Americana de Vapores (Chilean flag). The purpose of the Agreement was to authorize each of the carriers to charter space to each other on vessels operated by them when needed on a space-available basis with no requirement that any party request space or reserve space for any other party. It was characterized by proponents of the Agreement as a "casual space charter" arrangement without any fixed requirements and was compared to another such arrangment, albeit one more complicated, Agreement No. 10420, the American Flag Common Carrier Charter Agreement, approved by the Commission. The subject Agreement would expire on June 30, 1987, unless four members withdrew earlier.

Proponents of this space-charter Agreement maintained that the Agreement was required by a serious transportation need, would secure important public benefits, and was in furtherance of a valid regulatory purpose. Specifically, proponents argued and presented evidence in support of their contentions that the subject trade was seriously overtonnaged, that cargo had declined, that severe rate instability existed in the trade, that costs of providing service had increased, that some carriers had suffered bankruptcies and had to withdraw from the trade, and that certain excessive competitive practices had severely destabilized the trade. Proponents contended that their Agreement would benefit the trade by allowing for maximum equipment utilization, conserve energy, maintain the quality and quantity of service that shippers had come to expect, add to stability in the trade, and have little anticompetitive effect since participation in the arrangement was entirely voluntary.

At the same time that the above five proponents filed their space-charter agreement (No. 10467) with the Commission, the same five carriers plus

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

a sixth carrier, Flota Mercante Grancolombia, S.A., filed a so-called "discussion agreement" (No. 10468) by which the six carriers would confer for the purpose of developing, exchanging, and discussing trade data and information. The six carriers believed that this latter Agreement would serve as a forum to discuss the problems affecting the trade adversely, mentioned above, and would enhance their ability to reach helpful economic decisions on modernization and fleet deployment as well as commercial solutions to conflicting cargo promotion laws and policies.

The filing of the two Agreements generated four protests filed by three carriers and an association of customs brokers and freight forwarders, namely, Naviera Continental, NAVICON, C.A. (Navicon); Ecuadorian Line, Inc. (Ecuadorian); Coordinated Caribbean Transport, Inc. (CCT); and the Florida Customs Brokers and Forwarders Association (Brokers and Forwarders Association). These protestants disputed proponents' contentions that the trade was overtonnaged, contended that the space-charter Agreement was unjustified, extremely anticompetitive, and was a first step towards a consortium, and raised the question of possible impact of the cargo reservation laws in the various South American countries on the subject Agreement. Two of the protesting parties, CCT and the Brokers and Forwarders Association, also protested approval of the discussion Agreement (No. 10468) reiterating similar objections.

After consideration of the proponents' submissions seeking approval, the protests, and proponents' replies to the protests, the Commission determined that the nature of the contentions and factual disputes required that the Commission institute a formal proceeding in which these issues could be determined properly, consistent with the Commission's duty to examine competitive consequences of agreements, weigh the purported benefits against possible competitive harm, and determine whether the Agreements served needs or purposes which would offset their inroads on antitrust policies, as required by principles of law prevailing under the 1916 Act. See *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *United States Lines* v. *F.M.C.*, 584 F. 2d 519 (D.C. Cir. 1978); *Marine Space Enclosures, Inc.* v. *F.M.C.*, 420 F. 2d 577 (D.C. Cir. 1969).

The formal proceeding was launched, as noted above, by the service of the Commission's order on October 5, 1983. The Commission set forth the basic issue as to whether the two Agreements should be approved, disapproved, or modified under the standards of section 15 of the 1916 Act. In addition, the Commission framed three specific issues for determination relating to the competitive effects of the Agreements, either alone or together, the effects of South American cargo preference laws, the interaction of the two Agreements, and the scope of the second Agreement, No. 10268.[2]

Developments Following Issuance of the Commission's Order

The first major development occurring after institution of the formal proceeding was the withdrawal of Agreement No. 10468, the discussion agreement, by the parties thereto. This withdrawal was effectuated by letter of counsel dated November 3, 1983, and was confirmed by my ruling on November 7, 1983. The withdrawal of the discussion Agreement served to remove from the proceeding all issues pertaining solely to that Agreement, specifically an issue pertaining to joint competitive effects resulting from the interplay of the two Agreements, trade conditions and problems which might be alleviated by the discussion Agreement, interaction of the two Agreements, and the scope and membership limitations of the discussion Agreement. Justification for the remaining space-charter Agreement (No. 10467) of course, remained to be shown under the standards of section 15 of the 1916 Act.

Shortly after withdrawal of the discussion Agreement, the parties commenced to utilize the Commission's prehearing discovery processes. Proponents of the space-charter Agreement served interrogatories and requests for production of documents on protestants and Hearing Counsel and Hearing Counsel served corresponding materials on proponents. In addition, proponents took the deposition of the President of Protestant Ecuadorian Line. Several prehearing conferences were conducted in an effort to bring the proceeding to a prompt conclusion.

During the course of this prehearing activity, discussions began between proponents and the three active protestants, Ecuadorian Line, CCT, and the Brokers and Forwarders Association, in an effort to narrow or eliminate issues among these parties. (The remaining protestant, Navicon, although kept apprised of developments by counsel for proponents, by Hearing Counsel, and by notices which I issued, took no part in prehearing activity, did not appear at any of the prehearing conferences or at the hearing, and notified Hearing Counsel that it was declining participation because

[2] The specific issues framed in the Commission's Order (p. 4) were as follows:

1. What competitive effect will the Agreements, either individually or together, have on the trade, and what conditions in the trade (footnote omitted) would justify any anticompetitive effect the Agreements may be found to have?

2. What are the terms of the South American cargo preference laws that apply to the trades within the geographic scope off the Agreements, and what effect will these laws have on the implementation of the Agreements and the trade?

3. How will Agreement Nos. 10467 and 10468 interact with each other and other approved section 15 agreements in the trade? Why should Agreement No. 10468 membership be limited to the national flag carriers of the countries involved, and why should that agreement include matters that are within the scope of other approved section 15 agreements to which Proponents are party?

In the footnote to issue no. 1 omitted above, the Commission instructed proponents to submit evidence supporting their allegations that trade conditions were unstable and other matters and to show how the Agreements would alleviate such conditions.

it was being purchased by an Ecuadorian concern and had no instructions. I issued no sanctions against Navicon but noted its absence and cautioned that the proceeding could not be delayed and its allegations would not be proven by its continued lack of participation.)[3]

The result of the discovery and discussions among the parties concerned was the withdrawal of two protests, those by CCT and the Ecuadorian Line, in return for certain amendatory or clarifying language which proponents agreed to insert in their Agreement. (Later, as I discuss, a third protestant, the Brokers and Forwarders Association, also withdrew their protest in return for certain clarifying statements by proponents, and Hearing Counsel expressed support for approval of the Agreement on certain conditions relating to reporting requirements and minor language changes.)

Both CCT and the Ecuadorian Line had protested approval of the subject Agreement, contending that proponents had not shown the requisite need or justification for such an Agreement. They disputed proponents' contentions that there was an overtonnaging problem in the trade, that cargo had declined, and that severe rate instability existed and disputed proponents' contentions that activities at the Port of Miami causing shift of cargo to that port required any remedial action and were concerned that the subject Agreement might be aimed at diverting cargo away from Miami and harming carriers serving that port such as CCT and Ecuadorian Line. CCT was especially concerned that the subject space-charter Agreement might work in conjunction with the now-withdrawn discussion Agreement to create a consortium with monopolistic effects, and both CCT and Ecuadorian Line were worried about any possible effects of the subject Agreement on South American cargo reservation laws. (See affidavits of Vlada and Calderon, Attachments G and H to Ex. 1.) Furthermore, according to a deposition taken of Mr. Dennis A. Meenan, President, Ecuadorian Line, that Line also feared that the subject space-charter Agreement authorized joint rationalization of sailings, coordination of sailings, possible elimination of some ports of direct call, joint advertising and joint cargo solicitation, and did not provide for other carriers serving the trade to become parties to the Agreement. (Exs. 2 and 3).

Whatever the concerns of the two protestants, CCT and Ecuadorian Line, they appear to have been alleviated considerably by a further understanding of the Agreement which resulted from discussions with proponents and by proponents' willingness to amend the original Agreement with clarifying language. Specifically, to remove any ambiguity as to the meaning and intention of the parties to the Agreement, proponents submitted the following

[3] See letter dated November 15, 1983, from Mr. Arturo J. Abascal, Marketing Manager of Navicon, to Hearing Counsel; Notice of Further Prehearing Conference and Related Rulings, March 2, 1984, p. 3 n. 1; transcript of prehearing conference, March 1, 1984, pp. 5–10. I note that the Commission has made clear that it expects parties protesting approval of agreements to come forward with information in support of the allegations in their protests and that failure to do so may result in approval of an agreement notwithstanding the protest. See, e.g., *Agreement No. 9955–1*, 18 F.M.C. 426, 470 (1975); Agreement No. 9905, 14 F.M.C. 163, 165 (1970).

clarifying language, adding new paragraphs "(d)" and "(e)" to Article 1 of the Agreement and a new paragraph "21." (Ex. 1A). The new language reads as follows:

> (d) Carriers shall not agree among themselves nor jointly coordinate vessel sailings nor shall they arrange, except on a vessel-by-vessel basis, for the charter of space.
>
> (e) A Carrier seeking to charter space from another carrier party to this agreement at a particular port must serve that port, through cargo solicitation and regular vessel calls at that port, in order to charter space on the vessel of a carrier party calling at that port.
>
> 21. Any common carrier by water operating vessels in the Trade may become a party to this agreement by signing a counterpart signature page to this agreement. Changes in membership shall be reported to the Federal Maritime Commission.[4]

As explained by Mr. David Flint, Director of Pricing for Delta, a party to the Agreement, parties to the Agreement met with representatives of protestants CCT and Ecuadorian Line in order to explain the proposed operation of the Agreement with the hope that the protestants would perhaps join the Agreement themselves or at least withdraw their protests. Proponents discussed the various concerns expressed by protestants, explained that the Agreement was not intended to operate in the manner feared by protestants, and agreed to furnish amendatory or clarifying language to the Agreement to make clear that protestants should no longer be concerned about the Agreement. (Ex. 2). Thus, the clarifying language quoted above is designed to answer and satisfy the various concerns. As seen by paragraph "(d)," the proponents specifically disable themselves from coordinating vessel sailings or engaging in joint activities. (Ex. 2, p. 4). Furthermore, to emphasize the fact that the Agreement is intended to be merely a casual space-charter arrangement when the need arises for a carrier to utilize space of another carrier's vessel calling at a particular port when the first carrier's vessel, for some reason, cannot call at that port, paragraph "(e)" specifically requires that the first carrier must regularly serve the port through solicitation and regular vessel calls in order to be able to charter space on another carrier's vessel. In order to allay any fears that the Agreement would be anticompetitive, new Article 21

[4] This last sentence regarding reporting of changes in membership to the Commission was added to the original amendatory language at the hearing held on April 19, 1984, at the request of Hearing Counsel, to which request counsel for proponents had no objection. Proponents agreed to certain other clarifying amendments to the language of the Agreement at the hearing on April 19, 1984. Thus, they agreed to delete the words "U.S. Flag and reciprocal national flag" from the preamble to the Agreement qualifying the parties so that the Agreement would ensure that it is open to all carriers serving the trade. In addition, in Article 17 of the Agreement (Reporting Requirements), proponents agreed to minor word changes to clarify the fact that they would be submitting periodic reports "detailling" rather than summarizing their carryings and would submit those reports "in the form set forth by the Federal Maritime Commission." Proponents agreed to amend their Agreement to insert these quoted words and phrases in Article 17.

to the Agreement specifically provides that membership in the Agreement is open to any carrier serving the trade.

After discussing their Agreement with the two protesting carriers, proponents believed that they had satisfied those carriers' concerns and expected the two carriers to withdraw their protests provided that the amendatory language quoted above would be included in the Agreement. (Ex. 2, pp. 3–4; Ex. 1A). Counsel for the two lines thereafter notified me that the amending language satisfied "many of the major concerns of the Ecuadorian" Line (Ex. 2A) or "the major concerns of CCT as to the possible injurious consequences of the Agreement." (Ex. 2B). Accordingly, both of these lines withdrew their protests although not supporting approval of the Agreement and still questioning some of proponents' arguments in favor of approval. (Exs. 2A, 2B).[5]

In addition to satisfying many or all of the major concerns of the two lines and of the Brokers and Forwarders Association, proponents made an effort to answer Hearing Counsel's concerns as well. Hearing Counsel's concern was that somehow the space-chartering Agreement could reduce the amount of cargo available to carriers not parties to the Agreement in conjunction with cargo reservation laws of the destination countries in South America and expressed certain other concerns about how the Agreement would operate as to compensation to the carrier leasing space to another carrier, as to reporting requirements, and as to explicit reference to the rights of other carriers to join the Agreement. These concerns were satisfied in the following manner.

As to clarification of the rights of other carriers to join the Agreement, as seen, new Article 21 makes clear that "any common carrier operating vessels in the trade may become a party . . ." Furthermore, in response to Hearing Counsel's request that the Commission be informed of changes in membership, proponents agreed at the hearing on April 19, to add language to Article 21 requiring the parties to notify the Commission of any such changes. Mr. Flint of Delta, furthermore, explained how the compensation provision of the Agreement was intended to operate. As explained by him, a carrier who charters space from another carrier under the Agreement will carry the cargo under the first carrier's bill of lading

[5] Ecuadorian Line stated that it was withdrawing as a protestant because the "potential negative consequences of the Agreement for Ecuadorian do not justify the time and expense of further participation in this proceeding." (Ex. 2A). Ecuadorian expressed confidence that the Commission would review the Agreement and its justification under the Commission's statutory responsibilities and questioned proponents' contentions that certain activities at the Port of Miami justified approval of the Agreement. Similarly, CCT withdrew its protest but also questioned proponents' arguments that certain activities at the Port of Miami justified approval of the Agreement. (Ex. 2B). It is understandable why these two carriers, which serve Miami, would take exception to any aspersions cast upon that port. Another protestant, the Brokers and Forwarders Association, also serving Miami, took similar exception to proponents' adverse comments upon practices at that port. Later, however, at the hearing in this proceeding, counsel for proponents explained that proponents had no intention of singling out or criticizing law-abiding forwarders operating at Miami. Furthermore, since there is sufficient justification for the Agreement without casting aspersions at practices at Miami, it is not necessary to utilize any evidence relating to alleged practices at Miami to which any of these parties excepted in finding that the Agreement warrants approval.

and tariff rates. Furthermore, the carrier seeking the space on the other carrier's vessel will negotiate compensation with the carrier offering the space and the amount of compensation which the latter carrier will require will vary depending upon loading costs to the vessel-operating carrier at the particular port and other cost factors including the cost of shifting other cargo to accommodate the cargo booked by the carrier which obtained the space and any costs relating to the nature of the cargo itself. (Ex. 2, pp. 5–6).

The major concern of Hearing Counsel (and it was a concern of all the protestants, including the two carriers and Association who withdrew their protests) was that the cargo reservation laws of the five South American countries involved (Bolivia, Chile, Peru, Ecuador, Colombia) would somehow work in conjunction with the Agreement to oust non-member carriers from cargo carryings. Proponents have throughout the proceeding consistently and vehemently denied that their spacechartering Agreement had any relationship to cargo reservation laws or that the parties to the Agreement had any intention or any thought of using the Agreement to benefit themselves by means of rights granted under those laws. Nevertheless, because protestants had expressed concern over possible interrelationships between those laws and the subject Agreement, the Commission instructed the parties to address the issue, namely, what are the terms of the various laws and what effect will they have on the implementation of the subject Agreements, one of which, the discussion Agreement, as I have mentioned above, has been withdrawn.

Whatever the concerns of the original protesting parties and of the Commission regarding these laws, there is absolutely no evidence that the subject Agreement was designed to benefit from those laws, would benefit by them, or would give the parties to the Agreement any special privileges or advantages compared to carriers not parties to the Agreement. After several months were expended by Hearing Counsel in prehearing discovery in an effort to determine if these laws had any bearing on the subject Agreement, Hearing Counsel concluded that the laws in question are a veritable maze of confusion and inconsistent and uncertain application and that further time and effort in seeking to translate and analyze those laws in detail would be unwarranted.[6] Furthermore, not only is there no evidence whatsoever that the subject Agreement has anything to do with South American cargo reservation laws, but the record shows that all the carriers

[6] A list of the various decrees and laws was provided by Hearing Counsel. (Ex. 5). Hearing Counsel, who is fluent in Spanish, stated that he could not justify consuming more time in litigation to furnish the translated texts of all of these laws and decrees in view of proponents' willingness to furnish periodic reporting of their activities under the Agreement. It was also Hearing Counsel's understanding that the various laws and decrees were not administered consistently. There is no evidence that these laws and decrees have anything to do with the subject space-charter Agreement. The evidence, especially that of Mr. Flint of Delta, who is experienced in the subject trade area, amply confirms this conclusion. Under the authority given me by the Commission to alter or delete issues that proved to be "irrelevant or immaterial to the ultimate question presented" (Order, p. 3 n. 7), as requested by Hearing Counsel, I ruled that the issue concerning cargo reservation laws would accordingly be considered to be deleted.

serving the subject trade areas are either national-flag carriers or associates so that they are all generally eligible to carry cargo to particular South American countries involved, and there is no basis to fear that a carrier member of the Agreement would "waive" cargo to another carrier-member of the Agreement to the detriment of outside, non-member carriers. (Ex. 2, pp. 5, 6). Certainly the Agreement nowhere authorizes any such preferential treatment to carrier members, the parties stoutly deny that they ever intended any such thing, and any carrier member as well as non-member carrier has rights to carry cargo to the South American countries depending upon its flag or associate status and not by anything in the subject Agreement. In short, as Mr. Flint states:

> With respect to the cargo reservation law issue, it is my understanding of these laws based on my personal experience in each country involved in the trade that this Agreement is neutral with respect to those laws. By that I mean that it neither enlarges nor restricts the rights of any carrier to serve any country in the trade. (Ex. 2, p. 6).

In lieu of pursuing the issue in further detail fruitlessly, Hearing Counsel stated that the Commission's time could be spent much more profitably by monitoring the Agreement to determine if any trends could be discerned in cargo carryings in the trade. Therefore, Hearing Counsel urged and proponents agreed that the parties should furnish periodic reports of utilization and bookings, which reports are almost identical to reports which carrier members of other spacecharter agreements have been required to furnish to the Commission on a semi-annual basis.[7] After proponents agreed to file the clarifying language to their Agreement, as quoted above, furnished explanations as to the operations of the Agreement, furnished additional evidence showing that the Agreement had nothing to do with South American cargo reservation laws, and agreed to provide the Commission with semiannual reports very similar to reports which members of other agreements have been furnishing so that the Commission can monitor operations under the Agreement, Hearing Counsel stated at the hearing on April 19, that they supported approval of the Agreement.

[7] The semi-annual reports of utilization and capacity (Ex. 4) are adopted almost verbatim from reports which the Commission has required to be filed by the carriers who are members of the American-Flag Common Carrier Charter Agreement (No. 10420), a five-party space-chartering arrangement approved by the Commission on December 11, 1981. Utilization reports have also been required in much less complicated agreements such as Agreement No. 10254, a simple non-exclusive transshipment and chartering agreement between American Export Lines, Inc. and Zim Israel Navigation Co., Ltd., approved January 25, 1977, agreement canceled, August 27, 1982. See also the reports in *Agreement No. 10364*, 19 SRR 1323, 1327 (1980). Such reporting should enable the Commission to determine if overtonnaging or underutilization continues to be a problem since proponents offer overtonnaging as one of the reasons for the need for their Agreement. The reports, especially Table No. 3, which deals with a report of cargoes booked by one member with another member should help indicate whether the Agreement is being used casually as proponents state is intended rather than as a means for a particular party to cease serving a particular port. Thus, the reporting serves useful purposes.

The only other active party to the proceeding, the Brokers and Forwarders Association, as I briefly mentioned above, withdrew their protest although they did not withdraw from the proceeding, after counsel for proponents had assured the Association on the record at the hearing that proponents had no intention of questioning the reputation or impugning the valuable contributions of the law-abiding licensed forwarders serving the Port of Miami. As I mentioned above, furthermore, I find enough justification on the record for approval of the Agreement without having to evaluate proponents' original evidentiary submissions concerning alleged questionable practices at the Port of Miami and determining whether any such practices, even if they existed, were relevant to the question of approvability of the subject space-chartering Agreement, especially since that evidence seems far more relevant to the now withdrawn discussion Agreement (No. 10468). Suffice it to say that the record shows benefits that may reasonably be expected to flow from the space-chartering Agreement which outweigh any harmful effects, as to which the evidence of record is essentially speculative, as I briefly discuss below. Consequently, with no active protests, with the support of Hearing Counsel, and with the evidence of justification present in the record, which evidence is not refuted, I find the subject Agreement should be approved provided that the clarifying language quoted above is filed with the Commission and subject to the reporting requirements discussed.

DISCUSSION AND CONCLUSIONS

The ultimate issue to be determined is whether the space-chartering Agreement (No. 10467) meets the standards of approvability under section 15 of the Shipping Act, 1916. Subsidiary issues framed by the Commission are to determine what competitive effects the Agreement will have, whether there are any conditions in the trade which would justify any anticompetitive effects, and whether South American cargo preference or reservation laws have any effects on the space-chartering Agreement.[8]

As discussed above, proponents of the subject Agreement contended that their Agreement was justified because of problems in the trade relating to overtonnaging, unstable rates, decline in cargo, and purported questionable activities at the Port of Miami, and submitted that the Agreement was minimally anticompetitive and would produce benefits to the trade. As also discussed, four protestants, three who have withdrawn their protests and one of whom has been totally inactive in the proceeding, contended that the Agreement was unjustified, extremely anticompetitive, and of uncertain relationship with South American cargo reservation laws. They contested proponents' evidence concerning overtonnaging, cargo decline, rate instability and other matters and feared that the Agreement would harm

[8] Withdrawal of Agreement No. 10468, the discussion Agreement, removes a third issue framed by the Commission from the proceeding concerning how the two Agreements would interact with themselves and other agreements and why the discussion Agreement was limited in membership and scope.

them or the Port of Miami and would authorize joint activities that would enhance the anticompetitive effects of the Agreement. Hearing Counsel also expressed some concern that the space-chartering Agreement might be used in conjunction with cargo reservation laws to give parties to the Agreement an advantage over non-parties.

As I discussed above, most of the concerns of the protestants and of Hearing Counsel were ameliorated or eliminated by clarifying language which proponents agreed to insert in their Agreement, by a better understanding of the intended operations of the Agreement, by the total lack of evidence that parties to the Agreement would enjoy any special privilege or advantage over any outside carrier because of cargo reservation laws, and, finally, by the proponents' agreeing to furnish reports periodically so that the Commission could monitor the operations under the Agreement, which reporting is customary in agreements of this type and is patterned after similar reporting required by the Commission in other such agreements. Consequently, as I discuss below, I find justification for the Agreement, no countervailing probative evidence of harm, and recommend approval provided that the clarifying language quoted above is filed with the Commission and that, as agreed, proponents furnish periodic reports to the Commission. I now explain.

Applicable Principles of Law

Under the standards of section 15 of the 1916 Act, proponents of agreements seeking approval must come forward with evidence of needs, benefits, or regulatory purposes which their agreements provide or serve, and the Commission essentially weighs the potential benefits against possible harmful effects of the agreements, considering, in addition, the extent to which the proffered agreements violate the policies of the antitrust laws. See *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* cited above, 390 U.S. 238; *United States Lines* v. *F.M.C.,* cited above, 584 F. 2d 519; *Marine Space Enclosures, Inc.* v. *F.M.C.,* cited above, 420 F. 2d 577; *Isbrandtsen Co., Inc.* v. *United States,* 211 F. 2d 51, 57 (D.C. Cir. 1954); *Agreement Nos. 9718–3 & 9731–5,* 19 F.M.C. 351, 371 (1976).

Although proponents of agreements submitted under the 1916 Act are supposed to bring forward evidence justifying approval of their agreements in order to offset the fact that their agreements are normally contrary to the policies of the antitrust laws favoring free and open competition, the Commission has held that the degree and extent of their proof varies depending upon the extent to which the agreement invades those policies. In other words, a minimally anticompetitive agreement may require less proof than one which contains substantial anticompetitive or monopolistic effects. See, e.g., *Agreement No. 9955–1,* 18 F.M.C. 426, 462 (1975); *Agreement No. 8760–5,* 17 F.M.C. 61, 62 (1973). Finally, the Commission expects parties protesting agreements to come forward with evidence supporting their allegations and will not decide cases on the basis of "speculative possibilities,'' i.e., in the absence of facts and reasonable deductions to be drawn therefrom. *Agreement No. 9955-1*, cited above, 18 F.M.C. at 470; *Alcoa SS. Co., Inc.* v. *Cia. Anonima Venezolana,* 7 F.M.C. 345, 361 (1962).

The Evidence Favoring Approval

In the present case, I note at the outset that there are no active protests to the Agreement and that Hearing Counsel, after examining the various South American cargo reservation laws and obtaining clarifications to the Agreement and proponents' expression of willingness to furnish customary periodic reports of operations under the Agreement, support approval. Furthermore, in the absence of viable protests or evidence tending to show that the Agreement would have harmful effects, there is little or nothing to offset evidence of expected benefits. Furthermore, the Agreement appears to be what its proponents state it to be, namely, a simple, casual space-charter arrangement open to any carrier serving the trade with no fixed minimum or maximum requirements or obligations of a carrier to make space available if the carrier's vessel does not have available space. (Ex. 1, Attachment D, Affidavit of Joseph T. Lykes, pp. 9-10). It has nothing to do with rate-fixing, joint solicitation, or joint activities of any kind. Very simply, if a carrier who is a party to the Agreement books cargo at a port but for some operational reason[9] its vessel cannot call at the port, the carrier can seek to carry the cargo on another carrier's vessel calling at the port if space is available on that vessel. Thus, the shipper's cargo need not be left at the pier. Furthermore, rather than abandoning a particular port, if a carrier books cargo at that port but its vessel cannot call there, the carrier will arrange to carry it under its own booking and bill of lading on the space of another carrier-party's vessel which can call at the port, if space is available. Since the Agreement is open to any carrier who wishes to join and enables any party to provide service which it might not otherwise be able to provide if its vessel cannot make a direct call at a particular port and since there is no joint activity, i.e., no joint solicitation, advertising, coordination or rationalization of sailings, it is difficult to see how the effects of the Agreement on competition are more than minimal or how the policies of the antitrust laws are significantly contravened.[10] Furthermore, there is no evidence which would support

[9] According to Joseph T. Lykes, Vice President-Pricing of Lykes Bros., a party to the Agreement, cancellations or delays of vessel sailings occur for reasons such as severe weather during the hurricane season causing vessel deviation or because of congestion at the Panama Canal which may require alteration of sailing schedules. Such cancellations or alterations can have adverse effects on the businesses of shippers and consignees who book cargo long in advance of the sailings. The Agreement, however, would enable the parties to it to secure vessel space and serve the shippers or consignees who might otherwise be adversely affected. (Ex. I, Attachment D, pp. 7-8.)

[10] To show how little the anticompetitive effects on the trade should be, evidence submitted by proponents showing overtonnaging also shows that there are 19 carriers serving the subject trade area, nine of whom

any of the apprehensions of any of the protestants concerning possible harmful effects of the Agreement on any particular port or carrier or as to special privileges or advantages to parties to the Agreement that might arise under South American cargo reservation laws, as to which the Agreement is strictly neutral.

The record shows that there are operational benefits and that there is no probative evidence of harmful effects. It also indicates that the fears of possible harm are essentially speculative or are based largely upon previous misunderstandings of the intentions of the parties to the Agreement and upon misunderstandings as to how the Agreement is to operate as well as concern that the Agreement would work in conjunction with the now-withdrawn discussion Agreement (No. 10468) to lead to a "consortium" or other harmful entity in the trade. Significantly, once these misunderstandings were eliminated, the discussion Agreement was withdrawn, and proponents submitted clarifying language and other explanations, all the active protestants withdrew their protests. Thus, it would appear that there is as much or even more reason to approve this simple space-charter Agreement than there was in *Agreement Nos. 10186 et al.,* 25 F.M.C. 538 (1982), in which the Commission approved a more complicated space-charter agreement (No. 10364) which was also a chartering arrangement on a space-available basis without provision for rate-fixing, coordination of sailings or joint solicitation, but with a maximum limitation which is not present in the subject Agreement No. 10467. As the Commission stated in *Agreement Nos. 10186 et al.,* (25 F.M.C. at 547):

> Agreement No. 10364 is nothing more than an arrangement whereby the parties charter space on each other's vessels on a space available basis subject to a maximum. There is no provision authorizing the fixing of rates, coordination of sailings, joint solicitation of cargo or joint bills of lading. The vessel owner retains full control over the vessel. In short, the space charter places little or no restriction on the competition between the parties. Nor has it been shown, to the extent it was even argued, (footnote omitted) that the agreement will adversely affect other operators in the trade competitively.
>
> On the other hand, proponents of Agreement No. 10364 have come forward with evidence indicating that the agreement will allow for more direct calls, prevent the introduction of additional tonnage to the trade and result in a generally more efficient transportation service to the shipping public. The Commission is satisfied that these benefits outweigh any anticompetitive features of the agreement . . . It will, accordingly, be approved.

Even if the operational benefits enabling parties to serve shippers and ports under the Agreement when they would otherwise be disabled from

entered the trade within the last four years. The subject Agreement, however, consists of only five carriers. (Ex. I, Attachments A, C, pp. 2–3, and table mentioned therein.)

doing so were not shown, however, there are other benefits and purposes of the Agreement which would justify approval, as proponents have shown. Thus, if a vessel sailing is cancelled for some operational reason, as mentioned above, a carrier-party to the Agreement may still be able to carry the cargo under its own bill of lading on another carrier's vessel. Because the evidence shows significant overtonnaging, a fact to which the parties at the April 19 hearing stipulated,[11] space on a vessel that might otherwise be unused could be utilized by a carrier whose vessel sailing at the port had to be cancelled. (Ex. 1, Attachment C, p. 5, Affidavit of John M. Dillon). The Agreement will therefore help promote better utilization of vessel space while at the same time providing service to shippers whose businesses might otherwise be disrupted because of vessel cancellation or delays. Furthermore, unrefuted evidence shows overtonnaging, the presence of numerous independent carriers, a certain degree of trade instability, and increased costs for carriers wishing to provide a high quality of liner services. The space-charter Agreement, however, will provide a greater degree of operating flexibility and enhance the capability of each party to the Agreement to satisfy the requirements of shippers and consignees without diminishing competition among carriers. (Ex. 1, Attachment C, p. 5). Thus, while the space-charter Agreement may not be the answer to all the problems besetting the trade (which problems it appears that the withdrawn discussion Agreement (No. 10468) was also intended to address), the voluntary space-chartering arrangement can help a member-carrier's utilization and reduce costs by avoiding the need to reschedule a vessel to call at a particular port for relatively small amounts of cargo when the vessel has otherwise been delayed or its itinerary has had to be changed. In such instances, the carrier-party to the Agreement can book the cargo on another carrier-member's vessel calling at the particular port if space is available.

ULTIMATE CONCLUSIONS

The space-charter Agreement appears to have negligible anticompetitive effects, and there is no evidence that it was intended to or would harm any port, shipper, or carrier, or confer any special privilege or advantage on parties to it because of South American cargo reservation laws. Opposi-

[11] Proponents furnished a considerable body of evidence showing overtonnaging in the trade area and other conditions tending to promote unstable conditions. As noted earlier, 19 carriers serve the trade area. Other carriers have been forced to leave the trade for financial reasons. Southbound, evidence shows that 12 of the 19 carriers alone offer an aggregate capacity of approximately 224.2 million cubic feet whereas cargo moving comprises only 120 million cubic feet. If the remaining seven carriers' capacities were known and added, obviously the aggregate utilization factor would be considerably less than 50 percent. Northbound the situation is even worse (only approximately 36 million cubic feet of cargo moving compared to the same aggregate vessel capacity of 224.2 million cubic feet). (Ex. 1, Attachment C and tables mentioned therein; Attachment D). Evidence concerning capacity utilization for the five parties to the Agreement was also furnished on a confidential basis and tends to confirm significant underutilization of vessel capacity. (Confidential Ex. 1). On the basis of such evidence, the parties at the hearing (Hearing Counsel, proponents, and the Brokers and Forwarders Association) stipulated that considerable overtonnaging exists).

tion to the Agreement has virtually disappeared now that the intentions of the parties to it have been clarified, a companion discussion Agreement has been withdrawn, and they have agreed to furnish the customary reports to the Commission to ensure that the authority conferred under it will be used as intended. Under such circumstances, applicable principles of law under the 1916 Act do not require an inordinate amount of evidence showing benefits to be gained by approval of the Agreement. However, the record does show benefits to shippers and ports which would result when a carrier member of the Agreement could serve the port even when its vessel could not call at the port and further benefits in the form of cost reductions and efficiencies derived from greater flexibility in vessel deployment. The space-chartering Agreement is extremely simple and voluntary among the parties and does not authorize joint solicitation, advertising, coordination or rationalization of sailings. It is thus less restrictive than or similar to numerous other space-chartering agreements which the Commission has approved after finding that expected benefits would outweigh any possible harmful effects. See, e.g., *Agreement No. 10186–3,* 19 SRR 1611 (1980); *Agreement Nos. 10186 et al.,* cited above, 25 F.M.C. 538; *Agreement No. 10364,* 19 SRR 1323 (1980).

Agreement No. 10467 is therefore approved provided that proponents file with the Commission and the Commission receives the amendatory language discussed above, signed by the parties or their duly authorized representatives, within 30 days of the date of service of the Commission's notice rendering this Initial Decision administratively final or such other time as the Commission may direct upon review of this Decision.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-3

SOUTH ATLANTIC-NORTH EUROPE RATE AGREEMENT (AGREEMENT NO. 9984-23)

GULF EUROPEAN FREIGHT ASSOCIATION (AGREEMENT NO. 10270-2)

ORDER

June 15, 1984

On February 28, 1984, the Commission served an Order Reopening The Record in the above-captioned proceeding in order to provide the parties to the Gulf-European Freight Association (GEFA) with an opportunity to supplement the record in support of the agreement's microbridge authority. The Commission indicated in its Order that information concerning actual operations under the GEFA microbridge tariff would be relevant to a determination as to whether GEFA's U.S. microbridge authority had been adequately justified under the standards set forth in *U.S. Atlantic & Gulf/Australia-New Zealand Conference (Agreement No. 6200-20—Intermodal Authority)*, 21 S.R.R. 89 (1981) *(Agreement No. 6200-20)*. The Order also stated that GEFA might submit any other information which it believed would be relevant to the issue of whether continuation of GEFA's U.S. microbridge authority had been justified.

On March 28, 1984, Proponents filed a four volume submission together with a confidential exhibit, a time/volume contract with a shipper. These documents provide the following information concerning U.S. microbridge service under the GEFA tariff. Approximately 98 commodities have been shipped under the tariff. An additional 18 commodities have moved at open rates. Approximately 125 points are served under the microbridge tariff. GEFA has made a cumulative total of 240 separate arrangements with 24 different railroad companies and 78 different trucking companies to operate as participating U.S. inland carriers in connection which shipments moving under GEFA's microbridge tariff. In addition, data provided by GEFA show that the demand for GEFA's microbridge service is increasing. During the first quarter of 1984, 12,000 tons of cargo were carried as compared to 4,000 tons in the final quarter of 1983. Finally, GEFA has submitted, as a confidential exhibit, a currently effective time/volume contract with a major shipper.

This information concerning GEFA microbridge service, increases in GEFA microbridge cargo, and a GEFA contract commitment, would appear to indicate that GEFA now has in operation a viable microbridge service that is meeting an actual, although limited, demand by shippers. Based on the additional information provided upon reopening the record, and the relevant information previously introduced into the record in this proceeding, the Commission concludes that continued approval of GEFA microbridge authority is warranted.

Approval of Agreement No. 10270–2, however, shall be subject to modifications to the Preamble and to Article 5.3 of Agreement No. 10270, which were adopted by the members of Agreement No. 10270 during the course of the proceeding. These modifications were required to define more precisely the scope of Agreement No. 10270 in response to the Commission's Order of Investigation which noted certain deficiencies in the Agreement's definitions. In addition, the approval granted here is also subject to the deletion of GEFA's minibridge authority, which GEFA has advised its members no longer seek. Agreement No. 10270 is deemed to be amended to incorporate these modifications as of the date of approval. These modifications shall be included in the Agreement at the time that GEFA next files an amendment to Agreement No. 10270, as stated below.

THEREFORE, IT IS ORDERED, That Agreement No. 10270–2 is approved;

IT IS FURTHER ORDERED, That the parties to Agreement No. 10270 shall include in the Agreement the following modifications at the time that they next file an amendment to Agreement No. 10270:

1. The Preamble of Agreement No. 10270 shall be amended to read as follows:

> The undersigned common carriers by water (the "Members"), regularly operating trans-Atlantic vessels, hereby associate themselves in a cooperative arrangement known as the Gulf-European Freight Association ("GEFA") for the purpose of establishing, maintaining and enforcing agreed and otherwise lawful tariffs or rates, charges, and rules governing the transportation of cargo, whether moving in all water or intermodal service, or under through bills of lading or otherwise, in the trade by water from or via U.S. Gulf coast ports, except as excluded under Article 5.3 of this Agreement, to European Continental ports in the Bordeaux/Hamburg range and to ports in Scandinavia and on the Baltic Sea, and to interior and coastal points via such Continental, Scandinavian and Baltic ports (the "trade"). As used in this Preamble, the term "ports" includes ports and points on inland waterways tributary to all U.S. Gulf and European ports within the above described trade.
>
> For the purposes of this Agreement, the term "points" means "coastal points" (*i.e.* points in port communities) and "interior points" (*i.e.* all points other than coastal points); and the terms "coastal points" and "interior points" are mutually exclusive. Also for the purposes of this Agreement, the term "intermodal service" means service (1) from U.S. points via U.S. Gulf ports

to European ports or via such ports to European points, all within the scope of this Agreement; and (2) from U.S. Gulf ports to European points via European ports, all within said scope. Provided, further, that transport by Seabee/Lash barge operated by members constitutes all water service.

2. Article 5.3 of Agreement No. 10270 be amended to read as follows:

5.3 Notwithstanding any other provisions hereof, the intermodal authority established by this agreement shall not extend to any joint Motor or Rail/Ocean minibridge service from U.S. Pacific or Atlantic Coastal port cities via U.S. Gulf ports and operated by any Member Line under tariffs naming through single factor Motor or Rail/Ocean rates filed with the Federal Maritime Commission and Interstate Commerce Commission. This agreement does not cover cargo moving on a through bill of lading which is transshipped at a port within the scope of the agreement and which has a prior or subsequent movement by water from or to a port not within the scope of this agreement.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–54

AGREEMENTS NOS. 9718–7, 9718–8, 9731–8, 9835–5, 9975–7, 10116–4 AND 10274–1—SPACE CHARTER AND CARGO REVENUE POOLING AGREEMENTS IN THE UNITED STATES/JAPAN TRADES

NOTICE

June 15, 1984

The initial decision in this proceeding was served June 1, 1984. This decision ordered all parties to advise the Commission within five days of that date whether or not they intended to file exceptions. This action was taken to facilitate final disposition of the proceeding prior to the effective date of the Shipping Act of 1984 (i.e., June 18, 1984). All parties advised the Commission that they would not be filing exceptions.

The Commission's 30-day period to request review of this decision, pursuant to 46 CFR 502.227, is currently scheduled to expire on July 2, 1984. However, given the Commission's objective to finalize as many formal proceedings as possible and feasible prior to June 18, 1984, the Commission has considered the involved initial decision and has determined that it will not review it. Accordingly, the initial decision in this proceeding has become administratively final.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–54

AGREEMENTS NOS. 9718–7, 9718–8, 9731–8, 9835–5, 9975–7, 10116–4 AND 10274–1—SPACE CHARTER AND CARGO REVENUE POOLING AGREEMENTS IN THE UNITED STATES/JAPAN TRADES [1]

1. Where four space charter agreements have been amended and filed as a result of settlement negotiations between the Proponents and the Protestants, as well as the Hearing Counsel of the Federal Maritime Commission, and where the record evidences that such agreements are required by a serious transportation need, are necessary to secure public benefits and are in furtherance of a valid regulatory purpose, the requirements of section 15 of the Shipping Act have been satisfied and the agreements must be approved.
2. Where four space charter agreements have been amended and filed and two pooling agreements have been withdrawn as a result of settlement negotiations between the parties in a formal proceeding originating in the Federal Maritime Commission, and where their negotiations are on the record and the filed agreements fully reflect what the parties agreed to and intended, there are no other agreements which are required to be filed with the Federal Maritime Commission within the ambit of section 15.
3. Where a formal proceeding is begun as a result of a remand from a Circuit Court of Appeals which directs that a hearing be conducted on the "*disputed* material issues of fact," raised by the Protestants in this proceeding, and where the parties have agreed that there are no longer any "disputed issues of material fact," insofar as the amended agreements are concerned and Hearing Counsel also agrees, the specific issues on remand and in the Commission's Order of Investigation and Hearing need not be considered from the aspect of "disputed" issues of material fact. Instead the provisions of the agreements must generally satisfy the requirements of section 15 and the applicable case law.

Charles Warren, George A. Quadrino and *David M. Dunn* for Proponents. *Edward M. Shea* and *John E. Vargo* for Protestant Sea-Land Service, Inc. *Kevin O'Rourke, Daniel W. Lenehan, Russell T. Weil* and *James W. Pewett* for Protestant United States Lines, Inc.

Robert Basseches, David B. Cook and *I. Michael Greenberger* for Protestant American President Lines, Ltd.

William H. Fort and *J. Alton Boyer* for Protestant Lykes Bros. Steamship Co., Inc.

George F. Mohr for Intervenor Delaware River Port Authority.

R. Moriconi for Intervenor Massachusetts Port Authority.

J. Robert Ewers, Alan Jacobson and *Stuart James* as Hearing Counsel.

[1] The Commission's Order of Investigation and Hearing on Remand originally related to the seven agreements that are enumerated in the caption in this case. As will be seen, as a result of settlement negotiations the Proponents of these agreements withdrew them from consideration. Two were not resubmitted at all and the others were proffered as amended agreements. The two agreements which were withdrawn are Agreement Nos. 10116–4 and 10274–1, respectively. The remaining agreements were revised to become 9718–10, 9731–10, 9835–7 and 9975–9.

INITIAL DECISION[2] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized June 15, 1984

BACKGROUND INFORMATION

This proceeding began as an Investigation and hearing on remand instituted under the provisions of sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. §§814 and 821), to determine whether Agreement Nos. 9718–7, 9718–8, 9731–8, 9835–5, 9975–7, 10116–4 and 10274–1 should be approved, disapproved or modified.[3] The pertinent parts of the Order of Investigation and Hearing on Remand are set forth in the Findings of Fact. The Order listed the Proponents and Protestants as follows:

Proponents	Protestants
Japan Line, Ltd.	Sea-Land Service, Inc.
Kawasaki Kisen Kaisha, Ltd.	United States Lines, Inc.
Mitsui O.S.K. Lines, Ltd.	American President Lines, Ltd.
Yamashita-Shinnihon Steamship Co., Ltd.	Lykes Bros. Steamship Co., Inc.
Nippon Yusen Kaisha	
Showa Shipping Co., Ltd.	

After the Commission's Order was served there were two Motions to Intervene. As a result, the Delaware River Port Authority and the Massachusetts Port Authority were allowed to intervene for limited purposes subject to the discretion of the Administrative Law Judge.[4] Also, one of the original protestants, United States Lines, Inc., was allowed to withdraw as a party.[5]

Once the case was docketed there was extensive discovery. There were several motions filed regarding discovery which resulted in prehearing conferences that disposed of discovery problems and allowed for certain procedural scheduling to move the case forward. Also, there were several motions and much discussion regarding confidentiality which resulted in the adoption of an Order Regarding Confidential Materials.[6] The parties throughout the pendancy of this proceeding have designated certain material as being confidential in accordance with the order of confidentiality.

Finally, after several prehearing conferences this proceeding was set down for hearing on December 6, 1983, at which time the parties indicated

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

[3] All of the agreements except 9718–8 were published in the *Federal Register* on April 29, 1980. 45 Fed. Reg. 28, 487 (1980). Agreement No. 9718–8 was filed because the Commission Order of January 16, 1981, limited the total container capacity sought in Agreement No. 9718-7. Agreement No. 9718–8 sought to raise that capacity and was published in the *Federal Register* on July 8, 1981. It became the subject of the Commission's Order of Investigation served on December 14, 1981. FMC Docket No. 81–74, *Agreement No. 9718–8—California-Japan/Korea Space Charter Agreement*, 46 Fed. Reg. 61723 (1981).

[4] The Orders granting the motions to intervene were served on March 11, 1983 and April 14, 1983, respectively.

[5] The Procedural Order was served on April 26, 1983.

[6] The Order was served on May 2, 1983.

a basis of settlement had been reached. Their subsequent actions were in furtherance of that settlement.

Findings of Fact

It is appropriate to note that the references to Exhibits 1, 2 and 3 in the following portions of these findings refer to the written testimony of K. Kawamura, Seiichi Hirano and Douglas C. Tucker, respectively, which is attached to the "Brief of Proponents" filed on March 7, 1984, and which is hereby made a part of the evidentiary record of this proceeding.

I. On November 19, 1982, the Federal Maritime Commission (the "Commission") served an Order of Investigation on Remand which reads in pertinent part, as follows:

> On July 13, 1982, the U.S. Court of Appeals for the District of Columbia Circuit remanded the Commission's order of January 16, 1981 (January Order) conditionally approving, pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. §814, a series of space charter and revenue pooling agreements among Japanese-flag lines in the United States/Japan trades. *Sea-Land Service, Inc. v. United States,* 683 F.2d 491 (D.C. Cir. 1982). The Court directed the Commission to conduct further evidentiary hearings on certain issues raised by four U.S.-flag carriers who had protested the agreements. This Order of Investigation and Hearing is issued in compliance with the Court's decision.

The Order, in pertinent part, directs that:

> THEREFORE, IT IS ORDERED, That pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. §§814 and 821), a proceeding is hereby instituted to determine whether Agreements Nos. 9718–7, 9718–8, 9731–8, 9835–5, 9975–7, 10116–4 and 10274–1 are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916, and therefore, whether they should be approved, disapproved, or modified; and
>
> IT IS FURTHER ORDERED, That the parties, in addressing the approvability of the Agreements under the standards of section 15, shall specifically address the following issues consistent with the discussion of them in this Order:
>
> (1) whether the Japanese lines have engaged in bloc voting within the shipping conferences to which they belong and, if so:
>
> (a) the extent of such bloc voting;
>
> (b) whether such bloc voting occurred on significant conference matters;
>
> (c) whether such bloc voting was caused, directly or indirectly, by actions of the Japanese government;

(d) whether such bloc voting was caused, in whole or in part, by economic relationships between the Japanese lines, on the one hand, and Japanese trading companies and other shipping interests, on the other hand; and

(e) the effects of such bloc voting on the trades and other carriers;

(2) whether the Japanese lines should be considered to operate as a joint service or joint services in some or all of the trades which they serve;

(3) whether the Japanese lines have economic relationships with Japanese trading companies and other shipping interests which, when coupled with the Agreements under investigation, render the Agreements unjustly discriminatory or unfair between carriers or contrary to other section 15 standards;

(4) whether the service market areas served by the Japanese lines should be measured by:

(a) each agreement considered individually;

(b) each of the four space charter agreements;

(c) each of the two pooling agreements;

(d) all six agreements considered collectively; or

(e) some variation of the above;

(5) Whether the service market areas served by the Japanese lines should be measured in terms of:

(a) ports served;

(b) actual points of cargo origin and destination; or

(c) some combination thereof;

(6) The market share held by the Japanese lines in those market areas;

(7) The vessel utilization factors experienced by both the Japanese lines and the protestants in those market areas;

(8) whether those market areas are overtonnaged and the potential impact of these Agreements on any such overtonnaging;

(9) the projected rates of cargo growth over calendar years 1983, 1984 and 1985 in those market areas;

(10) whether the geographic scope, pooling limits and reporting requirements in the Agreements are adequate and have been complied with;

(11) whether provisions of the Agreements are unacceptably vague; and

(12) whether there is inadequate forty-foot and reefer container service in the market area served by Agreements Nos. 9718–7 and 9718–8 and, if so, the potential impact of Agreement No. 9718–8 on this problem; * * *

* * *

IT IS FURTHER ORDERED, That the record developed in FMC Docket No. 81–74, *Agreement No. 9718–8—California*

Japan/Korea Space Charter Agreement is made a part of the record in this proceeding; and

* * *

2. The Commission Order originally related to the seven agreements that are enumerated in the caption of this case. As a result of settlement negotiations between the parties, Agreement Nos. 10116 and 10274, respectively, which are pooling agreements, were completely withdrawn. The other agreements, which are space charter agreements were proffered as new agreements numbered 9718–10, 973110, 9835–1 and 9975–9, respectively.[7]

3. The remand mentioned in the Commission's November 19, 1982, Order is from the United States Court of Appeals for the District of Columbia Circuit. It is reported as *Sea-Land Service Inc., et al.* v. *United States,* 683 F.2d 491 (D.C. Cir., 1982). In reviewing the Commission's Order of January 16, 1981, wherein the Commission extended the agreements involved here through August 22, 1983, and concluded that a hearing was not necessary, the Circuit Court stated:

> We disagree with the Commission's characterization of the issues here as questions of law or policy. Our review of the record convinces us that a number of issues raised by petitioners clearly involve questions of fact which require an evidentiary hearing. To illustrate this point we will briefly detail the material disputes presented by the parties.

and further:

> Accordingly we remand to the Commission with directions to conduct a hearing on the disputed material issues of fact raised by the petitioners, including the following: (1) the occurrence and effects of bloc voting within conferences that include signatories to the agreements; (2) potential anticompetitive effects of the agreements resulting from preexisting economic relationships among the signatories; (3) the observance by the signatories of the geographic limitations, pooling limits, and reporting, requirements specified in the agreements; (4) the occurrence and effects of overtonnaging in the trades covered by the agreements and the potential impact the agreements will have on this problem; and (5) the extent and significance of any involvement of the Japanese government in formulating the policies and practices of the signatories. The Commission should also consider any other material issues of disputed fact raised by petitioners that constitute more than bare allegations.

4. On August 19, 1983, the Commission served an "Order Amending Order of Investigation and Conditionally Approving Certain Agreements

[7] The old and new agreements have been filed with the Commission's Secretary and have also been submitted by the Proponents as appendices to various documents. They are incorporated herein by reference.

Pendente Lite," wherein it approved the agreements in issue subject to certain conditions.[8]

5. Following many months of intensive litigative efforts and after several pretrial hearings, the case came on for hearing on December 6, 1983. At that time counsel for the Proponents indicated that, "the parties on both sides are in a position at this time to resolve their differences. The proponents accordingly have made the decision to revise their agreements forthwith, being of the view that if these revisions are appropriately made that they will satisfy the objections of the protestants." The Protestants agreed that the statement was correct.

6. In accordance with the agreement of the parties in this proceeding the Proponents filed four amended space charter agreements designated respectively, as Nos. 9718–10, 9731–10, 9835–7 and 9975–9. Also, in accordance with the agreement of the parties the Proponents withdrew their two revenue pooling agreements. Also, on January 16, 1984, 'the Proponents filed a motion in the United States Circuit Court of Appeals for the District of Columbia to dismiss their Petition for Review of the Commission's August 19, 1983, Order. The Proponents' Motion was granted by the Appeals Court on January 27, 1984. Finally, on February 13, 1984, the Proponents further amended their space charter agreements at the behest of Hearing Counsel. The agreements were not renumbered as a rėsult of these further changes.

7. On February 22, 1984, the Proponents filed a motion with the Commission, entitled "Motion to Amend Order of Conditional Approval *Pendente Lite* and to Expedite Consideration Thereof." In the motion the Proponents requested that the Commission increase, pending final resolution of this proceeding, the limitations on total fleet capacities placed on them in the Commission's August 19th Order. At the same time Proponents withdrew various other motions that were then pending with the Commission.

8. On May 1, 1984, the Commission issued an "Order Further Amending Order of Investigation and Conditionally Approving Certain Agreements *Pendente Lite.*" In its order the Commission terminated its prior *pendente lite* approval of Agreements Nos. 9718–9, 9731–9, 9835–6 and 9975–8, respectively, and then approved *pendente lite* Agreements Nos. 9718–10, 9731–10, 9835–7 and 9975–9, respectively, subject to certain conditions, including specific limitations on total liner container vessel capacities deployed in each trade. By amendments received on May 3, 1984, the Proponents complied with the conditions set down in the Commission Order regarding total liner container vessel capacities.

9. Agreement Nos. 9718–10, 9731–10, 9835–7 and 9975–9 (collectively, "the Agreements") are space chartering and vessel coordination arrangements which provide for the employment of containership vessels in the Japan-United States trades. In the case of Agreement No. 9718–10, vessels

[8] Reported at 22 Pike & Fischer, Shipping Regulation Reports (SRR) 307.

may also be employed in the Korean-U.S. trade. Ex. 1, para. 7; Ex. 2, paras. 7–8.

10. The Agreements contain virtually the same provisions, their earlier prototypes having been sequentially filed with, and approved by, the Commission over a period of years. Once the structure was devised for the first of the agreements in 1968, the basic format of that agreement was thereafter followed. Ex. 1, para. 8; Ex. 2, para. 6.

11. The article entitled "Sailings" authorizes the coordinated scheduling and advertising of sailings as to promote optimum utilization. The article entitled "Containerized Cargo" clarifies that only container cargo is the cargo subject to the Agreements, but that the parties are not precluded from carrying on their agreement vessels other available cargo. The article entitled "Solicitation" assures that the parties will solicit cargo only for their own separate accounts and not jointly. The article entitled "Bills of Lading" assures that bills of lading will be issued separately by each of the parties and not on a common basis. The article entitled "Charterage" authorizes the shipment of loaded and empty containers on each other's vessels and the chartering to and from each other equal blocks of space (in the case of Agreement No. 9731, "certain" blocks of space) on terms as the parties may agree. The article also authorizes the chartering to one another of additional space should a party need more space than the space it has on a particular vessel. The article entitled "Accountings" prohibits the pooling of revenues or sharing of operational expenses except, in the case of jointly-owned vessels, operational expenses may be shared. The article permits the sharing of administrative expenses. In view of the exchange of containers in equal blocks, no accountings are contemplated. Accountings are contemplated in respect to the chartering of additional space. Adjustments in accounts are also contemplated in the case of force majeure situations. The article entitled "Container Interchange" permits the interchange of empty containers and/or related equipment on terms as may be agreed. In addition, there are articles entitled "Modifications," "Withdrawal" and "Duration" which allow changes in the Agreement terms, withdrawal on 90 day's prior notice and provide for a five year term effective to and including August 22, 1988. Ex. 1, paras. 10–16, 18–19; App. 1; Ex. 2, paras. 8–13, 15, App. 1.

12. A final article entitled "Conditions" imposes maximum capacity levels, transshipment levels (except under Agreement No. 9975) and comprehensive reporting requirements. Paragraph (A) of the article sets forth the total annual capacity of the vessels which are to be operated in any calendar year, all of which may be cross-chartered among the parties. Beyond this space, which is based upon standard operating capacities, additional space may be used when operating conditions permit. Paragraph (A) also allows the parties, in their non-agreement containership services, to call at Japan and thus to compete to a limited extent with their Agreement services. Paragraph (B) explicitly clarifies what has long been an accepted

practice, the loading and discharging of transshipmertt cargo "irrespective of its origin or destination." The paragraph imposes limitations on the parties' carryings, however, in respect to cargo originating or terminating only in Indonesia, Malaysia, Singapore or Thailand (except under Agreement No. 9975). Paragraph (C) of the article imposes a comprehensive reporting requirement to be accomplished semiannually in accordance with an attached format. Ex. 1, paras. 17, 21; Ex. 2, paras 14, 15.

13. Japan Line, "K" Line, Mitsui-OSK and Y-S Line are parties to Agreement No. 9718–10; NYK and Showa are parties to Agreement No. 9731–10; all six Japanese lines are parties to Agreement No. 9835–7; and all but Showa are parties to Agreement No. 9975–9. Ex. 1, paras. 29, 34; Ex. 2, para. 5.

14. Agreement No. 9718–10 permits the employment of the parties' vessels in the trades between ports in Japan and Korea and California; Agreement No. 9731–10 permits the employment of the parties' vessels in the trade between Japan and California, Hawaii and Alaska; Agreement No. 9835–7 permits employment of the parties' vessels in the trade between Japan and Oregon and Washington ports; and Agreement No. 9975–9 permits the employment of the parties' vessels between ports in Japan and ports on the U.S. Atlantic Coast of North America. Additionally, it authorizes the utilization of U.S. documented feeder vessels and/or barges at U.S. Atlantic ports. Ex. 1, paras. 20, 29, 34; Ex. 2, paras. 7–8.

15. The sense of each Agreement is that the parties may agree to operate, utilize or substitute such vessels as they may see fit, but within, and not in excess of, the capacity levels as the particular Agreement sets forth. Ex. 1, paras. 21, 74–76, App. 1; Ex. 2, paras. 16, 41–42, App. 1.

16. As far back as 1968, the Agreements have been the subject of continuing governmental direction by the Japanese Ministry of Transport. The Ministry's role has been limited to assuring that its broad policy objectives are carried out, the basic objective relating to the achievement of stable trading conditions in the relevant Agreement trades. Ex. 1, paras. 55–57; Ex. 2, para. 34.

17. Originally, the Commission's approvals limited the number of vessels which could be operated on a coordinated basis. By order of January 16, 1981, the Commission discontinued this limitation on vessels and substituted a limitation on the TEU space which could be cooperatively chartered. Under the Commission's *pendente lite* order of August 19, 1983, an additional limitation was temporarily imposed on the parties' total vessel capacities, sized to the total capacities which had, at the time, been employed on the vessels operated under each Agreement. The latest agreements would in lieu thereof impose limits on the annual TEU capacity which could be operated under each Agreement during a calendar year. Ex. 1, para. 21, App. 1; Ex. 2, para. 6, App. 1.

18. The Agreements, as revised, differ from those which the parties initially filed in the following manner: A third Whereas Clause clarifies

that the vessels which may be operated are those which the parties may agree upon subject to the annual TEU capacity levels as stated in each Agreement. A fourth Whereas Clause provides that the services offered will be the parties' exclusive services in the Japan trade, subject to certain limited independent vessel callings at Japan. The group concept under Agreement Nos. 9718 and 9835 has been deleted. The authority under Agreement Nos. 9731 and 9835 reposed in NYK and Showa to share agents has been deleted. The authority to share operational expenses in the case of jointly-owned vessels has been clarified, and such authority has been added as a clarification under Agreement No. 9975. A requirement to report the essential terms of space chartering and, if requested, the level of compensation, has been added. The authority to substitute vessels in the event of labor disturbances has been deleted as unnecessary. A requirement to report the essential terms of interchanges has been added. A new provision, entitled "Conditions," has been added, specifying annual capacity levels under the Agreements and of Japan cargo which may be carried outside the Agreements calling at Japan. Also, under the provision, explicit clarifying authority to carry transshipment cargo has been provided, together with certain limits on the parties' transshipment carryings to or from certain named countries. Finally, the provision adds new comprehensive reporting requirements. Ex. 1, paras. 11–121, App. 1; Ex. 2, paras. 16, App. 1.

19. Some of the aforementioned revisions were prompted upon the parties' own initiative. Others were included upon the instance of the Commission's staff, including the Office of Hearing Counsel. And, still others were adopted by the parties in deference to the concerns of one or more of the protestants. The latter category of revisions followed informal discussions among the attorneys for proponents and protestants held for the purpose of identifying each party's particular concerns in the proceeding. As a consequence of revising the Agreements, each of the protestants no longer opposes the Agreements, and, therefore, does not contest the issues specifically assigned by the Commission for investigation resulting from the remand by the U.S. Court of Appeals for the District of Columbia Circuit, these being issues which had been raised by the protestants. Moreover, as proponents' revisions have also operated to satisfy the concerns of Hearing Counsel, the parties have agreed that other issues raised by the Commission are now moot. Ex. 1, paras. 22–23; Ex. 2, para. 17.

20. Although proponents have adopted revisions to the Agreements as initially filed, and although each protestant has elected not to oppose the revised Agreements, all parties to this proceeding agree that there is no continuing agreement among them, which would prevent the proponents from further modifying the agreements or from seeking authority to operate under new and different arrangements in the future. Ex. 1, para. 23; Ex. 2, paras. 17, 43.

21. Under Agreement No. 9718, the parties operate an eight vessel container service; under Agreement No. 9731, they operate a four vessel service; under Agreement No. 9835, they operate a six vessel service; and under Agreement No. 9975, they operate an eight vessel service—a total of 26 Agreement vessels in the U.S. trades. Ex. 1, paras. 24–25, 27–29; Ex. 2, para. 18.

22. Under their Government's 38th and 39th Shipbuilding Programs, the parties considered it essential to replace a number of their older vessels which were between 10 and 15 years old and which had been overtaken by technological advances and were no longer cost competitive in the trade with their major competitors. Plans were made and approvals and financing were obtained (from our Government through the Japan Development Bank) to replace a total of 10 vessels between 1981 and 1985. Five vessels were planned for Agreement No. 9718, two for Agreement No. 9731 and three for Agreement No. 9835. Subsequent review of capacity requirements and utilizations, however, have shown there is now a greater need for additional capacity under Agreement No. 9835. Hence, the present deployment calls for only three vessels for Agreement No. 9718, only one vessel for Agreement No. 9731, and a total of six for Agreement No. 9835 where current capacity is already fully utilized.

23. The capacity increases, which arise as a result of the replacement of larger, more economical vessels, and which are the first significant increase since 1974, are as follows:

Agreement No. 9718—2,815 TEU's
Agreement No. 9731—971 TEU's
Agreement No. 9835—2,982 TEU's

Although no replacements have been carried out in the case of Agreement No. 9975 operations, the capacity level stated in Article 14 of that Agreement represents a 15 percent increase over the current annual capacity level. Overall, capacity under the four Agreements will increase by approximately 30 percent by 1985, more than half of which is already in service *pendente lite*. Ex. 1, paras. 74–77; Ex. 2, paras. 36, 43.

24. By space chartering and vessel coordination, competitive service is made possible under each Agreement which would not be possible with the limited number of vessels absent the Agreements. The service frequency is as follows:

Agreement No. 9718—semiweekly
Agreement No. 9731—weekly
Agreement No. 9835—five days
Agreement No. 9975—weekly

Ex. 1, paras. 24, 32, 33, 37; Ex. 2, para. 24.

25. The Agreements have materially reduced the need for adding additional vessels. Since 1974, no vessels have been added under the Pacific

Coast space charter operations, and only one vessel was added in 1976 for their Atlantic Coast operations, although older vessels have been, and are being, replaced from time to time. Service to shippers under the Agreements has been stable and unvarying since the parties' fleets were completed in the mid-1970's, the parties having uniformly provided reliable service levels to their customers:

Agreement No. 9718—89–93 annual sailings
Agreement No. 9731—46–49 annual sailings
Agreement No. 9835—67–73 annual sailings
Agreement No. 9975—48–52 annual sailings

Ex. 1, paras. 31–32, 34, 40–41, 74; Ex. 2, paras. 18, 21, 23.

26. The space chartering and vessel coordination features of the Agreements have also enabled the parties, using a limited number of vessels, to serve a large number of ports. Ports which have been served regularly and occasionally include:

Agreement No. 9718—Oakland, Los Angeles/Long Beach—Kobe, Tokyo, Nagoya, Shimizu, Busan.
Agreement No. 9731—Oakland, Los Angeles—Kobe, Tokyo, Nagoya, Shimizu.
Agreement No. 9835—Portland, Seattle, Vancouver—Kobe, Tokyo (or Yokohama), Nagoya, Shimizu.
Agreement No. 9975—Kobe, Tokyo, Nagoya, Shimizu—Baltimore, Boston, Jacksonville, New York, Norfolk, Philadelphia, Savannah, Wilmington.

Ex. 1, para. 29, App. 3,
Ex. 2, para. 20, App. 3.

27. The ability to charter a predetermined amount of space on one another's vessels under the Agreements produces a larger number of shipping opportunities with the deployment of a minimum of capital resources. For example, by space chartering, the individual carrier parties are thereby placed in a position to offer a frequency of service which they could not offer absent the introduction of a substantially greater number of vessels. This conservation of resources and offering of competitive service by six individual carriers is beneficial to the trade, as a whole. Similarly, the ability to coordinate the sailing schedules of the parties' vessels is indispensable to assuring regular and evenly-spaced competitive service frequency upon which shippers rely. These are the principles which underlie the chartering and vessel coordination provisions of the Agreements. Ex. 1, paras. 31–33, 35, 37–40; Ex. 2, paras. 23, 26, 28.

28. Experience, over many years, in implementing the current and earlier prototypes of the Agreements shows that under these provisions the parties have had a high degree of frequent and regular sailings and without major service interruptions, thereby holding any inconvenience to shippers at a

minimum. Efficient, frequent and regular service has thus been provided under the Agreements. Ex. I, paras. 31–34, 36–37; paras. 22–24.

29. Without the Agreements, many of the benefits-efficient, reliable and regular competitive service—could not be achieved absent the development of individual fleets sized to produce individual competitive services. As the parties cannot be expected to abandon their national trade with the United States if the Agreements were not approved, more ships would be added and this would produce more tonnage in the trade. Ex. 1, paras. 38, 40–42; Ex. 2, paras. 21–22, 26.

30. Despite a mild down turn in cargo in 1982 and a temporary decline in utilizations, the ability to rationalize through space chartering and vessel coordination has enabled the parties to remain committed to offering full service at a broad range of ports. Despite the "ups and downs," the Agreements help to provide a reliable service commitment. This is particularly made possible by the ability to schedule and coordinate sailings, as shippers can rely on fixed arrivals and departures, thus allowing them flexibility in planning their future transportation needs. The ability just to space charter is not enough, as there could be no assurance when a ship would arrive or depart. In these circumstances, the parties would be disadvantaged in competing against other carriers. Ex. 1, paras. 36–38, 59–60, App. 13; Ex. 2, paras, 28, 34.

31. Without vessel coordinating authority, a natural decision of a vessel owner would be to schedule its vessel late in the month at Japanese ports, thus causing a bunching of sailings with wide gaps at other times. This is because there is an established tendency of cargo from Japan to increase near the end of the month as letters of credit expire. Ex. 1, para. 39; Ex. 2, para. 28.

32. As Japan is an island nation with limited resources, the nation is extremely dependent on its national flag ocean liner services to assure that the lines of commerce will remain open. Therefore, any disruption in proponents' space chartering and vessel coordination would impact adversely upon these channels of commerce. Ex. 2, para. 33.

33. With fewer vessels, operations under the Agreements require less fuel to serve the same routes with the same schedules. Fuel savings are believed to be very substantial. The ability to utilize fewer vessels also serves to reduce marine and air pollution. Ex. 1, paras. 43–46; Ex. 2, paras. 22, 30–32.

34. The ability to coordinate sailings under the Agreements has served, and will serve, to reduce port and terminal congestion, as departures and arrivals at or about the same time would be eliminated. Terminal congestion has been, and will continue to be, reduced, as space chartering enables the use of a single terminal facility. Even if the same terminal facility were used, the impact on terminal use would be negative if there were no vessel coordination. In such a case, schedules would conflict and overlap, leading to delays in berthing and, at other times, the idleness of port

facilities. Reducing terminal and port congestion also decreases the risks of marine collisions. Under the Agreements, Portland and Oakland terminal facilities have experienced less congestion and greater efficiencies. Ex. 1, paras. 47–52, Apps. 9, 10, 10A; Ex. 2, paras. 22, 31–32.

35. Not only have and will the Agreements enhance the efficient deployment of vessels and the use of resources, the regularity and dependability of service they provide enable shippers to reduce their equipment inventory requirement, thus reducing the time that cargo sits idle while awaiting shipment. This, in turn, reduces problems with cash flow which shippers may experience while cargo remains idle. Ex. 1, para. 53; Ex. 2, para. 22, 32.

36. As a general principle, reducing capital expenditures encourages higher quality service and technological innovations. Ex. 1, para. 54; Ex. 22, para. 32.

37. The nature of U.S. ocean shipping is that, from time to time, the foreign waterborne trades are subject to overtonnaging in one degree or another. This is true in the case of the Japan-U.S. trade and the Far East-U.S. trade. The Far East-U.S. Pacific Coast trade is a very cyclical trade, particularly Eastbound. Beginning with 1979 and into 1980, declining cargoes coupled with capacity expansions resulted in depressed utilizations and serious overtonnaging. By late 1980 and through 1981 cargoes rebounded, capacity stabilized and utilizations improved. The second half of 1982 then witnessed more capacity increases and a slowing of growth. By 1983, however, strong cargo growth had again produced an equilibrium of capacity and cargo availability. Ex. 1, paras. 59–61; Ex. 2, paras. 34–39; Affidavit of Mr. Tucker (hereafter Ex. 3), pages 22–24.

38. The nature of the trade is such that shipowners must size their operations in a manner which will enable them to accommodate peak cargo situations, as well as foreseeable market growth. In this regard, all carriers, including parties operating under section 15 agreements, must be in a position to respond to trade fluctuations and improvements brought on by economic uprisings in the market. The parties' current inability under Agreement No. 9835 to meet the capacity needs of PNW (Pacific Northwest) shippers is a case in point. Ex. 1, paras. 61, 62, Apps. 11, 12; Ex. 2, paras. 34, 43; App. 7; Ex. 3, pp. 4, 19.

39. Currently (1983 second half), the parties' Eastbound carryings have strongly rebounded with the worldwide recovery:

Agreement	July–Dec., 1982	July–Dec., 1983	Increase
9718	40,386	55,088	36%
9731	18,538	25,405	37%
9835	36,220	45,344	27%

Ex. 1, para. 63; Ex. 2, para. 37.

40. A natural phenomenon of replacing a fleet with larger vessels is to experience some immediate decline in utilizations. This is what happened

when the parties began their replacement program in 1981. Had the vessels not been introduced, the parties would have been close to overbooked. Even so, by the second half of 1983, the parties' utilizations were strongly up, although five of their ten replacement vessels were already in place:

Agreement	Utilization
9718	85%
9731	80%
9835	98%

The remaining replacements will increase total Pacific Coast capacity by only 13.7 percent. Ex. 1, paras. 60, 75, App. 2–5; Ex. 2, para. 36; Ex. 3, p. 19.

41. A further factor in adjudging utilizations relates to the volume of cargo which may be carried on a particular leg of the movement. While in the California trades, Westbound utilizations have remained in the 60–70 percent range, the parties' Eastbound utilizations have, as indicated, been considerably higher. This is because there is a traditionally higher volume of cargo which moves from the Far East encouraged by the continued strength of the U.S. dollar. In considering utilizations and the need for replacing capacity, carryings on the dominant leg must be the controlling consideration, although this is moderated somewhat by the preponderance of heavy, dense cargoes Westbound which cause the parties' vessels to "Weigh out" prior to reaching their standard TEU capacity. In the PNW trade, Westbound utilizations have remained at 90 percent for the past four years despite the dollar's strength and the parties' replacement of two vessels under Agreement No. 9835. Ex. 1, para. 61; Ex. 2, para. 36; Ex. 3, p. 20.

42. In the period 1980–1982, APL, Sea-Land and U.S. Lines have all experienced relatively high utilizations in the Pacific trades, and, with the current cargo recovery, it is probable they and other carriers are continuing to enjoy increased carryings. Further, confidence in trade growth has been shown over the past year by several new carriers entering the trades and by a number of existing carriers, including APL, Lykes, U.S. Lines, Evergreen, Maersk and Zim, expanding their capacity or announcing plans shortly to do so. Ex. 1, paras. 66, 76; Ex. 2, para. 34; Ex. 3, p. 23.

43. As there has been less fluctuation in the Atlantic Coast trade under Agreement No. 9975, and as there are fewer carriers offering a direct all-water service to the Atlantic, the parties over many years have consistently been in a position to achieve Eastbound utilizations approaching 100 percent. Ex. 1, para. 65.

44. According to U.S. Maritime Administration statistics, Far East-U.S. cargo growth for 1983 should total between 10–15 percent. For 1984–85, Mr. Tucker, proponents' economist, has predicted 9 percent growth for the Far East Eastbound trades as a whole, but with Japan growth, after 1984, leveling off a 3.5 percent annually. After 1985, Far East origin

cargoes, other than Japan cargo, are expected to return to past growth factors or approximately 6 percent annually. Throughout, Pacific Coast cargoes are expected to outperform the Atlantic, as they have over the last decade. Comparing the cargo predictions of Mr. Tucker with the remaining capacity increases under the revised agreements, there is every indication proponents' utilizations should continue to improve in both the Eastbound and Westbound directions, and that a return to serious overtonnaging is not expectable. Ex. 1, para. 64; Ex. 2, paras. 38, 40; Ex. 3, pp. 5–19.

45. There is no overall coordination among the parties to the various Agreements, and so far as the record in this proceeding shows, the decisions that affect any one Agreement are made only by the parties to that particular Agreement, each Agreement involving different operational considerations, different trades (for the most part), and not all of the same parties. For market purposes, therefore, each Agreement must be viewed individually. Ex. 1, para. 69; Ex. 2, para. 40.

46. As much as one-third of the cargo moving Eastbound under the Agreements originates in the Far East other than Japan. This trend is expected to continue as non-Japanese Far East cargo develops. This non-Japanese cargo is carried on Agreement vessels on a transshipment basis, as has been the practice since inauguration of operations. These countries include Hong Kong, Taiwan, the Philippines and other Far East and Southeast countries. The relevant market to measure the Agreements is, therefore, the entire Far East trading area which is served by the parties and which is the trading area of their competitors. As the parties compete in that trade not only with conference carriers but with other competitors who operate outside of conferences, the relevant Far East market necessarily includes the tradewide liner market. Ex. 1, paras. 70–72; Ex. 2, paras. 48–49; Ex. 3, p. 5–7.

47. As is shown in the Affidavit of Mr. Tucker, the Eastbound Far East-United States Pacific Coast market share of the parties under the Agreements steadily declined through 1981, as third flag and developing national flag fleets have emerged, but has stabilized since that time at 24–25 percent. Ex. 2, paras, 40; Ex. 3, pp. 20–22.

48. The primary purpose of the Agreements is to enable the parties to charter space on each other's vessels. This is how the Agreements were permitted to operate in the beginning before the Commission's January 16, 1981 order freezing the space which could be chartered at levels which had prevailed since 1974 in the Pacific and 1976 in the Atlantic. The replacement of Agreement vessels with larger vessels starting in 1981, however, and the inability to charter their full capacity has created operational problems for the individual vessel owners and has served to deny the parties the right to rationalize the full capacity of their vessels. The annual capacity levels under the Agreements are based upon the maximum number of sailings contemplated times the capacities of the vessels now

in operation, taking into consideration the vessels being replaced. This, in a very practical sense, may render it unnecessary to place limitations upon the space which can be chartered. Ex. 1, para. 78; Ex. 2, paras. 41.

49. The capacities of the vessels upon which the annual capacity levels are based are stated on the basis of the vessels' standard operating capacities which normally means loading up to the third tier. The Agreements permit the parties to use, however, the space above the third tier when operating conditions permit. This will enable an efficient use of the full capacity of the vessels. As the space above the third tier fluctuates from sailing to sailing depending upon operational considerations, it is not practical to include it in the annual capacity levels named in the Agreements. It is, moreover, an accepted industry practice to size the capacity of a vessel on the basis of its standard operating capacity, as it is to calculate utilizations on the basis of the containers which are loaded aboard a vessel as a percentage of the vessel's standard operating capacity. Ex. 1, paras. 81–85, App. 15; Ex. 2, paras. 44–46, App. 7.

50. During the period the space charter program has been in operation, no party has had a serious need to operate a containership in the Japan trade independent of the coordinated services, although several lines have introduced separate Far East-U.S. Pacific Coast services. For the future, however, one or more of the parties will call at Japan on an individual basis. However, in order to safeguard the benefits derived from space chartering, the parties have restricted the cargo which is carried outside of the Agreements to 3 percent of the capacity authorized under their space charter operations. Ex. 1, para. 86; Ex. 2, para. 47.

51. Although there is no TEU limitation on transshipment cargo carried to or from other Far East countries, the Pacific Coast Agreements limit such carryings of the parties in the Indonesia, Malaysia, Singapore and Thailand trades. The limits are based upon the parties' historical carryings and Mr. Tucker's projections of market growth in those trades. The parties decided to impose the limits in these trades because of the concerns identified by one of the protestants which actively serves these trades. Ex. 1, paras. 17, 21, 88–89, App. 1; Ex. 2, paras. 14, 16, 49, App. 1; Ex. 3, pp. 11–12, 13–14, 16–19.

52. Only a few Agreement vessels are jointly-owned by some of the parties. Certain instances of joint ownerships arose early in the formation of the Agreements and represented an effort to conserve capital resources. When other vessels were added and it became possible for each party to operate its own vessel, most of the joint ownerships were abandoned. There remain at present only six jointly owned vessels, four under Agreement No. 9731, one under Agreement No. 9835 and the other under Agreement No. 9975. Accordingly, clarifying authority to share operational expenses between the owning parties has been included under each Agreement, although the parties consider such expenses necessarily may be appropriately

shared between joint owners. Ex. 1, paras. 21, 87; Ex. 2, paras. 12, 16, 50.

Ultimate Findings of Fact

53. On the basis of the record in this proceeding, the Proponents have sustained their burden of proof that the space charter and vessel coordination provisions of the agreements in issue will provide substantial public benefits which outweigh any possible negative antitrust considerations.

54. The discussions among Proponents' and Protestants' counsel, whose purpose was to reach a basis of settlement on the issues involved in this proceeding do not require a separate section 15 filing. Such discussions do not constitute new "agreements" within the meaning of section 15 of the Shipping Act, and are adequately explained in the record of this case.

55. Since the parties have agreed that there are no disputed material issues of fact the specific areas set forth on remand and in the Commission's Order of Investigation and Hearing need not be considered from the specific points of view set forth in the remand. Instead, the issue involved is whether or not on the record made the requirements of section 15 and the pertinent case law have been satisfied so as to warrant approval of the agreements.

Discussion and Conclusions

I. *Preliminary Matters*

It should be noted at the outset that throughout the pendancy of this proceeding both in the Commission and in the Circuit Court of Appeals there have been many actions of an interim nature, such as *pendente lite* orders, oral argument before the Commission, etc. To the extent we deemed them material and relevant to the decision made here we have included them in the findings of fact. However, we chose not to chronicle every action taken since to do so would unduly burden the record and was not necessary to the decision itself.

It is also important to note that on May 10, 1984, a Procedural Order was promulgated by the Administrative Law Judge wherein he ordered that the latest agreements filed by the Proponents in this proceeding be published in the *Federal Register* so as to allow, within 10 days, any comments, protests and requests for hearing *relating to those portions of the agreements which represent an expansion of the authority* sought in the prior agreements filed by the Proponents. This was done as a precaution to forestall any questions which might arise because of the holding in *Sea-Land Service, Inc.* v. *Federal Maritime Commission,* 653 F.2d 544

(D.C. Cir., 1981).[9] There, the Court held that where changes expand the authority sought notice is necessary, but where changes restrict rather than expand, additional notice is not necessary. In ordering the 10 day *Federal Register* notice we sought to avoid any potential problems that might later arise and to expedite this Initial Decision. Our action should not be contrued as a determination that the new agreements represent an enlargement of the authority sought in the old agreements. That question only need be addressed if it arises within the 10 day notice period.

II. *Filing of Agreements Under Section 15*

Section 15 provides that:

> 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. * * *

We hold that in this proceeding there are no agreements, other than those already on file, which need to be filed within the ambit of section 15. Specifically, we hold that the decision in *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82 (1970), is inapplicable to this proceeding because the record in the instant case is materially distinguishable from *Isbrandtsen* on the facts. In *Isbrandtsen, supra,* the Commission held that where parties to a case brought before the Maritime Subsidy Board of the Maritime Administration entered into a settlement agreement, the agreement was subject to section 15 jurisdiction because it provided for a cooperative working arrangement, constituted a special privilege or advantage and controlled or regulated competition. Here, unlike *Isbrandtsen,* the litigation originated in the Commission precisely because the original agreements were filed with the Commission and other parties protested their implementation. While the agreements have been amended since they were originally filed, the latest agreements reflect a settlement of a formal docketed Commission

[9] While the new agreements generally represent a diminution of requested authority, establishing capacity levels on an annual TEU basis, which total capacity limitations were required by the Commission in its *pendente lite* orders, does have the effect of increasing previous space charter capacities.

proceeding resulting from negotiations amongst counsel for the litigating parties. We hold that given those facts and the record in this proceeding the "agreements" which are subject to section 15 scrutiny here are the written agreements which already have been filed and not the discussions engaged in by counsel.[10]

III. *The Remand From the D.C. Circuit Court of Appeals and the Order of Investigation and Hearing*

As is set forth in the Findings of Fact, this proceeding originated on remand from the Court of Appeals.[11] In its decision the Appeals Court listed a series of disputed factual issues on which it directed the Commission to conduct hearings. The Commission in turn, ordered that hearings be held by the Administrative Law Judge on specific issues which it felt were relevant to the disposition of the disputed factual issues raised by the Appeals Court. Of course, underlying any action was the Appeals Court's direction "to conduct a hearing on the *disputed material issues of fact raised by the petitioners.*" (Emphasis supplied.)

The present state of the record in this proceeding is that the Proponents of both pooling agreements, Nos. 10116 and 10274, respectively, have withdrawn them so as to make unnecessary determination of several of the "disputed" material issues referred to by the Appeals Court. Further, and more importantly, all of the Protestants have withdrawn any objection to the four space charter agreements now on file, and Hearing Counsel raises no objection to them, so that there are no "disputed" material issues remaining. We hold, therefore, that the issues raised on remand need not be specifically determined. Further, we hold that since the Circuit Court did not remand the record in the case to the Commission, it did not retain jurisdiction over the case.[12] In essence, the settlement amongst the parties and the filing of the new agreements renders inapplicable the issues raised in the remand from the District of Columbia Circuit Court of Appeals and the related issues contained in the Commission's Order of Investigation and Hearing. Such holding, of course, does not obviate the need to determine whether or not the agreements in question are approvable within the general standards set forth in section 15 and the applicable case law.

IV. *The "Svenska" Criteria*

Section 15 of the Shipping Act, 1916, requires the Commission to disapprove agreements which are found "contrary to the public interest."

[10] See the Commission's "Order Partially Adopting Initial Decision," served on February 29, 1984, in Docket No. 83–28, *In Re Agreement Nos. 10457, et al.* 26 F.M.C. 191.

[11] *Sea-Land Service, Inc.* v. *USA and FMC et al.*, 683 F.2d 491 (D.C. Cir., 1982).

[12] See Rule 13(d), U.S. Court of Appeals for the District of Columbia Circuit. Further, the pertinent parties have indicated they did not dismiss the Circuit Court action as part of the overall settlement because they believed the Circuit Court did not retain jurisdiction over the matter.

In *FMC* v. *Aktiebolaget Svenska Amerika Linien,* 389 U.S. 816 (1967), the Supreme Court stated:

> The antitrust standard imposed by the Commission in *Svenska* required the carriers to justify an anticompetitive agreement which was a *per se* violation of the anti-trust laws by demonstrating that it was "required by a serious transportation need, necessary to secure important public benefits, or in the furtherance of a valid regulatory purpose of the Shipping Act," *U.S. Lines* v. *FMC*, 584 F.2d 519, 528 n. 28 (D.C. Cir. 1978). (Citations omitted.)

Once the proponents of agreements seeking approval do come forward with evidence to support their burden of proof the Commission generally weighs the potential benefits against the possible harmful effects of the agreements, and in the process must consider the extent to which the agreements violate anti-trust laws and policies. In weighing the pros and cons of agreements the Commission recognizes that the extent of the proponents burden will vary in accordance with the type and scope of the agreement under consideration. In Agreement *No. 57–96, Pacific Westbound Conference—Extension of Authority for Intermodal Services*, 19 F.M.C. 289, 300 (1976), the Commission stated:

> [T]he extent of the justification that need be shown for such approval will, of course, vary from case to case with the intensity of the otherwise "illegal restraint" involved. Thus, the "legitimate commercial objectives" which the Commission will accept as evidencing the necessity for restraint will generally be determined by the type and scope of the agreement under consideration.

See also *Agreement No. 8760–5—Modification of the East Coast United States and Canada/India, Pakistan, Burma and Ceylon Rate Agreement,* 17 F.M.C. 61, 62 (1973).

In applying the above criteria to the instant proceeding, we begin by disregarding both pooling agreements which have been withdrawn. Their withdrawal removes the most objectionable and anti-competitive arrangements from our consideration altogether. What remains are four space chartering agreements which limit total capacity by inclusion of annual TEU capacity levels, and which impose other limits on transshipment and non-agreement carryings, eliminate sub-groups within an agreement, delete the right to share agents in certain cases, and require comprehensive semi-annual reporting.

The benefits accruing from the four agreements have been found as fact from the uncontroverted evidence submitted by Messrs. Kawamura (Ex. 1), Hirano (Ex. 2) and Tucker (Ex. 3). For example, by space chartering and vessel coordination, competitive service is made available, which service would not be possible with the limited number of vessels absent the agreements; the need for additional vessels has been reduced and service to shippers under the agreements has been stable since reliable service levels have been provided; the parties have been able to serve a large number of ports using a limited number of vessels; despite normal "ups" and "downs" the agreements help provide a reliable service commitment. Further, the ability to coordinate sailings reduces port and terminal congestion and because fewer vessels are needed under the agreements less fuel is required to service the same routes. The regularity df service also enables shippers to reduce their equipment inventory and capital expenditures.

Finally, with respect to overtonnaging, it is true that the nature of U.S. ocean shipping is that from time to time declining cargoes coupled with capacity expansion result in overtonnaging. This was true in the case of the Japan-U.S. trade and the Far East-U.S. trade in the 1979–1980 period. Since 1981, however, cargoes rebounded, capacity stabilized and utilizations improved. By 1983, strong cargo growth had again produced an equilibrium of capacity and cargo availability. Given the cargo predictions of the Proponents' witness it is likely that their utilizations should continue to improve in both the Eastbound and Westbound directions, and that a return to serious overtonnaging will not occur.

In the face of the above, as well as many other factors which lead one to conclude the public benefits from these agreements far outweigh any anticompetitive consequences which might violate anti-trust laws or policies, the record in this case is devoid of any evidence which would justify any other conclusion. Indeed, all of the primary Protestants, who presumably are also the Proponents' major competitors, agree that the latest agreements should be approved. Sea-Land in its legal memorandum states:

> The actions which Proponents took to satisfy the concerns of Sea-Land and/or other Protestants were detailed in Proponents' filing, and they need not be detailed again here. Briefly stated, those actions consisted of the following:
>
> imposition of effective and realistic capacity limitations upon each of the four space charter agreements;
> designation of the space charter agreement services as essentially Proponents' sole containership services in the Japan-U.S. trades;
> establishment of a limitation on the carriage of transshipment cargo to/from four important Far East markets in the three West Coast space charter agreements; and
> elimination of the revenue pooling agreements.
>
> * * *
>
> In making the determination not to oppose the amended agreements, the key considerations for Sea-Land were, quite obviously, (1) the fact that the actions taken by Proponents will serve to diminish their competitive impact upon Sea-Land, and (2) the fact that continuing to oppose the agreements would involve a further expenditure of time, money and effort in a proceeding which has already been a lengthy and expensive one, and the

outcome of which is by no means certain. The first of these considerations was by far the more important of the two, and it should be elaborated upon, particularly from the point of view of how the actions taken by Proponents address Sea-Land's past concerns regarding their agreements.

b. Actions of Proponents Addressing Specific Sea-Land Concerns.

First, the prior filings of Sea-Land regarding Proponents' agreements are permeated with concern over overtonnaging in the Transpacific trades, and the fact that the space charter agreements under which Proponents had been operating did not contain any provision effectively limiting the amount of vessel capacity which Proponents could deploy thereunder.[8] The annual capacity limitations which Proponents have decided to include in each of their amended space charter agreements are real and effective ones, and thus they go a long way toward satisfying those concerns. The further step taken by Proponents of designating their agreement services as essentially their exclusive containership services in the Japan-U.S. trades serves to ensure that the capacity limitations will not be undermined by the initiation of non-agreement services in those trades. (Carriage of small amounts of cargo to/from Japan by non-agreement containerships is permitted to enable Proponents to meet extraordinary situations.)

While the capacity limitations included in the agreements would permit Proponents to deploy more capacity than they are now deploying, it must be kept in mind that the agreements have a five year term, through August 22, 1988. To be realistic, the limitations must take into account the amount by which cargo is expected to grow during the period that the agreements are in effect. In this connection, the affidavits submitted by Proponents' witnesses establish that the limitations are indeed realistic ones when their own forecasts of cargo growth are taken into account. Thus Mr. Kawamura, one of Proponents' company witnesses, states at ¶77 (p. 44) of this affidavit:

> Based on our assessment of current and foreseeable market conditions, we anticipate these planned increases [in capacity] under Agreement Nos. 9731, 9835, and 9975 will be sufficient to enable us to carry our existing market share for the duration of the Agreements.

The affidavit of Mr. Hirano, Proponents' other company witness, includes a similar statement at ¶43 (p. 24). Those statements are fully confirmed by the comparison of projected cargo growth and the growth in Proponents' capacity done by Mr. Tucker,

[8] Capacity limitations of this nature were, however, required by the Commission's Order of August 19, 1983, in this proceeding as a condition of *pendente lite* approval of the space charter agreements. Those Commission-mandated limitations are currently in effect.

Proponents' economic witness, which appears at page 19 of his affidavit.

That testimony of Proponents' witnesses establishes, in our view, that Proponents will not have any need to seek any increase in the capacity limitations during the term of the agreements, unless cargo growth is greater than Mr. Tucker forecasts, or there is some other unforeseen change in market conditions. To be sure, as Messrs. Kawamura and Hirano also state in the above cited paragraphs, the parties have made no commitment not to seek further revisions in their capacities. Be that as it may, the addition of unwarranted capacity to the trades by Proponents would be contrary to their own and the trades' interests, and we expect the Commission would not countenance such significantly anti-competitive activity. To reiterate, Sea-Land's position in this regard is based on what Proponents have themselves said in their affidavits as cited above.

The capacity limitations, in addition to serving to mitigate overtonnaging, also provide Sea-Land with a benchmark by which it can plan its own operations in the Transpacific trades. Considering the highly influential role which Proponents collectively play in the Transpacific trades, the importance to other carriers of having this benchmark should not be understated. Put another way, the capacity limitations provide an important measure of certainty in an area in which there was none before, and thus they will also further stability in the Transpacific trades.

Another longstanding concern of Sea-Land has been Proponents' carriage in their space charter agreement operations of cargo to and from Far Eastern countries other than Japan. Because those operations are essentially limited to calls at Japan in the Far East,[9] nearly all of this carriage is done on a transshipment basis. Proponents' decision to amend their West Coast space charter agreements to include limitations on the carriage of transshipment cargo to/from Indonesia, Malaysia, Singapore and Thailand addresses this concern. While the limitations apply only with regard to those four Far Eastern countries, those countries are rapidly growing markets and are also ones which Proponents serve on a non-conference basis Eastbound. Also, those limitations, like the overall capacity limitations, provide Sea-Land with an important benchmark by which it can plan its own operations.

In the memorandum of American President Lines it states:

Capacity limitations. The limitations on agreement capacity and non-agreement Japan calls were central to APL's decision in that regard. APL believes that it would be clearly inconsistent with the stated purpose of restraining overtonnaging if proponents were to seek to amend their agreements during their five-year terms

[9] Only Agreement 9718 authorizes calls at a Far East country other than Japan, its scope having been expanded to include calls at Korea on a limited basis.

to allow the operation of greater capacity unless actual trade growth exceeds their expert economist's projections (which show a correlation between the capacity increases allowed under the revised agreements and trade growth through 1988).[5] As to the capacity increases authorized under the revised agreements, APL has, in contemplation of the following, determined that non-objection at this time is preferable to continuation of the litigation:

(i) Each of the three Pacific agreements has an annualized capacity limitation that is clearly derived from a maximum number of annual sailings by specifically identified vessels (albeit there is no prohibition on varying vessels or sailings within the annual limit).

(ii) Each of the vessels so identified is already in service in the Pacific or already under construction or firm order pursuant to the previously announced Japanese Government shipbuilding program.

(iii) While the identified vessels include all ten of the announced larger replacement vessels for the Pacific, the operation of half of those ships was allowed by the Commission's August 19, 1983 *pendente lite* Order and hence is, for practical purposes, a *fait accompli.*

(iv) The agreements have five-year terms (of which about four and one-half years remain).

(v) Proponents' expert economist has forecast that, given his projections concerning market growth and assuming no increase in proponents' market share, the allowed capacity should be sufficient through the end of the agreements' terms. See Proponents' Exhibit No. 3 at 18–19.

(vi) Proponents' designated spokesmen have similarly stated that, based on their assessment of current and foreseeable market conditions, the allowed capacity should be sufficient for the full term of the agreements (again assuming no increase in market share). See Proponents' Exhibits Nos. 1 (¶77) and 2 (¶43).

(vii) The capacity limitations apply to all standard operating capacity on the vessels; *i.e.,* they apply to space allocated to the vessel owner as well as to space allocated to other agreement parties.

(viii) There is a requirement that space in excess of standard operating capacity be identified for each vessel.

Other factors. In addition to the above-noted factors concerning agreement capacity, the following factors also were important to APL's determination that non-objection to the revised agreements is preferable to continuation of the litigation: (i) the limitation of non-agreement containership Japan cargo to 3% of allowed agreement capacity; (ii) the withdrawal of the pooling agreements,

[5] See Proponents' Exhibit No. 3 at 19.

> thus to some extent lessening the unitary tendencies of the arrangements; (iii) a desire to avoid the costs, burdens, risks, and friction of further litigation; and (iv) the uncertainties created by the prospect—and now the eventuality—of new legislation governing future agreements among carriers.

In the Lykes Bros. Steamship Co., Inc., memorandum it is stated:

> Among the important considerations which led Lykes to oppose the now-withdrawn agreements was Lyke's position that agreements of this nature had not in the past always served to ameliorate overtonnage, a principal justification advanced by proponents in support, and that for this and other reasons the Commission should adopt certain policies in approving such agreements, including (1) placing limits on the trade areas served and the capacity which may be offered under such agreements, (2) approving such agreements for limited durations, (3) imposing detailed reporting requirements on the parties, and (4) conditioning further extension of such agreements upon a demonstration that the trade served will grow sufficiently to absorb any proposed capacity increases.
>
> Lykes notes that the amended agreements are in some measure responsive to each of these concerns. It notes particularly proponents' statements (*e.g.*, Kawamura Affidavit, ¶'s 76 and 77; Tucker Affidavit, pp. 18–19; and Proposed Finding No. 36) to the effect that the capacity increases provided in the amended agreements compare favorably with proponents' projections of expected increases in the liner trade over the term of the amended agreements. The amended agreements thus provide a capacity limit for an extended period, consistent with proponents' planned vessel replacement program and expectations of trade growth. Lykes would regard with very serious concern any proposed increases in capacity beyond those currently provided, and would regard as objectionable future capacity increases under the agreements inconsistent with actual trade growth.
>
> In arriving at its position on the amended agreements Lykes has also considered the existence of independent (*i.e.*, non-agreement) services operated by proponents in some of the same trade areas covered by the amended agreements (see, *e.g.*, Proposed Finding No. 42). Lykes's position of non-opposition to the amended agreements has been formulated in consideration of the present deployment and capacity offered in these non-agreement services, and on limitations in the amended agreements upon employment of these vessels in the Japan/U.S. trades. Should changes in these services occur or should new or different services be commenced by proponents, such action could significantly alter the competitive environment in the trade and would be cause for reassessment of Lykes's views on the amended agreements.

Finally, in its memorandum (reply) Hearing Counsel stated:

With the withdrawal of the two pooling agreements and the substantial modifications made to the space-charter agreements, the agreements currently before the Commission are significantly different than those agreements remanded to the Commission. So different, in fact, that the very Protestants, on whose behalf the court acted, have now announced they will not oppose the current agreements. Thus, Protestants are no longer pressing the issues they raised before the Court of Appeals.

Indeed, many of the issues listed on pages 16–18 of the Order of Investigation and Hearing on Remand have been rendered moot by Proponents' pooling agreement withdrawals and space charter agreement modifications. Thus, issues 1 (bloc voting), 2 (joint service), and 3 (trading house relations), relate more to the agreements as previously existed. Issues 10 and 11, relating to the terms of the agreements, have also been resolved by Proponents' modifications and extensive reporting provisions.

Now that new agreements are before the Commission and the Protestants do not press the issues they raised regarding the predecessor agreements, it only remains for Proponents to justify the new agreements under *Svenska* type standards. This, Hearing Counsel submit, Proponents have done in their March 6, 1984, Brief.

Accordingly, Hearing Counsel support approval of Agreements Nos. 9718–10, 9731–10, 9835–7, and 9975–9 as now on file.

In view of the above, we hold that the Proponents have sustained the burden that is theirs under *Svenska, supra,* of justifying the agreements involved here as required by a serious transportation need, necessary to secure important public benefits and in furtherance of valid regulatory purposes.[13] Since the record is devoid of any evidence to the contrary the agreements are approved.

V. Miscellaneous Conclusions

The parties in this proceeding have all expressed the view that despite their settlement of the issues in this proceeding as reflected in the filing of the latest agreements there is no tacit or express agreement among them as to future conduct or positions. The Proponents have made no commitment of any kind to refrain from seeking to amend their agreements in the future and the Protestants would be entirely free to oppose any such amendments in whatever manner it chooses to do so. We so hold.

The Protestants in this proceeding have also expressed some concern as to the application of the doctrine of *res judicata* or collateral estoppel to each or all of them. While the record in the case does not contain

[13] See *Agreement No. 9835,* 14 F.M.C. 203 (1971); *Agreement Nos. 9718–3, 973–5,* 19 F.M.C. 351, 365 (1976); *Agreement No. 10422 United States-East Asia Space Charter Agreement,* 21 SRR 686, 691 (FMC 1982), for cases where the Commission approved space charter and vessel coordination agreements because they afforded transportation benefits in terms of cost as well as ameliorating overtonnaging.

any written agreement to that effect the Proponents have orally agreed that in any future proceeding they would not invoke the doctrine of *res judicata* or collateral estoppel against any of the Protestants in this proceeding.

During the pendency of this proceeding certain intervenors were allowed to intervene for limited purposes, subject to the discretion of the Administrative Law Judge. As the case progressed toward settlement they did not appear at the prehearing conference or at the hearing itself. However, they did speak with the Administrative Law Judge by telephone and it is his understanding they have no objection to any of the latest agreements filed.[14] In any event should that not be the case, it is hereby held that any objection made by any intervenor is untimely, and in the discretion of the Administrative Law Judge such intervenor will no longer be allowed to intervene for that purpose.

With respect to the fact that the parties have expressed a desire to expedite this proceeding and to allow the Commission discretion in its review of the Initial Decision and related matters, it is hereby ordered that the parties to this proceeding advise the Commission in writing whether or not they intend to file any exceptions to the Initial Decision within five days of the date of service of the decision. Of course, since the parties have withdrawn their objections to the agreements it is hoped that no exceptions will be filed in which case the Commission may approve the agreements before June 18, 1984, which is the effective date of the Shipping Act of 1984, if it so desires.

Finally, in view of all of the above and the holding in this proceeding, it is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[14] The Delaware River Port Authority so indicated by letter dated March 23, 1984.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–1

TRANSEUROPE SHIPPING, INC.

NOTICE

June 15, 1984

Notice is given that no exceptions were filed to the May 9, 1984, 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) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–1
TRANSEUROPE SHIPPING, INC.

Held:

1. Where the Respondent, Transeurope Shipping, Inc., was in the business of freight forwarding, and where overcharges occurred regarding eight outbound shipments in 1979-1980, such overcharges were the responsibility of Transeurope for which it might be held liable and subject to penalty under the provisions of the Shipping Act, 1916, as amended, and the provisions of the Federal Maritime Commission's General Order 4 (46 CFR 510.1 et seq.).
2. Where Transeurope contended the wrongdoing was the fault of disloyal and dishonest former employees, and Hearing Counsel asserted it was engaged in at the behest of Transeurope's owner, the trial hazard related to a determination of the factual discrepancy as well as other surrounding circumstances justifies a settlement setting a penalty of $5,000.00. Such a penalty gives due consideration to mitigating circumstances and is within that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others, and which will secure compliance with the law and the Commission's rules and policies.
3. Where the Respondent as well as its affiliates, owner and directors surrenders its freight forwarder license and agrees not to reapply for such license for a period of three years, the issue regarding revocation of the respondent's freight forwarder license raised in the Commission's Order of Investigation becomes moot.

R. Frederic Fisher, Charles L. Coleman and *Laurence N. Minch* for respondent, Transeurope Shipping, Inc.

Joseph B. Slunt, James S. Oneto and *John Robert Ewers,* Hearing Counsel.

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

Finalized June 15, 1984

PRELIMINARY MATTERS

By Order of Investigation and Hearing served on January 14, 1983, the Commission ordered that pursuant to sections 22, 32, and 44 of the Shipping Act, 1916, as amended (46 U.S.C. 821, 831 and 841(b)), a proceeding be instituted to determine:

1. Whether Transeurope Shipping, Inc. violated the Commission's General Order 4 (46 CFR 510 (1980)), section 510.23(e), withholding information; section 510.23(d), due diligence; section 510.23(j),

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

invoices; section 510.23(k), records required to be kept; and/or section 510.23(1), failure to make records available;

2. Whether civil penalties should be assessed against Transeurope Shipping, Inc., pursuant to section 32 of the Shipping Act, 1916, (46 U.S.C. 831(e)), if found to be in violation of the Commission's regulations and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty; and

3. Whether the license of Transeurope Shipping, Inc. to act as an independent ocean freight forwarder should be revoked or suspended pursuant to Section 44(d), Shipping Act, 1916, and/or section 510.17 of Revised General Order 4 (46 CFR 510.17 (1981)) for:

   a. willfully violating section 510.23(e), 510.23(d), 510.23(j), 510.23(k), and/or 510.23(l) of General Order 4 (46 CFR 510 (1980)); or

   b. conduct which the Commission determines renders the licensee unfit or unable to carry on the business of forwarding.

As a result of the above Order the parties initially began discovery and then asked for time to settle the issues involved. The settlement negotiations were protracted and involved several proposals, none of which were acceptable to the undersigned. Ultimately, the matter was set for trial at which time the parties submitted the joint settlement proposal which is attached.

Findings of Fact

The parties in this proceeding never submitted a stipulation of facts. Instead, in making their settlement proposal they did submit what they termed "Proposed Stipulations and Statements of Position," which, together with other documentary evidence contained in the record, serves as a basis for the following findings of fact:

1. By letter dated April 23, 1980, the Federal Maritime Commission (the "Commission") was informed by the former New Jersey Office traffic manager of Transeurope Shipping, Inc. (Transeurope), that he "was fired because I complained constantly of the unfair practive of over-charging on Ocean Freight." The letter enclosed "photostats given to me by the former Traffic Manager . . . "who had also been fired because of the same reasons."

2. By letter dated May 2, 1980, the Commission was informed by a former employee of Transeurope that he left the Carson, California, Office of the company because:

> In order to keep my job with this Company, I was forced to continuously increase the measurements billed to our customers,

> even though Transworld Shipping, GMBH in Hamburg had increased the measurements already up to 13 CBM.
> Due to this fact, more and more customers complained, or discontinued our service. The general practice was to declare minimum measurements to the shipping lines and to charge out maximum rates to our customers. It also was common practice to charge conference rates while shipping with non-conference vessels.
> Since this business practice came to this extent, I saw no other way but to leave this Company in order not to destroy my own reputation, which I built up in the last few years.

3. The receipt of the above letters was predated by a routine postlicensing compliance check commenced by the Commission's Los Angeles Office in February of 1980. The check related to the freight forwarder operations of Transeurope, License Number 2064, which was issued on April 3, 1978. The check involved the interview of Transeurope's Vice-President who sent the letter referred to in paragraph (2) above. No questionable practices were noted during the compliance check.

4. On June 2, 1980, Commission investigators interviewed Transeurope's Vice-President referred to in paragraph 3 above. At the interview Mr. ____________________:[2]

> * * * explained that on inbound shipments, Transworld would instruct Transeurope how much to collect from consignees on its behalf. The amount to be collected would sometimes be inflated by increasing the cubic measurement of the freight shipped more than that declared to the ocean carrier. Transworld would send Transeurope a handwritten worksheet indicating the true cube shipped as well as the amount of the increased cube. Transeurope would also increase the freight charges to be collected from the consignees in order to further overcharge the consignees. Mr. ____________________ stated that the increase to the consignee on the part of Transeurope was not a set amount of percentage, but just what he thought the traffic would bear. Mr. ____________________ also stated that Mr. ____________________, the owner of Transeurope and Transworld, had instructed him to also start increasing the costs on Transeurope's outbound shipments sometime in June or July of 1979. He ignored this instruction until late 1979, when Mr. ____________________ demanded that he start increasing the charges on outbound shipments. He increased the amount of ocean freight, bunker surcharges and currency adjustment factor charges in fear of being fired by Mr. ____________________. He stated that to the best of his knowledge there were approximately eight or ten outbound shipments where the ocean freight charges' were increased from a total of twenty-five outbound shipments handled by Transeurope. Since the compliance check of February, 1980 had shown no discrepancies in

[2] Specific names of the parties involved are being deleted herein since they are not necessary to the decision.

Transeurope's records regarding the increase in ocean freight, Mr. ________________ was asked to explain the reason these increases did not appear in Transeurope's records. Mr. ________________ stated that false invoices and false ledger sheets were provided to the Commission investigator during the compliance check. The true invoices were kept in a notebook marked "TWS". Mr. ________________ informed the investigators of the location of the notebook within Transeurope's office.

5. The allegations noted in paragraph (4) above were investigated by the Commission staff, which found that in eight instances Transeurope had billed its forwarding clients inflated ocean freight charges, bunker surcharges and currency adjustment factor charges. Hearing Counsel was prepared to present evidence to show that the records for six of the eight shipments supported the statement regarding the two sets of invoices on outbound shipments, and that Transeurope would also sometimes increase the cube itself. Hearing Counsel alleges that the evidence would show that Transworld (apparently a subsidiary of Transeurope, or in some way a related foreign company), also misdescribed the goods being shipped to ocean carriers in order to obtain lower freight charges. Hearing Counsel further alleges that Transeurope purged its files in an attempt to cover up the above practice.

6. On December 1, 1981, Commission investigators interviewed the new Qualifying Officer for Transeurope. Ten current outbound shipments were reviewed with no violations noted. Copies of Transeurope's balance sheet as of 10/31/81 were also obtained. It indicated current assets of $141,180.92 and liabilities of $127,620.74.

7. Transeurope alleges it did not commit the violations alleged by Hearing Counsel except for the eight instances occurring in 1979 and January of 1980, which it believed were "technical" violations. It alleges the violations were committed by a disloyal, dishonest former employee without the company's or its owner's knowledge. Further, it alleges two of its employees (the authors of the letters referred to in paragraphs (1) and (2) above) were secretly involved in the unauthorized diversion of the respondent's assets to a business or businesses of their own, which included the setting-up of a competing concern aimed at respondent's customers.

8. Transeurope admits that the letters referred to in paragraphs (1) and (2) above were written by its former employees. It alleges that before the letters were written both employees had been fired and that criminal complaints had been filed against them for the unlawful diversion of company assets. It asserts that except for the eight export shipment violations, none of the violations alleged by Hearing Counsel occurred, and in any event the alleged violations were part of its employees own mismanagement of the business, not known or condoned by its owner.

9. The respondent alleges that one of its former employees admitted the improper use of its funds and entered into a promise to repay the respondent on which promise he defaulted.

10. The respondent denies that there was an "increase in cube" or any misdescription to ocean carriers, and points out that there is no such showing after its employee was fired. It also denies any "purging" of documents.

11. The respondent alleges that in inbound trades, it is not acting as a freight forwarder and has not acted in any trades as an NVOCC, and further, that all actions of Transeurope and its affiliates in inbound trades were at all times lawful and proper.

12. The respondent notes that its files have always been available to the Commission, except for the 1979 and 1980 shipments handled by its fired, former employee. It asserts it is involved in freight forwarding on a very small scale, that it lost $14,761.00 in 1982, and $15,686.00 in the first seven months of 1983, and was in a negative working capital posture.

13. The respondent alleges that in 1979–80, its owner spent substantial time outside of the United States and left the day-to-day management of Transeurope to its former employee, who was responsible for any wrongdoing that may have occurred.

14. During the pendency of this proceeding several joint settlement proposals were offered by the parties. In those proposals a sum of $1,000.00 was offered in settlement of the penalty provisions of the Shipping Act, 1916. The proposed settlements were justified in part by citing the financial statements of the respondent and its inability to pay any more than the $1,000.00. The proposed settlements were rejected by the Administrative Law Judge and subsequently the respondent's financial statement was reviewed by the Commission's staff which concluded:

> We have reviewed the financial data on the subject company accompanying your memorandum to the Chief, Office of Financial Analysis dated November 3, 1983. This review was conducted with a view towards determining Transeurope's ability to pay a penalty in excess of $1,000.
>
> Although the financial information submitted was not prepared by independent auditors and does not constitute financial statements in conformance with generally accepted accounting principles, we were able to reach certain conclusions regarding the company's operations. According to data submitted, Transeurope had cash in the bank in excess of $20,000 on August 31, 1983. Its working capital (current assets less current liabilities) was almost $3,000 on that date. This calculation was made excluding a loan to one of the owners which, in our opinion, cannot be properly classified as a current liability. The company's net worth (total assets less total liabilities) was approximately ($700) on

> August 31, 1983. It is also notable that the company has no long-term debt other than the loan from the owner.
> Included in the information furnished your Bureau was a summary of income (losses) for the twelve months ending August 31, 1983. This summary showed that operations during the period resulted in a net loss of more than $17,000. However, an income statement covering seven months ending on that date showed legal expense of more than $13,000. It is our understanding that this expense is directly related to the matter before the Commission, and should not be considered an expense incurred in the ordinary course of business.
> Taking into account all of the foregoing, it is our opinion that Transeurope has the ability to pay a fine in excess of $1,000. A penalty of $5,000 would not be unreasonable. We do not feel that an on-site review of Transeurope's accounting records would serve a useful purpose.

15. When this proceeding was called for hearing the parties presented an offer in settlement wherein the respondent agreed to pay $5,000.00 on the installment basis in settlement of the pertinent penalty provisions of the Shipping Act, 1916.[3] In return the Commission among other things released the respondent from any claims, penalties or liability for any penalties or sanctions under the Shipping Act, 1916, or any other pertinent statute, in connection with any of the activities described in the Order of Investigation and Hearing occurring prior to December 31, 1981.

Ultimate Facts

16. The eight violations which occurred in 1979–1980 were not merely technical in nature but were material violations of the Shipping Act, 1916, for which the respondent was responsible and might be held liable and subject to penalty.

17. The record in this proceeding justifies a settlement whereby the respondent pays $5,000.00 to the Commission. Such a settlement takes into consideration relevant mitigating circumstances and is within the parameters of that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others, and which will secure compliance with the law and the Commission's rules and policies.

Discussion and Conclusions

1. *Settlement of Civil Penalties*

[3] The settlement agreement also contains a provision that "neither Transeurope, nor its affiliates, owners or directors shall apply to the Commission for an ocean freight forwarder's license within three years after this agreement becomes final." This provision is in furtherance of revocation of the respondent's license to which it agreed thereby making the fitness issue raised in the Order of Investigation and Hearing moot.

It is well settled that the law generally, as well as the Federal Maritime Commission, encourages settlements and that there is a presumption that settlements are fair, correct and valid. Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1), provides:

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

In *Pennsylvania Gas & Water Co.* v. *Federal Power Commission,* 463 F.2d 1242, 1247 (D.C. Cir. 1972), the Court, noting its legislative history,[4] referred to the above provision "as being of the 'greatest importance' to the functioning of the administrative process" and stated:

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

Further, the Commission has by rule encouraged settlement[5] and has often favorably looked upon them as a matter of policy.[6]

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[4] Senate Judiciary Comm., Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 203 (1945). In considering the settlement provision in S. 7, 79th Cong., 1st Sess. (1945), which ultimately became Section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

> Subsection (b) [now Section 554(c) of the Administrative Procedure Act] provides that, even where formal hearing and decision procedures are available to parties, the agencies and parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the Administrative process. . . . The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves.

S. Doc. No. 248, *Supra*, at 24.

[5] Rule 91 of the Commission's Rules of Practice and Procedure, 46 CFR 502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . ."

See also Rule 505, 46 CFR 505, where in General Order 30 the Commission provides for: "compromise, assessment, settlement and collection of civil penalties under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933"; and the criterion contained in the government-wide "Standards for the Compromise of Claims" where in section 103.5 under the heading "Enforcement Policy" (4 CFR 103.5) it is stated that:

> Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon.

[6] See *Perry Crane Service* v. *Port of Houston Authority, of Port of Houston, Texas (Approval of Settlement),* FMC Docket No. 75–51, served June 21, 1979, Administratively Finalized, July 27, 1979; 22 F.M.C. 31 *Del Monte Corp.* v. *Matson Navigation Co. (Approval of Settlement),* FMC Docket No. 79–11, served

As to the propriety of the settlement itself in this case, there is no question that at least eight violations were involved respecting overcharges in outbound shipments. We do not believe those overcharges were merely "technical" in nature. This is especially so since the facts in the record established that they were serious enough that Hearing Counsel alleges former employees quit Transeurope because they were forced to engage in the wrongdoing, and the respondent argues they were part of a scheme by the former employees to enrich themselves. Under either premise the violations can hardly be termed "technical." Further, there are allegations of a cover-up by way of maintaining a set of duplicate records.

It is clear from the record in this case that the single most important aspect of it is the discrepancy in facts. There is a direct conflict between Hearing Counsel's position that the wrongdoing was ordered by and known to Transeurope's President, and the respondent's position that its former employees engaged in the wrongful acts and that Transeurope's owner neither asked them to commit the wrongs nor even knew of them. At first the trial hazard described above was not really addressed in terms of settlement. Instead $1,000.00 was offered on the basis of inability to pay. This was rejected when the Commission's staff reviewed the respondent's financial statements and called into question the conclusions made from those statements. However, the present offer of $5,000.00 represents a substantial increase over the original offer, and given the trial hazard previously described is a fair and reasonable figure, considering further the cost of trial and the likelihood of a judgment for a higher monetary figure.

Therefore, it is held that the settlement of the civil penalties proposed by the parties is fair and equitable and in light of the facts and circumstances involved, is in the public interest and is approved. A copy of the settlement agreement is attached.

2. *Fitness*

The respondent has surrendered its freight forwarder license. It has agreed not to reapply for at least three years, as have its affiliates, officers and directors. The respondent's actions make moot the fitness issue raised in the Commission's Order of Investigation and therefore, no decision relating to such issue is warranted here.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

November 20, 1979, Administratively Finalized, December 27, 1979 (22 F.M.C. 364): *Merck, Sharp & Dohme* v. *Atlantic Lines*, 17 FMC 244 (1973).

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–1

TRANSEUROPE SHIPPING, INC.

PROPOSED SETTLEMENT

This Proposed Settlement has been entered into between the Bureau of Hearing Counsel, Federal Maritime Commission, and Respondent, Transeurope Shipping, Inc., an ocean freight forwarder. 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 503.3 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 January 14, 1983, the Federal Maritime Commission instituted the present proceeding to determine whether "Transeurope Shipping, Inc. (Respondent), violated the Commission's general Order 4 (46 C.F.R. 510. (1980)), section 510.23(e), withholding information; section 510.23(d), due diligence; section 510.23(j), invoices; section 510.23(k), records required to be kept; and/or section 510.23(l), failure to make records available," and whether "civil penalties should be assessed against the Respondent, pursuant to section 32 of the Shipping Act, 1916, (46 U.S.C. 831(e)), if found to be in violation of the Commission's regulations and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty;" and whether "the license of the Respondent to act as an independent ocean freight forwarder should be revoked or suspended pursuant to section 44(d), Shipping Act, 1916, and/or section 510.17 of Revised General Order 4 (46 C.F.R. 510.17) (1981)), for willfully violating section 510.23(e), 510.23(d), 510.23(j), 510.23(k), and/or 510.23(l) of General Order 4 (46 C.F.R. 510 (1980)), or conduct which the Commission determines renders the licensee unfit or unable to carry on the business of forwarding;" and

WHEREAS, Hearing Counsel have identified eight shipments in U.S. outbound trades and nine shipments in U.S. inbound trades during 1979 and early 1980, which Hearing Counsel allege involve violations of Commission regulations; and

WHEREAS, the Respondent denies such allegations but is unwilling to expend the sum necessary to continue with discovery proceedings and the cost of litigating its defenses; and

WHEREAS, Hearing Counsel and the Respondent, in order to avoid the delays and expense which would be occasioned by litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issues of violations and the appropriate amount to be paid by the Respondent in accordance with the terms and conditions of this Agreement; 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 premises set forth herein, and in compromise of all civil claims set forth herein, the parties agree as a condition of this settlement to comply with all the requirements set forth hereinafter, subject to the stipulations, conditions, and terms of settlement contained herein.

1. Within fifteen (15) days of the date this Agreement becomes final by final Commission Order in this proceeding, Transeurope Shipping, Inc. will voluntarily surrender to the Commission its freight forwarder's license No. 2064 and pay the sum of one thousand dollars ($1,000.00) to the Commission and tender to the Commission a duly executed promissory note in the amount of four thousand dollars ($4,000) plus simple interest at 12 percent per annum, payable to the Commission in two installments of two thousand dollars ($2,000) on July 1, 1984 and two thousand dollars ($2,000) on December 31, 1984.

2. Neither Transeurope Shipping, Inc. nor its affiliates, owners or directors, shall apply to the Commission for an ocean freight forwarder's license within three years after this Agreement becomes final.

3. Upon satisfaction of the undertakings in paragraph 1, Transeurope Shipping, Inc., is released from any claims, penalties or liability for sanctions or penalties of any kind under the Shipping Act, 1916, or any other statute administered by the Commission, in connection with any of the activities or subject matter described in the Commission's Order of Investigation and Hearing instituting this (Docket No. 83–1) which occurred prior to December 31, 1981 or as to which evidence had, as of the date of the settlement agreement, been brought to the Commission's attention in the course of its administrative investigation herein.

4. This Agreement shall not constitute an admission by Transeurope Shipping, Inc., or any affiliate, owner, officer, director, or employee of Transeurope Shipping, Inc., that any of the allegations set forth in the Order of Investigation and Hearing are true. Except as provided in paragraph 3, it is understood by the Respondent that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or by any other department or agency of the United States Government for conduct engaged in by the Respondent. However, based on information available to the Commission as of September 20, 1983, the Commission has no evidence of violations of the Shipping Act, 1916, by Respondent that are not released under paragraph 3 and no intentions as to further enforcement actions as to Respondent.

Respondent acknowledges that it has voluntarily entered into this Agreement and states that no promises or representations have been made to it, other than the agreements and consideration herein expressed.

In the event of changes of law or other circumstances at any time during the term of this Agreement that the Respondent believes warrants modification or mitigation of any of the requirements imposed on it by this Agreement, the Commission agrees, as an inherent part of this Agreement, to the Respondent's right to petition the Commission to this end.

5. This Agreement becomes final on the service date of the Order in which the Commission declines to review the order of the Presiding Administrative Law Judge approving the Agreement or on the service date of the final Order of the Commission, whichever is later. If for any reason this Agreement is not approved as provided above, it shall be of no force and effect, and may not be used by any person for any purpose.

Transeurope Shipping, Inc.

By: ________________
Peter K. Laser, President

Date: January 19, 1984

____
R. Frederic Fisher
Lillick McHose & Charles
Counsel for Respondent

Federal Maritime Commission

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Joseph B. Slunt, Hearing Counsel

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James S. Oneto, for Hearing Counsel

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John Robert Ewers, Director,
Bureau of Hearing Counsel

Date: January 17, 1984

FEDERAL MARITIME COMMISSION

DOCKET NOS. 83–9 AND 83–12
PRUDENTIAL LINES, INC.

v.

FARRELL LINES, INC.

Respondent Farrell Lines, Inc., found to have operated a service beyond the scope of its agreement authority and thus in violation of the tariff requirements of section 18(b) (1) and (3) of the Shipping Act, 1916.

Complainant Prudential Lines, Inc., denied reparation for failure to show causal connection between violation and alleged injury or injury in fact caused by Farrell Lines, Inc.'s violation of the statute.

Cease and desist order denied as moot.

Terrance J. Ingrao, Assistant General Counsel, Prudential Lines, Inc., *John L. Morris,* Prudential Lines, Inc., Director of Traffic, *Mark E. Schaefer,* Prudential Lines, Inc., Pricing Manager, for Complainant.

Edward Aptaker, Lynn Kormondy, of Schmeltzer, Aptaker and Sheppard for Respondent.

REPORT AND ORDER

June 15, 1984

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* James J. Carey, *Vice Chairman;* James V. Day, Thomas F. Moakley and Robert Setrakian, *Commissioners*)

These consolidated proceedings [1] came before the Commission on Exceptions from Complainant Prudential Lines, Inc. (PLI) to the Initial Decision of Administrative Law Judge William Beasley Harris (Presiding Officer), finding that a service of Farrell Lines, Inc. (Farrell), whereby Farrell transported cargo overland from South Atlantic ports for ocean carriage from North Atlantic ports, had not been shown to violate the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*). He therefore denied reparation and discontinued the proceeding. Farrell filed a Reply to PLI's Exceptions. The Initial Decision of the Presiding Officer is reversed insofar as the finding of violation is concerned, but reparation is denied for failure to show either a causal connection between the violation and the alleged injury or injury in fact.

[1] The complaints in Docket 83–9 and Docket 83–12, filed on February 9 and February 25, 1983, respectively, involve the same parties and substantially the same issues. The Presiding Officer consolidated the two proceedings and subsequently permitted the filing of an amended complaint.

BACKGROUND

The material facts are not in dispute. PLI and Farrell are U.S.-flag common carriers by water operating in the foreign commerce of the United States between U.S. Atlantic Coast ports and ports in the Mediterranean. Both participate in the carriage of United States preference cargo.

Both carriers were members of the U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement No. 10261 ("Agreement"). The Agreement had on file with the FMC its Agreement No. 10261, Freight Tariff No. 1, FMC No. 1 applicable to transportation of cargo between South Atlantic ports south of Cape Hatteras and Mediterranean ports (Tr. 119, 132). PLI withdrew from the Agreement in 1981 (Tr. 20).

Agreement No. 10261's tariff is a port-to-port tariff (Tr. 120). The Agreement has only authority to fix rates from port to port and has no intermodal authority. (Tr. 41, 43).

Prior to February 1982, Farrell's vessels called regularly at Savannah, Georgia and Charleston, South Carolina, and less frequently at other U.S. South Atlantic ports. (Tr. 20).

Between February 1983 and April 1983 Farrell vessels did not call at South Atlantic ports. (Ex. 7). Claiming authority under the Agreement and the Agreement's tariff, Farrell accepted cargo for shipment to Mediterranean ports at Savannah, Georgia, Charleston, South Carolina, and other South Atlantic ports, and transported it overland by rail and truck at its own expense to Norfolk or Newport News, Virginia, North Atlantic ports not within the origin ports of the Agreement. Farrell issued port-to-port bills of lading at the South Atlantic ports which were stamped "on board" when the cargo had been loaded onto vessels at North Atlantic ports. (Exs. 7, 8, 11, Tr. 19–20, 35, 117–119, 132–133). Effective April 30, 1983, Farrell withdrew from the Agreement (Tr. 47).

Farrell has on file with the Commission an independent tariff, Farrell Tariff No. 1, FMC No. 136, which became effective May 1, 1983, upon Farrell's withdrawal from the Agreement.[2] It contains rules and rates for port-to-port transportation of cargo between South Atlantic ports and Mediterranean ports by direct or transshipment service. Farrell also has on file Eastbound Intermodal Freight Tariff No. 302, FMC No. 46, pursuant to which, since May 1, 1983, it has transported cargo which it has received at Charleston and Savannah for overland transportation to Norfolk and ocean transport to Mediterranean ports by Farrell vessels.

PLI alleges that Farrell's above-described operation between February, 1982 and April, 1983 was unauthorized by the applicable tariff and thus was in violation of sections 16, 17, and 18(b) (1) and (3) of the Shipping

[2] PLI and the Initial Decision erroneously state that Farrell's independent port-to-port tariff became effective on February 8, 1984. The Commission's tariff filings show that the tariff was several times postponed so as not to become effective prior to Farrell's withdrawal from the Agreement.

Act, 1916, as well as the Commission's tariff filing rules. PLI asks that Farrell be ordered to cease and desist from operating the described service and that "sanctions" be imposed against it. It also seeks cancellation of Farrell's independent tariff and reparation for injury caused by Farrell's alleged violations.

Farrell admits that it carried cargo from South Atlantic ports in the manner described by PLI but maintains it did so under the authority of the Agreement and the Agreement Tariff.

DISCUSSION

The Presiding Officer discontinued the proceeding for PLI's failure to prove by a preponderance of the evidence that Farrell had violated the Shipping Act. The Presiding Officer also found that PLI had not proven that it is entitled to reparation and concluded that the reparation issue had been abandoned since PLI had not pressed it after the first prehearing conference on April 21, 1983.

PLI excepts to the Initial Decision insofar as it finds that no evidence exists that Farrell operated without vessels calling at South Atlantic ports. PLI maintains that record evidence, both documentary and testimonial, is to the contrary. PLI points to Journal of Commerce printouts showing cargo moved by Farrell from Hampton Roads, and Lloyd Register summaries showing no Farrell vessel calls at South Atlantic ports, as well as a bill of lading which shows receipt by Farrell of cargo at Savannah for transportation overland to Norfolk for loading on a Farrell ship for carriage to the Mediterranean. PLI points out that Farrell admits that this was not an isolated incident but rather represents the manner in which all shipments delivered to South Atlantic ports were carried by Farrell during the February, 1982-April, 1983 period.

PLI also excepts to the Presiding Officer's conclusion that it is not entitled to reparation. PLI maintains it is legally entitled to reparation because it would have carried the shipments complained of had not Farrell transported those shipments by rail or truck from South Atlantic ports for loading in North Atlantic ports. PLI expresses uncertainty as to whether the Presiding Officer's finding on the lack of evidence to support an order granting reparation refers to PLI's entitlement to reparation or to the exact quantum of PLI's damages. If the Presiding Officer's finding addresses the exact quantum of damages PLI sustained, PLI asserts that the lack of evidence on this issue results from his refusal to order Farrell to produce documents identifying the shipments in question. In support of this contention PLI excepts to certain rulings of the Presiding Officer, *i.e.:*

(a) The denial of PLI's Motion to Compel Production of Documents or Answers to Interrogatories dated June 23, 1983;

(b) The denial of PLI's Motion to modify the July 26, 1983 Order to Produce Documents dated August 10, 1983;

(c) The denial of PLI's Motion to Postpone the Hearing also dated August 10, 1983;

(d) The denial of PLI's Motion for Sanctions dated August 16, 1983.

Lastly, PLI excepts to the limitation placed on cross-examination of Farrell's witness at the hearing held August 16, 1983 with respect to Farrell's independent port-to-port tariff.

Farrell maintains that both the Agreement and Agreement tariff provide for transportation "either direct or by transshipment," which term has been construed to comprise the transfer of cargo in the manner utilized by Farrell here. It also asserts that the "Alternate Port" service provision of the agreement authorizes its service. Because Farrell admits that from February 1982 through March 30, 1983, it made no direct calls with its vessels at any ports on the U.S. South Atlantic Coast range south of Cape Hatteras, the question before the Commission is whether the overland carriage of cargo from the South Atlantic to the ports of Norfolk and Newport News in the North Atlantic range was lawful.

There is nothing in the Agreement that authorizes Farrell's service here in issue. Article 1, which defines the scope of the trade covered by the Agreement, provides for transportation "either direct or by transshipment . . . *to the extent cargo moves through ports covered by this agreement.*" (Emphasis supplied). Under its service, however, Farrell moves the cargo overland to ports in the North Atlantic range not covered by the Agreement. Farrell's position is that the limitation in the Agreement refers to ports of origin only, and not to intermediate ports of transshipment. The Agreement, however, contains no language to that effect. The words "either direct or by transshipment" in Article 1 of the Agreement are conditioned by the words "to the extent cargo actually moves through ports covered by this agreement."[3] The Agreement tariff could not lawfully expand this scope, because the Agreement's approval limits trading to the area specified in the Agreement.[4] The argument, therefore, that the "either direct or by transshipment" provision of Rule 1A authorizes any transshipment is without merit,[5] especially in light of the Agreement tariff (Rule 13) which

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[3] Article 1 in full provides:

> The said parties intend, under this agreement, to confer with each other through their representatives and to discuss together in meetings, by telephone conversations or polls or by correspondence, from time to time, all matters pertaining to rates and charges for the carriage of cargo and rules and regulations governing the application thereof and defining the service to be rendered therefor all in connection with such carriage of cargo, either direct or by transshipment, by the parties in the trade from the U.S. South Atlantic ports (including all ports south of Cape Hatteras and including Key West, Florida) to Spanish, Portuguese and Moroccan Atlantic Ports and to ports on the Mediterranean Sea, Black Sea, Sea of Marmara, Adriatic Sea and Gulf of Taranto and to all points in Europe, Morocco and all points in all countries bordering the Mediterranean Sea, Sea of Marmara, Adriatic Sea and Gulf of Taranto, whether moving on a through bill of lading or otherwise, to the extent cargo actually moves through ports covered by this agreement.

[4] *Swift Co.* v. *FMC*, 306 F.2d 277, 280–281 (D.C. Cir. 1962); *Disposition of Container Marine Lines*, 11 F.M.C. 476, 485–492 (1968). *See also, Baton Rouge Marine Contractors* v. *FMC*, 530 F.2d 1062, 1066–1068 (D.C. Cir. 1976).

[5] Rule 1A of the Agreement tariff reads:

precludes the application of the Tariff to shipments "from . . . ports of call outside the scope of this tariff."[6] Farrell concedes that with respect to the trade in question, its vessel actually "calls" only at North Atlantic ports outside the scope of the Agreement.

Moreover, Farrell's service does not appear to be the "Alternate Port" service contemplated in Article 3.2 of the Agreement, because the clear language of that agreement authorizes such service only between "ports of discharge" and only if a tariff establishing such service has been adopted by the members and published.[7] Any "Alternate Port" service here takes place between "origin," not "discharge" ports, and, at any rate, no tariff authorizing any such service has been approved by the members or published.

Because the Agreement did not authorize Farrell's service, the service could not be supported by the Agreement tariff. To the extent that Farrell's service, however described, was not lawfully set forth in a tariff on file with the Commission at the time of the shipments, the proper definition of the service as "transshipment" or "Alternate Port" service is irrelevant. Consequently, Farrell's operation of a transportation service between February 1982 and April 1983 without a proper tariff on file with the Commission and the collection of freight charges on shipments carried without a tariff so on file was in violation of section 18(b) (1) and (3) of the Shipping Act, 1916 (46 U.S.C. §817).[8] *See Intermodal Service to Portland,*

Rates and conditions herein named apply only to shipments from South Atlantic Ports of the United States including all ports south of Cape Hatteras to and including Key West, Florida either direct or via transshipment to all ports served in Spain, Portugual, Morocco and on the Mediterranean Sea, of the Sea of Marmara and the Black Sea.

[6] Rule 13 of the Tariff states that:

Unless otherwise agreed, rates in this tariff do not apply on shipments moving under thru bills of lading from or to ports of call outside the scope of this tariff.

[7] Article 3.2 of the Agreement provides:

The parties may by majority vote agree upon and file, cancel, or modify tariff provisions permitting, prohibiting or limiting Alternate Port Service by Land. As used herein, "Alternate Port Service by Land" shall mean the movement of cargo by land, at the party's expense, from a port within the scope of this Agreement at which the cargo is discharged from a vessel to a port within the scope of this Agreement named as the port of discharge in the bill of lading. Not withstanding any provision of this Agreement, including Article 2, no party to this Agreement shall perform Alternate Port Service by Land between ports located in different countries. Rules governing Alternate Port Service by Land and the ports at which it is authorized shall be published in the Rate Agreement tariff. There is no "substituted service" rule, as such, in Farrell's independent port-to-port tariff.

[8] Section 18(b)(1) requires:

Every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission . . . 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 . . . Such tariffs shall plainly show the places between which freight will be carried . . .

Section 18(b)(3) states in part:

No common carrier by water in foreign commerce . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property . . . 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 . . .

Oregon, 17 F.M.C. 106, 118–119, 137 (1973); *Cf. Disposition of Container Marine Lines, supra*, 11 F.M.C. at 485–486.

PLI's contentions under sections 16 and 17 of the Shipping Act, 1916, (46 U.S.C. §§ 815, 816) appear to have been abandoned. (*See* Transcript of Prehearing Conference, July 26, 1983, 14, where PLI's counsel stated: "The allegations in the amended complaint are confined to the 18(b)(1) and (b)(3) violations.") At any rate, its Exceptions to the Initial Decision make no arguments based on any section other than section 18, and the record contains no evidence of anything other than simple tariff violations.

PLI has not been prejudiced by the Presiding Officer's refusal to permit it to cross-examine Farrell's witness with respect to Farrell's service under its independent port-to-port tariff. Farrell represents that it purported to operate during the entire period here in issue under authority of the Agreement tariff, and the record shows that such authority did not exist.

The complainant in a proceeding before the Commission has the burden of proof with respect to each element of its case. See 46 C.F.R. § 502.155 (1982); *Boston Shipping Ass'n* v. *FMC*, 706 F.2d 1231, 1239 (1st Cir. 1983). Moreover, an essential element in a complaint's case for reparation is a demonstration of injury and the statutory violation as proximate cause of such injury. See *e.q.*, *West Indies Fruit Co.* v. *Flota Mercante Grancolombiana*, 7 F.M.C. 66, 70 (1962); *Ballmill Lumber & Sales Corp.* v. *The Port of New York Authority*, 11 F.M.C. 494, 510–511 (1968).

PLI bases its claim for reparation solely on its assertion that Farrell's service was unlawful and that but for Farrell's service it would have carried the cargo which Farrell carried. But by PLI's own admission, whether or not PLI would have carried the cargo depended upon what other carriers operated competitive services, what the frequency of those services was, and what PLI's rates were on the particular cargo involved. (*See* Transcript of Prehearing Conference, April 21, 1983, 45–55).

PLI was specifically advised at the first prehearing conference that it would have to establish its entitlement to reparation (Tr. 49–56). PLI knew that it would be difficult for it to establish such entitlement and indicated what was necessary to show that entitlement. (*See* Transcript of Prehearing Conference, April 21, 1983, 45–55). PLI had access to the relevant data with respect to its own operations and the extent to which they competed with those of Farrell, but failed to produce them.

Although Farrell was less than cooperative in furnishing information to PLI, PLI has not been injured by this lack of cooperation. The sole purpose for the information which PLI requested was to prove the extent of the violation. (*See* Motion for Certification and Appeal to the Federal Maritime Commission, August 25, 1983, 3–4). PLI recognized that the materials it requested, even if produced by Farrell, would only have shown the extent of the violation, which we have found to have existed over the entire period in question. (*See* Transcript of Prehearing Conference, April

21, 1983, 45–55; Transcript of Prehearing Conference, July 26, 1983, 14–15).

Untariffed carriage alone does not create injury. See *e.g.*, *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304, 1308–1310 (D.C. Cir. 1981), *cert. denied sub nom. Nitrochem, Inc.* v. *ICC*, 456 U.S. 905 (1982); *Southern Transportation Co.* v. *Norfolk & W. Ry. Co.*, 147 I.C.C. 29, 36–37 (1928); *Increase In Freight Rates and Charges—1973*, 365 I.C.C. 426, 428 (1981); *Lowe Paper Co.* v. *Kaydeross R. Corp.*, 167 I.C.C. 700, 701 (1930). To establish injury, at the very least PLI would have to show that it would have carried the cargo. The record does not show this to be true. In fact, the record indicates the existence of other carriers who may have been able to carry the cargo (see *e.g.*, Tr. 87–93; 95–98). There is, moreover, no necessary causal relationship between a failure to have a lawful tariff on file and a failure of a competitor to carry cargo. Here it is conceded that transportation was carried out at the rates in the Agreement tariff which, although not legally applicable, was on file with the Commission and known to all competing carriers. It is difficult to see how there is any causal connection between the failure to have a valid tariff on file in this instance and PLI's failure to carry the cargo, and PLI must bear the consequences of the failure to show such connection. *Cf. Puget Sound Tug & Barge Co.* v. *Foss Launch & Tug Co.*, 5 S.R.R. 67, 75, 77 (I.D. 1964, subsequently discontinued following withdrawal of complaint); *Prudential Lines, Inc.* v. *Farrell Lines, Inc., et al.*, 26 F.M.C. 497 (1984).

Had PLI at least established that it would have carried the cargo absent Farrell's tariff violations, further inquiry might have been warranted. As provided by our Rules of Practice and Procedure, an opportunity is to be given a complainant to show the extent of reparation to which he is entitled *if* he has established violations, injury, and right to reparation.[9] Here, however, despite adequate opportunity such proof is lacking, and reparation is denied.[10]

CONCLUSION

(1) Farrell's service here in issue is found to have violated sections 18(b) (1) and (3) of the Shipping Act, 1916.

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[9] Title 46 CFR § 502.251, Proof on Award of Reparation, provides:

If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought, the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered. In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts. [Rule 251.]

[10] Section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) provides in part:

(a) That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water . . . and asking reparation for the injury, if any, caused thereby. The board, . . . may direct the payment . . . of full reparation to the complainant *for the injury caused by such violation.* (Emphasis added).

(2) The present record does not show that PLI is entitled to reparation. Although Farrell is found to have violated section 18 of the Shipping Act, 1916, there has been no showing that there was a causal connection between that violation and any "injury" PLI may have suffered thereby. There is no showing that Farrell's failure to have a lawful tariff on file prevented PLI from carrying the cargo, nor that PLI would have carried the cargo in any case.

(3) No order to cease and desist need be issued. Farrell has withdrawn from the Agreement and no longer utilizes the Agreement tariff. As far as appears from the record herein, it has never utilized its port-to-port tariff, and the service which Farrell presently performs pursuant to its intermodal tariff is not challenged. Farrell is cautioned, however, that its independent port-to-port tariff, which still appears to be in effect, should not be used for services covered by its intermodal tariff, or *vice versa.* The type of tariff applied in any particular instance will, of course, depend upon the contractual arrangements between Farrell and inland carriers. See *e.g., Alaska S.S. Co.* v. *FMC,* 399 F.2d 623 (9th Cir. 1968); *Sea-Land Service, Inc.* v. *FMC,* 404 F.2d 824 (D.C. Cir. 1968); *IML Sea Transit, Ltd.* v. *U.S.,* 343 F.Supp. 32 (N.D. Ca. 1972), *aff'd* 404 U.S. 1002 (1972).

THEREFORE, IT IS ORDERED, That Prudential Lines, Inc., is denied reparation;

IT IS FURTHER ORDERED, That the issuance of a cease and desist order is denied as moot;

FINALLY, IT IS ORDERED That these proceedings are discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1102

APPLICATION OF UNITED STATES ATLANTIC & GULF-JAMAICA AND HISPANIOLA STEAMSHIP FREIGHT ASSOCIATION AND SEA-LAND SERVICE, INC., FOR THE BENEFIT OF UNITED BRANDS FOR CHIQUITA INTERNATIONAL TRADING CO.

ORDER PARTIALLY ADOPTING INITIAL DECISION

June 15, 1984

This proceeding is before the Commission pursuant to Rule 227(d) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.227(d)) upon its own motion to review the Initial Decision of Administrative Law Judge Charles E. Morgan granting an application to refund freight charges pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)).

BACKGROUND

On November 9, 1983, Sea-Land Service, Inc. (Sea-Land), as a member of the United States Atlantic & Gulf-Jamaica and Hispaniola Steamship Freight Association (Freight Association), filed an application pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.92(a)), on behalf of United Brands of Chiquita International Trading Co., requesting permission to refund $6,181.50 in freight charges on 38 shipments of pineapples. The shipments departed Elizabeth, New Jersey on April 9, April 30, May 7 and May 14, 1983, for Haina, Dominican Republic. Only five of these shipments, those on May 14, 1983, occurred within 180 days of the filing of the petition.

Based upon an alleged "mistaken assumption" that Sea-Land's 35-foot containers had a maximum capacity of 27,000 pounds, the Freight Association established a rate on pineapples of $101 per ton, 27,000 pound minimum, plus ancillary charges. This replaced rates of $130 per ton, any quantity, and $115 per ton, 30,000 pound minimum. These earlier rates included most ancillary charges, and were subject to a maximum charge limit of $1,463 per 35-foot container. Because the maximum loadability of the 35-foot containers is actually over 30,000 pounds, the new rate method resulted in an increase in the shipper's total costs. On May 15, 1983 the base rate was reduced to $91 per ton. The aggregated difference in freight charges on all 38 shipments is $6,181.50.

DISCUSSION

Jurisdiction

The Presiding Officer permitted applicant Sea-Land to refund freight charges on shipments which occurred more than 180-days prior to the filing of the application for refund. He held that such relief is proper "on a stream of shipments provided that some of the later shipments fall within the 180-day period." The Presiding Officer's stated reason for allowing this "relation back" is to prevent discrimination "among shipments," citing *PWC for the Benefit of Minnesota Mining & Manufacturing Co.*, 21 S.R.R. 793 (1982).

In *Minnesota Mining* it was held that section 18(b)(3) special docket relief can be afforded to shipments occurring more than 180-days prior to the filing of an application in order to prevent "discrimination among similarly situated shipments." While that case did address a "stream of shipments," the out-of-time shipments also involved charges due for a general rate increase that was imposed without the required 30-day statutory notice. Accordingly, relief was "technically granted only for the four shipments falling within that [180-day] period of time." 21 S.R.R. at 798.

In *PWC for the Benefit of Mitsui and Co.*, 21 S.R.R. 1275 (1982), the Commission allowed the "intended rate" to "relate back" beyond 180-days prior to the filing of the application to a date when the rate "should have been filed" to avoid any discriminatory treatment of other shippers of the same commodity shipped after the "intended filing" date. The Commission cited *Minnesota Mining* in support of its decision.

The "relation back" theory expressed in *Minnesota Mining* and applied in *Mitsui & Co.* must be limited to preventing discrimination *among shippers.*[1] The Initial Decision here would extend the 180-day period stated in section 18(b)(3) unreasonably. Because the 180-day limit is jurisdictional, relief in this case will be granted only on the five shipments made on May 14, 1983.

Administrative/Clerical Error

The Presiding Officer held that a "mistaken assumption" as to the maximum loadability of a 35-foot container is an administrative error contemplated by section 18(b)(3), citing *Schenectady Midland, Ltd.* v. *Gulf/United Kingdom Conference*, 21 F.M.C. 459 (1978). In that case, the carrier had deleted a tariff item covering a chemical commodity under the "mistaken assumption" that it was covered by another tariff item. The retained tariff item was limited to the chemical shipped "in drums" while the actual shipment was made "in bags." An administrative error contemplated by section 18(b)(3) was found to exist.

[1] As noted by the Presiding Officer here, section 18(b)(3) prohibits discriminatory treatment "among shippers" and not "among shipments."

Whether the "mistaken assumption" relating to the stowage capacity of Sea-Land's 35-foot container is the type of administrative or clerical error contemplated by section 18(b)(3) is a close question.[2] Although the Commission has reservations concerning the alleged error in this case, the Presiding Officer's determination that there was a *bona fide* administrative error will be adopted in light of the liberal interpretation generally accorded special docket cases.

THEREFORE, IT IS ORDERED, That the Initial Decision is reversed with respect to the refund of freight charges on the shipments on April 9, April 30 and May 7, 1983 and adopted in all other respects, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

[2] In *South African Marine Corp. for the Benefit of Valmont Int'l. Inc.*, 20 S.R.R. 4 (1980) it was held that, when converting from imperial to metric measure, a rounding off of the metric measurement that "inadvertently" resulted in a higher rate is not an administrative error upon which relief could be granted. The assertion of "inadvertence" was determined to be contrary to the long term tariff practices of the carrier in rounding off measurement conversions. The Commission could, on the basis of Valmont, find that Sea-Land's prior experience with 35-foot containers militates against finding such an error here.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1102

APPLICATION OF UNITED STATES ATLANTIC & GULF-JAMAICA AND HISPANIOLA STEAMSHIP FREIGHT ASSOCIATION AND SEA-LAND SERVICE, INC. FOR THE BENEFIT OF UNITED BRANDS FOR CHIQUITA INTERNATIONAL TRADING CO.

Application for permission to refund a total of $6,181.50 of the applicable freight charges on 38 shipments granted.

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

Partially Adopted June 15, 1984

By application mailed on November 9, 1983, the applicant, Sea Land Service, Inc., for the benefit of United Brands for Chiquita Int'l Trading Co., seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), to refund a total of $6,181.50 of the applicable freight charges on 38 shipments of pineapples, N.O.S., fresh, from Haina, Dominican Republic, to Elizabeth, New Jersey, sailing dates, April 9, 1983 (five shipments), April 30, 1983 (thirteen shipments), May 7, 1983 (fifteen shipments), and May 14, 1983 (five shipments).

Most of the above shipments occurred more than 180 days prior to the mailing date of this application. Only the last five shipments of the 38 are within the statutory 180-day period. However, the Commission has found, to prevent discrimination among *shipments*, that relief is proper on a stream of shipments provided that some of the later shipments fall within the 180-day period. *Pacific Westbound Conference for the Benefit of Minnesota Mining & Mfg. Co.,* Special Docket Nos. 890 and 893, initial decision served April 7, 1982 (finalized May 14, 1982), 21 SRR 793.

In both the above cited cases and in the present case, all of the shipments were made by *one shipper,* whereas the first proviso of the special docket provision of section 18(b)(3) of the Act refers to refunds or waivers which "will not result in discrimination among *shippers.*" *Emphasis supplied.*

Following the reasoning in Special Dockets 890 and 893 above, all 38 of the present shipments will be considered as subject to the granting of relief under section 18(b)(3) of the Act.

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

The United States Atlantic & Gulf-Jamaica & Hispaniola Steamship Freight Association (the Association) joins in the present application.

The applicable rate on the 38 shipments was $101 per ton of 2,000 pounds, TL minimum 27,000 pounds, plus ancillary charges.

These additional charges include a terminal delivery charge of $4 per ton (W), an arrimo charge in the Dominican Republic of $1.50 per 1,000 kilos, a customs charge of $19.75 per shipment, a Dominican documentation charge of $5 per shipment, and a CFS cargo handling charge of $5 per shipment. These ancillary charges listed next above are not in issue, that is, these ancillary charges are the same as originally billed and as sought under this application. All of the shipments weighed either 30,888 pounds or 27,896 pounds each. Thus, the terminal delivery charges were based on either 15.44 tons or 13.94 tons. The shipments weighed either 14.01 kilo tons or 12.65 kilo tons for the computation of arrimo charges.

Another ancillary charge was a gross receipts surcharge of 5.7 percent of the basic freight charges. This charge varies between the charges billed and the charges sought, inasmuch as the sought basic freight rate is $91 per ton of 2,000 pounds, TL minimum 27,000 pounds, plus ancillary charges.

The charges as originally billed, and as sought, are shown in detail for the 38 shipments on Exhibit No. 8. The aggregate charges originally billed and collected on the 38 shipments, based on the basic freight rate of $101 a ton, were $66,467.76, and the aggregate charges sought based on the lower basic freight rate of $91 a ton are $60,286.26. Thus, $6,181.50 is sought to be refunded by this application.

Sea-Land Service is a member of the Association and participates in the Association's tariff No. 4, N.B. SDM-19, F.M.C. No. 4, for shipments from ports in the Dominican Republic to U.S. Atlantic and Gulf Coastal Ports.

Prior to April 8, 1983, the applicable rates on fresh pineapples were $139 per ton (W), any quantity, and $115 per ton (W) in minimum lots of 30,000 pounds, inclusive of all other charges, except arrimo and gross receipts surcharge.

At the April 6, 1983, meeting of the Association, the members agreed to convert the then applicable maximum charges of $1,463 per 35-foot container and $1,776 per 40-foot container, both subject to specified additional charges, to a revenue ton/TL minimum based on the maximum loadability in a 35-foot container, said rate to be published subject to all additional charges.

The maximum loadability for a 35-foot container was stated as 27,000 pounds, and the members approved a rate of $101 on fresh pineapples, minimum 27,000 pounds.

Shortly thereafter, the Association's members realized the maximum loadability of a 35-foot container was 30,888 pounds, not 27,000 pounds, which resulted in an unintentional increase in the shipper's cost.

At the May 5, 1983, meeting, the Association's members rectified their mistaken assumption by agreeing to reduce the rate to $91 a ton (W), minimum 27,000 pounds. This $91 rate was made effective May 15, 1983.

During the period from April 9, 1983, through May 14, 1983, the period in issue herein, the 38 shipments herein sailed.

It is the position of Sea-Land Service and the Association that the members' mistaken assumption as to the maximum loadability of pineapples in a 35-foot container is the type of administrative error contemplated by section 18(b)(3) of the Act. They cite *Schenectady Midland, Ltd.* v. *Gulf/United Kingdom Conference*, 21 F.M.C. 459 (1978), which dealt "with the mistaken assumption that a tariff covered butyl "in bags" as well as "in drums."

Accordingly, Sea-Land Service and the Association request, for the mistaken assumption above, that the rate of $91 a ton (W), TL minimum 27,000 pounds, be allowed to be assessed on all 38 shipments herein, and that permission be granted to refund a total of $6,181.50.

The application contains the statement that there were no other shipments of the same or similar commodity moved by members of the Association during the period in issue herein.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by the members of the Association in calculating and publishing the applicable rate of $101 for the shipments herein, whereas their true intention was to calculate and publish the rate of $91; that their intended rate of $91 was published to be effective after the shipments herein moved, and prior to this application; that the application was timely mailed as to five of the 38 shipments, and that the application constructively is considered as timely filed for the other 33 shipments in this continuous stream of shipments herein; and that the authorization of a refund will not result in discrimination among shippers.

The applicant, Sea-Land Service, Inc., is authorized to refund a total of $6,181.50 of the applicable charges on these 38 shipments. An appropriate notice of this matter and of the details of the refund shall be published in the pertinent tariff of the Association.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING OCEAN FREIGHT FORWARDERS, TERMINAL OPERATIONS AND PASSENGER VESSELS

[46 CFR PARTS 526, 533, 540, 550 AND 551]

DOCKET NO. 84–18

INTERIM RULES TO IMPLEMENT THE SHIPPING ACT OF 1984

AGENCY: Federal Maritime Commission.

ACTION: Interim Rules and Request for Comments.

SUMMARY: On March 20, 1984, the President signed the Shipping Act of 1984, which will become effective on June 18, 1984. The Commission hereby issues interim rules to implement the Shipping Act of 1984 by its effective date and requests public comment on these rules for the purpose of their potential revision as final rules superseding the interim rules by December 15, 1984. The parts amended (and redesignated) by this rulemaking are Part 526 [free time and demurrage—new part 525]; Part 533 [filing of tariffs by terminal operators—new part 515]; Part 540 [security for the protection of the public on passenger vessels]; Part 550 [filing of tariffs by terminal barge operators in Pacific Slope States—new part 520]; and Part 551 [truck detention at New York—new part 530].

DATES: Interim Rules effective on June 18, 1984. Comments at any time but no later than June 4, 1984.

SUPPLEMENTARY INFORMATION:

The following summarizes the background for this rulemaking, sets forth the intended structure of the subchapter in which these rules will be included, and analyzes related proceedings and the interim rules themselves.

The Shipping Act of 1984; interim authority; request for comments.

The Commission is issuing these interim rules to implement the Shipping Act of 1984, Pub. L. 98–237, 98 Stat. 67 (46 U.S.C. app. 1701–1720), which was signed on March 20, 1984 and becomes effective on June 18, 1984. In order that the Commission can properly implement this major legislation, Congress provided interim rulemaking authority under section 17(b) of that statute which is effective immediately. These rules are issued pursuant to that section in order that the Commission can perform its essential regulatory functions on and after June 18.

The interim authority provided under section 17(b) of the 1984 Act exempts the Commission from compliance with the notice and comment requirements of section 553 of Title 5, United States Code. In order to have its essential regulations in place by June 18, the Commission must utilize this authority bestowed by Congress.

At the same time, however, section 17(b) provides that all rules and regulations issued under the interim authority shall expire no later than 270 days after enactment, i.e., December 15, 1984, unless superseded by final rules which are not exempt from the requirements of 5 U.S.C. 553.

To provide for the basic notice and comment provisions of the Administrative Procedure Act, therefore, the Commission requests comments on these interim rules to assist it in developing final rules to supersede and, where necessary modify, these interim rules by December 15, 1984. Accordingly, the public is provided with thirty days within which to comment on the interim rules but, if anyone believes that there are serious problems created by these rules which should be addressed immediately, the Commission urges them to bring their concerns to the attention of the Commission, without prejudice to subsequently filing additional comments within the thirty day comment period.

Structure: Terminal operations, passenger vessels and freight forwarders.

The implementation of the Shipping Act of 1984 requires the Commission to develop new parts to the CFR. The Commission retains, however, regulatory functions under the revised Shipping Act, 1916, the Intercoastal Shipping Act, 1933 and other statutes, which also must continue to be implemented by regulations. In order to synthesize all of its regulations into a more coherent and usable format and to correct style and typographical errors, the Commission is taking this opportunity to review all of its regulations and to restructure and improve them.

The entire intended reorganization has been set forth in the previous rulemaking for Subchapter A [Parts 500, 501, 502, 503, 504 (Old 547), and 505], as well as in the Commission's press release NR. 84–22. Briefly, however, it provides for all administrative matters to go into Subchapter A; all purely domestic regulations into Subchapter C; all purely foreign matters into Subchapter D; and the rules, here, into Subchapter B, "Regulations Affecting Ocean Freight Forwarders, Terminal Operations and Passenger Vessels".

An interim rule amending Part 510, "Licensing of Ocean Freight Forwarders", is being published separately.

This rulemaking provides full "coverage" of Subchapter P (except for other rulemakings that may be necessary from time to time) by providing the Commission with interim rules, in place by June 18, 1984, for the following new parts, listed in the intended structural organization for Subchapter B:

Part 510 Licensing of Ocean Freight Forwarders (separate rulemaking)

Part 515 Filing of Tariffs by Terminal Operators (Old part 533)

Part 520 Filing of Tariffs by Terminal Barge Operators in Pacific Slope States (Old part 550)

Part 525 Free Time and Demurrage Charges on Import Property applicable to all Common Carriers by Water (Old part 526)

Part 530 Truck Detention at the Port of New York (Old part 551)

Part 540 Security for the Protection of the Public.

The rules in these listed parts attempt to put into place all the Commission's basic regulations for freight forwarders, passenger vessel operators and terminal operations, except for agreements which will be issued later under Subchapter C and/or D.

The Port Inquiry, Docket 83–38.

Oral hearings in various port cities have recently been held in Docket No. 83–38, *Notice of Inquiry and Intent to Review Regulations of Ports and Marine Terminal Operators,* presided over by Commissioner Robert Setrakian.

The issues in that proceeding may eventually affect marine terminal operations, both tariffs and agreements, as well as other matters within the Commission's jurisdiction.

At this time, however, the Commission is issuing these interim rules to ensure that existing Commission surveillance over marine terminal-related practices continues to the extent necessary. Any changes resulting from the marine terminal inquiry will be the subject of later rulemaking(s).

Analysis of the Interim Rules.

While the new organization has been set forth above, the order of the rule changes herein follows current numbering in the CFR (October 1, 1983, edition).

The major change intended to be effectuated by this rulemaking is to provide the Commission with the necessary statutory authority to continue its regulation of terminal-related practices under the Shipping Act of 1984. This we have done in these rules by adding the pertinent provisions of that statute to the "Authority" sections of parts 526, 533, 540, 550, and 551. This results in dual authority for these parts, i.e., the Shipping Act, 1916 (46 U.S.C. app. 801, *et seq.*) for the domestic aspect, and the Shipping Act of 1984 for the foreign aspect.

In providing for the new statute, penalty provisions and other technical language have also been conformed in sections 533.1; 533.2; 533.4; 533.5; and 550.1(c).

For terminal tariffs (part 533), the Commission is continuing to require the filing of such tariffs but has excluded from this requirement the filing of tariffs on forest products, bulk cargo and recyclable metal scrap, waste paper and paper waste (part 533, amendment #5), consistent with sections

8(a)(1) and 8(c) of the Shipping Act of 1984, and the Conference Report on this statute. See H.R. Rep. No. 98–600, 98th Cong., 2nd Sess.

Other amendments herein involve nomenclature changes resulting from reorganizations: Part 533—amendment #2; part 540—amendments #'s 2, 3, 4, 5, 6, 7 and 8.

In part 540, the forms in Appendixes A and B have been slightly revised to reflect organization changes and current language usage.

All other changes in this rulemaking involve minor corrections or redesignations resulting from the reorganization of Title 46, Chapter IV.

The Federal Maritime Commission has determined that this interim rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies that this interim rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

LIST OF SUBJECTS:

46 CFR Parts 526, 533, 550, 551.

Barges; Cargo; Cargo vessels; Harbors; Imports; Maritime carriers; Motor carriers; Ports; Rates and fares; Trucks; Water carriers; Waterfront facilities; Water transportation.

46 CFR Part 540

Rates and fares; Passenger vessels; Surety bonds.

For the reasons set out in the preamble, Parts 526, 533, 540, 550 and 551 of Title 46 of the Code of Federal Regulations are amended as follows:

1. Revise the title of Subchapter B to read: "SUBCHAPTER B—REGULATIONS AFFECTING OCEAN FREIGHT FORWARDERS, TERMINAL OPERATIONS AND PASSENGER VESSELS"

Amend and redesignate the following parts in Subchapter B as follows:

PART 526—FREE TIME AND DEMURRAGE CHARGES ON IMPORT PROPERTY APPLICABLE TO ALL COMMON CARRIERS BY WATER

1. In Part 526, the authority citation appearing after the table of contents is revised to read as follows and all other authority citations are removed.

> AUTHORITY: 5 U.S.C. 553; secs. 17 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 816, 841a); secs. 10 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709 and 1716).

2. In §526.1(c), remove "§§551.3(e)(2), 551.4(e), and 551.4(g) of Part 551" and insert "§§530.3(e)(2), 530.4(e), and 530.4(g) of this Chapter".

3. Part 526 of 46 CFR, Chapter IV, is redesignated as Part 525 and all internal references are changed.

PART 533—FILING OF TARIFFS BY TERMINAL OPERATORS

1. In Part 533, add O.M.B. clearance numbers and revise the authority section to read as follows:

> AUTHORITY: 5 U.S.C. 553; secs. 17, 21, 43 of the Shipping Act, 1916 (46 U.S.C. app. 816, 820, 841a); secs. 10, 15, 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709, 1714, 1716). [The Information collection requirements contained in this part have been approved under O.M.B. number 3072-0002.]

2. In Part 533, remove "Bureau of Domestic Regulation" everywhere it appears and Insert "Bureau of Tariffs".

3. Amend §533.1, by removing "in the foreign commerce of the United States or in interstate commerce on the high seas or the Great Lakes." and inserting.

"in the foreign or domestic offshore commerce of the United States."

4. §533.2 is revised to read:

> §533.2 Purpose
> The purpose of this part is to enable the Commission to discharge its responsibilities under section 17 of the Shipping Act, 1916 and section 10 of the Shipping Act of 1984, by keeping informed of practices, rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices. Compliance is mandatory and failure to file the required tariffs may result in a penalty of not more than $5,000 for each day such violation continues. Additionally, if willful and knowing, the Shipping Act of 1984 provides a civil penalty of not more than $25,000 for each day a violation continues.

5. In §533.3, add at the beginning the following:

> "Except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste,"

6. Amend §533.4 by removing "agreements approved pursuant to section 15" and inserting:

> "agreements approved pursuant to section 15 of the Shipping Act, 1916 and/or effective under section 6 of the Shipping Act of 1984."

7. Amend § 533.5 by removing "approved section 15 agreements" and inserting:

> "agreements approved under section 15 of the Shipping Act, 1916 and/or effective under section 6 of the Shipping Act of 1984."

8. Part 533 of 46 CFR, Chapter IV, is redesignated as Part 515.

9. Redesignate all internal cross-references to sections of present part 533 as cross references to the same numbered sections of new part 515. Such cross-references are found in §§ 533.3 and 533.4.

PART 540—SECURITY FOR THE PROTECTION OF THE PUBLIC

1. In Part 540, add O.M.B. clearance numbers and the authority citation appearing after the table of contents is to read as follows and all other authority citations are removed.

> AUTHORITY: 5 U.S.C. 552, 553; secs. 2 and 3, Pub.L. 89–777, 80 Stat. 1356–1358 (46 U.S.C. app. 817e, 817d); sec. 43 of the Shipping Act, 1916 (46 U.S.C. app. 841a); sec. 17 of the Shipping Act of 1984 (46 U.S.C. app. 1716).
> [The information collection requirements contained in this part have been approved under O.M.B. numbers 3072–0011 and 3072–0012.]

2. In Part 540, Remove "Bureau of Investigation and Enforcement" everywhere it appears and insert "Bureau of Hearing Counsel".

3. In § 540.4(a), in the last sentence, remove "and" and the period and add at the end:

> Miami, Fla.; Los Angeles, Calif.; Hato Rey, P.R.; and Chicago, Ill.

4. In § 540.5(a)(1), remove "1321 H Street, N.W." and insert "1100 L Street, N.W."

5. Remove paragraph § 540.9(i).

6. In § 540.23(a), in the last sentence, remove "and" and the period and add at the end:

> Miami, Fla.; Los Angeles, Calif.; Hato Rey, P.R.; and Chicago, Ill.

7. In § 540.24(a)(1), remove "1321 H Street, N.W." and insert "1100 L Street, N.W."

8. Remove paragraph § 540.27(i).

9. Part 540, APPENDIX A, is revised to read:

APPENDIX A—EXAMPLE OF SETTLEMENT AGREEMENT TO BE USED UNDER 46 CFR §§ 540.30–540.36

SETTLEMENT AGREEMENT FMC FILE NO.__________

This Agreement is entered into between:

(1) the Federal Maritime Commission and,

(2) __________________ hereinafter referred to as respondent.

WHEREAS, the Commission is considering the institution of an assessment proceeding against respondent for the recovery of civil penalties provided under the ___________ Act ________, for ________ alleged violation(s) of Section(s)__________________.

WHEREAS, this course of action is the result of practices believed by the Commission to have been engaged in by respondent to wit;

____

____

WHEREAS, the parties are desirous of expeditiously settling the matter according to the conditions and terms of this Agreement and wish to avoid the delays and expense which would accompany agency litigation concerning these penalty claims; and,

WHEREAS, Section ___________ of the ___________ Act ___________ authorizes the Commission to collect and compromise civil penalties arising from the alleged violation(s) set forth and described above; and,

WHEREAS, the respondent has terminated the practices which are the basis of the alleged violation(s) set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate, discourage and prevent these practices by respondent or its officers, employees and agents.

NOW THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the violation(s) set forth and described herein that may have occurred between (date) ___________ and (date) ___________, the undersigned respondent herewith tenders to the Federal Maritime Commission a bank cashier's check in the sum of $___________, upon the following terms of settlement:

1. Upon acceptance of this agreement of settlement in writing by the Director of the Bureau of Hearing Counsel of the Federal Maritime Commission, this instrument shall forever bar the commencement or institution of any assessment proceeding or other claims for recovery of civil penalties from respondent arising from the alleged violations set forth and described herein, that have been disclosed by respondent to the Commission and that occurred between (date) ___________ and (date) ___________.

2. The undersigned voluntarily signs this instrument and states that no promises or representations have been made to the respondent other than the agreements and consideration herein expressed.

3. It is expressly understood and agreed that this Agreement is not to be construed as an admission of guilt by undersigned respondent to the alleged violations set forth above.

4. Insofar as this agreement may be inconsistent with Commission procedures for compromise and settlement of violations, the parties hereby waive application of such proeedures.

(S) By: ______________________________

Title: ______________________________

Date: ______________________________

Approval and Acceptance

The above Terms and Conditions and Amount of Consideration are hereby Approved and Accepted:

By the Federal Maritime Commission:

(S)______________________________
(Hearing Counsel)

____
Director, Bureau of Hearing Counsel

Date ______________________________

10. Part 540, Appendix B is revised to read:

APPENDIX B—EXAMPLE OF PROMISSORY NOTE TO BE USED UNDER 46 CFR § 540.36

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT

FMC FILE NO.___________

For value received, ____________________ promises to pay to the Federal Maritime Commission (the Commission) the principal sum of $____________________($________) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

$____________________($________) within ________ months of execution of the settlement agreement by the Director of the Bureau of Hearing Counsel;

$____________________($________) within ________ months of execution of the agreement;

$____________________($________) within ________ months of execution of the agreement;

[Further payments if necessary]

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date of this execution of this Promissory Note by the Director of the Bureau of Hearing Counsel, and be computed at the rate of [___________percent (___________%) per annum.]

If any payment of principal or interest shall remain unpaid for a period of ten (10) days after becoming due and payable, the entire unpaid principal amount of this Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under this Promissory Note, (Respondent)__________________ does hereby authorize and empower any U.S. attorney, any of his assistants or any attorney of any court of record, Federal or State, to appear for him, and to enter and confess judgment against (Respondent) __________________ for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State; to waive the issuance and service of process upon (Respondent) __________________ in any suit on this Promissory Note; to waive any venue requirement in such suit; to release all errors which may intervene in entering up such judgment or in issuing any execution thereon; and to consent to immediate execution on said judgment.

(Respondent)__________________ hereby ratifies and confirms all that said attorney may do by virtue thereof.

This Promissory Note may be prepaid in whole or in part by Respondent by bank cashier's or certified check at any time, provided that approved interest on the principal amount prepaid shall be paid at the time of the prepayment.

(S) By:________________________________

Title: ________________________________

Date: ________________________________

PART 550—FILING OF TARIFFS BY TERMINAL BARGE OPERATORS IN PACIFIC SLOPE STATES

1. From table of contents, remove "§ 550.3 Effective Date".

2. In Part 550, the authority citation appearing after the table of contents is revised to read as follows and all other authority citations are removed.

AUTHORITY: 5 U.S.C. 553; secs. 18(a) and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817(a) and 841(a)); sec. 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 844); and secs. 8 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707 and 1716).

3. In § 550.1(c), remove the period and add at the end:

"and/or the Shipping Act of 1984."

4. In § 550.2(a), remove "General Order 13 (46 CFR Part 536)" and insert "part 580 of this Chapter".

5. In § 550.2(b), remove "Tariff Circular 3 (46 CFR Part 531)" and insert "part 550 of this Chapter".

6. Remove § 550.3.

7. In § 550.2(c), remove "§ 550.2(a)" and insert "520.2(a)".

8. Part 550 of 46 CFR, Chapter IV, is redesignated as Part 520 and all internal references are changed.

PART 551—TRUCK DETENTION AT THE PORT OF NEW YORK

1. In part 551, add O.M.B. clearance numbers and revise the authority section to read as follows:

AUTHORITY: 5 U.S.C. 553; secs. 17 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 816 and 841a); secs. 10 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709 and 1716).
[The information collection requirements contained in this part have been approved under O.M.B. number 3072–0010.]

2. In § 551.3(e)(1), remove "General Order 8, § 526.1(c)" and insert "§ 525.1(c) of this Chapter".

3. In § 551.7(e), remove "§ 551.4(1)" and insert "§ 551.4(i)".

4. Part 551 of 46 CFR, Chapter IV, is redesignated as Part 530.

5. Redesignate all internal cross-references to sections of old part 551 as cross references to the same numbered sections of new part 530. Such cross-references are found in §§ 551.1(m), 551.2(b)(11), 551.2(c)(14); 551.2(g); 551.3(c)(2); 551.3(d)(1); 551.3(d)(2); 551.4(c); 551.4(d); 551.5(b); 551.6(a) [two references]; 551.7(b); 551.7(c); 551.7(d); 551.7(e) [two references]; 551.7(g); and 551.8(e)(1) [three references].

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 510]

[GENERAL ORDER 4, REVISED, DOCKET NO. 84–19]

LICENSING OF OCEAN FREIGHT FORWARDERS

AGENCY: Federal Maritime Commission.

ACTION: Interim Rules and Request for Comments.

SUMMARY: On March 20, 1984, the President signed the Shipping Act of 1984, which will become effective June 18, 1984. The Commission hereby issues interim rules and requests comments on those changes to its General Order 4 (46 C.F.R. Part 510) that are required by the new legislation. Also included herein are interim rules revising certain other sections of General Order 4 which the Commission had under consideration at the time the Shipping Act of 1984 was signed.

DATES: *Effective Date:* Interim Rules effective June 18, 1984. Comments due on or before June 4, 1984.

SUPPLEMENTARY INFORMATION:

On March 20, 1984, the President signed the Shipping Act of 1984, which will become effective June 18, 1984. This legislation substantially alters the regulatory responsibilities of the Commission and directly impacts on the Commission's regulations pertaining to the ocean freight forwarding industry, General Order 4. A number of changes to General Order 4 are required by this new legislation. While most of the changes are technical in nature, some will have a significant impact on the industry.

Last August, the Commission issued a notice of proposed rulemaking in the *Federal Register* (48 F.R. 167 at p. 38856, Docket No. 83–35) proposing to revise certain provisions of General Order 4. In response to that notice, comments were received and evaluated by the staff. In view of the new legislation recently signed, the Commission has withheld adoption of final rules concerning those proposed changes noticed last August, and the Commission will again notice them as interim rules, as amended herein, for additional possible comment along with the changes required by the new legislation. It should be noted that the comments submitted in Docket No. 83–35, Proposed Revisions to General Order 4, will be incorporated into the record of this proceeding and it will not be necessary for commenters to submit their previous comments again in connection with this rulemaking proceeding.

The Commission's ultimate goal will be a single, comprehensive rule which will include all amendments required by new legislation as well as the changes noticed last August.

So as not to confuse issues, we discuss the changes to General order 4 required by new legislation under Part A, "Legislative Changes," of the Supplementary Information. In Part B, "Other Changes," we discuss the proposals previously noticed last August.

These interim rules will take effect on June 18, 1984, the effective date of the Shipping Act of 1984. If individuals believe that there are serious problems created by these interim rules which should be addressed immediately, they are free to bring their concerns to the attention of the Commission without prejudice to subsequently filing additional comments within the thirty day comment period. In any event, all interested parties have been provided thirty days to comment on the interim rules.

PART A—LEGISLATIVE CHANGES

The Shipping Act of 1984 has made several substantial changes in the regulation of the forwarding industry. The definition of an ocean freight forwarder is changed to mean any person in the United States who dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and processes the documentation or performs related activities incident to those shipments. Thus, there will be no prohibition against export shippers, sellers, consignees and purchasers of goods from the United States obtaining an ocean freight forwarder license as there currently is. Any class of person can obtain a license as an ocean freight forwarder if found qualified.

The qualifications for licensing will be changed from a fit, willing and able standard to an experience and character standard. We see, however, no great difference between the two standards. It appears that someone found unfit under the old standard would not possess the proper character to be licensed under the new standard.

The Commission will be able to revoke or suspend a license, after notice and hearing, where it finds that an ocean freight forwarder is not qualified to render forwarding services, or that it willfully failed to comply with a provision of the new Act or with a lawful order, rule, or regulation of the Commission (this would also include failure to honor financial obligations to the Commission such as for civil penalties). The Commission may also revoke a license for failure to maintain a surety bond. Again, we see no drastic differences between the old law and the new law in this area.

The payment of ocean freight forwarder compensation is still the prerogative of the carrier, although no conference or group of two or more carriers may deny in the export foreign commerce of the United States compensation to a forwarder or limit that compensation to less than a reasonable amount. On the issue of what is "reasonable", the Conferees' report accompanying the new legislation states:

> Rather than specify the limitation at 1¼ percent of the freight charge, as was done in the Senate version, the Conferees agree to proscribe any denial of compensation at less than a reasonable amount. "Reasonable" has been determined by the Federal Maritime Commission in those cases at which limitation of compensation was at issue to be no less than 1¼ percent. The Conferees view the approach taken by the Federal Maritime Commission as consistent with their continuing regulatory responsibility and assume that the Commission will be guided by its past actions when determining what a reasonable amount" will be.

An ocean freight forwarder is still required to provide the carrier with a certification that it is entitled to the payment of compensation. However, the form of the certification has been changed to require that the forwarder (1) engage, book, secure, reserve, or contract directly with the carrier or its agent for space aboard a vessel or confirm the availability of that space, and (2) prepare and process the ocean bill of lading, dock receipt, or other similar document with respect to the shipment. Carriers may not pay compensation for services described above more than once on the same shipment. Compensation may only be paid in accordance with the carrier's tariff provisions. No ocean freight forwarder may receive compensation on a shipment on which the ocean freight forwarder has a direct or indirect beneficial interest.

Section 20 of the new legislation, Repeals and Conforming Amendments, does not provide for the licensing of forwarders in the U.S. domestic off-shore trades. Hence, a person engaging in the business of ocean freight forwarding in the U.S. domestic off-shore trades will not be required to obtain a license from the Commission. Furthermore, General Order 4 (Part 510) will not apply to such activity.

The foregoing briefly outlines how the new legislation will impact on the forwarding industry. The Commission's regulations require changes to implement the new legislation. What follows is identification of the changes, section-by-section, required in General Order 4 to conform it with the new legislation. There are, however, several changes which occur throughout the rule that are better dealt with apart from the section-by-section analysis. These are:

1. Reference to "Independent Ocean Freight Forwarder" shall be changed to "Ocean Freight Forwarder".
2. Reference to the "Shipping Act, 1916" shall be changed to the "Shipping Act of 1984".
3. References to specific sections of the Shipping Act, 1916 shall be changed to the appropriate sections of the Shipping Act of 1984.
4. Reference to "oceangoing common carrier" shall be changed to "common carrier".

5. Reference to "Bureau of Certification and Licensing" shall be changed to "Bureau of Tariffs". This is required by internal reorganization and not by new legis1ation.
6. Any reference to the U.S. domestic off-shore trades shall be deleted.
7. The Authority shall be The Shipping Act of 1984.

Section 510.1 Scope

In paragraph (b), add language indicating that if a violation is willfully and knowingly committed the amount of the civil penalty may not exceed $25,000 for each violation. Also revise the lower range of penalties to specify such penalty may not exceed $5,000 instead of $1,000.

Add language to provide that each day of a continuing violation shall constitute a separate offense.

Section 510.2 Definitions

Add a definition for common carrier" as defined in the Shipping Act of 1984 (The Act). This term will include both vessel-operating common carriers and non-vessel-operating common carriers.

Delete the definition for "freight forwarder" as it is not necessary.

Amend paragraph (i) by eliminating reference to the domestic trades.

Delete the language in paragraph (j) and replace it with the definition of "ocean freight forwarder" contained in The Act.

Amend paragraph (1) so it comports with the definition of a non-vessel-operating common carrier contained in The Act.

Substitute the definition for "ocean common carrier" in The Act for the language contained in paragraph (n).

Add the definition for "shipment" in The Act.

Add the definition for "shipper" in The Act.

Substitute the definition of the "United States" in The Act for the language contained in paragraph (s).

Section 510.11 Basic requirements for licensing: eligibility

Amend paragraph (a) to indicate that the basic requirement will now be experience and character of the applicant and the filing of an appropriate bond.

Section 510.12 Persons not eligible

Delete the entire section as it is no longer necessary.

Section 510.14 Investigation of applicants

Delete the phrase "and independence" in paragraph (c).

Delete paragraph (e).

Section 510.15 Surety bond requirements

Delete the language contained in the third sentence in paragraph (a) and substitute statutory language that the surety company be acceptable by the Secretary of the Treasury.

Section 510.16 Denial of license

Amend the language so that the grounds will now be:

1. does not possess the necessary experience or character to render forwarding services;
2. has failed to respond to any lawful inquiry of the Commission; or
3. has made any willfully false or misleading statement to the Commission in connection with its application.

Section 510.17 Revocation or suspension of license

In subparagraphs (a)(l) and (a)(2), add "order" of the Commission. In subparagraph (a)(4), amend the language to indicate that a ground for revocation or suspension shall be where the Commission finds the licensee is no longer qualified to render freight forwarding services. Delete language in subparagraph (a)(5) and substitute language regarding a licensee's financial obligations to the Commission.

Section 510.18 Application after revocation or denial

Delete any reference to "unfit" or "lack of fitness" contained in this section and substitute "not qualified" or some variations thereof.

Section 510.19 Issuance and use of license

Amend language of this section by deleting references to fit, willing and able and substitute the necessary experience and character criteria. Also add language concerning the filing of the required surety bond.

Section 510.20 Changes in organization

Delete reference to "see section 15 of the Act" contained in paragraph (a)(6).

Section 510.21 Branch offices; interim operation

Although not affected by the new legislation, this section is no longer necessary, thus it will be deleted.

Section 510.32 Forwarder and principal; fees

Paragraph (a) is deleted as under the new legislation this prohibition will no longer be applicable.

Section 510.33 Forwarder and carrier; compensation

In paragraph (a), delete the first sentence. Amend the remaining language to clarify that the identity of the actual shipper must be disclosed on the bill of lading and in instances where the licensee is not also the actual shipper, the licensee's name may appear after the shipper's name.

In paragraph (c) amend the language of the certification to comply with the language contained in the new legislation.

In paragraph (d) add language that conferences or groups of carriers shall not deny compensation or limit the level to less than a reasonable amount.

In paragraph (f) amend language so it comports with the language contained in the new legislation.

In paragraph (9) make several technical changes to clarify that it applies only to non-vessel-operating carriers.

Section 510.35 Reports required to be filed

Paragraph (a) currently requires each licensee to file copies of its office stationery and invoice forms within sixty days of licensing. Although not affected by the new legislation, we do not believe that this requirement is necessary and, in order to reduce the burden on the industry, we are deleting the requirement.

In view of the proposed deletion of section 510.36 (see below), paragraph (b) of section 510.35 is deleted, as it contains reference to section 510.36.

Section 510.36 Section 15 Agreements

Under the new legislation, forwarders are not required to file any of their agreements in the U.S. foreign commerce with the Commission. Thus, this section is deleted in its entirety.

PART B—OTHER CHANGES

As indicated earlier, the changes discussed under this part were originally noticed for comment last August. In its notice of proposed rulemaking, the Commission had proposed nine areas of change to the current rules. Our discussion addresses the comments on each area of change separately and, in accordance therewith, we are adopting interim rules along with the changes discussed under Part A that are required by new legislation.

1. *Protecting the Shipping Public*

(The language changes for the specific rules addressed under this topic appear in Amendments Nos. 11 (section 510.13(e)) and 20 (section 510.31(b).)

The Commission proposed that forwarders who are affiliated with export shippers or sellers of goods from the United States be required to give notice on their office stationery and billing invoices that they are affiliated with one or more shippers or sellers of goods from the United States and, upon request, the forwarder would be required to identify such affiliations in writing. It was the Commission's belief that such notification would give potential clients the opportunity to choose whether or not to employ certain forwarders who may be controlled by or otherwise affiliated with a potential competitor of the client.

The comments generally favor the proposal and support the intent of the Commission in proposing the change. Two forwarders, however, oppose the proposal. Davidson Forwarding Company, (FMC License No. 1086) believes that the proposal would harm small forwarders which have no shipper affiliations. This forwarder feels that shippers would lean more toward forwarders that are affiliated. It suggests that forwarders be required to make annual certifications stating their affiliations similar to the annual anti-rebate certification. NAVTRANS International Freight Forwarding, Inc. (FMC License No. 2522) argues that the prohibition contained in section 20 of the Shipping Act, 1916, which prohibits the disclosure of any information concerning a shipment which may be used to the detriment of the shipper/consignee or may improperly disclose the business transaction to a competitor, is sufficient and, in the absence of any showing to the contrary, it would seem somewhat capricious at best to simply dismiss section 20 of that Act as ineffectual or insufficient. It sees the proposal as an attempt to artificially restrain competition among freight forwarders.

With respect to NAVTRANS' argument that section 20 of the 1916 Act is sufficient to protect the shipping public, we would point out that the Shipping Act of 1984 contains no counterpart for section 20 of the 1916 Act which pertains to ocean freight forwarders. Hence, the notification of shipper affiliations becomes all that more important in alerting unknowing shippers that the forwarder they deal with may be a potential competitor. Furthermore, in light of the removal of the prohibition against shippers obtaining an ocean freight forwarder license by the new legislation, we are modifying our proposal to require notification of the fact that the forwarder is an export shipper.

The National Customs Brokers & Forwarders Association of America, Inc. (hereinafter referred to as the National Association) has suggested a further revision to the notice requirement proposal. It recommends that the Commission require that the type size for the notice be the same as other portions of the forwarder's stationery. It fears that forwarders will put the notice in the smallest type possible. We do not believe the National Association's suggestion is practical as a forwarder's stationery may contain several different type sizes. Thus, we will not adopt the suggestion in our revised rule.

Also in this area, the Commission proposed to amend the rules to require forwarders to report to the Commission any changes in fact contained in the forwarder's original application form within thirty days. This rule is meant to rectify an oversight that occurred when the rules were revised in 1981. No commenter objected to the proposal.

In view of the favorable comments submitted regarding the proposals in this area, we will adopt the proposals, as modified above.

2. *The Invoicing Rules*

(See Amendments Nos. 21 (section 510.32(h) and 23 (section 510.34(b))

With regard to the invoicing rules, the Commission proposed three alternatives: (a) retain the current rules with no change; (b) delete the rules entirely; or (c) any modification falling between alternatives (a) and (b), including a rule that would allow a forwarder to provide a lump sum invoice but, at the same time, require the forwarder, upon request of its principal, to provide copies of any or all pertinent documents (such as invoices for trucking, warehousing, insurance, etc.) pertaining to the forwarder's invoice.

No commenter supported alternative (a), i.e., make no change. The overwhelming sentiment was that the Commission should delete all requirements pertaining to how forwarders should invoice their clients. Given the possibility that the Commission probably would not adopt final rules which would eliminate the invoicing rule, the commenters generally support changes in the current rules which would allow forwarders to provide lump sum billing with no breakout of costs. Further, it is suggested by the commenters that, where a forwarder chooses to utilize an itemized invoice, the forwarder be allowed to show only the total cost to the client for accessorial services, such as inland freight, insurance, warehousing, etc., instead of having to break out the forwarder's cost for the accessorial service and its markup on the accessorial service.

We are amending the current invoicing rule to permit forwarders to provide lump sum billing on their invoices to their shipper-clients without breaking out specific costs.

However the rule will require that the forwarder, upon request of its shipper-client, must provide a break out of costs and a copy of any pertinent document relating to the invoice, for example, invoices from third parties. We also are requiring a notice to this effect be placed on each invoice the forwarder renders to its shipper-clients. We believe the shipper-client should have a way of determining for itself whether the charges billed by the forwarder are reasonable and acceptable to it.

Additionally, to make it clear which particular documents a forwarder is required to retain in its files, we are amending section 510.34(b) to identify more specifically the types of documents, such as invoices for any service arranged by the forwarder and performed by others, that are to be retained by the forwarder.

3. *Sale or Transfer of Stock*

(See Amendment No. 18 (section 510.20(a)(5))

Section 510.20(a)(5) currently requires the Commission's prior approval of the sale or transfer of five percent or more of a forwarder's stock to ensure that licensees remain independent of shipper connections. With the passage of the Shipping Act of 1984, the need for the prior approval of sale/transfer of stock in a forwarder no longer exists, as forwarders are allowed by law to be shippers or shipper-connected. Therefore, we are deleting this requirement.

We would point out that forwarders will still be required to notify the Commission of any stock sale or transfer for our information under the adopted revision discussed earlier. See revised section 510.13(e).

4. *Arrangements with Unauthorized Persons*

(See Amendment No. 20 (section 510.31(e))

It was proposed to clarify section 510.31(e) to allow forwarders to hire and compensate bona fide sales agents for services rendered, provided that such services are restricted to soliciting and obtaining business for the forwarder and are not otherwise prohibited by law or regulation. Also, the Commission wished to clarify that the rule's intent is that when a forwarder is employed for the transaction of forwarding business by a person who is not the person responsible for paying the forwarding charges, the forwarder shall transmit to the person paying the forwarding charges a copy of its invoice for services rendered.

Comments received on the proposed clarifications were favorable. Hence, we adopt these clarifications as interim rules.

5. *Anti-Rebate Certification*

(See Amendments Nos. 20 (section 510.31(h) and 22 (section 510.33(c))

To obtain as much comment as possible, the Commission proposed two alternatives dealing with the issue of requiring forwarders to place an anti-rebate policy declaration on each invoice to a shipper-client and on each certification for freight forwarder compensation to an oceangoing common carrier: First, that no change be made in the current rule as it serves to reinforce the Commission's policy against rebates among carriers, forwarders and shippers and, second, that the rule be deleted leaving only the annual certification as suggested by the National Association.

Comments on the proposals support the deletion of the rule as it is perceived as burdensome to stamp each such document. The National Association further argues that Shipping Act, 1916, does not require forwarders to continuously certify an anti-rebate policy. It is generally felt by the commenters that the annual certification is sufficient. One forwarder, however, did suggest that the annual certification requirement be deleted and that the supposed burden of stamping each document can be alleviated by simply having documents preprinted with the required statement.

We agree with the one forwarder's comment that if the notice is preprinted there is no continual burden, and we would urge all forwarders to have their documents preprinted. This policy declaration is but one means of insuring that the Commission's policy against rebates is disseminated to unknowing shippers and it is consistent with the intent of section 15 of the new legislation. However, we do not believe it is necessary for forwarders to declare this policy to carriers, as the carriers are fully aware of the Commission's policy; in fact, carriers file annual certifications similar to those filed by forwarders. Therefore, we are amending section 510.31(h) to the extent that forwarders now be required to provide the anti-rebate policy declaration only to their shipper-clients and not additionally to carriers. We would point out that, in view of the foregoing rule, a conforming amendment to section 510.33(c) will be necessary to delete the reference to section 510.31(h) contained therein, and it is, therefore, included.

We would emphasize that the change here would not in any way affect the annual anti-rebate certification as each forwarder will still be required to file its annual certification of its policies against rebating as required by section 510.35(c) of General Order 4.

6. *Accounting to Principal*

(See Amendment No. 21 (section 510.32(k))

In lieu of requiring forwarders to obtain written consent to offset funds on each and every shipment, the Commission proposed that the forwarder either execute a written agreement with its principal which would allow the forwarder to offset funds on all of the principal's shipments, or obtain oral consent on each shipment.

The general view of the comments on this issue is best expressed by the comments of the National Association. It is argued that the licensing statute did not create a fiduciary relationship with the exporter and that the forwarder should not be considered as an agent of the shipper but rather as an independent contractor. The forwarder should be allowed to offset funds without the principal's consent just like other business persons. It adds, however, that if the Commission does not agree with its position, it would support the proposed changes.

We see the interim rules here as a compromise between retaining the current rule and doing away with the requirement entirely. As such, we believe that the changes will benefit all parties involved as they provide the forwarder with an option that can be employed as conditions dictate and, in the case of a written agreement, they leave no doubt between a forwarder and its client of what can be expected in situations concerning offsetting obligations.

7. *Section 15 Agreements, Exemptions*

(See Amendment No. 27 (section 510.36))

The Commission had earlier proposed to amend the rules to delete the requirement that non-exclusive cooperative working agreements between forwarders be reduced to writing.

In view of the fact that agreements between forwarders are not required to be filed with the Commission under the new legislation, we have decided earlier to delete section 510.36 in its entirety.

8. *Port-Wide Exemptions*

(See Amendment No. 22 (section 510.33(e))

The Commission proposed to modify section 510.33(e) to allow compensation to be paid to a forwarder who requests that the carrier or its agent perform some of the forwarding functions, if such carrier or agent is a licensed independent ocean freight forwarder, or if no other licensee is willing and able to perform such services. With this allowance, the current port-wide exemption provision contained in the section would be unnecessary and hence would be deleted.

Comments directly addressing this issue favor the proposed changes. Several commenters apparently did not understand completely the intent of the current rule and they strayed off onto a discussion of why carriers and agents should not be licensed.

In view of the favorable comments, we are adopting the proposed changes.

9. *Publication of Orders of Revocations*

(See Amendment No. 15 (section 510.17(c))

The Commission proposed that, instead of publishing the entire order of revocation in the *Federal Register*, a simple notice of such action be published.

The comments support this change. Therefore, we adopt the proposal.

Pursuant to 5 U.S.C. 601 *et seq.*, the Commission certifies that the interim rules published herein will not have a significant economic impact on a substantial number of small entities. The interim rules are intended to bring the Commission's regulations in line with new legislation. Further, they tend to lessen the regulatory burden upon the forwarding industry and they should have a cost-saving impact on daily operations.

Collection of information requirements contained in this regulation have been approved by the Office of Management and Budget under provisions of the Paperwork Reduction Act of 1980 (P.L. 96–511) and have been assigned control numbers 3072–0004 and 3072–0018.

List of Subjects in 46 CFR part 510:

Freight forwarders, Maritime carriers, Rates, Surety bonds, Exports.

THEREFORE, pursuant to 5 U.S.C. 553; sections 8, 10, 15, 17 and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1707, 1709, 1714, 1716 and 1718), the Commission is amending 46 CFR Part 510, as follows:

1. In part 510, add O.M.B. clearance numbers, and the authority citation appearing after the table of contents is revised to read as follows and all other authority citations are removed.

AUTHORITY: 5 U.S.C 553; secs. 8, 10, 15, 17 and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1707, 1709, 1714, 1716 and 1718).

[The information collection requirements contained in this part have been approved under O.M.B. numbers 3072–0004 and 3072–0018.]

2. References to "Independent Ocean Freight Forwarder", wherever they appear, shall be changed to "Ocean Freight Forwarder".

3. References to "Shipping Act, 1916", wherever they appear, shall be changed to "Shipping Act of 1984".

4. References to "Oceangoing Common Carrier", wherever they appear, shall be changed to "Common Carrier".

5. References to "Bureau of Certification and Licensing", wherever they appear, shall be changed to "Bureau of Tariffs".

6. In § 510.1, paragraph (b) is revised to read as follows:

§ 510.1 Scope.

* * * * *

(b) Information obtained under this part is used to determine the qualifications of freight forwarders and their compliance with shipping statutes and regulations. Failure to follow the provisions of this part may result in denial, revocation or suspension of a license for freight forwarding. Persons operating without the proper license may be subject to civil penalties not to exceed $5,000 for each violation unless the violation is willfully and knowingly committed, in which case, the amount of the civil penalty may not exceed $25,000 for each violation; for other violations of the provisions of this part, the civil penalties range from $5,000 to $25,000 for each violation. Each day of a continuing violation shall constitute a separate violation.

7. In § 510.2, remove paragraphs (f), (i), (j), (l), (n), and (s). In § 510.2(d), remove "§ 510.2(m) of this part" and insert "the definition of 'Ocean freight broker' in this section". In § 510.2(g), remove "freight forwarding services as specified in § 510.2(h) of this part" and insert" 'freight forwarding services' ".

8. In § 510.2, remove paragraph designations appearing before each definition; arrange definitions in alphabetical order. In definition of "freight forwarding services", redesignate paragraphs (1)–(13) as paragraphs (a)–(m), and add the following definitions in alphabetical order, to read as follows:

§ 510.2 Definitions.

* * * * *

"Common Carrier" means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(a) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(b) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

* * * * *

"From the United States" means oceanborne export commerce from the United States, its territories, or possessions to foreign countries.

* * * * *

"Non-Vessel-Operating Common Carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

"Ocean Common Carrier" means a vessel-operating common carrier; but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp.

* * * * *

"Ocean Freight Forwarder" means a person in the United States that:

(a) Dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(b) Processes the documentation or performs related activities incident to those shipments.

* * * * *

"Shipment" means all of the cargo carried under the terms of a single bill of lading.

"Shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

* * * * *

"United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

9. In §510.11, revise paragraph (a) to read as follows:

§510.11 Basic requirements for licensing; eligibility.

(a) *Necessary qualifications.* To be eligible for an ocean freight forwarder's license, the applicant must demonstrate to the Commission that:

(1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years experience in ocean freight forwarding duties in the United States, and the necessary character to render forwarding services; and

(2) It has obtained and filed with the Commission a valid surety bond in conformance with §510.15.

* * * * *

10. §510.12 is removed.

11. In §510.13, revise paragraph (e) to read as follows:

§510.13 Application for license.

* * * * *

(e) *Changes in facts.* Each applicant and each licensee shall submit to the Commission, in duplicate, an amended Form FMC–18 Rev., advising of any changes in the facts submitted in the original application, within thirty (30) days after such change(s) occur. In the case of an application for a license, any unreported change may delay the processing and investigation of the application and may result in rejection or denial of the application. No fee is required when reporting changes to an application for initial license under this section.

12. In §510.14, remove the phrase "and independence" in paragraph (c) and remove paragraph (e).

13. §510.15 is amended by revising paragraph (a), Introductory text, to read as follows:

§510.15 Surety bond requirements.

(a) *Form and amount.* No license shall be issued to an applicant who does not have a valid surety bond (FMC–59 Rev.) on file with the Commission in the amount of $30,000. The amount of such bond shall be increased by $10,000 for each of the applicant's unincorporated branch offices. Bonds must be issued by a surety company found acceptable by the Secretary of the Treasury. Surety Bond Form FMC–59 Rev. can be obtained in the same manner as Form FMC–18 Rev. under §510.13(a), and shall read as follows:

* * * * *

14. §510.16 is revised to read as follows:

§510.16 Denial of license.

If the Commission determines, as a result of its investigation, that the applicant:

(a) Does not possess the necessary experience or character to render forwarding services;

(b) Has failed to respond to any lawful inquiry of the Commission; or

(c) Has made any willfully false or misleading statement to the Commission in connection with its application,

a letter of intent to deny the application shall be sent to the applicant by certified U.S. mail, stating the reason(s) why the Commission intends to deny the application. If the applicant submits a written request for hearing on the proposed denial within twenty (20) days after receipt of notification, such hearing shall be granted by the Commission pursuant to its Rules of Practice and Procedure contained in Part 502 of this chapter. Otherwise, denial of the application will become effective and the applicant shall be so notified by certified U.S. mail. Civil penalties for violations of the Act or any Commission order, rule or regulation may be assessed in any proceeding on the proposed denial of a license or may be compromised for any such violation when a proceeding has not been instituted in accordance with Part 505 of this chapter.

15. In § 510.17, paragraphs (a) introductory text, and (a)(1), (a)(2), (a)(4), (a)(5) and (c) are revised to read as follows:

§ 510.17 Revocation or suspension of license.

(a) *Grounds for revocation.* Except for the automatic revocation for termination of a surety bond under § 510.15(d), or as provided in § 510.15(c), a license shall be revoked or suspended after notice and hearing for any of the following reasons:

(1) Violation of any provision of the Act, as amended, or any other statute or Commission order or regulation related to carrying on the business of forwarding;

(2) Failure to respond to any lawful order of or inquiry by the Commission

* * * * *

(4) Where the Commission determines that the licensee is not qualified to render freight forwarding services; or

(5) Failure to honor the licensee's financial obligations to the Commission, such as for civil penalties assessed or agreed to in a settlement agreement under Part 505 of this chapter.

* * * * *

(c) *Notice of Revocation.* The Commission shall publish in the *Federal Register* a notice of each revocation.

16. § 510.18 is revised to read as follows:

§ 510.18 Application after revocation or denial.

Whenever a license has been revoked or an application has been denied because the Commission has found the licensee or applicant to be not qualified to render forwarding services, any further application within 3 years of the date of the most recent conduct on which the Commission's notice of revocation or denial was based, made by such former licensee or applicant or by another applicant employing the same qualifying individual or controlled by persons on whose conduct the Commission based its determination for revocation or denial, shall be reviewed directly by the Commission.

17. In § 510.19, paragraph (a) is revised to read as follows:
§ 510.19 Issuance and use of license.

(a) *Qualification necessary for issuance.* The Commission will issue a license if it determines, as a result of its investigation, that the applicant possesses the necessary experience and character to render forwarding services and has filed the required surety bond.

* * * * *

18. In § 510.20, remove paragraph (a)(5) and in paragraph (a)(6), remove the phrase: "(see section 15 of the Act)".

19. Remove § 510.21.

20. In § 510.31, paragraphs (b), (e) and (h) are revised to read as follows:
§ 510.31 General duties.

* * * * *

(b) *Stationery and billing forms; notice of shipper affiliation.*

(1) The name and license number of each licensee shall be permanently imprinted on the licensee's office stationery and billing forms. The Commission may temporarily waive this requirement for good cause shown if the licensee rubber stamps or types its name and FMC license number on all papers and invoices concerned with any forwarding transaction.

(2) When a licensee is a shipper or seller of goods exported from the United States or affiliated with such an entity, the licensee shall have the option of either identifying itself as such or its affiliations on its office stationery and billing forms, or including the following notice on such items:

> This company is a shipper or seller of goods exported from the United States or affiliated with such an entity. Upon request, a general statement of its business activities or that of its affiliations, along with a written list of the names of such affiliates, will be provided.

* * * * *

(e) *Arrangement with unlicensed persons.* No licensee shall enter into an agreement or other arrangement (excluding sales agency arrangements not prohibited by law or this part) with an unlicensed person so that any resulting freight forwarding fee, compensation, or other benefit inures to the benefit of the unlicensed person.

When a licensee is employed for the transaction of forwarding business by a person who is not the person responsible for paying the forwarding charges, the licensee shall transmit to the person paying the forwarding charges a copy of its invoice for the services rendered.

* * * * *

(h) *Policy against rebates.* The following declaration shall appear on all invoices under § 510.32(h):

> (Name of firm) has a policy against payment, solicitation, or receipt of any rebate, directly or indirectly, which would be unlawful under the United States Shipping Act of 1984.

21. In § 510.32, paragraph (a) is removed and paragraphs (h) and (k) are revised to read as follows:

§ 510.32 Forwarder and principal; fees.

(a) [Reserved.]

* * * * *

(h) *Invoice; documents available upon request.* Licensees shall not be required to itemize the components of charges on shipments. However, upon request of its principal, each licensee shall provide a complete breakout of such components of its charges and a true copy of any underlying document or bill of charges pertaining to the licensee's invoice. The following notice shall appear on each invoice to a principal:

> Charges indicated herein may include a markup. Upon request, we shall provide a detailed list of the components of these charges and a true copy of any pertinent document relating to the charges contained in this invoice.

* * * * *

(k) *Accounting to principal.* Each licensee shall account to its principal(s) for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance monies received for claims, proceeds of c.o.d. shipments, drafts, letters of credit, and any other sums due such principal(s). These sums shall be forwarded promptly to the principal or, with the principal's consent, may be used to offset the licensee's outstanding receivables due from such principal. A memorandum of such consent shall be retained by the licensee in each shipment file. Alternatively, the licensee may execute a written agreement with its principal which would authorize the licensee to offset funds on all the principal's shipments handled by the licensee.

22. In § 510.33, paragraphs (a), (c), (d), (e), (f) and (g) are revised to read:

§ 510.33 Forwarder and carrier; compensation.

(a) *Disclosure of principal.* The identity of the actual shipper must always be disclosed on the bill of lading. The licensee's name may appear after the name of the actual shipper, but the licensee must be identified as the shipper's agent.

* * * * *

(c) *Form of certification.* Prior to receipt of compensation, the licensee shall file with the carrier a signed certification as set forth below on one copy of the relevant ocean bill of lading which indicates performance of the listed services:

> 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 performed the following services:
>
> (1) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space, and
>
> (2) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

A copy of such certificate shall be retained by the licensee pursuant to § 510.34.

(d) *Compensation pursuant to tariff provisions.* No licensee, or employee thereof, shall accept compensation from an ocean-going common carrier which is different than that specifically provided for in the carrier's effective tariff(s) lawfully on file with the Commission. No conference or group of common carriers shall deny in the export commerce of the United States compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount.

(e) *Compensation for services performed by underlying carrier.* No licensee shall charge or collect compensation in the event the underlying common carrier or its agent has, at the request of such licensee, performed any of the forwarding services set forth in § 510.2(h) unless such carrier or agent is also a licensee, or unless no other licensee is willing and able to perform such services.

(f) *Duplicative compensation.* A common carrier shall not pay compensation for the services described in § 510.33(c) more than once on the same shipment.

(g) *Licensed nonvessel-operating 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 ocean common 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 ocean common carrier pay compensation to such person for such shipment.

* * * * *

23. In §518.34, paragraphs (b) and (e) are revised to read as follows:

§510.34 Records required to be kept.

* * * * *

(b) *Types of services by shipment.* A separate file shall be maintained for each shipment. Each file shall include a copy of each document prepared, processed, or obtained by the licensee, including each invoice for any service arranged by the licensee and performed by others, with respect to such shipment.

* * * * *

(e) *Agreements to offset funds.* Any written agreement, or a memorandum of any oral agreement, with a principal to offset funds, as provided in §510.32(k), shall be retained by the licensee.

24. In §510.35, remove paragraphs (a) and (b).

25. In §510.35(c), remove "section 21(b) of the Shipping Act, 1916" and insert "section 15(b) of the Shipping Act of 1984".

26. In §510.35(c), remove "46 CFR parts 510 and 552" and insert "46 CFR parts 510 and 582".

27. Remove §510.36.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 536]

DOCKET NO. 84–21

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES—SERVICE CONTRACTS AND TIME/VOLUME CONTRACTS

AGENCY:	Federal Maritime Commission.
ACTION:	Interim Rule and Request for Comments.
SUMMARY:	This rule governs the form and use of service contracts, authorized by the Shipping Act of 1984, as well as the use of time/volume contracts. It is proposed that both types of contracts be accorded similar regulatory treatment and be integrated with existing regulations relating to time/volume rates. The existing time/volume rules would also be expanded to permit time/revenue contracts.
DATES:	Interim Rule effective on June 18, 1984 except paragraph (f) of § 536.7 which is under OMB review. Comments on Interim Rule due within 90 days after publication in the *Federal Register*.

SUPPLEMENTARY INFORMATION:

This rule is intended to implement the provisions of the Shipping Act of 1984 (the Act) relating to service contracts between shippers or shippers' associations and ocean common carriers or conferences. The relevant statutory provisions relating to service contracts appear at sections 3(21), 4(a)(7), and 8(c) of the Act (46 U.S.C. app. 1702(21), 1703(a)(7), and 1707(c)). Section 3(21) defines a service contract as an agreement between a shipper and a carrier or conference wherein the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period and the carrier commits to a certain rate or rate schedule and a defined service level. Section 4(a)(7) brings conference agreements to regulate or prohibit service contracts within the scope of the Act. Section 8(c) provides that service contracts that are not otherwise exempted must be filed in confidence with the Commission and that their essential terms must be filed with the Commission and made available in tariff format to all similarly situated shippers. The exclusive remedy for a breach of a service contract is an action in an appropriate court, unless the parties agree otherwise.

In light of the similarity between service contracts authorized by the Act and time/volume rate contracts provided for in the Commission's existing regulations (46 CFR § 536.7), the Commission believes that these two types of rate contracts should be accorded similar treatment. The Commission therefore proposes to carry forward most of its existing requirements relating to time/volume contracts and apply them to service contracts. It should be noted, however, that because of the statutory definition of "service contract," such contracts have been restricted to "ocean common carriers" while time/volume contracts are available to all "common carriers," including as a result, non-vessel operating common carriers.

In addition, it is proposed that volume incentive arrangements, such as the ones recently investigated by the Commission in Docket No. 83–31, be considered as a type of time/volume contract (wherein freight revenues rather than volume of cargo are used as the basis for a discount) and treated accordingly under the rule.[1]

This rule covers the use of time/volume contracts, although the Act expressly provides only for service contracts and addresses time/volume only in terms of rates.[2] Time/volume contracts are a traditional form of shipper-carrier cargo transportation arrangement presently authorized by the Commission's rules and actively engaged in by the ocean shipping industry.[3] They have not been expressly precluded by the Act. In fact, the definition of "loyalty contract" clearly recognizes the concept of a "contract based upon time-volume rates" (section 3(14)). Moreover, the legislative history of the Act indicates that Congress was aware that time/volume rates have historically been predicated upon underlying contract commitments.[4] We presume that Congress also recognized that these contracts are presently sanctioned by the Commission. Finally, time/volume contracts differ from service contracts in that the former do not contractually obligate the carrier/conference to any particular level of service or by their terms otherwise impose any other service commitment. The rule therefore provides for the filing of both time/volume and service contracts. In the event, however, that a carrier or conference chooses to offer a time/volume *rate* in its tariff, without basing that rate on an underlying contractual arrangement, the provisions of the rule would not apply. Offerings of time/volume rates not based upon contracts are governed by section 8(a) of the Act.

The Act requires that service contracts be filed in confidence with the Commission and that their essential terms be published in tariff format.

[1] The volume incentive arrangements under review in Docket No. 83–31 provided discounts or refunds to shippers if their freight revenues exceeded a stated minimum over a fixed time. Administrative Law Judge Joseph N. Ingolia (Presiding Officer) found that these volume incentive arrangements did not violate certain provisions of the Shipping Act, 1916. *Volume Incentive Program—Possible Violations of the Shipping Act, 1916*, 26 F.M.C. 219 (1984). In a related matter, the Presiding Officer concluded that although rulemaking may be advisable with respect to volume incentive programs, no rulemaking was necessary in that particular proceeding, especially in light of the enactment of the Shipping Act of 1984. *Volume Incentive Program—Possible Violations of the Shipping Act, 1916*, 26 F.M.C. 307 (1984).

[2] Section 8(b) of the Act states:

> Time-Volume Rates—Rates shown in tariffs filed under subsection (a) may vary with the volume of cargo offered over a specified period of time.

[3] *See Time/Volume Rate Contracts*, 25 F.M.C. 1 (1982); 46 CFR 536.7.

[4] H.R. Rep. No. 53, Part 1, 98th Cong., 1st Sess. 34 (1983).

It appears that there is no regulatory purpose to be served by treating time/volume contracts any differently. The rule therefore accords similar treatment to time/volume contracts, *i.e.* they must be filed with the Commission on a confidential basis with their essential terms made available to similarly situated shippers.

The Act does not specifically require that the essential terms of service contracts be set forth in tariffs filed with the agency, but rather states only that they be published in "tariff format." However, the legislative history of the Act does indicate that Congress contemplated that the essential terms of service contracts would be published in tariffs. The Senate Committee on Commerce, Science and Transportation, in commenting on a provision identical to section 8(c), noted:

> For public information, however, all "essential terms," as specifically enumerated, shall be published and filed in tariffs to ensure that such essential terms shall be available to all shippers similarly situated. This objective is consistent with the rationale for tariff publication and, accordingly, the essential terms must be stated with sufficient specificity to serve that purpose.

S. Rep. No. 3, 98th Cong., 1st Sess. 31 (1983). This is further supported by the statement of the House Merchant Marine and Fisheries Committee that: "It is hoped that the requirement that a service contract's essential terms be *filed publicly* so that those terms are available to all other shippers who may wish to use them, will preserve an important element of the common-carriage concept that the bill is based on." H.R. Rep. No. 53, at 17 and 34 (emphasis added). The Conference Report (H.R. Rep. No. 600, 98th Cong., 2nd Sess. (1984)) does not contradict the House and Senate Committees' stated intention that the essential terms of service contracts be publicly available in tariffs. It would appear, therefore, that a public filing appended to a tariff is not only consistent with the relevant legislative history but also may be the only practical method by which the Commission can ensure that the Congressional objective is met and that service contracts are in fact offered to all similarly situated shippers. The rule therefore requires that the essential terms of service and time/volume contracts be published in a special appendix to tariffs on file with the Commission.

The requirement that a service contract's "essential terms" be appended to a conference's tariff should not suggest the application of independent action required by section 5(b)(8) to such contracts. Conferences have specifically been provided the authority to regulate or prohibit the use of service contracts (section 4(a)(7)). Moreover, the Conference Report makes it clear that independent action was not meant to apply to service contracts by stating:

> Section 8(a) does not require that service contracts be filed in a tariff. Consequently, section 5(b)(8) does not require conferences

> to permit their members a right of independent action on service contracts. The conferees agree that section 8(c) of the bill, which authorizes the use of service contracts, cannot be read as undermining the authority of a conference to limit or prohibit a conference member's exercise of a right of independent action on service contracts. However, conference agreements must permit independent action on time-volume rates in section 8(b), since time-volume rates must be filed under section 8 (a).

H.R. Rep. No. 600, at 29.[5]

The rule may, in certain circumstances, result in the publication of contract terms beyond those delineated as "essential" in the statute. Essential terms numbered (d)(1) through (d)(7) are the basic essential terms listed in the Act. The additional terms (numbered (d)(8) and (d)(9)) are further elaborations on these essential terms. They are not, however, mandatory in all contracts, but rather may or may not apply depending on the agreement reached between the initial contracting parties. These additional terms are based upon experience gained in the administration of time/volume contracts, which contained similar provisions and, to the extent they are part of the contract, they should be made available to all other similarly situated shippers.

It should also be noted that, rather than require a statement of the "linehaul rate," the rule requires a statement of "the contract rate, rates or rate schedule, including whether any ancillary charges shall apply." This is consistent with Congress' intent that the essential terms include "all compensation to be paid." S. Rep. No. 3, at 31, 32.

It is proposed that time/volume and service contract terms be located in a special appendix to a tariff, so that the essential terms of the time/volume and service contracts will be readily available and identifiable to all shippers. The rule will also require that tariffs specify in the "Index of Commodities" the existence of any time/volume or service contract applicable to any commodity listed. In addition, the rule will require that contracts (both time/volume and service) be assigned a number and bear a cross-reference to the applicable tariffs to which the "essential terms" are attached so that a comparison can be made between the terms in the confidential contracts and those published in the appendix.

In the past the Commission has rejected amendments to time/volume contracts in instances where the amendment would have resulted in a retroactive adjustment in the original contract terms. The rule continues this policy. Once a time/volume or service contract is effective, any modification of its terms is treated as a new contract subject to the filing and publication requirements of this regulation, and is limited to prospective application. Carriers and conferences should draft their contract terms accordingly. Fail-

[5] This rule does not address the issue of how the Act's mandatory independent action requirement affects time/volume rates and time/volume contracts. These matters will be considered in the Commission's rulemaking governing agreements subject to the Act, which will be published soon after this rule.

ure to adhere to the terms of a service or time/volume contract could violate some of the prohibited acts set forth in section 10 of the Act (46 U.S.C. app. 1709).

The record keeping requirement contained in paragraph (f) of the rule contemplates a retention of shipping documents, such as bills of lading and disability notices, and the designation of a resident agent as a repository. The designation of an agent and the retention of records are designed to allow ready access to carrier records to ensure that contract rate deficiencies can be promptly addressed. These requirements have proven to be a minimal burden under the existing time/volume contract regulation. We believe that they are necessary to enable the Commission to adequately carry out its policing and surveillance functions under the new Act, particularly as it relates to ensuring that the essence of shipper-carrier contracts are made available to all shippers similarly situated. In addition, the records retained under this section should assist the Commission to carry out its obligations under section 18 of the Act (46 U.S.C. app. 1717).

The Commission has had no prior experience dealing with service contracts, since such arrangements have only recently been legitimized by the new Act. This rule is, therefore, based in large part on the Commission's experience with time/volume contracts, a shipper/carrier arrangement with which the Commission is more familiar. This approach is intended to reflect the Congressional concern that the use of service contracts ". . . not be employed so as to discriminate against all who rely upon the common carrier tradition of the liner system," and the expectation that ". . . the FMC . . . be cognizant of the effects of common carriage that abuse of service contracting may occasion." H.R. Rep. No. 53, at 17. The Commission recognizes that some adjustments in the rule may have to be made and, accordingly, seeks guidance from all interested persons.

This rule is being published as an interim rule with opportunity for comment. It will serve as an interim rule until such time as a final rule is adopted.[6] This interim rule will take effect on June 18, 1984, the effective date of the Shipping Act of 1984, unless otherwise modified. All interested persons have been provided 90 days to comment on the proposed rule. This interim rule and all comments filed within the 90-day period will be used as the basis for a final rule pursuant to the requirements of the Administrative Procedure Act (5 U.S.C. 553). If individuals believe that there are serious problems created by this interim rule which should be addressed immediately, they should submit these concerns in writing to the Commission without prejudice to subsequently filing additional comments within the 90-day comment period.

This interim rule is being added to current Part 536, the rest of which will be the subject of a separate rulemaking, which will result in the

[6] The Commission was given the authority to prescribe interim rules, without adhering to notice and comment requirements, by section 17(b) of the Shipping Act of 1984.

redesignation of Part 536 as Part 580 in Subchapter D, "Regulations Affecting Maritime Carriers and Related Activities in Foreign Commerce." When all the separate rulemakings affecting current Part 536 are finalized, it may be necessary to reorganize that Part so that the definitions appearing in paragraph (a) of the attached section 536.7 are worked into the definitions' section of current Part 536, *i.e.*, section 536.2, and are renumbered appropriately.

The Commission finds that this amendment to its rules is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Section 601(2) of the Act excepts from its coverage any "rule of particular applicability relating to rates . . . or practices relating to such rates . . ." As the instant rule relates to particular applications of rates and rate practices, the Regulatory Flexibility Act requirements are inapplicable.

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3504 (h)). Comments on the information collection aspects of this rule should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Federal Maritime Commission. List of subjects in 46 CFR Part 536:

Maritime Carriers, Rates

Therefore, pursuant to 5 U.S.C. 553 and sections 8 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707 and 1716), the Federal Maritime Commission proposes to amend Title 46, CFR Part 536, as follows:

1. Remove paragraph (p) of § 536.2;
2. Revise § 536.7 to read as follows:

§ 536.7—SERVICE CONTRACTS AND TIME/VOLUME CONTRACTS

(a) *Definitions.* The following definitions shall apply for purposes of this section:

(1) "contract party" means a party signing a contract as shipper or carrier and any parent, subsidiary, or other related company or entity including the membership of any shippers' association, conference, or agreement who may engage in the shipment of commodities in the trade covered by the contract.

(2) "geographic area" means the general location from which or to which contract cargo will move in intermodal service, the scope of which will vary depending on the size of a particular country.

(3) "port range" means those ports in the countries of loading or unloading of the contract cargo that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

(4) "service contract" means a contract between a shipper or shippers' association and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

(5) "shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(6) "time/volume rate" means a freight rate which varies with the volume of cargo offered or freight revenues received over a specified period of time.

(7) "time/volume contract" means a contract between a shipper or shippers' association and a common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo or freight revenues, over a fixed time period, and the common carrier or conference commits to a certain rate or rate schedule.

(b) *Filing Requirements.* Except for contracts relating to bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, every ocean common carrier or conference which enters into a service contract or every common carrier or conference which enters into a time/volume contract with a shipper or shippers association shall file with the Director, Bureau of Tariffs a true and complete copy of each contract prior to its effective date. Such contract shall clearly state:

(1) the contract parties;

(2) the essential terms;

(3) a contract number bearing the prefix "SC" for service contract or "TV" for time/volume contract; and

(4) the applicable tariff identified by its Commission tariff number, to which the essential terms have been appended.

(c) *Confidentiality.* All service contracts and time/volume contracts filed with the Commission will, to the full extent permitted by law, be held in confidence.

(d) *Publication of Essential Terms.* The essential terms of all service and time/volume contracts required to be filed with the Commission shall be made available to all shippers or shippers' associations under the same terms and conditions for a period of at least thirty (30) days from filing. The essential terms for service and time/volume contracts shall be located in a separate appendix to tariffs on file with the Commission and shall bear a reference to their respective contract numbers. Every commodity listed in the "Index of Commodities" section of each tariff to which a time/volume or service contract applies shall be annotated to indicate the existence of such contract. The essential terms shall include, where applicable, the following:

(1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(2) the commodity or commodities involved;

(3) the minimum quantity of cargo or freight revenue necessary to obtain the rate or rate schedule;

(4) the contract rate, rates or rate schedule, including whether any ancillary charges shall apply;

(5) the effective time period of the contract;

(6) carrier or conference service commitments;

(7) liquidated damages for nonperformance, if any; or where the volume requirement will not be met during the contract period in situations other than those described in paragraph (d)(9) below, the rate, charge, or rate basis which will be applied;

(8) an identification of the shipment records which will be maintained to support the contract; and

(9) a clear description of any circumstance which will permit:

(i) a reduction in the quantity of cargo or amount of revenues required under the contract,

(ii) an extension of the contract period without any change in the contract rate or rate schedule,

(iii) a discontinuance of the contract, or

(iv) other deviations from the terms of the contract.

(e) *Contract Modifications.* Amendments to contracts on file with the Commission shall be treated as new contracts subject to the filing and publication requirements of this section. No new contract or contract modification may retroactively modify the terms or effects of a previously filed contract.

(f) *Resident Agent.* Every common carrier and conference shall designate a resident representative in the United States who shall maintain contract shipment records for a period of five years from the completion of each contract.

(g) *Rejection of Essential Terms.* Within 15 days of filing, the Commission may reject the statement of essential terms for any service or time/volume contract for failure to conform to the requirements of this section.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 587]

DOCKET NO. 84–22

ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

AGENCY: Federal Maritime Commission.

ACTION: Interim Rule and Request for Comments.

SUMMARY: This rule implements section 13(b)(5) of the Shipping Act of 1984. The Shipping Act of 1984 will become effective on June 18, 1984. The rule describes the procedures to be followed when undue impairment of the access of a vessel documented under the laws of the United States (U.S.-flag vessel) to an ocean trade between foreign ports is alleged to exist and the actions which the Commission may take to address such conditions.

DATES: Interim Rule effective June 18, 1984. Comments on Interim Rule due August 14, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (the Act) was enacted on March 20, 1984 with an effective date of June 18, 1984. Section 13(b)(5) (46 U.S.C. app. 1712(b)(5)) of the Act provides that:

> If, after notice and hearing, the Commission finds that the action of a common carrier, acting alone or in concert with any person, or a foreign government has unduly impaired access of a vessel documented under the laws of the United States to ocean trade between foreign ports, the Commission shall take action that it finds appropriate, including the imposition of any of the penalties authorized under paragraphs (1), (2), and (3) of this subsection [13(b)].[1]

This rule will implement section 13(b)(5) of the Act, and will constitute a new part, 46 CFR Part 587, entitled: *Actions to Address Conditions Unduly Impairing Access of U.S.-Flag Vessels to Ocean Trade Between Foreign Ports*, which will be included in new *SUBCHAPTER D—REGULA-*

[1] These penalties include suspension of the tariffs of a common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, and the imposition of a civil penalty of not more than $50,000 per shipment for the acceptance or handling of cargo for carriage under a tariff that has been suspended or after the common carrier's right to utilize that tariff has been suspended. *See* 46 U.S.C. app. 1712(b)(1)(2)(3).

TIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES IN FOREIGN COMMERCE.

Section 13(b)(5) derives in part from section 14a of the Shipping Act of 1916 (46 U.S.C. 813) which empowered the Commission to investigate arrangements which unfairly excluded U.S.-flag carriers in foreign-to-foreign trades.[2] Section 14a was not considered adequate to protect U.S.-flag carriers in the new international ocean shipping environment. Section 13(b)(5) is intended to provide this needed protection and more specifically to address situations that may arise when contracting parties implement the United Nations Conference on Trade and Development Code of Conduct for Liner Conferences (UNCTAD Code). The UNCTAD Code, among other things, provides for a cargo sharing framework for conferences between contracting nations. Because the United States is not a contracting party to this Code, protecting the right of access of U.S.-flag carriers to trades where the UNCTAD Code will apply has been a central issue in maritime discussions with other nations of the Organization for Economic Cooperation and Development.[3] Section 13(b)(5) protects such rights in all cross trades, on a basis of reciprocity and thereby is consistent with one of the stated goals of the Act to encourage the development of an economically sound and efficient U.S.-flag liner fleet.

This rule delineates the procedures to be followed when an allegation of undue impairment of the access of a U.S.-flag vessel to a cross trade is made. It describes the kinds of information deemed relevant to a decision concerning such allegations, and the actions which the Commission may take in response, should it determine that conditions unduly impairing access of a U.S.-flag vessel to a trade between foreign ports exist.

In some respects, the section 13(b)(5) rule is similar to that implementing section 19 of the Merchant Marine Act of 1920 (46 U.S.C. 876(1)(b)).[4] Section 13(b)(5), however, specifically requires that notice and opportunity for hearing be afforded. The proposed rule fashions a procedure which is intended to fulfill this requirement and at the same time preserve the flexibility of the Commission to act expeditiously to address conditions of unduly impaired access. Such flexibility is necessary in order to assure that a U.S.-flag carrier does not suffer harm before remedial action is taken.

The Commission anticipates that problems relating to alleged impairment of U.S.-flag vessel access to cross trades will arise primarily in connection with foreign government laws and practices. However, section 13(b)(5) also empowers the Commission to take action where such undue impairment stems from commercial practices. The Commission does not propose to

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[2] *See* H.R. Rep. No. 53, 98th Cong., 1st Sess. 22–23 (hereinafter referred to as House Report); S. Rep. No. 3, 98th Cong., 1st Sess. 38 (1983) (hereinafter referred to as Senate Report).

[3] *See* House Report at 23 and Senate Report at 38.

[4] The Commission's rules implementing section 19 presently may be found at 46 CFR Part 506. Part 506 is to be redesignated as 46 CFR Part 585 and transferred to new Subchapter D of the Commission's rules.

exclude alleged impaired access due to foreign government implementation of bilateral or multilateral treaties or other international agreements from its consideration under this rule. The Commission interprets the phrase "ocean trade between foreign ports" in section 13(b)(5) to include foreign-to-foreign ocean trade involving intermodal movements.

Section-by-Section Discussion

Section 587.1 states the purpose of this part which is to protect U.S.-flag carriers from being excluded or denied reasonable access to trades between foreign countries. The rule preserves the Commission's flexibility to act swiftly when harm to a U.S.-flag carrier is imminent. This rule, however, is not intended to interfere with the normal forces of competition in the marketplace. This section therefore states that a condition of unduly impaired access will be found only where it is shown that a U.S.-flag carrier has the ability to enter a particular trade or where actual participation in a trade by a U.S.-flag carrier is being eroded for reasons other than its commercial ability to compete. Finally, this section recognizes that U.S. maritime policy, U.S. Government shipping arrangements with other nations, and the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom action is contemplated, must be weighed when the Commission considers action under section 13(b)(5).

Section 587.2 sets forth those factors which would indicate the existence of conditions of unduly impaired access. This section makes clear that it is not necessary for a U.S.-flag carrier to suffer irreparable harm before relief under section 13(b)(5) may be granted. Such relief is available where it is shown that impairment of access is presently occurring or will likely occur because of existing or proposed government or commercial actions.

Section 587.3 identifies those persons who may file a petition for relief under section 13(b)(5) and provides for the filing of such a petition with supporting affidavits of fact and memoranda of law with the Commission Secretary. This section also describes the contents of a petition for relief. Petitions which are deficient shall be returned with an explanation of the reason for rejection. Only petitions which meet these requirements will be noticed in the *Federal Register* to ensure the consideration of only *bona fide* petitions. This procedure is intended to discourage the filing of frivolous petitions and the abuse of these procedures for competitive and other reasons.

Section 587.4 is intended to provide further guidance as to the kind of information which the Commission regards as relevant to its consideration of matters arising under section 13(b)(5). The Commission may receive such relevant information from any reliable source. Such information shall be made part of the record and may be commented upon by any interested persons. Petitions and responses thereto and any accompanying affidavits and documents shall also be part of the record. The record established in a proceeding may provide the basis for Commission decision, including the imposition of sanctions.

Section 587.5 provides for notice to the Secretary of State of pending section 13(b) (5) matters. The Commission may, at its discretion, simultaneously initiate a proceeding under this part. Alternatively, the Commission may allow diplomatic negotiations to proceed or be completed before initiating any proceeding under this part.

Section 587.6 establishes procedures for hearing, either upon the filing of a petition which meets the requirements of section 587.3 or by the Commission upon its own motion. The Act does not specify any particular hearing procedure to be followed in section 13(b)(5) proceedings. Such proceedings could, depending on the circumstances, be limited to written submissions. The Commission may also undertake more formal procedures. Adversely affected parties will, however, be provided an opportunity to respond to any allegations of unduly impaired access under whatever procedure is used in a particular situation.

Section 587.7 enumerates sanctions which the Commission may impose when and where conditions of unduly impaired access of a U.S.-flag vessel are determined to exist. The Act gives the Commission broad authority in this regard. In addition to the specific penalties authorized under section 13(b) (1), (2) and (3), the Act empowers the Commission to take other action that it considers appropriate. This section provides for publication in the *Federal Register* of any decision imposing sanctions issued under this part. This order will generally be made effective 30 days after publication. This period is intended to accommodate the 10-day statutory review period provided the President, and allow a final opportunity for diplomatic resolution of the matter prior to the imposition of sanctions.

Section 587.8 implements the requirement under section 13(b)(6) of the Act that any order under section 13(b) be submitted to the President.

Section 587.9 makes explicit the Commission's power to suspend, discontinue or postpone proceedings under section 13(b)(5). This section also recognizes the importance of national defense and foreign policy concerns and provides for postponement, discontinuance or suspension if the President informs the Commission that such actions are required for reasons of national defense or the foreign policy of the United States.

This rule is being published as an interim rule with opportunity for comment. It will serve as an interim rule until such time as a final rule is adopted.[5] This interim rule will take effect on June 18, 1984, the effective date of the Shipping Act of 1984, unless otherwise modified. All interested persons have been provided 90 days to comment on the proposed rule. This interim rule and all comments filed within the 90-day period will be used as the basis for a final rule pursuant to the requirements of

[5] The Commission was given the authority to prescribe interim rules, without adhering to notice and comment requirements, by section 17(b) of the Shipping Act of 1984.

the Administrative Procedure Act (5 U.S.C. 553). If individuals believe that there are serious problems created by this interim rule which should be addressed immediately, they should submit these concerns in writing to the Commission without prejudice to subsequently filing additional comments within the 90-day comment period.

The Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) that the proposed rule will not if promulgated have a significant economic impact on a substantial number of small entities, within the meaning of that Act. The primary economic impact of the proposed rule would affect common carriers by water, which generally are not small entities. A secondary impact may fall on shippers, some of which may be small entities, but that impact is not considered to be significant.

LIST OF SUBJECTS IN 46 CFR PART 587:

Foreign relations, Foreign trade, Maritime carriers, Rates and fares.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 13(b)(5), 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5), 1714 and 1716), the Federal Maritime Commission hereby proposes to amend Title 46, Code of Federal Regulations, by adding new Part 587 to Subchapter D to read as follows:

PART 587—ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

Sec.

AUTHORITY: 5 U.S.C. 553; secs. 13(b)(5), 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5), 1714, and 1716).

§ 587.1 Purpose.

(a) It is the purpose of the regulations of this part to enumerate certain conditions resulting from the action of a common carrier acting alone or in concert with any person, or a foreign government, which unduly impair the access of a vessel documented under the laws of the United States (hereinafter "U.S.-flag vessel") to ocean trade between foreign ports, and to establish procedures by which the owner or operator of a U.S.-

flag vessel (hereinafter "U.S.-flag carrier") may petition the Federal Maritime Commission for relief under the authority of section 13(b)(5) of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5)). It is the further purpose of the regulations of this part to indicate the general circumstances under which the authority granted to the Commission under section 13(b)(5) may be invoked, and the nature of the subsequent actions contemplated by the Commission. This part also furthers the goals of the Act with respect to encouraging the development of an economically sound and efficient U.S.-flag liner fleet as stated in section 2 (46 U.S.C. app. 1701).

(b) The rules of this part implement the statutory notice and hearing requirement and ensure that due process is afforded to all affected parties. At the same time, the rules allow for flexibility in structuring proceedings so that the Commission may act with expedition whenever harm to a U.S.-flag carrier resulting from impaired access to cross trades has been demonstrated. The provisions of 46 CFR Part 502 shall not apply to this part except for those provisions governing *ex parte* contacts and as the Commission may otherwise determine by order.

(c) The condition of unduly impaired access will be found only where a U.S.-flag carrier is fit, willing and able to enter a trade in which its access is being unduly impaired, or where actual participation in a trade by a U.S.-flag carrier is being eroded for reasons other than its commercial ability or competitiveness. However, the procedures of this part are not an instrument for harassment of foreign-flag carriers operating in the U.S. foreign trades.

(d) In examining conditions in a trade between foreign ports, and in considering appropriate action, the Commission will give due regard to U.S. maritime policy and U.S. Government shipping arrangements with other nations, as well as the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom Commission action is contemplated.

§ 587.2 Factors Indicating Conditions Unduly Impairing Access.

For the purpose of this part, factors which would indicate the existence of conditions created by foreign government action or action of a common carrier acting alone or in concert with any person, which unduly impair access of a U.S.-flag vessel engaged in or seeking access to ocean trade between foreign ports, include, but are not limited to:

(a) Imposition upon U.S.-flag vessels of fees, charges, requirements, or restrictions different from those imposed on other vessels, or which preclude or tend to preclude U.S.-flag vessels from competing in the trade on the same basis as any other vessel;

(b) Reservation of a substantial portion of the total cargo in the trade to national flag or other vessels which results in failure to provide reasonable competitive access to cargoes by U.S.-flag vessels;

(c) Use of predatory practices, including but not limited to closed conferences employing fighting ships or deferred rebates, which unduly impair access of a U.S.-flag vessel to the trade;

(d) Any government or commercial practice that results in, or may result in, unequal and unfair opportunity for U.S.-flag vessel access to port or intermodal facilities or services related to the carriage of cargo inland to or from ports in the trade;

(e) Any other practice which unduly impairs access of a U.S.-flag vessel to trade between foreign ports.

§ 587.3 Petitions for Relief.

(a) *Filing.* Any owner or operator of a liner, bulk, tramp or other vessel documented under the laws of the United States who believes that its access to ocean trade between foreign ports has been, or will be, unduly impaired may file a written petition for relief under the provisions of this part. An original and fifteen copies of such a petition shall be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

(b) *Contents.* Petitions for relief shall include the following:

(1) The name and address of the petitioner;

(2) The name and address of each party (carrier, person, or foreign government agency) against whom the petition is made;

(3) A concise description and citation of the foreign law, rule or government or commercial practice complained of;

(4) A certified copy of any law, rule, regulation or other document concerned and, if not in English, a certified English translation thereof;

(5) Any other evidence of the existence of such government or commercial practice;

(6) A description of the service offered or proposed, to which petitioner is alleging harm, supported by affidavits of fact, including information which indicates the ability of the petitioner to participate in the trade;

(7) A clear description, in detail, supported by affidavits of fact, of the harm already caused, or which may reasonably be expected to be caused, to the petitioner for a representative period, including:

(i) statistics documenting present or prospective cargo loss due to discriminatory government or commercial practices if harm is alleged on that basis; such statistics shall include figures for the total cargo carried or projected to be carried by petitioner in the trade for the period, and the sources of the statistics;

(ii) evidence documenting how the petitioner is being prevented from entering a trade, if injury is claimed on that basis;

(iii) statistics or other evidence documenting the impact of discriminatory government or commercial practices resulting in an increase in costs, service restrictions, or other harm on the basis of which injury is claimed, and the sources of the statistics; and

(iv) a statement as to why the period is representative;

(8) A memorandum of law addressing relevant legal issues; and

(9) A recommended action, rule or regulation, the result of which will, in the view of the petitioner, address the alleged conditions unduly impairing the access of petitioner to the affected trade.

(c) *Deficient petition.* A petition which substantially fails to comply with the requirements of paragraph (b) of this section shall be rejected and the person filing the petition shall be notified of the reasons for such rejection. Rejection is without prejudice to filing of an amended petition.

§ 587.4 Receipt of Relevant Information.

(a) In making its decision on matters arising under section 13(b)(5), the Commission may receive and consider relevant information from any owner or operator, or conference in an affected trade or from any foreign government either directly or through the Department of State or from any other reliable source. Relevant information may include, but is not limited to:

(1) statistics, with sources, or if unavailable the best estimates pertaining to:

(i) the total cargo carried in the affected liner or bulk trade by type, source, value, tonnage and direction;

(ii) cargo carried in the affected trade on vessels owned or operated by any person or conference, by type, source, value, tonnage and direction;

(iii) the percentage such cargo carried is of the total affected liner or bulk trade, on a tonnage and value basis;

(iv) the amount of cargo reserved by a foreign government for national-flag or other vessels in the affected trade, on a tonnage and value basis, and a listing of the types of cargo and specific commodities which are reserved for national-flag or other vessels;

(2) information on the operations of vessels of any party serving the affected trade, including sailings to and from ports in the trade, taxes or other charges paid to foreign authorities, and subsidies or other payments received from foreign authorities;

(3) information clarifying the meaning of the foreign law, rule, regulation or practice complained of, and a description of its implementation;

(4) complete copies of all conference and other agreements, including amendments and related documents, which apply in the trade.

(b) Once introduced or adduced, information of the character described in paragraph (a), and *bona fide* petitions and responses thereto, shall be made part of the record for decision and may provide the basis for Commission findings of fact and conclusions of law, and for the imposition of sanctions under this part.

§ 587.5 Notice to Secretary of State.

When there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports may exist, the Commission shall so notify the Secretary of State and may request that the Secretary of State seek resolution of the matter through diplomatic channels. If request is made, the Commission will give every assistance in such efforts, and the Commission may request the Secretary to report the results of such efforts within a specified time period.

§ 587.6 Hearing.

(a) Upon the filing of a petition which meets the requirements of section 587.3, or upon the Commission's own motion when there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports may exist, the Commission shall institute a proceeding pursuant to this part.

(b) Notice of the institution of any such proceeding shall be published in the *Federal Register* and interested, or adversely affected, persons will be allowed a period of time to reply to the petition by the submission of written data, views or legal arguments. Factual submissions shall be supported by affidavits and sworn documents.

(c) Following the close of the initial response period, the Commission may issue a final determination or order further hearings if warranted. If further hearings are ordered, they shall be conducted pursuant to procedures to be outlined by the Commission in its order.

§ 587.7 Decision; Sanctions; Effective Date.

(a) Upon completion of any proceeding conducted under this part, the Commission may issue a decision containing its findings and conclusions.

(b) If the Commission finds that conditions unduly impairing access of a U.S.-flag vessel to ocean trade between foreign ports do exist, the following actions may be taken:

(1) Imposition of equalizing fees or charges applied in the foreign trade of the United States;

(2) Limitation of sailings to and from United States ports, or of amount or type of cargo carried, during a specified period;

(3) Suspension, in whole or in part, of any or all tariffs filed with the Commission for carriage to or from United States ports, including the carrier's right to use any or all tariffs of conferences of which it is a member for any period the Commission specifies, or until such time as unimpaired access is secured for U.S.-flag carriers in the affected trade. Acceptance or handling of cargo for carriage under a tariff that has been suspended, or after a common carrier's right to utilize that tariff has been suspended pursuant to rules of this part will subject a carrier to the imposition of a civil penalty as provided under the Act (46 U.S.C. app. 1712(b)(3)) of not more than $50,000 per shipment.

(4) Any other action the Commission finds necessary and appropriate to address conditions unduly impairing access of a U.S.-flag vessel to trade between foreign ports.

(c) A decision imposing sanctions shall be published in the *Federal Register* and, except where conditions warrant and for good cause, shall become effective 30 days after the date of publication.

§ 587.8 Submission of Decision to the President.

Concurrently with the submission of a decision for publication in the *Federal Register* pursuant to section 587.7, the Commission shall transmit that decision to the President who may, within ten days after receiving the decision, disapprove it if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States.

§ 587.9 Postponement, Discontinuance, or Suspension of Action.

The Commission may, on its own motion or upon petition, postpone, discontinue, or suspend any and all actions taken by it under the provisions of this part. The Commission shall postpone, discontinue, or suspend any or all such actions if the President informs the Commission that postponement, discontinuance, or suspension is required for reasons of the national defense or the foreign policy of the United States.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 CFR PARTS 536, 538

DOCKET NO. 84–23

FILING OF TARIFFS AND DUAL RATE CONTRACT SYSTEMS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ACTION: Interim Rule and Request for Comment.

SUMMARY: This implements the Shipping Act of 1984 as it applies to loyalty (dual rate) contracts by removing regulations contained in Part 538 governing the present use of such contracts and by amending the regulations contained in Part 536 governing the filing of tariffs by carriers and conferences of carriers by (1) providing that any new loyalty contract will be permitted to be included in tariffs after June 18, 1984 only to the extent supported by a Business Review Letter issued by the Department of Justice, and (2) prohibiting the use of an existing loyalty contract after September 18, 1984 unless likewise supported by such a Business Review Letter.

DATES: Interim rule effective on June 18, 1984. Comments on Interim Rule due July 16, 1984.

SUPPLEMENTARY INFORMATION:

Section 14b of the Shipping Act, 1916 (46 U.S.C. 813a) permits the use of contracts which provide for lower rates to a shipper or consignee who agrees to give all or a fixed portion of its patronage to a carrier or conference of carriers. In addition, section 14b sets forth certain requirements applicable to such contracts. The Shipping Act of 1984 (46 U.S.C. app. 1701–1720, *et seq.*), which will become effective on June 18, 1984, repeals section 14b. (*See* section 20(a), 46 U.S.C. app. 1719(a).)

The provisions of the Shipping Act of 1984 (the Act) relating to loyalty contracts (or dual rate contracts as they are referred to in the Shipping Act, 1916) were the result of a compromise between the House Merchant Marine and Fisheries Committee and the House Judiciary Committee. As part of the compromise, section 6 of H.R. 1878, as reported out of the House Merchant Marine and Fisheries Committee, which was similar to section 14b of the Shipping Act, 1916, was deleted from the bill which eventually passed the House. Section 10, "Prohibited Acts," was amended to provide that no carrier may "use a loyalty contract, except in conformity with the antitrust laws." (*See* section 10(9)(a) [now found at 46 U.S.C. app. 1709(b)(9)] I.) The antitrust immunity for loyalty contracts, which appeared in section 7(a)(3) of H.R. 1878 as reported out by the Merchant Marine and Fisheries Committee, was also deleted from the final version of the bill, "in view of the broader proscription on the use of loyalty contracts in section 9(b)(9)." [Now section 10(b)(9).] Explanation of the Changes in the Amendment to H.R. 1878, the Shipping Act of 1983, 129 Cong. Rec. H8125 (daily ed. October 6, 1983).

Section 20(d) of the Shipping Act of 1984 (46 U.S.C. app. 1719(d)) continues contracts previously approved under the Shipping Act, 1916, "as if approved or issued under this Act." Although there is no antitrust immunity for new loyalty contracts, it appears that existing loyalty contracts have antitrust immunity by virtue of section 7(a)(6) of the Act (46 U.S.C. app. 1706(a)(6)), which states that the antitrust laws do not apply to:

> (6) . . . any agreement, modification, or cancellation approved by the Commission before the effective date of this Act under section 15 of the Shipping Act, 1916, or permitted under section 14b thereof, and any properly published tariff, rate, fare, or charge, classification, rule, or regulation explanatory thereof implementing that agreement, modification, or cancellation.

Notwithstanding section 7(a)(6), the Commission has the authority to disapprove, cancel or modify such contracts to assure compliance with section 10(b)(9) under procedures provided in section 11(c) of the Act. The House Judiciary Committee observed that section 7(a)(7) [now section 7(a)(6)], which extends antitrust immunity to agreements previously approved under sections 15 and 14b of the Shipping Act, 1916,

> . . . must be read in light of the continuing authority of the Commission to disapprove, cancel, or modify an agreement pursuant to Section 11, or to seek an injunction against operation of an agreement pursuant to section 5(g). The antitrust immunity extended by subsection (a)(7) does not run beyond the validity of the agreement itself.

H.R. REP. No. 53, 98th Cong., 1st Sess. 33 (1983).

Within the context of section 10(b)(9) of the Shipping Act of 1984, the question then becomes whether and to what extent the use of loyalty contracts violates the antitrust laws. The explanation on the floor of the House indicates that while "loyalty contracts involving a single carrier would probably be lawful," any "concerted use of loyalty contracts by carriers is likely to violate the antitrust laws." 129 Cong. Rec. at H8125.

This rule therefore provides that existing loyalty contracts will be prohibited after September 18, 1984,[1] unless the carrier or conference can demonstrate to the Commission that use of its loyalty contract will not violate the antitrust laws. A Business Review Letter from the Department of Justice (DOJ), stating that the DOJ does not intend to challenge the use of a

[1] The Commission is allowing this 90-day grace period beyond June 18, 1984 to accommodate the shipper/consignee termination notice requirement embodied in existing contracts and to permit an orderly phasing out of such contracts where necessary.

loyalty contract, will create a presumption that the use of that contract is in compliance with the antitrust laws.[2] This is without regard to the legality of such loyalty contracts under any other prohibited act listed in section 10 of the Shipping Act of 1984. *See Federal Maritime Board* v. *Isbrandtsen Co.*, 354 U.S. 481 (1958).

By separate rulemaking, the Commission is making other changes to its foreign tariff rules, Part 536 (to be included in subchapter D and redesignated as Part 580). That rule governs the filing and form of tariffs generally and will contain the definition of "Loyalty Contract" in section 536.2(k) as follows:

> (k) *Loyalty contract.* A contract with an ocean common carrier or conference by which lower rates are obtained in exchange for a commitment of all or a fixed portion of a shipper's cargoes. A loyalty contract does not require a specific quantity of cargo to be shipped over a stated period of time, nor does it commit a common carrier or conference to a given or specific level of service or performance.

In this rulemaking, we are providing for the rejection of any newly-filed loyalty contract for failure to include in the contract itself and in the tariff rules governing the availability of contract rates the required reference to a DOJ-issued Business Review Letter. Additionally, new paragraph (c) of section 536.16 provides that any loyalty contract in effect on June 18, 1984, must similarly be justified or be prohibited after September 18, 1984.

The Federal Maritime Commission has determined that this interim rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1984, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies that this interim rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

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[2] See 28 CFR § 50.6. Only the Department of Justice, which is charged with the enforcement of the antitrust laws, can provide carriers with some assurance that they will not be prosecuted under the antitrust laws for use of a loyalty contract. In this regard, it should be noted that private suits for damages under the antitrust laws will no longer be permitted when the injury is the result of conduct prohibited by the Shipping Act of 1984 (*see* section 7(c)(2) (46 U.S.C. app. 1706(c)(2)). H.R. REP. No. 600, 98th Cong., 2d Sess. 40 (1984).

This rulemaking contains no additional information collections requirements requiring approval by the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects: 46 CFR Parts 536 and 538, Antitrust; Contracts, Maritime Carriers; Rates.

For the reasons set out in the preamble, Parts 536 and 538 of Title 46 of the Code of Federal Regulations are amended as follows:

1. Part 536 is amended by adding §536.16 to read as follows:

§536.16 Loyalty Contracts

(a) A sample of any loyalty contract, as defined in this part, must be filed in the applicable tariff together with rules which set forth the scope and application of the contract system.

(b) Every sample loyalty contract and applicable rule filed for inclusion in a tariff under paragraph (a) of this section shall make specific reference to a Business Review Letter, issued pursuant to 28 CFR §50.6, indicating no objection to the use of that contract. A copy of the Business Review Letter shall be simultaneously furnished to the Commission's Director, Bureau of Tariffs. Failure to comply with these requirements will result in the rejection of the contract and the applicable rules pursuant to §536.10(d).

(c) The use of any loyalty contract in effect prior to June 18, 1984 shall be prohibited after September 18, 1984 unless supported by a Business Review Letter issued pursuant to 28 CFR §50.6. Such Business Review Letter shall be furnished to the Director, Bureau of Tariffs.

2. Part 538 is removed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 536 AND PART 580]

GENERAL ORDER 13, REVISED, DOCKET NO. 84–24

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

ACTION: Interim Rules and Request for Comments.

SUMMARY: The Commission is revising its foreign tariff filing rules to bring them into conformity with the Shipping Act of 1984 and contemporary tariff filing practices. These interim new rules modify and add to definitions contained in the existing tariff filing rules, amend rules governing the filing of intermodal tariffs, delete references to dual rate contracts, make provision for time/volume and related contracts and implement the statutory exemptions. Additionally the tariff rules reflect previously applicable interpretations of the Shipping Act, 1916, as they pertain to tariffs filed pursuant to the Shipping Act of 1984.

DATES: Interim Rules effective June 18, 1984. Comments due on or before June 22, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (1984 Act) was enacted on March 20, 1984 and becomes effective on June 18, 1984, except for sections 17 and 18 thereof which became effective on enactment. Section 17 authorizes the Federal Maritime Commission to prescribe rules and regulations and interim rules and regulations to carry out the 1984 Act.

The 1984 Act requires both substantive and technical modifications to the Commission's tariff filing regulations, contained in 46 CFR Part 536. These modifications require revision of various other provisions of the Commission's rules and interpretations, such as the Commission's Interpretations and Statements of Policy (46 CFR Part 530].

The Commission is, therefore, issuing these-interim rules to implement the Shipping Act of 1984, Pub. L. 98–237, 98 Stat. 67 (46 U.S.C. app. 1701–1720]. These rules are issued pursuant to section 17(b) of the 1984 Act in order that the Commission can perform its essential regulatory functions on and after June 18.

The Commission is requesting comments on these interim rules to assist it in developing final rules to supersede and, where necessary modify these interim rules. Accordingly, the public is provided with thirty days within which to comment on the interim rules but, if anyone believes that there are serious problems created by these rules which should be addressed immediately, the Commission urges them to bring their concerns to the attention of the Commission, in writing, without prejudice to subsequently filing additional comments within the thirty day comment period.

The 1984 Act has made several substantial changes in the regulation of the oceanborne foreign commerce of the United States. The most substantive changes, insofar as they relate to tariff filing, involve through and exempt transportation, service and time/volume arrangements, loyalty contracts, penalty provisions and the statute of limitations for filing claims or complaints.

The filing of service contracts, time/volume contracts, time/revenue contracts is the subject of a separate rulemaking proceeding. Likewise, although this rule contains a definition of "loyalty contract," a rule pertaining to the use and filing of such "loyalty contracts" is the subject of a separate rulemaking proceeding. This proceeding will focus on the balance of the tariff filing rules.

The 1984 Act contains definitions for: common carrier, forest products, nonvessel-operating common carrier, ocean common carrier, person, shipment, shipper, through rate and through transportation. These definitions, as appropriate, are being added to the Commission's tariff filing rules.

Subtantial modifications to the intermodal tariff filing rules have been made to accommodate the statutory scheme. Eliminated are any provisions which required a tariff to "breakout" or disclose the charge, rate or division for the inland transportation portion of a through intermodal or joint through rate or service. These proposals were previously advanced by the Commission in the now discontinued proceeding, Docket No. 84–3, *Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States; Intermodal Tariff Filing Requirements—Exemption From Certain Statutory Requirements and Amendment of Tariff Filing Regulations,* (49 F.R. 7609, March 1, 1984] which should be referred to for further information.

The 1984 Act contains an exemption from tariff filing for cargo loaded and carried in bulk without mark or count. These provisions are identical to the exemption from tariff filing formerly contained in section 18(b)(1) of the Shipping Act, 1916 (1916 Act). The Commission has previously interpreted these provisions insofar as they apply to bulk cargo loaded into and carried in intermodal equipment (see 46 CFR § 530.15). This interpretation has been incorporated into this rule.

Section 8(a)(1) of the 1980 Act expands the current tariff filing exemption for softwood lumber to include the broader category of forest products as defined in the statute and adds a new exemption for recyclable metal scrap, waste paper and paper waste. These changes have been incorporated into the rules.

The revised tariff filing rules also preserve previous exemptions granted from time to time by the Commission pursuant to section 35 of the 1916 Act. These exemptions were previously contained in § 536.1 and covered:

foreign transshipped cargo (§ 536.1(a)); carriage of vehicles, passengers, buses and personal effects on vessels operated by the State of Alaska (§ 536.1(b)(1–2)); transportation of mail (§ 536.1(b)(3)); transportation by Incan Superior, Ltd. of cargo moving in railroad cars (§ 536.1(b)(4)); transportation by water of cargo moving in rail cars between British Columbia and United States ports and points (§ 536.1(b)(5)); transportation by water of cargo moving in bulk with count in rail cars between British Columbia, Canada and United States ports on Puget Sound (§ 563.1(b)(6)); transportation of used military household goods by non-vessel operating common carriers (§ 536.1(b)(7)); and controlled carriers when specific conditions are met (§ 536.1(d)). To these previous exemptions the Commission is proposing to add an exemption to permit points to be added to intermodal tariffs without providing the otherwise required thirty day notice. The new exemption will also be available to controlled carriers on a limited basis.

The Commission notes the similarity between sections 35 of the 1916 Act and section 16 of the 1984 Act. Section 16 contains all of the former criteria of section 35 and adds the requirement that any exemption will not result in a "substantial reduction in competition." The 1984 Act criteria are met with respect to all of these exemptions. The removal of the requirement that carriers or conferences provide thirty days' notice prior to naming new intermodal points in their tariffs, will enable such carriers and conferences to promptly address changing transportation conditions without delay.

A number of technical modifications have been made in the tariff filing rules to conform them to either the new statutory provisions or to contemporary tariff filing practices. The modifications include: elimination of all references to temporary tariff amendments which have been abolished; elimination of the requirement for tariffs to contain a check sheet (a check sheet serves no regulatory purpose); deletion of the project rate provisions (they are now subsumed in either service or time/volume arrangements); and the elimination of any references to the 1916 Act. In addition, rules pertaining to the filing of per-container rates which were promulgated and subsequently suspended in Docket No. 81–50, *Per-Container Rates—Tariff Filing Requirements Applicable to Carriers and Conferences in the Foreign Commerce of the United States*, have been removed inasmuch as that proceeding has been discontinued.

This rule also reflects certain interpretations and clarifications contained in 46 CFR Part 530. The affected CFR provisions are: sections § 530.7 (carrier admission to a conference—new/initial rates); § 530.14 (disputes regarding the exercise of the right of independent action in tariff filing); and § 530.15 (bulk cargo in intermodal equipment).

The 1984 Act also increases the time period for filing complaints or overcharge claims with the Commission from two to three years. These changes are also reflected in the rules.

A new § 580.91 has been added to display the Office of Management and Budget's clearance numbers for information collection requirements. These are currently displayed in tabular form in § 503.91 of Title 46, Code of Federal Regulations, but the new separate section should be convenient, especially after the part is redesignated.

The Commission has determined that this interim rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with Foreign-based enterprises in domestic or export markets.

The Commission certifies that this interim rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

The collection of information requirements contained in paragraphs 580.8(b) and 8(c) of this rule have been submitted to the Office of Management and Budget for review under section 3504(b) of the Paperwork Reduction Act (44 U.S.C. 3504(h)). Comments on the information collection aspects of this rule should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Federal Maritime Commission.

List of Subjects in 46 CFR Part 536:

Cargo; Cargo vessels; Exports; Harbors; Imports; Maritime carriers; Rates and fares; Reporting and record keeping requirements; Water carriers; Water transportation.

For the reasons set out in the *Supplementary Information*, Part 536 of Title 46 of the Code of Federal Regulations is transferred to Subchapter D, redesignated, and amended as follows:

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

1. Part 536 of 46 CFR, Chapter IV, is redesignated as Part 580 and added to Subchapter D and all internal references are changed.
2. In Part 580, revise the authority citation to read as follows and remove all other authority sections:

   Authority: 5 U.S.C. 553; secs. 4, 5, 6, 8, 9, 10, 15, 16, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1703–1705, 1707, 1708, 1709, and 1714–1716).
3. Insert the word "common" before the word "carrier" or "carriers" wherever it appears in part 580.

4. In § 580.0(a) remove "Shipping Act, 1916" and insert: "Shipping Act of 1984".

5. In § 580.0(b):

   a. Remove "Section 18(b) of the Shipping Act," and insert "section 8 of the Shipping Act of 1984,";

   b. Remove, "sections 14(b) and 18(c)" and insert "sections 9, 10 and 16";

   c. Remove "reasonable" and insert "unreasonable" and

   d. Remove "Shipping Act sections 15, 16 and 17." and insert "section 10 of the Shipping Act of 1984."

6. In § 580.0(c) remove "day the violation continues (46 U.S.C. 817(b)(4), (b)(6))," and insert "violation unless the violation was willfully and knowingly committed, in which case the amount of civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate offense. Additionally, the Commission may suspend any or all tariffs of the common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, for a period not to exceed 12 months."

7. In § 580.1 redesignate paragraphs (a)–(d) as paragraphs (b)–(e) and add a new paragraph (a) to read as follows:

   § 580.1 Exemptions and exclusions.

   (a) This part does not apply to bulk cargo, forest products, recyclable metal scrap, waste paper and paperwaste.

* * * * *

8. In § 580.1(b)(6) remove "Shipping Act, 1916" and insert "Shipping Act of 1984".

9. In § 580.1(d)(1)(iii) remove "Shipping Act section 18(b)" and insert "the Shipping Act of 1984".

10. In § 580.1(e)(1)(iii) remove "approved under section 15 of the Act."

11. Revise § 580.2 to read as follows:

§ 580.2 Definitions.

The following definitions of terms shall apply unless otherwise indicated by the context of this part.

(a) *Act.* The Shipping Act of 1984.

(b) *Bulk cargo.* Cargo that is loaded and carried in bulk without mark or count. Bulk cargo loaded into intermodal equipment is subject to mark and count and is therefore, subject to the tariff filing requirements of this part.

(c) *Class rates.* Rates applicable to all articles which have been grouped or "classified" together in a classification tariff or a classification section of a rate tariff.

(d) *Commodity rates.* Rates applying on a commodity or commodities specifically named or described in the tariff in which the rate or rates are published.

(e) *Common carrier.* A person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(2) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) *Conference.* An association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, sailing, or transshipment arrangement.

(g) *Controlled carrier.* An ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by the government under whose registry the vessels of the carrier operate; ownership or control by a government shall be deemed to exist with respect to any carrier if:

(1) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(2) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier.

(h) *Forest products.* Forest products in an unfinished or semi-finished state that require special handling moving in lot sizes too large for a container, including, but not limited to lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper board in rolls, and paper in rolls.

(i) *Joint rates.* Rates or charges established by two or more common carriers for ocean transportation over the combined routes of such carriers.

(j) *Local rates.* Rates or charges for transportation over the route of a single common carrier (or any one common carrier participating in a conference tariff), the application of which is not contingent upon a prior or subsequent movement.

(k) *Loyalty contract.* A contract with an ocean common carrier or conference by which lower rates are obtained in exchange for a commitment of all or a fixed portion of a shipper's cargoes. A loyalty contract does not require a specific quantity of cargo to be shipped over a stated period of time, nor does it commit a common carrier or conference to a given or specific level of service or performance.

(l) *Nonvessel-operating common carrier.* A common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

(m) *Ocean common carrier.* A vessel-operating common carrier; but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp.

(n) *Ocean freight forwarder.* A person in the United States that:

(1) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(2) processes the documentation or performs related activities incident to those shipments.

(o) *Open rate.* A rate on a specified commodity or commodities over which a conference suspends its rate making authority, thereby permitting each individual common carrier member of the conference to fix its own rates on such commodity or commodities.

(p) *Open for public inspection.* The maintenance of a complete and current set of the tariffs used by a common carrier, or to which it is a party, in each of its offices and those of its agent in any city where it transacts business involving such tariffs.

(q) *Person.* Includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.

(r) *Proportional rates.* Rates or charges assessed by a common carrier for transportation services, the application of which are conditioned upon a prior or subsequent movement.

(s) *Shipment.* All of the cargo carried under the terms of a single bill of lading.

(t) *Shipper.* An owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(u) *Tariff.* A publication containing the actual rates, charges, classifications, rules, regulations, and practices of a common carrier or conference of carriers. For the purposes of this part, the term "practice" refers to those usages, customs or modes of operation which in any way affect, determine or change the transportation rates, charges or services provided by a common carrier, and, in the case of conferences, must be restricted to activities authorized by the basic conference agreement.

(v) *Tariff filing.* Any tariff, or modification thereto, which is received by the Commission as filed pursuant to these rules.

(w) *Tariff filing, Electronic.* The transmission of tariff filings to the Commission through the use of commercial data processing terminals. The data processing receiving terminal(s) are to be located in the Commission's Washington, D.C. offices. Tariff material filed electronically must conform to all the regulations applicable to permanent tariff filings, except as follows:

(1) Electronically filed tariff pages received from data processing terminals may be used for filing with the Commission; and

(2) Electronically filed tariff matter shall be accompanied by an electronically filed letter of transmittal.

(x) *Through rate.* The single amount charged by a common carrier in connection with through transportation.

(y) *Through transportation.* Continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

12. In § 580.3(e) remove "except temporary filings as permitted hereinafter in § 580.10(c)(1),".
13. In § 580.3(f) remove "including temporary filings by mail pursuant to § 580.10(c)(1) of this part," and, "Provided, however, that temporary filings made by telegraph or cable pursuant to § 580.10(c)(1) need not be submitted in duplicate or triplicate" and remove the semicolon at the end of "triplicate" and insert a period.
14. In § 580.3(i) remove "section 18(b)" and insert "section 8(a)(1)".
15. In § 580.3(j) remove "section 18(b)" and insert "section 8(a)," and remove "approved" wherever it appears.
16. In § 580.3(j) remove the last sentence.
17. In § 580.3(l) remove "sections 14(b), 18(b), or 18(c) of"
18. In § 580.4(e) remove "each vessel operating common carrier's" and insert, "the".
19. In § 580.4(e) remove "United States Shipping Act, 1916," and "Shipping Act Amendments of 1979, Pub. L. 96–25, 93 Stat. 71, and the regulations of the Commission set forth in 46 CFR Part 552." and insert "Shipping Act of 1984."
20. Amend § 580.4(f) by removing "Check Sheet." and adding at the end of the paragraph, "Appendices of Essential Terms for Service Contracts/Time Volume Contracts."
21. Amend § 580.5(a)(1) by removing "approved under section 15 of the Act," and in the third sentence removing "section 18(c)" and inserting "section 9".
22. Amend § 580.5(c)(2) by removing "United States Shipping Act, 1916," and "Shipping Act Amendments of 1979, Public Law 96–25, 93 Stat. 71, and the regulations of the Commission set forth in 46 CFR 552." and inserting "Shipping Act of 1984."
23. Remove § 580.5(d)(13) and (d)(14).
24. In § 580.5, paragraph (d), redesignate (d)(15)–(d)(18) as paragraphs (d)(13)–(d)(16).
25. Amend § 580.5(d)(19) as follows:

a. Revise the heading to read: "*Shippers requests, consultations and complaints.*"

b. Remove "with § 527.6 of the Commission's rules," and insert "with the effective agreement's provisions,";

c. Add after "complaints," the phrase "and so they may engage in consultation under section 5(b)(6) of the Act."

d. Redesignate § 580.5(d)(19) as "§ 580.5(d)(17)."

26. Redesignate § 580.5(d)(20) as "§ 580.(d)(18)," and remove in the first sentence of the introductory text "two years" and insert "three years".

27. Amend § 580.5(d)(18)(i) by removing "section 22 of the Shipping Act, 1916 (46 U.S.C. 821)" and inserting "section 11(g) of the Shipping Act of 1984," in the first sentence, and by removing "two" and inserting "three," in the second sentence.

28. Amend § 580.5(d)(18)(ii) by removing "Shipping Act, 1916." and inserting "Shipping Act of 1984."

29. Amend § 580.5(e) by removing ", commencing with number 21." and inserting a period.

30. Amend § 580.6(n) by removing "section 18(c) of the Shipping Act, 1916," and inserting "section 9 of the Shipping Act of 1984," in the last sentence.

31. Amend § 580.6(o) by removing the word "Temporary," and capitalizing "Special" in the introductory text.

32. Remove § 580.6(o)(2).

33. Revise § 580.8 to read as follows:

§ 580.8 Intermodal Tariffs.

(a) *Definitions.* The following definitions shall apply for purposes of this section

(1) *Contracting Carrier.* A carrier which performs part of a through intermodal service in the capacity of a subcontractor on behalf of and in the name of a common carrier which is subject to the Act.

(2) *Joint through intermodal rate.* A single charge jointly established by two or more carriers, one of which is a common carrier subject to the Act, for through transportation over the combined routes of such carriers, between (i) points in the United States and ports in a foreign country; (ii) points in the United States and points in a foreign country; or (iii) ports in the United States and points in a foreign country. Tariffs which name joint rates must also list the participating carriers.

(3) *Participating Carrier.* A carrier that holds itself out to perform a portion of a joint through intermodal service.

(4) *Through intermodal rate.* A single charge established by a common carrier(s) subject to the Act, which covers a through service, part of which is performed by a contracting carrier or carriers, for through transportation over the combined routes of such carriers, between (i) points in the United States and ports in a foreign country; (ii) points in the United States and points in a foreign country; or (iii) ports in the United States and points in a foreign country.

(5) *Through route.* An arrangement for the continuous carriage of goods between points of origin and destination either or both of which lie beyond port terminal areas.

(b) *Intermodal tariff filing requirements.* Every common carrier and conference subject to the Act, which establishes through intermodal rates and/or joint through intermodal rates, shall file tariffs stating all such rates and related charges, rules, regulations, privileges or facilities, granted or allowed. Such tariffs shall be filed and maintained in the manner set out in the Act, and in accordance with the rules of this part. Intermodal tariffs shall be filed in the name of the common carrier or conference subject to the Act. Intermodal tariffs shall be initially filed on thirty days' notice as provided by section 8 or 9 of the Act, unless a shorter notice is permitted pursuant to special permission. In addition, such tariffs shall contain the following provisions:

(1) A notation on the Title Page that the publication contains through intermodal rates and/or joint through intermodal rates. Also, an identification of the modes of service, i.e., rail-water, water-motor, etc., shall be shown.

(2) A list, either on the Title Page or on an interior page referenced on the Title Page, of all ports or points to, from and between which the rates apply and the ports through which cargo originating or terminating in such places shall move. Each port or point served shall be described by its commonly used geographic name. When rates are established which apply from, to, or between all points within a named region; for example, a county, township, parish or province, such region must be identified with the state, province, and country in which the region is located.

(3) A contract of affreightment clearly setting forth through liability which is consistent with the holding out provided by the application of the rates and conditions of the tariff.

(4) In the case of joint through intermodal rates, the names of all participating carriers and a clear description of the services performed by such participating carriers which are included in the through rates. Points served by each participating carrier must be so specified.

(c) *Amendments to intermodal tariffs.* Common carriers and conferences of such carriers publishing amendments to intermodal tariffs which provide for new or initial joint through intermodal rates and/or through intermodal rates are exempt from the 30 day filing notice requirements of sections 8 or 9 of the Shipping Act of 1984. Provided, however, that amendments filed pursuant to this exemption shall not become effective earlier than upon publication and filing or some time interval less than 30 days. Provided, further that amendments filed by controlled carriers, subject to section 9, Shipping Act of 1984 may be filed only when such amendments provide for rates which meet but do not go below those previously established by non-controlled carriers. Each amendment filed by a controlled carrier under authority of this exemption shall bear the following notation: "Filed pursuant to 16 CFR § 580.8(c)."

34. Amend § 580.10(a)(2) by removing its second sentence.
35. Amend § 580.10(a)(3) by removing "section 18(c) of the Shipping Act, 1916" in the last sentence and inserting "section 9 of the Shipping Act of 1984".
36. Amend § 580.10(b)(4) by removing "section 18(b) and 18(c)" and inserting "sections 8 and 9".
37. Remove § 580.10(b)(10).
38. Amend § 580.10(d)(1) and (d)(2) in the introductory text by removing "sections 18(b), 18(c) and 14b of".
39. Remove § 580.12.
40. Amend § 580.15(a) by removing in the first sentence, "section 18(b)," and inserting "section 8(d)".
41. Amend § 580.15(a) by removing, in the second sentence "Section 18(c)(3)," and inserting "Section 9(c)".
42. Add § 580.91 to read as follows:

§ 580.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork

Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
580.3	3072–0009
580.8 through 580.15	3072–0009

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 552 AND 582]

DOCKET NO. 84–25

CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

ACTION: Interim Rule and Request for Comments.

SUMMARY: The Commission is modifying its rules on the filing of certifications of company practices to combat rebating in the foreign commerce of the United States to bring them into conformity with the Shipping Act of 1984. The modification expands the application of the annual certification requirement from vessel operating common carriers to all common carriers.

DATES: Interim Rule effective on June 18, 1984. Comments at any time but no later than July 30, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (1984 Act) (46 U.S.C. app. 1701–1720) was enacted on March 20, 1984 and becomes effective on June 18, 1984, except for sections 17 and 18 thereof which became effective on enactment. Section 17(b) authorizes the Federal Maritime Commission to prescribe interim rules and regulations to carry out the Act, which rules can become effective notwithstanding the nature and comment provisions of the Administrative Procedure Act (5 U.S.C. 553) but must be superseded by final rules subject to the A.P.A.

Section 15(b) of the 1984 Act (46 U.S.C. app. 1714(b)) makes substantive changes to the previous requirements of section 21(b) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. 820(b)), regarding the certification of company policies and efforts to combat rebating in the foreign commerce of the United States. The fundamental change is the expansion to all common carriers from the former limited application to vessel operating common carriers only. Although the statute imposes a new and mandatory reporting requirement for domestic as well as foreign NVOCCs, the Commission is allowing for comments from this affected class to determine the best method and procedure for assuring compliance.

These rules contain technical amendments to reflect certain changes in definitions and application contained in the 1984 Act. For instance, the 1916 Act permits the Commission to require an anti-rebating certification from any "consignor, consignee, forwarder, broker, other carrier, or other person subject to the Shipping Act, 1916." Section 15(b) of the 1984 Act alters the statutory scheme to permit the Commission to require certification from "any shipper, shippers' assocation, marine terminal operator, ocean freight forwarder or broker." This rule does not, however, require certifications from entities other than those mandated by statute. The requirement for certifications from ocean freight forwarders is continued in Docket No. 84–19, *Licensing of Ocean Freight Forwarders.*

Other amendments to the required certification are of the same genus, such as the amendments to the statutory references and *Code of Federal Regulations* citations.

To provide for the basic notice and comment provisions of the Administrative Procedure Act, therefore, the Commission requests comments on these interim rules to assist it in developing final rules to supersede and, where necessary modify, these interim rules by December 15, 1984. Accordingly, the public is provided with sixty days within which to comment on the interim rules but, if anyone believes that there are serious problems created by these rules which should be addressed immediately, the Commission urges them to bring their concerns to the attention of the Commission, without prejudice to subsequently filing additional comments within the sixty-day comment period.

A new § 582.91 is being added to display the Office of Management and Budget's clearance number for information collection requirements. These are currently displayed in tabular form in § 503.91 of Title 46, Code of Federal Regulations, but the new separate section should be convenient, especially after the part is redesignated.

The Federal Maritime Commission has determined that this interim rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in Parts 552 and 582: Cargo; Cargo vessels; Exports; Foreign relations; Freight forwarders; Imports; Maritime carriers; Rates and fares; Reporting and recordkeeping requirements; Water carriers; Water transportation.

For the reasons set out in the preamble, Part 552 of Title 46 of the Code of Federal Regulations is redesignated as Part 582, included in Subchapter D, and is revised to read as follows:

PART 582—CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

Sec.

Authority: 5 U.S.C. 553; secs. 2, 3, 8, 10, 13, 15, 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1707, 1709, 1712, 1714, 1715, and 1716).

§ 582.1 Scope.

(a) The requirements set forth in this part are binding upon every common carrier and, at the discretion of the Commission, will be applicable to any shipper, shippers' association, marine terminal operator, ocean freight forwarder, or broker.

(b) Information obtained under this part will be used to maintain continuous surveillance over common carrier activities and to provide a deterrent against rebating practices. Failure to file the required reports may result in a civil penalty of not more than $5,000, or if willfully and knowingly committed, not more than $25,000, for each day such violation continues.

§ 582.2 Form of certification.

The Chief Executive Officer (defined as the most senior officer within the company designated by the board of directors, owners, stockholders or controlling body as responsible for the direction and management of the company) of each common carrier and, when required, at the discretion of the Commission, the Chief Executive Officer of any shipper, shippers' association, marine terminal operator, ocean freight forwarder or broker, shall file a written certification, under oath, as set forth in the format in Appendix A attesting to the following:

(a)(1) That it is the stated policy of the filing company that the payment, solicitation or receipt of any rebate, by the company which is unlawful under the provisions of the Shipping Act of 1984, is prohibited; and

(2) That such company policy was promulgated recently (together with the date of such promulgation) to each owner, officer, employee, and agent thereof; and

(b) The details of the efforts made within the company or otherwise to prevent or correct illegal rebating; and

(c) That the filing company will fully cooperate with the Commission in its efforts to end those illegal practices.

§ 582.3 Tariff notification.

(a) Each common carrier shall file a provision in each of its tariffs that shall read substantially as follows:

> (Name of Company) has a policy against the payment of any rebate by the company or by any officer, employee, or agent, which payment would be unlawful under the Shipping Act of 1984. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act of 1984 and the regulations of the Commission set forth in 46 CFR Part 582.

(b) When the common carrier's tariff is a conference/rate agreement tariff, the common carrier shall ensure that the conference or rate agreement publishes the common carrier's tariff provision set forth in § 582.3(a) in the conference/rate agreement tariff.

(c) The anti-rebate tariff provision, as set forth in § 582.3(a), shall be effective upon filing.

(d) Every common carrier tariff must contain the anti-rebate tariff provision set forth in § 582.3(a) by September 18, 1984.

§ 582.4 Change of Chief Executive Officer.

Every common carrier and any other person required by the Commission to file a certification in accordance with § 582.2 shall notify the Secretary, Federal Maritime Commission, of the identity of any new Chief Executive Officer within thirty (30) days of such appointment. Each new Chief Executive Officer shall file a certification as required by § 582.2 of this part within thirty (30) days of appointment.

§ 582.5 Reporting requirements.

(a) Every common carrier required by this part to submit a written certification as provided for in § 582.2 to the Secretary, Federal Maritime Commission, shall submit such certification on or before May 15 of each year.

(b) Every person other than a common carrier who is required by the Commission to submit a written certification under § 582.2 of this part shall submit the initial certification to the Secretary, Federal Maritime Commission, on the date designated by the Commission and, thereafter, as the Commission may direct.

§ 582.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement.

Section	Current OMB Control No.
582.2 through 582.5	3072–0028

APPENDIX A TO 46 CFR 582.3—(NAME OF FILING COMPANY), CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

Pursuant to the requirements of section 15(b) of the Shipping Act of 1984, and Federal Maritime Commission regulations promulgated pursuant thereto, (46 CFR 582), I, ______, Chief Executive Officer of (name of company) state under oath that:

1. It is the policy of (name of company) that the payment, solicitation, or receipt of any rebate which is unlawful under the provisions of the Shipping Act of 1984 is prohibited.

2. On or before , 19 , such company policy was promulgated to each owner, officer, employee and agent of (name of company) who is directly or indirectly connected with commercial ocean shipping, import or export sales or purchasing.

3. [Set forth the details of measures instituted by the filing company or otherwise to eliminate or prevent the payment of illegal rebates in the foreign commerce of the United States].

4. (Name of company) affirms it will fully cooperate with the Federal Maritime Commission in any investigation of illegal rebating and with the Commission's efforts to end such illegal practices.

____

Signature

Subscribed and sworn before me this _____ day of ___________ 19____.

____

Notary Public

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ACTION: Interim Rules With Request For Comments.

SUMMARY: These rules implement those provisions of the Shipping Act of 1984 which govern agreements by or among ocean common carriers and other persons in the foreign commerce of the United States. The statute authorizes the Commission to prescribe rules as necessary to effectuate the Act, including the issuance of interim rules. The Commission is also authorized to prescribe by rule the form and manner in which an agreement shall be filed and to obtain information needed to evaluate agreements. These rules set forth those agreements which are subject to the requirements of the Act, enumerate those agreements which are exempt from certain requirements of the Act, prescribe the form of agreements. and the information which shall be filed, establish procedures for processing agreements, set forth record retention and reporting requirements, and establish certain transitional rules for existing agreements.

DATES: Interim Rule effective on June 18, 1984. Comments on or before August 27, 1984.

SUPPLEMENTARY INFORMATION:

I. Background

On March 20, 1984, President Ronald Reagan signed into law the Shipping Act of 1984, Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 (hereinafter referred to as "the Act" or "the 1984 Act"). The Act, among other things, establishes a new regulatory regime governing agreements by or among ocean common carriers and other persons subject to the Act in the foreign oceanborne commerce of the United States. Section 3 of the Act (46 U.S.C. app. 1702) defines an "agreement" and certain other terms. Section 4 (46 U.S.C. app. 1703) sets forth those types of agreements that are within the scope of the Act. Section 5 (46 U.S.C. app. 1704) requires parties to an agreement to file a true copy of the agreement together with relevant information and specifies certain provisions which must be contained in particular types of agreements. Section 6 (46 U.S.C. app. 1705) establishes procedures under which the Commission shall review and take action upon an agreement. Section 16 (46 U.S.C. app. 1715) establishes the authority of the Commission to exempt any class of agreements from any requirement of the Act. Under section 7 of the Act (46 U.S.C. app. 1706), agreements which have been filed and become effective, or which are exempt from filing, are not subject to the federal antitrust laws. Section 15 (46 U.S.C. app. 1714) authorizes the Commission to require periodical or special reports as well as the filing of conference minutes.

The purpose of these rules is to implement those sections of the Act that govern agreements. These rules are being issued pursuant to the general rulemaking authority provided under section 17(a) of the Act (46 U.S.C. app. 1716(a)). Certain sections of these rules are also issued pursuant to the Commission's specific authority under section 5(a) of the Act to prescribe the form and manner in which an agreement shall be filed and to obtain the information and documents necessary to evaluate an agreement (46 U.S.C. app. 1704(a)). The rules are also issued pursuant to the Administrative Procedure Act (APA) and thereby are subject to the normal notice and comment procedures of the APA (5 U.S.C. 553). These rules are intended to serve as interim rules until such time as final rules are adopted. Specific authority to prescribe interim rules without adhering to notice and comment requirements is contained in section 17(b) of the Act (46 U.S.C. app. 1716(b)). These interim rules will take effect on June 18, 1984, the effective date of the Shipping Act of 1984. If persons believe that there are serious problems created by these interim rules which should be addressed immediately, they may bring their concerns to the attention of the Commission in writing without prejudice to subsequently filing additional comments within the 90-day comment period. In any event, all interested persons have been provided 90 days to comment on these rules.

These rules are organized as a single Part 572 of Title 46 of the Code of Federal Regulations. Subpart A states the authority, purpose and policies of these rules and defines certain terms used in the Act and these rules. Subpart B sets forth those types of agreements which are within the scope of the Act as well as those categories of agreements to which these rules do not apply. Subpart C contains procedures for requesting and granting exemptions for agreements from any requirement of the Act, lists certain kinds of agreements which are excluded by statute from filing requirements, and enumerates certain classes of agreements which the Commission proposes to exempt from certain requirements of the Act. Subpart D states rules for filing, the form in which agreements shall be filed, and the information which shall be submitted with certain agreements. Subpart E sets forth requirements as to organization and content of agreements and includes mandatory provisions for conference agreements. Subpart F establishes procedures for action on agreements prior to implementation. Subpart G contains rules setting forth certain reporting and record retention requirements. Subpart H contains transitional rules affecting existing agreements.

Subpart I states penalty rules. An Information Form to be completed and filed with certain agreements subject to the Act is attached as an Appendix A to Part 572. The following is a section-by-section discussion of proposed Part 572 of the Code of Federal Regulations which is to be included in new "Subchapter D—Regulations Affecting Maritime Carriers and Related Activities in Foreign Commerce."

II. Section-By-Section Discussion of Part 572 and the Information Form

SUBPART A OF THE RULES—GENERAL PROVISIONS

This subpart contains provisions which apply generally to the rules throughout Part 572.

Section 572.101—Authority

This section recites the statutory authority for the rules of Part 572.

Section 572.102—Purpose

This section states the purpose of the rules of this part, namely to implement those provisions of the Act which govern or affect agreements.

Section 572.103—Policies

The policies underlying the rules of this part are set forth in this section.

Section 572.104—Definitions

This section includes definitions of terms used in the Act and those rules which are relevant to agreements.

Section 572.104(a)—Agreement

The definition of the term "agreement" is based on the definition contained in section 3(1) of the Act.

Section 572.104(b)—Antitrust Laws

The term "antitrust laws" is defined in section 3(2) of the Act.

Section 572.104(c)—Appendix

The definition of the term "appendix" is new.

Section 572.104(d)—Assessment Agreement

The term "assessment agreement" is defined in section 3(3) of the Act.

Section 572.104(e)—Common Carrier

The term "common carrier" is defined in section 3(6) of the Act.

Section 572.104(f)—Conference Agreement

The definition of the term "conference agreement" is based upon and further clarifies the definition contained in section 3(7) of the Act.

Section 572.104(g)—Consultation

The definition of the term "consultation" is new.

Section 572.104(h)—Cooperative Working Agreement

The definition of the term "cooperative working agreement" is new.

Section 572.104(i)—Effective Agreement

The definition of the term "effective agreement" is new.

Section 572.104(j)—Equal Access Agreement

The definition of the term "equal access agreement" is new.

Section 572.104(k)—Independent Neutral Body

The definition of the term "independent neutral body" is new.

Section 572.104(l)—Information Form

The definition of the term "Information Form" is new.

Section 572.104(m)—Interconference Agreement

The definition of the term "interconference agreement" is based on section 5(c) of the Act.

Section 572.104(n)—Joint Service/Consortium Agreement

The definition of the term "joint service/consortium agreement" is new.

Section 572.104(o)—Marine Terminal Facilities

The definition of the term "marine terminal facilities" is new.

Section 572.104(p)—Marine Terminal Operator

The term "Marine Terminal Operator" is defined in section 3(15) of the Act. The term includes any person, firm, company, corporation or government subdivision furnishing marine terminal facilities or marine terminal services, or which owns, leases or operates property used as a marine terminal facility. The term "marine terminal operator" includes, but is not limited, to:

(i) Ports;

(ii) Commercial operator's of public general cargo marine terminal facilities;

(iii) Operators of shipside grain elevators, bulk loaders, tank farms and lumberyard facilities handling cargo in connection with ocean common carriers;

(iv) Stevedores when engaged in performing any of the duties of a marine terminal operator;

(v) Operators of off-dock container freight stations handling cargo in connection with ocean common carriers, even when such facilities are not located at or proximate to the waterfront;

(vi) Carloaders and unloaders, truckloaders and unloaders, when furnishing equipment or labor;

(vii) Railroads which provide marine terminal facilities;

(viii) Any other person subject to the Commission's marine terminal tariff filing requirements.

The term marine terminal operator does not include persons engaged solely in the business of stevedoring and which furnish no marine terminal facilities or services.

Section 572.104(q)—Maritime Labor Agreement

The term "maritime labor agreement" is defined in section 3(16) of the Act.

Section 572.104(r)—Modification

The definition of the term "modification" is new.

Section 572.104(s)—Nonvessel-Operating Common Carrier

The term "nonvessel-operating common carrier" is defined in section 3(17) of the Act.

Section 572.104(t)—Ocean Common Carrier

The term "ocean common carrier" is defined in section 3(18) of the Act.

Section 572.104(u)—Ocean Freight Forwarder

The term "ocean freight forwarder" is defined in section 3(19) of the Act.

Section 572.104(v)—Person

The term "person" is defined in section 3(20) of the Act.

Section 572.104(w)—Pooling Agreement

The definition of the term "pooling agreement" Is based on the definition in the Commission's current agreement regulations at 46 CFR 522.2(a)(3).

Section 572.104(x)—Port

The definition of the term "port" is new.

Section 572.104(y)—Sailing Agreement

The definition of the term "sailing agreement" is new.

Section 572.104(z)—Service Contract

The term "service contract" is defined in section 3(21) of the Act.

Section 572.104(aa)—Shipper

The term "shipper" is defined in section 3(23) of the Act. The term is inclusive of the ordinarily used terms, "consignee" and "cargo interest" and is used interchangeably.

Section 572.102(bb)—Shippers' Association

The term "shippers' association" is defined in section 3(24) of the Act.

Section 572.104 (cc)—Shippers' Requests and Complaints

The definition of the term "shippers' requests and complaints" is new.

Section 572.104(dd)—Space Charter Agreement

The definition of the term "space charter agreement" is new.

Section 572.104(ee)—Through Transportation

The term "through transportation" is defined in section 3(26) of the Act.

Section 572.104(ff)—Transshipment Agreement

The definition of the term "transshipment agreement" is new.

SUBPART B OF THE RULES—SCOPE

Subpart B contains rules defining scope which are based on sections 3, 4, 5 and 7 of the Act. It recites the language of the Act regarding agreements by or among ocean common carriers. Agreements which fall within any one of seven designated categories are subject to the Act. These categories generally derive from section 15 of the Shipping Act, 1916 (46 U.S.C. 814). One new category of agreement, i.e., an agreement that regulates or prohibits the use of service contracts, is created under the 1984 Act.

Subpart B sets forth the Commission's Interpretation of the scope of the 1984 Act insofar as marine terminal operator agreements involving foreign commerce are concerned. The Commission interprets the language of sections 4(b) and 5(a) of the 1984 Act, when read in conjunction with the Act's legislative history, as reflecting clear Congressional intent to carry forward under the 1984 Act the same areas of concerted marine terminal activity previously covered under the 1916 Act, with three exceptions. First, marine terminal agreements involving ocean transportation strictly in United States interstate commerce, which remain under the jurisdiction of the 1916 Act, are outside the scope of the 1984 Act. Second, agreements among common carriers subject to the 1984 Act to establish, operate or maintain a marine terminal in the United States are not subject to the 1984 Act. Third, pooling agreements between marine terminal operators are not included, but marine terminal operators are permitted to enter into arrangements with vessel operators which vary rates with the volume of cargo offered. *See* 129 Cong. Record 51782 (daily ed. Feb. 28, 1983) (statement of Mr. Gorton). Most marine terminal operators (and therefore the involved facility or service agreements and terminal conferences) simultaneously handle cargo moving in both interstate and foreign commerce. Indeed, the terminal facilities and services furnished to cargo and vessels are generally indistinguishable on the basis of the ultimate (i.e., foreign or domestic) origin or destination of the cargo or vessel concerned. In short, marine terminal operations are one area in the maritime industry wherein a virtually seamless operational interface exists between U.S. foreign commerce and interstate commerce.

The Commission has given careful consideration to formulating an interpretation of the relationship between the scopes of the two Shipping Acts in a practical manner insofar as marine terminal operator agreements are concerned. Certainly, the legislative history of the 1984 Act does not support a conclusion that Congress intended that marine terminal operator agreements which involve both streams of commerce be simultaneously subjected to the regulatory regimes of both the 1916 and 1984 Acts. Consequently, the Commission is adopting the position set forth in sections 572.202 and 572.203 of this part, whereby it interprets the 1984 Act as extending to marine terminal operator agreements which relate to terminal facilities and/or services which, either wholly or in part, handle or are held out to handle foreign commerce, either directly or by transshipment, including: (1) agreements involving both foreign and interstate commerce; and (2) agreements relating to facilities and/or services dedicated to interstate commerce which handle transshipment cargo moving under a through bill of lading to or from foreign ports or points.

Finally, in the interest of clarity, Subpart 9 explicitly states certain categories of agreements which are wholly outside the scope of these rules. Section 4 of the Act places acquisitions of voting securities or assets outside the scope of the Act as does section 5(e) of the Act with regard to maritime labor agreements. In addition, Subpart 9 recognizes that two categories of agreements, those involving nonvessel-operating common carriers and those involving ocean freight forwarders, which were formerly within the jurisdiction of the 1916 Act, are not covered by the 1984 Act.

Section 572.201—Agreements by or Among Ocean Common Carriers

This section recites the language of section 4(a) of the Act regarding agreements by or among ocean common carriers. Agreements which embrace any of the seven categories of activities enumerated here are subject to the requirements of these rules.

Section 572.202—Marine Terminal Operator Agreements Involving Foreign Commerce

This section recites the language of section 4(b) of the Act with regard to agreements involving marine terminal operators. The Commission interprets section 4(b) to include all marine terminal operator agreements which involve foreign commerce of the United States.

Section 572.203—Marine Terminal Operator Agreements Exclusively in Interstate Commerce

This section is intended to further clarify the Commission's jurisdiction under the Act. Where a marine terminal operator agreement involves interstate commerce exclusively, these rules do not apply.

Section 572.204—Common Carrier Terminal Agreements

Agreements between common carriers to operate marine terminals in the United States are outside the scope of these rules. Under section 5(a) of the Act such agreements do not have to be filed. Moreover, such agreements do not have antitrust immunity as indicated in section 7(b)(3) of the Act. The effect of these statutory provisions is to remove these agreements from the scope of the Act.

Section 572.205—Nonvessel-Operating Common Carrier Agreements

The purpose of this section is to make clear that such agreements are outside the scope of these rules.

Section 572.206—Ocean Freight Forwarder Agreements

The purpose of this section is to make clear that such agreements are outside the scope of these rules.

Section 572.207—Maritime Labor Agreements

This section recites the language of section 5(e) of the Act. The Act excludes maritime labor agreements from filing requirements and from review by the Commission. Consequently, the Part 572 rules do not apply to maritime labor agreements. However, while a maritime labor agreement itself is outside the scope of these rules, activities pursuant to a maritime labor agreement are subject to other provisions of the Act and other statutes administered by the Commission. Thus, rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, whether or not those rates, charges, regulations, or practices arise out of, or are otherwise related to, a maritime labor agreement will nevertheless be subject to scrutiny under other provisions of the Act.

Section 572.208—Acquisitions

This section recites the language of section 4(c) of the Act. Such transactions are outside the scope of these rules.

SUBPART C OF THE RULES—EXEMPTIONS AND EXCLUSIONS

Subpart C contains rules which partially implement the Commission's exemption authority under section 16. This subpart establishes general procedures for granting or revoking an exemption for an agreement or class of agreements. The formalization of these procedures by rule is new but is based on past Commission practice in considering exemption matters. In addition to formalizing exemption procedures by rule, Subpart C would continue to exempt under the 1984 Act certain classes of agreements which are presently exempt under the 1916 Act. The substantive standard for granting an exemption under section 16 of the Act has been expanded slightly from the section 35 standard of the 1916 Act to include a finding that the exemption does not result in a substantial reduction in competition. Moreover, the effect of an exemption under the 1984 Act differs from an exemption under the 1916 Act inasmuch as an exemption under the new statute confers antitrust immunity. The Commission has evaluated the current exemptions under the 1916 Act and believes that continuation of certain of these existing exemptions under the new Act is warranted. The current exemption for military household goods agreements, however, is not continued because such agreements between nonvessel-operating common carriers are outside the scope of the 1984 Act. Interested persons will have an opportunity to comment on the continuation, discontinuation or modification of the exemptions.

Sections 7(a)(4) and 7(a)(5) of the 1984 Act exclude foreign inland transportation agreements and foreign marine terminal agreements from the filing requirements of the Act and extends antitrust immunity to these agreements. For the purposes of clarity, Subpart C includes sections which restate these statutory exclusions.

Subpart C rules should be consulted to determine whether an agreement falls into a class which is excluded by statute or exempt by rule from filing or other requirements. However, in order to remove any uncertainty which a party may have as to the applicability of an exemption to an agreement, the rules of Subpart C allow for the optional filing of an exempt agreement.

Subpart C is organized so that the general procedures for applying for and granting exemptions are stated first. This is followed by a separate section for each exclusion or exemption. Organizing all exclusions and exemptions under a single subpart eliminate some redundancy in the current rules, and provides for the orderly addition of any new class of agreements which may be exempt in the future. The purpose of this subpart is to remove or minimize the delay in implementation of routine agreements and to avoid unnecessary costs.

Section 572.301(a)—Authority

This section of the rules is based on section 16 of the Act and recites the language of the Act which authorizes the Commission to exempt certain classes of agreements from any requirement of the Act. This section implements only the authority to exempt any class of agreements and does not implement the Commission's authority to exempt any specific activity of persons subject to the Act. This section recites the finding which the Commission must make in order to grant an exemption, namely, that the exemption will not substantially impair effective regulation, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce.

Section 572.301(b)—Optional Filing

Section 572.301(b) provides for the optional filing of an exempt agreement. The purpose of this paragraph is to enable parties who are uncertain of the application of an exemption to their agreement to file the agreement and thereby remove that uncertainty. Such optional filing of an exempt agreement, however, must be accompanied by the Information Form.

Section 572.301(c)—Application for Exemption

Section 16 of the Act provides that persons may apply for an exemption of any agreement or class of agreement from any requirement of the Act or may seek revocation of an existing exemption. Section 572.301(c) restates that right to file such an application. Section 572.301(c) specifies the particular requirements of such an application including a requirement that information provided be relevant to the finding which must be made in order to grant or continue an exemption.

Section 572.301(d)—Participation by Interested Persons

This section restates the language of section 16 which affords interested persons an opportunity for hearing regarding any proposal to adopt or revoke an exemption. The Act does not define the meaning of "opportunity for hearing." The appropriate "opportunity for hearing" will be decided on a case-by-case basis. In some cases the opportunity to comment on an exemption proposal in response to *Federal Register* notification may be sufficient.

Section 572.301(e)—*Federal Register* Notice

Section 16 of the Act provides that no exemption may be adopted or revoked, in whole or in part, by the Commission unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States. This section establishes notice in the *Federal Register* as the means for informing interested persons. The *Federal Register* notice shall contain sufficient information concerning the exemption to enable interested persons to submit relevant comment.

Section 572.301(f)—Retention of Agreement by Parties

Under this section parties are not required to file a copy of an exempt agreement, but merely to retain a copy of the agreement and make it available upon request by the Commission. This requirement is necessary in order to ensure that the Commission fulfills its monitoring responsibilities with regard to such agreements.

Section 572.302—Foreign Inland Transportation Agreements—Exclusion

Section 5(a) of the Act states, in part, that agreements related to transportation to be performed within foreign countries are not required to be filed with the Commission. Section 7(a)(4) provides that the antitrust laws do not apply to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." The effect of these provisions is to extend antitrust immunity to a class of agreements that is excluded by statute from filing rquirements. This section restates this statutory exclusion.

Section 572.303—Foreign Marine Terminal Agreements—Exclusion

This section makes explicit the exclusion of foreign marine terminal agreements from the filing and Information Form requirements of the Act and these rules. Such agreements may be viewed as a specific type of foreign transportation agreement and thereby excluded from filing by section 5(a) of the Act. Foreign marine terminal agreements are specifically referred to and given antitrust immunity in section 7 (a)(5).

Section 572.304—Non-substantive Modification to Existing Agreements—Exemption

This section continues, in a modified form, the present exemption of non-substantive agreements contained in 46 CFR 524.2 and exempts such agreements pursuant to section 16 of the 1984 Act. Paragraphs (d)(1) and (d)(2) of the current exemption are removed.

Section 572.305—Husbanding Agreements—Exemption

This section clarifies and continues the exemption of husbanding agreements presently contained in 46 CFR 520 and exempts such agreements pursuant to section 16 of the 1984 Act.

Section 572.306—Agency Agreements—Exemption

This section clarifies and continues the present exemption for agency agreements contained in 46 CFR 520 and exempts such agreements pursuant to section 16 of the 1984 Act.

Section 572.307—Equipment Interchange Agreements—Exemption

This section continues the present exemption of equipment interchange agreements contained in 46 CFR 524 and exempts such agreements pursuant to section 16 of the 1984 Act.

Section 572.308—Joint Policing Agreements—Exemption

This section continues, on an interim basis, the present exemption of joint policing agreements contained in 46 CFR 524. The Commission, however, proposes to terminate this exemption 30 days from the issuance of a final rule. The Commission believes that such agreements should be filed and reviewed because of their potential for adverse effects upon shippers.

Section 572.309—Credit Information Agreements—Exemption

This section continues, on an interim basis, the present exemption for credit information agreements contained in 46 CFR 524. The Commission, however, proposes to terminate this exemption 30 days from the issuance of a final rule. The Commission believes that such agreements should be filed and reviewed because credit is an important factor in price competition and should be placed under regulatory scrutiny.

Section 572.310—Non-Exclusive Transshipment Agreements—Exemption

This section continues, in a modified form, the present exemption for non-exclusive transshipment agreements contained in 46 CFR 524. The modifications refine the description of the type of agreement which is exempt''. This will permit inclusion of matters in the agreement which are more fully representative of the usual actual arrangement of the parties for the conduct of commercial transshipment activities. The modifications permit inclusion in the arrangement of any specifics of equipment interchange, service rationalization and agency arrangements as may be necessary to complete the contemplated carriage. Additionally, these agreements now will be exempt from filing, but only if limited in scope to the provisions set forth. The exemption from filing eliminates the need to continue the requirement of a specified form of agreement.

SUBPART D OF THE RULES—FILING AND FORM OF AGREEMENTS

Section 5 of the Act establishes a requirement that every agreement subject to the Act shall be filed with the Commission. A special provision makes assessment agreements effective upon filing. The Commission is empowered under section 5(a) to prescribe by rule the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate an agreement.

Subpart D contains rules implementing section 5 filing requirements. These rules contemplate that new agreements and modifications to existing agreements shall be filed in looseleaf, notebook-style format. These requirements are designed To facilitate the necessary expedited processing of agreements, upgrade the Commission's agreement record keeping process and enhance its data retrieval ability. The requirements are developed from, and based upon, past Commission experience in these areas and the recognition of the difficulties encountered under former procedures.

The establishment of a loose-leaf, notebook style requirement for filing of agreements is considered necessary for standardization and maintenance of the agency's record systems and their ultimate conversion to more automated storage and retrieval. It will also facilitate expedited review of agreements. The loose-leaf form is not a new notion with respect to agreement filings. It is presently used by some major conference agreements on their own initiative. Its convenience of use and maintenance should he apparent to the parties.

Subpart D also implements the information requirements under section 5 by requiring the filing of an Information Form with certain agreements. The purpose of the Form is to provide the Commission with the information needed to evaluate an agreement. Only that information which is needed for the Commission's initial substantive review shall be required. A more complete discussion of the basis and purpose of the Information Form appears below. The Information Form requirement is not being imposed on assessment or terminal agreements.

Section 572.401—Filing of Agreements

All agreements shall be filed with the Secretary of the Commission. The Commission will require a true copy and 15 additional copies of an agreement and the Information Form. This number of copies will be needed to enable the various involved offices of the Commission to review a filed agreement. The requirements specifying who may file an agreement and how it is transmitted are designed to avoid delays in the agreement reception process and to minimize the number of rejections. This section shall apply to all agreements and modifications filed on or after June 18, 1984.

Section 572.402—Form of Agreements

This section states certain technical requirements as to form. The purpose of the proposed loose-leaf style filing is to ensure compatability of agreements' documents with the Commission's records systems, and to ensure the legibility and durability of these documents. The specifications are modeled on those used in tariff publication. This system should also facilitate the modification of agreements and reduce the burden on parties filing modifications to their agreements. This section shall apply to all new agreements, other than assessment or marine terminal agreements, filed on or after June 18, 1984. It is not mandatory that modifications of existing agreements filed during the pendency of this rulemaking meet these requirements but the parties may do so if the modifications are incorporated in a restatement of the entire agreement. Upon completion of this rulemaking proceeding and final issuance of these provisions, all existing agreements will be required, within a reasonable period of time to be specified, to be refiled to meet the form requirements then imposed. Parties are invited to comment on the period of time to be specified.

Section 572.403—Modification of Agreements

This section provides guidance for the filing of modifications to agreements. Modifications to agreements must include an Information Form where the modification may result in a reduction in competition.

Section 572.404—Application for Waiver

This section provides procedures for the waiver of the form requirements of this subpart upon a showing of good cause.

Section 572.405—Information Form

Section 5(a) of the Act authorizes the Commission to prescribe by rule the additional information and documents necessary to evaluate an agreement. The legislative history to section 6 of the Act (H.R. Rep. No. 98-600, 98th Cong., 2d Sess. 30 (1984)) indicates that the agreement review procedure established under the Act is modeled upon the Hart-Scott-Rodino procedures governing clearance of proposed acquisitions and mergers (Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a). Pursuant to its Hart-Scott-Rodino authority, the Federal Trade Commission has developed a reporting form to aid its review of proposed mergers. Section 572.401 of these rules implements the Commission's authority under section 5(a) of the Act by requiring the filing of an Information Form with certain agreements. The Information Form is intended to enable the Commission to obtain the information needed to carry out its responsibility to review an agreement under the substantive standard set forth in section 6(g). The information requested on the Form does not seek all information which may be relevant to an agreement. Rather it requires only that information which would enable the Commission to expeditiously perform its responsibilities under section 6(g) of the Act. Parties to an agreement will therefore not be burdened with supplying any more information than is necessary for the Commission to conduct its initial substantive review. Use of the Form should also benefit the parties by removing any uncertainty about the depth of information which the Commission believes is necessary and relevant to its initial substantive review of an agreement. Only agreements where some further need for information is warranted would therefore be subject to a request for additional information. Parties also have the option of filing any additional information and documents which they believe may be relevant to the Commission's review of an agreement.

This section provides that where parties are unable to complete a particular item on the Form, they will not be deemed to be in non-compliance with these rules, provided that an adequate explanation for the incomplete item is submitted. This procedure is intended to fulfill the directives of the legislative history that information requirements should not be unduly burdensome and should be within the parties' grasp. The explanation of an incomplete item is intended to enable the Commission to determine whether compliance would be unduly burdensome or unreasonably beyond the information available to the parties. This procedure applies to each incomplete response on the Form.

SUBPART E OF THE RULES—CONTENT AND ORGANIZATION OF AGREEMENTS

Sections 5 (b) and (c) of the Act require certain mandatory provisions in conference and interconference agreements. Subpart E implements these requirements and contains certain rules which establish a standard organization for agreements. Specific language is not required by these rules. Parties to agreements will retain the full measure of flexibility in fashioning their commercial arrangements. The purpose of these minimal organizational requirements is to facilitate the Commission's preliminary review to determine whether an agreement meets technical filing requirements and the substantive review of an agreement under the general standard set forth in section 6(g) and the prohibited acts listed in section 10. Moreover, as with the Subpart D requirements regarding form, these content and organization requirements will enhance the Commission's data retrieval capabilities without imposing any significant burden on parties to agreements. In fact, these minimal requirements as to agreement organization may be of assistance to the parties in preparing their agreements.

As in the case of Subpart D form requirements, the organization and content requirements of Subpart E will apply immediately to all new agreements filed on or after June 18, 1984, except assessment or marine terminal agreements. Parties filing modifications to existing agreements may restate their agreements to conform to Subpart E requirements. Upon completion of this proceeding, parties to existing agreements will be given a reasonable period of time in which to meet the requirements of this subpart.

Section 572.501—Agreement Provisions—Organization

This section sets forth certain basic articles which are required in most agreements. The purpose of this requirement is to facilitate review of the essential terms of an agreement. This section does not require specific language. The parties therefore are not restricted in establishing their commercial relationships. Since each of these nine articles may be found in virtually all agreements and since the articles are limited to what may be considered the essential terms of any agreement, the burden on agreement parties is minimal. Persons are encouraged to comment on the desirability of including additional specified provisions in the standardized organization set forth in this section. In the case of conference agreements, certain additional provisions are required by section 5(b) of the Act.

Section 572.502—Organization of Conference and Interconference Agreements

This section specifies certain additional provisions required of conference, interconference, freight conference, and passenger conference agreements.

SUBPART F OF THE RULES—ACTION ON AGREEMENTS

Section 6 of the Act establishes procedures under which agreements shall be reviewed and acted upon by the Commission. A strict schedule for processing agreements is mandated. Section 6 provides for public notice of filed agreements and for rejection of agreements that fail to meet technical filing requirements. Filed agreements will go into effect in 45 days unless a request for expedited approval is granted or the Commission seeks additional information or injunctive relief. Section 6 contains the substantive standard under which agreements are reviewed and authorizes the Commission to bring suit to enjoin an agreement and to seek court enforcement of its information requests. Section 6 also preserves the confidentiality of information submitted with agreements.

Subpart F contains rules implementing the provisions of section 6. A fundamental purpose of section 6 is to streamline the processing of agreements filed with the Commission and to ensure that agreements will be acted upon in an expeditious manner. The model for Commission review of agreements is that portion of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390, governing premerger clearance of proposed acquisitions and mergers. In most cases, agreements will become effective following the observance of a 45-day waiting period. The rules in Subpart F are intended to establish clear procedures for the processing of agreements, so that the Commission may be able to review agreements based on necessary and relevant information within the time allowed by the statute.

Section 572.601—Preliminary Review—Rejection of Agreement

Section 6(a) of the Act provides that any filed agreement which fails to meet the requirements of section 5 of the Act shall be rejected. The first step in the processing of an agreement is a preliminary review to determine whether the agreement and accompanying Information Form meet the technical filing requirements of the Act and these rules. Where an agreement fails to provide for required statutory provisions or to meet the requirements of these rules, or where the Information Form is incomplete and an adequate explanation is not provided, the agreement shall be rejected. Parties will be notified in writing of the rejection of an agreement and the reasons for rejection. Along with the notice of rejection, the agreement, the Form, and all accompanying materials shall be returned to the parties. When an agreement is rejected, the running of the waiting period terminates.

Should the parties refile, the refiled agreement would be subject to the full waiting period required under the Act.

Section 572.602—*Federal Register* Notice

Section 6(a) of the Act requires the Commission to transmit notice of the filing of an agreement to the *Federal Register* within seven days of receipt. This section implements that requirement. The Commission will transmit such notice immediately upon completion of its preliminary review. The content of the *Federal Register* Notice is based on the Commission's current rule at 46 CFR 522.6.

Section 572.603—Comment

This section provides for comment by any interested person on an agreement. Comments may include documentary or other information. Such comments and information shall be accorded the full measure of confidentiality permitted by law.

Section 572.604—Waiting Period

Section 6 requires that parties to agreements observe a waiting period, usually 45 days, prior to implementing a filed agreement. This section sets forth certain technical provisions which make clear when the waiting period commences, when it may be tolled, when it is resumed, and when it terminates.

Section 572.605—Requests for Expedited Approval

Section 6 of the Act allows parties to an agreement to request expedited approval of an agreement. Section 572.605 sets forth grounds and procedures for applying for and granting expedited approval. The rule makes clear that such requests will generally be granted only in exceptional circumstances.

Section 572.606—Requests for Additional Information

Section 6(d) of the Act authorizes the Commission to issue requests for additional information. Section 572.507 implements that section of the Act.

Section 572.607—Failure to Comply With Requests for Additional Information

Section 6(i) of the Act authorizes the Commission to seek court enforcement of its information requests. This section is based on that provision of the Act.

Section 572.608—Confidentiality of Submitted Material

Section 6(j) of the Act provides that all information submitted by a filing party other than the agreement itself shall be exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). This section of the rules implements the Act's confidentiality provision.

Section 572.609—Negotiations

The section makes clear that the negotiation process may take place at any time after the filing of an agreement up to the conclusion of an injunctive proceeding. The negotiation process will thus be available throughout the pendency of an agreement to resolve differences over an agreement. Where more expeditious, alternative solutions may be found, the parties and the Commission may avoid the cost of litigation. The negotiation process is limited to the filing party and Commission personnel. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

SUBPART G OF THE RULES—REPORTING AND RECORD RETENTION REQUIREMENTS

Section 15 of the Act authorizes the Commission to obtain reports from any common carrier subject to the Act. The Commission may also require a conference to file conference minutes with the Commission. Subpart G contains rules which implement the various record retention and reporting requirements under the Act. Some types of data, such as conference minutes, must be submitted directly to the Commission. Other Information is required to be kept by the carrier and an index of the records is required to be filed with the Commission. The Commission seeks to ensure that sufficient information is available to satisfy its statutory responsibility to adequately monitor the concerted activities of regulated parties.

Section 572.701—General Requirements

This section contains certain general requirements which apply to all reports required by this subpart.

Section 572.702—Filing of Reports Related to Shippers' Requests and Complaints and Consultations

The Act requires conferences to provide for a consultation process and to establish procedures for considering shippers' requests and complaints. This section requires the filing of annual reports which will enable the Commission to determine whether conferences are fulfilling their responsibilities under the Act. This section reduces current requirements for shipper requests and complaints and establishes new requirements for reporting on consultations.

Section 572.703—Filing of Minutes

This section requires certain agreements to file minutes of meetings. Discussions of certain matters, however, are exempt from the filing requirement of this section. This section is essentially a continuation of current requirements.

Section 572.704—Index of Documents

This section requires that certain agreements maintain an index of certain documents distributed to member lines. Its purpose is to further assist the Commission in fulfilling its monitoring responsibilities under the Act. The index of documents is essential to the maintenance of effective surveillance over concerted ocean carrier activities. The Commission merely seeks the identity of the documents, rather than copies of the documents themselves.

Section 572.705—Waiver of Reporting and Record Retention

This section provides for waiver of any of the provisions of this subpart.

SUBPART H OF THE RULES—TRANSITION RULES

This subpart establishes rules dealing with certain transitional matters involving agreements in existence prior to the effective date of the 1984 Act. One purpose of this subpart is to bring existing conference agreements into conformance with the mandatory provisions for conference agreements set forth in section 5(b) of the Act. Section 20(d) of the Shipping Act of 1984 (46 U.S.C. app. 1719(d)) continues conference agreements previously approved under section 15 of the Shipping Act, 1916, "as if approved or issued under this Act." Even though conference agreements remain in effect and retain antitrust immunity, the legislative history of the Act supports Commission action to assure that such agreements meet certain requirements of the Shipping Act of 1984. H.R. REP. No. 53, Part 2, 98th Cong., 1st Sess. 33 (1983).

Conference agreements already contain provisions relating to their purpose and the admission, readmission and withdrawal of members which meet or may even exceed the requirements of section 5(b) in these areas. Model provisions implementing these statutory requirements, therefore, are not necessary. However, no conference agreement approved under section 15 of the Shipping Act, 1916 fully complies with all of the requirements of section 5(b). Although conferences are free after June 18, 1984 to file amendments in order to comply with section 5(b) and implementing rules issued by the Commission, any amendment will only become effective

45 days after filing. (*See* section 6 (46 U.S.C. app. 1705)). During the interim, conferences could be in violation of section 5(b). In order to alleviate this potential problem, the Commission is prescribing model provisions to be incorporated in existing conference agreements during this interim period. Rather than requiring conferences to file an amendment containing the model provisions, the Commission is permitting conferences simply to file a telex followed by a letter, or a letter, signed by all parties or their duly authorized representatives, evidencing the adoption of the mandatory provisions contained herein. It is not necessary for the parties to recite verbatim the mandatory provisions contained in §§ 572.801(a) through 572.801(e). It is sufficient to state that the conference adopts as a modification to its agreement §§ 572.801(a) through 572.801(e). The deadline for adoption is June 18, 1984.

Section 572.801—Mandatory Provisions in Existing Conference Agreements

Section 5(b) of the Act sets forth certain required provisions for all conference agreements. This section provides certain model mandatory provisions which, if adopted, assure that existing conference agreements shall be fully in conformance with the Act on June 18, 1984 and will continue to remain in effect pursuant to section 20(d) of the Act.

Section 5(b)(4) of the Act requires conferences, at the request of any member, to require an independent neutral body to police the obligations of the conference and its members. Section 572.801(a) assures compliance with this statutory requirement by including such a provision in a conference agreement. The Commission is removing its current self-policing regulations contained in 46 CFR Part 528 from application to agreements subject to the 1984 Act and is merely requiring the statement in section 572.801(a) to assure compliance with the 1984 Act. To the extent that conferences do have neutral body policing, those provisions are integral to the agreement and such authority and procedures must be included in the agreement.

Section 5(b)(5) of the Act requires conferences to contain a provision which states that the conference is prohibited from engaging in conduct prohibited by section 10(c) (1) or (3) of the Act. Section 572.801(b) assures compliance with this requirement.

Sections 5(b)(6) and 7 of the Act require conferences to provide for consultation procedures and procedures dealing with shipper's requests and complaints. Sections 572.801(c) and 572.801(d) assure compliance with this requirement.

Section 5(b)(8) of the Act requires every conference agreement to contain a provision permitting any member to take independent action on any rate or service item in the conference tariff, on not more than 10 days' notice to the conference. Section 572.801(e) of the rules implements the independent action requirement of the statute by mandating an independent action provision. The provision makes it clear that once proper notice is received, the conference must include the new rate or service item in its tariff within 10 days, or a lesser time if the conference so decides. Other conference members must then be provided the opportunity to adopt the independent rate or service item on or after its effective date. The provision also prohibits a conference member from taking independent action on a conference service contract or time/volume contract, unless the conference agreement specifically provides otherwise. Unless otherwise provided in its agreement, the conference may regulate or prohibit its members from unilaterally entering into such contracts and may also prevent any member from taking independent action on any service contract and any time/volume contract offered by the conference. Section 5(b)(8) requires a right of independent action only as to those rate or service items "required to be filed in a tariff under section 8(a) of [the] Act." Since service contracts are governed by section 8(c) of the Act and are not required to be filed in tariffs, conference members need not be provided the right to take action independent of them. Consequently, the Commission has accorded the same treatment to time/volume contracts because they are conceptually so similar to service contracts and to do otherwise might frustrate the compromise apparent in the statute concerning conference control over the use of service contracts. The Commission's interim rule on contract arrangements does not require time/volume contracts to be published in tariffs and this rule does not require independent action on a conference time/volume contract unless otherwise provided by the conference. Time/volume rates published in tariffs without any underlying contract are subject to the independent action requirements of the rule.

Section 572.802—Mandatory Provision in Existing Interconference Agreements

This section recites the requirement of section 5(c) of the Act that all interconference agreements must provide for the right of independent action. However, given the fact that existing interconference agreements contain such a provision, such agreements are in conformance with the 1984 Act and do not require any modification in order to conform to section 20(d) of the Act.

Section 572.803—Expiration Dates in Existing Agreements

Existing agreements with specified terms, either agreed to by the parties or previously required by the Commission, shall remain in effect after the effective date of the Act, June 18, 1984. Action to renew or eliminate the termination date is subject to the waiting period required in section 6(c) of the Act. Parties are advised to file modifications for renewal or elimination of a termination date sufficiently in advance to guarantee expiration of the waiting period during the term of the existing agreement, in order to avoid any lapse in authority.

SUBPART I OF THE RULES—PENALTIES

This subpart provides for the application of penalties for certain violations of the rules of this part pursuant to section 13(a) of the Act.

Section 572.901—Failure to File

Failure to file an agreement is a violation of section 5(a) of the Act and the rules of Subpart C. Such failure is subject to the penalties of section 13(a) of the Act. Maximum penalties are $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the maximum penalty is $25,000 for each violation.

Section 572.902—Falsification of Reports

Falsification of any report required by the Act and these rules, including falsification of any item on the Information Form, will be subject to the civil penalties set forth in section 13(a) of the Act. Such violations may also be subject to criminal sanctions under 18 U.S.C. 1001.

APPENDIX A TO THE RULES—INFORMATION FORM

Parties to agreements, referenced in Section 572.201 (excluding assessment agreements, marine terminal agreements, and those agreements exempted from the filing of the Information Form pursuant to Subpart C of these rules), by or among ocean common carriers, shall be required to file with each agreement an Information Form (Form). The Information Form is attached as Appendix A to Part 572.

Section 6(g) of the Act states that the Commission may file suit to enjoin an agreement if it determines "that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation costs." The legislative history provides guidance on the kind of analysis which Congress expected the Commission to make under the general standard, H.R. Rep. No. 98–600, 98th Cong., 2d Sess. 33–37 (1984). Such an analysis may include a consideration of the relevant market, including all competitive transportation alternatives, and the share of that market possessed by the parties. The Commission is required to consider the likely impact of the agreement on costs and services to shippers and to ports, and to weigh any negative impact on costs or services against other offsetting benefits, such as any efficiency-creating aspects of the agreement and the ability of a conference to address problems of overcapacity and rate instability. In general, Congressional intent is clear that before the Commission intercedes under the general standard, the likely reduction in competition resulting from the agreement should be substantial.

The Information Form is intended to furnish the Commission with the information necessary to make the initial substantive review of an agreement under the general standard. Given the statutory 45-day period before a filed agreement becomes effective and limited Commission resources, the Form was designed to capture information that would enable the Commission to perform its responsibilities expeditiously under section 6(g) of the Act. The Form is not intended to elicit all potentially relevant information concerning an agreement, but only that information which is necessary, limited to the issues at hand and not unduly burdensome. The nature of a particular agreement will determine the extent of information required. Relevant information not specifically requested by any part of the Form may be obtained, where necessary, by a request for additional information under section 6(d) of the Act. The Commission recognizes that the amount of information requested on the Information Form is significant. These information needs may be refined as the Commission gains experience under the general standard and determines what is relevant and essential to that review. In addition, the Commission plans to develop its own internal sources of trade information and as this information becomes available may be able to reduce the amount of information required on the Form. The Commission wishes to emphasize that the quantum of information required on the Form is not meant to shift the burden of proof to the parties to an agreement. The Commission fully recognizes that the statute places the burden of proof on the Commission in any injunctive proceeding under the general standard. At this point, the Form reflects the Commission's preliminary determination as to the information it will need to carry out the review functions under the Act. Finally, it should be noted that where the parties are unable to complete a particular item, the rules provide that completion of that item will not be required provided that an adequate explanation is given.

A completed Form must accompany all agreements, referenced in Section 572.201 (excluding assessment agreements, marine terminal agreements, and those agreements exempted from the filing of the Information Form pursuant to Subpart C of these rules), by or among ocean common carriers that are required to be filed with the Commission. Agreements that do not provide for rate fixing (i.e., concerted actions fixing or agreeing on rates), pooling, or joint-services/consortia, are not required to complete Parts III and IV, which seek information on market shares and market competition. These three types of agreements, of all agreements historically filed with the Commission, are the most likely to trigger the 6(g) standard because of their potential to create excessive market power. Market power is the ability to set and maintain prices that yield above-normal profits over a sustained period of time. Where new and evolving forms of cooperative conduct cause substantial anticompetitive effects that exceed their benefits, it is believed that either rate fixing, pooling or a joint-service/consortium, or some combination thereof, will be involved. This does not, however, preclude the Commission from assessing the anticompetitive consequences of other types of agreements and taking the appropriate action under the general standard.

While there may be occasions when rate fixing, pooling, joint-service/consortium, or other types of agreements may lead to excessive market power raising substantial issues of unreasonably anticompetitive effects, excessive market power is most likely to occur in trades where foreign governments restrict entry to the trade or access to cargoes. Given the contestability of markets in the liner shipping Industry—where contestability in the liner industry is indicated by the industry's history of frequent entry and exit and the mobility of its resources from one trade to another—in all but the rarest cases, only government laws, decrees, rules, regulations or other governmental actions can effectively block entry to a trade. Accordingly, Part VI of the Form requests information that would permit the Commission to assess the extent of foreign government involvement in the liner market.

Part V requests information about U.S. ports proposed to be served under the agreement and any reduction in service frequency or the elimination of service to certain U.S. ports. Part V is intended to address that aspect of the section 6(g) general standard concerning certain agreements that might "produce an unreasonable reduction in transportation service."

Part VII of the Form requests information on any benefits resulting from the agreement that may accrue to the parties, the shipping public, or to U.S. commerce generally. This part is included in the Form in response to congressional intent that the Commission, in its review of an agreement under the section 6(g) general standard, should consider that increases in efficiency may offset a reduction in competition.

III. Conclusion.

The rules contained in Part 572, and the accompanying Information Form, are intended to establish a comprehensive regulatory framework which fulfills the purposes of the Shipping Act of 1984. The rules are intended to facilitate the filing of agreements by parties and the review of agreements by the Commission with a minimum of government intervention and regulatory cost.

The Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that these rules will not have a significant economic impact on a substantial number of small entities, within the meaning of that Act. The primary economic impact of these rules would be on ocean common carriers which generally are not small entities. A secondary impact may fall on shippers, some of whom may be small entities but that impact is not considered to be significant.

The collection of information requirements in these rules and the Information Form have been submitted to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the information collection aspects of the rules should be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, Attention: Desk Officer for the Federal Maritime Commission.

List of subjects in 46 CFR Part 572, Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

THEREFORE, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, I3, 15, 16, 17, and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717), the Federal Maritime Commission hereby amends Title 46, Code of Federal Regulations, by adding new Part 472 to Subchapter D to read as follows:

PART 572—AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

Subpart A—General Provisions

Sec.
572.101 Authority.
572.102 Purpose.
572.103 Policies.
572.104 Definitions.

Subpart B—Scope

572.201 Agreements By or Among Ocean Common Carriers.
572.202 Marine Terminal Operator Agreements Involving Foreign Commerce.
572.203 Marine Terminal Operator Agreements Exclusively in Interstate Commerce.
572.204 Common Carrier Terminal Agreements.
572.205 Non-Vessel-Operating Common Carrier Agreements.
572.206 Ocean Freight Forwarder Agreements.
572.207 Maritime Labor Agreements.
572.208 Acquisitions.

Subpart C—Exemptions and Exclusions

572.301 Exemption Procedures.
572.302 Foreign Inland Transportation Agreements—Exclusion.
572.303 Foreign Marine Terminal Agreements—Exclusion.
572.304 Non-Substantive Modifications to Existing Agreements Exemption.
572.305 Husbanding Agreements—Exemption.

Subpart D—Filing and Form of Agreements

Subpart E—Content and Organization of Agreements

Subpart F—Action on Agreements

Subpart G—Reporting and Record Retention Requirements

Subpart H—Transitional Rules

Subpart I—Penalties

Appendix A to Part 572

Authority. Sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717).

Subpart A—General Provisions

§ 572.101 Authority.

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 ("the Act").

§ 572.102 Purpose.

These rules implement those provisions of the Act which govern agreements by or among ocean common carriers and other entities subject to the filing requirements of the Act and set forth more specifically certain procedures provided for in the Act.

§ 572.103 Policies.

(a) The Shipping Act of 1984 requires that agreements be processed and reviewed according to strict statutory deadlines. These rules are intended to establish procedures for the orderly and expeditious review of filed agreements in accordance with the statutory requirements.

(b) The Act requires that agreements be reviewed in accordance with a general standard as set forth in section 6(g) of the Act and empowers the Commission to obtain certain information to conduct that review. These rules set forth the kind of information for particular types of agreements which the Commission believes relevant to that review. Only that information which is relevant to a 6(g) review is requested. It is the policy of the Commission to keep the costs of regulation to a minimum and at the same time obtain information needed to fulfill its statutory responsibility.

(c) In order to further the goal of expedited processing and review, agreements are required to meet certain minimum requirements as to form. These requirements are intended to ensure expedited review and should assist parties in preparing agreements. These requirements as to form do not affect the subtance of an agreement and are intended to allow parties the freedom to develop innovative commercial relationships and provide efficient and economic transportation systems.

(d) The Act itself excludes certain agreements from filing requirements and authorizes the Commission to exempt other classes of agreements from any requirement of the Act or these rules. In order to minimize delay in implementation of routine agreements and to avoid the private and public cost of unnecessary regulation, the Commission is exempting certain classes of agreements from the filing or information requirements of these rules.

(e) Under the new regulatory framework established by the Act, the role of the Commission as a monitoring and surveillance agency has been enhanced. The Act favors greater freedom in allowing parties to form their commercial arrangements. This, however, requires greater monitoring of agreements after they have become effective. The Act empowers the Commission to impose certain recordkeeping and reporting requirements. These rules identify those classes of agreements which require specific record retention and reporting to the Commission and prescribe the applicable period of record retention, the form and content of such reporting, and the applicable time periods for filing with the Commission. These rules assure that Commission monitoring responsibilities will be fulfilled.

(f) The Act requires that conference agreements must contain certain mandatory provisions. These rules provide a means for immediate compliance and grandfathering of existing agreements on the effective date of the new statute by a simple acceptance of model provisions by letter or telex on or before June 18, 1984. These rules also provide that conferences may file their "own" modifications to meet these statutorily mandated provisions on or after June 18, 1984. As the conference "sponsored" modifications or agreements become effective after the statutory review period, the model provisions would be superseded.

§572.104 Definitions.

When used in this part:

(a) *Agreement.* The term "agreement" means an understanding, arrangement or association, written or oral (including any modification or appendix) entered into by or among ocean common carriers and/or marine terminal operators, but does not include a maritime labor agreement.

(b) *Antitrust Laws.* The term "antitrust laws" means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; the Antitrust Civil Process Act (76 Stat. 548), as amended; and amendments and Acts supplementary thereto.

(c) *Appendix.* The term "appendix" means a document containing additional material of limited application and appended to an agreement, distinctly differentiated from the main body of the basic agreement.

(d) *Assessment Agreement.* The term "assessment agreement" means an agreement, whether part of a collective bargaining agreement or negotiated separately, to the extent that it provides 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.

(e) *Common Carrier.* The term "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that: (1) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (2) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) *Conference Agreement.* The term "conference agreement" means an agreement between or among two or more ocean common carriers or between or among two or more marine terminal operators for the conduct or facilitation of ocean common carriage and which provides for: (1) the fixing and adherence to uniform rates, charges, practices and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo for all members; (2) the establishment of a central organization to conduct the collective administrative affairs of the group; and may include (3) the filing of a common tariff in the name of the group and in which all the members participate, or, in the event of multiple tariffs, each member must participate in at least one such tariff. The term does not include consortium, joint service, pooling, sailing or transshipment agreements.

(g) *Consultation.* The term "consultation" means a process whereby a conference and a shipper confer for the purpose of resolving commercial disputes or preventing and eliminating the occurrence of malpractices.

(h) *Cooperative Working Agreement.* The term "cooperative working agreement" means an agreement which establishes exclusive, preferential, or cooperative working relationships which are subject to the Shipping Act of 1984, but which do not fall precisely within the arrangements of any specifically defined agreement.

(i) *Effective Agreement.* The term "effective agreement" means an agreement approved pursuant to section 15 of the Shipping Act, 1916 or filed and effective pursuant to sections 5 and 6 of the Act.

(j) *Equal Access Agreement.* The term "equal access agreement" means an agreement between ocean common carriers of different nationalities, as determined by the incorporation or domicile of the carriers' operating companies, whereby such common carriers associate for the purpose of gaining reciprocal access to cargo which is otherwise reserved by national decree, legislation, statute or regulation to carriage by the merchant marine of the carriers' respective nations.

(k) *Independent Neutral Body.* The term "independent neutral body" means a disinterested third party, authorized by a conference and its members to review, examine and investigate alleged breaches or violations by any agreement member of the conference agreement and/or the agreement's properly promulgated tariffs, rules or regulations.

(l) *Information Form.* The term "Information Form" means the form containing economic information which must accompany the filing of certain kinds of agreements.

(m) *Interconference Agreement.* The term "interconference agreement" means an agreement between conferences serving different trades.

(n) *Joint Service/Consortium Agreement.* The term "joint service/consortium agreement" means an agreement between ocean common carriers operating as a joint venture whereby a separate service is established which: (1) holds itself out in its own distinct operating name; (2) fixes its own rates, charges, practices and conditions of service; (3) publishes its own tariff(s) in its own operating name; (4) issues its own bills of lading; and (5) acts generally as a single carrier. The common use of facilities may occur and there is no competition between members for traffic in the agreement trade; but they otherwise maintain their separate identities.

(o) *Marine Terminal Facilities.* The term "marine terminal facilities" means one or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and ocean common carriers or between two ocean common carriers. This term is not limited to waterfront or port facilities and includes so-called off-dock container freight stations at inland locations and any other facility from which inbound waterborne cargo may be tendered to the consignee or outbound cargo is received from shippers for vessel or container loading.

(p) *Marine Terminal Operator.* The term "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.

(q) *Maritime Labor Agreement.* The term "maritime labor agreement" means a 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 an agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing or administration of a multiemployer bargaining group; but the term does not include an assessment agreement.

(r) *Modification.* The term "modification" means any change, alteration, correction, addition, deletion, cancellation or revision of an existing effective agreement (including such changes to appendices to an agreement).

(s) *Non-Vessel-Operating Common Carrier.* The term "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation portion is provided, and is a "shipper" in its relationship with an "ocean common carrier."

(t) *Ocean Common Carrier.* The term "ocean common carrier" means a vessel-operating common carrier, but the term does not include one engaged in ocean transportation by ferry boat or an ocean tramp.

(u) *Ocean Freight Forwarder.* The term "ocean freight forwarder" means a person in the United States that (1) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers, and (2) processes the documentation or performs related activities incident to those shipments.

(v) *Person.* The term "person" means individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(w) *Pooling Agreement.* The term "pooling agreement" means an agreement between ocean common carriers which provides for the division of cargo carryings, earnings, or revenue and/or losses between the members in accordance with an established formula or scheme.

(x) *Port.* The term "port" means the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

(y) *Sailing Agreement.* The term "sailing agreement" means an agreement between ocean common carriers which provides for the rationalization of service by establishing a schedule of ports which each carrier will serve and/or the frequency of each carrier's calls at those ports.

(z) *Service Contract.* The term "service contract" means a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

(aa) *Shipper.* The term "shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(bb) *Shippers' Association.* The term "shippers' association" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(cc) *Shippers' Requests and Complaints.* The term "shippers' requests and complaints" means a communication from a shipper to a conference requesting a change in tariff rates, rules, regulations, or service; protesting or objecting to existing rates, rules, regulations or service; objecting to rate increases or other tariff changes; and/or protests against allegedly erroneous tariff implementation. Routine information requests are not included in the term.

(dd) *Space Charter Agreement.* The term "space charter agreement" means an agreement between ocean common carriers whereby a carrier (or carriers) agrees to provide vessel capacity for the use of another carrier (or carriers) in exchange for compensation or services. The arrangement may include arrangements for equipment interchange and receipt/delivery of cargo.

(ee) *Through Transportation.* The term "through transportation" means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is an ocean common carrier, between a United States point or port and a foreign point or port.

(ff) *Transshipment Agreement.* The term "transshipment agreement" means an agreement between an ocean common carrier serving a port or point of origin and another such carrier serving a port or point of destination, whereby cargo is transferred from one carrier to another carrier at an intermediate port served by direct vessel call of both such carriers in the conduct of through transportation. Such an agreement does not provide for the concerted discussion, publication or otherwise fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the transshipment service offered, the port of transshipment and the participation of the nonpublishing carrier.

Subpart B—Scope

§ 572.201 Agreements By or Among Ocean Common Carriers.

These rules apply to agreements by or among ocean common carriers to:

(a) Discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(b) Pool or apportion traffic, revenues, earnings, or losses;

(c) Allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(d) Limit or regulate the volume or character of cargo or passenger traffic to be carried;

(e) Engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;

(f) Control, regulate, or prevent competition in International ocean transportation; and

(g) Regulate or prohibit their use of service contracts.

§ 572.202 Marine Terminal Operator Agreements Involving Foreign Commerce.

These rules apply to agreements (to the extent the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to:

(a) Discuss, fix, or regulate rates or other conditions of service; and

(b) Engage in exclusive, preferential, or cooperative working arrangements.

§ 572.203 Marine Terminal Operator Agreements Exclusively in Interstate Commerce.

These rules do not apply to agreements by or among marine terminal operators which exclusively and solely involve transportation in the interstate commerce of the United States.

§ 572.204 Common Carrier Terminal Agreements.

These rules do not apply to agreements among common carriers to establish, operate, or maintain a terminal in the United States.

§ 572.205 Nonvessel-Operating Common Carrier Agreements.

These rules do not apply to agreements by or among non-vessel-operating common carriers.

§ 572.206 Ocean Freight Forwarder Agreements.

These rules do not apply to agreements by or among ocean freight forwarders.

§ 572.207 Maritime Labor Agreements.

These rules do not apply to maritime labor agreements.

§ 572.208 Acquisitions.

These rules do not apply to an acquisition by any person, directly or indirectly, of any voting security or assets of any other person.

Subpart C—Exemptions and Exclusions

§ 572.301 Exemption Procedures.

(a) *Authority.* The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act from any requirement of the Act if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce. The antitrust laws do not apply to any agreement exempted from any requirement of the Act, including filing and Information Form requirements.

(b) *Optional Filing.* Notwithstanding any exemption from filing, Information Form, or other requirements of the Act and these rules, any party to an exempt agreement may file such an agreement with the Commission.

(c) *Application for Exemption.* Any person may apply for an exemption or revocation of any class of agreements or an individual agreement pursuant to section 16 of the Act and the rules of this subpart. An application for exemption shall state the particular requirement of the Act for which exemption is sought. The application shall also include a statement of the reasons why an exemption should be granted or revoked and shall provide information relevant to any finding required by the Act. Where an application for exemption of an individual agreement is made, the application shall include a copy of the agreement.

(d) *Participation by Interested Persons.* No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

(e) *Federal Register Notice.* Notice of any proposed exemption or revocation of exemption, whether upon application or upon the Commission's own motion, shall be published in the *Federal Register.* The notice shall include:

(1) A short title for the proposed exemption or the title of the existing exemption;

(2) The identity of the party proposing the exemption or seeking revocation;

(3) A concise summary of the agreement or class of agreements for which exemption is sought, or the exemption which is to be revoked;

(4) A statement that the application and any accompanying information are available for inspection in the Commission's offices in Washington, D.C.; and

(5) The final date for filing comments regarding the application.

(f) *Retention of Agreement by Parties.* Any agreement which has been exempted by the Commission pursuant to section 16 of the Act and any agreement excluded from filing by the Act shall be retained by the parties and shall be available upon request by the Bureau of Agreements and Trade Monitoring for inspection during the term of the agreement and for a period of three years after its termination.

§ 572.302 Foreign Inland Transportation Agreements—Exclusion.

(a) A foreign inland transportation agreement is any agreement concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

(b) A foreign inland transportation agreement is excluded from the filing and Information Form requirements of the Act and these rules.

§ 572.303 Foreign Marine Terminal Agreements—Exclusion.

(a) A foreign marine terminal agreement is any agreement to provide or furnish wharfage, dock, warehouse, or other terminal facilities outside the United States.

(b) A foreign marine terminal agreement is excluded from the filing and Information Form requirements of the Act and these rules.

§ 572.304 Non-substantive Modifications to Existing Agreements—Exemption.

(a) A non-substantive modification to an existing agreement is an agreement between ocean common carriers and/or marine terminal operators, acting individually or through approved agreements, which concerns the procurement, maintenance, or sharing of office facilities, furnishings, equipment and supplies, the allocation and assessment of the costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals.

(b) A copy of the non-substantive modification shall be submitted for information purposes in the proper format but is otherwise exempt from the Information Form, notice, and waiting period requirements of these rules.

§ 572.305 Husbanding Agreements—Exemption.

(a) A husbanding agreement is an agreement between a principal and an agent both of which are subject to the Act, which provides for the agent's handling of routine vessel operating activities in port, such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, and linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operator; dealing with passenger and crew matters; and providing similar services related to the above activities. The term does *not* include an agreement which provides for the solicitation or booking of cargoes, signing contracts or bills of lading and other related matters, nor does it include an agreement that prohibits the agent from entering into similar agreements with other carriers.

(b) A husbanding agreement is exempt from the filing and Information Form requirements of the Act and these rules.

§ 572.306 Agency Agreements—Exemption.

(a) An agency agreement is an agreement between a principal and an agent, both of which are subject to the Act, which provides for the agent's solicitation and booking of cargoes and signing contracts of affreightment and bills of lading on behalf of an ocean common carrier. Such an agreement may or may not also include husbanding service functions and other functions incidental to the performance of duties by agents including processing of claims, maintenance of a container equipment inventory control system, collection and remittance of freight and reporting functions.

(b) An agency agreement between persons subject to the Act except those: (1) where a common carrier is to be the agent for a competing carrier in the same trade; or (2) which permit an agent to enter into similar agreements with more than one carrier in a trade, is exempt from the filing and Information Form requirements of the Act and these rules.

§ 572.307 Equipment Interchange Agreements—Exemption.

(a) An equipment interchange agreement is an agreement between two or more ocean common carriers for the exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment; and 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.

(b) An equipment interchange agreement is exempt from the filing and Information Form requirements of the Act and these rules.

§ 572.308 Joint Policing Agreement—Exemption.

(a) A joint policing agreement is an agreement:

(1) Between or among: (i) two or more common carriers by water; (ii) two or more associations of common carriers by water each operating pursuant to an effective agreement subject to the Act; or (iii) one or more common carriers by water and one or more such associations; and

(2) Which provides that its parties may discuss and agree upon any of the following: (i) the employment of cargo inspection and/or self-policing services; (ii) the establishment of rules and procedures relating thereto (including the collection of delinquent freight and other tariff charges); (iii) the allocation of the costs of such services; and (iv) the administration and management of cargo inspection and/or self-policing.

(b) A joint policing agreement is exempt from the filing and Information Form requirements of the Act and these rules.

(c) This exemption shall expire 30 days from the issuance of the final rule which supersedes this interim rule.

§ 572.309 Credit Information Agreements—Exemption.

(a) A credit information agreement is an agreement between ocean common carriers or their duly appointed representatives which provides for the collection, compilation and exchange of credit experience information.

(b) A credit information agreement is exempt from the filing and Information Form requirements of the Act and these rules, subject to the condition contained in § 572.309(c).

(c) Under such an agreement, the parties cannot discuss or agree on any matter which is required to be published in a tariff pursuant to the Shipping Act of 1984 or any rule published pursuant thereto.

(d) This exemption shall expire 30 days from the issuance of the final rule which supersedes this interim rule.

§ 572.310 Nonexclusive Transshipment Agreements—Exemption.

(a) A nonexclusive transshipment agreement is an agreement by which one ocean common carrier serving a port of origin by direct vessel call and another such carrier serving a port of destination by direct vessel call provide transportation between such ports via an intermediate port served by direct vessel call of both such carriers and at which cargo will be transferred from one to the other and which agreement does not: (1) prohibit either carrier from entering into similar agreements with other carriers; (2) guarantee any particular volume of traffic or available capacity; or (3) provide for the discussion or fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the service offered as being by means of transshipment, the port of transshipment and the participation of the nonpublishing carrier.

(b) A nonexclusive transshipment agreement is exempt from the filing and Information Form requirements of the Act and these rules provided that the tariff provisions set forth in § 572.310(c), and the content requirements of § 572.310(d) are met.

(c) The applicable tariff or tariffs shall provide:

(1) The through rate;

(2) The routings (origin, transshipment and destination ports) additional charges, if any (*i.e.* port arbitrary and/or additional transshipment charges); and participating carriers; and

(3) A tariff provision substantially as follows: The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating, connecting or feeder carrier. Every participating connecting or feeder carrier, which is a party to transshipment arrangements, has agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement between the parties.

(d) Nonexclusive transshipment agreements must contain the entire arrangement between the parties, must contain a declaration of the nonexclusive character of the arrangement and may provide for:

(1) the identification of the Parties and the specification of their respective roles in the arrangement;

(2) a specification of the governed cargo;

(3) the specification of responsibility for the issuance of bills of lading (and the assumption of common carriage-associated liabilities) to the cargo interests;

(4) the specification of the origin, transshipment and destination ports;

(5) the specification of the governing tariff(s) and provision for their succession;

(6) the specification of the particulars of the nonpublishing carrier's concurrence/participation in the tariff of the publishing carrier;

(7) the division of revenues earned as a consequence of the described carriage;

(8) the division of expenses incurred as a consequence of the described carriage;

(9) termination and/or duration of the agreement;

(10) intercarrier indemnification or provision for intercarrier liabilities consequential to the contemplated carriage and such documentation as may be necessary to evidence the involved obligations;

(11) the care, handling and liabilities for the interchange of such carrier equipment as may be consequential to the involved carriage;

(12) such rationalization of services as may be necessary to ensure the cost effective performance of the contemplated carriage; and

(13) such agency relationships as may be necessary to provide for the pickup and/or delivery of the cargo.

(e) No subject other than as listed in paragraph (d) of this section may be included in exempted nonexclusive transshipment agreements.

Subpart D—Filing and Form of Agreements

§572.401 Filing of Agreements.

(a) All agreements subject to these rules shall be submitted during regular business hours to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Such filing shall consist of a true copy and 15 additional copies of the agreement and, where applicable, the accompanying completed Information Form. Agreements must be filed by a responsible official whose authority is expressly provided for in the agreement or by an agent appointed by the agreement. When an agent is employed, an appropriate delegation of authority must either be on file with the Commission or be submitted with the agreement matter being tendered for filing.

(b) A filing shall also include a letter of transmittal which summarizes the agreement's contents. In the case of a modification to an existing basic agreement, the letter shall include the full name of the agreement and Commission assigned number of the basic agreement and the revision, page, or appendix number. The letter of transmittal shall be signed by the filing party, and shall show immediately below the signature the name, position, business address and telephone number of the filing party.

(c) Any agreement and accompanying Information Form which does not meet the requirements of filing shall be rejected in accordance with 572.601.

(d) Assessment agreements shall be filed and shall become effective upon filing. Assessment agreements need not be accompanied by an Information Form.

§572.40 Form of Agreements.

The requirements of this section apply to all agreements except for marine terminal agreements and assessment agreements.

(a) Agreements shall be clearly and legibly typewritten on one side only of 8½ inch by 11 inch durable white loose-leaf paper, providing a margin of not less than three-quarters of an inch on all edges.

(b) The first page of every agreement and/or appendix shall be the Title Page and all pages subsequent to the Title Page shall be consecutively numbered beginning with Page 1. The first edition of any one page shall be designated in the upper right-hand corner as: "Original Page No. ________." The Title Page shall contain:

(1) the full name of the agreement;

(2) once assigned, the Commission-assigned agreement number;

(3) the generic classification of the agreement in conformity with the definitions in 572.104;

(4) the date on which the entire agreement was last republished as required by 572.403(g);

(5) if applicable, the currently effective expiration date of the agreement and/or any specific provision.

(c) Face agreement page (including appendices) shall be identified by printing the agreement's "doing business as" name and, once assigned, the applicable Commission-assigned agreement number at the top of the page.

(d) Each agreement, appendix and/or modification filed will be accompanied by a separate signature page, appended as the last page of the item, which is signed in the original by each of the parties personally or by an authorized representative, providing immediately below each such signature, the typewritten full name of the signing party and their position, including organizational affiliation.

(e) The body of the agreement shall contain:

(1) Immediately following the Title Page, a Table of Contents providing for the location of all agreement provisions.

(2) Following the Table of Contents, the body of the agreement setting forth the operative provisions of the agreement in the order prescribed by 572.502. Any additional material/provisions shall be set forth as consecutively numbered articles.

(f) Any nonsubstantive provisions, as defined in 572.304 of this part, may be separated from the main body of the agreement text by the inclusion of an Appendix to the agreement. Such appendices must comply with the format requirements of paragraphs (a) and (c) of this section. Such appendices are to be serialized alphabetically with the first such Appendix being designated on its first page as "Appendix A."

§ 572.403 Modification of Agreements.

The requirements of this section apply to all agreements except for marine terminal agreements and assessment agreements.

(a) Agreement modifications shall be: filed in accordance with the provisions of § 572.401; in the format specified in § 572.402 and this section; and accompanied by an Information Form. The Information Form shall be completed as it pertains to significant modifications of the agreement. Significant modifications, for the purposes of this section, are those that may result in a reduction in competition. Such modifications include, but are not limited to, changes in geographic scope, additions to the number of parties, reductions in service levels, changes in the allocation of pooled revenues or cargoes, or changes in pool penalty provisions or carrying charges.

(b) Agreement modifications shall be made by reprinting the entire page on which the matter being changed is published. Such modified pages shall be designated as "revised pages" and shall publish in the upper right-hand corner of the new page the consecutive denomination of the revision, *e.g.*, "1st Revised Page 5."

(c) If a modification exceeds the page being modified and the parties do not wish to modify the entire agreement, the additional material may be published on an original page, designated with the same number as the page being modified and an alphabetical suffix, i.e. "Original Page 5a."

(d) The language being modified shall be indicated as follows:

(1) language being deleted or replaced shall be indicated by being struck through; and,

(2) new and initial or replacement language shall immediately follow the language being superseded and be underlined.

(e) When a revised or new page is revised, or the entire agreement is reissued, the change indications in paragraphs (d) (1) and (2) of this section are to be deleted from the republished pages.

(f) If a modification requires the relocation of the provisions of the agreement, such modification shall be accompanied by a revised Table of Contents page which shall report the new location of the agreement's provisions.

(g) Not later than two years after the last modification to the agreement, the entire agreement shall be republished, incorporating such modifications as have been made and superseding the previous edition of the agreement. Such republished agreement will be filed with the Commission in accordance with the filing (except as hereinafter noted), format and content requirements of this part and shall contain nothing other than the previously effective language and such nonsubstantive modifications as are necessary to accomplish the republication. It is not required that the filing of such republished agreements be accompanied by the Information Form or that they be filed in more than an executed original true copy.

§ 572.404 Application for Waiver.

(a) Upon a showing of good cause, the Commission may waive the form requirements of §§ 572.401, 572.407 and 572.403.

(b) Requests for permission to depart from the form requirements of this subpart must be submitted in advance of the filing or submission of the materials to which the requested waiver would apply and must state: the specific regulation from which relief is sought; the special circumstances requiring the requested relief; and, the beneficial results anticipated to be obtained from the requested waiver.

§ 572.405 Information Form.

(a) Except for marine terminal agreements and assessment agreements, the information required by the Commission for review of an agreement shall be provided in the Information Form set forth in the Appendix to this part. The filing party to an agreement subject to the Act shall complete and submit the Information Form, or a photostatic or equivalent reproduction thereof, at the time that an agreement is filed. The Information Form shall be completed in accordance with the instructions therein and these rules. Copies of the Form may be obtained in person at the Office of the Secretary or by writing to the Secretary of the Commission.

(b) A complete response shall be supplied to each item on the Information Form. Whenever the party completing the Information Form is unable to supply a complete response, that party shall provide, for each item for which less than a complete response has been supplied, either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain the required information.

(c) Any party filing the Information Form may supplement that Form with any other information or documentary material.

(d) The Information Form and any additional information, submitted by a filing party under this section shall not be disclosed except as provided in § 572.608.

Subpart E—Content and Organization of Agreements

§ 572.501 Agreement Provisions—Organization.

(a) All agreements, except for marine terminal agreements and assessment agreements, shall be organized and shall include the content as provided by this section. Article numbers are reserved for the particular provision or authority as indicated in this section.

(b) All agreements shall organize and number the following articles in the following order and shall observe the guidelines as to content as provided in this section.

(1) Article 1—Full Name of the Agreement.

(2) Article 2—Purpose of the Agreement. State the objectives or ends to be attained through the conduct of the agreement.

(3) Article 3—Parties to the Agreement: List the current parties to the agreement to include for each participant: (i) the full legal name of the party; (ii) the address of its principal office (to the exclusion of the address of any agent or representative not an employee of the participating carrier or association); and (iii) nationality as determined by the incorporation or domicile of the carrier's operating companies.

(4) Article 4—Geographic Scope of the Agreement: State all U.S. and foreign port ranges served by the membership pursuant to the authority of the agreement. In the event of an inland scope, state the points or geographic areas of origin and destination together with the ports or ranges or ports at which the ocean transportation begins and ends.

(5) Article 5—Agreement Authority: State the authority of the parties pursuant to the agreement to engage in the joint activities set forth in §§572.201 and 572.202 of this part (*E.g.*, Article 5 of a conference agreement shall include a statement of authority of the conference to establish rates, service contracts, practices, terms and conditions of service, credit terms, freight forwarder compensation, etc.).

(6) Article 6—Officials of the Agreement and Delegations of Authority: Indicate the administrative and executive officials and those persons with authority to file or to delegate such authority to file agreements or modifications to agreements. This article shall also specify any designated U.S. representative(s) of the agreement required by this chapter.

(7) Article 7—Membership, Withdrawal, Readmission and Expulsion: Specify the terms and conditions for admission, withdrawal, readmission and expulsion to or from membership in the agreement, including membership fees, refundable deposits and other fees or charges associated with membership.

(8) Article 8—Voting: Specify the procedures, including quorum requirements, by which the agreement membership exercises its collective authority to choose, endorse, decide the disposition of, defeat, or authorize any particular matter, issue or activity.

(9) Article 9—Duration and Termination of the Agreement: Specify, where applicable, the date on which the agreement terminates and describe the procedures to be followed to terminate the agreement.

§572.502 Organization of Conference and Interconference Agreements.

(a) Each conference, freight conference or passenger conference agreement filed on or after June 18, 1984, in addition to Articles 1 through 9 contained in §572.501, shall include the following articles:

(1) Article 10—Neutral Body Policing: State that at the request of any member the conference shall engage the services of an independent neutral body to fully police the obligations of the

conference and its members. Include a description of any such neutral body authority and procedures related thereto.

(2) Article 11—Prohibited Acts: State affirmatively that the conference shall not engage in conduct prohibited by section 10(c)(1) or 10(c)(3) of the Act.

(3) Article 12—Consultation, Shippers' Requests and Complaints. Specify the procedures for consultation with shippers and for handling shippers' requests and complaints.

(4) Article 13—Independent Action. Specify the independent action procedures of the conference. Such procedures shall provide that any conference member may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of the Act upon not more than 10 calendar days' notice to the conference and shall otherwise be in conformance with section 5(b)(8) of the Act.

(b) Each interconference agreement filed on or after June 18, 1984, in addition to Articles 1 through 9 contained in § 572.501, and Articles 10, 11, and 12 contained in § 572.502(a) shall include the following article: "Article 13—Independent Action" which specifies the independent action procedures of the agreement.

Subpart F—Action on Agreements

§ 572.601 Preliminary Review—Rejection of Agreements.

(a) The Commission shall make a preliminary review of each filed agreement to determine whether the agreement is in compliance with the filing requirements of the Act and these rules and whether the Information Form is complete, or where not complete, the deficiency is adequately explained.

(b) The Commission shall reject any agreement that fails to comply with the filing and information requirements under the Act and these rules. The Commission shall notify in writing the person filing the agreement of the reason for rejection of the agreement. The entire filing, including the agreement, the Information Form and any other information or documents submitted, shall be returned to the filing party. Should the agreement be refiled, the full waiting period must be observed.

§ 572.602 *Federal Register* Notice.

(a) Any filed agreement which is not rejected pursuant to § 572.601 will be transmitted to the *Federal Register* within seven days of the date of filing.

(b) The notice will include:

(1) A short title for the agreement;

(2) The identity of the parties;

(3) The Federal Maritime Commission agreement number;

(4) A concise summary of the agreement's contents;

(5) A statement that the agreement is available for inspection at the Commission's offices; and

(6) The final date for filing comments regarding the agreement.

§ 572.603 Comment.

(a) Persons may file with the Secretary a written statement regarding a filed agreement. Such comments are not subject to any limitations except the time limits provided in the *Federal Register* notice. If requested, comments and any accompanying material shall be accorded confidential treatment to the fullest extent permitted by law.

(b) The filing of a comment does not entitle a person to: (1) reply to the comment by the Commission; (2) institution of any Commission or court proceeding; (3) discussion of the comment in any Commission or court proceeding concerning the filed agreement; or (4) participation in any proceeding which may be instituted.

§ 572.604 Waiting Period.

(a) The waiting period before an agreement becomes effective shall commence on the date that an agreement is filed with the Commission.

(b) Unless tolled by a request for additional information or extended by court order, the waiting period terminates and an agreement becomes effective on the later of the 45th day after the filing of the agreement with the Commission or on the 30th day after publication of notice of the filing in the *Federal Register.*

(c) The waiting period is tolled on the date when the Commission, either orally or in writing, requests additional information or documentary materials pursuant to section 6(d) of the Act. The waiting period resumes on the date of receipt of the additional material or an adequate statement of the reasons for noncompliance, and the agreement becomes effective in 45 days unless the waiting period is further extended by court order.

§ 572.605 Requests for Expedited Approval.

Upon written request of the filing party, the Commission may shorten the review period. Accompanying the request, the filing party should provide a full explanation, with reference to specific facts and circumstances, of the necessity for a shortened waiting period. If the Commission decides to approve an abbreviated waiting period, the term will be decided after consideration of the parties' needs and the Commission's ability to perform its review functions under a reduced time schedule. In no event, however, may the period be shortened to less than fourteen days after the publication of the notice of the filing of the agreement in the *Federal Register.* When a request for expedited approval is denied by the Commission, the normal waiting period specified in § 572.604 will apply. Such expedition will not be granted routinely and will be granted only in exceptional circumstances which include but are not limited to: the impending expiration of the agreement; operational urgency; Federal or State imposed time limitations;

or other reasons which, in the Commission's discretion, constitute grounds for granting the request.

§ 572.606 Requests for Additional Information.

(a) The Commission may request from the filing party any additional information and documentary material necessary to complete the statutory review required by section 6 of the Act. The request shall be made prior to the expiration of the waiting period. All additional information and documentary material shall be submitted to the Director, Bureau of Agreements and Trade Monitoring, Federal Maritime Commission, Washington, D.C. 20573. If the request is not fully complied with, a statement of reasons for noncompliance shall be provided for each item or portion of such request which is not fully answered.

(b) Where the Commission has made a request for additional information material, the effective date is 45 days after receipt of the additional material. In the event all material is not submitted, the effective date will be 45 days after receipt of both the documents and information which are submitted, if any, and the statement indicating the reasons for noncompliance. The Commission may, upon notice to the Attorney General, and pursuant to sections 6(i) and 6(k) of the Act, request the United States District Court for the District of Columbia to further extend the effective date until there has been substantial compliance.

(c) A request for additional information may be made orally or in writing. In the case of an oral request, a written confirmation of the request shall be mailed to the filing party within seven days of the communication.

(d) The party upon whom a request for additional information is made will have a reasonable time to respond, as specified by the Commission. The test of reasonableness shall be based on the particular circumstances of the request and shall be determined on a case-by-case basis.

§ 572.607 Failure to Comply with Requests for Additional Information.

(a) A failure to comply with a request for additional information results when the party responsible for filing the request fails to substantially respond to the request or does not file a satisfactory statement of reasons for noncompliance. An adequate response is one which directly addresses the Commission's request. When a response is not received by the Commission within a specified time, failure to comply will have occurred.

(b) The Commission may, pursuant to section 6(i) of the Act, request relief from the United States District Court for the District of Columbia where there has been a failure to substantially comply with a request for additional information. The Commission may request that the court:

(1) Order compliance with the request; and

(2) At its discretion grant other equitable relief which under the circumstances seems necessary or appropriate.

(c) Where there has been a failure to substantially comply, section 6(i)(2) of the Act provides that the court shall extend the review period until there has been substantial compliance.

§ 572.608 Confidentiality of Submitted Material.

(a) Except for an agreement filed under section 5 of the Act, all information submitted to the Commission by the filing party will be exempt from disclosure under 5 U.S.C. 552. Included in this disclosure exemption is information provided in the Information Form, voluntary submissions of additional information, reasons for noncompliance, and replies to requests for additional information.

(b) Information which is confidential pursuant to paragraph (a) of this section may be disclosed, however, to the extent:

(1) It is relevant to an administrative or judicial action or proceeding; or

(2) It is in response to a request from either body of Congress or to a duly authorized committee or subcommittee of Congress.

§ 572.609 Negotiations.

At any time after the filing of an agreement and prior to the conclusion of judicial injunctive proceedings, the filing party or an authorized representative may submit additional factual or legal support for an agreement or may propose modifications of an agreement. Such negotiations between Commission personnel and filing parties may continue during the pendency of injunctive proceedings. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

Subpart G—Reporting and Record Retention Requirements

§ 572.701 General Requirements.

(a) *Address.* All reports required by this subpart should be addressed to the Commission as follows:

Director,
Bureau of Agreements and Trade Monitoring
Federal Maritime Commission
Washington, D.C. 20573

The lower, left-hand corner of the envelope in which each report is forwarded should indicate the subject of the report and the related agreement number. For example: "Minutes, Agreement 5000."

(b) *Serial. Numbers of Reports.* Each report filed with the Commission should be assigned a number for each subject. For example, a conference filing minutes of its first meeting upon the effective date of this rule should assign "Meeting No. 1" to its Minutes, the next meeting will be assigned "Meeting No. 2," and so on. The first Shippers' Request and Complaint report should be designated "Shippers' Request and Complaint Report No. 1," the next report would be "Shippers' Request and Complaint Report No. 2," and so on.

(c) *Retention of Records.* Each agreement required to file an index of documents pursuant to this subpart shall retain a copy of each document listed for a minimum period of 3 years after the date the document is distributed to the members and shall make it available to the Commission upon written request.

(d) *Request for Documents.* Documents may be requested by the Director, Bureau of Agreements and Trade Monitoring, in writing by reference to a specific minute or index, and shall indicate that the documents will be received in confidence. Requested documents shall be furnished by the parties within the time specified.

(e) *Time for Filing.* Documents filed on an annual (calendar) year basis shall be filed by February 15 of the following year. Other documents shall be filed within 30 days of the end of a quarter-year, a meeting, or the receipt of a request for documents.

(f) *Confidentiality.* All information submitted to the Commission under this subpart shall be accorded confidential treatment to the fullest extent permitted by law.

572.702 Filing of Reports Related to Shippers' Requests and Complaints and Consultations.

(a) *Shippers' Requests and Complaints.* Each conference shall file with the Commission an annual report setting forth a statistical summary showing the total number of shippers' requests and complaints received, the total number which were fully granted, the total number which were partially granted and the total number which were denied, during each calendar year, under the established shippers' requests and complaints procedures. Each report shall also show the total number of requests or complaints which were pending disposition at the start and at the end of the report period. Each of the totals which are reported to the Commission shall be divided into three categories: those involving rates or charges, those involving transportation services, and those involving other matters.

(b) *Consultations.* Each conference shall file with the Commission an annual report setting forth a statistical summary showing the total number of requests for consultations and the total number of consultations during each calendar year under established consultation procedures. Each of the totals which are reported to the Commission shall be divided into two categories: consultations involving commercial disputes and consultations involving cooperation with shippers in preventing and eliminating malpractices.

§572.703 Filing of Minutes.

(a) *Meetings.* For purposes of this subpart, the term "meeting" shall include any meeting of the parties to the agreement, including meetings of their agents, principals, owners, committees, or subcommittees of the parties authorized to act in any capacity under the agreement and, if the agreement authorizes, other action such as telephonic or polls of the membership, etc.

(b) *Content of Minutes.* Conferences, interconference agreements, agreements between a conference and one or more ocean common carriers, pooling agreements, equal access agreements, discussion agreements, marine terminal conferences, and marine terminal rate fixing agreements shall, through a designated official, file with the Commission a report of each meeting describing all matters within the scope of the agreement which are discussed or considered at any such meeting, shall specify any documents distributed by the conference or other agreement to inform or assist the members on such matters, and shall indicate the action taken. These reports need not disclose the identity of parties that participated in discussions, or the votes taken.

(c) *Exemption.* No minutes need be filed under paragraph (b) of this section with respect to any discussion of or action taken with regard to: (1) rates that, if adopted, would be required to be published in the Commodity Rate Section, Class Rate Section, or Open Rate Section of the pertinent tariff on file with the Commission (this exemption does not apply to discussions involving general rate policy, general rate changes, the opening or closing of rates, or service or time/volume contracts); or (2) purely administrative matters.

§ 572.704 Index of Documents.

(a) Each agreement required to file minutes pursuant to § 572.703 shall maintain an index of all reports, circulars, notices, statistics, analytical studies, or other documents, not otherwise filed with the Commission pursuant to this subpart, which are distributed to the member lines.

(b) Each index required by paragraph (a) of this section shall be filed with the Commission on a quarterly basis, the first to be filed for the period ending September 30, 1984, and for each succeeding quarterly period thereafter. Each index must be certified by an official of the agreement as true and correct.

§ 572.705 Waiver of Reporting and Record Retention.

Upon a showing of good cause, the Commission may waive any of the provisions of this subpart.

Subpart H—Transitional Rules

§ 572.801 Mandatory Provisions in Existing Conference Agreements.

As of June 18, 1984, all existing conference agreements must be in compliance with the requirements set forth in section 5(b) of the Act. Conferences shall achieve compliance with the Act by submitting to the Commission on or before June 18, 1984, either a telex to be followed by a letter, or a letter, evidencing the adoption by the conference of the mandatory provisions contained in this section. To the extent that any provision in an existing agreement is inconsistent with a particular mandatory provision, the mandatory provision shall govern.

(a) *Neutral Body Policing.* Upon written request of one conference member submitted to the [chief executive officer] of the conference, the conference shall engage the services of an independent neutral body to police fully the obligations of the conference and its members.

(b) *Prohibited Acts.* The conference shall not engage in any boycott or take any other concerted action resulting in an unreasonable refusal to deal; or engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade, of a common carrier not a member of the conference, a group of common carriers, an ocean tramp or a bulk carrier.

(c) *Consultation.* In the event of a controversy, claim, or dispute of a commercial nature arising out of or relating to this agreement or efforts to reduce or eliminate malpractices, the conference, its [chief executive officer or other designee] shall attempt to resolve the dispute in an amicable manner through direct discussions with the disputant. The services of third parties may be drawn from members of the conference or impartial outsiders, including use of the Commission's conciliation service provided for at 46 CFR §§502.401–502.406. The means of invoking consultation shall be set forth in the conference tariff.

(d) *Shippers' Requests and Complaints.*

(1) Shippers' requests and complaints may be made by filing a statement thereof with the [chief executive officer or in the case of an executive domiciled outside the United States, the designated U.S. representative.] Such statement shall be accompanied by a completed information sheet prescribed by the conference [chief executive officer]. The statement and information sheet shall be submitted promptly to each member of the conference.

(2) The shipper's request or complaint shall be considered by the conference at its next meeting following its submission to the conference members. Written notice of the scheduling of consideration of the request or complaint shall be served on the shipper at the time of scheduling. The shipper shall be granted the opportunity to be heard at such Conference meeting upon written request.

(3) Conference discussion and action on the shippers' request or complaint need not be restricted to the exact scope of the request or complaint and may include other matters varying from but related thereto. However, all such discussion and action must be authorized by the conference agreement.

(4) The conference shall render a decision on the request or complaint promptly after its initial submission to the conference membership. Such decision shall be in writing, signed by the conference [chief executive officer] and served upon the shipper.

Such decision shall include a notice to the shipper that it may file a complaint with the Federal Maritime Commission if the matter is not resolved to the shipper's satisfaction and if the matter is one which may be subject to the Shipping Act of 1984.

(5) The procedures for filing shippers' requests and complaints shall be set forth in the conference tariff.

(e) *Independent Action.* Any party to this agreement may take independent action on any rate or service item required to be filed in a tariff pursuant to section 8(a) of the Shipping Act of 1984 (46 U.S.C. app. 1707(a)) upon not more than 10 calendar days' notice to the conference. The time period shall commence upon receipt by the conference, during normal business hours, of a written notice of a member's intention to exercise independent action. Within 10 calendar days of the receipt of such notice, the conference shall file the rate or service item in its tariff for use by the member. The conference or any other conference member may elect to adopt the independent rate or service item, on or after its effective date, by providing written notice of such intention. If another member decides to adopt the independent rate, then the conference shall file the rate immediately on behalf of that member. Unless otherwise provided in this agreement, conference members may regulate or prohibit its member lines from unilaterally entering into service or time/volume contracts and may also regulate or prohibit any conference member from taking independent action on any service contract or time/volume contract offered by the conference.

§572.802 Mandatory Provision in Existing Interconference Agreements.

Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier. Each agreement between conferences must provide the right of independent action for each conference.]

§572.803 Expiration Dates in Existing Agreements.

(a) Expiration dates to existing agreements or specific provisions thereof, shall remain in effect on and after June 18, 1984.

(b) Parties to agreements with expiration dates have the obligation to file any modification seeking renewal for a specific term or elimination of a termination date in sufficient time to accommodate the waiting period required under the Act.

Subpart I—Penalties

§572.901 Failure to File.

Any person operating under an agreement involving activities subject to the Act which has not been filed is in violation of the Act and the rules of this part and is subject to the civil penalties set forth in section 13(a) of the Act.

§ 572.902 Falsification of Reports.

Falsification of any report required by the Act or these rules, including falsification of any item on the Information Form, is a violation of the rules of this part and is subject to the civil penalties set forth in section 13(a) of the Act and may be subject to the criminal penalties provided for in 18 U.S.C. 1001.

Appendix A to Part 572—Information Form and Instructions
Explanation and Instructions for Information Form

The following explanation and instructions accompany the Information Form (Form) and are intended to facilitate the completion of the Form. The explanations and instructions should be read in conjunction with the Shipping Act of 1984 (Act) and with 46 CFR Part 572.

All agreements by or among ocean common carriers referenced in 572.201 (excluding assessment agreements, marine terminal agreements and those agreements exempted from the filing of the Information Form pursuant to Subpart C of the rules) filed with the Commission must be accompanied by a completed Information Form, which in all cases necessitates the completion of Parts I, II, V, VI, VII, VIII and IX.

Because of their potential substantial anticompetitive implications, parties filing certain types of agreements, namely rate-fixing (including, for example, agreements authorizing conferences, interconference agreements, and agreements between a conference and one or more ocean common carriers), pooling, and joint-service and consortium agreements, are required to complete Parts III and IV of the Form in addition to the above specified parts required to be completed by all filing parties.

Certain parts of the Form request information that may not be readily available to the filing party. Where precise information is not available, best estimates may be supplied. Where estimates are made, they should be identified by the use of the notation "est." Furnishing an estimate requires a clear explanation of why the precise information is not available. Where such an explanation is provided, the use of estimates will not ordinarily be regarded as a failure to supply a complete response as specified in 572.607, and does not require a separate statement of reasons for noncompliance.

In all parts of the Form where data are requested, the filing party is required to indicate all sources used to obtain such data. Sources should also be specified where estimates have been made by the filing party.

PART BY PART EXPLANATION

Part I

Part I requires the filing party to state the full name of the agreement as also provided under 572.501.

Part II(A)

Part II(A) requires the filing party to indicate whether or not the agreement authorizes the parties to collectively fix rates. Rate fixing may be authorized by a conference agreement [§ 572.104(f)], an interconference agreement [§ 572.104(m)], or an agreement between a conference and one or more ocean common carriers.

Part II(B)

Part II(B) requires the filing party to indicate whether or not the agreement authorizes the parties to pool cargoes or revenues [§ 572.104(w)].

Part II(C)

Part II(C) requires the filing party to indicate whether or not the agreement authorizes the parties to establish a joint service or consortium [§ 572.104(n)].

Background Information to Parts III and IV

If any question in Part II was answered "YES", the filing party is required to complete Parts III and IV (in addition to completing Parts I, II, V, VI, VII, VIII and IX, which are required to be completed by all filing parties).

The *amount of cargo* is to be given on *both* a weight ton (specify long, metric or short ton, whichever is used), and a dollar value basis.

The *dollar value of cargo* is measured according to Bureau of Census practices. The value of *export cargo* is taken to be equivalent to the f.a.s. (free alongside ship) value at the U.S. port of export, based on the transaction price, including inland freight, insurance and other charges incurred in placing the merchandise alongside the carrier at the U.S. port of exportation. The value of *import cargo* is defined as the price actually paid or payable for merchandise when sold for exportation to the United States, excluding U.S. import duties, freight, insurance, and other charges incurred in bringing the merchandise to the United States.

Sub-trade is defined as the scope of all liner movements between *each* foreign country and *each* U.S. port range within the scope of the agreement. Each foreign country/US. port range pair should be shown separately. Where the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound liner movements should be shown separately.

U.S. port ranges are defined by using the Bureau of Census classification of U.S. Coastal Districts. Thus, the U.S. port ranges are defined as follows:

North Atlantic—Includes ports along the eastern seaboard from the northern boundary of Maine to the southern boundary of Virginia.

South Atlantic—Includes ports along the eastern seaboard from the northern boundary of North Carolina to, but not including Key West, Florida. Also included are all ports in Puerto Rico and the U.S. Virgin Islands.

Gulf—Includes all ports along the Gulf of Mexico from Key West, Florida to Brownsville, Texas, inclusive.

South Pacific—Includes all ports in the States of California and Hawaii.

North Pacific—Includes all ports in the states of Oregon, Washington, and Alaska.

Great Lakes—Includes all ports bordering upon the Great Lakes and their connecting waterways as well as all ports in the State of New York on the St. Lawrence River.

Liner service refers to a definite, advertised schedule, giving relatively frequent sailings at regular intervals between specific U.S. ports or port ranges and designated foreign ports or port ranges. *Liner vessels* are defined as those vessels used in a liner service. *Liner cargoes* are cargoes carried on liner vessels in a liner service. A *liner operator* is a vessel operating ocean common carrier engaged in liner service. *Liner movement* is the carriage of liner cargo by liner operators.

Market share information should be provided using data for the most recent twelve (12) month period for which data are available. State the period used. Identify all sources of the data.

Alternative liner routing is defined as liner service between the foreign country specified in the sub-trade and any North American port(s) other than those located within the port range covered by the sub-trade. The alternative liner routing may serve the sub-trade's port(s) and interior point(s) by way of feeder service, transshipment, surface carriage (such as mini-landbridge), or some other form of substituted transport. Alternative liner routing includes only those liner services which compete for cargoes carried in the sub-trade.

Part III(A)

Part III(A) requires the filing party to provide the total amount of cargo carried on *all parties'* liner vessels in each sub-trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

Part III(B)

Part III(B) requires the filing party to provide the total amount of cargo carried on *all* liner vessels (i.e., both party and non-party carriers) operating in each sub-trade within the scope of the agreement for the most recent twelve (12) month period for which data are available.

Part III(C)

Part III(C) requires the filing party to provide the combined market share of all parties operating in each sub-trade within the scope of the agreement. The market share provided in Part III(C) is the quotient (multiplied by 100) of the total derived in Part III(A) divided by the total derived in Part III(B). The *formula for calculating market share* is as follows:

> The total amount of cargo carried on all parties' liner vessels in each sub-trade within the scope of the agreement over the most recent twelve-month period for which data are available divided by the total amount of cargo carried on all liner vessels in each sub-trade within the scope of the agreement over the same twelve month period; which quotient is multiplied by 100.

The most recent twelve month period for which data are available is to be the same period of time used both in the calculation of the parties' total sub-trade liner cargo movements [Part IV(A)] and in the calculation of the total sub-trade liner cargo movements for all liner operators [Part IV(B)].

Part IV(A)

Part IV(A)(1) requires the filing party to provide, for each sub-trade within the scope of the agreement, the names of all liner operators who are not parties to the agreement, and who were offering liner service in that sub-trade at the time the agreement was filed with the Commission.

Part IV(A)(2) requires the filing party to provide, for each sub-trade, the names of all liner operators serving alternative liner routings who compete for the cargoes carried by the parties.

Part: IV(A)(3) requires the filing party to describe the extent of the competition offered by all non-party liner operators, including liner operators directly serving the sub-trade *and* liner operators serving alternative liner routings. A description of the extent of competition should include estimates (or precise information where available) of non-party liner operator market share (shown either for each individual operator or for all operators collectively, and calculated on the basis either of height tons, value of cargo, or capacity), and any evidence of underutilized capacity in the alternative liner routings. Explain how the non-party market share was derived. Specify the units of measurement used in the calculations. Indicate the source(s) used to provide data or estimates.

Part IV(B)

Part IV(B)(1) requires the filing party to identify all non-liner competitive substitutes that are available to shippers of commodities historically transported by liner service within the scope of the agreement. Non-liner competitive substitutes may include carriage on a charter or contract basis or on an infrequent, irregular basis by bulk, mix container/bulk, breakbulk or other vessel-type operators. Such substitutes may also include carriage by air freight operators or air passenger operators with available "belly space" for air freight. Such substitutes may provide service to a sub-trade through some form of substituted service (e.g., mini-landbridge, trans-shipment or feeder service) by way of ports within an alternative North American port range(s).

Part IV(B)(2) requires the filing party to estimate the percentage of the total amount of cargo, historically carried in the trade on liner vessels, that has been carried by non-liner competitive substitutes over the most recent twelve (12) month period for which data are available. The intent of Part IV(B)(2) is to determine the amount of liner cargo historically carried in the trade that has been "lost" to non-liner operators. Identify all units of measurement and describe how the percentage was derived. Identify the sources used.

Part V(A)

Part V(A) requires the filing party to identify all U.S. ports expected to be served under this agreement. Include all U.S. ports expected to receive direct liner service (port calls by a party) and indirect liner service (port calls by way of some form of substituted service such as trans-shipment, feeder, or surface carriage).

Part V(B)

Part V(B)(1) requires the filing party to specify any party's reduction in frequency of service to any U.S. port within the scope of the agreement. Reductions in frequency are determined as follows: (1) for each party and for each U.S. port within the scope of the agreement served by that party, determine total number of port calls over the most recent twelve (12) month period for which data are available (historical port call calculation); (2) for each party and for each U.S. Port within the scope of the agreement served by that party, estimate the total number of port calls for the twelve (12) month period immediately following implementation of the agreement (expected port call calculation); (3) calculate the difference between the "historical port call calculation" and the "expected port call calculation." Provide, for each party and for each U.S. port, the following calculations: the "historical port call calculation"; the "expected port call calculation"; and the difference between those calculations.

Part V(B)(2) requires the filing party to specify any elimination of service to any U.S. port within the scope of the agreement that is currently (at the time the agreement is filed) receiving liner service front any party to the agreement, where the elimination of that port occurs as a result of the implementation of the agreement. The term "service to any U.S.

port'' includes direct service by the parties and indirect service by way of, for example, transshipment, feeder service, or alternate or substitute port service.

Part VI(A)

Part VI(A) requires the filing party to indicate whether or not the agreement was entered into as a direct or indirect response to any law, decree, rule, regulation or any other governmental action promulgated or, otherwise implemented by a foreign government. The agreement may, for example, operate in a context where a foreign government has promulgated or implemented certain cargo reservation, cargo preference or other cargo sharing schemes that favor national flag lines and that require these national lines to be members of a conference. A *direct* response to such governmental action would be the creation of a conference agreement. An *indirect* response to such governmental action would be the creation of a pool that facilitates cargo sharing within a conference even though the pool was not *per se* required by such governmental action.

Part VI(B)

Part VI(B) requires the filing party to identify all such laws, decrees, rules, regulations or any other foreign governmental actions that have led to the agreement. All such governmental actions should be identified by the type of governmental action (e.g., a law, decree, memorandum order, etc.), the full legal title of the governmental action, the date that the governmental action became (or will become) effective, and the date (if specified) the governmental action will terminate. Part VI(B) also requires a detailed description of the purpose and the nature of the governmental action, including all requirements imposed on the parties by the governmental action, and the specification of each provision in the agreement that is a direct or indirect response to each such governmental action.

Part VI(C)

Part VI(C) requires the filing party to indicate whether or not any law, decree, rule, regulation or any other foreign governmental action identified in Part II(B) limits access to the carriage of liner cargoes within the scope of the agreement. Limited access to the carriage of liner cargoes may be effected by excluding certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality) from the trade entirely, or by reserving certain cargoes for carriage by certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality), or by limiting the ports at which liner operators may call, or by restricting the frequency of scheduled port calls, or by other such measures that restrict the open competition for liner cargoes within the scope of the agreement by liner operators.

Part VI(D)

Part VI(D) requires the filing party to explain how access to cargoes carried by liner operators is limited by the actions of a foreign government as identified in Part VI(B). See Part VI(C) for examples of how access to cargoes can be limited by the actions of a government.

Part VI(E)

Part VI(E) requires the filing party to provide the percentage of the total amount of cargo carried on all liner vessels in the trade to which access is limited by a foreign government. The percentage is derived by dividing the amount of cargo in the trade to which access is limited by a foreign government, by the total amount of cargo carried on all liner vessels in the trade and multiplying the quotient by 100. The *trade* is defined as the scope of the agreement, that is, all foreign and domestic ports or port ranges served under the agreement. The amount of cargo can be measured in weight tons or dollar value of cargo. Specify which unit of measurement is used. The amount of cargo should be provided on the basis of the most recent twelve (12) month period for which data are available. Where precise information is not available, best estimates may be supplied. Identify estimates by the use of the notation "est.". Indicate the sources of such estimates.

Part VII(A)

Part VII(A) requires the filing party to indicate all benefits resulting from the agreement that will accrue principally to the parties as a result of the operation of the agreement. Such benefits may include increased operational efficiencies or other reductions in costs that result from the implementation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VII(B)

Part VII(B) requires the filing party to indicate all benefits resulting from the agreement that will accrue to shippers and to U.S. commerce generally. Such benefits may include reduced rate levels or improved quality or frequency of service that result from the operation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VIII

Part VIII requires the filing party to identify any reports, studies or other research that were prepared by or for the parties severally or collectively for the purpose of analyzing, formulating or assessing the need for the proposed agreement or the activities contemplated therein.

Part IX(A)

Part IX(A) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding the Information Form and any information provided therein.

Part IX(B)

Part IX(B) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding a request for additional information or documents.

Part IX(C)

Part IX(C) requires generally that the filing party sign and certify before a Notary Public that the information in the form and all attachments and appendices were, in fact, prepared under the supervision of the filing party, and that all information so provided is to the best of the filing party's knowledge, true, correct and complete. The filing party is also required to indicate his or her relationship with the parties to the agreement.

FEDERAL MARITIME COMMISSION INFORMATION FORM

For Certain Agreements by or Among Ocean Common Carriers

Agreement Number ___________ (Assigned by FMC)

PART I *Agreement Name:* ___________

PART II *Agreement Type*

	YES	NO
(A) *Rate-Fixing Agreements*		
Does the agreement authorize the parties to collectively fix rates?	[ ]	[ ]
(B) *Pooling Agreements*		
Does the agreement authorize the parties to pool cargoes or revenues?	[ ]	[ ]

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

(C) *Joint Service Agreements*

Does the agreement authorize a joint service/consortium arrangement? [ ] [ ]

[If any question in PART II is answered "YES", complete PARTS III and IV, (in addition to PARTS I, II, V, VI, VII, VIII and IX that are required to be completed by all filing parties.)]

PART III *Market Share Information*

(A) Provide the total amount of cargo (measured in both weight tons and dollar value) carried on all parties' liner vessels in each sub-trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(B) Provide the total amount of cargo (measured in both weight tons and dollar value) carried on all liner vessels in each sub-trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(C) Provide the market share of all parties in each sub-trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

PART IV *Market Competition*

(A) *Liner Competition*

(1) For each sub-trade, provide the names of all liner operators *not* parties to the agreement, currently offering service in that sub-trade.

(2) Provide the names of all liner operators serving alternative liner routings where those operators compete for cargoes carried by the parties in the sub-trade.

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

(3) Describe the nature and extent of the competition from the liner operators listed in (A)(1) and (A)(2) above.

(B) *Non-Liner Competition*

(1) Identify all competitive substitute forms of transport, other than liner service, that are available to shippers of commodities historically transported by liner service in each subtrade (including, for example, bulk carriers, charter operators, or air freight carriers).

(2) Estimate the percentage of the total amount of liner cargoes in each subtrade (measured in weight tons and in dollar value), traditionally carried on liner vessels, that has been carried by non-liner substitute forms of transport over the most recent twelve (12) month period for which data are available.

PART V *Service to the Shipping Public Under the Agreement*

(A) *Proposed Service*

Identify all U.S. ports to be served by the parties under this agreement.

(B) *Reduced Sailings*

(1) Estimate the parties' reductions in frequency of calls at each U.S. port within the scope of the agreement.

(2) Specify the parties' elimination of service to any U.S. port within the scope of the agreement currently served by any party.

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

PART VI *Foreign Government Involvement in the Liner Market*	YES	NO
(A) Was this agreement entered into as a direct or indirect response to any law, decree, rule, regulation, or other governmental action promulgated or implemented by a foreign government?	[ ]	[ ]
(B) If the answer to (A) is "YES", identify all such laws, decrees, rules, regulations or other governmental actions and specify all provisions in the agreement that stem from these factors.		
(C) If the answer to (A) is "YES", do any of the above identified governmental actions limit access to the carriage of liner cargoes within the scope of the agreement?	[ ]	[ ]
(D) If the answer to (C) is "YES", explain how access to liner cargoes is limited by the foreign government.		
(E) If the answer to (C) is "YES", provide the percentage of the total liner cargo in the trade to which access is limited by a foreign government. Explain the method by which the percentage was derived.		

PART VII *Benefits of the Agreement*

(A) Indicate any benefits (such as improved efficiencies or other reductions in transportation costs) that will accrue principally to the parties as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

(B) Indicate any benefits (such as lower rate levels or improved service levels) that will accrue to shippers and to U.S. commerce generally as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

PART VIII *Reports, Studies or Other Research*

Identify any reports, studies or other research that were prepared by or for the parties severally or collectively for the purpose of analyzing, formulating or assessing the need for the proposed agreement or the activities contemplated therein.

PART IX *Identification of Person(s) to Contact Regarding the Information Form and Certification of Authenticity*

(A) Identification of Contact Person

(1) Name of Contact Person ____________________

(2) Title of Contact Person ____________________

(3) Firm Name and Business ____________________

(4) Business Telephone Number ________________

(5) Cable Address ____________________________

(B) Identification of an Individual Located in the United States Designated for the Limited Purpose of Receiving Notice of an Issuance of a Request for Additional Information or Documents (see §572.407)

(1) Name ____________________________________

(2) Title _____________________________________

(3) Address __________________________________

(4) Telephone ________________________________

(5) Cable Address ____________________________

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

(C) Certification

This Supplemental Agreement Filing Information Form together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Maritime Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

Name (please print or type) ______________

____

Title ______________________________

Relationship with parties to agreement ________

____

Signature ______________________________

Date ______________________________

Subscribed and sworn to me at the

City of ______________ State of ______________

This __________ day of ____________, 19____

Signature ____________________________________

My Commission expires ______________________

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ACTION: Interim Rule.

SUMMARY: The Commission instituted this proceeding by Federal Register notice of May 29, 1984 (49 FR 22296–22318), in order to issue rules implementing those sections of the Shipping Act of 1984 that govern agreements. The collection of information requirements of these interim rules have been granted interim clearance by the Office of Management and Budget (OMB), and are, therefore, effective on June 18, 1984, to the same extent as the balance of the interim rules. A new section has been added to reflect the interim control number assigned by OMB to these information collection requirements.

DATES: Interim Rule effective June 18, 1984.

SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission is amending these interim rules by adding a new section which reflects the interim control number assigned by OMB to the information collection requirements of the rules.

List of subjects in 46 CFR Part 572—Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, Part 572 of Title 46 of the Code of Federal Regulations is amended as follows:

Add § 572.991 to read as follows:

§ 572.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control number assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
572.101 through 572.902	3072–0045

(Sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717)).

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ACTION: Interim Rules.

SUMMARY: The Commission amends its interim rules governing agreements by ocean common carriers and other persons subject to the Shipping Act of 1984. These amendments are issued pursuant to the interim rulemaking authority provided in the Act. These amendments make changes in Subpart D with respect to those modifications to agreements which must be accompanied by the Information Form. The purpose of these amendments to Subpart D is to ensure that only those modifications to agreements which significantly reduce competition will be subject to the information requirements. These amendments make adjustments in several of the mandatory provisions of Subpart H. The purpose of these changes is to clarify the mandatory provisions. These amendments also make the completion of Part VII of the Information Form optional for the filing party. Finally, these amendments make certain technical corrections in the rules and Information Form.

DATES: Interim Rule amendments listed in this document are effective on June 18, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984, Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 (hereinafter referred to as "the Act" or "the 1984 Act") was signed into law on March 20, 1984 with an effective date of June 18, 1984. Section 17(b) of the Act (46 U.S.C. app. 1716(b)) authorizes the Commission to prescribe interim rules without adhering to the normal notice and comment procedures under the Administrative Procedure Act (5 U.S.C. 553). On May 29, 1984, pursuant to the authority under section 17(b), the Commission published interim rules implementing those provisions of the Act which govern agreements by ocean common carriers and other persons subject to the Act (49 *Fed. Reg.* 22296–11318). These interim agreements rules become effective on June 18, 1984. Interested persons were given 90 days from the date of publication in the *Federal Register* in which to comment on the interim rules. In addition, the supplementary information to the interim rules invited persons who believed that the interim rules created a serious problem which should be addressed prior to the effective date, to bring their concern to the attention of the Commission in writing without prejudice to subsequently filing additional comments within the 90-day comment period.

The Commission has received a number of comments on the interim rules and has carefully reviewed all of these comments. Some address matters which do not require attention at this time. The absence of discussion of any particular comment in connection with these amendments should not in any way be construed as a determination as to the merits of the comment. It merely reflects the Commission's judgment that the comment did not raise a matter of such urgency as to require immediate action. Consideration of these comments not of an emergency nature will be deferred until final rules are issued and the Commission has the benefit of a full record developed during the course of this proceeding.

Other comments, either in whole or in part, do raise questions which require clarification prior to June 18, 1984. Based on the comments received, the Commission has determined that certain adjustments to Subparts D and H of the interim rules and to Part VII of the Information Form are warranted at this time. These adjustments affect the information requirements for agreement modifications, certain mandatory provisions, and the agreement benefits section of the Form, and are discussed more fully below. In addition, certain technical corrections are being made in the interim rules and the Form. Interested persons will have the opportunity to comment on these amendments to the interim rules, as well as the interim rules themselves, within the original 90-day comment period. Comments on the interim rules, as amended, should be received on or before August 27, 1984.

A. Amendments to Subpart D

1. *Section 572.402(e)(2).* Section 572.402 generally sets forth the requirements as to form for all agreements except for marine terminal agreements and assessment agreements. Paragraph (e)(2), however, presently refers only to § 572.502 in prescribing format rules for the body of an agreement. In order to provide direction to all classes of agreements subject to format requirements, paragraph (e)(2) should also refer to § 572.501. This section therefore is being amended by adding a reference to § 572.501.

2. *Section 572.403(a).* Subpart D of the interim rules, among other things, implements the information requirements under section 5 of the Act by requiring the filing of an information Form with certain agreements. Section 572.403(a) provides that the Information Form must accompany a significant modification to certain agreements. Significant modifications, for the purpose of section 572.403(a), are those that may result in a reduction in competition. Section 572.403(a) presently states that:

> Such modifications include, but are not limited to, changes in geographic scope, additions to the number of parties, reductions in service levels, changes in the allocations of pooled revenues or cargoes, or changes in pool penalty provisions or carrying charges.

All such modifications must be accompanied by the Information Form.

One comment refers to the definition of a significant modification in this section and contends, among other arguments, that the requirement that every significant modification to an existing agreement be accompanied by the Information Form is unduly burdensome.

One purpose of section 572.403(a) is to obtain needed information to review a modification to an agreement where such a modification may result in a significant reduction in competition. This purpose is clearly related to the standard of review set forth in section 6(g) of the Act. The Information Form would not be required where the competitive consequences of an agreement modification are minor. For example, the addition of a single port to an agreement's geographic scope would not, in most cases, be likely to have a significant impact on competition. On the other hand, expansion of geographic scope to include an entire new port range may have such competitive impact as to be a significant modification.

The Commission, therefore, is amending section 572.403(a) to clarify that its purpose is to apply only to significant modifications. Agreements which would not generally be likely to have a significant competitive impact will thereby not be required to file the Information Form. In the case of those modifications where the Form is not required and an issue under the general standard is raised, the Commission would be able to obtain information through the request for additional information procedures as set forth in section 572.606. The Commission has not attempted to address all cases in which a modification would require the filing of the Information Form. If a filing party is uncertain as to whether a modification is significant within the meaning of this section, they may contact the Director, Bureau of Agreements and Trade Monitoring for clarification.

B. Amendments to Subpart H

Subpart H of the interim rules deals with certain transitional matters affecting existing agreements. In particular, section 572.801 of Subpart H establishes rules for assuring that existing agreements comply with the requirements for conference agreements set forth in section 5(b) of the Act. The mechanism for achieving compliance is the submission to the Commission of a telex followed by a letter, or a letter, evidencing the adoption by the conference of the mandatory provisions contained in this section (§§ 572.801(a) through 572.801(e)). A number of the comments recommended changes to the mandatory provisions of paragraphs (c), (d) and (e) of section 572.801 dealing, respectively, with consultation, shipper's requests and complaints, and independent action. As indicated in the following discussion, the Commission has determined to adopt some of the recommended changes or otherwise to make adjustments in the rules to accommodate concerns expressed in the comments.

1. *Section 572.801(c).* This section sets forth a mandatory consultation provision for conference agreements as required by section 5(b)(6) of the Act. One comment suggests that the phrase "direct discussions" be deleted and replaced with the phrase "direct communications." The reason offered for this change appears to be that a requirement of "direct discussions" is unduly burdensome on the conference. The Commission believes that there is merit in direct discussions between conferences and shippers and that such discussions are beneficial to the consultation process. The term "direct discussions" need not be limited to face-to-face meetings. Nor are such direct discussions intended to be the only means of consultation. Rather, it is intended that the consultation process shall provide an opportunity for such discussions. The Commission therefore is amending the first sentence of section 572.801(c) to state that the conference shall attempt to resolve the dispute in an amicable manner "with the opportunity for direct discussions with the disputant."

2. *Section 572.801(d).* This section sets forth a mandatory provision establishing conference procedures for handling shippers' requests and complaints as required under section 5(b)(7) of the Act. A number of comments recommend changes to various aspects of this mandatory provision.

Section 572.801(d)(2) presently states that, upon submission, a complaint will be considered at the next conference meeting. Written notice is to be sent to the shipper who will have an opportunity to be heard at a conference meeting.

One comment states that the requirement for consideration of a request or complaint at the next conference meeting is unworkable because of the large number of complaints received and because requests are often submitted in incomplete form and require investigation before they may be properly considered. For the same reasons, the comment argues that granting a shipper a hearing before the conference would not be feasible. The comment also states that it is inefficient and burdensome to require the entire conference to consider a request or complaint.

The Commission believes that there are benefits in having shipper requests and complaints considered at a conference meeting and in providing shippers with an opportunity to be heard. Nevertheless, the Commission does not wish to unduly burden conference deliberations or impose inflexible requirements as to when a shipper matter must be considered.

The Commission therefore is amending the first sentence of section 572.801(d)(2) by deleting the requirement that these matters be considered at the next meeting and stating that such matters shall be considered promptly. The Commission will also amend the third sentence of section 572.801(d)(2) to provide for an opportunity for hearing of a shipper matter by the chief executive officer of the conference if the shippers' request or complaint is denied. This provision will be relocated in section 572.801(d)(4) of this section. Finally, sentence two is being deleted in light of the other changes to this provision.

Section 572.801(d)(4) provides that conference decisions on shipper matters shall include a notice that the shipper may file a complaint with the Federal Maritime Commission. One comment on this provision states that such a notification requirement would change the nature of the process from commercial consultation to an adversarial proceeding. The Commission does not wish to require procedures which could have an adverse impact on the successful resolution of requests or complaints. Moreover, in the absence of such a notice, shippers would still be likely to be aware of their rights under the 1984 Act. The Commission therefore is amending section 572.801(d)(4) by deleting the third sentence.

3. *Section 572.801(e).* This section implements the statutory requirement specified in section 5(b)(8) of the Act through a mandatory independent action provision. A number of the comments recommend changes in this provision. Several of these recommended changes have merit in that they clarify the purpose of this provision or avoid results which were not intended by the Commission.

The first sentence of §572.801(e) states that a party may take independent action "upon not more than 10 calendar days notice to the conference." Several comments note that this language could be interpreted to allow independent action at any time less than 10 days. The comments note that the statute allows a conference to fix a specific notice period as long as it does not exceed 10 days. It was not the Commission's intention to preclude a conference from selecting any period of notice up to 10 days. Therefore, the Commission is amending the first sentence of §572.801(e) to permit conferences to insert a specific number of days not to exceed 10 calendar days for notice of independent action.

The third sentence of §572.801(e) states that the conference shall file the rate or service item in its tariff for use by the member "Within 10 calendar days of the receipt of such notice." One comment notes that this language could have the effect of extending the notice period beyond the statutory limit. The introductory clause in this sentence will therefore be deleted in order to remove this ambiguity.

The fourth sentence of §572.801(e) provides for the adoption of an independent action rate or service item by other conference members. One comment suggests that this sentence could be construed as preventing another member from adopting an independent rate until the date the independent action becomes effective. This was not the Commission's intention. The Commission therefore will delete sentence four and replace it with a sentence which indicates that a member may adopt an independent rate or service item at any time following its announcement, effective on or after the effective date announced by the party taking independent action.

The sixth sentence of § 572.801(e) presently provides that a conference may regulate or prohibit member lines from unilaterally entering into service or time/volume contracts and may also regulate or prohibit a conference member from taking independent action on any service contract or time/volume contract offered by a conference. A number of the comments recommended changes in this sentence. One comment notes that the phrase "conference members" should read "the conference." The Commission agrees. Another comment suggested that this sentence should make clear the authority of the conference itself to enter into service contracts with shippers and shippers' associations. Sentence six shall be revised to clearly state the conference's authority in this regard, while retaining the concept that the negotiating and providing of service contracts is a matter which is exclusively within the conference's authority to control. The Commission is also deleting the reference to time/volume contracts in sentence six. This change is made necessary because in a separate rulemaking proceeding the Commission is no longer treating time/volume contracts as a separate category. Finally, the Commission is deleting the introductory clause of sentence six which states "Unless otherwise provided in this agreement" because it is unnecessary.

C. Amendments to the Information Form

1. *Information Form: Part VII Benefits of the Agreement.* Part VII of the Information Form contains questions which seek to elicit information regarding the benefits that may be expected to accrue to the parties, to shippers, or to U.S. commerce generally from the operation of the agreement. This part included in the Form so that the Commission, in its review of an agreement under the section 6(g) general standard, may consider increases in efficiency that may offset a reduction in competition. One comment objects to Part VII of the Information Form as an attempt to re-establish the public interest standard which was specifically removed by the 1984 Act. The Commission continues to believe that its interpretation of the Act and its legislative history supports the inclusion of Part VII in the Information Form. Assessment of such benefits is one element of a full analysis of an agreement under the general standard. Such an assessment, however, would come into play and would only be reached if it were first determined that the agreement would be likely to result in a substantial reduction in competition. Parties to agreements should certainly be able to demonstrate benefits to themselves and in most instances there would likely be benefit to shippers or to commerce generally. It would appear therefore that completion of Part VII of the Information Form would generally be to the advantage of parties filing agreements. Nevertheless, the Commission has determined to make completion of Part VII of the Form optional during the period of these interim rules and to defer a determination as to whether Part VII should be made mandatory or optional after the full comment period and an opportunity to gain operational experi-

ence with the Information Form. Should the information in Part VII be necessary in a particular case the Commission may obtain it through a request for additional information. Parties, of course, should be aware that this procedure would extend the waiting period before an agreement becomes effective. Appropriate changes are being made in the Information Form and accompanying instructions in order to indicate that completion of Part VII is optional.

2. *Information Form, Part IX(C).* The first sentence of this part refers to a "Supplemental Agreement Filing Information Form." The correct term is "Information Form." This incorrect term is being deleted and replaced with the correct term in sentence one.

The rules of this part, as amended herein, become effective on June 18, 1984. Existing conference agreements subject to the Act shall achieve compliance with the requirements of section 5(b) of the Act by indicating their adoption of the mandatory provisions specified in § 572.801, as amended herein, in the manner provided for in these rules.

List of subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 5, 6, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1704, 1705 and 1716), the Federal Maritime Commission hereby amends Title 46, Code of Federal Regulations, Part 572, Subchapter D as follows:

1. In § 572.402, revise paragraph (e)(2) to read as follows:

§ 572.402 Form of Agreements.

* * * * *

(e) * * *

(2) Following the Table of Contents, the body of the agreement setting forth the operative provisions of the agreement in the order prescribed by §§ 572.501 and 572.502. Any additional material provisions shall be set forth as consecutively numbered articles.

* * * * *

2. In § 572.403, revise paragraph (a) to read as follows:

§ 572.403 Modification of Agreements.

The requirements of this section apply to all agreements except for marine terminal agreements and assessment agreements.

(a) Agreement modifications shall be: filed in accordance with the provisions of § 572.401; in the format specified in § 572.402 and this section; and accompanied by an Information Form. The Information Form shall be completed as it pertains to significant modifications of the agreement. Significant modifications, for the purposes of this section, are those that may result in a significant reduction in competition. Such modifications include, but are not limited to: significant changes in the geographic scope of conference, pooling or joint service agreements which expand the scope to cover additional foreign countries or U.S. port ranges; additions to the number of parties in pooling or joint service agreements; significant reductions in service levels; significant changes in pool penalty provisions or carrying charges.

* * * * *

3. §572.801 is amended by revising paragraphs (c), (d) and (e) to read as follows:

§572.801 Mandatory Provisions in Existing Conference Agreements.

* * * * *

(c) *Consultation.* In the event of a controversy, claim, or dispute of a commercial nature arising out of or relating to this agreement or efforts to reduce or eliminate malpractices, the conference, its [chief executive officer or other designee] shall attempt to resolve the dispute in an amicable manner with the opportunity for direct discussions with the disputant. The services of third parties may be drawn from members of the conference or impartial outsiders, including use of the Commission's conciliation service provided for at 46 CFR §§502.401–502.406. The means of invoking consultation shall be set forth in the conference tariff.

(d) *Shippers' Requests and Complaints.*

(1) Shippers' requests and complaints may be made by filing a statement thereof with the [chief executive officer or in the case of an executive domiciled outside the United States, the designated U.S. representative.] Such statement shall be accompanied by a completed information sheet prescribed by the conference [chief executive officer]. The statement and information sheet shall be submitted promptly to each member of the conference.

(2) The shipper's request or complaint shall be promptly considered by the conference.

(3) Conference discussion and action on the shippers' request or complaint need not be restricted to the exact scope of the request or complaint and may include other matters varying from but related thereto. However, all such discussion and action must be authorized by the conference agreement.

(4) The conference shall render a decision on the request or complaint promptly after its initial submission to the conference membership. Such decision shall be in writing, signed by the conference [chief executive officer] and served upon the shipper. If the shipper's request or complaint is denied, the shipper shall be granted an early opportunity to be heard by the chief executive officer.

(5) The procedures for filing shippers' requests and complaints shall be set forth in the conference tariff.

(e) *Independent Action.*

(1) Any party to this agreement may take independent action on any rate or service item required to be filed in a tariff pursuant to section 8(a) of the Shipping Act of 1984 (46 U.S.C. app. 1707(a)) upon [10 or such lesser period as the conference may elect] calendar days' notice to the conference. The time period shall commence upon receipt by the conference, during normal business hours, of a written notice of a member's intention to exercise independent action. The conference shall file the rate or service item in its tariff for use by the member. At any time following the announcement of an independent action by a party to this agreement, any other conference member may elect to adopt the independent rate or service item, effective on or after the effective date announced by the party taking independent action, by providing written notice of such intention. If another member decides to adopt the independent rate, then the conference shall file the rate immediately on behalf of that member.

(2) The conference may enter into service contracts with shippers and shippers' associations and may regulate or prohibit its member lines from unilaterally entering into service contracts and may also regulate or prohibit any conference member from taking independent action on any service contract offered by the conference.

4. Appendix A of Part 572 is amended as follows:

a. In Part VII of the Information Form after the title Benefits of the Agreement insert the following: (Optional);

b. In the Explanation and Instructions for Information Form revise the second paragraph to read as follows:

* * * * *

All agreements by or among ocean common carriers referenced in §572.201 (excluding assessment agreements, marine terminal agreements and those agreements exempted from the filing of the Information Form pursuant to Subpart C of the rules) filed with the Commission must be accompanied by a completed Information Form, which in all cases necessitates the completion of Parts I, II, V, VI, VIII and IX. Completion of Part VII is optional.

* * * * *

c. In the Part by Part Explanation of the Information Form revise Parts VII (A) and (B) to read as follows:

* * * * *

Part VII(A)

Part VII(A) permits the filing party to indicate all benefits resulting from the agreement that will accrue principally to the parties as a result of the operation of the agreement. Such benefits may include increased operational efficiencies or other reductions in costs that result from the implementation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VII(B)

Part VII(B) permits the filing party to indicate all benefits resulting from the agreement that will accrue to shippers and to U.S. commerce generally. Such benefits may include reduced rate levels or improved quality or frequency of service that result from the operation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

* * * * *

d. In Part IX(C) of the Information Form, remove the words "Supplemental Agreement Filing Information Form" and in their place insert the words "Information Form."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–56

JOSE BUENAVENTURA D/B/A PHILIPPINE EXPRESS POSSIBLE VIOLATION OF SECTIONS 16, INITIAL PARAGRAPH, AND 44(A), SHIPPING ACT, 1916

NOTICE

June 20, 1984

Notice is given that the time within which the Commission could determine to review the May 10, 1984, order in this proceeding styled "Approval of William Beasley Harris, Administrative Law Judge, of Agreement of Settlement," which approved the settlement and discontinued the proceeding, has expired. No such determination has been made and accordingly, that order has become administratively final.

In accordance with the terms of the Agreement of Settlement, Respondent shall:

a. Cease and desist from misdeclaring the weight of shipments to ocean carriers and obtaining or attempting to obtain transportation by water of property at less than rates and charges which would otherwise be applicable; and

b. Cease and desist from refusing to pay applicable ocean carrier tariff rates.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–56

JOSE BUENAVENTURA D/B/A PHILIPPINE EXPRESS [1] POSSIBLE VIOLATION OF SECTIONS 16, INITIAL PARAGRAPH, AND 44(A), SHIPPING ACT, 1916

Alan J. Jacobson, Hearing Counsel, *John Robert Ewers*, Director, Bureau of Hearing Counsel.

Bernard Ferrera, attorney for respondent.

APPROVAL BY WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE, OF AGREEMENT OF SETTLEMENT

Finalized June 20, 1984

The Order of Investigation and Hearing in this proceeding was served December 8, 1983; it was published in the *Federal Register*, Vol. 48, No. 240, on Tuesday, December 13, 1983, pages 55510–55511.

A prehearing conference was held in the proceeding on Tuesday, January 31, 1984.

In a letter dated February 29, 1984, Hearing Counsel requested that April 19, 1984 be set as the date for submission of a joint stipulation of facts, a proposed settlement and a memorandum in support thereof. The respondent supported the request. The request was granted.

The parties entered into the following stipulation:

STIPULATION

> Pursuant to Rule 162 of the Federal Maritime Commission's Rules of Practice and Procedure (46 C.F.R. § 502.162), the Commission's Bureau of Hearing Counsel and Respondent Philippine Express Corp. and Jose Buenaventura hereby respectfully submit this stipulation of facts to the presiding Administrative Law Judge and request that he include the facts so agreed upon in the record in the instant proceeding.

[1] Title change from Philippine Express Corp. used in Order of Investigation and Hearing served December 8, 1983, for purpose of clarification. Rule 147, 46 CFR 502.147. This is in response to motion of Hearing Counsel served April 19, 1984, to delete the words "Philippine Express Corp." wherever they appear in the Order of Investigation and Hearing and substitute the words "Jose Buenaventura d/b/a Philippine Express." The reason for the change is simple. The Commission thinking Philippine Corporation was indeed a corporation in existence, named it as respondent. Mr. Buenaventura informed Hearing Counsel and Hearing Counsel confirmed through the New York Secretary of State Office, that he had not incorporated. Therefore, the true party-at-interest in this proceeding is Mr. Buenaventura.

1. Philippine Express, formerly located at 467 Tenth Avenue, New York, New York, was started in 1977 as an importer/exporter of general merchandise. It is no longer operating.

2. Mr. Jose Buenaventura, at all times relevant, was the President of Philippine Express and is responsible for the activities described herein.

3. During the course of 1980, Mr. Buenaventura, as Philippine Express, knowingly engaged in a scheme, involving six shipments of Cocoa Beans from New York to Manila, the Philippines, to obtain transportation by water at less than the applicable ocean carrier tariff rates.

4. The six shipments of cocoa beans were all carried aboard Maersk Line vessels and are represented by the following:

Vessel	Bill of Lading	Bill of Lading Date
ALBERT	NYCY 11969	1-11-80
AXEL	NYCY 14824	2-8-80
ARILD	NYCY 16976	2-27-80
ANDERS	NYCY 17858	3-7-80
ADRIAN	NYCY 19048	3-21-80
ALVA	NYCY 20121	3-28-80

5. On these shipments, Mr. Buenaventura first billed for and collected the proper freight charges from the underlying shippers. Balfour Maclaine International, Ltd. was the underlying shipper for the first five shipments listed in 4 above. Warren G. Harting & Co., Inc. was the underlying shipper for the last shipment.

6. Then, by using inaccurate dock receipts substituted in the carrier's files for the actual dock receipts, Mr. Buenaventura made it appear to the carrier that the shipments weighted approximately one-half of their actual weight.

7. Maersk Line rated these shipment based upon the false weight declarations on the dock receipts and on the corresponding bills of lading, also prepared by Philippine Express.

8. Relying on the inaccurate weight declarations, Maersk Line billed, and Philippine Express paid, approximately one-half the proper freight charges, and approximately one-half the amount paid to Philippine Express by the underlying shippers.

9. Philippine Express did not reimburse its underlying shippers for the difference between the amount they paid to Philippine Express and the amount Philippine Express paid to Maersk Line.

10. The total monetary difference on these shipments between the amount Philippine Express collected from the underlying shippers and the amount Philippine Express paid Maersk Line is $14,716.00.

11. On July 27, 1981, Mr. Buenaventura, of Philippine Express, entered an Affidavit of Confession of Judgement, in 80 Civ. 3830, United States District Court, Southern District of New York, a case initiated by complaint filed by Maersk Line to recover monies

owed it by Philippine Express in connection with the above described facts.

12. In said Confession of Judgment, Mr. Buenaventura acknowledged the facts as alleged in the complaint, and agreed to pay Maersk Line the sum of Thirty Thousand Dollars ($30,000).

13. During the period beginning on December 27, 1978 and running at least through April 18, 1980, Philippine Express carried on the business of ocean freight forwarding without an independent ocean freight forwarder's license issued to it by the Commission.

14. These freight forwarding activities were in connection with the six shipments described above as well as at least 97 other shipments.

15. Philippine Express performed the freight forwarding functions on these shipments, but pursuant to an arrangement with a licensed forwarder (that is no longer in business), listed that forwarder's license number in the forwarder block of the ocean carriers bill of lading.

Respectfully submitted,
/s/ John Robert Ewers 4–19–84
John Robert Ewers, Director
Bureau of Hearing Counsel

/s/ Bernard Ferrera
Bernard Ferrara
Attorney for Respondent
April 18, 1984
New York City, N.Y.

/s/ Alan J. Jacobson
Hearing Counsel

The parties entered into the following proposed settlement of Civil Penalties and Promissory Note Containing Agreement for Judgment:

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Hearing Counsel (Hearing Counsel) and Philippine Express Corp. and Jose Buenaventura (Respondent). 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. §5053) and is to be incorporated into the Final Order in the instant proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served December 8, 1983, the Commission instituted the present investigation to determine whether Respondent had violated sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916 (46 U.S.C. §§815 and 841(b)) during the period December 29, 1978 through April 18, 1980, and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916 so found;

WHEREAS, Hearing Counsel believe that the facts as described in the Stipulation submitted in this proceeding indicate that Respondent engaged in specific conduct violative of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916, and Respondent chooses not to contest the question of violative conduct;

WHEREAS, Respondent has terminated the practices which are the basis of the Commission's allegations in this proceeding, and has indicated its willingness and commitment to maintain measures designed to eliminate discourage and prevent such practices in the future;

WHEREAS, the parties, in order to avoid the delays and expense that would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issues of alleged violation and civil penalties in accordance with the terms and conditions of this Agreement; 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 premises set forth herein, and in compromise of all civil penalty claims arising from conduct set forth in the factual record submitted in the present proceeding, Respondent agrees, as a condition of this Agreement, to comply with all the requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Respondent hereby agrees, as a condition of this Agreement, to pay the Federal Maritime Commission the monetary amount of Ten Thousand Dollars ($10,000) which shall be payable according to the terms of the Promissory Note attached hereto as Appendix 1.

2. Respondent consents as a condition of this settlement agreement, to the entry of an Order directing it to cease and desist from practices which have resulted in the alleged violations described above. This Order shall expressly require the Respondent to:

a. Cease and desist from misdeclaring the weight of shipments to ocean carriers and obtaining or attempting to obtain transportation by water of property at less than rates and charges which would otherwise be applicable; and

b. Cease and desist from refusing to pay applicable ocean carrier tariff rates.

3. Except as provided in paragraph five (5) below, this Agreement shall forever bar the commencement or institution by the Commission of any assessment proceeding or other claims for recovery of civil penalties from Respondent arising from the conduct set forth and described in the factual record submitted in the present proceeding.

4. Respondent agrees to take all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916.

5. Respondent hereby agrees, as a condition of this Agreement, that, if it breaches this Agreement, it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to December 8, 1988, by or on behalf of the Commission, to recover civil penalties for violations of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916, arising out of the conduct set forth in the factual record submitted in the instant proceeding. In the event of such a breach by Respondent, if such noncompliance shall not have been cured or explained to the Commission's satisfaction within thirty (30) days after written notice to Respondent by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that Respondent's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any monies paid to the Commission shall remain the property of the United States, and Respondent will not impose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

6. In the event of changes of law or other circumstances at any time during the term of this Agreement that Respondent believes warrant modification or mitigation of any of the requirements imposed on Respondent by this Agreement, the Commission agrees, as an inherent part of this Agreement, to Respondent's right to petition the Commission to this end.

7. It is expressly understood and agreed that this Agreement and final approval hereof is not to be construed as an admission by Respondent or its owners, officers, directors, employers or affiliates of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

8. Respondent 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 the consideration herein expressed.

The undersigned represents that he is properly authorized to execute this Agreement on behalf of Respondent and to fully bind Respondent to all of the terms and conditions set forth herein.

______________________	John Robert Ewers 4–19–84
Philippine Express	John Robert Ewers, Director
Jose Buenaventura	Bureau of Hearing Counsel
By: __________________	/s/ Alan J. Jacobson
	Alan J. Jacobson
April 18, 1984	Hearing Counsel

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT

For value received, Jose Buenaventura promises to pay to the Federal Maritime Commission (the Commission) the principal sum of Ten Thousand Dollars ($10,000) to be paid at the offices of the Commission in Washington, D. C., by bank cashier's or certified check in the following installments:

One Thousand Dollars ($1,000) on or before ten (10) days following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before three (3) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before nine (9) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before fifteen (15) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before twenty one (21) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before twenty four (24) months following the approval by the Commission of the Proposed Settlement in FMC No. 83-56.

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date of the approval of the Commission of the Proposed Settlement in No. 83-56 and be computed at the rate of twelve percent (12%) per annum.

If any payment of principal or interest shall remain unpaid for a period of ten (10) days after becoming due and payable, the Commission shall give Respondent written notice of the amount unpaid. Respondent shall have five (5) days thereafter to pay all unpaid principal and interest. If any payment of principal and interest shall remain unpaid following this five (5) day period, then the entire unpaid principal amount of this Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under this Promissory Note, Jose Buenaventura does hereby authorize and empower any U.S. attorney, any of his assistants or any attorney of any court of record, Federal or State, to appear for him, and to enter and confess judgment against Jose Buenaventura for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State; to waive the issuance and service of process upon Jose Buenaventura in any suit on this Promissory Note; to waive any venue requirement in such suit; to release all errors which may intervene in entering up such judgment or in issuing any execution thereon; and to consent to immediate execution on said judgment. Jose Buenaventura hereby ratifies and confirms all that said attorney may do by virtue thereof.

This Promissory Note may be prepaid in whole or in part by Jose Buenaventura by bank cashier's or certified check at any time, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

By: ______________________________

Jose Buenaventura

Date: April 18, 1984

Hearing Counsel submitted the following memorandum in support of the proposed settlement:

MEMORANDUM IN SUPPORT OF PROPOSED SETTLEMENT

I. INTRODUCTION

The Federal Maritime Commission began this proceeding by an Order of Investigation and Hearing served December 8, 1983. The Order alleged that Philippine Express may have violated sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916. Specifically, the Commission ordered that the following issues be resolved in this proceeding:

1. Whether Philippine Express Corp. violated sections 16, Initial Paragraph, and/or 44(a) of the Shipping Act, 1916, during the period December 29, 1978 through April 18, 1980.
2. Whether civil penalties should be assessed against Philippine Express Corp. for violations of section 16, Initial Paragraph and/or 44(a) and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible aggravation and mitigation of such penalty.
3. Whether the Commission should order Philippine Express Corp. to cease and desist from carrying on the business of forwarding without a license obtained pursuant to section 44 of the Shipping Act, 1916.

By Notice of March 1, 1984, the presiding Administrative Law Judge granted the parties' request to submit a proposed settlement agreement with supporting memoranda and record on or before April 19, 1984. The record in this proceeding consists of a stipulation of facts submitted herein. In this memorandum, Hearing Counsel explain the proposed settlement offered by the parties, and we indicate the reasons we believe support acceptance of the settlement.

II. THE PROPOSED SETTLEMENT SHOULD BE APPROVED

A. *Authority for Settlement*

It is well established that settlement is an acceptable means of terminating an administrative proceeding. The Administrative Procedure Act ("APA") provides in part that "[t]he agency shall give all interested parties opportunity for . . . the submission and consideration of . . . offers of settlement . . . when time, the nature of the proceeding, and the public interest permit . . .", 5 U.S.C. § 554(c)(1). The actual authority, however, to use settlement as a means to terminate a proceeding comes from judicial precedent and the agency's rules. *See Pennsylvania Gas & Water Co.* v. *FPC,* 463 F.2d 1242, 1247, n. 17 (D.C. Cir. 1972). The Court of Appeals for the District of Columbia in that case noted that the "purpose of the informal settlement provisions [in the APA] is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest," and that settlement should not be discouraged. *Id.*

The Commission's rules provide authority for settlement of penalties for violations which are the subject of a formal proceeding, stating that "Hearing Counsel shall have full authority to enter into stipulations and settlements." 46 C.F.R. § 505.3 (1980).

The Commission has thus approved settlements under this authority for violations of many different sections of the Shipping Act, 1916, which fact indicates that "there is a very strong policy favoring settlements in lieu of needless expensive litigation and . . . the Commission has been following this policy frequently, especially in most recent years." *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162,* 24 F.M.C. 316, 322 (1981).

Section 505.3 of the Commission's Rules for Compromise, Assessment, Settlement and Collection of Civil Penalties also requires that settlements be submitted for approval to the presiding officer. (46 C.F.R. § 505.3.) The presiding Administrative Law Judge in his determination has to follow the stricture that "the settlement must not contravene any law or public policy." *Old Ben Coal Company* v. *Sea-Land Service,* 21 F.M.C. 506, 512 (1978). If the settlement is not invalid under this principle, the presiding Administrative Law Judge may look to other criteria to decide whether "the settlement is fair, reasonable and adequate." *Id.*

In determining whether the settlement amount is sufficient to warrant approval of proposed settlements, the presiding Administrative Law Judge is assisted by the standards set forth in 4 C.F.R. Parts 101–105, which are referred to in section 505.1 of the Commission's Rules and Regulations (46 C.F.R. § 505.1). These standards under Part 103 of Chapter 4 provide criteria that can be considered in settling a case. Among those mentioned are ability of the respondent to pay and furtherance of enforcement policy. (4 C.F.R. § 103.)

B. *Proposed Settlement Agreement and Stipulation*

The proposed settlement agreement provides for Jose Buenaventura to pay a civil penalty in the amount of $10,000. This penalty is to be paid over a period of two years with interest according to a promissory note. In addition, as part of the settlement, Respondent agrees to the entry of an Order directing it to cease and desist from practices which have resulted in those complained of here.

Philippine Express knowingly obtained transportation by water of property at less than the applicable ocean carrier tariff rates. This involved six shipments of cocoa beans from New York to the Philippines, all during the first three months of 1980. (See Stipulation Nos. 3–12.) In addition, during the period beginning on December 27, 1979, and running through April 18, 1980, Philippine Express carried on the business of ocean freight forwarding without an independent ocean freight forwarder's license issued to it by the Commission. (See Stipulation Nos. 13–15.)

Rather than fully litigate the issues raised in the Order of Investigation and Hearing, Respondent and Hearing Counsel entered into the proposed settlement and agreed upon a stipulated record.

C. *Criteria For Settlement*

The proposed settlement meets the criteria established by the Commission as set out in 4 C.F.R. parts 101–105 (1980). Part 103 of that Title includes standards to be used as guidelines in settling claims. Relevant to this proceeding are the factors mentioned previously; ability to pay and furtherance of agency enforcement policy.

Both of these factors figured prominently in Hearing Counsel's decision to enter into the settlement in this proceeding. In the first instance, a payment of $10,000 is a significant amount which will serve to emphasize the Commission's determination to eliminate practices such as those involved here.

It is also a penalty reasonable in light of Respondent's status as an individual and his agreement to pay Maersk Line the sum of Thirty Thousand dollars as compensation for the complained of practices as well as other matters.

Further support of the settlement amount is found in Respondent's financial status. Mr. Buenaventura is personally responsible for payment of the promissory note. His business, Philippine Express, is no longer functioning, and he was evicted from his office space. He has no business assets at all. He has also stated that he is personally without sufficient funds to pay a large penalty. He indicates, however, that he is trying "to get back on his feet" and, recognizing his obligation in this matter, will try to pay the $10,000 settlement amount.

Hearing Counsel believe the factors outlined above should be given considerable weight by the Administrative Law Judge in reviewing the settlement proposal. The settlement amount should operate to prevent recurrence of the practices upon which the proceeding was predicated and thereby serve the Commission's enforcement policy. It will also serve the Commission policy of favoring settlements in lieu of needless expensive litigation.

III. CONCLUSION

Hearing Counsel, by reason of the foregoing, urge the Presiding Administrative Law Judge to approve the proposed settlement.

Respectfully submitted,
John Robert Ewers, Director
Bureau of Hearing Counsel

Alan J. Jacobson
Hearing Counsel

DISCUSSION

Upon review of the above and the entire record in this presiding, the Presiding Administrative Law Judge is satisfied that the settlement is fair and reasonable, and should be approved. The Judge *finds* and *concludes* that the parties have made out a proper case for settlement and supplied stipulations and reasons in support which are found acceptable.

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 proposed settlement and promissory note containing Agreement for Judgment.

(B) The parties shall notify the Commission promptly upon their carrying out the terms of the settlement.

(C) The case name shall be clarified as noted herein above.

(D) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]

GENERAL ORDER 16; DOCKET NO. 84–17

INTEREST IN REPARATION PROCEEDINGS

June 20, 1984

ACTION: Final Rule.

SUMMARY: This rule changes the method of assessment from simple to compound interest calculated on U.S. Treasury obligations. The rule implements section 11(g) of the Shipping Act of 1984 but would be equally applicable to proceedings under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933, initiated on or after June 18, 1984.

DATES: Effective 30 days from publication in the *Federal Register.*

SUPPLEMENTARY INFORMATION:

I. *BACKGROUND*

This proceeding was instituted by a Notice of Proposed Rulemaking published in the *Federal Register* on April 23, 1984 (49 FR 17044) for the purpose of conforming the Commission's current rule on the award of interest in reparations proceedings to Section 11(g) of the recently enacted Shipping Act of 1984. Section 11(g) of the Act requires that interest assessed in reparations proceedings be at "commercial rates compounded from the date of injury." The current Commission rule on the assessment of interest in reparations proceedings specifies that "Interest (simple) will accrue from the date of payment of freight charges to the date reparations are paid."

The proposed rule would make two modifications to the current rule. The first modification changes the period during which interest accrues. The period in the current rule extends from the date the freight charges are paid until the date reparations are paid. The period in the proposed rule would extend from the date the injury occurred until the date specified in the Commission Order awarding reparations.

The second modification changes the manner in which interest is accrued. In the current rule, simple interest is assessed on reparations awards, while in the proposed rule, interest is compounded on a daily basis.

The comment period on the proposed rule was 30 days after publication in the *Federal Register*. Comments were received from Traffic Service Bureau, Inc., United States Lines, Inc. and United States Lines (S.A.)

Inc. (together U.S.L.), and two Trans-Pacific conferences. These comments are discussed below.

The Period of Time During Which Interest Accrues

The proposed rule states that "Interest awarded in reparations proceedings will accrue from the date of injury to the date specified in the Commission Order awarding reparations." Traffic Service Bureau, Inc. suggests that interest should accrue from the date of injury to the date reparations are paid. It points out that: (1) this is the policy of the current rule; and (2) it encourages the timely payment of reparations.

U.S.L. suggests that a "mechanism should be developed whereby payment may be made in the discretion of the Respondent after service of the Recommended Decision of [the] Administrative Law Judge or the Settlement Officer." They argue that: (1) the rule provides a disincentive for earlier payment, (because once a date is specified in the Commission Order, there will be no incentive to pay before that date); and (2) the respondent is forced to pay interest during comment or Commission review periods subsequent to the date of recommended decisions by Administrative Law Judges or Settlement Officers. U.S.L. suggests that in the event that a party wishes to object to the decision of the Administrative Law Judge or of the Settlement Officer, that party should be required to file a notice of intention to object prior to the date specified for payment, and a failure to file such a notice would be deemed a waiver of its right to file objections. U.S.L. adds that "interest on any additional amount only, as determined by the Commission to be owed, could then be calculated in the same manner as the previous award."

The Commission, in enforcing the current rule, determines the relevant rate of interest to be assessed on reparations awards. The current rule also specifies that this relevant rate of interest is to be assessed on a simple basis (i.e., it is not compounded). The Commission however does not compute the actual interest amount, but leaves this to the respondent. Under the proposed rule, not only would the Commission determine the relevant rate of interest, but it would also calculate the actual amount of interest to be paid. This involves: (1) a determination of the relevant rate of interest (in the regard the current and the proposed rules are identical); and (2) the daily compounding of this rate of interest via a compounding formula in order to determine the precise interest payment to be made.

The proposed rule, in responding to a Congressional mandate to compound interest, requires the use of several involved calculations in order to compute the actual interest payments. While the least complicated compounding formula is used, it nevertheless lends itself to easy error either in misapplication or simple arithmetic mistakes. It is thus believed that if such calculations are made in all cases by the Commission, not only will there be a uniform application of the rule, but also, there will be a minimal number of errors, because of a developed, in-house expertise (due to repetitive calculations) in the application of the formula (as opposed to occasional use by outside parties).

In order to include the amount of the interest payments in the Commission Orders awarding reparations, it is necessary to know the specific termination date of the reparations period. Under the current rule, where interest accrues until the date reparations are paid, such a date is unknown at the time of the commission Order. Hence, the proposed rule, (in order to identify a specific termination date for the reparations period), recommends that the reparations period terminate on the date specified in the Commission Order awarding reparations. The proposed rule also states that "Normally, the date specified within which payment must be made will be 15 days subsequent to the date of service of the Commission Order." The amount of lost interest which would accrue during the 15-day period would be negligible.

With respect to U.S.L.'s argument that some mechanism should be established to toll the time for payment of interest, this flies in the face of the theory underlying interest. No matter how long a proceeding may continue, the "offender" still has the use of the illegally-obtained monies. It should also be mentioned at this point that carriers as well as shippers benefit from this rule inasmuch as the 1984 Act permits carriers to proceed against shippers for underpayment.

In response to Traffic Service Bureau, Inc.'s concern about timely payment of reparations, it should be noted that in those instances of delinquent payments, the complainant may seek enforcement of the Commission Order in the United States District Court having jurisdiction over the parties as well as petition the Commission for relief.

The Compounding of Interest on a Daily Basis

The proposed rule specifies that interest will be compounded on a daily basis. U.S.L. argues against daily compounding and suggests that compounding occur every six months because this is the same maturity period as for six-month Treasury bills which are the benchmark on which the reparations rate of interest is based.

There is an important conceptual point that should be made concerning the above issue. The intent behind the proposed rule was to establish a benchmark interest rate that would produce a reasonable result for the reparations process. The Commission is not attempting to look behind a particular entity's uses of working capital to reveal in each case where the monies at issue were actually invested. The fungibility of money would make such an exercise impossible because the funds could have been placed in numerous alternative forms of investments. These alternatives include certificates of deposit, Treasury bills and bonds, money market funds, long-term corporate debentures, and literally hundreds of other instruments of varying risk and maturity. Thus, the linkage between the use of six-month-

Treasury-bill yields and a compounding of interest every six months is spurious. The interest rate factor determined by evaluating the monthly yields on six-month Treasury bills is simply a representation of what the Commission believes to be a fair rate of interest.

Daily compounding is recommended in the proposed rule because it is the most precise and least complicated, compounding formula which can be used. Perhaps of more importance, daily compounding is now used in the commercial sector by most major money market funds.

Furthermore, if six-month compounding were adopted by the Commission, there would still be a residual, daily compounding computation necessary in those instances when the reparation period did not precisely terminate at the beginning or the end of a six-month interval. This would unnecessarily complicate the proposed rule's compounding formula. Finally, the difference in the amount of reparations between six-month compounding (as recommended by U.S.L.) and daily compounding (as used in the proposed rule) is not very large. For example, at 10%, daily compounding over 5 years, a dollar would grow to $1.648, whereas with semiannual compounding, the amount would be $1.629.

The Use of the Six-Month Treasury Bill Rate

The Trans/Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference, and their member lines, have argued against the proposed rule's use of the interest rates on six-month Treasury bills. They point out that six-month Treasury bills are available only in minimum $10,000 denominations, and consequently suggest that "it would be inappropriate to assess interest rates beyond those available in commercial passbook accounts for reparation awards before the Commission." U.S.L. on the other hand stated that: "While it can be argued that some index other than secondary market interest rates on six-month Treasury Bills may be more valid, since not all claims will involve $10,000 or more, U.S. Lines is satisfied that this index represents a readily ascertainable rate and a rate that is adequately reflective of the statutory intent."

This issue was raised in Docket 81–22 (the rulemaking for the current reparation rule). In its Final Order in that proceeding, the Commission upheld the use of six-month Treasury bills as a basis for calculating a reparations rate of interest and stated that: "While most reparation amounts, by themselves, would probably not be large enough to invest in Treasury bills, there are a myriad of investment opportunities at rates approximating the Treasury bill rate which are available to the small investor." The Commission thus concluded that "the use of an average Treasury bill rate as opposed to a fixed 'statutory' rate or 'passbook' rate is a valid exercise of agency discretion." As such the six-month Treasury bill rate fully meets the benchmark standard contemplated in this rule.

To reiterate, the six-month Treasury bill rate represents a benchmark interest rate that establishes a reasonable level of compensation. The Commission is not attempting to identify the actual investment instruments used in each instance. It should be pointed out, however, that a hypothetical investor with less than $10,000 could obtain a return that would closely approximate the six-month Treasury bill rate by investing in a money market fund which invested solely in Treasury bills. As previously stated, most major money market funds compound interest on a daily basis.

All other comments have been considered and have been found to be without merit.

In view of the foregoing, the Commission is adopting the proposed rule as final, without change.

List of subjects in 46 CFR Part 502:

Administrative Practice and Procedure.

Therefore, pursuant to 5 U.S.C. 553, sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 821 and 841a.) and sections 11(g) and 17(a) of the Shipping Act of 1984 (46 U.S.C. app. 1710(g) and 1716(a)), the Commission is revising 46 CFR § 502.253 to read as follows:

§ 502.253 *Interest in reparation proceedings.*

Interest awarded in reparation proceedings will accrue from the date of injury to the date specified in the Commission Order awarding reparations. Normally, the date specified within which payment must be made will be 15 days subsequent to the date of service of the Commission Order. The rate of interest will be derived from the average monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that the injury occurred and concluding with the latest available monthly Treasury bill rate at the date of the Commission Order awarding reparations. Compounding will be daily from the date of injury to the date specified in the Commission Order awarding reparations. The monthly rates on six-month U.S. Treasury bills for the reparation period will be summed and divided by the number of months for which interest rates are available in the reparation period to determine the average interest rate applicable during the period.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–13

IN THE MATTER OF THE AUTHORITY OF THE MALAYSIA-PACIFIC RATE AGREEMENT TO SERVE ALASKA

ORDER DENYING PETITION FOR DECLARATORY ORDER

June 28, 1984

The members of the Malaysia-Pacific Rate Agreement (Agreement No. 9836) (Petitioners) have petitioned the Commission pursuant to Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68, for a declaratory order to remove uncertainties concerning the geographic scope of their agreement. Notice of the Petition was served on April 3, 1984. In response to the Notice, the Commission's Bureau of Hearing Counsel (Hearing Counsel) has requested leave to intervene and file a reply to the Petition. The intervention of Hearing Counsel will be granted and its reply considered herein.

DISCUSSION

Agreement No. 9836 authorizes its members to agree upon rates and practices for the trades from Malaysia, Singapore and Brunei "to ports on the West Coast of the United States, including the State of Hawaii" and Canada. Petitioners wish to provide service to Alaska and seek to have the Commission declare that Alaskan ports are included within the phrase "ports on the West Coast of the United States."

The Petition advises that Alaska is not mentioned in the memoranda and orders contemporaneous with the original approval of Agreement No. 9836 in 1970 and the subsequent modification in 1975 of the Agreement to include Hawaii (Agreement No. 9836–4). Petitioners go on to state that they have discovered no Commission or court case which construes the phrase "West Coast of the United States" or any analogous term. Despite the lack of legal authority on the question, Petitioners believe that the "plain and ordinary" meaning of "West Coast of the United States" includes Alaska. Petitioners argue that Alaska, unlike Hawaii, is on the West Coast of the United States.

Hearing Counsel opposes the Petition, arguing that agreements must be clear and explicit, particularly with respect to the limits on the scope of authority. It cites Commission precedent to the effect that agreements should be complete, especially as to matters of substance, and the language used should be so clear as to eliminate all necessity for the interpretation as to the "intent" of the parties. *In the Matter of Agreement No. 6510,* 1 U.S.M.C. 775, 778 (1938) and *Agreement No. T–1685, et al.*, 19 F.M.C. 440, 445 n. 8 (1977). Hearing Counsel believes that to avoid ambiguity, the Agreement should be modified to expressly include service to Alaska.

As the parties point out, the phrase "West Coast of the United States" as used in Agreement No. 9836 is not a term of art nor has it been construed by the Commission or the courts. This being the case, the question becomes whether or not the Commission, in this case, should construe the phrase broadly so as to include Alaska.

There is nothing to indicate that, at the time Agreement No. 9836 was originally submitted to the Commission, transportation circumstances in Alaska were relied on by the Agreement's proponents or considered by the Commission. Moreover, it appears from the Petition that, after obtaining approval, the parties operated under Agreement No. 9836 for fourteen years before expressing a desire to extend its coverage to Alaska. The Commission is therefore unable to grant the relief requested. If Petitioners wish to include Alaska within the geographic scope of their agreement, they should file an appropriate amendment to their agreement. For the Commission to decide otherwise would be to permit Petitioners to avoid the requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. app. § 814) and section 6 of the Shipping Act of 1984 (46 U.S.C. app. § 1705).

THEREFORE, IT IS ORDERED, That the Petition of the Malaysia-Pacific Rate Agreement for Declaratory Order is denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR 502]

GENERAL ORDER 16; DOCKET NO. 84–16

ENFORCEMENT OF ORDERS AND SUBPOENAS IN FORMAL PROCEEDINGS

June 29, 1984

ACTION: Final Rule.

SUMMARY: This revises the Commission's Rules of Practice and Procedure with respect to enforcement in the event of a party's refusal to obey an order or to comply with a subpoena. The revised procedures provide for court enforcement by the Attorney General on behalf of the Commission or private parties injured by the violation or refusal. Advance notice to the Commission is required of a private party's intention to seek court enforcement of subpoenas and discovery orders. The purpose of the revision is to clarify existing procedures and implement the statutory provisions of the Shipping Act of 1984.

DATES: Effective 30 days after publication in the *Federal Register.*

SUPPLEMENTARY INFORMATION:

On April 23, 1984, the Commission published in the *Federal Register* (49 Fed. Reg. 17043) a proposed amendment to the Commission's Rules of Practice and Procedure (46 CFR 502 et seq.) to clarify procedures for enforcement of Commission orders and subpoenas and to require advance notice to the Commission in cases of private party enforcement. Specifically, it was proposed that 46 CFR 502.210(b) be revised as follows:

> (b) *Enforcement of orders and subpoenas.* In the event of refusal to obey a Commission order or failure to comply with a Commission subpoena, the Attorney General, at the request of the Commission, or any party injured thereby may seek enforcement by a United States district court having jurisdiction over the parties. Such action shall be taken within twenty (20) days of the date of refusal to obey or failure to comply. A private party shall advise the Commission five (5) days (excluding Saturdays, Sundays and legal holidays) before applying to the court of its intent to seek enforcement.

Comments to the proposed rule were filed on behalf of the Chemical Manufacturers Association (CMA) and the non-governmental members of the Maritime Administrative Bar Association (MABA).

CMA and MABA question the Commission's authority to place limitations on the three-year statute of limitations for enforcement of Commission orders contained in section 14(e) of the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. 1713(e)) with respect to matters other than subpoenas and discovery orders. Additionally, while acknowledging the need for prompt action with respect to subpoenas and discovery orders and the propriety of advance notice to the Commission in the event of private party enforcement of such directives, MABA feels that the time for enforcement should be increased to 120 days to conform with the time during which discovery must be completed under the Commission's Rules of Practice and Procedure. Lastly, CMA asks that the proposed rule be modified to show that it is applicable to subpoenas and discovery orders of the Commission's Administrative Law Judges (ALJs) as well as to orders of the Commission itself.

It was not the Commission's intention to apply the time limitations on enforcement to directives other than subpoenas and discovery orders and the language of the rule will be modified to ensure that the time limitations on enforcement contained therein apply only to subpoenas and orders related to discovery.

We do not agree, however, that the 20-day period during which subpoenas and discovery orders must be enforced should be increased. The 1984 Act, as MABA acknowledges, is designed to foster prompt determination of Commission proceedings (see section 11(c), (e), 46 U.S.C. app. 1710(c), (e)) and should not be read to thwart this objective. The legislative history, moreover, indicates that the three-year limitation was designed to relate, not to interim procedural orders, but to orders relating to findings of substantive violations of the Act. *See e.g., Ocean Shipping Act of 1983: Hearing on S. 47 Before the Subcommittee on Merchant Marine of the Senate Committee on Commerce, Science, and Transportation,* 98th Cong., 1st Sess. 130 (February 2, 1983) (Comments of Chemical Manufacturers Assn.).

The 20-day period provided in the present rule has been in effect since 1974, and no adverse consequences have been shown to flow from it. In fact, MABA does not contend that the present 20-day period has created any problems. On the other hand, the 120-day discovery period referred to by MABA is an outside limit which may often prove too lengthy as an enforcement period in particular cases, such as actions with respect to assessment agreements (Fifth paragraph, section 15, Shipping Act, 1916, 46 U.S.C. app. 814; section 5(d), Shipping Act of 1984, 46 U.S.C. app. 1704) and rate investigations in the domestic offshore trades (section 3(b), Intercoastal Shipping Act, 1933, 46 U.S.C. 845), which must be completed within one year. Of course, the 20-day provision can be waived in any case in which it has an unreasonably limiting effect.

In response to CMA's comments and to preserve present practice, the rule will be modified to ensure that it will apply to subpenas and discovery orders of ALJs as well as to orders of the Commission itself. This objective will be accomplished by deleting the word "Commission" before the words "order" and "subpena" in the first sentence of the rule.

List of Subjects in 46 CFR Part 502, Administrative Practice and Procedure

Therefore, pursuant to 5 U.S.C. 553; sections 27, 29 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 826, 828 and 841a); and sections 12(a), 14(c) and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1711(a), 1713(c) and 1716), section 502.210(b) of 46 CFR is revised as follows:

502.210 Refusal to comply with orders to answer or produce documents; sanctions; enforcement.

* * * * *

(b) *Enforcement of orders and subpenas.* In the event of refusal to obey an order or failure to comply with a subpena, the Attorney General, at the request of the Commission, or any party injured thereby may seek enforcement by a United States district court having jurisdiction over the parties. Any action with respect to enforcement of subpenas or orders relating to depositions written interrogatories, or other discovery matters shall be taken within twenty (20) days of the date of refusal to obey or failure to comply. A private party.shall advise the Commission five (5) days (excluding Saturdays, Sundays and legal holidays) before applying to the court of its intent to seek enforcement of such subpenas and discovery orders.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary