FEDERAL MARITIME COMMISSION

DOCKET NO. 84–36

SEATTLE CRESCENT CONTAINER SERVICE, INC.

v.

THE PORT OF SEATTLE

NOTICE

April 25, 1986

Notice is given that no appeal has been taken to the March 19, 1986, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–36

SEATTLE CRESCENT CONTAINER SERVICE, INC.

v.

THE PORT OF SEATTLE

COMPLAINT DISMISSED

Finalized April 25, 1986

By complaint filed October 9, 1984, as amended, Seattle Crescent Container Service, Inc., Complainant, alleged that The Port of Seattle, Respondent, was engaged in certain practices seeking to exculpate the Respondent from its own negligence in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. app. 816), and section 10(d)(l) of the Shipping Act, 1984 (46 U.S.C. app. 1709(d)(1)). The Complainant asked that the practices be declared unjust and unreasonable and that a cease and desist order be issued. Costs and attorneys' fees were requested.

The matter proceeded to hearing in Seattle, Washington, but was recessed on October 10, 1985, to allow the parties to seek a fresh approach to a settlement.

By letter dated March 6, 1986, Complainant advises that the Complainant and Respondent have reached a settlement with respect to practices for the future and that it has withdrawn its complaint. A copy of the written agreement to govern future conduct is attached to the Notice of Withdrawal.[1]

Neither the Respondent nor Hearing Counsel, an Intervenor in the proceeding, opposes the withdrawal.

Accordingly, the complaint is dismissed without prejudice.

(S) SEYMOUR GLANZER
Administrative Law Judge

[1] Inasmuch as the agreement was filed March 13, 1986, with the Commission's Bureau of Agreements and Trade Monitoring under the provisions of section 5 of the Shipping Act, 1984 (46 U.S.C. app. 1704) it will not be attached to this order.

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 85–7

INDEPENDENT ACTION—NOTICE AND MEETING PROVISIONS IN CONFERENCE AGREEMENTS

April 25, 1986

ACTION: Final Rule.

SUMMARY: This revises the Commission's regulations governing the filing of agreements submitted to the Commission pursuant to the Shipping Act of 1984. The Final Rule requires conference agreements to: (1) establish a maximum notice period of not more than 10 days for member lines taking independent action; (2) provide for a single notice to the conference of a member line's independent action; and (3) state that a member line taking independent action is not required to attend a meeting, or to comply with other procedures, for the purpose of explaining, justifying or compromising a proposed independent action. The Final Rule also makes technical changes based on the comments received.

EFFECTIVE DATE: May 30, 1986.

SUPPLEMENTARY INFORMATION:

I. *PROCEEDING*

This proceeding was initiated by a Notice of Proposed Rulemaking (Proposed Rule) published in the *Federal Register*, 50 FR 10810 (March 18, 1985), to revise "Part 572—Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984," 46 CFR Part 572, as it relates to conference independent action (IA) authority. The Proposed Rule would require conference agreements to establish a maximum notice period of not more than 10 days for member lines taking independent action, to provide for a single notice of independent action to the conference, and to state that a proponent of independent action is not required to attend a meeting, or to comply with other procedures, for the purpose of explaining, justifying or compromising a proposed independent action.

A total of 14 comments were received in response to the Commission's Notice of Proposed Rulemaking. The Proposed Rule was supported in comments filed by: (1) the Department of Justice (DOJ); (2) the Chemical

Manufacturers Association (CMA); (3) PPG Industries, Inc. (PPG); and (4) Brown-Forman Distillers Corporation (Brown-Forman).

Comments seeking clarification, modification, or withdrawal of the Proposed Rule were filed by: (1) the Transpacific Westbound Rate Agreement (TWRA); (2) the Philippines North America Conference (PNAC); (3) the Inter-American Freight Conference (IAFC); (4) the U.S.-Flag Far East Discussion Agreement (Agreement No. 10050); (5) the North Europe-U.S. Pacific Freight Conference, the Pacific/Australia-New Zealand Conference, and the Pacific Coast European Conference (NEUSPAC *et al.*); (6) the 8900 Lines and the U.S. Atlantic & Gulf Ports/Italy, France & Spain Freight Conference (8900 Lines *et al.*); (7) the Atlantic and Gulf/West Coast of South America Conference, the United States Atlantic and Gulf/Colombia Conference, the United States Atlantic and Gulf/Ecuador Conference, the United States Atlantic and Gulf/Venezuela Freight Association, the United States Atlantic and Gulf/Southeastern Caribbean Conference, and the United States Atlantic and Gulf/Hispaniola Steamship Freight Association (Latin American Conferences); (8) the Trans-Pacific Freight Conference of Japan/Korea, the Japan/Korea-Atlantic & Gulf Freight Conference, the Trans Pacific Freight Conference (Hong Kong), the New York Freight Bureau, and the Japan-Puerto Rico & Virgin Islands Freight Conference (Trans-Pacific Conferences); (9) the United States-European Carrier Associations (USECA) consisting of the North Europe-U.S. Gulf Freight Association, the Gulf-European Freight Association, the North Europe-U.S. Atlantic Conference, the U.S. Atlantic-North Europe Conference, the Pan-Atlantic Carrier Trade Agreement, and the Trans-Atlantic American Flag Liner Operators Agreement; and (10) Sea-Land Service, Inc. (Sea-Land).

II. *COMMENTS AND DISCUSSION*

A. *The Right of Independent Action*

Section 5(b)(8), 46 U.S.C. app. 1704(b)(8), of the Shipping Act of 1984 (the Act or the 1984 Act), 46 U.S.C. app. 1701–1720, states that each conference agreement must:

> provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of this Act upon not more than 10 calendar days' notice to the conference and that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.

Before addressing the specific issues raised with regard to particular provisions of the Proposed Rule, it is necessary to address a number of general issues raised by the comments regarding the interpretation of section

5(b)(8) of the Act. One such issue concerns the proper role of independent action within the statutory scheme of the 1984 Act. A number of the conferences argue that collective ratemaking is the "normal" method for pricing ocean transportation services. It is asserted that in a well-functioning conference, differences over pricing will usually be resolved internally. Independent action is said to be a "safety valve," a "last resort," an "exception to the norm that will rarely be used. These comments generally conclude that the Proposed Rule would distort the statutory scheme by elevating independent action above collective action.

This position, however, ascribes too peripheral a role to the independent action provision of the Act. Independent action is not merely a safety valve to be used on rare occasions whenever pricing decisions cannot be resolved internally and a member is allowed to act independently rather than be forced to leave the conference. It is a central provision designed to balance those provisions of the Act which facilitate collective action.

The independent action provision was a key feature of the compromise that led to the passage of the 1984 Act. Moreover, the independent action provision was one of the shipper-sponsored provisions. The 1984 Act represents a legislative effort to balance the interests of carriers and shippers. In order to fulfill that Congressional purpose, it is necessary to ensure that the right of independent action is fully preserved and that no restrictions, other than those permitted by the statute, are placed on its exercise.

Rather than distorting the statutory scheme, the Proposed Rule would appear to be in harmony with the purpose of the 1984 Act. The independent action provision of the 1984 Act is the counterbalance to the enhanced economic power of conferences. Congress could not have spoken more clearly on this issue than it did in the Conference Report:

> A critical factor enabling the Conferees to agree on a more narrowly drawn general standard is the inclusion in this bill of numerous other provisions which address the nation's interest in competition in the ocean common carrier industry. . . . Even more importantly, the bill includes other specific and major procompetitive reforms that will affect the operation of ocean carriers and conferences—notably a strong requirement of independent action with a limited notice period. . . .

H.R. Rep. No. 98–600, 98th Cong., 2d Sess. 33–34 (1984).

As the Conference Report makes clear, Congress intended independent action to be a procompetitive balance to the more narrowly drawn general standard. Moreover, it is clear that Congress was aware that it would "affect the operation of ocean carriers and conferences . . ." including pricing. Furthermore, there is nothing in the legislative history which indicates that independent action is merely a safety valve rarely to be used or only as a last resort. Although Congress continued to allow for collective ratemaking by conferences, it provided for a strong, effective right of IA in the clearest of terms. Preserving an unburdened right of IA is in

keeping with the Congressional purpose. Restricting, burdening, or making it more difficult to exercise independent action defeats the purpose of the Act and the legislative compromise that led to the Act's passage.

A number of conferences suggest further that the Proposed Rule is contrary to the Congressional purpose of continuing the conference system in order to address structural and competitive problems such as rate instability and overcapacity. While it is true that Congress did continue the conference system for such a purpose, this does not mean that independent action should be circumscribed or limited. Congress gave not only conferences but other types of carrier agreements the opportunity to deal with problems of overcapacity by providing for a relaxed general standard, expedited processing, and clear antitrust immunity. Restricting IA, however, is not a solution to the problem of overcapacity which is the fundamental cause of rate instability.

One conference comment argues that the Act's silence with regard to any other restrictions on independent action does not mean that all other conditions are *per se* unlawful. Another comment argues that section 5(b)(8) does not prohibit other provisions in agreements which might result in reducing the frequency of independent action. This same comment criticizes the Proposed Rule as an administrative rulemaking which impermissibly adds to the statutory requirements of section 5(b)(8).

These comments misconstrue the nature of the right of independent action. Independent action means that a member line may act independently, and not collectively, with regard to any rate or service item required to be filed in a tariff. In order to take such action, the member line may only be required to provide notice of up to 10 days to the conference. To argue that the Act's alleged silence permits other substantive requirements or conditions which would effectively add to the limited notice requirement, either as a precondition to or as a consequence of independent action, is contrary to the express language of the Act. Any condition, procedure or other mandatory requirement that in effect adds to the 10-day maximum notice requirement or places a mandatory burden on IA is, on its face, *per se* violative of section 5(b)(8).

The Proposed Rule does not add to the statutory requirements of section 5(b)(8). Its intent is merely to codify, by rulemaking, Commission policy concerning some of the conference-imposed conditions on the exercise of independent action which appear, on their face, to violate section 5(b)(8). These conference-imposed requirements specified in the Proposed Rule have been encountered in a number of agreement filings and have prompted negotiation with the parties to obtain their removal or modification. Continued case-by-case adjudication of such provisions, as suggested by one comment, is inappropriate, unnecessary, and an inefficient use of Commission resources. The Proposed Rule provides clear guidelines for conferences and avoids filings which otherwise would be rejected or require modification.

Finally, it should be noted that the Department of Justice believes that the Proposed Rule does not go far enough and that additional regulations are needed. DOJ urges the Commission to broaden the scope of this proceeding to include consideration of regulations requiring all conference agreements to expressly prohibit: (1) any form of collusion in connection with any carrier's right of independent action; (2) the erection of any artificial procedural barriers to any carrier's exercise of its right of independent action; and (3) all forms of conference or collective retaliation against carriers who exercise their right of independent action. DOJ acknowledges that consideration of its proposals would require continuation of this proceeding. Whatever the merits of these proposals, they are beyond the scope of this rulemaking. DOJ's proposals will, however, be given consideration in a future rulemaking proceeding on this subject.

B. *Specific Provisions of the Proposed Rule*

1. *Section 572.502(a)(4) (i)—Right of Independent Action*

Section 572.502(a)(4)(i) of the Proposed Rule incorporates the requirement of section 5(b)(8) of the Act that each conference agreement must provide for the right of independent action. The language of this paragraph is substantially the same as that of the existing rule which appears at 46 CFR 572.502(a)(4).

One comment contends that the language of this paragraph, which states "and shall otherwise be in conformance with section 5(b)(8) of the Act", is superfluous and should be deleted because the regulation already incorporates all of the requirements of section 5(b)(8) of the Act.

Section 572.502(a)(4)(i) paraphrases, but does not restate verbatim, the language of section 5(b)(8) of the Act. The language cited by the comment, therefore, assures that the rule is not interpreted as a delimitation of the statutory right of independent action. Moreover, it does not add any requirement which does not already exist in the Act itself. Therefore, this language shall be retained in the Final Rule.

The same comment proposes further that language be added to this paragraph which would provide expressly for notice to a section of a conference in lieu of notice to the conference itself where ratemaking is conducted on a sectional basis. If ratemaking authority resides exclusively within the particular sections of a conference and the business of agreeing on rates and publishing tariffs is done on a sectional basis, it would not appear to be inconsistent with the Act to allow for notice to the section since it, rather than the overall conference, is the ratemaking body. To that extent the comment has merit and shall be accommodated by adding a paragraph to the Final Rule which allows for notice to a ratemaking section in lieu of notice to the overall conference. As discussed more fully below, only a single notice to the section may be required.

2. *Section 572.502(a)(4)(ii)—Notice Period*

Section 572.502(a)(ii) of the Proposed Rule establishes a maximum notice period of 10 days which may either be required or permitted by the conference agreement. The Proposed Rule prohibits IA provisions which provide for a minimum notice period and leave open the possibility of voluntary notice in excess of 10 days. The effect of the Proposed Rule is, thus, to preclude an IA proponent from voluntarily providing more than 10 days' notice to the conference.

The Department of Justice fully supports this requirement of the Proposed Rule. DOJ contends that this rule regarding the notice period warrants adoption because it gives full effect to the literal meaning of section 5(b)(8) of the Act and because it would prevent conference members from becoming participants in implicit understandings in which carriers would voluntarily give more advance notice of independent action than was intended under section 5(b)(8).

CMA also supports this provision. CMA contends that the language and intent of the Act are to prohibit a conference from requiring a conference member to give more than 10 calendar days' notice. Moreover, according to CMA, the restriction on voluntary notice would still allow an IA proponent to informally discuss a proposed independent action prior to giving formal notice or to withdraw a proposed independent action prior to effectiveness and resubmit it at any time.

The conference/carrier comments unanimously oppose the Proposed Rule's prohibition of voluntary notice of independent action in excess of 10 days. The comments advance various arguments to support the position that an IA proponent should be permitted to voluntarily provide notice of more than 10 days.

First, some comments argue that the plain meaning of the language of the Act places a limit only upon the conference agreement and not on the action of an individual member. The only purpose of section 5(b)(8) of the Act allegedly is to prohibit a conference from imposing a greater notice period upon a member line. Some comments argue further that the language of the Act, which states that the inclusion of the IA item in the tariff for use by the member shall be "effective no later than 10 calendar days after receipt of the notice", does not impose any restriction on the member line. This language, it is argued, merely requires the conference to file the notice within 10 days of receipt. Some comments argue that filing and effectiveness of the tariff must be distinguished from the effective date of the IA rate as specified in the tariff. The language of the Act is said merely to require filing of the tariff within 10 days. This filing requirement allegedly cannot be converted into a limitation on a member's right to give voluntary notice of more than 10 days. Thus, it is contended that an IA proponent can specify an effective date of more than 10 days and that this does not conflict with the requirement that the conference file the tariff within 10 days. Finally, some comments

argue that the Proposed Rule would conflict with the minimum 30-day notice requirement of section 8(d) if the independent action rate is a new or increased rate.* The comments conclude that the Commission may not prevent, or compel a conference to prevent, a member line from independently and unilaterally giving more than 10 days' notice, cancelling IA whether effective or pending, or extending the effective date of a pending IA.

Second, some conference comments contend that the legislative history makes clear that Congress intended only to place a limit on the maximum number-of-days notice which a conference could require a member line to give. They argue that the legislative history speaks only in terms of the maximum notice that may be required, and does not prohibit additional voluntary notice. It is also argued that if Congress had intended to impose such a requirement, it would have established minimum and maximum time periods.

Third, conference comments argue that the policy of the Act favors allowing carriers the freedom to structure their own affairs. In keeping with this policy, member lines should be allowed to provide longer notice.

Fourth, conference comments argue that the prohibition on voluntary notice of more than 10 days is unworkable and unneeded. Several conferences point out that the Proposed Rule could be circumvented in various ways. A member considering independent action could: (1) announce an intended IA in advance of formal notice and discuss, withdraw or compromise it; (2) docket a rate proposal and give formal notice of IA only after the proposal is rejected by the conference; or (3) give notice of IA and then withdraw it prior to effectiveness and re-notice the IA. Another comment argues that a conference could completely disregard a notice given 11 days prior to the effective date under the Proposed Rule.

Fifth, some conference comments argue that there are positive benefits to be obtained from a rule which would allow voluntary notice of more than 10 days. It is argued that such voluntary notice would enhance communication among members which would in turn support collective ratemaking and thereby promote rate stability. It is also stated that such voluntary notice would enable conference members to meet outside competitors' rates well in advance and allow time to take a possible second IA to meet outside competition.

* Section 8(d), 46 U.S.C. app. 1707(d), provides:

> No new or initial rate or change in an existing rate that results in an increased cost to the shipper may become effective earlier than 30 days after filing with the Commission. The Commission, for good cause, may allow such a new or initial rate or change to become effective in less than 30 days. A change in an existing rate that results in a decreased cost to the shipper may become effective upon publication and filing with the Commission.

The comments, in effect, argue that, if the Proposed Rule requires effectiveness of an IA rate within 10 days of filing, there would be a potential conflict with the 30-day notice requirement of section 8(d) in the case of new or increased rates.

Sixth, three conference comments contend that contract law permits a party that is required to give a specific notice to voluntarily give more notice than that required by the contract.

Seventh, one comment argues that the legal construction generally given to statutory provisions and agency rules requiring a notice period of a certain number of days supports voluntary additional notice. This comment argues that none of these statutes or rules prohibits the person bearing the notice burden from giving additional notice.

Eighth, two comments argue that the Proposed Rule is inconsistent with the Commission's previous interpretation of notice requirements made in the Final Rule issued in Docket No. 84–26, *Rules Governing Agreements By Ocean Common Carriers And Other Persons Subject To The Shipping Act of 1984*, 49 FR 45320 (November 15, 1984) 27 F.M.C. 430. There, the comments contend, the Commission recognized the right to give more than 10 days' notice by deleting an absolute 10-day limit from its interim rule.

A 10-day maximum notice requirement is consistent with section 5(b)(8) of the Act and shall be retained in the Final Rule. Section 5(b)(8) of the Act establishes the mechanism by which independent decisions regarding tariffed price or service items may be made within the structure of the conference system. Section 5(b)(8) sets forth statutory requirements regarding notice, waiting period, conference filing obligations and effectiveness of IA items. These requirements affect both the collective action of the conference and the individual action of a conference member taking IA. The language of section 5(b)(8) is clear. "Each conference agreement must—(8) provide that any member of the conference may take independent action. . . . upon not more than 10 calendar days' notice to the conference. . . ." This language requires each conference agreement to contain such a provision which establishes a maximum waiting period following notice of not more than 10 calendar days. The conference is then required to ". . . include the new rate or service item in its tariff for use by that member *effective* no later than 10 calendar days after receipt of the notice (emphasis added)." This language not only obligates the conference to file the IA item in the conference tariff after receiving notice, but further specifies when the IA item shall become *effective*. This limit applies both to the conference and the individual member taking IA. Neither the conference nor the IA proponent may set an effective date beyond 10 calendar days. The language of section 5(b)(8), when read in its entirety, establishes a clear, certain, and predictable mechanism governing independent action which includes a 10 calendar day limit on IA notice. Once formal notice of independent action has been given, the Act establishes a definite scheme for filing of the IA item in the conference tariff and effectiveness of the IA item.

The legislative history, to the extent that it addresses the question of notice, waiting period and effective date, is not inconsistent with and in

some instances supports the interpretation of section 5(b)(8) taken in the Final Rule. The Conference Report, for example, stated that:

> The conferees agree that the notice period to be given to the conference before a member may take independent action cannot be more than ten calendar days. The House recedes from a provision that would have limited the notice period to 2 working days for independent action; the Senate recedes from a provision that would have limited independent action to certain trades and only when a loyalty contract is in effect.

H.R. Rep. No. 98–600, 98th Cong., 2d Sess. 29 (1984). Similarly, the House Committee on the Judiciary stated that the bill ". . . requires all conferences to permit independent action upon a maximum of ten days' notice to the conference." H.R. Rep. No. 98–53, Part 2, 98th Cong., 1st. Sess. 30 (1983).

Moreover, as the legislative history acknowledges, the proper length of the waiting period was a matter of dispute:

> The proper length of the waiting period has been a matter of some dispute. The chemical manufacturers advocate no waiting period, or a maximum of 48 hours; Sea-Land Industries argues that conferences need at least ten days; other carrier representatives believe a still longer period is necessary to allow conference members to meet before the rate takes effect. As approved by the Committee, the conference may shorten, but cannot lengthen, the ten-day notice period. While some carriers preferred a longer period, the Committee believes some concessions are warranted in the interest of a flexibility [sic] pricing mechanism that could significantly aid this nation's export performance.

H.R. Rep. 98–53, Part 2, 98th Cong., 1st. Sess. 27 (1983). The 10-day waiting period thus represents a compromise between shipper interests which had advocated no waiting period or 48-hour notice and some carrier interests which had advocated a longer waiting period. Moreover, a 10-day ceiling was imposed so that there would be more pricing flexibility for the benefit of U.S. shippers and exporters. A shorter waiting period before a rate or service item becomes effective also contributes to the stated intention to give U.S. shippers ". . . greater flexibility in meeting price competition from foreign shippers and to enable them to respond more quickly to market opportunities." H.R. Rep. No. 98–53, Part 1, 98th Cong., 1st. Sess. 31 (1983).

Although not directly addressing the question of voluntary notice, the extensive discussion in the legislative history of the appropriate period of notice would appear to have little value if a member line could voluntarily give more than 10 days' notice. Similarly, the compromise between carrier and shipper interests would appear to be disturbed if carrier members could voluntarily provide more notice. As noted above, the Conference Report states that the Act provides for a ". . . strong requirement of

independent action with a *limited notice period* (emphasis added).'' H.R. Rep. No. 98–600, 98th Cong., 2d Sess. 33–34 (1984). The Final Rule implements the intended purpose of section 5(b)(8) by assuring that shippers will have the benefit of IA rates that become effective within 10 days after notice. The Final Rule also reduces the potential danger that, by allowing voluntary notice in excess of 10 days, conference members might become participants in implicit understandings in which carriers would always ''voluntarily'' give more than 10 days' advance notice of independent action.

The various objections raised by the conference comments do not warrant a change in this provision of the Proposed Rule. The alleged loopholes in the Proposed Rule which would allow effectively for longer periods of notice do not in any way undermine the purpose or value of a maximum 10-day requirement. The Proposed Rule was not intended to preclude advance discussions of possible independent actions or other rate actions or considerations that might be undertaken prior to formal notice. In fact, the availability of these procedures indicates that conference flexibility in considering IA proposals is not unduly impaired. Moreover, the Proposed Rule does not prevent an individual carrier that has given notice of IA from withdrawing the IA prior to its effectiveness. In this regard, the alleged positive benefits of allowing voluntary notice of more than 10 days (*i.e.* better communications, conference stability, etc.) still would be largely available under various pre-formal notice procedures. The Rule does ensure, however, that once formal notice is given, and unless withdrawn by the IA proponent, the filing of the tariff and effectiveness of the IA rate will occur in a predictable and certain manner.

Nor does the alleged inconsistency of the Proposed Rule with section 8(d) of the Act constitute a barrier to the issuance of a Final Rule precluding voluntary notice in excess of 10 days. The Final Rule has been harmonized with section 8(d) by expressly recognizing that new or increased rates are subject to the requirements of section 580.10(a)(2), 46 C.F.R. § 580.10(a)(2), of the Commission's tariff rules. Presumably, such instances would be rare because the vast majority of independent actions are rate decreases. In this regard it should be noted that at one point H.R. 1878 expressly provided that independent action would apply only to an action ''. . . that results in a decreased cost to a shipper . . . .'' The accompanying Committee Report noted that: ''Independent action must be limited to decreases in rates.'' H.R. Rep. No. 98–53, Part 2, 98th Cong., 1st. Sess. 30 (1983). Although this language did not remain in the legislation which became law, it would appear to be consistent with the Act to allow IA on any tariffed rate or service item, including rate increases, but to make IA's which increase rates subject to tariff filing requirements. The approach also seems appropriate inasmuch as both section 5(b)(8) and section 8(d) are provisions of the Act which are intended to benefit shippers. The Final Rule reconciles the requirements of both provisions.

Neither the principles of contract law nor the construction given to notice periods in other statutes or agency rules are controlling in this instance. Section 5(b)(8) sets statutory limits on the waiting period before tariff filing and on rate effectiveness which apply both to the conference and the individual member.

Finally, the Proposed Rule is not inconsistent with the Commission's previous interpretation of notice requirements made in Docket No. 84–26, *Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject To The Shipping Act of 1984*, 49 FR 45320 (November 15, 1984) 27 F.M.C. 430, as alleged in some comments. In that proceeding, the Commission ultimately deleted the model independent action provision which had been in effect in the interim rule issued under the 1984 Act. *See* 46 C.F.R. § 572.801(e). The Commission retained unchanged § 572.502(a)(4) which specified the content of the independent action article of conference agreements. In addressing the comments to § 572.502(a)(4), the Commission stated:

> Section 572.502(a)(4) requires that conference agreements specify its (sic) independent action procedures. Comment 34 proposes that this section be revised to permit: (1) independent action procedures which allow for the exercise of such action on less than 10 calendar days' notice; and (2) a conference member to independently elect to provide more than 10 calendar days' notice of its intention to exercise independent action.
>
> Section 572.502(a)(4) tracks the language of section 5(b)(8) of the Act which, in relevant part, provides that conference agreement independent action provisions may not impose a notice period of ". . . more than 10 calendar days . . ." for the exercise of independent action. The revisions suggested by Comment 34 are unnecessary because their intended purpose is presently being served by section 572.502(a)(4). Therefore, no change to this section has been made.

49 FR 45335.

One comment relies upon this discussion as support for the contention that the Commission has previously interpreted section 5(b)(8) of the Act to allow for voluntary notice of more than 10 days. This reliance is misplaced. Certainly nothing in the present rule itself (§ 572.502(a)(4)) in any way interprets section 5(b)(8) as allowing for voluntary notice of more than 10 days. Moreover, the accompanying discussion referred to above was intended merely to indicate that further changes in § 572.502(a)(4) were unnecessary inasmuch as conferences would be permitted to draft their own independent action provisions in accordance with section 5(b)(8) of the Act. The discussion did not expressly authorize voluntary notice of more than 10 days. To the extent that that discussion may have left any ambiguity on this issue, it is clarified by the Final Rule issued in this proceeding.

As indicated in the Notice of Proposed Rulemaking, section §572.502(a)(4)(ii) is intended to address provisions in conference agreements which are stated in terms of a minimum period of notice to the conference. An example of such a provision would be one which states that a conference member may take independent action "upon not less than 10 calendar days' notice to the conference." Such a provision requires a minimum period of notice but leaves open the possibility that a member line taking independent action may voluntarily provide notice which exceeds the required minimum, including notice in excess of 10 days. Such conference provisions which only establish a minimum notice period are prohibited by the Final Rule. The Final Rule permits a conference to provide for a fixed period of notice not in excess of 10 calendar days, or a range of notice provided that the maximum permissible notice does not exceed 10 calendar days.

3. *Section 572.502(a)(4)(iii)—Single Notice*

Section 572.502(a)(4)(iii) of the Proposed Rule states that an IA proponent may only be required to give a single notice to a "conference official" or "designated representative." The proposed Rule would codify by rule the Commission's established policy with regard to multiple notice provisions. Although not expressly stated, this section does not preclude an IA proponent from voluntarily giving notice to the other parties to the agreement.

DOJ contends that this section of the Proposed Rule warrants adoption because it prohibits a procedural obstacle to independent action that is inconsistent with the statutory language which requires notice "to the conference." CMA supports this section and states that the statute allows only for single notice.

Relying on the statutory definition of the term "conference," 46 U.S.C. app. 1702(7), four conference comments argue that the individual members of the conference are "the conference" and that a requirement of notice to each member therefore is permissible.

Two comments contend that the Act does not prohibit a conference from requiring direct notice to each conference member, provided that the conference does not refuse to publish an independent action in a tariff or otherwise withhold the right of independent action if the member fails to notify other members as well as the conference secretariat. Another comment adds that a multiple notice requirement is permissible provided that the notice to all members does not extend the notice period.

Other comments contend that: (1) multiple notice imposes little if any burden on the IA proponent; (2) there is no evidence that multiple notice would deter IA; (3) many rate agreements operate without a secretariat and depend on the initiating party to communicate with all other participants; and (4) notice to all other members serves a legitimate commercial purpose by assuring that other members have a reasonable period of time to decide

whether to exercise follow-up IA. Finally, two comments submitted by carrier interests take the position that the Act does prohibit a conference from requiring a member to give more than one notice, but does not preclude a member from voluntarily doing so.

Section 5(b)(8) of the Act requires an IA proponent to provide notice "to the conference." The Act's definition of "conference," 46 U.S.C. app. 1702(7), states:

> "conference" means 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.

This definition does not support the argument advanced in several comments that the conference is merely the sum of its members and therefore notice to each member may be required. Rather the definition makes clear that the conference is itself a distinct entity, namely an "association of ocean common carriers." It is the single entity, i.e. "association," to whom notice must be given. Section 5(b)(8) provides that "the conference" will include the new rate or service item in its tariff. Normally this is accomplished by the conference office or secretariat. The filing of the IA tariff item is not the responsibility of the other member lines. If there is no central conference office, then one member could be designated to file the tariff.

Other comments contend that a conference may require multiple notice as long as this requirement does not prevent or delay the publication of the IA item in the conference tariff. Such an interpretation, in addition to again ignoring that the Act speaks in terms of notice "to the conference," also, as a practical matter, lays a heavy collateral burden on the taking of IA since failure to provide multiple notice still would constitute a breach of the agreement in the view of these comments. Finally, it should be noted that the Proposed Rule does not preclude voluntary notice to other conference members. Thus, the alleged benefits of multiple notice still might be available through voluntary notice to the other members.

Section 572.502(a)(4)(iii) also requires each conference agreement to indicate which conference official or single designated representative is to receive the IA notice. One comment suggests that this requirement be modified to allow the conference to designate an office rather than a particular person. Another comment recommends that, if this requirement is retained, it be modified to take into account conferences which conduct ratemaking by sections and to allow notice to the section.

These suggested changes may be accommodated without imposing any additional burden on the IA proponent and may facilitate the giving of IA notice. It is therefore appropriate to amend this section to allow a conference to designate a conference official, single designated representative, or conference office as the recipient of the IA notice. As discussed

above, a new paragraph allowing for notice to the ratemaking section in lieu of notice to the overall conference would address the concerns of such conferences where ratemaking is by section.

Finally, it should be noted that section 572.404 of the Commission's rules, 46 CFR 572.404, allows for a waiver of any of the requirements of section 572.502 upon a showing of good cause. A waiver of the single notice requirement might be available, for example, to a conference with no formal administrative structure for receiving notice or to a conference made up of only a few lines.

4. *Section 572.502(a)(4)(iv)—Mandatory Meetings, Etc.*

Section 572.502(a)(4)(iv) of the Proposed Rule prohibits a conference from requiring attendance at conference meetings, submission of information other than that necessary to accomplish tariff filing, or compliance with any other procedures for the purpose of explaining, justifying, or compromising the proposed independent action. This section would codify current Commission policy in this area.

DOJ supports this section of the Proposed Rule and argues that such meeting, informational, or procedural requirements should be prohibited because they encourage intimidation, harassment, and coercion of carriers who attempt to take IA. CMA argues that such mandatory requirements should be prohibited because the Act provides for independent action, not action that must be discussed and considered collectively.

Two conference comments argue that the Act does not prohibit a requirement of mandatory meetings. TWRA, for example, states: "It is permissible . . . to require . . . meetings and even to treat failure to comply as a breach, so long as the IA is published as noticed within 10 days." TWRA and PNAC argue that the conference also may require additional information or data so long as failure to comply cannot be used as a basis for refusing to publish a tariff. Another comment argues that the conference may require a statement of the reasons motivating or underlying the independent action. Finally, one comment argues that conferences should be permitted to require a "post-IA exercise" explanation of the IA.

Several other conferences express no objection to this paragraph provided that it is clarified that voluntary meetings, voluntary submission of additional information or data, and voluntary procedures to explain or justify independent action are not precluded.

The argument that mandatory requirements beyond notice to the conference may be imposed upon an IA proponent, provided that the conference fulfills its filing obligation, is without merit. Simply because a requirement is not made a pre-condition to filing IA does not alter the fact that it places an obligation on the IA proponent once the proponent takes IA. Mandatory requirements which are absolute preconditions to the taking of IA are, of course, more offensive. But whenever the taking of IA means that the proponent must meet some other requirement, sometimes even at risk of violating the conference agreement if not done, that provision

has gone beyond the permissible limits of section 5(b)(8) of the Act inasmuch as it may burden the use of independent action.

The Act merely requires an IA proponent to give notice. Once notice is given, the conference must carry out the ministerial task of tariff filing. An IA proponent has no other obligations under the Act. Any *mandatory* requirement beyond notice is impermissible. As some of the comments candidly acknowledge, failure to meet these conference-imposed mandatory requirements would be a breach of the agreement. Such a breach would presumably subject the IA proponent to penalties under the terms of the agreement, a circumstance which would clearly burden the taking of independent action. Therefore, any mandatory requirements, whether meetings, information, or procedures, appear to be prohibited under the Act. This prohibition is clarified by the Proposed Rule. Even post-IA *mandatory* explanations, although arguably less burdensome, are impermissible.

The Proposed Rule does not preclude *voluntary* attendance at meetings, submission of information, or observance of procedures. Such provisions do not, in themselves, burden the taking of independent action. There does not appear to be any reason at this time to prohibit IA proponents who wish to *voluntarily* accommodate the conference or its members from doing so.

5. *Section 572.502(a)(4)(v)—Following IA*

Section 572.502(a)(4)(v) of the Proposed Rule incorporates the requirement under the Act that the conference file the IA item in the conference tariff for use by the member. It also provides for following IA by other members who wish to adopt an IA item as their own.

Several comments seek clarifications of this provision. One suggests that the language of this provision be modified to account for conferences in which ratemaking is done by sections. A similar change has been considered in connection with earlier paragraphs of the Proposed Rule and shall be accommodated here through the paragraph which allows for notice to the section in such conferences.

Several comments suggest that the Final Rule expressly state that an IA proposal may be amended, postponed, or cancelled during the notice period and prior to its effectiveness. The Proposed Rule did not preclude such action by an IA proponent. Nor does the Final Rule.

Finally, one comment states that the Final Rule should protect follow-up independent action by providing that a following IA continues to remain in effect after the original IA is withdrawn prior to its effective date unless the conference is instructed otherwise. Whatever the merit of this comment, such a provision was not put-forth in the Proposed Rule and would appear to be beyond the scope of this rule making proceeding. In addition, this issue is currently being addressed in Commission Docket No. 86–3, *Modifications to the Trans-Pacific Freight Conference of Japan Agreement, et al.*

6. *Section 572.502(a)(4)(vi)—Compliance*

Section 572.502(a)(4)(vi) of the Proposed Rule provides for immediate compliance with a Final Rule by all new conferences and allows 90 days after effectiveness for compliance by other conferences.

One conference states that it needs 180 days to accomplish the changes which might be required by the Proposed Rule and requests that the rule allow that period of time for compliance.

It would appear that 90 days is not an unreasonable period of time in which to achieve compliance with the final Rule. Indeed, only one conference expressed any difficulty with this provision. Therefore, a change in this section is not deemed necessary.

7. *Section 572.502(a)(4)(vii)—Rejection*

Section 572.502(a)(4)(vii) provides that any agreement which does not comply with the requirements of this section shall be rejected pursuant to section 572.601.

One comment argues that this provision is inconsistent with paragraph (vi) and should be deleted. A number of other comments argue that this paragraph exceeds the Commission's rejection authority. These comments argue that the Commission can only reject an agreement because it fails to meet the express requirements of section 5(b) of the Act.

Section 5(b) states that each conference agreement *must, inter alia*, provide a member line the right of independent action on not more than 10 days' notice. The Proposed Rule would prohibit only those provisions which, on their face, fail to comply with one of the requirements a conference agreement filed pursuant to section 5 must meet if it is to be made effective under section 6 and granted antitrust immunity under section 7 of the Act. Accordingly, this appears to be a proper use of the Commission's rejection authority and shall be retained in the Final Rule.

8. *Section 572.502(a)(4)(viii)—Ratemakinq Section*

Section 572.502(a)(4)(viii) provides that, if ratemaking is done by sections within a conference, any notice required by the Final Rule may be to the section involved. This is a new paragraph which accommodates a concern expressed in a conference comment as discussed above.

III. *CONCLUSION*

This Final Rule is intended to give full effect to section 5(b)(8) of the Act in accordance with the Act's guiding policies. The changes made in the Proposed Rule accommodate as fully as is consistent with the requirements of the Act certain concerns expressed in the comments. The key substantive provisions of the Proposed Rule, however, have been retained in the Final Rule.

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193, Feb-

ruary 27, 1981, because it will not result in: (l) 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 effect 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 Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) that this 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 this Final Rule have been approved by the Office of Management and Budget under provisions of the Paperwork Reduction Act of 1980 (P.L. 95–511) and have been assigned OMB Control Number 3072–0045.

List of Subjects in 46 CFR Part 572: Administrative practice and procedure; Antitrust; Contracts; Maritime carriers; Rates and fares; Reporting and record keeping requirements.

Therefore, pursuant to 5 U.S.C. 553 and auctions 5, 6 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1704, 1705, 1716), Part 572 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 572 continues to read as follows

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1701–1707, 1709, 1710, 1712, 1714–1717.

2. Paragraph (a)(4) of § 572.502 is revised to read: § 572.502 Organization of conference and interconference agreements.

(a) * * *

(4) *Article 13—Independent action.*

(i) Each conference agreement shall specify the independent action procedures of the conference which 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.

(ii) Each conference agreement that provides for a period of notice for independent action shall establish a fixed or maximum period of notice to the conference. A conference agreement shall not require or permit a conference member to give more than 10 calendar days' notice to the conference, except that in the case of a new or increased rate the notice period shall conform to the requirements of § 580.10(a)(2).

(iii) Each conference agreement shall indicate the conference official, single designated representative, or conference office to which notice of independent action is to be provided. A conference agreement shall not

require notice of independent action to be given by the proposing member to the other parties to the agreement.

(iv) A conference agreement shall not require a member who proposes independent action to attend a conference meeting, to submit any further information other than that necessary to accomplish the filing of the independent tariff item, or to comply with any other procedure for the purpose of explaining, justifying, or compromising the proposed independent action.

(v) A conference agreement shall specify that any new rate or service item proposed by a member under independent action shall be included by the conference in its tariff for use by that member effective no later than 10 calendar days after receipt of the notice and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date.

(vi) All new conference agreements filed on or after the effective date of this section shall comply with the requirements of this section. All other conference agreements shall be modified to comply with the requirements of this section no later than 90 days from the effective date of this section.

(vii) Any new conference agreement or any modification to an existing conference agreement which does not comply with the requirements of this section shall be rejected pursuant to § 572.601 of this part.

(viii) If ratemaking is by sections within a conference, then any notice to the conference required by § 572.502(a)(4) may be made to the particular ratemaking section.

* * * * *

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–11

ARMADA GREAT LAKES/EAST AFRICA SERVICE, LTD. GREAT LAKES TRANSCARIBBEAN LINE

NOTICE

April 25, 1986

Notice is given that no exceptions were filed to the March 21, 1986, 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) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–11

ARMADA GREAT LAKES/EAST AFRICA SERVICE, LTD. GREAT LAKES TRANSCARIBBEAN LINE

Settlement of a proceeding to determine whether Respondents violated section 15 of the Shipping Act, 1916, and section 10 of the Shipping Act, 1984, by implementing an agreement prior to its lawful effective date, and, if so, to determine whether penalties should be assessed, approved. Each Respondent ordered to pay $40,000 pursuant to terms of settlement agreement, as amended.

Hopewell H. Darneille, III, for Respondents, Armada Great Lakes/East Africa Service, Ltd., and Great Lakes Transcaribbean Line.

Aaron W. Reese, Director, Bureau of Hearing Counsel, and *William D. Weiswasser* as Hearing Counsel.

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

Finalized April 25, 1986

This proceeding was instituted by Order of Investigation and Hearing ("Order"), served April 16, 1985, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. app. 821), and section 11 of the Shipping Act, 1984 (46 U.S.C. app. 1710), to determine whether the named Respondents, Armada Great Lakes/East Africa Service, Ltd. ("Armada East Africa") and Great Lakes Transcaribbean Line ("GLTL") violated section 15 of the Shipping Act, 1916 (46 U.S.C. app. 814), and section 10 of the Shipping Act, 1984 (46 U.S.C. app. 1709), by implementing Agreement No. 207–010640 prior to its "effective lawful date" and whether, in the event those Respondents "are found to have violated" those sections either or both should be assessed a penalty, and, if so, the appropriate level of such penalty. The order named Hearing Counsel as a party.

The matter is before me by way of the Respondents' Motion for Approval of Proposed Civil Penalty Settlement Agreements. The title is a misnomer, because it is not Hearing Counsel's policy or practice to enter into settlement agreements as the culmination of agreeably concluded settlement discussions. Instead, Hearing Counsel makes known its position by advising, in reply to what is more aptly described as a motion for approval of an offer of settlement, that they do not oppose the offer. Here, Hearing Counsel

[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).

does not oppose these offers. They also urge that the offers satisfy the statutory and regulatory criteria for settlement.

It will be useful briefly to note the several apposite substantive, and procedural statutes and regulations in order to place the proposed settlement within the framework of the regulatory scheme.

I

THE REGULATORY SCHEME AND THE RELEVANT STATUTES

A. Substantive Provisions

The first issue to be determined in this proceeding is whether the Respondents violated the Shipping Acts of 1916 and 1984 "by implementing Agreement No. 207–010640 prior to its lawful effective date." The term "lawful effective date" needs amplification in order to pinpoint the differences in the requirements of the two cited Acts.

Under the provisions of section 15 of the 1916 Act, parties to a joint service agreement are required to submit such agreement for approval by the Commission. Section 15 expressly provides that, "before approval * * * it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *. Thus, under the 1916 Act, the lawful effective date of the subject agreement would be the time fixed by the Commission in its approval. Naturally, if not submitted, an agreement cannot be approved.

Section 10(a)(2) of the 1984 Act (46 U.S.C. app. 1709(a)(2)) prohibits any person from operating "under an agreement required to be filed under section 5 of this Act that does not become effective under section 6 * * *." Section 5 (46 U.S.C. app. 1704) requires that any agreement described in section 4(a) of the 1984 Act (46 U.S.C. app. 1703(a)) be filed with the Commission. A joint service agreement lies within the purview of section 4(a). Pursuant to section 6 of the 1984 Act (46 U.S.C. app. 1705), agreements filed with the Commission, unless rejected, become "effective" within a statutorily fixed time set forth in section 6(c) (46 U.S.C. app. 1705(c)), but not less than 14 days after notice of the filing of the agreement is published in the *Federal Register*, as provided in section 6(e) (46 U.S.C. app. 1705(e)). However, the clock which is used to calculate the effective date of an agreement does not begin to tick, if that agreement is not filed. Thus, an agreement which is filed may have a lawful effective date not less than 14 days after its publication in the *Federal Register* (section 6(e))—or on the 45th day after filing, or on the 30th day after noticed in the *Federal Register*, whichever is later (section 6(c)). Of course, an agreement required to be filed, but which is not filed, cannot have a lawful effective date.

B. Penalty Provisions

The penalty for implementing an agreement subject to approval under section 15 of the 1916 Act is "not more than $1,000 for each day such violation continues." Section 15, last paragraph.

Among other things, section 13 of the Shipping Act, 1984 (46 U.S.C. app. 1712), sets forth the penalties for violation of the 1984 Act. Under section 13(a) (46 U.S.C. app. 1712(a)) the amount of penalty for a violation of section, 10(a)(2) "may not exceed $5,000" per violation unless the violation is "willfully and knowingly" committed, in which case the amount of civil penalty may not exceed $25,000 for each violation. Section 13(a) also provides that "Each day of a continuing violation constitutes a separate offense."

C. Procedural Provisions

The second issue to be determined is whether any penalty should be assessed and the appropriate level of a penalty. This requirement implicitly invokes (1) the provisions of section 32 of the Shipping Act, 1916 (46 U.S.C. 831); (2) provisions of section 13 of the 1984 Act, other than those mentioned in I.B., *supra*; and (3) provisions of the Commission Regulations implementing these statutory provisions. The simple point made is that all of these provisions explicitly empower the Commission to settle civil penalties within the context of a formal assessment proceeding, as follows:

(1) As pertinent, section 32 of the 1916 Act provides:

> (e) Notwithstanding any other provision of law, the Commission shall have authority to assess or compromise all civil penalties provided in this Act: *Provided, however*, That, in order to assess such penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred.

(2) As pertinent, section 13(c) of the Shipping Act, 1984 (46 U.S.C. 1712(c)), provides:

> ASSESSMENT PROCEDURES.— * * * the Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. The Commission may compromise, modify, or remit, with or without conditions, any civil penalty.

(3) As pertinent, the Commission's Regulations governing compromise, assessment, settlement and collection of penalties, 46 CFR Part 505, at 505.3, provide:

> (a) *Procedure for assessment of penalty.* The Commission may assess a civil penalty only after notice and opportunity for a hearing under section 22 of the Shipping Act, 1916, or sections 11 and 13 of the Shipping Act of 1984. The proceeding, including settlement negotiations, shall be governed by the Commission's Rules of Practice and Procedure in Part 502 of this Chapter.[2] All settlements must be approved by the Presiding Officer. The full text of any settlement must be included in the final order of the Commission.
>
> (b) *Criteria for determining amount of penalty.* In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

II

THE REVISED OFFERS OF SETTLEMENT

The original offers of settlement were submitted on December 18, 1985. Following an informal conference, the Respondents filed revised offers on March 10, 1986. Copies of the original and revised offers are attached as Appendix A and Appendix B, respectively.

Under the revised proposals, each Respondent, individually, proffers to pay the amount of $40,000 in full settlement of all penalty claims for any violations alleged in the Order. Although the Respondents do not deny having implemented Agreement No. 207–010640 before it became effective on October 20, 1984, or that such prior implementation constituted violations of the Shipping Acts, their proposals specifically provide that the settlements are not to be construed as admissions of any violations alleged in the Order. In the event, the alleged violations terminated on October 20, 1984, and Respondents represent that they will comply with regulations in the future.

As revised, the offers propose that the payment be made in accordance with the following program:

(A) Each Respondent shall establish an interest bearing escrow account in favor of the Commission and deposit the initial installment of monies due under the settlement in such account prior to submitting the revised

[2] Sections 502.91 and 502.94 of the Commission's Rules of Practice and Procedure, 46 CFR 502.91 and 502.94, authorize the submission and consideration of offers of settlement.

offer. Accordingly, each Respondent deposited $10,000 into a segregated, interest bearing money market escrow account, in its counsel's name for the benefit of the Commission/Respondent at NS&T Bank, N.A., Washington, D.C., on February 11, 1986.

(B) Within 15 days after final approval of the settlement, all monies in said escrow accounts (including any additional deposits of installments, as provided in (C) below, and all accrued interest) shall be paid to the Commission. If the settlement is disapproved, all such monies shall be returned to the Respondents.

(C) The remaining $30,000 shall be payable in accordance with the terms of a promissory note, attached to and made a part of the settlement, in the following installments:

1. Five Thousand ($5,000) Dollars, plus interest, shall be paid on or before June 3, 1986;

2. Ten Thousand ($10,000) Dollars, plus interest, shall be paid on or before September 16, 1986; and

3. Fifteen Thousand ($15,000) Dollars, plus interest, shall be paid on or before December 30, 1986.

In the event the Commission has not taken final action with respect to approval of the settlement by the date any installment is due, such installment, including interest, shall be paid into the escrow account.

III

FINDINGS

For the purpose of settlement the administrative record before me consists of the Motion, the proposed settlements and their attached promissory notes, as revised, Respondents' Memorandum of Points and Authorities in Support of Proposed Settlements (Memorandum) and Hearing Counsel's Reply to Respondents' Motion for Approval of Proposed Civil Penalty Settlement Agreements (Reply). For the same purpose, the evidentiary record consists of all parties' Joint Factual Stipulation and Stipulated Exhibits and the Affidavits of Detrich Moehle von Hoffmannswaldau and Jens-Erik Valentin. For editorial reasons or because of perceived irrelevancy or immateriality, some of the joint stipulations of fact have not been adopted.

By way of introduction to my findings I believe it will be helpful to expand on what was noted, earlier, about the Order and the Respondents' position with respect to the allegations of violations as well as some of the procedures which led up to the Motion.

Although one of the purposes of this proceeding is to determine whether violations were committed, the Order makes it clear that the issue of violation is not really in dispute and that the major issue to be decided is the amount of penalty.

The Order put it this way:

> At no point has either [Respondent] denied implementing the agreement or that such implementation constitutes a violation. Because a satisfactory compromise of the subject claims could not be reached, the Commission has decided to institute this proceeding to determine and assess the appropriate penalty for the violation referred to above.

At a prehearing conference on May 29, 1985, Respondents reiterated that they did not deny implementing an agreement required to be filed under the Shipping Acts without appropriate sanction. Again they did not contest that such implementation violated section 15 of the 1916 Act and section 10 of the 1984 Act. They denied that any violation was intentional.

Thereafter the parties undertook extensive voluntary discovery efforts as to the nature and scope of Respondents' activities and various mitigating circumstances. After the completion of such discovery, the parties entered into settlement discussions. Respondents have fully cooperated with Hearing Counsel throughout the course of this case in developing an evidentiary record and have voluntarily made available all materials relating to the subject of this proceeding, including complete vessel manifests, representative bills of lading and detailed financial statements.

I find:

1. GLTL, formerly known as GK Great Lakes Transcaribbean Line GmbH, is a corporation organized and established under the laws of the Federal Republic of Germany. Since 1965 GLTL has operated a common carrier service only between U.S./Canadian Great Lakes ports and ports in the Caribbean Sea and on the West Coast of South America pursuant to tariffs filed with the Commission.

2. Armada East Africa is a corporation created under the laws of the Republic of Liberia on March 26, 1981, for the sole purpose of entering into a joint venture with Respondent 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.

3. On April 24, 1981, Armada East Africa and GLTL entered into an agreement establishing a joint venture under the name of Armada/GLTL East Africa Service ("Armada/GLTL line") to operate a common carrier service between ports on the U.S. and Canadian Great Lakes and ports in South and East Africa. Armada East Africa and GLTL agreed to share equally in the expenditures, earnings, responsibilities and liabilities of the joint venture.

4. By Addendum No. 1, executed February 5, 1982, Armada East Africa and GLTL agreed, *inter alia,* to extend the joint venture agreement through March 31, 1983.

5. Armada East Africa and GLTL further agreed in Addendum No. 2, executed December 16, 1982, to expand the scope of the agreement to include service from U.S. Atlantic and Gulf ports, and to extend the term of the agreement as amended to March 31, 1984.

6. Neither the joint venture agreement nor either of the addenda thereto was filed with the Commission for approval under section 15 of the Shipping Act, 1916, prior to January 11, 1983.

7. Notwithstanding the foregoing, Armada and GLTL commenced to implement the agreement as of late April 1981, and Armada/GLTL line commenced service with its first sailing on May 21, 1981, from the port of Green Bay, with stops at Milwaukee, Chicago and Montreal, en route to ports in South and East Africa.

8. Armada/GLTL line is a vessel-operating common carrier which owns no vessels of its own. Since its inception in 1981 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 service was expanded to include U.S. Atlantic and Gulf Coast ports, and an appropriate tariff was filed with the Commission. Service from U.S. Gulf ports was suspended in June 1984 due to lack of profitability. The service continued to operate on a regular basis from the Great Lakes and U.S. Atlantic ports.

9. Since there is no westbound cargo available to the service from ports in East and South Africa, the service has operated 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.

10. All cargo of the service has been carried under bills of lading issued in the trade name of Armada/GLTL East 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.

11. In December 1982 the Commission's staff received information alleging that Armada East Africa and GLTL were operating a joint service in violation of section 15 of the Shipping Act, 1916.

12. After an informal investigation of these allegations the Commission's staff contacted Armada/GLTL and advised them to file the agreement.

13. The very next day—January 11, 1983—Respondents filed for approval of the agreement under section 15. A protest ensued.

14. On September 9, 1983, the Commission served an Order of Investigation directing initiation of an expedited proceeding (FMC Docket No. 83–39) to determine whether the agreement, which became known as Agreement No. 10464, was subject to the Commission's jurisdiction and the filing requirements of section 15.

15. *Pursuant to the Commission's Order, an expedited evidentiary proceeding was conducted.* On November 23, 1983, Administrative Law Judge Norman D. Kline issued his Initial Decision. Judge Kline concluded, *inter alia,* that Armada East Africa was a common carrier under the Shipping Act, 1916, and that Agreement No. 10464 was between two common carriers and subject to the Commission's jurisdiction.

16. By letter dated December 19, 1983, Respondents advised that they did not intend to file exceptions to Judge Kline's Initial Decision, and requested the Commission to authorize appropriate staff members to meet with Respondents and protestants to discuss any objections to the form of the agreement and the steps necessary to place the agreement in approvable form.

17. By letter dated February 3, 1984, the Commission's Bureau of Agreements and Trade Monitoring responded to Respondents' request to confer with the Commission staff and protestants concerning the form of Agreement No. 10464 as originally filed. This letter, which was in the nature of an informal staff advisory opinion and was not binding on the Commission, discussed the general principles governing the approvability of joint service agreements, and identified specific shortcomings in the terms of Agreement No. 10464. The staff advised Respondents to consider submitting an appropriate agreement, together with sufficient factual justification. The staff further advised Respondents "that, inasmuch as the Commission has determined the Agreement to be subject to its jurisdiction under Section 15 in Docket No. 83–39 . . . , any operations thereunder are illegal and at their own peril." The staff "requested that [Respondents] advise of their intentions no later than April 2, 1984." The staff's letter concluded as follows:

> In view of the foregoing, the Proponents should consider submitting an agreement fashioned as they see fit—together with sufficient factual justification—for Commission approval pursuant to section 15, Shipping Act, 1916, in accordance with the rules set forth in 46 CFR 522, as amended. The Proponents are also advised that, inasmuch as the Commission has determined the Agreement to be subject to its jurisdiction under section 15 in Docket No. 83–39, Armada/GLTL East Africa Service (Agreement No. 10464), any operations thereunder are unlawful and at their own peril.
>
> The foregoing is an informal staff advisory opinion which is not binding on the Commission or its ultimate disposition of this matter.
>
> It is requested that the Proponents advise of their intentions no later than April 2, 1984.

18. By letter dated February 15, 1984, Respondents advised the Commission that "[t]he parties to the Agreement will comply promptly with the Commission's Section 15 policies and regulations."

19. Armada East Africa and GLTL thereafter entered into a new restated agreement, which was specifically designed to satisfy the concerns raised by the staff. This revised agreement was filed for the Commission's approval under section 15 by letter dated April 2, 1984.

20. By letter dated April 6, 1984, the Bureau of Agreements and Trade Monitoring notified Respondents that their revised agreement had been received and was being processed as a refiling of Agreement No. 10464 with the same agreement number. Notice of this filing was published in the *Federal Register* on April 19, 1984 (49 Fed. Reg. 15621).

21. One set of comments on the refiled agreement was submitted on behalf of the member lines of the United States/South and East Africa Conference which had protested the original agreement. Respondents did not reply to these comments.

22. By letter dated June 18, 1984, the Commission's Secretary's office notified Respondents that the Commission had determined on June 13, 1984, that Agreement No. 10464, as refiled, was not approvable under the Shipping Act, 1916, "due to substantial protests, insufficient justification and remaining technical problems." Pursuant to the Commission's policy concerning agreements filed under the Shipping Act, 1916, which could not be processed to completion prior to the June 18, 1984, effective date of the Shipping Act of 1984, Agreement No. 10464 was returned to the parties, without prejudice to refiling under the Shipping Act of 1984.

23. On June 20, 1984, Respondents telephoned the Bureau of Agreements and Trade Monitoring and "discussed the remaining technical problems." Respondents thereafter prepared a new proposed Joint Service Agreement in light of the staff's comments and the new Shipping Act of 1984. This draft was forwarded to the FMC staff for informal review by letter dated July 18, 1984.

24. The staff's subsequent comments were incorporated into a new, restated agreement which was executed by GLTL on Auaust 30, 1984, and by Armada East Africa on September 4, 1984. This new agreement was filed with the Commission pursuant to the Shipping Act of 1984, along with the required completed Information Form, by letter dated September 5, 1984.

25. By letter dated September 11, 1984, the staff advised that the new agreement had been received and assigned Agreement No. 207–010640. Notice of the filing of this Agreement was published in the *Federal Register* on September 14, 1984 (49 Fed. Reg. 36163). No comments or protests were received by the Commission in response to this notice.

26. By letter dated September 27, 1984, the staff requested additional information and clarification regarding certain aspects of the agreement and service. The staff requested a prompt response in view of the extremely limited time frame established under the Shipping Act of 1984, and concluded by advising the parties that "to operate under this agreement prior to it becoming effective is unlawful and to do so is at their own peril."

27. Respondents responded to the staff's request for additional information and clarification by letter dated October 9, 1984.

28. By letter dated October 18, 1984, the Secretary's office notified Respondents that the Commission had reviewed Agreement No. 207–010640 and had determined to take no action to prevent or delay the Agreement from going into effect on the 45th day after filing, October 20, 1984.

29. Agreement No. 207–010640 became effective on October 20, 1984.

30. By letters dated September 26, 1984, the Bureau of Hearing Counsel notified respondents of a civil penalty claim against each of them "for apparent ongoing violation of section 15 of the Shipping Act, 1916, (46 U.S.C. § 814) and of section 10 of the Shipping Act of 1984 (46 U.S.C. § 1709) by implementing an agreement which has not been approved or has not gone into effect under applicable law." These letters stated that Respondents appeared to have been implementing a joint service agreement since April 1981, and that such implementation had continued subsequent to the decision in Docket No. 83–39 becoming final, notwithstanding the Commission staff's February 3, 1984, warning "that implementation of the parties' agreement was unlawful and at their peril."

31. Respondents timely responded to these notices, but were unable to negotiate a settlement of the civil penalty claims. As seen, the Commission therefore initiated the present proceeding.

32. As discussed in No. 7, *supra,* Respondents commenced implementation of their joint service agreement in April 1981. Thereafter Respondents continued to implement their agreement, as it was amended from time to time, continuously, to October 19, 1984.

33. At no time have Respondents attempted to conceal their operations in any way. To the contrary, Respondents openly and widely advertised their joint service, and filed the appropriate tariffs pertaining thereto with the Commission.

34. The Armada/GLTL line made a total of 44 voyages in U.S. foreign commerce from the inception of service in 1981 through October 19, 1984.

35. At the time the joint venture agreement was entered into and the Armada/GLTL line commenced service in the spring of 1981, there was no direct all water liner service between the Great Lakes and South and East Africa.

36. The Armada/GLTL line made the following number of sailings from the Great Lakes to ports in South and East Africa during the period from the commencement of service in April 1981 through October 19, 1984: in 1981, four sailings; in 1982, four sailings; in 1983, five sailings; and in 1984, nine sailings. There was one other sailing in 1984 before the St. Lawrence Seaway was opened. It originated at Halifax, N.S., and called at the Port of New York.

37. In the latter part of 1982, Norton, Lilly & Co., Inc., approached Armada/GLTL. Norton, Lilly previously had acted as agent for Cape Line, which in the past had operated a service from U.S. Atlantic and Gulf

ports to South and East Africa prior to going into bankruptcy. Norton, Lilly suggested that there was a need for additional direct all-water service to South and East Africa from U.S. Atlantic and Gulf coast ports, and proposed that Armada/GLTL line expand its operation to include such service.

38. Armada East Africa and GLTL subsequently agreed to amend their joint service agreement to include service from U.S. Atlantic and Gulf coast ports to South and East Africa. This was accomplished by means of Addendum No. 2 to the joint service agreement, executed December 16, 1982. Armada/GLTL line filed an appropriate tariff with the Commission, and began to advertise service from U.S. Atlantic and Gulf ports. Armada/GLTL line commenced the new service on February 28, 1983.

39. This service was operated with one sailing approximately every three weeks. Armada/GLTL line made a total of 13 voyages in this service in 1983, and an additional eight voyages in 1984 prior to suspending service from U.S. Gulf ports in June 1984.

40. Unlike the Great Lakes trade, the U.S. Atlantic and Gulf/South and East Africa trade was highly competitive with a number of competing carriers. Although able to attract cargoes, Armada/GLTL line was unable to achieve consistent profitability. Armada/GLTL line therefore suspended operations from U.S. Gulf ports in June 1984, and restructured its service to offer a combined service from the Great Lakes, Baltimore and New York.

41. This restructured operation allowed Armada/GLTL line to increase the frequency of its Great Lakes sailings. Armada/GLTL line made six sailings under the restructured service during the period from June through October 19, 1984.

42. Financial statements show that in 1984, and including revenues on cargoes carried from non-U.S. ports, the Armada/GLTL line made a net profit of $197,548. Armada/GLTL line had a positive net worth as of the end of 1984. Armada/GLTL line sustained losses during the first six months of 1985, however, and had a negative net worth as of June 30, 1985.

43. The financial statement further shows that Armada East Africa had a positive net worth as of December 31, 1984. Allowing for allocation of Armada East Africa's 50 percent share of the joint service losses, this net worth figure was reduced, although still positive, as of June 30, 1985.

44. GLTL had a negative net worth as of the end of its fiscal year on March 31, 1985, and sustained operating losses for the six months through September 30, 1985, not including GLTL's 50 percent share of any profits/losses from the Armada/GLTL line.

45. As the only carrier providing direct all-water liner service between the Great Lakes and South and East Africa during the period from 1981 to the present, Armada/GLTL line has provided a needed service to the

shipping public. Support for its service is evidenced by letters to the Commission from members of the Great Lakes shipping community.

46. Armada/GLTL line's cargoes have consisted of government relief cargoes, primarily P.L. 480, Title II cargoes, private charitable organization relief cargoes, and a wide variety of commercial cargoes, as evidenced by vessel manifests and bills of lading.

47. During the period from January 1 to October 19, 1984, government relief cargoes constituted 81.0 percent of Armada/GLTL line's total tonnage and 78.5 percent of total revenue from U.S. Great Lakes ports. The cargoes carried from U.S. Atlantic and U.S. Gulf coast ports were entirely commercial.

48. In a letter to the St. Lawrence Seaway Development Corporation dated December 20, 1984, the U.S. Department of Agriculture ("USDA") noted problems incurred in Great Lakes P.L. 480, Title II, cargo liftings in 1984, and specifically cited Armada Lines and GLTL as "[s]teamship lines participating in a timely manner * * *."

49. In 1985 to date, the Great Lakes and St. Lawrence Seaway have suffered their worst year in more than 20 years. Cargoes out of the Great Lakes through the St. Lawrence Seaway were down about 25 percent from 1984 level prior to the recent closure of the Welland Canal.

50. This situation has been exacerbated by recent closings of the St. Lawrence Seaway, and resulting cargo diversions, including the closure of the Seaway for 24 days from October 14th until November 7, 1985, as the result of the collapse of a wall in the Welland Canal. As a result of the Welland Canal accident, the St. Lawrence Seaway Development Corp. recently reported that "shipments through the Seaway are about 38 percent down from last year."

51. USDA has recently diverted nearly 50,000 tons of P.L. 480, Title II cargoes away from the Great Lakes to other coastal ranges in order to utilize U.S. flag service available there to achieve U.S. flag cargo preference compliance. Moreover, USDA is proposing to change the Agency for International Development's current cargo preference policy against coastal range diversions.

52. A lawsuit challenging USDA's actions has been filed.

53. There have been no complaints to the Commission, other than those set forth herein, regarding the joint operation or conduct of the Armada/GLTL line service.

54. There have been no shipper complaints or prior FMC enforcement proceedings as to individual operations of GLTL or Armada East Africa.

IV

DISCUSSION

Hearing Counsel do not oppose the offers of settlement and acknowledge that the "offers satisfy the statutory and regulatory criteria for settlements."

I believe that Respondents' proposals are reasonable and meet well settled criteria for approval of offers of settlement in adjudicative penalty assessment proceedings and that approval is warranted. Generally, it appears that the amounts proffered fit well within a zone of reasonableness and that the "settlement is neither a coercive attempt to exact exorbitant punishment nor a profligate cession of 'public rights,' Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 442 U.S. 430, 450 (1977), to the alleged wrongdoer." *Far Eastern Shipping Company Possible Violation of Section 16, Second Paragraph, 18(b)(3) and 18(c), Shipping Act, 1916 (FESCO),* 24 F.M.C. 991, 1013 (1982) (Initial Decision), administratively final May 7, 1982. Moreover, it appears that the amounts of the penalties are substantial and are likely to have a deterrent effect upon the Respondent and others under regulation.

A. The Criteria for Settlement

As seen, section 13(c) of the 1984 Act and section 505.3 of the Commission's regulations, which implements both section 13 of the 1984 Act and section 32 of the 1916 Act, explicitly set forth *criteria for assessment* of penalties, and while they do not directly address the *criteria for settlement* of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission.

Section 32(e) of the 1916 Act was enacted in 1977.[3] The rules and regulations implementing section 32(e) were promulgated and published by the Commission in a predecessor version of 46 CFR 505, in 1979. Under those rules the "criteria for compromise, settlement or assessment" might "include but need not be limited to those which are set forth in 4 CFR Parts 101–105." The criteria in 4 CFR Parts 101–105 were government-wide standards established by the Comptroller General of the United States and the Attorney General of the United States under authority of section 3 of the Claims Collection Act of 1966, 31 U.S.C. 952. Those standards, particularly the standards enumerated in 4 CFR 103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to section 32(e). More to the point, it was held that those standards provided *criteria for both settlements and assessments.* "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." *Eastern Forwarding International, Inc.—Independent Ocean Freight Forwarder Application—Possible Violations, Section 44, Shipping Act, 1916,* 23 F.M.C. 206, 213 (1980), Initial Decision, administratively final, September 8, 1980; *Behring International, Inc.—Independent Ocean*

[3] P.L. 96–25, section 10, June 19, 1979.

Freight Forwarder License No. 910, 23 F.M.C. 973 (1981), Initial Decision, adopted June 30, 1981. The following summary of those standards was set out in *FESCO, supra,* 24 F.M.C. at 1014:

> * * * settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon"; that "the amount accepted in compromise * * * may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection"; the value of settling claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled "for one or for more than one of the reasons authorized in this part." [Footnotes omitted.]

I deem it unnecessary to go through a clause by clause comparison of the section 13(c) and section 505.3 assessment criteria with those settlement criteria cited in *FESCO, supra,* to show that for present purposes those criteria are substantially the same. It is enough to note that an analysis under all those standards, whether there be an assessment or settlement of penalties, is required in the interest of justice and consideration "of such other matters as justice may require" is exactly what section 13(c) and section 505.3 are about.[4]

B. Applying the Criteria to the Settlement

Hearing Counsel do not dispute that the enforcement policy of the Commission will be adequately served by acceptance of the sums agreed upon, thus signifying their acknowledgement that the offers are reasonable in the light of the magnitude of the offenses and the matters in mitigation.

It is important to recognize that the violations charged in the Order are not casual or technical infractions but offenses which have the potential to do serious damage to the regulatory scheme. It is safe to say that the two Respondents are now well aware that the implementation of agreements, required to be filed under the Shipping Acts of 1916 and 1984, prior to the time they may be put into effect lawfully, is a violation that goes to the "very heart" of regulation.[5] They appreciate, too, that "it is no excuse for failure to file to contend that the violation was merely a 'technical' one or that respondents' motives were good . . . and that it is not necessary under [s]ection 15 to impart an evil motive."

[4] In a recent initial decision, Administrative Law Judge Norman D. Kline enunciated conclusions similar to those expressed in the text, above, concerning assessment criteria under the old and new Shipping Acts. Docket No. 85-13, *Marcella Shipping Company Ltd.,* slip opinion at pp. 21-22 (I.D. served February 18, 1986).

[5] Memorandum p. 10.

Prudential Lines v. Farrell Lines, 26 F.M.C. 496, 511 n. 6 (1984) (Initial Decision), administratively final, June 7, 1984. See also, discussion and cases cited on *mens rea* in *Jorge Reynoso Import and Export Co. Possible Violations of Section 44(a), Shipping Act, 1916,* 27 F.M.C. 596, 607–608, Initial Decision, administratively final, February 21, 1985.

Nevertheless, Respondents hasten to add that the prior implementation of their agreement was not done out of any wrongful intent or disregard for regulation. They submit that the evidentiary record warrants the conclusion that during some of the period when the implementation took place, they had formed the belief, albeit erroneously, that the operation could continue so long as they were actively cooperating with the staff in working towards approval of the agreement. Hearing Counsel does not dispute the accuracy of this summation. I find there is sufficient uncontradicted evidence to conclude that the Respondents did not deliberately undertake to violate the Shipping Acts.[6]

The Respondents never concealed their activities from the public or the staff. They published tariffs for the joint service and maintained those tariffs on file with the Commission. Prior to Judge Kline's Initial Decision in Docket No. 83–39 on November 23, 1983, Respondents may have misunderstood the regulatory requirements for filing of agreements. But, once those requirements were brought to their attention, Respondents did make the necessary filing for approval and thereafter cooperated with the staff, while retaining the mistaken understanding that the implementation of the agreement could continue as long as they engaged in such cooperative endeavors.

There is no evidence of noncompliance with any of the laws or regulations over which the Commission has jurisdiction on the part of either Respondent, other than the implementation of the joint service agreement prior to October 20, 1984. Moreover, in addition to cooperating with the staff prior to the institution of this proceeding, afterwards Respondents cooperated with Hearing Counsel in voluntarily providing documentation and records needed by Hearing Counsel for the preparation of this case. Undoubtedly, the latter cooperation, while monetarily expensive to Respondents, did result in lowering the overall costs of litigation and particularly the costs of Hearing Counsel. In this respect, it should be noted that by offering to settle for specified amounts Respondents have elected not to avail themselves of their rights to a plenary trial on the substantive merits and matters in mitigation.

Among those documents furnished to Hearing Counsel were financial statements showing the individual Respondent's profits and losses and net worth as of June 30, 1985 and September 30, 1985. Those financial state-

[6] The conclusion reached in this paragraph of the text should not be equated with a determination that the violations were not "willfully and knowingly" committed. Hearing Counsel has not contended that these were knowing and willful violations and I deem it unnecessary, in those circumstances, to address the conduct of the Respondents under the precise statutory standard of knowledge and willfulness.

ments, which show declining revenues and reduced net worth, tend to confirm the reasonableness of the amounts offered in settlement and provide justification for the method of payment over a stated period of time during calendar year 1985.[7] The more realistic revised schedule and its built in safeguards of good faith deposits and escrowed payments, enhance the probability that the penalty claims not only will be collected, but that they will be collected at the least expense to the government.

V

CONCLUSION

It is evident that the settlement is equitable to both the Respondents and the Commission. It allocates the perceived need for punishment with the public's need for vindication of its rights in a reasonable manner. The statutory and regulatory standards for settlement of penalty claims have been met. I believe that the terms and conditions of the settlement reflect a proper balancing of the interests of the government and Respondents given the risks and uncertainties of trial and collection of potential penalties at the conclusion of a fully litigated proceeding.

VI

ORDER

It is ordered that the settlement agreements be approved. It is further ordered that the terms and conditions of the settlements are incorporated in this paragraph as if more fully set forth herein. It is further ordered that Exhibit SX–37 be filed by the Secretary of the Commission in a Confidential Section of Docket No. 85–11 and that said Exhibit be withheld from the general public.

(S) SEYMOUR GLANZER
Administrative Law Judge

[7] Relevant financial statements were submitted as supplements to the Stipulated Exhibits. They will be marked Exhibit SX–37. Because the information contained therein is current and sensitive, Exhibit SX–37 will be treated confidentially.

APPENDIX A

(Part 1)
BEFORE THE FEDERAL MARITIME COMMISSION

In the Matter of:
ARMADA GREAT LAKES/EAST AFRICA
SERVICE, LTD. AND GREAT
LAKESTRANSCARIBBEAN LINE—ORDER OF
INVESTIGATION AND HEARING.

DOCKET NO. 85–11

PROPOSED SETTLEMENT OF CIVIL PENALTY

Respondent Armada Great Lakes/East Africa Service, Ltd. ("Armada East Africa") by its undersigned duly authorized corporate officer, respectfully submits this proposed Settlement Agreement to the presiding Administrative Law Judge for approval pursuant to Section 505.3 of the Commission's General Order 30, 46 C.F.R. §505.3, and for incorporation into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served April 12, 1985 ("Order"), the Commission instituted the present proceeding to determine whether Armada East Africa had violated Section 15 of the Shipping Act, 1916, 46 U.S.C. App. 814, and Section 10 of the Shipping Act of 1984, 46 U.S.C. App. 1709, and whereas the Order includes the issue of whether a civil penalty should be assessed for any such violations and, if so, the amount of such penalty; and

WHEREAS, the Order alleges that Armada East Africa may have violated Section 15 of the Shipping Act, 1916 and Section 10 of the Shipping Act of 1984 by implementing joint service Agreement No. 207–010640 prior to its becoming effective on October 20, 1984; and

WHEREAS, the parties, in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order, are desirous of settling expeditiously the issue of the appropriate amount to be paid by Armada East Africa in accordance with the terms and conditions of this Agreement; and

WHEREAS, Section 32(a) of the Shipping Act, 1916, 46 U.S.C. App. 831(e), and Section 13(c) of the Shipping Act of 1984, 46 U.S.C. App. 1712(c), authorize the Commission to assess or compromise civil penalty claims under the Shipping Act, 1916 and the Shipping Act of 1984 respectively; and

WHEREAS, Agreement No. 207–010640 became effective on October 20, 1984, and Armada East Africa has terminated the actions which formed the basis of the violation set forth in the Commission's Order and has indicated its willingness and intention to avoid similar actions by Armada East Africa or its officers, employees and agents in the future;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the Order and factual record submitted in this proceeding, the parties hereto agree as follows:

1. Armada East Africa agrees to pay a monetary amount of $40,000, of which $10,000 shall be payable within thirty (30) days following approval by the Commission of this proposed Settlement, and $30,000 shall be payable according to terms of the Promissory Note attached hereto as Appendix I in the following installments:

> Ten Thousand ($10,000) Dollars, plus interest, shall be paid on or before six (6) months following the due date of the initial $10,000 payment,
>
> Ten Thousand ($10,000) Dollars, plus interest, shall be paid on or before twelve (12) months following the due date of the initial $10,000 payment and
>
> Ten Thousand ($10,000) Dollars, plus interest, shall be paid on or before eighteen (18) months following the due date of the initial $10,000 payment.

2. Upon approval of this Agreement by the Commission, this Agreement shall forever bar the commencement or institution of any assessment proceeding, civil action or other claim for recovery of civil penalties from Armada East Africa arising from or in any way related to the subject matter of this proceeding or the facts set forth and described in the Commission's Order and in the record in this proceeding.

3. This Agreement is entered into voluntarily by both parties, and no promises or representations have been made by either party other than the agreements and consideration herein expressed.

4. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Armada East Africa to the violations alleged in the Order.

IN WITNESS WHEREOF, the parties have executed this Agreement through their duly authorized representatives.

	ARMADA GREAT LAKES/EAST AFRICA SERVICE, LTD.
Of Counsel:	By:
	(S) Jen-Erik Valentin
(S) Hopewell H. Darneille III	Corporate Secretary
Bowman Conner Touhey & Petrillo	14227 Fern Drive
A Professional Corporation	Houston, Texas 77079
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FEDERAL MARITIME COMMISSION

By:

APPENDIX A

(Part 2)

BEFORE THE FEDERAL MARITIME COMMISSION

In the Matter of:
ARMADA GREAT LAKES/EAST AFRICA SERVICE, LTD. AND GREAT LAKES TRANSCARIBBEAN LINE—ORDER OF INVESTIGATION AND HEARING.

DOCKET NO. 85–11

PROPOSED SETTLEMENT OF CIVIL PENALTY

Respondent Great Lakes Transcaribbean Line, GmbH ("GLTL"), by its attorney, respectfully submits this proposed Settlement Agreement to the presiding Administrative Law Judge for approval pursuant to Section 505.3 of the Commission's General Order 30, 46 C.F.R. § 505.3, and for incorporation into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served April 12, 1985 ("Order"), the Commission instituted the present proceeding to determine whether GLTL had violated Section 15 of the Shipping Act, 1916, 46 U.S.C. App. 814, and Section 10 of the Shipping Act of 1984, 46 U.S.C. App. 1709, and whereas the Order includes the issue of whether a civil penalty should be assessed for any such violations and, if so, the amount of such penalty; and

WHEREAS, the Order alleges that GLTL may have violated Section 15 of the Shipping Act, 1916 and Section 10 of the Shipping Act of 1984 by implementing joint service Agreement No. 207–010640 prior to its becoming effective on October 20, 1984; and

WHEREAS, the parties, in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order, are desirous of settling expeditiously the issue of the appropriate amount to be paid by GLTL in accordance with the terms and conditions of this Agreement; and

WHEREAS, Section 32(a) of the Shipping Act, 1916, 46 U.S.C. App. 831(e), and Section 13(c) of the Shipping Act of 1984, 46 U.S.C. App. 1712(c), authorize the Commission to assess or compromise civil penalty claims under the Shipping Act, 1916 and the Shipping Act of 1984 respectively; and

WHEREAS, Agreement No. 207–010640 became effective on October 20, 1984, and GLTL has terminated the actions which formed the basis of the violation set forth in the Commission's Order and has indicated its willingness and intention to avoid similar actions by GLTL or its officers, employees and agents in the future;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the Order and factual record submitted in this proceeding, the parties hereto agree as follows:

1. GLTL agrees to pay a monetary amount of $40,000, of which $10,000 shall be payable within thirty (30) days following approval by the Commission of this proposed Settlement, and $30,000 shall be payable according to terms of the Promissory Note attached hereto as Appendix I in the following installments:

> Ten Thousand ($10,000) Dollars, plus interest, shall be paid on or before six (6) months following the due date of the initial $10,000 payment;
>
> Ten Thousand ($10,000) Dollars, plus interest, shall be paid on or before twelve (12) months following the due date of the initial $10,000 payment; and
>
> Ten Thousand ($10,000) Dollars, plus interest, shall be paid on or before eighteen (18) months following the due date of the initial $10,000 payment.

2. Upon approval of this Agreement by the Commission, this Agreement shall forever bar the commencement or institution of any assessment proceeding, civil action or other claim for recovery of civil penalties from GLTL arising from or in any way related to the subject matter of this proceeding or the facts set forth and described in the Commission's Order and in the record in this proceeding.

3. This Agreement is entered into voluntarily by both parties, and no promises or representations have been made by either party other than the agreements and consideration herein expressed.

4. It is expressly understood and agreed that this Agreement is not to be construed as an admission by GLTL to the violations alleged in the Order.

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

GREAT LAKES TRANSCARIBBEAN LINE, GmbH

By:
(S) Hopewell H. Darneille III

Bowman Conner Touhey & Petrillo
A Professional Corporation
2828 Pennsylvania Avenue, N.W.
Washington, D.C. 20007
(202) 965–7600

Attorney for Respondent Great
Lakes Transcaribbean Line, GmbH

FEDERAL MARITIME COMMISSION

By:

APPENDIX B

BEFORE THE FEDERAL MARITIME COMMISSION

ARMADA GREAT LAKES/EAST AFRICA
SERVICE
LTD. AND GREAT LAKES
TRANSCARIBBEAN LINE

DOCKET NO. 85-11

JOINT SUBMISSION PURSUANT TO JUDGE'S DIRECTION AMENDING THE SETTLEMENT OFFERS OF DECEMBER 18, 1985 AND HEARING COUNSEL'S REPLY THERETO

Respondents Armada Great Lakes/East Africa Service, Ltd. ("Armada East Africa") and Great Lakes Transcaribbean Line, GmbH ("GLTL"), by their attorneys, and the Bureau of Hearing Counsel amend, respectively, Respondents' Proposed Settlements, filed December 18, 1985, and the Bureau's Reply thereto of the same date. This submission is filed jointly in accordance with the presiding Administrative Law Judge's orders to counsel during an informal conference held on January 29, 1986.

In accordance with the Administrative Law Judge's directions, Respondents hereby amend their above described settlement offers as follows, leaving them otherwise as originally filed:

1. Each Respondent has deposited an initial, good faith sum of S10,000 into segregated, interest bearing money market escrow accounts in the name, respectively, of "Bowman Conner Touhey & Petrillo, A Professional Corporation FBO" The Federal Maritime Commission/Armada Great Lakes/ East Africa Service Ltd., and "Bowman Connor Touhey & Petrillo, a Professional Corporation FBO The Federal Maritime Commission/Great Lakes Transcaribbean Line GMBH" at NS&T Bank, N.A., Washington, D.C. as of February 11, 1986. Upon the approval and acceptance of these Proposed Settlements by the Federal Maritime Commission, and within fifteen (15) days after service of a Final Order in this proceeding incorporating approval of the Proposed Settlements, the sum in such segregated accounts, including all accrued interest, shall be paid to the Federal Maritime Commission. In the event the Settlement offers are not accepted and approved by the Federal Maritime Commission, such sums with all accrued interest shall be returned to the respective Respondents.

2. The remaining $30,000 per Respondent shall be payable in accordance with the terms of the Promissory Notes attached hereto as Appendices I and II in the following installments:

a. Five Thousand ($5,000) Dollars, plus interest, shall be paid on or before June 3, 1986, by each Respondent;

b. Ten Thousand ($10,000) Dollars, plus interest, shall be paid on or before September 16, 1986 by each Respondent; and

c. Fifteen Thousand ($15,000) Dollars, plus interest, shall be paid on or before December 30, 1986 by each Respondent.

3. In the event the Commission has not taken final action to approve these Settlement offers by the date any installment is due, such installment, including interest, shall be paid into the segregated escrow accounts described in Paragraph 1 above, and shall be handled in accordance with the terms thereof.

4. The appended Promissory Notes provide that interest on subsequent installments will run from the service date of the Administrative Law Judge's Initial Decision approving the Proposed Settlements, and will be at a rate equal to the average weekly six-month U.S. Treasury Bill rates during the applicable period.

The installment payments have been structured with consideration to the seasonality of Great Lakes Shipping, and are scheduled to fall on Tuesdays so as to ease the transmittal of funds.

Hearing Counsel do not oppose approval of Respondents' Settlement offers, as originally filed and herein amended.

RESPECTFULLY SUBMITTED,

(S) HOPEWELL H. DARNEILLE III
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FEDERAL MARITIME COMMISSION

[46 CFR PART 552]

DOCKET NO. 86–8

FINANCIAL REPORTS OF TUG AND BARGE OPERATORS IN THE DOMESTIC OFFSHORE TRADES

May 1, 1986

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission amends its rules governing financial reports required of vessel operating common carriers in the domestic offshore waterborne commerce of the United States. Tug and barge operators have been completing the reporting form (Form FMC–377) based on the accounts prescribed by the Interstate Commerce Commission (ICC) for Carriers by Inland and Coastal Waterways. Since the ICC no longer requires reports from such carriers, it is necessary to define the terms used in the report form.

EFFECTIVE DATE: June 9, 1986.

SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission is required to evaluate the reasonableness of rates filed by vessel operating common carriers in the domestic offshore trades. To provide for the orderly acquisition of data essential to this evaluation, the Commission promulgated what is now 46 CFR Part 552. Tug and barge operators report the required financial and operating data on Form FMC–377, "Statements of Financial and Operating Data." It had been the policy of the Commission to base these statements on the accounts prescribed by the Interstate Commerce Commission (ICC) for Carriers by Inland and Coastal Waterways. The ICC no longer requires reports from such carriers. Consequently, Form FMC–377 will now contain a glossary.

A proposed rule was published in the *Federal Register* on February 26, 1986 (51 FR 6760) with comments due on March 28, 1986. No comments were received. Therefore, the Commission intends to adopt the rule as final.

The Commission has determined that this proposed rule is not a "major rule" as defined in Executive Order 12291, February 27, 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 effect on competition, employment, investment productivity, innovations, or on the ability of United States based enterprises to compete in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental organizations. The primary economic impact of this rule 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 contained in original Part 552 were approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned control number 3072–0008. The amendments in this rulemaking are technical in nature and will not result in any substantive modification of the financial reporting requirements contained in the Commission's request for extension of clearance.

List of Subjects in 46 CFR Part 552: Cargo vessels; Freight; Maritime carriers; Rates and fares; Report and recordkeeping requirements; Uniform system of accounts.

Therefore, for the reasons set forth above, Part 552 of Title 46, Code of Federal Regulations, is amended as follows:

1. The Authority Citation to Part 552 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 817(a), 820, 841a, 843, 844, 845, 845a, and 847.

2. Paragraph (o) of § 552.5 is revised to read as follows:

§ 552.5 Definitions.

* * * * *

(o) *"Voyage Expense"* means:

(1) For carriers required to file Form FMC–378: the total of Vessel Operating, Vessel Port Call and Cargo Handling Expenses less Other Shipping Operations Revenue.

(2) For carriers required to file Form FMC–377: the total of Transportation, Terminal and Traffic Expenses.

* * * * *

3. Section 552.6 is amended by removing paragraph (b)(7); revising paragraphs (a)(2), (b)(6), (b)(8), (b)(9)(iii), (b)(10), (c)(2), (c)(3), (c)(9); revising heading of paragraph (b)(4); and renumbering paragraphs (b)(8), (b)(9), (b)(10); as follows:

§552.6 Forms

(a) *General.*

(1) * * *

(2) Statements containing the required exhibits and schedules, are described in paragraphs (b), (c), (d), (e) and (f) of this section and are available upon request from the Commission. The required General Information, schedules and exhibits are contained in Forms FMC–377 and FMC–378. For carriers required to file Form FMC–378, the statements are based on the *Uniform Financial Reporting Requirements* prescribed by the Maritime Administration, U.S. Department of Transportation. For carriers required to file Form FMC–377, the statements are based on definitions contained therein. The schedules contained in these statements are distinguished from those contained in the Form FMC–378 statements by the suffix "A" (e.g., Schedule A–IV(A)).

(b) *Rate Base (Exhibits A and A(A)).*

(1)–(3) * * *

(4) *Investment in Other Property and Equipment; Accumulated Depreciation Other Property and Equipment (Schedules A–IV and A–IV(A)).*

* * * * *

(5) * * *

(6) *Workinq Capital (Schedule A–V(A))*

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

[(7) Removed; paragraphs (b)(8)–(b)(10) are renumbered (b)(7)–(b)(9), respectively, and amended as follows:]

(7) *Property and Equipment of Related Companies.*

Property and equipment of related companies used by the filing carrier in the Trade shall be reported in accordance with paragraphs (b)(1), (b)(2) and (b)(4) of this section. The cost of such assets shall be that which is recorded on the books of the related company. Where such assets are included in the rate base, the profits or losses from intercompany transactions related to such assets are to be eliminated in accordance with paragraph (c)(11) of this section.

(8) *Capitalization of Interest During Construction (Schedules A–VI and A–VI(A)).*

(i)–(ii) * * *

(iii) A detailed description of the interest calculations shall be submitted for each capital asset included in the rate base of the carrier in the first year of its inclusion. Such description shall be set forth on Schedule A–VI or A–VI (A), "Capitalization of Interest During Construction." Capitalized interest shall be included in the rate base when the asset is included

in the rate base, in accordance with paragraph (b) of this section, and in the same allocable amounts as the asset. A schedule shall be provided each time a rate base statement is submitted, setting forth the year in which an interest calculation statement was submitted for each asset which included capitalized construction interest in the rate base.

(iv) The effects of the interest-during construction provisions shall be applicable to all work completed after December 31, 1977.

(9) *Capitalization of Leases (Schedules (A–VIII and A–VII(A)).*

Leased assets which are capitalized on the carrier's books and which meet the AICPA guidelines for capitalization may also be included in rate base. Schedule A–VII or A–VII(A), "Capitalization of Leases," shall be submitted setting forth pertinent information relating to the lease and the details of the capitalization schedule. Allocations to the Trade shall follow the requirements of paragraphs (b)(1) and (b)(4) of this section.

(c) *Income Account (Exhibits B and B(A)).*

(1) * * *

(2) *Voyage Expense (Schedule B–II).* This schedule shall be submitted by vessel operators for any period in which any cargo was carried in the Service. Allocations to the Trade shall be on the following basis:

(i)–(ii) * * *

(iii) Other Shipping Operations Revenue shall be deducted from Gross Voyage Expense. Other Shipping Operations Revenue should be assigned directly, to the extent possible, or otherwise allocated on the basis of cargo cube loaded and discharged at each port. Any direct assignments shall be fully set forth and explained.

(3) *Voyage Expense (Schedule B–II(A).* This schedule shall be submitted by tug and barge operators:

(i) For all voyages in the Service, transportation expense shall be allocated to the Trade in the cargo-cube mile or cargo-cube relationship, as appropriate. Should any elements of transportation expense be directly allocable to specific cargo, such direct allocations shall be made and explained.

(ii) Terminal and traffic expenses shall be assigned directly, to the extent possible, by ports at which incurred, to the Trade and Other Cargo, or otherwise allocated on the basis of cargo cube loaded and discharged at each port.

(iii) Where multiple barge units are towed by a single tug, voyage expense shall be allocated on the basis of the cargo-cube relationship.

(4)–(8) * * *

(9) *Other Revenue or Expense (Schedules B–VIII and B–VII(A)).*

(i) Any other elements of revenue or expense, wholly or partially applicable to the Trade, shall be fully explained by a schedule showing details of allocation.

(ii) Operating-differential subsidy refunds under section 605(a) of the Merchant Marine Act, 1936, shall not be allocated to the Trade.

* * * * *

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–12

APPLICATION OF THE LOYALTY CONTRACT PROVISIONS OF THE SHIPPING ACT OF 1984 TO A PROPOSED TARIFF RULE ON REFUNDS

ORDER DENYING PETITION

May 16, 1986

The Trans-Pacific Freight Conference of Japan/Korea and the Japan/Korea-Atlantic & Gulf Freight Conference (Petitioners or Conferences) have jointly filed a Petition for Declaratory Order requesting that the Commission declare that a proposed rule for tariff refunds is not a "loyalty contract" within the meaning of section 3(14)[1] and section 10(b)(9)[2] of the Shipping Act of 1984 (the Act or 1984 Act). In essence, the proposed rule would state that the Conferences would provide a prompt refund of no greater than 10 percent to any shipper which shipped all or a fixed percentage of its cargo with the Conferences during a period not to exceed four consecutive months. Shippers would not be required to ship any cargo on conference vessels for subsequent periods in order to qualify for a refund. However, if a shipper intended to use the rule, it would be required to give the Conferences advance notice and obtain a registration number.

Notice of filing of the Petition was published in the *Federal Register*, 50 Fed. Reg. 16347 (April 25, 1985), and comments in response were submitted by: (1) the "8900" Lines and the U.S. Atlantic & Gulf Ports/Italy, France & Spain Freight Conference (Mediterranean Conferences); (2) KKL (Kangaroo Line) Pty., Ltd. (Karlander); and (3) the Department of Justice (DOJ).

THE PETITION

The Conferences contend that section 3(14) of the 1984 Act addresses only arrangements by which carriers and shippers are mutually bound by enforceable contractual obligations, with the shipper obtaining a lower rate by agreeing to commit its cargo to a carrier or conference. They contend, however, that their tariff rule imposes no enforceable contractual obligations

[1] *Section 3(14), 46 U.S.C. app. § 1702(14), defines "loyalty contract" as*

a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

[2] Section 10(b)(9), 46 U.S.C. app. § 1709(b)(9), provides:

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may . . . use a loyalty contract, except in conformity with the antitrust laws.

on a shipper, because a shipper could elect at any time to use non-conference carriers without incurring a penalty. Petitioners further believe that their interpretation of section 3(14) is supported by Congress' treatment of loyalty arrangements under the Shipping Act, 1916, 46 U.S.C. app. §§801–842 (1916 Act). They maintain that the language used in section 14b of the 1916 Act[3] evidenced a Congressional intent to regulate only those loyalty arrangements by which shippers were bound by means of an enforceable contract. They further note that the 1984 Act refers only to loyalty "contracts" and contend that it does not, therefore, encompass non-contractual, non-binding tariff rules. The Conferences also argue that the legislative history of the 1984 Act reveals a Congressional intent merely to deal with dual-rate contracts which had been in existence since 1961 and not prohibit tariff provisions such as theirs which allegedly do not compel shipper loyalty.

Petitioners suggest that the non-contractual nature of their tariff rule makes it very similar to time-volume rates which are permitted by section 8(b) of the 1984 Act.[4] They contend that both are contained in tariffs, provide incentives to utilize carriers, require notification prior to use, and do not penalize failure to comply with the conditions of the tariff. They also contend that their rule is similar to their Volume Incentive Program, which the Commission has indicated may be implemented on a tariff basis. *See* 46 CFR §580.12(a). Lastly, the Conferences note that their proposed rule is similar to a "fidelity commission system" which a Commission administrative law judge previously found not to be a contract.[5]

REPLIES TO THE PETITION

The Mediterranean Conferences support the Petition and therefore urge that the Commission declare that the proposed rule for refunds is not a loyalty contract. They do request, however, that the Commission clarify that the amount of the refund to be paid to participating shippers and the duration of the program are matters which are within the discretion of any conference choosing to offer such a program.

Karlander opposes the Petition. It argues first that the Petition does not comply with the Commission's Rules of Practice and Procedure. Specifically, Karlander maintains that the Petition fails to "include a complete statement of the facts and grounds prompting the petition," as required by Rule 68, 46 CFR §502.68. Karlander contends that the Conferences'

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[3] Section 14b of the Shipping Act, 1916, 46 U.S.C. §813a (repealed 1984), permitted, under certain specified conditions, the use of contracts granting lower rates to any shipper "who agrees to give all or any fixed portion of his patronage" to a carrier or conference.

[4] Section 8(b), 46 U.S.C. app. §1707(b), states:

> Time-Volume Rates—Rates shown in tariff filed under subsection (a) may vary with the volume of cargo offered over a specified period of time.

[5] *Japan-Atlantic & Gulf Freight Conference Fidelity Commission System,* Docket No. 908, 1 S.R.R. 451 (1961). The Conferences note, however, that this decision never became final because the tariff amendment was withdrawn by the subject conference and the case dismissed at its request.

Petition merely indicates general guidelines for a proposed tariff rule and does not provide specific tariff language.

Karlander also notes that issuance of a declaratory order is a matter of agency discretion and that many agencies have declined requests to issue declaratory orders. Karlander further contends that even if the Commission determines that the proposed tariff rule is not a loyalty contract, uncertainty would continue as to the lawfulness of the rule under other provisions of the 1984 Act. For example, Karlander questions whether the proposed refund system would involve a deferred rebate, as prohibited by section 10b)(8) of the Act, 46 U.S.C. app. § 1709(b)(8).

Karlander argues that Petitioners' request for a declaratory order is nothing more than an attempt to obtain Commission sanction for an anticompetitive tying device not otherwise authorized by the 1984 Act. Karlander maintains, therefore, that even if the requested declaratory order were issued, it would not remove the legal uncertainty surrounding the proposal. Karlander further submits that the 1984 Act contemplates only two volume arrangements by which a shipper can be tied to a carrier—service contracts and time-volume rates. It concludes that the proposed tariff rule is neither.

DOJ contends that the term "loyalty contract," as used in the 1984 Act, encompasses any contractual arrangement which has the effect of tying a shipper to a particular carrier or conference, whether it be a unilateral or a bilateral contract. It notes that the traditional loyalty contract offered under the 1916 Act was a bilateral contract, *i.e.*, at the time it was entered into, prior to any shipments thereunder, enforceable contractual obligations were imposed on the shipper as well as on the carrier. DOJ argues, however, that the proposed tariff rule represents a unilateral contract in which a conference promises to provide a refund to a shipper in exchange for *performance* of certain specified conditions by the shipper (in this case, shipping all or a fixed portion of its cargo on conference vessels for a specified time period). DOJ contends that performance by the shipper is both acceptance of the conference's offer (as stated in its tariff offering) and the giving of consideration for the conference's promises to pay the refund. DOJ concludes by stating that the effect of the proposed tariff rule is the same as the effect of traditional loyalty contracts—to tie a shipper's patronage exclusively to a particular conference. Although the form of the proposed loyalty arrangement is unique, DOJ contends that it is nonetheless encompassed by the definition of loyalty contract in section 3(14) of the Act.

DISCUSSION

As an initial matter, we address Karlander's suggestion that the Petition may not comply fully with the Commission's requirements concerning petitions for declaratory orders, as set forth in Rule 68 of the Commission's Rules of Practice and Procedure. Specifically, Karlander claims that the Petition does not include "a complete statement of the facts and grounds

prompting the petition.'' Karlander's concern arises from the fact that the parameters of the proposed tariff rule are set out by the inclusion of general descriptive guidelines, rather than stating an actual tariff rule.

Karlander's concerns do not have merit. Petitioners are seeking an advance ruling from the Commission prior to initiating any activity. It is not unusual that at this point they have only a general description of their intentions and not a specific tariff rule. This description adequately informs the Commission of the nature of the proposed rule and provides sufficient detail upon which to consider the merits of the Petition.

Turning to the issue of whether the rule is or is not a ''loyalty contract,'' we agree with Petitioners that the tariff refund scheme which they are proposing is not the type of loyalty arrangement contemplated by section 14b of the 1916 Act. However, the basic question remains whether the proposed rule is a loyalty contract under the 1984 Act. As defined by section 3(14) of the 1984 Act, a ''loyalty contract'' is ''a contract with an ocean common carrier or conference . . . by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.'' 46 U.S.C. app. § 1702(14). It appear clear that under the proposed tariff rule, a shipper obtains a lower rate (after refund) by committing all or a fixed portion of its cargo to the Conferences. The only remaining issue, therefore, is whether a contract arises between a shipper and a carrier under the proposed arrangement. It would appear that one does, and, as a result, we cannot state definitively that the proposed arrangement is *not* a loyalty contract under the 1984 Act.

A ''contract'' has been defined as ''[a]n agreement between two or more persons which creates an obligation to do or not to do a particular thing.'' Black's Law Dictionary 291–292 (5th ed. 1979). The essential elements of a contract are generally considered to be: (1) Competent parties; (2) proper subject matters (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. 17 C.J.S. *Contracts* § 1(2).

As a matter of classification, the law recognizes two kinds of contracts—bilateral contracts and unilateral contracts. A bilateral contract is one in which there are reciprocal promises; mutual obligations are present and the promise which one party makes is sufficient consideration for the promise which the other makes. 17 C.J.S. *Contracts* § 8. The typical dual-rate contract formerly recognized under the 1916 Act is a classic example of a bilateral contract in which mutually enforceable contractual obligations were imposed on both the carrier (or conference) and the shipper at the time the agreement was executed.

A unilateral contract, on the other hand, arises from a promise by one party or an offer by that party to do a certain thing in the event the other party performs a certain act; the performance by the other party constitutes an acceptance of the offer and the contract then becomes executed and enforceable. 17 C.J.S. *Contracts* § 8.

The Conferences' proposed tariff rule would appear to give rise to a unilateral contract. The Conferences promise to provide a refund in exchange for performance of specified conditions by the shipper (*i.e.*, shipping all or a fixed portion of its cargo on conference vessels for a specified period of time). Performance by the shipper of the conditions would appear to constitute acceptance of the Conferences' offer and the giving of legal consideration for the Conferences' promise to pay the refund. If the shipper meets the conditions, the offering conference is contractually bound to issue it a refund. If the shipper does not fully perform over the period specified, no contract arises and no rebate is earned.

The Conferences' contention that there must be mutuality of obligation between the carrier and the shipper at the time the shipper begins to ship in order to create a contractual relationship suggests an incorrect assessment of the law. Because a unilateral contract is not founded on mutual promises, but is one where there is a promise on one side and executed consideration (performance) on the other, the doctrine of mutuality of obligation is inapplicable to such contracts. 17 C.J.S. *Contracts* § 100(1). What is essential is that the contract contain valid consideration. Here, the shipper's performance of the offering conference's conditions would appear to constitute valid consideration for the conference's promise to pay the refund.

The mere fact that a shipper who does not meet the conditions of the conference's offering does not incur a penalty (except that of paying the normal tariff rate), does not compel a different result. Although dual-rate contracts typically contained a penalty provision, that provision was not what brought them within the ambit of section 14b. There was no requirement that dual-rate contracts under section 14b of the 1916 Act contain a penalty provision and there is, of course, no such requirement in section 3(14) of the 1984 Act. It is not, therefore, a critical element in determining whether the instant arrangement falls within the definition of "loyalty contract" under the 1984 Act.[6]

Moreover, the legislative history of the 1984 Act suggests that the definition of "loyalty contract" was intended to be read expansively, encompassing arrangements having little anticompetitive effect as well as those that would clearly violate the antitrust laws. The provisions in the 1984 Act relating to loyalty contracts came about as the result of a compromise between the House Merchant Marine and Fisheries Committee and the House Judiciary Committee. This compromise was a radical departure from the regulatory scheme established by section 14b of the 1916 Act which had been carried forward in H.R. 1878, as reported out by the House

[6] The lack of a penalty provision, the relatively short period of time during which the shipper must obligate a fixed portion of its cargo to the conference, and the size of the refund are all factors which may be relevant in determining whether use of the loyalty contract would conform to the antitrust laws as required by section 10(b)(9) of the 1984 Act. However, they do not assist in determining whether an arrangement is a "loyalty contract" in the first instance.

Merchant Marine and Fisheries Committee. Section 14b of the 1916 Act specified mandatory provisions to be included in dual-rate contracts. Contracts which were in compliance with the requirements of section 14b enjoyed antitrust immunity. As reported out by the House Merchant Marine and Fisheries Committee, H.R. 1878 would have continued the requirements of section 14b, but expanded antitrust immunity to cover all loyalty contracts. The compromise did away with the specific requirements pertaining to loyalty contracts that existed under the 1916 Act and simply required that the use of loyalty contracts conform to the antitrust laws. Given this approach, it seems likely that Congress expected that carriers and conferences might develop non-traditional loyalty contracts which might or might not offend the antitrust laws.

The Conferences point out that the subject arrangement is similar to the Fidelity Commission System (FCS) which was the subject of *Japan Atlantic and Gulf Freight Conference Fidelity Commission System*, 1 S.R.R. 451 (1961) (*JAGFCS*). They rely on this decision in an attempt to demonstrate that the subject arrangement is not a loyalty contract. The FCS was a proposal designed to fill the void created when the Supreme Court struck down the conference's dual-rate system in *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958) (*Isbrandtsen*). An investigation and hearing was instituted by the Commission to determine whether the proposed FCS would violate the 1916 Act. Although the 1961 amendments to the 1916 Act rendered the case moot by legalizing dual-rate contracts before the Commission could issue a final decision, an initial decision had already issued in the case by an administrative law judge. He concluded that because the FCS did not depend upon the actions of the shipper in any successive period, it did not result in a deferred rebate. Nor was its anticompetitive effect found to be as great as the dual rates struck down in *Isbrandtsen*. It must be remembered, however, that the issue in that case was whether the FCS was lawful under section 14, Third of the Shipping Act, 1916.[7] There was no issue as to whether the FCS was a "dual-rate contract" because prior to 1961 there was no reference to dual-rate contracts in the 1916 Act. Thus the initial decision findings in *JAGFCS* are of little value in determining whether the subject arrangement is a loyalty contract.

The Conferences have also suggested that their proposed tariff rule is very similar to time-volume rates which are permitted by section 8(b) of the 1984 Act.[8] Both are contained in tariffs and both provide a refund or lower rate to a shipper who meets its requirements. However, the Con-

[7] Section 14, Third, formerly 46 U.S.C. § 813, stated that no common carrier by water shall:

Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

[8] Section 8(b), 46 U.S.C. app. § 1707b), 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.

ferences' argument appears to overlook critical distinction between the definitions of "loyalty contract" and "time-volume rates" appearing in the Shipping Act of 1984.

By definition, a loyalty contract contemplates a shipper tendering "all or a fixed portion" of its cargo to a carrier. On the other hand, a time-volume rate depends on "the volume of cargo tendered over a specified period of time." The proposed refund, like a loyalty contract, is dependent upon a shipper tendering all or a specified portion of its total traffic to the conference; its application does not depend on the volume of cargo tendered. For example, under the Conferences' proposed rule, two shippers could tender exactly the same number of containers to the offering conference and only one would be eligible for a refund. If the cargo tendered amounted to all or the fixed percentage of the shipper's total traffic specified in the tariff, a refund would be in order. The same volume, if it did not amount to all or a specified fixed percentage of the shipper's total traffic, would not qualify for refund. Because the application of the proposed refund is conditioned on the relationship of the amount of cargo tendered to the shipper's total traffic, and not just the amount of cargo tendered, it is not a time-volume rate, as section 8(b) of the 1984 Act would appear to contemplate that term.[9] *See also, In the Matter of the Carriage of Military Cargo*, 10 F.M.C. 69, 77–78 (1966).

For reasons stated above, the Commission is unable to declare that Petitioners' proposed tariff rule is not a "loyalty contract" as that term is defined by section 3(14) of the Shipping Act of 1984.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order submitted by the Trans-Pacific Freight Conference of Japan/Korea and the Japan/Korea-Atlantic Gulf Freight Conference is denied.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

[9] Even accepting Petitioners' suggestion that time-volume rates give rise to a type of loyalty arrangement, this does not necessarily advance their position. "Contract[s] based on time-volume rates" have been expressly excluded from the definition of loyalty contract in section 3(14), whereas the arrangement proposed by Petitioners has not.

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–2

ATLANTIC CARGO SERVICES, AB

v.

GULF EUROPEAN FREIGHT ASSOCIATION

NOTICE

June 3, 1986

Notice is given that no appeal has been taken to the April 21, 1986, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–2

ATLANTIC CARGO SERVICES, AB

v.

GULF EUROPEAN FREIGHT ASSOCIATION

COMPLAINT DISMISSED

Finalized June 3, 1986

Complainant has moved for an order dismissing its complaint without prejudice. Complainant states that it has resolved its dispute with respondent to its satisfaction and does not wish to prosecute its complaint at this time. Respondent does not object to the motion.

In view of the above situation, the motion is granted. As requested, costs are to be borne by the party incurring them.

It is ordered that the complaint be dismissed without prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–14

CARI CARGO INTERNATIONAL, INC. JORGE VILLENA AND SEA TRADE SHIPPING

NOTICE

June 5, 1986

Notice is given that no exceptions were filed to the April 24, 1986, 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) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–14

CARI-CARGO INTERNATIONAL, INC. JORGE VILLENA AND SEA TRADE SHIPPING

Respondent Jorge Villena found to have operated as a non-vessel operating common carrier between November 1983 and December 1985, sometimes in his personal capacity and other times in connection with respondent corporations, Cari-Cargo International, Inc., and Sea Trade Shipping. At various times during this period, respondents failed to charge rates specified in their tariffs, operated without a tariff, and underpaid vessel-operating carriers by means of cargo misdescriptions. These practices violated sections 18(b)(3 and 18(b)(1) and 16 Initial Paragraph of the Shipping Act, 1916, and corresponding provisions of the Shipping Act of 1984, sections 10(b)(1), 8(a)(1), and 10(a)(1), respectively.

Respondents' pattern of conduct by which they ignored their tariffs and misdescribed cargo tendered to vessel-operating carriers was deliberate and without regard to the requirements of law and continued even after Mr. Villena had been warned about the impropriety of such practices. Respondents' defenses, namely, that they had to meet competition, had intended to file their negotiated rates but had problems with their tariff publisher, are weak and unsubstantiated and, in any event, relevant only to the question of penalties.

To deter future violations of law and to encourage respondents to reform and comply with law without jeopardizing what may be relatively small businesses, respondents are assessed aggregate penalties of $100,000 with provision for possible remission of a portion of this amount if respondents pay at least $30,000 over a six-months' period and show evidence of reform and inability to continue to pay. Respondents are also ordered to cease and desist from continuing previous unlawful practices.

Jorge Villena for respondents

Aaron W. Reese and Alan J. Jacobson for Hearing Counsel.

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

Finalized June 5, 1986

The Commission began this proceeding on May 5, 1985, to determine originally whether respondents Cari-Cargo International, Inc. (Cari-Cargo), a non-vessel operating common carrier (NVO), and Mr. Jorge Villena, apparently Cari-Cargo's only officer and employee, had been operating without having a tariff on file with the Commission and without charging rates which may have been filed in such a tariff. If so, such conduct would violate sections 18(b)(1) and 18(b)(3) of the Shipping Act, 1916, and corresponding provisions of the Shipping Act of 1984, sections 8(a)(1)

[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).

and 10(b)(1). During the course of prehearing discovery, the Commission's Hearing Counsel uncovered evidence showing that respondents may have been consolidating cargo and tendering it to vessel-operating carriers under incorrect descriptions in order to obtain transportation at lower rates that would apply under those carriers' tariffs. If so, such conduct would violate section 16, Initial Paragraph, of the 1916 Act and the corresponding provision of the 1984 Act, section 10(a)(1). Still later, Hearing Counsel obtained evidence which appeared to show that respondent Jorge Villena may have been operating a company known as Sea Trade Shipping without regard to a tariff which that company had filed with the Commission effective September 5, 1985. If so, Sea Trade and Mr. Villena would have violated section 1(b)(1) of the 1984 Act, and, if Mr. Villena and Sea Trade had been misdescribing cargo to underlying vessel-operating carriers, such conduct would have violated section 10(a)(1) of the 1984 Act.

In order to reach the full range of all possible activities of the type mentioned above which may have been conducted by Cari-Cargo, Mr. Villena, and Sea Trade Shipping at various times between 1983 and 1985, the Commission amended its original Order of Investigation, first on August 7, 1985, and, later, on January 22, 1986. As amended, the Order now requires an investigation into the questions whether Cari-Cargo, Mr. Villena, and Sea Trade Shipping operated without a tariff, charged rates other than the rates on file with the Commission if tariffs had been filed, and tendered cargo to underlying vessel-operating carriers under incorrect descriptions in order to obtain transportation at lower rates than would properly apply under those carriers' tariffs.

The evidentiary record was developed gradually over a period of time primarily by means of prehearing inspection and discovery of respondents' records and a deposition of respondent Villena. Because respondents either did not wish or were unable to obtain legal counsel, every effort was made during the record-developing phase of the proceeding to keep Mr. Villena advised of the Commission's procedures and of respondents' rights to respond to the evidence proffered by Hearing Counsel in whatever way necessary to protect respondents' interests. In order to keep respondents continually advised of their rights and of the significance of the procedures being followed by Hearing Counsel, three telephonic prehearing conferences were held (on September 11, November 4, 1985, and January 28, 1986). In addition to these conferences, I instructed Hearing Counsel to furnish respondents with written evidence which Hearing Counsel had obtained and would be tendering together with statements explaining the significance of the evidence. Whenever appropriate, respondents were given the opportunity of furnishing rebuttal evidence or comments and were advised that they could request an oral hearing if they deemed such a hearing necessary

to protect their interests.[2] However, at no time did respondents furnish any rebuttal evidence or written comments or make any requests for an oral hearing. Accordingly, Hearing Counsel tendered their entire case which consisted of evidence in written form, which evidence was admitted without objection of respondents, the record was closed, and a schedule for briefing was established. Hearing Counsel submitted their opening brief on March 21, 1986. Respondents submitted no answering brief.

FINDINGS OF FACT

The evidentiary record consists of the written direct testimony of the Commission's Miami District Investigator, Mr. Albert Posnick, with related worksheets; the deposition of Mr. Jorge Villena, Cari-Cargo's President and Sea Trade's general manager, with related documents (a Cari-Cargo tariff, bills of lading, dock receipts, export declarations, manifests); an affidavit of Roland E. Ramlow, a Commission Transportation Industry Analyst; a Sea Trade tariff; and 34 Sea Trade bills of lading together with related shipping documents. (See Evidentiary Record Closed, February 28, 1986, at 2.)

Although the types of violations committed by the three respondents, i.e., violating their tariffs, operating without a tariff, or underpaying underlying vessel-operating carriers, are simple and easy to grasp by their nature, the surrounding facts are rather complicated and difficult to follow. There are several reasons. First, Mr. Villena operated under three different corporate names at various times between March 1983 and December 1985, the period of time within which shipments were studied. Second, the Shipping Act of 1984 supplanted the Shipping Act, 1916, effective June 18, 1984, so that although the types of violations were the same, the relevant provisions of law were renumbered. Third, for a period of time between November 10, 1983 and April 17, 1984, Mr. Villena operated without a corporation having been formed although he had filed a tariff and issued bills of lading in a corporate name (Cari-Cargo International, Inc.). During this period of time, the facts showed that he either operated in his own name without a tariff, or, alternatively, he operated a tariff in the name of an unformed corporation and violated that tariff.

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[2] See my rulings and instructions, May 13, August 22, September 12, November 5, 1985; January 24, January 30, 1986, February 28, 1986; letter dated December 9, 1985. As the Commission has noted, a fair hearing is one in which "the parties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case." *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 140 (1965); see also *Agreement No. 9955–1*, 18 F.M.C. 426, 464–465 (1975) (no violation of due process if respondents had opportunity to learn of allegations prior to hearing and to meet evidence presented against them); *L.G. Balfour v. F.T.C.*, 442 F.2d 1, 19 (7th Cir. 1971) (party must have reasonable opportunity to know claims against it and meet them as the case unfolds); *Modification of Agreement 5700–4*, 10 F.M.C. 261 (1967) (opportunity must be afforded to all parties to submit evidence and argument to constitute "full hearings"); 2 Davis, *Administrative Law* (2d Ed. 1979) sec. 13.9 at 599–600 (party may submit written evidence without trial-type hearings); *Cellular Mobile Systems of Pennsylvania* v. *F.C.C.*, 782 F.2d 182, 197–199 (D.C. Cir. 1985) ("full hearing" can consist of written evidence without cross-examination).

The following findings of fact are intended to describe the violations of law while providing the factual background in the most understandable fashion possible considering the complications discussed. What the reader should bear in mind, however, notwithstanding the various complications, is that essentially, Mr. Jorge Villena operated, sometimes personally but most of the time under a corporation, in a consistent fashion. Specifically, either personally, or under a corporation, he operated an NVO business without a tariff, violated that tariff even when it was filed, and underpaid vessel-operating carriers to whom he tendered cargo by filling out bills of lading with false descriptions of the cargo.

1. Mr. Jorge Villena was born in Peru. He moved to this country and began working around 1979 or 1980. Some time thereafter he became a co-owner of an NVO known as Cari-Cargo Consolidators, Inc. This corporation, formed on September 13, 1982, was dissolved on November 10, 1983. It had filed a tariff with the Commission effective October 23, 1982.

2. Mr. Villena continued in the NVO business operating out of Miami, Florida, after the dissolution of Cari-Cargo Consolidators, Inc., in November 1983. For a time he operated without having formed a new corporation. However, on April 17, 1984, a corporation known as Cari-Cargo International, Inc. (Cari-Cargo), came into existence under Florida law. Mr. Villena was the president of this company. This company was in active business as an NVO during the major part of 1984 but appears to be inactive presently. According to its tariff and bills of lading issued, it operated from Miami to ports all over the world.

3. In December 1984, a corporation known as Sea Trade Shipping was formed. Mr. Villena is one employee of this corporation. The other is a stenographic receptionist. Sea Trade Shipping, according to its tariff and bills of lading issued, operates as an NVO to ports and points in Latin America and the Caribbean.

4. From November 11, 1983 through April 16, 1984, i.e., after dissolution of Cari-Cargo Consolidators, Inc., and before formation of Cari-Cargo International, Inc., Mr. Villena handled 86 shipments and issued bills of lading for them. During this period of time, a tariff was on file with the Commission in the name of Cari-Cargo International, Inc., although that corporation had not yet come into existence. This tariff was the same one that had been filed in the name of Cari-Cargo Consolidators, Inc. Effective March 16, 1983, the name on the title page of that tariff had been changed from Cari-Cargo Consolidators, Inc. to Cari-Cargo International, Inc.

5. Analysis of the 86 bills of lading shows that Mr. Villena rated and charged the shipments at rates and charges which differed significantly

from the rates and charges specified in the Cari-Cargo tariff on file at the time.[3]

6. The Commission's District Investigator, Mr. Albert Posnick, spoke with Mr. Villena on April 4, 1984. Mr. Villena admitted to Mr. Posnick that he had not been using the Cari-Cargo tariff to assess charges on Cari-Cargo bills of lading. He explained that when asked by a shipper for a rate, he first checked the rates of ocean carriers and tried to determine what his competitors charged. He then set his own rates for the shipment. This admission was corroborated by relevant shipping documents. Although Mr. Villena said that he would revise and use the Cari-Cargo tariff, he told Mr. Posnick, on July 10, 1984, that he had not changed his method of operation.

7. On June 25, 1985, Mr. Villena was deposed. He explained his method of operation as an NVO and again admitted that he had disregarded tariffs in determining his rates to shippers. Furthermore, while operating as Cari-Cargo, Mr. Villena paid freight forwarder compensation at three percent although the tariff had specified five percent. The matter of this discrepancy was brought to Mr. Villena's attention in March of 1984 by Mr. Posnick, but Mr. Villena did not thereafter change the tariff rate nor the amount of compensation he paid. In fact, through the series of meetings with Mr. Posnick beginning in March 1984, Mr. Villena continually acknowledged that he had not been changing his tariff to reflect the rates he had been charging when advised that he had not been following his tariff.

8. During the period from November 11, 1983 through April 16, 1984, when Mr. Villena was operating without a corporation having been formed, he filled out bills of lading issued by underlying vessel-operating common carriers, inserting false descriptions of the goods tendered to those carriers. He did this on six bills of lading during this period.[4] Mr. Villena brought sets of shipping documents to his deposition which show how he misdescribed goods on underlying carriers' bills of lading. In a typical instance, Mr. Villena filled out a vessel-operating carrier's bill of lading by inserting the words "groceries and foodstuffs" in the space provided for cargo descriptions. The vessel-operating carrier thereupon rated the goods using that description according to the carrier's tariff. In truth, however, the goods tendered to that carrier were "used personal effects and household goods," and Mr. Villena's own bill of lading issued to his shipper customer

[3] An analysis performed for the period March 1983 through February 1984 by Commission District Investigator Albert Posnick shows that on 90 bills of lading there were substantial differences between the rates and charges shown on the bills of lading and the Cari-Cargo tariff. From March 16, 1983 to November 10, 1983, the previous corporation, Cari-Cargo Consolidators, Inc., was still in existence although the name on its tariff had been changed to Cari-Cargo International, Inc., a corporation not yet legally formed. From November 10, 1983, through February 1984, therefore, Mr. Villena was not operating under an existing corporation.

[4] There were actually seven bills of lading misdescribed by Mr. Villena in the record in 1983 and 1984. However, the first of them (Ex. 2, sub. ex. 5–1) is dated September 22, 1983, at a time when Cari-Cargo Consolidators, Inc., was still in existence. The remaining six all fell within the November 11, 1983 through April 16, 1984 time period.

in the name of Cari-Cargo shows the correct description. When asked why he described the cargo to the underlying carrier incorrectly, Mr. Villena replied that he was "taking advantage of the rate." He admitted that he misdescribed the foods in order to obtain a lower rate from the vessel-operating carrier. Mr. Villena followed this pattern at least 12 times, seven while he was operating without having formed the corporation, five times after the corporation (Cari-Cargo International, Inc.) had been formed. On eight of these instances of misdescription, the aggregate amount of freight by which Mr. Villena and Cari-Cargo underpaid the vessel-operating carriers was $60,910.86, according to an analysis performed by Mr. Roland E. Ramlow of the Commission's Bureau of Tariffs.

9. As to the above 12 misdescribed bills of lading Mr. Villena customarily issued several of his own bills of lading in the name of Cari-Cargo (before and after Cari-Cargo was incorporated) for his shipper-customers per each misdescribed bill of lading of the underlying carrier. Mr. Villena acknowledged that these Cari-Cargo bills of lading were consistently not rated in accordance with the Cari-Cargo tariff.

10. After Cari-Cargo International, Inc., became incorporated on April 17, 1984, Cari-Cargo, through Mr. Villena, issued 22 bills of lading, the last one of record issued in August 1984. The shippers involved were not charged rates specified in the Cari-Cargo tariff. As mentioned, Cari-Cargo, through Mr. Villena, also misdescribed cargo on five underlying carriers' bills of lading during this time period.

11. As noted earlier, Sea Trade Shipping was incorporated in December 1984, and Mr. Villena is one of only two employees of the corporation. Sea Trade filed its tariff with the Commission, effective September 5, 1985. However, from February through August 1985, Sea Trade handled 20 shipments and issued bills of lading for each. Eleven of these bills of lading had been issued prior to June 25, 1985. However, at his deposition taken on June 25, 1985, Mr. Villena swore that as of that date, he had issued only one Sea Trade bill of lading.

12. Sea Trade issued 14 bills of lading for shipments handled after September 5, 1985, the effective date of its filed tariff. The first was dated September 9, 1985; the last, December 20, 1985. A comparison between the rates and charges on these 14 bills of lading and the rates specified in the Sea Trade tariff shows that Sea Trade, through Mr. Villena, charged other than the rates and charges shown in the tariff on each of the shipments. For example, the first bill of lading, dated September 9, 1985, shows cargo of "plastic toilet seats" moving to Brazil rated at $260.00 W/M. There is no such rate in the tariff for this commodity, as described, moving to Brazil. Nor indeed is there a rate of S260.00 W/M for any item in the entire tariff. Furthermore, the bill of lading shows a bunker surcharge of $27.50 and a $10.00 bill of lading charge but the tariff states that no bunker surcharge applies and specifies a bill of lading charge of only $7.50.

13. The above pattern continued through all the 14 bills of lading issued by Sea Trade. For example, the next bill of lading in the series, dated September 13, 1985, shows cargo of "personal effects" moving from Miami to Chile. The cargo is rated at $297.00 W/M and shows a bill of lading charge of $10.00. However, the tariff shows a rate of $255.00 W/M for personal effects moving from Miami to Chile and, as noted, a bill of lading charge of only $7.50.

14. The pattern of ignoring tariff rates has characterized Mr. Villena's career whether operating as himself, Cari-Cargo International, or Sea Trade Shipping, from November 11, 1983, through December 1985. Indeed, the same pattern can be found as far back as March 1983 when a previous corporation, Cari-Cargo Consolidators, had been in existence.

DISCUSSION AND CONCLUSIONS

The issues presented in this investigation as to possible violations of law are whether the three named respondents, Cari-Cargo International, Inc. (Cari-Cargo), Mr. Jorge Villena, and Sea Trade Shipping committed three types of violations. More specifically, did these three respondents operate as a common carrier without filing their tariffs with the Commission, a violation of section 18(b)(1) of the 1916 Act, and section 8(a)(1) of the 1984 Act; did they charge rates other than those specified in tariffs that they may have filed with the Commission, a violation of section 18(b)(3) of the 1916 Act, and section 10(b)(1) of the 1984 Act; and finally, did they knowingly and willfully obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would be applicable by means of false billing, false classification, or any other unjust or unfair device or means, a violation of section 16, Initial Paragraph, of the 1916 Act, and section 10(a)(1) of the 1984 Act? The provisions of the 1984 Act are virtually identical to those of the 1916 Act with regard to these types of violations. The three relevant provisions of the 1984 Act, which became effective on June 18, 1984,[5] are as follows:

Section 8(a)(1), 46 U.S.C. app. sec. 1707(a)(1), provides in relevant part:

> . . . [E]ach common carrier . . . shall file with the Commission and keep open to public inspection, tariffs showing all its rates, charges, classifications, rules and practices between all points or ports on its own route and on any through transportation route that has been established.

Section 10(b)(1), 46 U.S.C. app. sec. 1709(b)(1), provides in relevant part:

[5] The Shipping Act of 1984 was enacted as P.L. 98–237, 98 Stat. 67, and became effective on June 18, 1984. See *Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984*, 22 SRR 976 (1984); *Marcella Shipping Co., Ltd.*, 28 F.M.C. 259, 261 n.2 (I.D.; F.M.C. notice of finality, March 26 1986); section 21, P.L. 98–237 (46 U.S.C. app. sec. 1701).

> No common carrier . . . may (1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs. . . .

Section 10(a)(1), 46 U.S.C. app. sec. 1709(a)(1), provides in relevant part:

> No person may (1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

Hearing Counsel summarize their contentions as follows (Opening Brief at 2–3):

> Hearing Counsel's evidence, undisputed by Mr. Villena, consists of incontrovertible documentary evidence showing that Mr. Villena consistently operated as a non-vessel operating common carrier (NVO) without a tariff on file at the Commission, that when he did file a tariff, both as Cari-Cargo and Sea Trade, he ignored it, and as a shipper to underlying carriers he deliberately misdescribed cargo to receive lower freight rates. Further, as to his activities prior to June 25, 1985, Mr. Villena corroborates the documentary evidence by admitting and acknowledging the activities Hearing Counsel contend violate the Shipping Acts.

Not only does the undisputed evidence show that respondent Villena, at times acting in the name of Cari-Cargo and Sea Trade Shipping, did commit the above violations of law, contend Hearing Counsel, but "Mr.. Villena acted with complete disregard for the requirements of the Shipping Acts and later, after the requirements were brought to his attention, deliberately and repeatedly acted in violation of the Shipping Acts." (Opening Brief at 2.) Moreover, as to his activities as Sea Trade Shipping, "notwithstanding Mr. Villena's sworn statement on June 25, 1985 . . . that he had only issued one Sea Trade bill of lading as of that date, he had actually issued several." (Opening Brief at 3.)

I agree with Hearing Counsel. Although at times it is not always clear whether Mr. Villena was acting in his own capacity rather than in the capacity of one of the two corporations of which he was an employee or officer, what is clear and convincing is that from a period dating at least from March 1983 through December 1985, Mr. Villena was actively engaged in the business of an NVO and either filed no tariff or, if he did, ignored the tariff. Furthermore, Mr. Villena customarily misdescribed commodities on underlying vessel-operating common carriers' bills of lading for the purpose of obtaining transportation at less than the lawful charges provided in those carriers' tariffs. The record clearly reveals a consistent

pattern of operations by which Mr. Villena would quote rates to his shipper-customers attempting to keep those rates at a level which would be competitive with other NVOs and then reduce his own freight costs as a shipper *vis-a-vis* the vessel-operating carriers by misdescribing the commodities tendered to those carriers, in effect, cheating those carriers. Furthermore, even after Mr. Villena had been visited by a Commission investigator and had been warned about the impropriety of such conduct, he continued operating in the same fashion. Furthermore, when testifying under oath at his deposition held on June 25, 1985, Mr. Villena's statements as to the number of bills of lading he had issued in the name of Sea Trade Shipping were incorrect, mentioning only one instead of the eleven that he had in fact issued before that date.

Summary of Violations

From November 11, 1983, through April 16, 1984, when there was no NVO corporation in existence with which Mr. Villena was affiliated, Mr. Villena handled 86 shipments and issued bills of lading for them in the name of "Cari-Cargo International, Inc." At that time he had on file with the Commission a tariff in the name of "Cari-Cargo International, Inc.," although that corporation had not yet been legally formed. Mr. Villena assessed his shipper-customers' rates and charges other than those specified in the tariff then on file. These were violations of section 18(b)(3) of the 1916 Act, then in affect.[6]

During this same period of time, Mr. Villena filled out bills of lading of underlying vessel-operating carriers on six occasions by inserting false descriptions of the cargo he was tendering to these underlying carriers. This was done for the admitted purpose of obtaining lower rates than the rates that would have been applicable under the correct descriptions. These were violations of section 16 Initial Paragraph of the Shipping Act, 1916, then in effect.

[6] It could be argued, alternatively, as Hearing Counsel note (Op. Br. at 15), that Mr. Villena violated section 18(b)(1) by operating without a tariff on these 86 occasions from November 11, 1983 through April 16, 1984, because the tariff on file was in the name of "Cari-Cargo International, Inc." and not "Jorge Villena." I find rather that Mr. Villena violated section 18(b)(3) by charging rates other than those specified in that tariff. This seems to conform better to the facts. First, a tariff was on file, although not in the name of Jorge Villena. Second, the bills of lading issued were issued in the name of "Cari-Cargo International, Inc." although that corporation had not yet been born. Therefore, in reality, Mr. Villena, who was incurring personal liability in these operations, was in effect doing business in the name of Cari-Cargo. Third, Mr. Villena knew that there was a tariff on file which he knew he was supposed to amend to conform to the rates he negotiated. Fourth, as his attorney advised him, prior to April 17, 1984, when Cari-Cargo was incorporated, Mr. Villena was incurring personal responsibility although using the name of the corporation. (Ex. 1, *Attachment E.*) As Florida and general law hold, persons promoting or operating for unformed corporations incur personal liability. See *Baker* v. *Bates-Street Shirt Co.*, 6 F.2d 854, 857 (1st Cir. 1925); *Ratner* v. *Central National Bank*, 414 So.2d 210 (Fla. App. D3 1982); 18 Am Jur. 2d, Corporations, secs. 6, 120, 131, 251 (1985); 18A Am Jur 2d, Corporations, sec. 263 (1985); Annotation: 41 A.L.R.2d 477. I conclude therefore that Mr. Villena was operating personally as an NVO, using the Cari-Cargo name at that time. It is what a person actually does, not what he calls himself, that determines his status. See *Possible Violations of section 18(a) of the Shipping Act, 1916*, 19 F.M.C. 43, 52 1975).

From April 17, 1984, when Cari-Cargo International, Inc., was formed under Florida law, through August 1984, Cari-Cargo, through Mr. Villena, handled 22 shipments and issued bills of lading for each of them. The rates and charges shown on the bills of lading and charged the shippers were not those specified in Cari-Cargo's tariff in effect at the time. Such practices violated section 18(b)(3) of the 1916 Act prior to June 18, 1984, and section 10(b)(1) of the 1984 Act on and after that date.

During this same time period, Cari-Cargo, through Mr. Villena, filled out five bills of lading of underlying vessel-operating carriers, inserting false descriptions of cargo for the purpose of obtaining transportation of the goods at rates lower than those that would be applicable under correct cargo descriptions. These practices constituted violations of section 16 Initial Paragraph of the 1916 Act prior to June 18, 1984, and of section 10(a)(1) of the 1984 Act after that date.

From February 28 through August 30, 1985, Sea Trade Shipping, through Mr. Villena, handled 20 shipments for which it issued bills of lading, although Sea Trade had not filed an effective tariff with the Commission until September 5, 1985. These practices were in violation of section 8(a)(1) of the 1984 Act.

From September 9, 1985 through December 20, 1985, Sea Trade Shipping, through Mr. Villena, handled 14 Shipments for which it issued bills of lading. The rates and charges shown on these bills of lading, which were assessed the shippers, were not the same as the rates and charges specified in the Sea Trade tariff. These practices were in violation of section 10(b)(1) of the Act.[7]

For easy reference the following table shows the above violations:

Table of Violations

Respondent	Type	When Occurred
Jorge Villena (using the name "Cari-Cargo International, Inc.")	Violated tariff (vs. sec. 18(b)(3), 1916 Act)	Nov. 11, 1983–April 16, 1984 (86 times)

[7] The record also discloses other violations of law and questionable practices. Between March and November 10, 1983, 42 bills of lading were misrated. At that time, Cari-Cargo Consolidators, Inc., was still in existence but the tariff on file and possibly the bills of lading showed the name "Cari-Cargo International, Inc." It may be that this earlier corporation (not named as a respondent) was operating without a tariff or that Mr. Villena was operating personally in the name of the, as yet, unformed corporation, Cari-Cargo International, Inc. The record also shows some discrepancies between Sea Trade Shipping bills of lading and underlying vessel-operating carriers' bills of lading, indicating possible misdescriptions of measurements or weights of cargo by Sea Trade, through Mr. Villena, between September 5, 1985 and December 1985, but the record is not fully developed on this point. Finally, the record shows that Mr. Villena had been paying freight forwarder compensation at five percent rather than the three percent specified in the Cari-Cargo tariff, at least between March 1983 and February 1984. Such practices would violate the Commission's regulation then in effect, 46 CFR 510.33(b) (1983). However, the Commission did not specify this matter as an issue to be determined in this proceeding.

Table of Violations—Continued

Respondent	Type	When Occurred
Same	Underpaid vessel-operating carriers by misdescriptions (vs. sec. 16 Initial Para., 1916 Act)	Nov. 11, 1983–April 16, 1984 (6 times)
Cari-Cargo International, Inc.	Violated tariff (vs. section 18(b)(3), 1916 Act; and section 10(b)(1), 1984 Act)	April 17, 1984–Aug. 1984 (22 times)
Same	Underpaid vessel-operating carriers by misdescriptions (vs. sec. 16 Initial Para., 1916 Act and sec. 10(a)(1), 1984 Act)	April 17, 1984–Aug. 1984 (5 times)
Sea Trade Shipping	Operated without tariff (vs. sec. 8(a)(1), 1984 Act)	Feb. 28, 1985–Aug. 30, 1985 (184 days; 20 shipments)
Same	Violated tariff (vs. sec. 10(b)(1), 1984 Act)	Sept. 9, 1985–Dec. 20, 1985 (14 times)

The Nature and Seriousness of the Violations

As discussed above, respondents Villena, Cari-Cargo, and Sea Trade Shipping have at various times between November 1983 and December 1985, violated various laws by operating without a tariff, by charging rates other than those specified in their tariffs, and by knowingly and willfully misdescribing cargo tendered by them to underlying vessel-operating carriers. The pattern of conduct described above appears to be the method by which Mr. Villena, sometimes personally and sometimes as employee or officer of Cari-Cargo and Sea Trade Shipping, chose to do business.

The Commission's Order of Investigation and Hearing, as amended, requires not only a determination of the question of violations of law but also whether respondents should be ordered to cease and desist from the above practices and whether penalties should be assessed. To determine those questions, it is helpful to consider preliminarily the nature of the offenses committed and their seriousness. Furthermore, perhaps respondents, who appear not to have considered that the laws they violated were sufficiently important to deter their unlawful conduct, can benefit from the following discussion if it will help them realize the purpose and importance of these laws.

Perhaps nothing is more important to effective protection of the shipping public and industry than the requirement that carriers file their tariffs and adhere to them strictly. Such were the requirements of sections 18(b)(1) and 18(b)(3) of the 1916 Act, as well as the requirements which Congress carried over into sections 8(a)(1) and 10(b)(1) of the 1984 Act. The enforcement of these laws goes to the very heart of the Commission's responsibilities, and the Commission and courts have long recognized the extreme importance of these laws. In *Ghiselli Bros.* v. *Micronesia Interocean Line,*

Inc., 13 F.M.C. 179 (1968), for example, the Commission stated (at 181–182):

> The purpose of requiring the submission of tariff schedules under section 18(b) of the Shipping Act, 1916, and regulations promulgated pursuant thereto, is to secure uniformity and equality of treatment in rates and services to all shippers. Requiring the public establishment of tariff schedules prevents unjust discrimination and undue preferences. As the court explained [in a case interpreting a similar tariff law]: Carriers, being engaged in a public employment, must serve all members of the public on equal terms. This was the doctrine of the common law. It has been explicitly stated and strengthened by the successive acts to regulate commerce. *The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost.* Secret rates will inevitably become discriminating rates. (Emphasis added.)

See also *Puget Sound Tug & Barge Co.* v. *Alaska Freight Lines,* 7 F.M.C. 550, 559 (1963); *Intercoastal Investigation,* 1 U.S.S.B.B. 400, 421 (1935); *Filing of Freight Rates in U.S. Foreign Commerce,* 6 F.M.B. 396, 399–400 (1961).

So important is the requirement that common carriers must file their tariffs and strictly adhere to them that the courts have long held that tariffs have the force and effect of law and that departure from them is not permitted even if hardship results in some cases or the carrier intended no harm. Again, the reason for such a rule is that prevention of discrimination is the paramount consideration. See discussion and cases cited in *Farr Co.* v. *Seatrain,* 20 F.M.C. 411, 414, 417 n. 8 (1978); see also *Mueller* v. *Peralta Shipping Corp.*, 8 F.M.C. 361, 364–365 (1965); *Matson Navigation Co.* v. *Capitol Co.,* 15 SRR 403, 408–409 (N.D. Cal. 1978). Therefore, sections 18(b)(1) and 18(b)(3) and corresponding provisions of the 1984 Act are violated even if the carrier acted without fault. See discussion in *Marcella Shipping Company Ltd.*, 28 F.M.C. 259, 266–268 (1984). Arguments as to good intentions, lack of knowledge, etc., however, may be considered when determining the question of penalties. *Marcella,* 28 F.M.C. at 267–268.[8]

[8] Of course, the severity of tariff-filing law has been lessened somewhat by the enactment of the "special-docket" law which authorizes the Commission to relieve carriers and shippers of the adverse effects of errors in tariffs. See *United States* v. *Columbia SS. Company,* 17 F.M.C. 8, 19–20 (1973); *Farr Co.* v. *Seatrain,* cited above, 20 F.M.C. at 414–415. Instead of negotiating rates with their shipper-customers and deliberately failing to file them in their tariffs, as these respondents did, they could, like law-abiding carriers, have at least made a good-faith attempt to file the negotiated rates in their tariffs and, if some error occurred, they could have applied for relief under the "special-docket" law. However, the record shows that these respondents never filed the negotiated rates nor made a really serious effort to do so, notwithstanding Mr. Villena's

Continued

The importance of section 16 Initial Paragraph of the 1916 Act and the corresponding provision of the 1984 Act (section 10(a)(1)) must also be emphasized. Those laws prohibit shippers or other persons from furnishing false information to carriers or otherwise deceiving them "knowingly and willfully" for the purpose of obtaining or attempting to obtain ocean transportation for property at less than the rates legally applicable.

These provisions of law were considered to be very important when they first were enacted as an amendment to the 1916 Act in 1936. The legislative history shows that the amendment was unanimously supported by every witness appearing before the congressional committee and was intended to protect both carriers and honest shippers from the deceptive practices of dishonest shippers. See *United States* v. *Peninsular and Occidental Steamship Co.,* 208 F.Supp. 957, 958–959 (S.D.N.Y. 1962); *Hohenberg Brothers Company* v. *F.M.C.,* 316 F.2d 381, 384–385 (D.C. Cir. 1963); H.R. Rep. 2598, 74th Cong., 2d Sess., at 2, 5. The present case presents an example of the type of shipper which the amendment to section 16 was intended to thwart, i.e., the shipper who misdescribes cargo and fills out false bills of lading, not only cheating the vessel-operating carrier but also honest shippers who may be competing with these respondents but who pay the legal rates for the goods they ship.

The Question of Penalties

The Commission's Order of Investigation and Hearing, as amended on January 22, 1986, requires a determination as to whether, if the three respondents violated the aforesaid provisions of law, "civil penalties should be assessed, and, if so, against whom and in what amount." (Order cited at 4.)

The current law regarding factors to be considered when fixing penalties is section 13(c) of the Shipping Act of 1984 (46 U.S.C. app. sec. 1712(c)). That statute provides:

> In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require.

The Commission's current regulation implementing the above law is 46 CFR 505.3(b) (1985). This regulation follows the statutory language quoted above but adds a factor for "deterrence and future compliance with the Commission's rules and regulations and the applicable statutes."

The previous regulation in effect under the 1916 Act and at the time of some of the violations of this case was 46 CFR 505.1 (1983), originally

letter of March 10, 1984, purporting to show a good-faith effort to comply with law. (Ex. 1, Attachment C.)

promulgated in 1979. Under that regulation, the Commission was entitled to consider such factors as inability to pay, litigative possibilities, cost of collecting claims, deterrence, and aid to enforcement and to compel compliance. The Commission could also consider whether the violation was "accidental or technical" which "may be dealt with less severely" in contrast to "willful and substantial violations." See discussion in *Marcella,* cited above, 28 F.M.C. at 271–272. There is essentially no difference between the previous criteria for determining penalties and those presently in effect. *Id.* However, in fixing the exact amount of penalties, the Commission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law. *Marcella,* 271–272; 278–280. Obviously, "[t]he prescription of fair penalty amounts is not an exact science," and "[t]here is a relatively broad range within which a reasonable penalty might lie." *Midland Pacific Shipping Co., Inc.—Independent Ocean Freight Forwarder License,* 25 F.M.C. 715, 719 (1983).

Hearing Counsel, on brief, have considered the evidence and have provided specific recommendations as to the amount of penalties to be assessed. (Opening Brief at 18–24.) After summarizing the particular violations committed by each respondent, Hearing Counsel estimate that the maximum amounts of penalties that could be assessed under a literal reading of applicable provisions of law are either $965,000 or $605,000 for respondent Jorge Villena; $230,000 for respondent Cari-Cargo International, Inc.; and $990,000 for respondent Sea Trade Shipping. (Opening Brief at 19–20.)[9]

Hearing Counsel contend that respondent Villena, acting sometimes as Cari-Cargo and other times as Sea Trade Shipping, rated shipments "with complete disregard for the lawful rate in the . . . tariff." (Opening Brief at 15.) Furthermore, they argue, "Mr. Villena spelled out quite clearly that he misdescribed cargo to underlying carriers with the express purpose of obtaining a less than proper freight rate." (Opening Brief at 17.) Moreover, state Hearing Counsel, "the record shows a pattern of deliberate and wanton conduct in violation of the Shipping Acts," and "this conduct continued even after the initiation of this proceeding." (Opening Brief at 22.) "Mr. Villena, though given every opportunity, offered no evidence

[9] Hearing Counsel thus estimate total maximum penalties for the three respondents to be either $2,300,000 or $1,825,000, depending upon whether Mr. Villena's operations prior to formation of Cari-Cargo International, Inc., were violations of section 18(b)(1) (operating without a tariff) or section 18(b)(3) of the 1916 Act (violating his tariff). These estimates are not precise. They include a seventh violation of section 16 of the 1916 Act which occurred before November 11, 1983, and a minor arithmetic error as to Cari-Cargo (22 violations times $5,000 equals $110,000, not $105,000). However, they may even be substantially understated in connection with penalties under the 1984 Act. Hearing Counsel calculate penalties under that Act at the regular rate of $5,000. However, if "willfully and knowingly committed," violations of the 1984 Act carry maximum penalties of $25,000 for each violation. Section 13(a), 46 U.S.C. app. sec. 1712(a).

either in defense of his actions or in mitigation. The record developed by Hearing Counsel shows a pattern by Mr. Villena of complete disregard for the requirements of law." (Opening Brief at 21.) Not only did Mr. Villena know that he was disregarding the tariffs but he even continued to handle Sea Trade shipments after his deposition in June 1985 when there was no effective Sea Trade tariff on file with the Commission, and later, after an effective tariff was filed, he ignored the tariff. (Opening Brief, at 21.)

As Hearing Counsel point out, violations of the tariff-filing and tariff-adherence laws (sections 18(b)(1) and 18(b)(3) of the 1916 Act; sections 8(a)(1) and 10(b)(l) of the 1984 Act) may be committed without regard to intent. In other words, a carrier can violate those laws merely by operating without a tariff and by not adhering to its tariff regardless of its knowledge or reasons because these laws are "absolute liability" statutes. (Opening Brief at 11, citing *Marcella*, cited above, 28 F.M.C. 266–268.) Evidence of intent to violate by the carrier may, however, be relevant on the question of penalties. *Marcella*, cited above, at 267–268; 272.

As to the question of violations of law prohibiting shippers from misdescribing and thereby cheating carriers, evidence of knowledge and willfullness is relevant not only to the question of penalties but to the very violations themselves. That is because both section 16 Initial Paragraph of the 1916 Act and the corresponding provision of the 1984 Act (section 10(a)(l)) state that no person may "knowingly and willfully" use false billing, false classification, etc. The Commission has held that "knowingly and willfully" as used in these statutes can mean deliberately and purposefully or intentionally or can mean conduct which shows a continuing pattern of indifference to the requirements of law. See discussion and cases cited in *Marcella*, cited above, at 273–274; see also Opening Brief at 16–17. The Commission summarized the standard test in *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954), as follows:

> The phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act.

In *Equality Plastics, Inc. and Leading Forwarders, Inc.*, 17 F.M.C. 217, 226 (1973), the Commission stated that conduct which is "plainly indifferent" to requirements of law is equivalent to wanton disregard from which an inference can be drawn that the conduct was in fact purposeful and likened this interpretation to the standard of gross negligence. However, it is clear on this record that respondents' conduct was more than plainly indifferent. It was rather deliberate and purposeful, Mr. Villena admitting that he misdescribed goods which he tendered to underlying vessel-operating

carriers with the specific intention of "taking advantage" of lower rates. There is no doubt whatsoever that his conduct was "knowing and willful."[10]

Having summarized the evidence of record showing knowing and willful violations of law and estimating the amounts of maximum penalties that could be assessed under law, Hearing Counsel compare this case with analogous cases before recommending specific penalties. Hearing Counsel refer to three cases, *Marcella Shipping Company Ltd.*, cited above; *Certified Corp. and Seaway Distribution Corp.*, 24 F.M.C. 542 (1982); and *Ariel Maritime Group,* 23 SRR 237 (I.D., remanded, 23 SRR 610 (1985).) In *Marcella,* the respondent, a vessel-operating carrier, had operated without a tariff and had violated its tariff on a number of occasions over several months. Respondent was penalized in the amount of $150,000 but provision was made for a total or partial remission of an amount over $20,000 upon a showing of remedial action and inability to pay by the carrier. In *Certified Corp.*, respondent, an NVO-shipper, which had misrated goods tendered to vessel-operating carriers in relatively small amounts on four occasions, was penalized $10,000, one-half the statutory maximum. In *Ariel Maritime Group,* the presiding judge assessed four companies a total of $260,000 for numerous violations of section 16 Initial Paragraph and section 18(b)(3) of the 1916 Act. The bulk of the penalty was assessed against one company in the amount of $150,000 for violating section 16 and $50,000 for violating section 18.

In the three cited cases, care was taken to ensure that the amount of the penalties would deter recurrence of violations of law but aggravating and mitigating factors were considered. In *Marcella,* the problem of the carrier's ability to pay was given much attention when fashioning the penalties because of concern that too severe a penalty might destroy the business of a relatively small carrier in a third-world trade.

As Hearing Counsel have noted, the above cited cases are too few to establish an easy reference for determining an appropriate penalty level. (H.C. Op. Br. at 22.) Moreover, agencies are not required to assess uniform penalties in every analogous case, although too drastic a departure from a pattern may constitute arbitrary and unfair action. See *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 186–188 (1973) (departure from uniformity in sanctions by an agency is not in itself ground for reversal); see also cases and discussion in 4 Davis, *Administrative Law Treatise* (2d Ed. 1983), sec. 20:11 at 40–43 (unevenness in assessing penalties is permissible but not excessive variance).

[10] The modern doctrine interpreting the phrase "knowingly and willfully" in administrative statutes stems from the Supreme Court's decision in *U.S.* v. *Illinois Central Railroad Co.*, 303 U.S. 239, 242–243 (1938). The Court there interpreted the phrase to mean intentional disregard or plain indifference to statutory requirements. This standard was repeated virtually verbatim by the Commission in *Misclassification of Tissue Paper,* cited above, 4 F.M.B. at 486. The Court held that the conduct had to be with knowledge and voluntary and not something done accidentally. For a similar holding under the Interstate Commerce Act, see *U.S.* v. *Joralemon Brothers, Inc.*, 174 F.Supp. 262, 263 (E.D.N.Y. 1959)

Having completed their contentions and analysis of analogous cases, Hearing Counsel conclude by recommending that respondent Jorge Villena be assessed $50,000; respondent Cari-Cargo, $25,000; and respondent Sea Trade Shipping, $25,000. Hearing Counsel note, furthermore, that although respondents did not offer any evidence that they could not pay such sums, Hearing Counsel would support the procedure set forth in *Marcella* if ability to pay became an issue, namely, requiring initial payments and possibly remitting the balance in whole or in part on a proper showing of inability to pay and of diligence.

I find that Hearing Counsel's recommendations are appropriate in their amounts and as to allocations among the three respondents. The bulk of the violations appear to have been committed by Mr. Villena personally in terms of numbers of shipments shown on the record and even when his conduct could properly be attributed to that of the two corporations, he appears to be the sole initiator of the violative practices. His only defenses appear to be that he thought he had to compete in a difficult environment, that he had filed a tariff and had intended to make some effort to file his negotiated rates in the tariff but had problems with the tariff publisher. (See Ex. 1, Attachment C.) These, of course, are rather weak defenses, and the evidentiary support is thin although respondents were given every opportunity to furnish evidence on their behalf and were even offered the assistance of a Commission investigator to help them furnish evidence regarding their financial situation. (See rulings of November 5, 1985, at 2–3.) Moreover, the record shows that even after Mr. Villena was warned about the seriousness of his conduct, he continued to operate in the same way, and he was not truthful in his testimony as to the extent of his operations with Sea Trade.

As was the case with *Marcella,* cited above, when a respondent carrier does not mount an effective defense, claims financial difficulties, and appears not to be a sizeable operation, it is difficult to determine a fair and suitable penalty. In this case, as with *Marcella,* it is necessary to send a clear message to respondents because of their persistence in operating in an unlawful manner even after warnings. However, it is also necessary to be careful not to destroy a business by imposing a totally unrealistic financial burden on it. Fortunately, a procedure has been established in *Marcella* which enables the Commission, pursuant to its specific statutory authority, to send the message of deterrence while guarding against inadvertent destruction of a small, financially-limited business if it appears in fact that the Commission is dealing with such a business.

In the instant case, penalties aggregating $100,000, allocated as described above among the three respondents, are far less than the statutory maxima, are considerably under those assessed in *Ariel Maritime Group* ($260,000) and somewhat under the amount assessed in *Marcella* ($150,000). However, Marcella was a vessel-operating carrier whereas respondents are NVOs whose assets are usually more limited. The amount of $100,000 should

send the appropriate message of deterrence to the three respondents and emphasize the seriousness of the violations. However, to guard against inadvertent destruction of what may not be major businesses, payments can be made in installments of $5,000 each month for 20 months, allocated in the same proportion among the three respondents (i.e., $2,500 from respondent Villena; $1,250 from each of the two corporate respondents). After six-months' payments, i.e., when $30,000 in penalties have been paid, respondents may, as could Marcella, petition the Commission for remission of the balance in whole or in part on a showing based upon reliable financial evidence that they cannot continue to pay and that they have taken steps to ensure that violations will not recur. See *Marcella,* cited above, 28 F.M.C. 278–279.[11]

The Question as to a Cease and Desist Order

The remaining issue framed by the Commission's Order of Investigation and Hearing, as amended, is whether a cease and desist order should issue against these respondents if they have been found to have violated the laws specified.

Hearing Counsel argue that a cease and desist order is appropriate when there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses. They also argue that the order should be tailored to the type of offenses that might be involved. (H.C. Opening Brief at 24.) They further contend that the record reveals both a persistent course of violative conduct as well as a likelihood that offenses will continue absent an order. They cite Mr. Villena's failure to conform his operations with law after warnings from Commission investigators and continued unlawful operations even during the pendency of this proceeding. (H.C. Opening Brief at 25.)

Hearing Counsel's contentions and concerns are amply supported in the record. Under applicable principles of law, a cease and desist order is eminently appropriate when, as in this case, respondents display a pattern of disregard for law so that the danger is obvious that they may resume unlawful activities unless orders are issued specifying that they cease and desist from certain conduct. See *Marcella,* cited above.

In this case, there is an obvious need to issue such an order, to impose realistic penalties, and to make sure that Mr. Villena understands how he is supposed to conduct the business of an NVO with respect to tariff-filing and adherence to both his own companies' tariffs and those of underlying vessel-operating carriers. As discussed above, there is no reason why an NVO cannot do business and seek to charge competitive rates while

[11] In *Marcella,* the carrier was allowed to pay $20,000 over the first four months before asking for remission of the balance in whole or in part. However, in this case there are three respondents, not one, and the respondents did more than operate without a tariff and violate their tariffs. They also cheated vessel-operating carriers.

complying with tariff-filing law. As seen from the numerous special-docket applications, and as discussed above, numerous carriers negotiate rates with their shipper-customers constantly with the intention of filing those rates in their tariffs, and if they make a tariff-filing error, relief is available. As the Commission has stated in *U.S.* v. *Columbia S.S. Company,* cited above, 17 F.M.C. at 19:

> The Act does not prohibit agreements between shippers and carriers provided that, prior to shipment, a rate is filed in accordance with the agreement, which rate is available to all shippers.

Accordingly, respondents Cari-Cargo, Villena, and Sea Trade Shipping are ordered to cease and desist from violating sections 8(a)(1) and 10(b)(1) of the 1984 Act (46 U.S.C. app. secs. 1707(a)(1); 1709(b)(1)) relating to the requirement of tariff-filing and tariff-compliance, respectively; and respondents are further ordered to cease and desist from violating section 10(a)(1) of the 1984 Act (46 U.S.C. app. sec. 1709(a)(1)) relating to the prohibition against misdescribing goods or otherwise obtaining or attempting to obtain transportation of property at less than the applicable legal rates.

In this case, the record shows that Mr. Villena and his two companies did not bother to comply with law although feeble efforts in that direction were made from time to time by occasionally filing tariffs. However, even when tariffs were filed, and even after he had been warned against continuing his practices, he carried on business as usual by ignoring the tariffs and cheating underlying vessel-operating carriers. Furthermore, although he willingly testified about his activities at a deposition proceeding and furnished documents, Mr. Villena did nothing further in this proceeding, neither responding to procedural rulings nor filing anything in respondents' own defense. His conduct perfectly exemplifies the Commission's description of a carrier who "knowingly and willfully" violates law, i.e., who acts "purposely and obstinately" or who "intentionally disregards the statute or is plainly indifferent to its requirements." *Misclassification of Tissue Paper as Newsprint Paper,* cited above, 4 F.M.B. at 486.

The above penalties and the cease-and-desist order are carefully designed to ensure that Mr. Villena finally understands the seriousness of his conduct and understands that he must change his method of operation, and they provide an incentive for him to reform. Thus, as noted above, if he pays penalties amounting to at least $30,000 over six months and shows that he has reformed and cannot afford further penalties, he may petition the Commission for appropriate relief. If he does not do these things and persists in his unlawful activities, the full weight of the $100,000 penalty will fall, and if he violates the cease-and-desist order, he is subject to further orders of a U.S. District Court judge in enforcement proceedings. It is hoped that the present measures and this decision will serve as a sufficient incentive for reform and that Mr. Villena and the two corporate

respondents will, if they wish to continue in business, at last begin to conduct their businesses in a lawful manner.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1379

APPLICATION OF NIPPON YUSEN KAISHA FOR THE BENEFIT OF GREAT LAKES CHEMICAL CORPORATION

ORDER OF PARTIAL ADOPTION

June 9, 1986

The Commission determined to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued in this proceeding.

On May 13, 1985, Nippon Yusen Kaisha (NYK), a member of the Transpacific Westbound Rate Agreement (TWRA or Conference), notified the Conference of its intent to take independent action to establish reduced rates of $1,060 per 20-foot container and $1,240 per 40-foot container on "Flame Retardants." The rates were published in TWRA's tariff on May 21, 1985.

On June 7, 1985, LSY Line (LSY), also a Conference member, exercised independent action and further reduced those rates to $990 per 20-foot container and $1,125 per 40-foot container. The rates were published in TWRA's tariff on June 17, 1985. Subsequently, at NYK's request on June 18, 1985, TWRA added NYK to the list of carriers which offered the lower LSY rates. However, due to clerical error, TWRA failed to cancel NYK's original independent action so that NYK's $1,060 and $1,240 rates were still in effect when the shipments at issue moved. The error was later corrected in the tariff published by TWRA on September 17, 1985.

While the Initial Decision properly grants the application for refund, it erroneously establishes the effective date of the required corrective tariff as June 7, 1985, the date LSY, and not NYK, declared independent action. In *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation (Yamashita),* Spec. No. 678 (F.M.C. February 25, 1980), 19 S.R.R. 1407, recently followed in *Application of Australia New Zealand Container Line for the Benefit of Meadowsfreight New Zealand Ltd.,* Spec. No. 1349 28 F.M.C. 183, the Commission established the effective date of the conforming tariff as either: (1) the date the tariff omitting the intended rate becomes effective; or (2) the date the intended rate would have become effective, absent the mistake. Accordingly, the effective date of the NYK conforming tariff should be June 18, 1985, the date the mistake upon which the application is based occurred. The notice required by the Initial Decision to be published by TWRA shall be amended accordingly.

THEREFORE, IT IS ORDERED, That the Transpacific Westbound Rate Agreement promptly publish in the pertinent tariff the following notice, in lieu of the one ordered by the Presiding Officer:

> Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1379, that effective June 18, 1985 and continuing through September 16, 1985, inclusive, the rate on Flame Retardants, additives or agents carried by Nippon Yusen Kaisha, from Gulf Ports and Points to Japan is $990.00 per 20-foot container and $1,125.00 per 40-foot container, for purposes of waiver or refund of freight charges, subject to all other applicable rates, regulations, terms and conditions of said rate and this tariff.

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

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

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1379

APPLICATION OF NIPPON YUSEN KAISHA FOR THE BENEFIT OF GREAT LAKES CHEMICAL CORPORATION

Application to waive freight charges of $3,225.00 granted.

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

Partially Adopted June 9, 1986

This application[2] is for permission to waive $3,225.00 of freight charges arising out of eleven shipments of Flame retardants, additives or agents from New Orleans, Louisiana, to Japan. Five shipments were to Tokyo, five to Kobe, ad one to Nagoya.

The tariff involved in this proceeding is Transpacific Westbound Rate Agreement, (TWRA) Westbound Local and Intermodal Tariff FMC No. 2 from U.S. Ports and Points (In Rule 1–A) to Northeast Asia Base Ports in Japan, Korea, Taiwan, Hong Kong and P.R.C. (In Rule 1–B). On May 13, 1985, NYK chose to take independent action under the tariff by establishing a reduced rate on Flame Retardants (Item 38–0192) for New Orleans' cargo only going to Japan of $1,060.00 per 20 foot container and $1,240.00 per 40 foot container.[3] On June 7, 1985, Y.S. Line, a fellow conference member declared independent action for a further reduction of the rate to $990.00 per 20 foot container and $1,125.00 per 40 foot container, but made the rate applicable from all U.S. Gulf Ports. As a result NYK was asked to meet this rate by the shipper, and agreed to do so. It issued a filing instruction to that effect which was relayed to TWRA and on June 18, 1985, NYK was added to the list of carriers offering the lower rate.[4] However, due to clerical inadvertence the original NYK action establishing the $1,060.00 and $1,240.00 rates was not withdrawn so that they were in effect on the dates of shipment. As a result the applicant now seeks to waive the freight charges representing the difference between the rate on file and the negotiated rates. They are as follows:

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

[2] The application was filed by Nippon Yusen Kaisha (NYK) on October 23, 1985, well within the 180 day statutory period set forth in section 8(e), Shipping Act, 1984. It was joined in by TWRA.

[3] Application, Exhibits C, D. Exhibit C which is the tariff page shows an effective date of May 21, 1985, although the application on page 4 states that it is May 23, 1985. Whichever date is correct the resulting decision would be the same.

[4] Application, Exhibit E.

Shipment No.	B/L Reference	Amount Paid	Amount Due
1	331-03300	$2,250.00	$2,480.00
2	331-03301	1,980.00	2,300.00
3	331-03321	2,970.00	3,450.00
4	331-03322	990.00	1,150.00
5	331-03323	990.00	1,150.00
6	331-03351	2,970.00	3,450.00
7	331-03407	2,970.00	3,450.00
8	331-03419	990.00	1,150.00
9	331-03427	1,125.00	1,240.00
10	331-03429	990.00	1,150.00
11	331-03464	2,970.00	3,450.00
		$21,195.00	$24,420.00
Amount to be waived			$3,225.00

The applicant ultimately withdrew the initial independent action of May 13, 1985, and substituted the negotiated rate agreed to on June 7, 1985, effective September 17, 1985.[5]

Section 8(e) of the Shipping Act, 1984, permits the Commission to waive collection of freight charges where it appears there was an error in a tariff of a clerical nature or an error due to inadvertence in failing to file a new tariff. Here, the applicants failed to withdraw an independent action which prevented a new negotiated rate from going into effect. The mistake is the kind of clerical inadvertence Congress sought to obviate in enacting section 8(e).

The application filed by NYK conforms to the requirements of Rule 92(a), Special Docket Applications, Rules of Practice and Procedure, 46 CFR 502.92(a), and therefore, after consideration of the application, the exhibits attached to it and the entire record, it is held that:

1. There was an error of a clerical or administrative nature which resulted in the failure to have timely filed a tariff containing a rate of $990.00 per 20 foot container and $1,125.00 per 40 foot container for Flame Retardant moving from New Orleans, Louisiana, to Japan, which rate would have been in effect had the error not been made.

2. The waiver will not result in discrimination among shippers[6] and there is no evidence that any carrier or parties would suffer discrimination should the application be granted.

3. Prior to applying for the waiver the applicant filed a new tariff which sets forth the rate upon which the waiver should be based.

4. The application was filed within 180 days from the date of the shipments.

Wherefore, in view of the above, it is

[5] Application, Exhibit C, 14th Rev. Pg. 802; Exhibit F.

[6] The applicant states there were no other shipments of the same commodity during the period involved here.

Ordered, that permission is granted NYK to waive a portion of the freight charges in the amount of $3,225.00 for the benefit of the shipper, Great Lakes Chemical Corp., which waiver will have no effect on the land portion of the intermodal movement, and *it is*,

Further Ordered, that NYK and TWRA promptly publish in the pertinent tariff, the following notice:

> Notice is give as required by the decision of the Federal Maritime Commission in Special Docket 1379, that effective June 7, 1985 and continuing through September 16, 1985, inclusive, the rate on Flame Retardants, additives or agents, from Gulf Ports and Points to Japan is $990.00 per 20 foot container and $1,125.00 per 40 foot container, for purposes of waiver or refund of freight charges, subject to all other applicable rates, regulations, terms and conditions of said rate and this tariff.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1381

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE BENEFIT OF EMBASSY OF TUNISIA, OFFICE OF DEFENSE ATTACHE

ORDER OF PARTIAL ADOPTION

June 9, 1986

The Commission determined on its own motion to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) served in this proceeding on March 17, 1986.

BACKGROUND

Lykes Bros. Steamship Co., Inc. (Lykes), a member of the Gulf/Mediterranean Ports Conference (GMPC or Conference), applied, pursuant to section 8(e) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. § 1707(e),[1] for permission to waive collection from the Embassy of Tunisia of a portion of the freight charges applicable on two shipments of Class C Explosives carried from New Orleans, Louisiana to Bizerte, Tunisia.

On April 9, 1985 Lykes offered the Embassy of Tunisia a rate of $385 per 40 cubic feet or 2240 pounds for Class C Explosives scheduled to be shipped on May 9, 1985. On May 3, 1985, Lykes asked GMPC to obtain from its members approval of the negotiated rate, but due to inadvertence the Conference staff failed to act timely on Lykes' request. As a result the rate was approved on May 10, 1985 and filed on May 14, 1985. The shipments sailed on May 9, 1985. The application for a waiver was filed with the Commission on November 5, 1985.

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[1] Section 8(e) authorizes the Commission to permit refund or waiver relief if:

(1) there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and the refund will not result in discrimination among shippers, ports, or carriers;

(2) the common carrier or conference has, prior to filing an application . . ., filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;

(3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, . . . that give[s] notice of the rate on which the refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and

(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

The Commission, by regulation, has defined date of shipment to mean

the date of sailing of the vessel from the port at which cargo was loaded.

46 C.F.R. § 502.92(a)(3)(iii).

DISCUSSION

The Presiding Officer properly found that the application met all the requirements of section 8(e) of the 1984 Act and correctly granted Lykes permission to waive collection of a portion of the freight charges assessed at the tariff in effect at the time of shipment. The only matter at issue is the tariff notice required by section 8(a) (3) of the Act to be published in the carrier's tariff.

Section 8(e)(2) requires the filing of a "new" tariff (conforming tariff) showing the rate on which refund or waiver adjustments are to be made. The notice required by section 8(a)(3), in addition to setting forth the rate upon which the refund or waiver to the shipper for whose benefit the application was filed, also provides the basis for *additional* refunds or waivers to *other* shippers of the same commodity not covered by the application. Because the conforming tariff rate is to apply to shipments which sailed earlier, the effective date of the conforming tariff reflected in section 8(e)(3) must accordingly be established at a date prior to the date of filing with the Commission.

In *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation (Yamashita)*, Spec. No. 678 (F.M.C. February 25, 1980), 19 S.R.R. 1407, recently followed in *Application of Australia New Zealand Container Line for the Benefit of Meadowsfreiqht New Zealand Ltd.*, Spec. No. 1349 28 F.M.C. 183, the Commission established the effective date of the conforming tariff as either: (1) the date the tariff omitting the intended rate becomes effective; or (2) the date the intended rate, absent the mistake, would have become effective. When published in the carrier's tariff, the rate becomes the basis for the refunds and waivers contemplated in section 8(e)(3) on shipments which sailed during the period set forth in the notice required by that section.

In a separate Order served this date in *Application of Sea-Land Corporation on Behalf of Sea-Land Service, Inc. as Agent for Pana-York Shipping Corporation/Frito Lay (Pana-York)*, Spec. No. 1412 (F.M.C. initial decision served March 5, 1986), 28 F.M.C. 427 (1986) the Commission has held that the 180-day statute of limitation in section 8(e)(4) applies to the refund and waiver adjustments contemplated in section 8(e)(3) as well as to the grant of refunds or waivers on the basis of the application. The Commission's decision qualifies the *Yamashita* standard accordingly. Therefore, the effective date of the conforming tariff, required by section 8(e)(2) and reflected in the tariff notice mandated by section 8(e)(3), is the date the error upon which the application is based was made, but in no event can exceed 180 days prior to the date the application is filed.

The tariff notice required by the Presiding Officer in this proceeding makes the effective date of the conforming tariff April 9, 1985, the date Lykes offered the rate to the Embassy of Tunisia. However, April 9 is 210 days before November 5, 1985, the date of filing of the application.

Consequently, based on our ruling in *Pana-York,* the earliest date the rate sought to be applied may become effective in this instance is May 9, 1985, the date the shipments at issue sailed from New Orleans. The tariff notice must be amended accordingly. The tariff notice must also be amended to limit it to carryings by Lykes so as not to bind the entire Conference membership.

THEREFORE, IT IS ORDERED, That, in lieu of the tariff notice mandated by the Initial Decision issued in this proceeding, the Gulf/Mediterranean Ports Conference promptly publish in its tariff the following notice:

> Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1381, that effective May 9, 1985, and continuing through May 13, 1985, inclusive, the rate on Class C Explosives carried by Lykes Bros. Steamship Co., Inc. from U.S. Gulf of Mexico ports of loading from and including Brownsville, Texas to, but not including Key West, Florida, to the Tunisian Armed Forces Project in Bizerte, Tunisia, is $385.00 W/M, for purposes of waiver or refund of freight charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

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

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

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1381

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE BENEFIT OF EMBASSY OF TUNISIA, OFFICE OF DEFENSE ATTACHE

Application to waive freight charges of $594.95 granted.

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

Partially Adopted June 9, 1986

This application[2] is for permission to waive $594.95 of freight charges arising out of two shipments of Class C Explosives from New Orleans, Louisiana, to Bizerte, Tunisia, aboard a vessel owned by Lykes Bros. Steamship Co., Inc. (Lykes).

The tariff involved in this proceeding is the Gulf/Mediterranean Ports Conference (GMPC), Gulf Mediterranean Tariff No. 3 (FMC–18) from U.S. Gulf of Mexico ports of loading from and including Brownsville, Texas to, but not including Key West, Florida, to all Ports (except Israeli ports) served from Huelva, East to Gibraltar and on the Mediterranean Sea from Gibraltar to Port Said (including Adriatic, Black Sea and Gulf of Toronto ports) and from North African ports in Morocco (including Atlantic West Coast Moroccan ports) to Port Said, all inclusive. Prior to April 9, 1985, and for sometime thereafter the rate on Class C Explosives was $458.00 W/M.[3] On April 9, 1985, Lykes offered the Embassy of Tunisia, through the freight forwarder representing it a rate of $385.00 per 40 cubic feet or 2,240 pounds for an upcoming shipment from New Orleans to Bizerte which was to sail on May 9, 1985. On May 3, 1985, Lykes asked the Conference to conduct a poll of members to secure approval of the negotiated rate. The Conference staff failed to timely process the request due to inadvertent error so that the rate was not approved until May 10, 1985, and was not made effective until May 14, 1985.[4]

The shipments involved here began on May 9, 1985. The applicant now seeks permission to waive the difference between the freight charges resulting from the rate then on file, $458.00 W/M and the negotiated

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

[2] The application which was filed by Lykes and joined in by the GMPC, was filed on November 5, 1985, within the 180 day statutory period set forth in section 8(e), Shipping Act, 1984.

[3] Application, Exhibit C–1.

[4] Application, Exhibit D.

rate of $385.00, such difference being $576.70 for the first shipment,[5] and $18.25 for the second shipment.[6] The lower freight rates have already been paid.

Section 8(e) of the Shipping Act, 1984, permits the Commission to waive collection of freight charges where it appears there was an error in a tariff of a clerical nature or an error due to inadvertence in failing to file a new tariff. Here, the record indicates that the Conference staff through inadvertence simply failed to process Lykes' request for a new tariff in timely fashion. It is the kind of error Congress sought to obviate in enacting section 8(e).

The application filed by Lykes conforms to the requirements of Rule 92(a), Special Docket Applications, Rules of Practice and Procedure, 46 CFR 502.92(a), and therefore, after consideration of the application, the exhibits attached to it and the entire record, it is held that:

1. There was an error of a clerical or administrative nature which resulted in the failure to have timely filed a tariff containing a rate of $385.00 W/M on Class C Explosives moving from New Orleans, Louisiana to Bizerte, Tunisia, which rate would have been in effect had the error not been made.

2. The waiver will not result in discrimination among shippers,[7] and there is no evidence that any carrier or ports would suffer discrimination should the application be granted.

3. Prior to applying for the waiver the applicant filed a new tariff which sets forth the rate upon which the waiver should be based.

4. The application was filed within 180 days from the date of the shipment.

Wherefore, in view of the above, it is

Ordered, that permission is granted Lykes, to waive a portion of freight charges in the total amount of $594.95 for the benefit of the Embassy of Tunisia; and it is,

Further Ordered, that GMPC promptly publish in the pertinent tariff the following notice:

> Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1381, that effective, April 9, 1985, and continuing through May 13, 1985, inclusive, the rate on Class C Explosives from U.S. Gulf of Mexico ports of loading from and including Brownsville, Texas to, but not including Key West, Florida, to the Tunisian Armed Forces Project in Bizerte, Tunisia, is $385.00 W/M, for purposes of waiver or

[5] Application, Exhibit A–1.

[6] Application, Exhibit A–3.

[7] The applicant states that there were no other shipments of the same commodity during the period involved here.

refund of freight charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

(S) JOHN N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1412

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF FORWARDING SERVICES, INC. AS AGENT FOR PANA-YORK SHIPPING CORPORATION/FRITO LAY

ORDER OF PARTIAL ADOPTION

June 9, 1986

The Commission determined to review the Initial Decision of Administrative Law Judge Norman D. Kline (Presiding Officer) issued in this proceeding.

BACKGROUND

Following negotiations with the shipper, Sea-Land Service, Inc., on July 18, 1985, published in its tariff a rate for potato chips applicable to Panama City, Panama. The rate included all additional charges.[1]

On July 25, 1985, Sea-Land directed that effective August 24, 1985, the tariff be amended to delete the exemption from the additional charges. Due to error, the revised tariff was published with an effective date of July 26, 1985.[2] As a result, the two shipments of potato chips which sailed on August 17, 1985, from Elizabeth, New Jersey to Panama City, became subject to higher charges than intended.

Subsequently, by tariff published on August 22, 1985, Sea-Land reinstated the exemption from the additional tariff charges and on February 13, 1985 applied pursuant to section 8(e) of the Act, 46 U.S.C. app. § 1707(e), for permission to waive collection of charges payable under the July 26, 1985 tariff.[3]

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[1] Sea-Land Service, Inc. Tariff No. 466, FMC No. 323 3rd rev. page 82–A effective July 18, 1985.

[2] *Idem*, rev. page 82–A effective July 26, 1985. The increase became effective on less than 30-day notice as required by section 8(d) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. § 1707(d).

[3] Section 8(e) authorizes the Commission to permit refund or waiver relief if:

> (1) there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and the refund will not result in discrimination among shippers, ports, or carriers;
>
> (2) the common carrier or conference has, prior to filing an application . . ., filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;
>
> (3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, . . . that give[s] notice of the rate on which the refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and

Continued

DISCUSSION

The Presiding Officer properly found that the application for waiver had been timely filed; that the tariff published on July 26, 1985 contained an error of the type contemplated in section 8(e) of the Act; and that the grant of the application would not result in discrimination among shippers, ports, or carriers. The only matter at issue here is the tariff notice required by section 8(a)(3) of the Act to be published in the carrier's tariff.

Section 8(e)(2) requires the filing of a new tariff (conforming tariff) showing the rate on which the refund or waiver will be based. The notice required by section 8(a)(3), in addition to setting forth the rate upon which the refund or waiver to the shipper for whose benefit the application was filed (application-shipper) will be based, also provides the basis for additional refunds or waivers to other shippers of the same commodity not covered by the application. In order to enable the carrier to make such additional refunds or waivers, the effective date of the "new" (or conforming) tariff, required by section 8(e)(2) of the Act, is made to relate back to a date prior to the date of filing with the Commission.

In Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation (Yamashita), Spec. No. 678 (F.M.C. February 25, 1980), 19 S.R.R. 1407, recently followed in *Application of Australia New Zealand Container Line for the Benefit of Meadowsfreight New Zealand Ltd.*, Spec. No. 1349, (F.M.C. January 16, 1986), 28 F.M.C. 183, the Commission established the effective date of the conforming tariff, required by section 8(e)(2) and reflected in the tariff notice prescribed by section 8(e)(3), as either: (1) the date the tariff omitting the intended rate becomes effective; or (2) the date the intended rate absent the mistake would have become effective.[4] When published in the carrier's tariff, the rate becomes the basis for the refunds and waivers contemplated in section 8(e)(3) on shipments which sailed during the time period set forth in the notice.

In this instance, applying *Yamashita*, the effective date of the conforming tariff would be July 26, 1985, the date the mistake in filing occurred. However, because July 26 is 202 days from the date the application was filed, this raises the question, not directly addressed in *Yamashita*, of whether the 180-day statute of limitation embodied in section 8(e)(4) of the Act applies to refund and waiver adjustments on shipments of other shippers authorized by section 8(e)(3) of the Act.

Certain discussion in the Commission's decision in *Application of U.S. Atlantic & Gulf-Jamaica Freight Association and Sea-Land Service, Inc.*

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(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

The Commission, by regulation, has defined date of shipment to mean the date of sailing of the vessel from the port at which cargo was loaded. 46 C.F.R. 502.92(a)(3)(iii).

[4] 19 S.R.R. at 1408.

for the Benefit of United Brands-Chiquita (United Brands), Spec. No. 1102 (F.M.C. order denying petition for reconsideration October 12, 1984), 27 F.M.C. 135, although not necessary to the decision there, is relevant here. In holding that it lacked jurisdiction to grant relief to the application shipper on certain shipments occurring earlier than 180 days from the date of filing of the application, the Commission in United Brands rejected the argument that shippers other than the application-shipper might benefit from an extension of the deadline. The Commission explained that relief to other shippers:

> . . . is actually dependent upon a favorable resolution of the legal issue, *i.e.,* that the Commission has the power to grant such an extension. However, the Commission has concluded that we have no such power.[5]

Although noting that the Commission's decision in *United Brands* "seems to hold that relief cannot be granted to any shipment occurring before the 180-day period and that a conforming tariff notice cannot be backdated to the dates enunciated in *Yamashita* . . . if such rates fall earlier than the 180-day period," the Presiding Officer nevertheless concludes that the detrimental effect the short notice rate increase might have had on other shippers of the same commodity warrants the extension of the effective date of the conforming tariff beyond the 180-day limit, to the day the mistake in filing occurred.[6] We disagree.

In light of the right given the shipper to file its own application (a right subject to the 180-day limitation), it appears that the anti-discrimination provision in section 8(e)(1) was only intended to ensure that other shippers of the same commodity, whose shipments moved within 180 days from the date the application was filed, would receive the same treatment as the application-shipper.[7] To interpret the statute otherwise could result in either extending to some shippers a relief which would have to be denied to the application-shipper or would allow the application-shipper to get indirectly a refund/waiver it could not obtain directly.

[5] 27 F.M.C. 136.

[6] This conclusion is somewhat surprising in view of the Presiding Officer's decisions in *Application of Gulf European Freight Association (as Successor to Gulf United Kingdom Conference) and Sea-Land Corporation on behalf of Sea-Land Service, Inc. for the Benefit of Griffin & Brand of McAllen, Inc.,* Spec. No. 1378 (F.M.C. initial decision served November 29, 1985), 23 S.R.R. 624, and *Application of Sea-Land Corporation on Behalf of Sea-Land Service, Inc. for the Benefit of Catelli-Primo Ltd.,* Spec. No. 1383 (F.M.C. initial decision served December 13, 1985), 23 S.R.R. 626, adopted by separate orders issued this date. There, the Presiding Officer acknowledged the jurisdictional limitation imposed by section 8(e)(4) to the grant of additional refunds or waivers provided in section 8(e)(3) of the Act.

[7] While the legislative history of the 1984 Act gives no particular guidance on this issue, the legislative history of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. app. §817(b)(3), the predecessor to section 8(e), indicates that Congress intended to confine relief and ensure nondiscriminatory treatment to shippers who shipped within the 180-day period of limitation. As explained by then-Chairman Harllee and an industry spokesman, the 180-day period was intended to make "mandatory refunds applicable [to] all shippers for similar shipments made from the date of shipment until the date of application . . ." and would also "eliminate or minimize stale claims." See Hearing Before Senate Subcommittee on Merchant Marine and Fisheries, 90th Cong., St. Sess. on S. 1905 (November 20, 1967) at 7, 15.

Consideration also must be given to the rule that when a statute which creates a right unknown at common law contains a limitation of time, the expiration of that time extinguishes both the right and the remedy.[8] Applied to section 8(e) of the Act, this means that after the expiration of the 180-day period, the Commission no longer has the authority to allow refunds or waivers whether they be granted on the application or based on the tariff notice issued thereunder.[9]

We therefore conclude that the 180-day limitation of section 8(e)(4) of the Act applies to any refund and waiver, be it granted on the application or under section 8(e)(3).[10] Consequently, application of the *Yamashita* standard to the determination of the effective date of the conforming tariff must be limited accordingly.

The tariff notice required by the Presiding Officer in this proceeding makes the effective date of the conforming tariff July 26, 1985. However, July 26, 1985 is 202 days before February 13, 1986, the date of filing of the application. Consequently, the earliest date the rate sought to be applied may become effective in this instance, is August 17, 1985, which is 180 days prior to the application filing date and the date the shipment at issue sailed from Elizabeth, New Jersey. The tariff notice must be amended accordingly.

THEREFORE, IT IS ORDERED, That in lieu of the tariff notice mandated by the Initial Decision issued in this proceeding, the Gulf/Mediterranean Ports Conference promptly publish in its tariff the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1411, that effective August 17, 1985, and continuing through August 21, 1985, the rate on Potato Chips: Per 40' container, is $2,050.00, inclusive of all additional charges, and applies to Panama City, R.P. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodity described which may have been shipped during the specified period of time.

[8] *U.S. v. Studivant*, 529 F.2d 673, 675–676 (3rd Cir. 1976); *Kalmich v. Bruno*, 553 F.2d 549, 553 (7th Cir. 1977); *M.S. Chambliss v. Coca-Cola Bottling Corp.*, 274 F.Supp. 401 (E.D. Te. 1967); *U.S. v. So. Pac. Co.*, 210 F.Supp. 760 (N.D. Pa. 1962). The Commission denied claims for reparation brought under section 22 of the Shipping Act, 1916, 46 U.S.C. app. § 821, on the same ground. *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471 (1968); *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959).

[9] Section 8(e)(3) specifically addresses refunds or waivers to be made to unidentified shippers of "other shipments." Were an application filed for their benefit, it would be subject to the 180-day limit.

[10] Unlike the specific 180-day provision in section 8(e)(4), the non-discrimination provision in section 8(e)(1) is expressed in generic terms. A principle of statutory construction is that a specific provision of law takes precedence over a general provision. *See* 2A Sutherland, *Statutory Construction*, § 46.05 (4th Ed. 1984).

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

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

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1412

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF FORWARDING SERVICES, INC. AS AGENT FOR PANA-YORK SHIPPING CORPORATION/FRITO LAY

Application for permission to waive the sum of $1,746.69 granted.

Applicant had intended to maintain a rate on potato chips inclusive of additional tariff charges, until August 24, 1985, but its tariff publishing department mistakenly changed the rate on same-day notice, July 26, increasing the rate by adding the additional tariff charges. The short-notice rate increase subjected a shipment to increased costs.

The conforming, remedial tariff notice is allowed to be backdated to an effective date when the error first appeared in the tariff although such date is more than 180 days before the application was filed. This type of notice was permitted in a previous Commission decision which, because it offset the effects of a short-notice rate increase, was not overruled by the Commission in a later decision interpreting the 180-day period of limitation.

John J. Brennan for applicant Sea-Land Corporation.

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

Partially Adopted June 9, 1986

By application filed February 13, 1986, Sea-Land Corporation on behalf of Sea-Land Service, Inc., seeks permission to waive $1,746.69 in freight in connection with a shipment of potato chips which Sea-Land carried from Elizabeth, New Jersey, to Panama City, Panama, on a ship sailing from Elizabeth on August 17, 1985. The requested waiver would ultimately benefit the shipper, Frito Lay, through its agent, Pana-York Shipping Corporation.

Sea-Land's supporting evidence is thorough and complete. It shows that Sea-Land had intended to maintain a rate of $2,050 per 40-foot container, inclusive of all additional tariff charges, for shipments of potato chips to Panama, through August 23, 1986. This rate had been filed effective July 18, 1985, after negotiations had been held with a shipper. However, on July 25, Sea-Land's Americas Pricing Department instructed Sea-Land's Tariff Publications Department in New Jersey to change the rate by deleting the provision that the rate included additional charges, which provision

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

was contained in Note 3 in the tariff. The change was supposed to become effective on August 24, 1985, i.e., on 30 days' notice. However, the Tariff Publications Department mistakenly advanced the effective date from August 24 to July 26, 1985. This mistake not only caused a short-notice rate increase but subjected the shipment of potato chips sailing on August 17 to unintended increases in costs totaling $1,746.69. Because the Shipper paid freight under the unincreased rate, Sea-Land now seeks permission to waive this additional amount.

The evidence shows that an error occurred in Sea-Land's tariff on July 26, 1985, when Sea-Land's tariff personnel mistakenly advanced a rate change which was supposed to become effective August 24. Such error is remediable under section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(e), and the Commission's regulation, 46 CFR 502.92(a). The evidence also shows, as required by that law, that the application and the new, corrective tariff were filed timely, and there is no evidence that discrimination among shippers, carriers, or ports would result if the application is granted.[3]

The Conforming Tariff Notice

When special-docket applications are granted, it is customary to order applicants to file "an appropriate notice" in the tariff showing the rate on which the requested refunds or waivers are based. See section 8(e)(3) of the 1984 Act, 46 U.S.C. app. sec. 1707(e)(3). That provision of law indicates that this tariff notice will inform the public and help ensure that other affected shipments will be treated the same way as may be appropriate. However, the law at present appears to be unsettled with regard to the fixing of the effective date of the conforming rate in the tariff notice.

In *Application of Yamashita-Shinnihon for Nissho-Iwai,* 19 SRR 1407 (1980), the Commission held that the critical time period which is to be used when determining the effects of the grant of an application on similarly situated shippers "commences on the day the tariff omitting the intended rate becomes effective or on the day the intended lower rate would have become effective absent the mistake and terminates on the day before the effective date of the conforming tariff." 19 SRR at 1408. The day the tariff omitting the intended rate became effective in *Yamashita-Shinnihon* was January 1, 1979. The date of sailing of the shipment involved

[2] There were five additional tariff charges that Sea-land had intended to include in the base rate but, because of the error, would be assessed against the shipment. These are: bunker surcharge, Panama handling, delivery charge, container charge, and documentation charge. Except for the documentation charge ($12.00), they would all be assessed against 56.875 measurement tons, the dimension of the shipment. The five charges total $1,746.69. (See Exhibit No. 5, page 1.)

[3] The application was filed on February 13, 1986, which is 180 days after date of shipment (sailing), which was August 17, 1985. The new, corrective tariff was filed to be effective on August 22, 1985. The application states that no other shipments were involved and that applicant has no information or evidence as to whether a grant of the application would result in discrimination among ports or carriers.

in that case was April 17, 1979, which was 173 days before the filing of the application (October 5, 1979). (See I.D., 22 F.M.C. 675 (1980).) The Commission held that it was wrong to backdate the relief only to the date on the bill of lading (April 12, 1979) and instructed the carrier-applicant to determine whether there were any other shipments of the subject commodity going back to January 1, 1979, "to ensure that such refund will not result in discrimination. . . ." (19 SRR at 1408.)

The decision in *Yamashita-Shinnihon* suggests that it would be proper to backdate a conforming tariff notice to the date the error first appeared in a tariff even if that date occurred as long as 277 days before the application was filed. (January 1 falls 277 days before October 5.) However, in SD 1102, *Application of U.S. Atlantic & Gulf-Jamaica Freight Association and Sea-Land for Chiquita,* 26 F.M.C. 605 (1984), the Commission denied an application which had sought relief for shipments of the same beneficiary shipper, which shipments had occurred more than 180 days before the filing of the application. The Commission held that the 180-day requirement was "jurisdictional" and limited relief to five shipments out of a total of 38 because the remaining 33 shipments fell outside the 180-day period. (See 26 F.M.C. at 606, 607.) The Commission distinguished previous decisions which had apparently permitted relief to such early shipments which had been shipped by shippers other than the beneficiary for whom the applications were originally filed. Such "relation back" was done in those cases, according to the Commission, for the purpose of "preventing discrimination among shippers." (See 26 F.M.C. at 606.)

Although it may not have been clear from the first Commission decision in SD 1102 as to whether the Commission could grant relief to early shipments of other shippers as opposed to early time-barred shipments of the same shipper-beneficiary, in its decision on reconsideration (27 F.M.C. at 135) the Commission appeared to have slammed the door on all shipments occurring earlier than the 180-day period regardless of who shipped them. Thus, on reconsideration, the Commission addressed the possibility that relief could be granted for other shippers having time-barred shipments by stating as to such other shippers, that "the Commission has concluded that we have no such power." (27 F.M.C. at 136.) Furthermore, as to the previous decisions suggesting such power, the Commission stated that "[t]o the extent those decisions conflict in part with the result in this case, they are overruled." (*Id.*)

It appears, therefore, that although the decision in *Yamashita-Shinnihon* would authorize relief and a corresponding conforming tariff notice backdated to the date an error first appeared in a tariff or the date the intended rate would have appeared in the tariff but for the error, the later decision in SD 1102 seems to hold that relief cannot be granted to any shipment occurring before the 180-day period and that a conforming

tariff notice cannot be backdated to the dates enunciated in *Yamashita-Shinnihon* if such dates fall earlier than the 180-day period.

The present case raises the problem of how to deal with the apparent discrepancy between *Yamashita-Shinnihon* and SD 1102. In the present case, the application was filed on February 13, 1986. The date of shipment (sailing) was August 17, 1985, which is 180 days before the filing date. Therefore, the shipment qualifies for relief. However, if I were to apply the *Yamashita-Shinnihon* decision, I would backdate the effective date of the tariff notice to July 26, 1985, the day the tariff omitting the intended rate became effective. But this date is 202 days before the filing of the application, and if the tariff notice contains such an effective date, theoretically it could apply to shipments occurring before the 180-day time period. However, other facts in this case permit a solution to the above problem.

One of the decisions in which the Commission had allowed the intended rate to relate back more than 180 days prior to the filing of the application was *PWC for the Benefit of Minnesota Mining &* Manufacturing Co., 21 SRR 793 (1982). However, as the Commission explained in SD 1102 (26 F.M.C. at 606), in *Minnesota Mining* the carrier-applicant had not only committed a tariff-filing error but had increased the rate without giving the 30-days' notice required by law.[4] The tariff notice was therefore allowed to extend back to offset the effects of the short-notice rate increase although technically the application was granted only for shipments falling within the 180-day period. (*Id.*)

The present case presents exactly the same situation as in *Minnesota Mining*. As Sea-Land concedes, on July 26, 1985, its Tariff Publishing Department increased the rate on potato chips on same-day notice.[5] Therefore, if the conforming tariff notice is related back to July 26, 1985, in accordance with the *Yamashita-Shinnihon* decision, it will also offset the effects of the short-notice rate increase as was done in *Minnesota Mining*. Therefore, even if, technically, relief could not be granted for time-barred shipments occurring between July 26 and August 17, 1985, under the special-docket law, relief could be granted and the tariff notice could be related back to July 26 in accordance with *Minnesota Mining*, which, because it is based on a short-notice rate increase as well as a tariff-filing error, is not inconsistent with the decision in SD 1102.

For the foregoing reasons, the tariff notice which Sea-Land will be ordered to file will relate back to July 26, 1985.

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[4] Section 8(d) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(d), provides that "No . . . change in an existing rate that results in an increased cost to the shipper may become effective earlier than 30 days after filing with the Commission." The Commission has held under corresponding provisions of the 1916 Act that if such a rate change has been filed, the new rate will not be effective for the first 30 days. See *Petition of PWC and OOCL-Seapac Service for Declaratory Order*, 25 F.M.C. 723, 724–725 1983); *E.I. Du Pont* v. *Sea-Land Service, Inc.*, 22 F.M.C. 525, 535 n. 9 (1980).

[5] See Affidavit of Lorraine Majewski, Supervisor of Tariff Typists, fourth paragraph.

Instructions to Applicant

The application is granted provided that Sea-Land complies with the following instructions:

1. Sea-Land 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. 1412, that effective July 26, 1985, and continuing through August 21, 1985, the rate on Potato Chips: Per 40′ container, is $2,050.00, inclusive of all additional charges, and applies to Panama City, R.P. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodity described which may have been shipped during the specified period of time.

2. Sea-Land shall waive the sum of $1,746.69 for the ultimate benefit of the shipper, Frito Lay, shall file the above tariff notice, shall adjust freight forwarder compensation, if necessary, and shall notify the Commission of the action taken within the time period prescribed by the Commission in its notice terminating this proceeding.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–4

FOUR WINDS INTERNATIONAL, INC. APPLICATION FOR A LICENSE AS AN OCEAN FREIGHT FORWARDER

NOTICE

June 16, 1986

Notice is given that the time within which the Commission could determine to review the May 9, 1986, dismissal in this proceeding has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–4

FOUR WINDS INTERNATIONAL, INC. APPLICATION FOR A LICENSE AS AN OCEAN FREIGHT FORWARDER

MOTION TO DISMISS GRANTED

Finalized June 16, 1986

This case arose as a result of an application for a license to act as an ocean freight forwarder by Four Winds International, Inc. (FWI), and the Commission's Order of Investigation and Hearing served on January 31, 1986. The Order states that:

> The Commission is unable, on the existing record, to conclude that FWI has the requisite character to perform forwarding services (p. 3)

and that:

> . . . a formal investigation and hearing is instituted to determine whether Four Winds International, Inc., possesses the necessary character to be licensed as an ocean freight forwarder.

By Motion dated April 22, 1986, FWI indicates it has withdrawn its application for an ocean freight forwarder license and asks that this proceeding be dismissed. Hearing Counsel supports the Motion.

Wherefore, it is,

Ordered, that since the question presented by the Commission's Order of Investigation and Hearing, served January 31, 1986, is now moot, this proceeding is hereby dismissed.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–10

VOLGA FORWARDERS SERVICE, INC.—APPLICATION FOR AN OCEAN FREIGHT FORWARDER LICENSE

NOTICE

June 16, 1986

Notice is given that the time within which the Commission could determine to review the May 6, 1986, discontinuance of the investigation in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–10

VOLGA FORWARDERS SERVICE, INC.—APPLICATION FOR AN OCEAN FREIGHT FORWARDER LICENSE

APPLICATION DISMISSED

Finalized June 16, 1986

By letter, dated April 29, 1986, counsel for Volga Forwarders Service, Inc., the applicant for an ocean freight forwarder license, gave formal notice that the application was withdrawn.

Accordingly, the application is ordered dismissed, without prejudice.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NOS. 1526(I) THROUGH 1531(I)—
A & A INTERNATIONAL

v.

KAWASAKI KISEN KAISHA, LTD.

ORDER REMANDING PROCEEDING

June 17, 1986

These informal complaints, filed on October 24, 1984 under sections 10(b)(1)–(3) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. §§ 1709(b)(1)–(3), allege overcharges on shipments which moved while the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. §§ 801–842, was still applicable to transportation in the foreign commerce of the United States.[1]

A & A International (A & A) claims $55,000, plus attorneys' fees, from Kawasaki Kisen Kaisha, Ltd. (K Line) for alleged freight overcharges arising from 30 shipments[2] transported by K Line from Japan and Hong Kong to several United States West and East Coast ports. K Line bills of lading indicate that these shipments occurred between May 9 and December 1, 1983. On March 7, 1986, Donald F. Norris (Settlement Officer) issued an Initial Decision (I.D.) in which he concluded that the two-year limitation in section 22 of the 1916 Act, 46 U.S.C. § 821 (1983), *amended by* 46 U.S.C. app. § 821 (1984), rather than the three-year limitation in section 11(g) of the 1984 Act, 46 U.S.C. app. § 1710(g), was applicable to the claims. The Commission determined to review the Settlement Officer's decision.

DISCUSSION

Upon review, we have decided to reverse the Settlement Officer's conclusion that the two-year statute of limitations found in the 1916 Act bars recovery on any claim based on a cause of action which occurred more than two years prior to October 24, 1984, the date upon which the claims were filed. We therefore will remand the proceeding for a decision on the merits. In taking this action, we acknowledge that the issue of whether the three-year statute of limitations contained in the 1984 Act can be applied to conduct which occurred while the 1916 Act was still in effect is a complex one. The Settlement Officer's conclusion that a statute of

[1] The Shipping Act of 1984 was enacted on March 20, 1984 and became effective June 18, 1984.

[2] The shipments were "Armaton" electronic toys, computer keyboards, power supply devices, toner for copiers, and computer parts.

limitations which bars the right as well as the remedy can not be applied retrospectively finds support in a number of cases. On the other hand, there exists another line of cases which have, under similar circumstances, applied an increased statute of limitations retrospectively, upon a finding that it would not deny the parties due process or otherwise result in manifest injustice. Although the Commission, contrary to the Settlement Officer, believes that the latter precedent represents the better view, we commend the Settlement Officer on his thoughtful analysis of this difficult issue.

Before directly addressing the issue presented here, it is useful to focus on the nature and purpose of statutes of limitation. The Supreme Court's observations in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), are particularly instructive:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. [Footnote omitted] They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual, He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

In the absence of a statutory directive or legislative history to the contrary,[3] a newly enacted statute may be applied retrospectively to conduct occurring prior to enactment unless it would deny due process to the parties[4] or would result in "manifest injustice". Whether retrospective application of a statute would result in "manifest injustices" depends on three factors: (1) the nature and identity of the parties, (2) the nature of the parties' rights, and (3) the impact of the change in the law on those rights. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

In determining whether retrospective application of a lengthened statute of limitations would deny due process or would result in "manifest injus-

[3] The legislative history of the 1984 Act contains no expression of congressional intent to apply the two-year limitation in the 1916 Act in foreign commerce after the effective date of the 1984 Act.

[4] "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315 (1945).

tice'', courts have drawn a distinction between statutes of limitation that simply bar a remedy and those that bar the right as well as the remedy. For example, in *Campbell* v. *Holt,* 115 U.S. 620 (1885), the Supreme Court found that the repeal of a statute of limitations applying to personal debts arising from a contract did not deny due process to a debtor, even though it revived a remedy previously barred by the former statute of limitations. The Court reasoned that although the running of the former statute of limitations created a valid defense to a suit under a contract, it did nothing to destroy or change the nature and character of the debtor's contractual obligations. In other words, the running of the statute of limitations did not give the debtor the ''right'' to avoid his obligation to pay under the contract. Thus, the removal of the statute of limitations defense, which the Court characterized as a ''purely arbitrary creation of the law'', did not result in a denial of due process.

In *William Danzer Co.* v. *Gulf R.R.,* 268 U.S. 633 (1925), the Court addressed the issue of whether an amendment to the Interstate Commerce Act increasing the statute of limitations from two to three years could *revive* a cause of action for overcharges which had been extinguished by the running of the two-year period at the time of the amendment. Unlike the situation in *Holt,* ''[o]n the expiration of the two-year period, it was as if liability had never existed.'' *Danzer,* 268 U.S. at 636. The Court stated that the three-year period could not be applied retrospectively because it would deprive the carrier of its property without due process of law.

Shortly after *Danzer,* the Interstate Commerce Commission applied the new, longer statute of limitations to claims which were *not* barred by the previous statute of limitations. *J.G. Curtis Leather Company* v. *Pennsylvania Railroad Company,* 123 I.C.C. 1, 3 (1927); *Sturges Company* v. *Alabama & Vicksburg Railway Co.,* 107 I.C.C. 136, 140 (1926). In *Curtis* and *Sturges,* the former statute of limitations had not extinguished the cause of action at the time the period of limitation was lengthened. Thus, the defendant-carrier had no vested right to immunity and retrospective application of the longer statute of limitations did not deny the carrier due process.

The Settlement Officer's decision under review here relies in large measure on the distinction between ''substantive'' and ''procedural'' statutes of limitation. Because the statutes of limitation in both section 22 of the 1916 Act and section 11(g) of the 1984 Act have been viewed by the Commission as limiting the right as well as the remedy, the Settlement Officer reasoned that these sections must be viewed as ''substantive'' rather than ''procedural''. Following a line of cases holding that a statutory modification pertaining to matters of substance can not be given retrospective effect, he concluded that the three-year statute of limitations contained in the 1984 Act could not be applied to the subject claims.

However, the distinction between "substantive" or "procedural" statutes of limitation is only helpful to the extent it resolves the ultimate question—whether the parties have vested rights which would be prejudiced by the retrospective application of a lengthened statute of limitations. To look only to the form of the statute of limitations without examining the rights of the parties and how those rights would be prejudiced by retrospective application of the lengthened statute of limitations elevates form over substance.

We believe that a better analysis of the issue may be found in cases such as *Friel* v. *Cessna Aircraft Company,* 751 F.2d 1037 (9th Cir. 1985). That case was brought under the Death on the High Seas Act, 46 U.S.C. § 761, after the decedent was killed in an airplane accident which occurred on July 23, 1980. At the time of the incident, the Death on the High Seas Act contained a two-year statute of limitations. 46 U.S.C. § 763. The two-year statute of limitations was subsequently repealed on October 6, 1980 and replaced with a three-year statute of limitations. The decedent's personal representative brought the action on October 18, 1982, more than two years after the accident. The defendant argued that the action was barred by the two-year statute of limitations in effect at the time of the crash. The court disagreed, stating:

> . . . . [I]t is clear that the considerations militating against retrospective application of a statute are not present in this case. The legislative change in no way alters the effect given to conduct before the change. No conduct on the part of either party would have differed if the statute had been in effect at the time of the fatal incident.
>
> * * * * *
>
> The two-year time bar was not yet complete and the action was viable when the limitation period was lengthened to three years. Moreover, defendants had acquired no vested right to immunity from suit for their alleged wrong under § 763 when the limitation period was lengthened.

Despite the "substantive" form of the limitations in both section 22 of the 1916 and section 11(g) of the 1984 Act, retrospective application of the three-year limitation will have no effect on the rights of the parties. Prior to the enactment of the 1984 Act, a claim for overcharges, such as the one here, was governed by section 18(b)(3) of the 1916 Act. Although the 1984 Act repealed section 18(b)(3), the language of section 18(b)(3) was brought forward with no substantive change in sections 10(b)(1)–(3) of the 1984 Act. Overcharges were unlawful under the 1916 Act and remain unlawful under the 1984 Act.

When the 1984 Act became effective and the limitation period was lengthened, Respondent K Line had acquired no vested right to immunity for its alleged wrong under section 18(b)(3). The 1984 Act did not create

a cause of action that previously did not exist; it simply continued a cause of action which existed under the 1916 Act. Thus the application of the 1984 Act to the subject shipments cannot be said to deny the parties due process or otherwise result in manifest injustice. Accordingly, we believe that the three-year period of limitation contained in section 11(g) of the 1984 Act should govern the subject claims.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is reversed to the extent it concludes that the two-year period of limitation contained in section 22 of the Shipping Act, 1916, bars any of the subject claims; and

IT IS FURTHER ORDERED, That this proceeding is remanded to the Settlement Officer for a decision on the merits.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–24

MATSON NAVIGATION COMPANY, INC. PROPOSED OVERALL RATE INCREASE OF 2.5 PERCENT BETWEEN UNITED STATES PACIFIC COAST PORTS AND HAWAII PORTS

ORDER PARTIALLY ADOPTING INITIAL DECISION

June 26, 1986

This proceeding is before the Federal Maritime Commission (Commission or FMC) on Exceptions to the Initial Decision (I.D.) served April 30, 1986. Upon review, the Commission finds and concludes that: (1) Matson Navigation Company, Inc.'s (Matson) proposed rate increase is unjust and unreasonable and ordered cancelled, and (2) Matson's current rates are unjust and unreasonable to the extent they produce a rate-of-return in excess of 11.50 percent. A 1.5 percent overall reduction in rates is ordered.

PROCEEDING

The Commission initiated this proceeding by Order of Investigation and Suspension served December 30, 1985 (December Order) to determine whether a 2.5 percent overall rate increase filed by Matson, effective January 1, 1986,[1] is just and reasonable within the meaning of section 3 of the Intercoastal Shipping Act, 1933 (ISA), 46 U.S.C. app. §845, and whether Matson's currently effective rates are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. §817.

The December Order suspended the proposed rate increase until June 30, 1986, the 180-day limit on proceedings under the ISA, and specified that the following issues be determined in this proceeding:

1. Has Matson properly projected its revenues, expenses and rate base for 1986?
2. Has Matson properly allocated its revenues, expenses and rate base between its Commission and non-Commission regulated services for 1986?
3. Are the business and financial risks faced by Matson greater or less than those faced by an average U.S. corporation? If so, should Matson's rate-of-return be adjusted? and

[1] Supplement No. 1 to Tariff FMC–F No. 14, Supplement No. 1 and 1st Revised Page 138 to Tariff FMC–F No. 15, Supplement No. 1 and 2nd Revised Page 56 to Tariff FMC–F No. 16 and Supplement No. 1 to Tariff FMC–F No. 17.

4. Are the current trends in rates of return and interest rates such that Matson's rate-of-return should be adjusted?

The proceeding was assigned for public hearing before an Administrative Law Judge. Matson was named Respondent. The State of Hawaii, Department of Commerce and Consumer Affairs (Hawaii), which had protested Matson's proposed rate increase, and the Commission's Bureau of Hearing Counsel (Hearing Counsel) were also made parties to the proceeding. The Saibot Corporation d/b/a Tobias Christmas Trees (Tobias) intervened in the proceeding. Hearings were held March 10–14, 1986 at the Commission's offices in Washington, D.C. The record of this proceeding consists of extensive written and oral testimony, legal briefs and proposed findings submitted by all parties.

Presiding Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued an I.D. which held that the proposed rate increase was unjust and unreasonable but that Matson's current rates were just and reasonable. Exceptions to the I.D. were filed by Hearing Counsel, Hawaii and Tobias. Replies to Exceptions were filed by Matson.

THE INITIAL DECISION

After analyzing the record evidence submitted by the parties, the Presiding Officer found and concluded as follows: [2]

Matson's cargo and overall revenue forecasts for 1986 are reasonable. Matson's forecasts have been historically accurate and the other parties have not shown any reasonable basis to find them unreliable in this case. However, Matson has over-estimated both its expenses and rate base for 1986 by: (1) forecasting an average fuel cost of $22 per barrel when the correct average per barrel forecast for 1986 should be $15 per barrel; and, (2) including in its rate base the *Matsonia*, which was removed from service in 1981, was not approved for reconstruction until 1985, and will not reenter the Hawaii service in 1986.

Matson computed its working capital in accordance with Commission regulations when it excluded inter-island barge voyages from the required calculations. Also, it properly calculated the amortization allowance on the leased vessel *Lurline*. Matson has an effective ongoing cost reduction program and is run in a prudent and relatively efficient manner.

Matson has properly allocated revenues, expenses and rate base between FMC-regulated and non-FMC-regulated services. It followed the cargo-cube basis of allocation required by Commission regulations. While this has resulted in a shift of high rated cargo to non-regulated service which, in turn, has resulted in a higher proportion of expense allocated to FMC-regulated cargo, the other parties to the proceeding have not shown this

[2] The Presiding Officer also advised that the methodology issues specified by the Commission had to be decided on a sparse evidentiary record due to the time restraints imposed by the December Order. He suggested that the Commission may wish to remand the proceedings on these methodology issues as they apply to the reasonableness of Matson's present rates.

result to be so aberrational as to warrant a departure from the cargo-cube allocation method.

Matson is less, and not more, risky than the average U.S. corporation. Matson's "variability of earnings" statistical test of risk and an erosion of its market share due to increased competition indicate higher than average risk. However, Matson still dominates the Hawaii trade, is the "rate leader" among its competitors and has steadily increased its total trade revenues. Its recent earnings performance indicates that, at least in the near future, it is probably less and certainly no more risky than the average U.S. corporation. However, because the evidence does not establish to what degree Matson is less risky, no downward adjustment to its rate-of-return is warranted.

Both prevailing rates of return and interest rates have shown a downward current trend. Rates of return peaked in 1980 and have trended downward since that time. Interest rates are at their lowest level in eight years. However, there is insufficient evidence of record to quantify a downward adjustment and therefore none will be required.

The appropriate benchmark rate-of-return for 1986 is 11.56 percent. This is calculated by an examination of the mean rates of return on average total capital by *Value Line Investment Survey* for the 15-year period ending in 1984. This is one of the benchmark analyses proffered by Matson in accordance with the applicable Commission regulations, Part 552, Title 46, Code of Federal Regulations (G.O. 11). Hearing Counsel agrees with this methodology but would find an 11.5 percent benchmark using Bureau of Census *Quarterly Financial Reports* for the 5-year period ending in 1984 after an appropriate adjustment for embedded debt. Hawaii urges a departure from G.O. 11 but has failed to make a sufficient showing that G.O. 11 produces aberrational results to warrant such a departure.

After making appropriate adjustments for the elimination of the *Matsonia* from its rate base and employing an average fuel cost of $15 per barrel, Matson's projected rate-of-return for 1986 is 12.19 percent without a rate increase. This is calculated by dividing the sum of projected total net income without a rate increase plus interest expense, $28,074,000, by the rate base, $230,276,000.

The difference between the unadjusted benchmark of 11.56 percent and Matson's adjusted projected rate-of-return without the rate increase of 12.19 percent is within the "zone of reasonableness." Accordingly, in light of the above findings, Matson's proposed rate increase would be unjust and unreasonable, but Matson's current rates are not unjust or unreasonable.

POSITIONS OF THE PARTIES

Hawaii

Hawaii agrees with the findings of the Presiding Officer in all major aspects and does not take specific exception to the I.D. Hawaii is in

accord with the determination that Matson's proposed rate increase is unjust and unreasonable.

Hawaii further believes, however, that Matson's current rates are also unjust and unreasonable. Accordingly, Hawaii supports the recommendation of the I.D. that the Commission remand the case to the Presiding Officer. However, it argues that, given the present record, the remand should take the form of a show cause proceeding placing the burden on Matson to prove its present rates just and reasonable. Specifically, Hawaii would have Matson show: (1) why inter-island barge movements should not be included in the computation of working capital; (2) why the capitalization of leased vessels that are refurbished by Matson should not be amortized beyond the lease term to the actual useful life of the asset; (3) why the Commission should not depart from the requirements of G.O. 11 in allocating revenues, expenses and rate base between FMC-regulated and Interstate Commerce Commission (ICC)-regulated service; and, (4) why downward adjustments to the benchmark rate-of-return should not be made in light of the Presiding Officer's findings of Matson's less than average risk and a declining cost of money.

Tobias

Tobias also agrees that the I.D. was correct in finding Matson's proposed rate increase unjust and unreasonable. However, it excepts to the failure of the Presiding Officer to make a downward adjustment to the benchmark rate-of-return on the basis of downward trends in average rate of return and the cost of money as well as Matson's relative risk. Alternatively, Tobias argues that the proceeding should be reopened on this issue.

Additionally, Tobias excepts to the findings that there is insufficient evidence of abuse of G.O. 11 methodologies by Matson to warrant departure from the established criteria in that regulation. Specifically, Tobias argues that Matson abused G.O. 11 requirements by: (1) improperly allocating revenues, expenses and rate base between FMC-regulated and non-FMC-regulated cargo; (2) including the *Matsonia* in the rate base; and (3) filing data allegedly inconsistent with the historical 1985 data filed in Docket No. 85–3, *Matson Navigation Company, Inc. Proposed Overall Rate Increase of 2.5 Percent Between United States Pacific Coast Ports and Hawaii Ports,* 23 S.R.R. 155, 171 (I.D. 1985). These alleged abuses are argued to be a manipulation of evidence that produces unfair and unreasonable results.

Finally, Tobias excepts to the finding that there exists a ''zone of reasonableness'' within which Matson's current rate-of-return falls. Tobias argues that there is no basis in the record to construct a ''zone of reasonableness'' beyond 11.56 percent and, accordingly, submits that it was error to find Matson's present rates just and reasonable.

Hearing Counsel

Hearing Counsel agrees with the Presiding Officer that Matson is not entitled to any upward adjustment to the benchmark rate-of-return based upon the record of this case. Hearing Counsel also supports the Presiding Officer's calculation of Matson's projected 1986 rate-of-return without a rate increase at 12.19 percent. Because Matson's rate-of-return exceeds both Hearing Counsel's proposed 11.5 percent benchmark and the Presiding Officer's finding of an 11.56 percent benchmark, Hearing Counsel concurs in the I.D.'s conclusion that no rate increase is justified.

However, Hearing Counsel contends that the Presiding Officer erred in adopting Matson's proposed 11.56 percent benchmark rate-of-return for 1986 because it is allegedly based upon a methodology previously considered and rejected by the Commission. Hearing Counsel submit that the proper benchmark is 11.50 percent, calculated in accordance with Commission precedent on point. Hearing Counsel also takes exception to the Presiding Officer's conclusion that the difference between the 11.56 percent unadjusted benchmark and Matson's projected 1986 rate-of-return of 12.19 percent is within a "zone of reasonableness." Accordingly, Hearing Counsel challenges the I.D.'s finding that Matson's current rates are just and reasonable. Hearing Counsel urges the Commission to adopt the 11.50 percent benchmark rate-of-return and to order Matson to roll back its current rates to achieve that level of profit.

Matson

Matson argues that because Hawaii did not file formal exceptions to the findings of the I.D., it has waived any right to request modifications to the Presiding Officer's conclusions. Matson further contends that, in any event, a remand to establish new G.O. 11 methodologies cannot be ordered in this case because: (1) the Commission must conclude this proceeding within the 180-day limit set by the ISA, and (2) the underlying determinations concerning the proposed rate increase are dispositive of and, therefore, *res judicata* as to the reasonableness of Matson's current rates. The only options allegedly available to Hawaii at this point are to initiate a separate complaint proceeding or to petition for a rulemaking. Matson states that, under either alternative, the burden of proof on the methodology issues would be on Hawaii, not Matson.

Matson further argues that no valid reason has been shown to require any downward adjustment to the benchmark rate-of-return established in the I.D. The record allegedly supports the findings that Matson followed G.O. 11 and that the results of its methodologies are not unfair or unreasonable.

Matson argues that the Presiding Officer was correct in finding an 11.56 percent benchmark and that the difference between this figure and Hearing Counsel's 11.50 percent figure is *de minimis*. Matson's use of a 15-year period, rather than Hearing Counsel's 5-year period, to calculate an average

rate-of-return of comparable U.S. corporations, is allegedly a more reliable methodology. Matson believes that a 5-year average is overly susceptible to unrepresentative variation due to aberrational years within that short period.

Matson supports the Presiding Officer's finding concerning a "zone of reasonableness" between 11.50 percent and 12.19 percent. Matson maintains that the 11.50 percent figure cannot be used as the "ceiling" on the "zone" because Matson was entitled to upward benchmark adjustments on the basis of comparative risk. Matson also argues that there is insufficient evidence to support a downward adjustment based upon declining average rates of return.

DISCUSSION

The Proposed Rate Increase

The Commission agrees with the Presiding Officer's finding that Matson's proposed rate increase has been proven to be unjust and unreasonable. Indeed, Matson did not file exceptions to the findings of the I.D. and all other parties unanimously support the I.D. The Commission therefore adopts this portion of the I.D.

Matson's Current Rates

The Presiding Officer's calculation of Matson's 12.19 percent projected rate-of-return for 1986 follows G.O. 11 methodology. Notwithstanding Tobias' Exceptions to the contrary, the evidence of record does not warrant a departure from the criteria established in that regulation. Accordingly, the Commission adopts the finding that 12.19 percent is the most accurate projection of Matson's rate-of-return for 1986.

The Presiding Officer's calculation of an 11.56 percent benchmark rate-of-return presents a more difficult issue. The gist of the Exceptions to the Presiding Officer's methodology is that the allowable benchmark for Matson should be reduced below 11.56 percent and that Matson's rates should be reduced by the Commission. The theories presented by Hawaii, Tobias and Hearing Counsel in their Exceptions are all conceptually creditable. However, only Hearing Counsel has produced substantial evidence of record that the Commission deems sufficiently precise and persuasive to warrant finding a benchmark below the 11.56 percent rate-of-return found by the Presiding Officer.

Hearing Counsel urges that Matson's rate-of-return be limited to 11.50 percent for 1986. In calculating a benchmark, the principal difference between Hearing Counsel's methodology and that apparently used by the Presiding Officer (in arriving at 11.6 percent) is the historical period used to determine the average rate-of-return for comparable U.S. businesses. The Presiding Officer apparently adopted Matson's approach which considered a 15-year period ending in 1984 utilizing data reported in *Value*

Line Investment Survey.[3] Hearing Counsel urged the use of a five-year historical average ending in 1984 based upon the Bureau of Census *Quarterly Financial Reports.*[4]

Hearing Counsel's method is supported by the standards established by the Commission in *Sea-Land Service, Inc. et al.; Proposed General Rate Increase in the Puerto Rico and Virgin Islands Trades,* 24 F.M.C. 164 (FMC 1981), *aff'd sub nom., Puerto Rico Maritime Shipping Authority* v. *F.M.C.,* 678 F.2d 327, 21 S.R.R. 859 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 906 (1982) (*Sea-Land*). As noted by the Presiding Officer when rejecting the methodology suggested by Hawaii, *Sea-Land* is the primary authority for resolving methodology disputes in ISA rate cases. We find no sufficient basis in the record to depart from the methodology established in *Sea-Land* for arriving at a benchmark rate-of-return. Not only has this methodology received judicial approval but it also has proven objective and reliable in application.[5] Hearing Counsel's suggested 11.50 percent benchmark will therefore be adopted.

The Commission adopts the Presiding Officer's findings that no upward adjustment in the benchmark rate-of-return is justified to account for: (1) the relative business and financial risks faced by Matson; and (2) current trends in rates of return and the cost of money. Both findings are amply supported by the record. Indeed, neither finding was challenged by Matson in exceptions.

Having concluded that the appropriate benchmark rate-of-return is 11.50 percent, the Commission must disagree with the Presiding Officer's finding that Matson's 12.19 percent projected rate-of-return is within a "zone of reasonableness" between 11.50 percent and 12.19 percent. This conclusion is not explained in sufficient detail to allow determination as to how it was calculated and whether it is based upon "substantial evidence of record."[6] On its face, the Presiding Officers conclusion that Matson's 12.19 percent rate-of-return is within a "zone of reasonableness" appears to be *inconsistent* with his underlying findings that: (1) no upward adjustment to the benchmark rate-of-return is warranted in this case; and, (2) if better quantified on the record, downward adjustments would be warranted.

The Presiding Officer's reliance on a "zone of reasonableness" also suggests a misuse of the concept. The "zone of reasonableness," as that term has been defined by the Supreme Court, designates a decisional area of discretion between minimum non-confiscatory rates and the maximum

[3] I.D. 28 F.M.C. 459 at 495.

[4] I.D. at 496.

[5] Debate over the appropriate data base and time period for determining benchmark rate-of-return invariably consumes an inordinate portion of time in Commission rate cases. Accordingly, the Commission intends that, absent a showing of overriding considerations to the contrary, *Sea-Land* be followed on methodology issues in order to save time and resources in ISA rate cases. *See, Airmark Corp.* v. *F.A.A.,* 758 F.2d 685, 691–692 D.C. Cir. 1985).

[6] *See* I.D. at 497.

reasonable level of rates supportable by the record. *F.P.C.* v. *National Gas Pipeline Co.*, 315 U.S. 575, 585 (1942). In order to establish a "zone of reasonableness" it is necessary to define the upper limit of the "zone"—the maximum level of rates. It was the Commission's intention in promulgating G.O. 11 that the benchmark rate-of-return, adjusted according to the requirements of 46 C.F.R. § 552.6(d)(2)(ii), represents this upper limit. Because the purpose of this proceeding was to determine the *maximum* reasonable limit of Matson's rate increase and/or existing rates, there is no need to establish a "zone of reasonableness." The Commission's ultimate responsibility in this case is to establish Matson's maximum allowable rate-of-return. We find that maximum to be 11.50 percent in 1986. On this basis, we conclude that Matson must implement an overall rate reduction of 1.5 percent.[7]

It has been suggested that the Commission remand the proceeding to the Presiding Officer to take further evidence on certain methodology issues noted in the I.D. and specified by the Exceptions. Hawaii and Tobias argue that they should be given another opportunity to quantify downward adjustments to the benchmark rate-of-return based upon: (1) the relative risk faced by Matson; and (2) the current trends in rates of return and the cost of money. While the Commission appreciates the difficulty in resolving these issues in the 180 days allowed by the ISA, the Commission finds the present state of the record adequate to make a final decision. Accordingly, it will not order a remand of the proceeding. Further refinement of the record is *always* possible in a rate case. However, there is no suggestion that the parties have been deprived of their due process rights. Accordingly, the general public benefit in promptly disposing of this rate case outweighs the apparently marginal benefit to the record a remand would produce.

Similarly, the proceeding will not be remanded to explore modifications to G.O. 11. In the context of a particular proceeding the record must show clearly unreasonable or aberrational results in applying established methodology to warrant a departure from the regulation.[8] In this case Matson generally followed the minimum requirements of G.O. 11. In those areas where novel issues were raised, there was not a sufficient showing of aberrational results or more appropriate alternatives to warrant the appli-

[7] To achieve a return on rate base of 11.50 percent, Matson's net income after tax would have to be reduced to $17,358,000. Based upon an imputed effective tax rate of 47.62 percent this computes to net income before taxes of $33,139,000. This in turn requires a reduction of total revenue to $198,939,000, a 1.505 percent revenue reduction. *See* Ex. PHC-2 (revised) at 5. The Commission recognizes that there does not exist a precise direct mathematical correlation between a percentage adjustment in Matson's freight rates and a percentage adjustment in its revenues. A slight differential exists due to Matson's rate structure and other income sources in the trade. *See*, Ex. R-3, "Test Year" at 11, Testimony at 7 However, the differential is smaller than one-tenth of one percent.

[8] I.D. at 473–475.

cation of different methodologies.[9] The Commission's experience with rate cases has shown that further proceedings on these issues in this case would be quite laborious and time-consuming and would not result in definitive and generally applicable solutions to these technical methodology problems.

A fairer and more appropriate method of reevaluating existing interpretations of G.O. 11 is by a separate rulemaking proceeding. This approach is also more compatible with the Congressional intent underlying the 1978 amendments to the ISA.[10] G.O. 11 must serve as a set of guidelines for determining rate-of-return reasonableness that all interested parties may rely on in a rate proceeding.[11] While periodic review of the regulation is required under the statute,[12] it is more appropriate to do so in the context of an industry-wide rulemaking proceeding wherein all affected interests may participate, not just those parties involved in a particular case.[13] The Commission is giving consideration to the initiation of a rulemaking proceeding on the issues noted by the Presiding Officer and on other selected G.O. 11 provisions.

Moreover, any benefit to ratepayers resulting from potential further downward adjustments in the benchmark rate-of-return or modifications to G.O. 11 methodology will largely be offset by the necessary delay in effecting any additional rate roll back resulting from the hearing and review process on remand.

The Commission therefore adopts the I.D. modified to the extent required by the Exceptions of Hearing Counsel, and orders Matson to roll back its rates 1.5 percent to produce a projected rate-of-return of 11.50 percent for 1986. This comports with the overall weight of evidence of record, Commission precedent and the Congressional sentiment that rate proceedings be decided with dispatch.

THEREFORE, IT IS ORDERED, That the Exceptions to the Initial Decision filed by the Commission's Bureau of Hearing Counsel are granted; and

IT IS FURTHER ORDERED, That the Initial Decision is adopted to the extent it is consistent with this Order and is modified to the extent required by this Order; and

IT IS FURTHER ORDERED, That the Exceptions of the State of Hawaii and the Saibot Corporation are denied to the extent they are inconsistent with this Order; and

IT IS FURTHER ORDERED, That, within ten (10) days of the date of service of this Order, Matson Navigation Company, Inc. file immediately effective supplements to its Tariffs FMC–F Nos. 14, 15, 16 and 17:

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[9] *See* I.D. at 477–478 (computation of working capital), 484–486 (allocations between FMC-regulated and ICC-regulated service).

[10] Pub. L. No. 95–475; 92 Stat. 1496 (1978).

[11] S. Rep. No. 1240, 95th Cong., 2d Sess. 13 (1978).

[12] *See* 46 U.S.C. app. 845(a).

[13] *See* supra note 11.

1. cancelling the proposed 2.5 percent overall rate increase filed November 15, 1985 and any other proposed overall rate increase filed during the course of this proceeding; and

2. implementing a 1.5 percent overall reduction in rates; and

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

By the Commission.[14]

(S) JOHN ROBERT EWERS
Secretary

[14] Commissioner Thomas F. Moakley's concurring and dissenting opinion is attached.

Commissioner Moakley, concurring and dissenting

I concur in the majority's conclusion that Matson's proposed 2.5 percent rate increase is unjust and unreasonable. However, I believe it is equally unreasonable for the Commission to order the carrier to reduce its current rates because the projected rate of return is viewed as less than seven-tenths of one percent too high.

Ratemaking is not an exact science.[1] When the mosaic of reasonableness includes revenue and expense *projections*, *average* return on capital for other industries over time, *comparable* risks and current *trends*, a difference of seven-tenths of one percent in rate of return is an inappropriately fine line to draw.

The overriding principle in adjudicating the reasonableness of domestic offshore rates is that we reach a fair and reasonable result.[2] It is not the methodology employed, but the result reached which is controlling.[3] Here, the majority would apply a methodology which is generally reasonable to reach a result which is not.

Matson is unquestionably an efficient carrier. In this very case, the majority adopts the following finding of the Administrative Law Judge:

> Matson has an effective ongoing cost reduction program and is run in a prudent and relatively efficient manner.
>
> (Majority order, p. 447)

Because of this, Matson's profitability has been increasing while its rates have remained remarkably stable, increasing by only 2.5 percent since 1982. A review of tariffs on file with the Commission will demonstrate that Matson's rates on most leading commodities are substantially lower than those available to shippers in the Atlantic Coast/Puerto Rico trade[4] where the distance is roughly one-half of that to Hawaii.

To measure the reasonableness of rates, the Commission has chosen to focus primarily on the rate of return that those rates produce for a particular carrier. This traditional ratemaking standard has the advantage of being objective and fairly easy to apply, but could easily result in a finding that identical rates are reasonable for one carrler, but unreasonable for a more efficient competitor. The obviously undesirable side effects of rate of return methodology are recognized and accommodated by the Commission's rules which read, in pertinent part:

> (b) The methodology employed in each case will depend on the nature of the relevant carrier's operations and financial structure.

[1] *Sea-Land Service Inc.—Increases in Rates In the U.S. Pacific Coast/Puerto Rico Trade* 15 F.M.C. 4, 9–10 (1971).

[2] 46 C.F.R. S551.1.

[3] *Federal Power Commission* v. *Hope Natural Gas Co.* 320 U.S. 591, 602 (1944).

[4] Matson Navigation Co., Tariff FMC–F No. 15, Items 3000, 2066, 2000, 50, 55, 60, 1052, 2076, 115, 1196 and 1030; Puerto Rico Maritime Shipping Authority, Tariff FMC–F No. 9, Item 3960; Sea-Land Service Inc., Tariff FMC–F No. 61, Item 1000.

> In evaluatlng the reasonableness of a VOOC'S overall level of rates, the Commission will use return on rate base as its primary standard. *However, the Commission may also employ other financial methodologies in order to achieve a fair and reasonable result.*
>
> (c) In evaluatlng the reasonableness of a carrier's rates, the Commission may consider, in addition to the rate of return of the filing carrier, *the effect which approval or disapproval of the rates will have on other carriers in the Trade.*
>
> (d) The Commission reserves to itself the right to employ other bases for allocation and calculation and *to consider other operational factors in any instance where it is deemed necessary to achieve a fair and reasonable result.* (emphasis supplied)[5]

As applied in this case, the rate of return methodology suffers from at least two additional shortcomings. First, the benchmark rate of return is constructed from a period of five years ending in 1984. Since then, the world has experienced a dramatic drop in the cost of oil, which is the primary reason for the significant increase in Matson's projected profitability for 1986. The earnings of the comparable companies (i.e. the benchmark rate of return) do not reflect this energy cost reduction and the consequent increase in profitability. In other words, if we could construct a benchmark rate of return for 1986, it would almost certainly be higher than 11.5 percent, reflecting the effect of oil cost reductions on the comparable companies. If we fail to account for this significant change on *both* sides of the comparison, we are not adhering to one critical element of the comparable earnings test as articulated in *Bluefleld Waterworks and Improvement Co.* v. *Public Service Commission of West Virginia* 262 U.S. 679, 692 (1923). Under that standard, earnings should be permitted that are

> equal to that generally being made *at the same time* and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties. (emphasis supplied)

Second, as argued by Matson the comparable earnings test has evolved into a formula for determining the *average* return for a wide spectrum of companies over a period of several years. Included in this average are extraordinarily good years and unusually bad ones, efficient companies and incompetent ones. This *average* is then used as a *maximum* allowable rate of return for the regulated carrier.

Obviously, if the carrier is never allowed to earn higher than the average return of other companies, the carrier's average return over time will necessarily be lower than that of the comparable companies, because of inevitable fluctuations in profitability over tine. The record supports this syllo-

[5] 46 C.F.R s552.1.

gism by indicating that Matson's average rate of return for the period 1975–1984 was 9.48 percent while the average of the comparable industries was approximately 11.5 percent.[6]

In earlier Matson rate proceedings, the Commission implicitly recognized this flaw in the comparable earnings test by adjusting the benchmark rate of return upward to account for the increased risk of the regulated carrier. Without explanation, the majority has abandoned this approach and, instead adopted the Administrative Law Judge's finding that

> Matson's risk is probably less and certainly no worse than equal to that of the average U.S. corporation.[7] I.D. at 490

This conclusion ignores a very basic difference between a regulated carrier and the "average U.S. corporation. The latter is able to make up for bad years with extraordinarily profitable ones. The former is not.

I would adjust the benchmark rate of return upward by one percent to account for the increased risk inherent in a regulated carrier and find Matson's current rates just and reasonable.[8]

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[6] *Exhibit R–7, schedule 8.*

[7] This finding rests in large part upon the testimony of Commission staff economists who also supported a one percent risk premium for Matson in earlier proceedings (e.g. Docket No. 85–3). Their change in position in this proceeding seem inexplicably to be linked to Matson's large market share, which everyone agrees has been steadily *shrinking* for the past decade. It is also noteworthy that the concept of market contestability, much discussed in international liner shipping, has not been injected into this type of domestic rate proceeding, where it would seem to have significant applicability.

[8] In view of this position, it would be unnecessary to remand the proceeding to develop evidence on the appropriate adjustment to the benchmark rate of return to accommodate the dramatic drop in energy costs in 1985–1986.

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–24

MATSON NAVIGATION COMPANY, INC. PROPOSED OVERALL RATE INCREASE OF 2.5 PERCENT BETWEEN UNITED STATES PACIFIC COAST PORTS AND HAWAII PORTS [1]

It is *held:*

1. Where the Federal Maritime Commission issues a regulation containing methodology guidelines in compliance with a Congressional mandate to do so, and where the regulation within its terms provides the Commission may also employ other financial methodologies in order to achieve a fair and reasonable result and that the Commission reserves to itself the right to employ other bases for allocation and calculation and to consider other factors in any instance where it is deemed necessary to achieve a fair and reasonable result, the Commission on a showing of unfairness or unreasonableness may depart from specific methodologies set forth in the regulation and may adopt any methodology that produces a fair and reasonable result without giving prior notice to carriers. Here, the record does not establish that the carrier's use of methodologies set forth in the regulation is unfair or unreasonable and those methodologies must be followed.
2. Matson, generally, properly projected its revenues, expenses and rate base for 1986. However, where a vessel, the *Matsonia*, was not used in the Trade since 1981 and would not be used in the test year 1986 ratepayers should not be required to pay for its use and it should be excluded from the rate base. Further, Matson's projected fuel costs of $22 per barrel is overstated. Based on the evidence of record, the average price of fuel for Matson in 1986 is $15 per barrel. Consideration of some of the evidence which was the result of recent, sudden and dramatic changes in the oil market was both necessary and warranted since it was bound to affect the estimate made by Matson.
3. Where a carrier expends monies to modify a vessel it originally leased for 25 years and amortizes the cost of the modification over the remaining life of the lease (16 years) in accordance with accepted accounting principles; and where the protestant does not establish that the vessel's useful life has been extended and that it will be available to be used in the Trade for a period longer than the remaining life of the lease, it is held the carrier's treatment of amortization is proper.
4. Where a carrier allocates expenses between its Commission and non-Commission regulated services using the cargo-cube method, which method was adopted in the Commission's regulation after in depth consideration of other methods, and where the evidence in the record fails to prove that the use of the cargo-cube method was unfair or unreasonable, the use of such method is not improper.
5. Where the evidence shows an increase in competition in the Trade, but where such increase is minimal and does not affect the carrier's dominant position in the Trade where it retains over a 70 percent share of the Trade and is the leading ratemaker, the carrier's business is not more risky than the majority of the Value Line (test) companies and no upward adjustment to the benchmark rate of return for current trends in relative risk is warranted. Further, in this case, where the regulation allows an adjustment for "current trends in relative risk," the use of a 15 year historical average

[1] Matson reduced its proposed rate increase to 1 percent after the proceeding began.

to determine the variability of past earnings as a measure of current trends in relative risk is questionable.

6. Based on the record in this proceeding where no party offers evidence in support of a specific adjustment, no adjustment to the benchmark rate of return is warranted for current trends in rates of return.
7. Where the Commission regulation provides for an adjustment to the benchmark rate of return for current trends in the cost of money (interest rates), and where the evidence of record clearly establishes a dramatic decline in interest rates, the carrier's use in this case of a 15 year period to establish an average interest rate from which it produces an upward adjustment has the effect of unduly distorting the "current trend" and no upward adjustment is warranted. Further, since no party recommended or presented evidence supporting a specific downward adjustment none can be made.
8. Based on the evidence of record the allowable rate of return is between 11.5 and 12.5 percent. Consequently, it is held that the 1 percent increase sought by Matson is excessive and that the present rates are not unfair or unreasonable.

David F. Anderson, Meredith N. Endsley and *George D. Rives* for Matson Navigation Company, respondent.

William W. Milks for the State of Hawaii, protestant.

Tobias E. Seaman for The Saibot Corporation, d/b/a Tobias Christmas Trees, intervenor.

Aaron W. Reese and Alan J. Jacobson, as Hearing Counsel.

INITIAL DECISION[2] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Partially Adopted June 26, 1986

This proceeding began as a result of the issuance of the Commission's Order of Investigation and Suspension, served on December 30, 1985. Generally, the Commission ordered:

> That pursuant to the authority of sections 18(a) and 22 of the Shipping Act, 1916 (46 U.S.C. app. §§ 817 and 821) and sections 3 and 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. §§ 845 and 845a) an investigation is instituted to determine whether the rate increase of 2.5 percent is just and reasonable.[3]

and further:

> That pursuant to sections 18(a) and 22 of the Shipping Act, 1916 (46 U.S.C. app. 817 and 821) an investigation is instituted to determine whether the rates stated in the above named Matson tariffs are just and reasonable without the proposed 2.5% rate increase.

[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] On November 15, 1985, Matson Navigation Company, Inc. (Matson) filed amendments to its Tariffs, FMC-F Nos. 14, 15, 16 and 17 proposing an overall increase of 2.5 percent on all rates and charges moving in its Pacific Coast/Hawaii trade (except on household goods or personal effects), effective January 1, 1986.

The Commission Order notes that the State of Hawaii, through its Department of Commerce and Consumer Affairs had filed a protest urging the rejection or suspension and investigation of Matson's increase. It names the State of Hawaii as a party to the proceeding as well as Matson and the Bureau of Hearing Counsel. The Saibot Corporation (Tobias) is also a party.[4]

In addition to the general issues set forth above the Commission's Order requires:

> That in determining the fair rate of return for Matson the following issues shall be addressed:[5]
>
> 1. Has Matson properly projected its revenues, expenses and rate base for 1986?
>
> 2. Has Matson properly allocated its revenues, expenses and rate base between its Commission and non-Commission regulated services for 1986?
>
> 3. Are the business and financial risks faced by Matson greater or less than those faced by an average U.S. corporation. If so should Matson's rate of return be adjusted? and
>
> 4. Are the current trends in rates of return and interest rates such that Matson's rate of return should be adjusted?

The Commission Order also requires that this Initial Decision be submitted by April 30, 1986, and indicates that the final decision of the Commission shall be issued by June 27, 1986.[6] In addition, the Commission, pursuant to the authority of section 3 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 845), suspended the proposed 2.5 percent rate increase to June 30, 1986.[7]

Prior to the hearing in this proceeding the parties engaged in a series of settlement negotiations, none of which were successful. Also, prior to the hearing Matson indicated that it was cancelling 1.5 percent of its proposed 2.5 percent rate increase "based on the decline in the price

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[4] After the issuance of the Commission's Order The Saibot Corporation d/b/a Tobias Christmas Trees filed a Petition to Intervene in this proceeding. The Petition (Motion) was granted by Order served on January 24, 1986.

[5] Public Law 95–475, which amends the Intercoastal Shipping Act of 1933, requires the Commission to set forth the specific issues involved. Section 3(a) of the 1933 Act states:

> The Commission shall not order a hearing pursuant to this subsection . . . unless the Commission publishes in the FEDERAL REGISTER the reasons, in detail, why it considers such a hearing to be necessary and the specific issues to be resolved by such hearing.

See Sen. Report No. 95–1240, 95th Cong., 2d Sess., September 26, 1978, at 1–2, 13.

[6] Section 3(b) of the Intercoastal Shipping Act of 1933 generally requires that where a rate increase is requested and the Commission orders a hearing concerning the lawfulness of such rate, a final decision will be issued within 180 days of the time the rate first goes into effect or if suspended when the rate would otherwise have gone into effect.

[7] Commissioner Moakley concurred with the majority of the Commission that Matson's current rates should be investigated under section 18(a) of the Shipping Act, 1916 (46 U.S.C. app. §817). However, he dissented with that portion of the Order which suspended Matson's 2.5 percent increase.

of bunker fuel."[8] At the hearing the written direct testimony of various witnesses which had previously been submitted was placed into evidence as was written rebuttal. Various witnesses also testified on cross-examination and additional documentary evidence was entered into the record.

Findings of Fact

It should be noted at the outset that, despite repeated attempts to secure a comprehensive joint stipulation of facts from the parties, time strictures apparently prevented the presentation of such a stipulation. Instead, the record contains only a sketchy and relatively useless statement of certain facts which are agreed and fails to address the bulk of documentary evidence placed into the record, much less the factual oral testimony given. Indeed, even in the briefs, referenced findings of fact are not adequately set forth. As a result the facts enumerated below have been found without the aid a well-prepared stipulation may have given. In some rare instances the general nature of the fact found is based on overall consideration of the entire record rather than on one particular document or statement and in those instances complete specific record references may not be given. It should be noted that reference to documentary exhibits in this proceeding are as follows:

Party	Exhibit No.
Matson	R–l et seq.
State of Hawaii	PH–l et seq.
Tobias	PT–l et seq.
Hearing Counsel	PHC–l et seq.

1. The Respondent, Matson Navigation Company, Inc. (Matson), is a wholly-owned subsidiary of Alexander & Baldwin, Inc., a Honolulu based diversified company whose principal activities, other than ocean transportation, are agriculture, property development, trucking and storage. Matson is the sole owner of Matson Terminals, Inc., Matson Freight Agencies, Inc. (parent of Matson Agencies, Inc.), and Matson Services Company, Inc. (Ex. R–2, p. 2).

2. Matson has served in the United States Mainland/Hawaii trade since 1882. It presently provides ocean transportation between the Pacific Coast and Hawaii, and between those ports and ports in the Western Pacific Trust Territory and Johnston Island (Ex. R–2, p. 3).

3. Containers represent the largest cargo group handled by Matson. There are also non-container cargoes such as autos, molasses, and conventional cargo which does not fit into containers (Ex. R–2, p. 6 (Ex. IV)).

4. Container cargo moves westbound primarily from Oakland and Los Angeles, with considerably less from the Pacific Northwest. Molasses origi-

[8] Matson filed Special Permission Application No. 278 with the Commission wherein it seeks to cancel 1.5 percent of the 2.5 percent overall rate increase. It was subsequently withdrawn.

nates in all of the islands and moves to all four West Coast ports as bulk liquid cargo. There is a directional imbalance in the Hawaiian Trade. The westbound containers and auto traffic are substantially greater than the eastbound traffic and the westbound trade cargoes are generally higher rated cargo. Approximately one-third of the westbound containers are returned loaded with eastbound cargo, one half of which consists of fresh or canned pineapple. Auto movement is greater westbound than eastbound. Molasses moves exclusively in an eastbound direction. Oversize conventional cargo moves predominantly in a westbound direction (Ex. R–2, pp. 6, 7; Exs. PH–5 through PH–7; Entire Record).

5. Matson's projected income expense and rate base figures are calculated using the period January 1, 1986 through December 31, 1986, as the Test Year for determining the reasonableness of Matson's proposed rate increase and existing rates (Ex. R–3, p. 4).

6. Matson's cargo forecast for 1986 is reasonable and is the basis for Matson's revenue projections for 1986 (Ex. R–1).

7. Matson's share of total revenues of General Order 11 reporting carriers in the U.S. Mainland/Hawaii trade has declined from 93 percent in 1975 to 71 percent in 1984 (Ex. R–1, p. 6).

8. Matson faces some competition from both regulated and unregulated carriers in the U.S. Mainland/Hawaii trade and indirect competition from liner and contract carrier services bringing cargo from foreign origins to Hawaii (Ex. R–1, p. 17).

9. Matson competes with barge service for bulk and other cargoes. This cargo constituted under 25 percent of Matson's westbound cargo movement (Ex. R–4, p. 4).

10. During 1986 Matson will utilize five specialized vessels and the inter-island barges for the carriage of cargoes in its U.S. Pacific Coast/Hawaii Trade. The five specialized vessels will operate with an 84 percent utilization of container slots and a 98 percent utilization of garage stall and "O" hatch space for autos (Ex. R–2 (Ex. 2)).

11. In computing its working capital as part of the rate base Matson used the voyages and voyage days as it is required to do by G.O. 11. It considered only its long-haul vessels and not inter-island barges in the computation (Ex. R–3, Test Year, p. 3).

12. The *Matsonia* has not been used in the Pacific Coast/Hawaii fleet since 1981. It was not withdrawn from the service for renovation or conversion. It entered the shipyard for reconstruction in 1986, but will not return to service in that year (Ex. R–2, p. 9; Ex. R–5, p. 17).

13. Matson leased the vessel, *Lurline*, in 1973 under a 25 year lease, renewable for 5 years, with an option to purchase at fair market value on termination of the lease. In 1982 it modified the vessel and amortized the modification costs as well as the initial cost over the remaining life of the lease in accordance with Financial Accounting Standards Board No. 13 (FASB) practice (Ex. R–5, p. 15).

14. Matson's ongoing cost reduction program in recent years has included a new consolidated terminal at Sea Island in Honolulu Harbor, a vessel full conservation program, vessel construction and reconstruction programs, vessel modifications to increase carrying capacity, replacement of aging aluminum with stainless steel containers and an improved container lashing system. Matson is operated in a prudent and relatively efficient manner (Ex. R–2, pp. 9, 10).

15. When Matson filed its 2.5 percent rate increase it was not required to file anything other than a certification that the Statements of Financial Data and Operating Data required by Part 552.2(f) were not necessary under General Order 11. It filed the certification initially. After the Order of Investigation and Suspension was issued, in the discovery phase of this proceeding, Matson did file some financial statements required by G.O. 11 in proposed general rate increases. In doing so Matson followed the G.O. 11 methodologies, and the year 1985 has been restated to show storedoor cargo as being under an ICC tariff throughout the year although such cargo was not removed from FMC tariffs until November of 1985 (Ex. R–3, pp. 15, 16; Entire Record).

16. Matson's original prediction for the average per barrel fuel forecast was $22 per barrel. It later reduced its rate increase from 2.5 to 1 percent and lowered its forecast to $18 per barrel. The correct average per barrel forecast for 1986 is $15 per barrel (Ex. PHC–5; Exs. R–5, R–10).

17. Return on rate base is the primary standard the Commission uses in evaluating the reasonableness of a vessel operating common carrier's level of rates. Return on rate base is computed by dividing Trade net income plus interest expense by Trade rate base (46 CFR 552.1(b) and 552.6(d)(2)(i), respectively).

18. Adjusting for the elimination of the value of the *Matsonia* from rate base, and also adjusting for average fuel cost of 15 per barrel, the rate of return on rate base for the FMC regulated Hawaii trade will be 12.19 percent without a 1 percent increase (Ex. PHC–2 (revised), pp. 4, 5).

19. Matson's 1986 rate base for its Pacific Coast/Hawaii Trade is $230,276,000, and Matson's 1986 total net income without a 1 percent increase is $28,074,000 (Ex. PHC–2 (revised)).

20. General Order 11 requires that the reasonableness of a carrier's return on rate base will be based on a comparative analysis of the carrier's projected return on rate base with the return on total capital earned by comparable U.S. corporations (46 CFR 552.6(d)(2)(ii)).

21. Matson allocated its expenses between FMC-Trade and non-Trade movements on the bases of cargo-cube, as required by G.O. 11. The record establishes that the shifts of high rated westbound cargo from FMC to ICC tariffs does have the effect of placing more of the expense burden on FMC ratepayers than before (Ex. R–3, Test Year, p. 14).

22. The 15-year period ending in 1984 is an appropriate period for establishing the historic benchmark rate of return on total capital before adjustment for current trends in the cost of money, for risk and in rates of return. The benchmark rate of return is 11.56 percent (Ex. R–7, pp. 8–13, Sch. 1).

23. General Order 11 provides that, where appropriate, the benchmark rate of return may be adjusted for current trends in rates of return, the cost of money and relative risk (46 CFR 552.6(d)(2)(ii)).

24. Rates of return peaked in 1980 and have trended downward since that time (Ex. PHC–6, p. 18; Entire Record).

25. The levels of long-term and short-term interest rates have come down recently as has the level of inflation. Corporate triple A bonds have declined from a rate of 14 percent in 1981 to 9.29 percent on March 1, 1986. Present interest rates are at their lowest level in eight years. It is more reasonable to expect lower rather than higher interest rates in 1986 (Ex. PHC–6, pp. 18, 19; Tr. 239, 240, 558–590, 794, 795)

26. Matson's risk is below the average risk of the average U.S. corporation since Matson's share of the Trade is over 70 percent, since it is the leader in the Trade in setting rates and since its competition has had a minimal effect on Matson's relative position in the Trade and in the Hawaiian Service generally (Ex. PHC–6, pp. 11–16).

Ultimate Facts

27. General Order 11 establishes guidelines for the methodology to be used in determining what constitutes a fair and reasonable rate of return or profit. The regulation specifically gives the Commission the authority and discretion to depart from the methodology where it would lead to an unfair or unreasonable result, and the Commission may do so on a case by case basis without prior notice to the carrier. However, where, as here, the record fails to establish that the methodology used was unfair or unreasonable General Order 11 methodologies must be followed.

28. Matson's cargo forecasts are reasonable and may be used to estimate revenues in the Test Year, 1986.

29. The *Matsonia* should not be included in Matson's rate base since it was removed from service in 1981, Matson's Board of Directors did not approve reconstruction until February of 1985 and it will not reenter service in 1986, the Test Year.

30. The evidence of record does not establish that Matson's treatment of the *Lurline* lease is improper and therefore Matson may amortize the remaining charter hire payments as modified over the remaining term of the original lease.

31. The correct average cost of fuel per barrel for the Test Year 1986 is $15 per barrel.

32. The evidence of record does not establish that Matson's use of cargo cube measurements to allocate expenses between FMC-Trade and

the non-Trade movements is unfair or unreasonable, and therefore Matson allocation is proper under General Order 11.

33. Matson is less and not more risky than the average U.S. corporation and no upward adjustment to the benchmark rate of return is warranted. Since the evidence fails to establish to what degree Matson is less risky no downward adjustment is warranted.

34. No adjustment to the benchmark rate of return for current trends in rates of return is warranted.

35. Interest rates are declining and the evidence does not support any upward adjustment to the benchmark rate of return for cost of money. Since the countervailing evidence does not establish the specific amount of the decline in the cost of money no downward adjustment for current trends is warranted.

36. The benchmark rate of return is 11.56 percent and on the basis of this record it should not be adjusted up or down for current trends. However, the difference between the benchmark rate and the rate Matson would realize after adjustment for the *Matsonia* and average fuel costs is, in our best judgment, within the zone of reasonableness and Matson's present rates are not unfair or unreasonable.

37. Matson's request for a 1 percent rate increase would, in our best judgment, be unfair and unreasonable and is therefore rejected.

Discussion, Findings, and Conclusions

As has previously been noted, the Commission generally has ordered that a determination be made as to whether or not Matson's tariffs are reasonable with or without the proposed 1 percent (formerly 2.5 percent) rate increase. It has set forth four specific issues that will be considered and discussed below. However, before moving to those specific issues it is important to enumerate the basic principles which govern determinations made in rate cases. The two leading cases were both decided by the Supreme Court of the United States. They are *Bluefield Waterworks and Improvement Company* v. *Public Service Comission of West Virginia,* 262 U.S. 679 (1923), and *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 91 (1944). In *Bluefield,* at page 692, the Court stated:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional rights to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the entity and should be adequate under efficient and economical management to maintain and support its credit

> and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunity for investment, the money market and business conditions generally.

Later, in *Hope* the Court, at page 603, refined and enlarged the above test as follows:

> The ratemaking process under the Act, i.e., the fixing of "just and reasonable rates" involves a balancing of the investor and consumer interests. . . . [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

A reading of the above language and of some legal commentators clearly indicates that the *Bluefield* and *Hope* cases actually set forth two tests for determining a fair rate of return.[9] The commentators seem to disagree as to whether or not the "cost of capital" test or the "comparable earnings" test should be the primary legal standard.[10] Given the above, one must answer the obvious question, i.e., did the Commission choose one test over the other, and if so, which test?

In Docket No. 78–46, *Financial Reports of Common Carriers by Water in the Domestic Offshore Trades,* 19 SRR 1283, the Commission revised General Order 11, effective March 28, 1980.[11] (46 CFR 552 et seq.). The order provides:

> §552.1 Purpose
>
> (a) The purpose of this part is to establish methodologies that the Federal Maritime Commission will utilize in evaluating the reasonableness of rates in the domestic off-shore trades filed by vessel operating common carriers (VOCC's) subject to the provisions of the Intercoastal Shipping Act, 1933. . . .

[9] See Phillips, *The Economics of Regulation* (Richard D. Irwin Inc., 1965), p. 268; Locklin, *Economics of Transportation* (Richard D. Irwin Inc., 1972, 7th Ed.), p. 394.

[10] See James C. Bonbright, *The Principles of Public Utility Rates* (Columbia University Press, 1981), p. 257, and Phillips, *supra,* who advocate "cost of capital" test; and Leventhal, *Vitality of the Comparable Earnings Standard for Regulation of Utilities in a Growth Economy,* 74 Yale Law Journal 989, 994–995 (1965); and Locklin, *supra,* who advocate the "comparable earnings" test.

[11] The background of the revision and its relationship to the enactment of P.L. 95–475 will be discussed in a latter portion of this decision.

> (b) The methodology employed in each case will depend on the nature of the relevant carrier's operations and financial structure. *In evaluating the reasonableness of a VOCC's overall level of rates, the Commission will use return on rate base as its primary standard.* However, the Commission may also employ other financial methodologies in order to achieve a fair and reasonable result. (Emphasis supplied.)

In considering the general principles applicable in rate cases it is well to remember that many of the determinations made are based on predictions and on subjective factors that militate against any great degree of precision, and the Supreme Court has long recognized a "zone of reasonableness." *Peruvian Air Base Rate Cases,* 390 U.S. 747 (1968). In *United Railways & Elec. Co.* v. *West,* 280 U.S. 234, 251 (1930), The Supreme Court stated:

> What will constitute a fair return in a given case is not capable of exact mathematical demonstration.

and further,

> It is a matter of more or less approximation about which conclusions may differ.

Perhaps, as a result of the Court's recognition that ratemaking is something less than an exact science, courts generally tend to give administrative bodies wide latitude and discretion in exercising their judgment. In *Market Street Ry. Co.* v. *Railroad Commission of California,* 324 U.S. 548 (1945), the Supreme Court (at page 559) justified the Railroad Commission's failure to follow expert testimony stating (at page 559):

> It is contended that the Commission should draw conclusions from these facts only upon hearing testimony of experts as to the conclusions they would draw from the facts of record. Experts' judgments, however, would not bind the Commission. Their testimony would be in the nature of argument or opinion, and the weight to be given it would depend upon the Commission's estimate of the reasonableness of their conclusions and the force of their reasoning.

In *Bluefield, supra,* the Supreme Court, at page 692, stated:

> What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.

In *Idaho Power Co.* v. *Thompson,* 19 F.2d 547, 552 (D. Ida. 1927), the Court stated:

> . . . where a factor in the problem involves prophesy (sic), or rests upon mere opinion evidence, the Commission was not, nor

> are we, bound to accept absolutely and without qualification one or the other of two conflicting views, or the opinion of a single expert where but one testifies.

In *Association of American Publishers, Inc.* v. *U.S. Postal Service,* 485 F.2d 768, 773 (D.C. Cir., 1973), the District of Columbia Circuit Court of Appeals stated:

> The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal.

Finally, the last and, we think, the most important general principle to be applied in a rate case was succinctly set forth by the Commission itself in *Trailer Marine Transport Corporation—Proposed General Increase in Rates,* 22 F.M.C. 175, 198 n. 8 (1979). There the Commission stated:

> Regardless of the specific issues stated in an order of investigation, *the ultimate issue in any proceeding involving a . . . increase in rates remains whether the increase is just and reasonable.* (Emphasis supplied.) [12]

Given the above principles it now remains for us to apply them in considering the specific issues raised by the Commission in its Order of Investigation and Suspension. Cutting across those issues is the recurring and overriding question of whether or not the guidelines set forth in G.O. 11 must be adhered to and to what extent. That question will now be considered.

Issue No. I—What is the purpose and effect of General Order 11 (46 CFR, Part 552 et seq.)?

Throughout the trial of this proceeding and in their briefs, Matson and the State of Hawaii with Tobias have engaged in a continuing argument as to the purpose and effect of G.O. 11. Generally, Matson avers that G.O. 11 must be strictly adhered to if rate cases are to be decided expeditiously as the Congress intended. It avers that, "Fairness to the Carrier Requires Adherence to the General Order 11 Guidelines," and that the Commission must give the carrier notice if it is going to change G.O. 11, citing *Boston Edison Co.* v. *F.P.C.,* 557 F.2d 845 (D.C. Cir. 1977), cert. denied, 343 U.S. 956 (1977), and *F.E.R.C.* v. *Triton Oil and Gas Corp.,* 750 F.2d 113, 116 (D.C. Cir. 1984). The State, on the other hand, with Tobias agreeing, argues that, while it does not contest the fact that

[12] While this case, unlike the present case, involved a "general rate increase," the statement applies equally to the proposed rate increase involved in this proceeding. We think the holding reflects the principles enunciated in *Hope, supra,* at page 602, that "Under the statutory standard of 'just and reasonable,' it is the result reached not the method employed which is controlling."

Congress intended to shorten the period of rate investigations to 180 days, and that the Commission was mandated by the Congress to "prescribe guidelines for the determination of what constitutes a just and reasonable rate of return or profit," it "disagrees with Matson on its interpretation of strict adherence to the prescribed rules regardless of the circumstances and conditions under which such rules are being applied." The State then argues the applicability or inapplicability of G.O. 11, as to specific issues, which will later be discussed.

In order to make any determination regarding the application of G.O. 11, it is necessary to know how it came into being, what it says, and what the Commission itself has said in case law decided after the general order was promulgated. Its origins are rooted in the amendment of the Intercoastal Shipping Act of 1933 by Public Law 95–475. In amending the 1933 Act Congress noted the P.L. 95–475 had two primary purposes. It stated (S.R. No. 95–1240, 95 Cong., 2nd Sess., p. 3331 (1978)):

> The first [purpose] is to alter the power of the Federal Maritime Commission (FMC) to suspend general rate increases or decreases in the domestic offshore trades. This is intended to avoid unnecessary interruptions in rate increases or decreases which may be lawful; to provide for refunds if rate increases go into effect and are later found illegal; and to extend the suspension power in those cases where it is needed to protect legitimate interests of the shipping public.
>
> The second [purpose] is to expedite the decisionmaking process of the FMC in its regulation of the domestic offshore trades. This will assure that the shipping public receives the benefit of prompt application of matters before the Commission, and that the participants will be spared the time and expense of participating in unnecessarily long and complex proceedings.

In the House Report (H.R. Rep. No. 95–474, 95th Cong., 1st. Sess. 10 (1977)) it was explained that the law requires the Commission to "promulgate methodology guidelines for determining an appropriate rate of return . . . ," and that "these guidelines should be given substantive effect and be followed rigidly in each rate proceeding."

The Intercoastal Shipping Act, as amended, in accordance with the Congressional purpose (page 2 of the Senate Report) requires:

> . . . the Commission to periodically promulgate guidelines for the determination of reasonable rates of return, or profit, for common carriers subject to the 1933 Act;

> and requires:

> . . . the Commission to explain in detail its reasons for instituting a hearing on rate changes in the domestic offshore trades, and publish such explanation in the Federal Register.[13]

After the enactment of P.L. 95–475, the Commission did undertake to publish what is now General Order 11. Before doing so it held a prolonged rulemaking proceeding in Docket No. 78–46 to "establish methodologies that the Commission intends to follow in evaluating rates in the domestic offshore trades filed by vessel operating common carriers, and to provide for orderly acquisition of data." *Financial Reports of Common Carriers by Water in the Domestic Offshore Trades*, 19 SRR 1283 (1980). A reading of the report attests to the broad scope of the rulemaking as well as to the detailed determinations made by the Commission. Some of the issues raised in this proceeding were raised in the rulemaking, albeit not on the same facts or in the same manner.[14] As a result of the proceeding the Commission promulgated the present G.O. 11.

The pertinent provisions of G.O. 11 are as follows:

> § 552.1 Purpose.
>
> (a) The purpose of this part is to establish methodologies that the Federal Maritime Commission will utilize in evalutating the reasonableness of rates in the domestic offshore trades filed by vessel operating common carriers (VOCCs) subject to the provisions of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 843, 844, 845, 845(a) and 847) and to provide for the orderly acquisition of data essential to this evaulation. Compliance is mandatory and failure to file the reports required under this part may result in denial of rate increases or rejection of tariff pages implementing rate changes or penalties of up to $100 for each day of such default (46 U.S.C. app. 820(a)).
>
> (b) The methodology employed in each case will depend on the nature of the relevant carrier's operations and financial structure. In evaluating the reasonableness of a VOCCs overall level of rates, the Commission will use return on rate base as its primary standard. However, the Commission may also employ other financial methodologies in order to achieve a fair and reasonable result.
>
> (c) In evaluating the reasonableness of a carrier's rates, the Commission may consider, in addition to the rate of return of the filing carrier, the effect which approval or disapproval of the rates will have on other carriers in the Trade.
>
> (d) The Commission reserves to itself the right to employ other bases for allocation and calculation and to consider other operational factors in any instance where it is deemed necessary to achieve a fair and reasonable result.

[13] See section 3 of the Intercoastal Shipping Act for the complete text which sets forth specific requirements for dealing with rate increases, including hearings, suspensions, and time limitations.

[14] These issues will be discussed in a latter portion of this decision.

§552.6 Forms.

* * * * *

(d) *Rate of return (Exhibits C and C(A))*—(1) *General.* All carriers are required to calculate rate of return on rate base. However, the Commission or individual carriers, at the Commission's discretion, may also employ fixed charges coverage and/or operating ratios.

(2) *Return on rate base.* (i) The return on rate base will be computed by *dividing* Trade net income plus interest expense *by* Trade rate base.

(ii) The reasonableness of a carrier's return on rate base will be based on a comparative analysis of the carrier's projected return on rate base with the rate of return on total capital earned by comparable U.S. corporations. This technique, the comparable earnings test, is based on analysis of the earnings of U.S. corporations over an extended period of time. From these time/series data, the average rate of return earned by U.S. corporations is computed, and, where appropriate, adjusted for current trends in rates of return, the cost of money and relative risk.

In addition to the above, G.O. 11 requires the filing of specific forms and data when there is a general rate increase (Part 552.2(f)(g)),[15] sets forth how property and revenue is to be allocated (Part 52.2(j)), defines the meaning of "voyage," "service," "trade" and "cargo-cube" (Part 552.5), provides what should be included in the rate base including vessels, depreciation, working capital and capitalized interest and leases (Part 552.6(a)), deals with administrative and general expenses (Part 552.6(c)(4)), and with interest expense (Part 552.6(c)(5)), inactive vessel expense (Part 552.6(c)(6)), provisions for income tax (Part 552.6(c)(10)), and many other matters. They all generally relate to the items required on the forms that must be filed when a general rate increase is sought or items contained in the carrier's annual report.

Since the promulgation of G.O. 11,[16] the Commission has decided several rate cases. Probably the most important of them is Docket No. 81-10, *Sea-Land Service, Inc., Trailer Marine Transport Corporation, Gulf Caribbean Marine Lines, Inc., and Puerto Rico Maritime Shipping Authority, Proposed General Rate Increases in the Puerto Rico and Virgin Islands Trades*, 24 F.M.C. 164 (1981), aff'd 678 F.2d 327 (D.C. Cir. 1982), hereinafter called "*Sea-Land.*" In *Sea-Land*, the Commission held that:

Under General Order 11, the fixed charges coverage ratio may be used as an alternative standard for measuring the reasonableness

[15] This case does not involve a general rate increase and all that is needed to avoid many of the filing requirements is a certification from the VOCC that the increase is not a general rate increase and that the financial and operating data required by Part 552(f) is not required.

[16] It should be noted that the Commission made some relatively minor changes to G.G. 11 in Docket No. 81-46.

> of proposed rates *only when the rate of return on rate base method produces an unreasonable result.* (Emphasis supplied.)

Further, in affirming the Commission, the United States Court of Appeals for the District of Columbia held that:

> In reviewing rate-making decisions of administrative agencies, courts must take proper cognizance of both difficulty of task and expertise of agency performing it.

and that:

> In reviewing general rate increase order of Federal Maritime Commission, Court of Appeals must determine whether Commission properly carried out its mandate from Congress to review carrier-filed rates for justness and reasonability.

and that:

> [an] Order by Congress to administrative agency to consider matter expeditiously is not a mandate to be arbitrary, capricious, irrational or sloppy, but strict time frames within which to work may require agency to make its decision on record more slender than desired and may render acceptable terse explanation of reasoning.

and that:

> When evidence of record does not fairly establish either proposition or its contrary, administrative agency is within its sound discretion in adhering to what is knowable and avoiding what is necessarily in domain of speculation.

and finally that:

> [the] Court of Appeals will accept agency's interpretation of its own regulation so long as it does not do violence to language of regulation itself.

Given the above, it remains for us to clarify the application of G.O. 11 to this proceeding. We can readily agree with Matson that G.O. 11 guidelines were mandated by Congress and that adherence to them is required, especially in the filing of the various forms and documents that are required in general rate increases. However, that is quite different from the view that the guidelines themselves are mandatory in the sense that they can never be changed or must be followed blindly. Certainly, it would be a clear denial of due process to exclude evidence as inadmissible, as Matson requested at trial, because the evidence did not follow the specific format or methodology set forth in G.O. 11. It is clear from a reading of the general order itself that, "the Commission may also employ other methodologies *in order to achieve a fair and reasonable result*" (emphasis supplied), and that "The Commission reserves to itself

the right to employ other bases for allocation and calculation and to consider other operational factors in any instance *where it is deemed necessary to achieve a fair and reasonable result.*" This clear language comports with Congress' desire that "the Commission shall from time to time . . . review such regulations and make such amendments thereto as may be appropriate."

So here, we reject Matson's view that the guidelines are "mandatory," if that view means to imply that once a methodology, or report or adjustment is set forth in G.O. 11 it *must* be followed. Such a view would mean that the Commission could not react promptly to factual changes that they had neither considered nor contemplated when G.O. 11 was promulgated. The regulation itself says otherwise and the real test is whether or not adherence to G.O. 11 produces a fair and reasonable result. As to Matson's argument that it must be given notice of changes in the general order under the holding in the *Boston, supra,* case we also disagree. The facts in the *Boston* case and the application of the regulation, as well as the content of the regulation itself differ markedly from G.O. 11, which within its terms allows for the use of other standards. That is not to say that from a pragmatic point of view we disagree totally with Matson on this point. Where a material change is contemplated in G.O. 11, for example, in a reporting requirement, that is not the result of a claim of unfairness or unreasonableness on the part of a protestant, then it would seem that some kind of prior notice is essential, even if only to allow the carrier to comply. Such notice, however, is hardly a precondition to the use of alternative methodologies, as Matson suggests, where fairness and reasonableness dictate otherwise.

Turning to the State and Tobias and the assertion that G.O. 11 should not be considered a "precise and unflexible prescription which cannot be modified to produce a more reasonable and realistic result," we would agree with that premise. We would also agree that the language in *Sea-Land, supra,* at 24 F.M.C. 170, which states that "Adherence to G.O. 11 therefore is essential. Departures from this requirement cannot *generally* be permitted in rate proceedings" (emphasis supplied), must be read in the light of the facts and circumstances of that case. Further, the Commission's use of the word "generally," which Matson seems to ignore, suggests that where the result was unfair or unreasonable it would exercise its discretion and allow the use of other methodologies. Finally, as we have noted, we would certainly agree with Hawaii that due process requires consideration of evidence going to the validity and propriety of G.O. 11 methodologies in particular circumstances.

Once having said all of the above, however, the question that really arises is just how compelling must the evidence be before G.O. 11 methodologies and procedures are deemed unfair and unreasonable and need to be changed. In our view, in a rate case that evidence must be specific and clear and must not only identify what one claims to be unfair and

unreasonable but must suggest what is fair and reasonable so that the Commission may arrive at a fair and reasonable rate of return. Here, as will be seen as the specific issues are discussed, the State raises some G.O. 11 issues that cause concern—that cause one to question. However, framing an issue or proving the existence of a question is not enough. No specific viable alternatives are offered which are themselves shown to be fair and reasonable. We suspect the imposition of time limits may have prevented a fuller presentation of facts or competing methodologies and that, as Hearing Counsel points out, the issues may "deserve more attention than is possible given the time constraints of this proceeding." Whatever the reason, we have generally found against the State and Tobias where questions of G.O. 11 methodology are concerned, not because we are always satisfied with Matson's use of the methodology, but because the record does not clearly establish unfairness or unreasonableness and does not offer other methodologies which are fair and reasonable and which can be incorporated into a determination of a fair and reasonable rate of return.

Perhaps in recognition of the above, the State requests that the Commission initiate another G.O. 11 rulemaking proceeding. That request, of course, is one the Commission may grant in its discretion. However, since the Commission exhaustively considered the regulation in Docket No. 78–46, and since it has been held that the present G.O. 11 allows for the use of other methodologies and since this proceeding was conducted under severe time constraints which disadvantaged all the parties, the Commission may wish to consider the alternative of remanding the proceeding insofar as it relates to the reasonableness of the present rates, where no time limitation need to be set, so that the parties may be given a realistic opportunity to fully develop the facts and issues.[17] Such an approach would avoid a prolonged and unnecessary repetition of all of the matters reviewed in Docket No. 78–46 and would allow for specific treatment of particular issues, such as the effect on FMC ratepayers when Matson shifts cargo movements to ICC tariffs and uses cargo cubes to allocate, the computation of voyage days where barge traffic to the Neighbor Islands is involved, and the validity of some of the adjustments made by the State's expert.

Issue No. 2—Has Matson properly projected its revenues, expenses and rate base for 1986?

Projected Revenues

In determining whether or not Matson properly projected its revenues, expenses and rate base for 1986, it is necessary to consider several smaller

[17] The reasonableness of the present rates is an issue raised pursuant to the authority of sections 18(a) and 22, respectively, of the Shipping Act of 1916 (46 U.S.C. app. §§817 and 821), where the 180 day time limitation does not apply. No party has raised any issue regarding the application of G.O. 11 methodologies where these sections of the 1916 Act are involved.

collateral issues raised by the parties. The first involves Matson's projected revenues. In estimating its revenues for 1986 Matson made certain cargo forecasts. It presented its Manager, Cargo Forecasting and Sales Analysis, who testified (Ex. R–1, pp. 1–3; Tr. 22–25) that the forecast is made on the basis of customer contacts, the evaluation of the competitive situation, and an analysis of economic trends as well as a review of historical results and trends. He projected total revenues of $286,494,000 in 1986, based on Matson's proposed rates, of which $206,896,000 was allocated to the "Trade" (FMC tariffed movements). Hearing Counsel and Tobias did not seriously contest Matson's revenue projections or offer substitute data. The State of Hawaii, however, argues "that Matson's projected additional revenues ($6,987,000) should be disallowed, and additional revenues based on a slightly more optimistic view of 1986 operations should be included ($5,186,000) because of an estimated 2.4 percent growth in cargo in 1986 over 1985." (Exs. PH–2, PH–3). It seeks to justify its estimate of the 2.4 percent increase by noting, "(1) the lackluster performance of the national economy in 1985, (2) the particular problems associated with the airline strike in 1985, (3) the falling value of the dollar and (4) rapidly declining oil prices." (See Exs. PH–16 thru PH–21 for a more detailed discussion and explanation of the State's arguments as well as pp. 8–11 of its Reply Brief.)

Based on the evidence contained in this record it is held that Matson's cargo forecasts for 1986 are reasonable and should be used to estimate revenues for 1986. The forecasting method used by Matson has been reviewed and approved by the Commission since 1975.[18] The forecasts themselves have been reasonably accurate. Actual results in the last three years have ranged from −.2 percent to +2.3 percent to plan for TFEU's, with an average variance of +.7 percent, and from −1 percent to +1.1 percent to plan for revenues, with an average variance of +.2 percent (Ex. R–4, p. 14). While the factors cited by the State may well occasion an increase in cargo growth and revenue, it is just as likely that countervailing events may prevent that growth. Rather than engage in pure conjecture as to what might or is likely to occur we prefer to adopt Matson's cargo and revenue projections based on their past history of reliability.

Rate Base

A second collateral issue raised by the parties is the validity of Matson's projected rate base for 1986. Matson presented a Statement of Financial and Operating Data for the test year 1986 (Ex. R–3 (Exhibit A)). Under 46 CFR 552.2(f), a carrier is required to file such a form when requesting

[18] See Docket No. 79–55, *Matson Navigation Co.—Proposed Bunker Surcharge in the Hawaii Trade*, 22 F.M.C. 281, 297 (1979), aff'd by the Commission at 22 F.M.C. 276 (1979), for a discussion of Matson's forecasting method.

a 3 percent or more general rate increase.[19] In its statement of rate base Matson included working capital of $7,759,000, which represented a computation of average voyage expenses allocated to the Trade (FMC tariffed movements). Matson's calculation of working capital considers only the voyage days and voyages of the long-haul vessels (Ex. R–5, p. 25). The State has recomputed the amount of working capital to be $5,123,000, a reduction of $2,636,000 from Matson's figure. It does so on the basis that Matson's calculations fail to include voyage terminations attributable to the inter-island barge service which was begun in 1985, and which provides distribution service to westbound cargo to Hawaii ports other than Honolulu as well as transporting molasses on their in-bound return trip from the outer islands. The State also notes that since December of 1985, the inter-island barges have been transporting various foreign and domestic origin cargo from Honolulu to the other Hawaii ports. The State complains that while Matson fails to include the barges' voyage terminations in the calculation of working capital it has included inter-island barge-related expenses in appropriate expense categories. Tobias agrees with the State while Hearing Counsel agrees with Matson's method of calculation.

Matson defends its calculation of working capital and the exclusion of the barge traffic in the computation of voyage days and the number of voyages stating, "They are not true voyages and they do not meet the criteria of a voyage per General Order 11, Section 552.5(a) which specifies that 'voyage' means a 'completed round-trip, from port of origin and return to port of origin.' " It argues that the barges "perform an extension of the voyages of the container ships that operate between the U.S. Pacific Coast and Hawaii." It also alleges that by excluding the barges it avoids "possible manipulation of the amount of working capital by selection of barge accounting periods considerably longer or shorter than the average voyage in the service."[20] In its reply brief, pp. 24–27, Matson describes how the "Neighbor Island Service" was performed either by a Matson self-propelled ship or through the use of outside (Young Brothers) barges prior to 1985. Now Matson tugs and barges perform such services. Matson admits that it added the expenses of the barge operations into the expenses of its long-haul ships although it did not add any additional voyages. It states that, "Since Matson is principally a self-propelled operator, we have followed the working capital provisions (in G.O. 11) applicable to such operators."

General Order 11 sets forth different methods for the calculation of working capital for vessel operators as opposed to tug and barge operators (46 CFR 552.6(b)(5) and (6)). In the case of vessel operators working

[19] Since the increase requested here was originally for 2.5 percent and was then reduced to 1 percent Matson was not required to file the form and, in fact, did not do so at the time it requested the 2.5 percent increase.

[20] See Ex. R–5, p. 25.

capital is determined as average voyage expense. In the case of tug and barge operators working capital is determined as average monthly expense. Matson states that, "In its determination of working capital, Matson elected not to add barge voyages which could alter the result obtained in computing the working capital for its long-haul service." It asserts that, "In the absence of guidance from the Commission, Matson felt that the fairest position would be not to unduly disrupt the result achieved in the calculation for the long-haul ships by including the additional barge voyages."

It is clear that Matson's computation of working capital does not properly take into account the operation of its barge service to the Neighbor Islands. It is also clear that the State's suggested remedy is equally improper. Given the record made here we cannot determine or calculate what the proper methodology or adjustment should be, and therefore must allow Matson's methodology to stand.

Another element of the rate base issue is Matson's inclusion of the *Matsonia* in the rate base. The *Matsonia* was operated in the Hawaii service from 1973 until July of 1981. Since then it remained out of service until July of 1981. In February of 1985 Matson decided to reconstruct the vessel. It has been in the shipyard since January of 1986 and Matson does not expect it to reenter service until the second quarter of 1987.

General Order 11 (46 CFR 552.6(b)(1)(i)(A)) provides that:

> For those cargo vessels employed exclusively in the service for the entire period, inclusive of normal periodic layups, the adjusted cost shall be included in the total to be allocated to the Trade. If a vessel is permanently withdrawn from the service during the period and laid-up pending disposition and that vessel has been employed exclusively in the service for the preceding 12 months, sixty days of the lay-up period may be assigned to the service. If a vessel is withdrawn from the service for renovation or conversion, and if the carrier certifies that the vessel has been employed exclusively in the service for the 12-month period immediately prior to withdrawal and will be employed exclusively in the service for a period of at least 12 months after the renovation or conversion is completed, the adjusted cost shall be included in the total to be allocated to the Trade.

Matson included the *Matsonia* in the rate base in the amount of $13,973,000. (Ex. R–3, Schedules A–I and A–II). It states the *Matsonia* was placed in "reserve status because of cargo declines" and that throughout the period of its reserve status, "*Matsonia* performed a vital function for Matson by being available for reactivation in case another vessel failed or a surge in cargo created a shortage of capacity." It avers that keeping *Matsonia* in the rate base is "consistent with the over all purpose of General Order 11 to encourage a carrier to provide efficient services by

reducing operating costs through placing temporarily in reserve vessels not needed to meet current operations."[21]

Hearing Counsel, the State and Tobias all argue that the *Matsonia* should be excluded from the rate base. They note that the *Matsonia* was not withdrawn from the service for renovation or conversion and that a decision was not made on reconstruction until 1985. Further, they argue that it is clear that the *Matsonia* will perform no service whatsoever in the Trade in 1986 and that current ratepayers should not bear the cost of the asset. Put another way, they assert that it would not be fair to current ratepayers to allow Matson a return on an asset idle since 1981.[22]

Whether one does or does not apply the "used and useful" test advocated by Hearing Counsel and rejected by Matson, we believe the record in this case clearly warrants the elimination of the *Matsonia* from Matson's rate base. It has been found as fact that the *Matsonia* was not withdrawn from the service for renovation or conversion and that it will not be used in the service during the test year 1986. That being so there is no reason why current ratepayers should pay Matson for use of the vessel.[23] As to Matson's assertion that Hearing Counsel and the State "have gone outside the provisions of General Order 11, which does not include such a standard" [the "used and useful" standard], we think that as to this issue, as well as others that have been and will be later discussed regarding General Order 11, Matson treats the regulation as some kind of absolute, inexorable, all-encompassing set of rules when in fact they are guidelines, albeit stringent ones, whose purpose is to aid in the setting of a fair and reasonable rate of return. The fact that the regulation does not specifically address the issue in no way, of itself, detracts from the validity of the arguments made by the parties. The issue here, with or without consideration of any specific provision of General order 11, is whether or not ratepayers should pay for the *Matsonia* when, in fact, the *Matsonia* had not been in service since 1981 and would not be used in 1986. We think not and it is so held.

Expenses

A third collateral issue to the broader issue contained in the Commission's Order of Investigation and Suspension is whether or not Matson properly projected its expenses for 1986. Two items of expense, i.e., (1) amounts included for escalation in its test year expenses, and (2) transfers to its affiliates of overhead and other expenses merit only brief discussion. As to the amounts collected for escalation in 1986, Matson's Manager of

[21] See pp. 22–24 of Matson's Opening Brief and pp. 15–20 of its Reply Brief for a full discussion of its views.

[22] See pp. 21–25 of Hearing Counsel's Original Brief; pp. 5, 6 of Tobias' Reply Brief; and Ex. PH–33 for the position of each of the parties.

[23] We think this result is in complete accord with G.O. 11, especially in view of the Commission's statements contained in Docket No. 81–46, 24 F.M.C. 373, 378 (1981).

Financial Analysis presented oral and written testimony (Ex. R–3, pp. 7, 9; Ex. R–5, pp. 21, 22; Tr. 411) explaining those expenses claimed in the Income Statement (Ex. B to Ex. R–3). He explained the projections of wage increases under union contract offshore bargaining agreement cost of living clauses, projected increases in wharfage expenses and bargained for increases under ILWU labor agreements. The State did present some evidence alleging that the expenses were not substantiated (Ex. PH–31). Tobias agrees with the State and Hearing Counsel did not contest the expense projections. In its briefs the State offers little or no specific arguments related to Matson's projections. Given the evidence of record we cannot but conclude that the offshore wage increase projected by Matson is required pursuant to clauses in the labor agreements which adjust wages based on charges in the Consumer Price Index for Urban Wage Earners and Clerical Workers. Further, the escalation in vessel/voyage expenses represents increases in port charges, subsistence and stores of approximately 2.5 percent, which we think is reasonable. Finally, the increase in ILWU charges is based on commitments already included in current labor agreements for wage and benefit increases which have reasonably been estimated by the Pacific Maritime Association to amount to 5.5 percent and 5.2 percent for mainland and Hawaii labor. All of the labor agreement escalations represent estimates based on commitments for wage increases, not on forecasts of liabilities not yet committed (Tr. 495). It is held that amounts included by Matson for escalation of expenses in 1986 are reasonable and allowable.

As to Matson's transfer of its administrative and overhead expenses to its affiliates, it has allocated approximately $2.5 million to reflect services which Matson allegedly provided to these companies. Hearing Counsel does not contest Matson's allocation. The State and Tobias while objecting to it, present little in the way of evidence or argument to warrant changing what Matson has done. Matson at pages 33 and 34 of its original brief presents argument supporting its position. We believe those arguments to be valid and hold that Matson's allocation of administrative and overhead expenses to its affiliates is proper.

Another facet of the expense issue is whether or not Matson's amortization of *Lurline* charter hire payments over the term of the original charter is appropriate. The State and Hawaii say it is not, while Hearing Counsel does not dispute Matson's treatment of the charter hire payments. According to the financial reports submitted by Matson it originally entered into a long-term lease agreement for the vessel *Lurline* running for 25 years. The original capitalized base cost of $26,776,462.00 was amortized at an annual rate of $1,071,058.00 until 1982 when Matson completed modifications costing $41,559,270.00. The owner-lessor paid for most of the modification costs and the original lease term was not extended for the modified vessel. In 1982, 16 years remained on the original term of the lease. Matson has continued the same rate of amortization as to the original

cost and has amortized the modification costs each year in the amount of $2,650,720.00, over the remaining life of the lease. Matson has an option to renew the lease for a total period of five years as well as an option to purchase the vessel at fair market value at the termination of the lease.

The State with Tobias would reduce the yearly amortization charge by extending the useful economic life of the vessel to not less than 25 years. It argues that while it concedes that Matson has capitalized *Lurline's* lease in accordance with Financial Accounting Standards Board Statement No. 13 (FASB), when a lease is capitalized under the criteria prescribed by the FASB, it is no longer a lease but is a purchase and its useful life must be determined as if it was a purchase rather than a lease. It states that it has chosen 25 years as the useful life as of the modification date and that "if Matson disagrees, then it behooves Matson to provide evidence for the record showing less than 25 years is more realistic." It urges that at issue is "simply the fairness and reasonableness of annual charges to the ratepayers and not the rules or practices which may be employed in the reporting of costs for tax and financial information purposes."[24] It notes that if Matson is allowed to treat the useful life of the modification as 16 years rather than 25, it will be unfair to ratepayers and points to the modification of the *Matsonia* at a cost exceeding that of the *Lurline* and that only 10 or 11 years will remain on the *Matsonia* lease when it resumes service. Finally, it states that Hawaii's solution is "offered only as an interim solution" and that "A longer term solution needs to be devised by the Commission."

Matson, on the other hand, argues that the State has not submitted any evidence to show that the remaining economic lives of the improvements are 25 years and that it has followed accepted accounting procedure. It alleges that the accounting rule "requiring the capitalization of only *known* lease payments and their amortization over only the *known* lease terms" makes sense and should be followed by the Commission. It cites the fact that the State's failure to capitalize the additional charter hire and purchase payments that Matson would have to make to retain *Lurline* for the additional nine year period, indicates the State's proposal is incomplete and unfair.

This issue is a troublesome one in that the decision regarding it results as much from the time strictures placed on the parties and the incompleteness of the evidentiary record as it does from the merits of the issue itself. It is clear to us that ratepayers should not be paying rates based on depreciation or amortization expenses which do not properly reflect the full term of the useful life of the asset's use in the Trade. That

[24] See pp. 15–17 of the State's Original Brief and pp. 15–18 of its Reply Brief for a more complete statement of its position including a discussion of how Matson's treatment under G.O. 11, notwithstanding the lease arrangement, recovers a full return and tax allowance as though the investment was funded on equity so that the return allowance exceeds the imputed interest cost embodied in the lease.

principle ought to be followed whether or not some tenet of "acceptable accounting practice" is involved.[25] However, where, as here, a capitalized lease is involved and the lease does not clearly establish how long the lessee is entitled to use the asset, as "modified," then questions do arise as to the proper period over which costs should be amortized. Here, the State has not established that the useful life of the *Lurline* as modified would be 25 years, much less that Matson will either continue leasing it for that period or would purchase it. Further, Matson is correct regarding the State's omission of the capitalization of the additional charter hire and purchase payments.

Given the present record we must hold in Matson's favor on this issue. In so doing it should be noted that the State's concerns are well-founded and that the impending modification of the *Matsonia,* where only 10 or 11 years remain on the lease, points up the need to closely monitor similar leases and their effect on ratepayers. Where it can be shown that extensive modifications are being made by Matson knowing that its use of the asset will extend beyond the stated terms of the capitalized lease, then the amortization should be spread over the term of its anticipated useful life.[26]

The most obvious item of projected expense for 1986 which begs examination is Matson's projection of fuel costs for 1986. The Commission's Order of Investigation and Suspension refers to it in stating that, "The most critical issues concerning Matson's current rates are whether declining fuel costs increased Matson's rate of return beyond the return projected for 1985 and whether a decline in the current trend in interest rates lowered the maximum reasonable rate of return." After the proceeding began Matson itself reduced the 2.5 rate increase originally sought, "Because of the decline in the price it pays for bunker fuel." Originally, Matson projected its 1986 fuel expenses on the cost of bunker fuel on September 15, 1985, which was $22 per barrel. It argues that "at the time of preparation of the plan [projection] and at the time of filing of the increase in [on] November 15, 1985, the projected fuel prices appeared reasonable estimates of likely fuel prices in 1986." (Ex. R–5, pp. 9–14.) It notes that since mid-January 1986, fuel prices sustained a dramatic decline resulting from the failure of OPEC oil ministers to reach an agreement on production. It states that it re-estimated its fuel costs for 1986 to be $18 per barrel, taking into account "projections received from its fuel oil suppliers of estimated costs for the remainder of 1986 as well as Matson's method of accounting for fuel expenses and its higher costs for the first four months of the year." [27]

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[25] What is acceptable accounting practice for tax purposes may not be proper for rate-making purposes.

[26] It is difficult to imagine a bona-fide lease which limits the lessee's use of an asset to a period that does not allow the lessee to recover the cost of modifications it makes. When the recovery is realized from special accounting or tax treatment at the expense of ratepayers the facts at least ought to be known and considered in arriving at a fair and reasonable rate.

[27] See pp. 17–22 of Matson's Opening Brief for a complete discussion of its position.

All of the other parties to this proceeding, i.e., Hearing Counsel, the State of Hawaii and Tobias, urge that a realistic estimate of the price Matson will pay in 1986 for fuel is $15 per barrel. Hearing Counsel's expert testified (Exs. PHC–5), that he believed the average price per barrel will drop to $13.52, and reached the $15 figure, recognizing that forecasting is not an exact science.

A thorough examination of the testimony given in support of one position or another regarding fuel prices leads one inescapably to the conclusion that cost projections in this area are highly uncertain. Where there is a collapse in oil prices as Matson's own witness testifies (Exs. R–5, R–10) forecasts based on historical trends have even less validity than they did formerly. Stated in its most elemental terms, here, there is no disagreement among the parties that fuel prices have fallen far below $22 per barrel since Matson's original estimate, however valid it may have been initially. The questions remaining are how much it will fall before stabilizing and when. The obvious answer to "when" is when OPEC is able to reach a solution. As to "how much," we already know it is well below even the $15 per barrel.

Based on the evidence of record we hold that the average price of fuel in 1986 for Matson will be $15 per barrel and that Matson's fuel expense figure of $20,491,772.00 should be adjusted to reflect such a holding. As to Matson's arguments that the estimate does not take into account its actual costs in January and February of 1986 we believe that as a projection the $15 figure does take those actual costs into account. Further, we agree with Hearing Counsel that "the use of Matson's fuel accounting system will require a downward adjustment in the fourth quarter average cost per barrel of fuel. This is caused by the fact that Matson's accounting reflects a several week lag between purchase and use of fuel, coupled with an expected upturn in fuel prices towards year's end, an upturn that will not be fully reflected in the Test Year using Matson's fuel accounting system."

We believe the Commission has considered the same type of situation in *Sea-Land, supra,* 24 F.M.C. 164 (1981). It held that because of dramatic changes in world oil markets, updated fuel cost projections should be included in the carrier's expense projections (24 F.M.C. pp. 180–186). It did so notwithstanding its determination that parties not be permitted to supplement their cases after the close of the record and after an Initial Decision is issued. The Circuit Court of Appeals for the District of Columbia in affirming the Commission's decision stated: [28]

[28] During this proceeding Matson made continuing objection to evidence presented which related to current events that occurred after some "cut-off date" it felt appropriate. In our view when current events are so sudden and far-reaching that projections made are unreliable or seriously open to question, it not only is not error not to limit evidence relating to the current events, but it would be error to rule such evidence inadmissible.

> . . . the agency is not required to blindfold itself, ignoring dramatic changes in circumstances which surface during the rate-making proceeding and are bound to effect [affect] the estimate. *Puerto Rico Maritime Shipping Authority* v. *Federal Maritime Commission*, 678 F.2d 327, 341 (D.C; Cir., 1982).

So here, it is held that the average full cost of fuel in 1986 will be $15 per barrel.

Issue No. 3—Has Matson properly allocated its revenues, expenses and rate base between its Commission and non-Commission regulated services for 1986?

The primary question involved in this issue is whether or not Matson's allocation of expenses between the FMC Trade and the non-Trade movements on a cargo cube basis is proper. General Order 11 (46 CFR 552.6(c)(2)(i)) provides:

> For all voyages in the Service, vessel expense shall be allocated to the Trade in the cargo-cube mile or cargo-cube relationship as appropriate. Should any of the elements of vessel expense be directly allocable to specific cargo, such direct allocations shall be made and explained.

All parties agree that Matson has allocated costs in accordance with G.O. 11. Hearing Counsel raises no question regarding the methodology. The State and Tobias, however, argue that it is flawed. The State in Exs. PH–1 through PH–11 and in its briefs make the argument that:

> . . . Matson exercised its options late in 1985 to withdraw its FMC Tariff No. 14, and to replace it with its ICC Tariff No. 16. While the tariff filings had absolutely no operational consequences, Matson's "tariff shuffle" has two direct adverse impacts: (1) delaying the disclosure of Matson's extraordinary high earnings under FMC regulation for 1985, and, (2) creating a basis for a rate increase in 1986. . . .
>
> The adverse consequences on the interests of the public due to Matson's "tariff shuffle" are simple: because Part 552 requires expense allocations on a "cargo-cube" or "cargo-cube-mile" basis, Matson's ICC-cargo (which is exclusively westbound) bears an inadequate assignment of the considerable costs of returning the Matson vessels and containers eastbound to their ICC points of origin; . . . . Therefore, this Commission must depart—as its rules permit it to do—from the inequitable strictures of Part 552.
>
> As Matson migrates more of its cargoes out from FMC regulation, FMC-regulated westbound and eastbound cargoes will be forced to bear an increasingly disproportionately large share of interest expense, vessel expense, and container handling expense.

In its arguments the State alleges that "Matson's recent shift of a significant volume of high-rated 'Storedoor' cargo from FMC tariffs to ICC tariffs significantly disrupts the historical directional balance of FMC-regulated Hawaii trade." It states that Storedoor cargo moves only in the westbound direction and that since the average revenue/unit of the Storedoor cargo is much greater than the cargo that remains under FMC tariffs, the rate structure is contorted, and the FMC revenue requirement/unit increase. The State asserts that by simply filing tariff sheets at the ICC, Matson removed nearly $25 million in income from the FMC-regulated service (Ex. PH–6). It stresses that the average yield per cargo cube for all westbound shipments is $1.00, that the ICC Storedoor, all-container cargo yields $1.15 per cargo cube and the remaining FMC-trade cargo has a yield of $.94 per cargo cube. It notes that total eastbound cargo has an average yield of $.51 per cargo cube, or about one-half of westbound cargo, reflecting a different commodity mix and a long-standing rate structure, and points out that although there is no substantial difference between the yield of "other cargo" and FMC-trade cargo in the eastbound direction, the "other cargo" volume represents less than 6 percent of total eastbound cargo, as compared to 26 percent of the westbound movements. The State concludes that for both directions combined, the spread between the "other cargo" and trade is 35 percent—a yield of $1.08 versus $.80 per cargo cube and that "The Matson revenue/cost allocations produce a profit (i.e., Income Before Taxes) on a unit basis for "other cargo" which is nearly three times the profit per cargo cube for FMC trade—$40.5 versus 13.5 (Ex. PH–6 (HAW–104, p. 5)). In order to correct the above imbalance the State has suggested, "Various Formulae Being Considered by Hawaii to More Accurately Separate (Allocate or Distribute) Costs Between Various Regulatory Jurisdictions (i.e., FMC and ICC) and Among Non-Regulated Activities." (Ex. PH–9 (HAW–105, p. 2)).[29]

Matson defends its treatment of cost allocations by arguing that it has followed General Order 11 and that, in essence, the State would allocate costs on a revenue basis which is contrary to G.O. 11. It states that "It is a fundamental principle of cost accounting that costs be assigned or allocated to the factors that generate them. Voyage expenses are a function of the carriage of cargo. Revenues do not generate costs and there is no reason for costs to track revenues. . . . The State's cost allocation system would improperly protect eastbound rates from Hawaii to the mainland by making them to appear to be fully compensatory when they are not." Matson alleges further that "The real basis of the State's position is that it opposes deregulation under the Interstate Commerce Act, and is trying by cost manipulation to turn the clock back to the pre-deregulation era." It proceeds to point out how water carriers in Alaska and Puerto Rico trades have converted "the great bulk of their operations"

[29] See pp. 20–22 of the State's Opening Brief and pp. 12–15 of its Reply Brief for additional discussion.

to ICC unregulated tariffs. Finally, Matson argues that the General Order 11 cargo cube method of allocating voyage expense is not unfair in this instance and that "It merely accomplishes what it was designed to do in calling attention to the fact that Matson's eastbound cargoes are not bearing their full share of the cost burden."

This particular issue is one of the most troublesome in the entire proceeding. Factually, there is no question that Matson followed the methodology set forth in G.O. 11. There is also no question that there always has been an imbalance between the eastbound and westbound cargoes. Not only that, a reading of Docket 78–46, *supra*, at 19 SRR 1296, 1297, indicates clearly that the Commission considered retaining the use of the revenue ton-mile relationship in allocating expenses between Trade and non-Trade cargo and rejected it. Instead the Commission chose the cargo cube basis noting that "the cost of providing service in a containership operation depends on the cost of providing space." In selecting the cargo cube method the Commission specifically rejected a suggestion to permit carriers to select their own method of allocation as contrary to the duty of the Commission to establish methodology guidelines under Public Law 95–475.

On the other side of the issue are the facts set forth by the State. They not only show an imbalance between the movement of the eastbound and westbound cargo, but they show that the imbalance is being magnified by the shifting of high rated westbound cargo from the Trade (FMC tariffed movements) to non-Trade (ICC tariffed movements). Of course, one cannot question Matson's right to shift the cargoes if it so desires, but it is clear that if the shift of cargo impacts on the ratepayers under the FMC tariffs unreasonably or unfairly, then the Commission may employ other fairer bases for allocation so as to achieve a fair and reasonable result.

After thoroughly reviewing the record in this case, we are constrained to hold that the use of cargo cube allocation by Matson was not unfair or unreasonable. In so holding, we hasten to note that the holding is based on the inadequacy of the record which was burdened by severe time constraints, and which fails to offer any alternative which is clearly more fair and reasonable, rather than on any finding that General Order 11, by its terms, compels such a result. As has been noted earlier, G.O. 11 is a methodology guideline, not a law. Strict adherence to each of its provisions is neither necessary nor proper where such adherence would achieve an unfair and unreasonable result. The record made here does not allow us to so conclude.

Issue No. 4—Are business and financial risks faced by Matson greater or less than those faced by an average U.S. corporation? If so, should Matson's rate of return be adjusted?

In measuring the business and financial risks of Matson its expert (Mr. Benderly) used the Variability in Past Earnings test. Matson asserts that

"Variability in past earnings is the oldest and most widely accepted measure of the general riskiness of a business. Past variability indicates the degree to which a company's earnings are susceptible to inflation, recession, competition and other factors. . . . These factors affect the investor's assessment of risk and the expected earnings level at which he is willing to invest in the enterprise." (Ex. R–7, pp. 21, 22). For his analysis of Matson's relative risk, its expert compared the variability in Matson's rate of return on rate base and net income margin with the variability in return on average total capital and net income margin of all U.S. corporations as reported in *The Value Line Investment Survey* (Ex. R–7, pp. 24, 25).[30] He calculated for each company its coefficient of variation and its standard deviation of rates of return about a linear trend, divided by the absolute value of the mean for the 15-year period, 1968–1982, and the 10-year period, 1973–1982, and for both return on average total capital and net income margin. (Ex. R–7, Appendix D sets forth the matrices and mathematical formulas used to carry out the statistical analysis of risk measures described orally by Matson's expert.[31] He found that on the basis of the 15-year period Matson ranked in the sixth or seventh decile among the U.S. corporations, the first decile being the lowest risk and the tenth decile being the highest. For the 10-year period Matson's expert concluded that Matson's relative risk was somewhat below the average for the Value Line companies. In selecting the 15 or 10-year period the expert testified the 15-year period should be given more weight and provides a better indication of relative risk than does the 10-year period, because it encompasses more economic cycles, and because it is more comparable to Matson's present situation where, according to the expert, competition is expected to increase. He concluded that the appropriate adjustment to the benchmark rate of return for relative risk was between .70 and 1.00 percentage points, and adopted the 1.00 percent figure (Ex. R–7, pp. 38, 40, 41).

The increased competition Matson's expert refers to is Matson's assertion that, (1) there is increased barge competition in the trade which has caused its Pacific Northwest cargo carriage to decline 26 percent from 1975 to 1987 (Ex. R–1, pp. 10–12), (2) two new barge lines entered the California-Honolulu service and the Seattle-Honolulu service in 1984 and 1985 (Ex. R–1, pp. 12, 13), (3) increasingly strong competition is being provided by United States Lines in carrying dry container and military cargo from California to Honolulu (Ex. R–1, p. 9), (4) substantial cargo has been lost to proprietary carriage (Ex. R–1, pp. 13, 14), (5) the share of total cargo moving to and from Hawaii that is carried by common carriers

[30] Although he had Matson data to 1984, data for comparison companies only was available through 1982.

[31] Matson states that, "the validity of the statistical analysis is unchallenged on the record." This indeed is true, but an examination of the six pages of Appendix D causes one to honestly question whether the absence of a challenge was due to a lack of understanding of the statistical model and the weighting process rather than on a disagreement with the conclusions the model purports to support.

and tramps in foreign trades is increasing (Ex. R–1, pp. 4, 5; Ex. R–4, p. 2), and (6) Matson's share of the westbound container and containerizable cargo in the Hawaii trade is substantially less than it was 10 years ago, declining from 93 percent to 79 percent, and (7) Matson faces the "risk of regulation" not faced by other Value Line companies which prevents it from realizing highly profitable returns but does not protect it from unreasonably low returns.

The State of Hawaii, Hearing Counsel and Tobias oppose any upward adjustment for risk to Matson's rate of return. The State argues that Matson's Trade operations are conducted in a protected environment in which Matson is the dominant carrier.[32] It attacks Matson's expert saying his analysis does not represent the considerations which would be "those of an informed investor determining an appropriate cost of capital for the Matson Trade entity in an investment market setting" and points to his testimony that "an empirical foundation for the relationship is 'unknowable.'" The State asserts that "apart from Mr. Benderly's reliance on a fifteen year volatility analysis which is flawed b[y] the inclusion of a major strike in 1971, there is no disagreement among the parties that the recent experience provides no basis for an incremental relative risk adjustment." It concludes that no risk adjustment should be made to Matson's rate of return because of difficulties in "quantifying the reduction" even though it believes "It would be more appropriate to reduce the allowable rate of return." (pp. 34–36 of the State's Opening Brief).

Hearing Counsel's position was expressed in the expert testimony of Dr. Ellsworth. In analyzing Mr. Benderly's Variability of Earnings test Dr. Ellsworth used the analysis put forth in Docket No. 85–3, because he did not believe Benderly's use of different time periods vis-a-vis the Value Line companies (1982) and Matson (1984) was appropriate. In addition he concluded that the use of the 10-year period beginning in 1973 was more appropriate than use of the 15-year period beginning in 1968. (Ex. PHC–6, p. 11).

As to Matson's objective relative risks, Dr. Ellsworth relied in part on the testimony of Sandra Kusumoto's analysis of Matson's competitive situation (Ex. PHC–3). Ms. Kusumoto is an economist with the Commission's Office of Planning and International Affairs. Her testimony discusses Matson's current competitive situation. She concludes that Matson is the dominant carrier in both the U.S. Continent/Hawaii and Pacific Coast/Hawaii trades. She states that from 1978 to 1984 total trade revenues increased every year even though Matson's market share declined. She further states that, "because Matson controls a large share of the market, it acts as a dominant firm price leader. . . . Matson is the first to submit its price increase then followed by similar price increases by the smaller competi-

[32] See Ex. PH–12 (Ex. HAW–107) for a full statement of the State's position on Matson's market share and on the nature of Matson's competition.

tors.'' She concluded that ''while I recognize that Matson does face direct and indirect competition and has been losing market share, other evidence indicated that Matson's risk of operating in the West Coast/Hawaii trades is minimal.'' In addition to the above testimony Dr. Ellsworth also himself subjectively measured Matson's relative risk (Ex. PHC–6, pp. 14, 15) by evaluating Matson's market share, the nature of its competition, and the entrance and exit of Seatrain Lines into and out of the Trade before he concluded that Matson appears to be a less risky investment than the average corporation. His final recomnendation was a neutral one which would adopt neither a positive nor negative risk factor.

Tobias in its Opening and Reply Briefs agrees with Hearing Counsel's analysis that Matson is less risky than the average U.S. corporation. However, he argues that a discount should be applied to the rate of return for the lesser risk. However, he does not indicate the amount of the discount.

General Order 11 at section 552.6(d)(2)(ii) provides that:

> The reasonableness of a carrier's return of rate base will be based on a comparative analysis of the carrier's projected return on rate base with the rate of return on total capital earned by comparable U.S. corporations. This technique, the comparable earnings test is based on an analysis of the earnings of U.S. corporations over an extended period of time. From these time/series data, the average rate of return earned by U.S. corporations is computed, and, where appropriate, adjusted for current trends in rates of return, the cost of money and relative risks.

The above regulation is, we think, both reasonable and clear. In adopting the comparison of the projected return on rate base the Commission specifically points out that the technique requires one to analyze earnings *over an extended period of time* to arrive at an average rate of return. However, with respect to adjustments to the average rate of return for relative risks the Commission specifically refers to *current trends*. It does not necessarily require some projection based on an analysis over a long period of time. Rather, we believe that the regulation requires a recognition of current circumstances or facts relating to risk and the acceptance of relevant evidence that would support a projection of relative risk during the test (1986) period. In this case it is the consideration of the actual competition Matson is facing now and is likely to face in the remainder of 1986 and of the projections made by Matson's and Hearing Counsel's experts. As to the actual competition Matson is facing, we believe the record establishes that there has been and will be an increase in the degree of competition. However, we believe and have found as fact that the increase is minimal and will not materially affect Matson's dominant position in the Trade. Matson retains over 70 percent of the Trade and is the leading ratemaker. Given those facts we have great difficulty in concluding as Matson would have us conclude, that they are in a worse competitive position or are more risky than the majority of Value Line companies, and indeed, one

would be more justified in finding that the opposite is true. As to the use of the variability in past earnings test, it has been used in previous rate cases. It may or may not be "the oldest and most widely accepted measure of the general riskiness of a business," as Matson suggests, but in terms of measuring and projecting "current trends," for 1986 in this case, we think that standing alone, it is a somewhat remote and tortuous test, based more on a complicated statistical exercise than on a pragmatic and significant evaluation of comparable factors affecting current trends in Matson's risks. Nevertheless, both Matson and Hearing Counsel use the variability of earnings test to arrive at their adjustment for risk and the other parties offer no real alternatives. Matson's expert predicts lesser risk on the basis of the 10-year period and more risk on the basis of the 15-year period. He would adopt the 15-year period, while Hearing Counsel would use the 10-year period.

The preponderance of the evidence presented here supports the result reached by Hearing Counsel which would use the 10-year period and would make no adjustment for risk in the benchmark rate of return. It is clear that Matson's risk is probably less and certainly no worse than equal to that of the average U.S. corporation. In balancing both subjective and objective considerations it is held that based on Matson's relatively stable earnings, its large market share and the absence of any new, significant container operator in the trade, Matson is no more risky than the average corporation used in arriving at the benchmark rate of return. Therefore, no adjustment for risk need be made in 1986 to the benchmark rate of return.

Issue No. 5—Are current trends in rate of return and interest rates such that Matson's rate of return should be adjusted?

A. *Adjustment for current trends in rates of return*

Insofar as one can determine from the record and from the briefs filed by the parties, Matson has not recommended any adjustment to the benchmark rate of return for current trends in rates of return and did not treat the issue in its initial brief. The State and Tobias both believe the benchmark rate of return ought to be adjusted downward for current trends in rates of return.[33] Hearing Counsel makes no adjustment but its expert testified that the trend is downward.[34] In its brief the State comments on the analyses of Matson's and Hearing Counsel's experts noting that it believes Hearing Counsel's model which uses Department of Commerce statistics rather than the Value Line Industrial composite, "produces the lowest rate of earnings averages in the most recent five year period because the use

[33] See pp. 30–34 of Matson's Opening Brief and pp. 8, 9 of Tobias' Reply Brief.

[34] See Ex. PHC–6, p. 18, and Chart 1 at p. 2.

of the quarterly data . . . affords a more sensitive reflection of current trends.'' It states that (p. 32 of its Opening Brief):

> There is also substantial agreement among the three series that the average rate of earnings have been trending steadily and sharply downward since the late 1970's and early 1980's at a rate of approximately 6 percent per year, in line with the cresting and ebbing of the rate of inflation of the nation's economy. Justifiable provision for a continuing decline in the benchmark rate of return, advanced by three years to a moving average centered at 1986, would reduce the benchmark rate of return projected from the Benderly series to *9.08 percent* in order to reflect an adjustment for ''current trends in rate of return.''

Matson, of course, disagrees with the State. In pp. 31–36 of its Reply Brief it urges rejection of the State's view because:

> First, the reason the State's calculation shows a decline in the earned return on total capital is that in its most recent three year moving averages, it gives the return of the recession-influenced year of 1982 one third of the weight in the average. . . . As shown in the first column of Appendix E of the State Opening Brief, the actual return on total capital for manufacturing companies has trended upward since 1982. The return on total capital increased 9% between 1982 and 1983, and increased 14% between 1983 and 1984.
>
> Second, an examination of the return on total capital data implied by the State's new proposed benchmark shows the unreasonable nature of the projection underlying its recommendation . . . .
> The anamolous results of the State's exercise are obvious. Average return on total capital for the industrials is predicted to decline from 12.11% in 1984 to 7.82% in 1985, a one year decline of 35%. The projected returns then trend upward to 8.84% in 1986 and 10.37% in 1978, before dropping precipitously to 6.20% in 1988, a decline of 40%. Nothing in the 15-year history of return on total capital for industrials supports a prediction of any such pattern or level of return for the companies involved (See App. E., Col. 2, State Opening Brief). . . . This new suggested benchmark [9.08%], is 2.3 percentage points below the 11.4 benchmark adopted by its own witness (Tr. 738–39).
>
> Third, the earned returns on total capital for manufacturing companies have been above the 9.08% level in every year since 1971 (Ex. R–7, Sch. 1). The State's newly suggested 9.08% benchmark is 1.87 percentage points below the 10.95% embedded cost of debt of industrial companies (Ex. R–9, p. 8). Clearly, under no stretch of the imagination can a return substantially lower than that earned by manufacturing companies in any of the last 15

> years and below their embedded cost of debt serve as a reasonable benchmark for today.[35]

After considering all of the above as well as other evidence and argument of record, it is held there need be no adjustment to the benchmark rate of return for current trends in rates of return. While, like Hearing Counsel, we believe rates of return are trending downward slightly, it is difficult to measure the extent of the trend—and certainly it cannot be done on the basis of the record made in this proceeding where both the State and Tobias fail to offer a viable specific adjustment. Consequently, it is held no adjustment need be made.

B. *Adjustment for Current Trends in Interest Rates*

In its opening brief Matson, at pp. 41–42, refers to the testimony and schedules introduced by its expert. (Ex. R–7, pp. 13–19, Sch. 2–6). It states:

> The next step [in reaching a fair rate of return for 1986] is to adjust the average returns on total capital of the comparison upward if (1) the current cost of money, as indicated by interest rates, is higher than the average cost in the period over which the returns were averaged; or (2) money costs are expected to trend higher in the future (Ex. R–7, p. 13).
>
> For the purpose of the first adjustment, the average interest rate in 1985 is compared with the average interest rate in the 10-year and 15-year periods. To make that comparison Mr. Benderly examined yields on corporate, utility and U.S. Treasury bonds over the period 1970–1984. He found the interest rates to be from 50–70 percentage points higher than the average for the 10-year period 1975–1984 and about 1.75 percentage points higher than the average for the 15-year period 1970–1984 (Ex. R–7, p. 15, Sch. 5, and 6). Therefore, he adjusted the 10-year benchmark of 12.26% to 12.76%, and the 15-year 11.56% benchmark to 13.31% (Ex. R–7, p. 16). In recognition of the fact that the increase in returns on total capital may not parallel the increase in interest rates on a one-for-one basis, he used 12.75% as the adjusted benchmark, this being at the bottom of the adjusted range of 12.76% to 13.31% (Ex. R–7, p. 16).
>
> With respect to the second adjustment (for trend of money costs in the future), Mr. Benderly noted the prediction of 25 prominent economists, as reported in the *Wall Street Journal*, January 2, 1986, that rates on long-term Treasury bonds would increase from 9.27% at the end of 1985 to 9.76% by the end of 1986 (Ex. R–7, p. 17). As reported January 3, 1986, Treasury bond futures contracts for delivery in December 1986 and December 1987, respectively, have implied yields of 10.08% and 10.41%.

[35] Matson's response to the State does not clearly differentiate between adjustments to the benchmark for current trends in rates of return and the establishment of the benchmark rate of return, and its arguments may be applied to both facets of the rate of return.

> Thus both predictions and market action point to an upward trend in interest rates from their level at the end of 1985.
>
> While Mr. Benderly stated that some weight should be given to these indications of future interest rates, he limited his adjustment for future trends to a minimum of zero and a maximum of 0.25, by adopting an adjusted benchmark range of 12.75%–13.00% (Ex. R–7, pp. 17–19).

Hearing Counsel, the State and Tobias all disagree with Matson's upward adjustment to the benchmark rate of return for current trends in the cost of money. Hearing Counsel recommends no adjustment, and so far as we can determine from the record, the State does not recommend any specific adjustment.[36] Hearing Counsel's position was presented through its experts, Dr. Ellsworth, and Mr. Blair. (Ex. PHC–4, pp. 8–19; Ex. PHC–6, pp. 16–24). Mr. Blair, a staff economist with the Commission's Office of Policy Planning, agreed with Mr. Benderly, that investors "have no *factual information* about the future and must make their decisions under conditions of uncertainty." He disagrees with Matson's reliance on the "*Wall Street Journal* poll." He states that:

> Taking the average of 25 points of view is not in any way a true *consensus* since it involves neither *general agreement* nor a clear *majority opinion*. It is a mechanical summation of points of view that, unfortunately, weighs the views of each member of the group equally—whether or not all the views expressed are equally reasonable, and without regard for any member's previously demonstrated expertise.

He avers that:

> Taking the *average* of a poll is *not* the way professional investors get the best available information on likely future interest rates. Either (1) limiting consideration to the sub-group of forecasters who have the better forecasting records, or (2) limiting consideration to those factors based on variable estimates which are most reasonable, provides superior sources of information on likely future interest rates.

He then proceeds to support the above premise by analyzing what was done in this case, and discusses other aspects of Mr. Benderly's analysis. He recommends that "the appropriate range per adjustment would be to *either make no adjustment for interest rates or* to lower the benchmark slightly, perhaps a –0.25 adjustment." He finally, "because of the uncertainty in forecasting," recommends "no adjustment factor for future interest

[36] The State speaks of "five adjustments, exclusive of current trends in the cost of money" (Opening Brief, p. 48), and directly objects to Mr. Benderly equating "the 'current cost of money' with current interest rates," however, we can find no specific recommendation for a discount for current trends in interest rates, to the benchmark rate of return.

rates." Dr. Ellsworth agrees and, as is noted in Hearing Counsel's Opening Brief, at pp. 15, 16:

> Dr. Ellsworth concluded that the benchmark rate of return need not be adjusted either upward or downward because of trends in rates of return and interest rates. (PFF 20; Ex. PHC–6, p. 24) This conclusion is based, in part, on the fact that rates of return peaked in 1980 and have trended downward since that time (PFF 17), and the level of long and short term interest rates has also come down as has the level of inflation, which has come down significantly in the past several years. (PFF 18)
>
> Though it is more reasonable to expect lower than higher interest rates in 1986 (PFF 19), economic forecasting is a hazardous business (Ex. PHC–6, p. 24), and it is appropriate to be conservative and refrain from making a negative adjustment for future trends (Ex. PHC–4, p. 19).

Finally, Tobias, in his Reply Brief at pp. 9–13, advocates a downward adjustment to the benchmark rates of return for current trends in the cost of money. He does not quantify the amount of the adjustment by making a specific recommendation. He notes that Mr. Benderly agrees that interest rates are going down (Tr. pp. 558–590), as did Mr. Hrabeta Tr. pp. 239, 240). He properly points to recent newspaper articles pointing to "the startling decline in interest rates" which "has taken them to their lowest level in eight years," and refers to the testimony of Dr. Ellsworth and Mr. Blair. Tobias concludes that "if the Commission is to assign a 'discount' to the benchmark rate of return for *current trends* in interest rates only once in a lifetime, this is that time."

Tobias, quite succinctly, has reached the heart of the issue. It seems almost inconceivable that, given the facts of record relating to the present level of interest rates the methodology of G.O. 11 respecting the allowance for current trends, and the term of the test period (1986), any justification could be found to adjust the benchmark rate of return upward for current trends in interest rates. We believe that in this case, the crucial facts relating to current trends in interest rate are, first, the present rates themselves and, second, the dramatic facts and circumstances precipitating the decline since the benchmark rate of return was determined. While it is also necessary to project what future interest rates will be throughout the remainder of the test period it is, here at least, invalid to go back over a long period of years to reach averages that, in effect, are used to present, not a current trend, but rather a long range 10 or 15 year average that actually negates the current trend adjustment. As to the "projections" made by the 25 *Wall Street Journal* economists and the arguments pro and con respecting their validity, we think that on the record presented in this case, the "projections" have about the same weight as an educated guess. The expert testimony in this proceeding leads one to the conclusion that the fall in interest rates and their level throughout 1986 involves

as much a political prognostication (Gramn-Rudman-Hollings, etc.) as it does an historical analysis, and in our view, exercise of the Commission's expertise and judgment is preferable to choosing to follow a pool of 25 economists, without knowing the precise factors leading to their conclusions and the various other factors, i.e., professional bias and affiliation, that may have influenced them.

So here, it is held that there should be no upward adjustment to the benchmark rate of return for current trends in interest rates. Unfortunately, the record before us does not contain sufficient probative evidence to allow us to discount the rate of return by any specific or reasonable percentage. Once again, we believe the state of the record might be more useful if the parties were not disadvantaged by the time constraints they were required to follow.

Issue No. 5—Rate of Return

The origin of all of the issues set forth in the Commission's Order of Investigation and Suspension is the determination and use of the benchmark rate of return. As has already been noted in G.O. 11, the Commission requires generally that:

> In evaluating the reasonableness of a VOCC's overall level of rates, the Commission will use return on rate base as its primary standard. 46 CFR 522.2(b).

and that this involves:

> . . . a comparative analysis of the carrier's projected return on rate base with the rate of return on total capital earned by comparable U.S. corporations. 46 CFR 52.6(d)(2)(ii).

Matson's expert first examined the mean rates of return earned on average total capital by *Value Line Investment Survey* manufacturing companies, which were 11.68%, 12.26% and 11.56%, respectively, for the 5-year, 10-year and 15-year periods ending in 1984 (Ex. R–7, p. 9, Sch. 1). He found that the 5-year period was atypical and rejected it and used the 10-year and 15-year average returns on total capital.[37] There is no question that in arriving at his averages Matson's expert complied with the provisions of G.O. 11, which he is required to do. His methodology has been used by Matson and accepted by the Commission in a continuing series of rate cases. After adjustments for the relative riskiness of Matson and U.S. corporations generally, recent trends of rates of return and interest rates,

[37] The return on total capital formula is:

$$\text{Return on Total Capital} = \frac{\text{Net Income After Taxes \& Interest Charges On Long-Term Debt}}{\text{Stockholders' \& Long-Term Debt Equity}}$$

and after reducing the average price of fuel to $18.00 per barrel, Matson contends that its fair rate of return is in the range of 13.75%–14%.

Hearing Counsel accepts and agrees with the G.O. 11 methodology used by Matson in arriving at a benchmark rate of return. However, instead of using the *Value Line Investment Survey* of manufacturing companies its expert used the Bureau of Census *Quarterly Financial Reports* (QFR). After making what he considered to be appropriate adjustments to arrive at Interest Charges on Long Term Debt (Embedded Debt), and using a 5-year, 1980–1984 average, he was able to calculate the rate of average return on total capital for manufacturing firms of 11.5 percent (Ex. PHC–6, p. 8). As we have already indicated, Hearing Counsel made no adjustment to the benchmark rate of return for current trends in rates of return, interest rates or relative risks.

As to the State, it relies on the testimony of its expert, Mr. Simat. Its basic objection on Matson's determination of benchmark rate of return is an attack on the methodology required by G.O. 11. It recognizes that the Commission "has opted to depart from the more traditional cost of capital approach" and "instead, has adopted the 'comparable earnings' approach." It attacks the use of that approach in regard to Matson because (1) "Matson's Trade entity has several unique attributes which are not present in the world of industrial companies . . . ," (2) "the G.O. 11 methodology is unclear as to the treatment of historical data in the determination of a fair and reasonable rate of return for prospective ratemaking purposes." It concludes that, "it would be unwise to consider the G.O. 11 methodology as anything more than a general guideline, rather than a precise and unflexible prescription which cannot be modified to produce a more reasonable and realistic result."

As to Matson's fair and reasonable rate of return on rate base, the State asserts that the figure should be 8.35%.[38] It begins with a benchmark rate of return of 11.4% and proceeds to discount that figure as follows:

Adjustments For	Amount
Higher percentage debt	.375
Working capital allowance	.025
Income tax allowance	.2
Interest expense allowance	.2
Market book value ratio	2.25
Total adjustments	3.05

The State's arguments supporting the above discounts are set forth in its Opening Brief, pp. 22–46, and in the testimony and exhibits presented by its expert (Exs. PH–35 through PH–56). The arguments and supporting data are too lengthy to repeat in the body of this decision. However, they are discussed briefly below.

[38] In the "Conclusion" to its Opening Brief, the State asks for a rate of 9%.

Insofar as the State's position regarding the G.O. 11 return on rate base methodology is concerned, the issues raised by the State were considered in Docket No. 78–46. The Commission specifically rejected the rate of return on equity methodology and adopted use of rate of return on rate base. In doing so it noted that Hawaii supported the use of return on rate base, but wanted to use other alternative methods where warranted, as it does in this case. The Commission also specifically rejected the State's requests. In reaching the return on rate base method it is clear that the Commission exhaustively considered various alternatives it might use. While one may agree or disagree with its decision, it must defer to the propriety of that decision. For the State to prevail here it must show the return on rate base method is unfair and unreasonable when used by Matson in this proceeding. On the basis of the record before us, we cannot so hold.

As to the State's adjustments to the benchmark rate of return we would agree with Matson that the .375 downward adjustment for Matson's debt ratio contravenes G.O. 11 and the holding in the *Sea-Land* case which frowns on considerations of capital structure in determining rate of return on rate base, and that the State expert's analysis is flawed (Matson's Opening Brief, pp. 66, 67). With respect to the market/book value ratio adjustment of 2.25%, it is based on a cost of capital approach which has generally been rejected by the Commission in G.O. 11. Further, we believe the regression analysis used, which does not employ individual-company data, is too imprecise and inconclusive. Regarding the other adjustments to rate base for working capital allowance (.025), income tax allowance (.2) and interest expense allowance (.2), they all contravene the import of G.O. 11 and in the case of the income tax allowance would be opposite to decisions made by the Commission in Docket No. 78–46. There is little question that as to the income tax allowance Matson benefits from the treatment allowed and no question that Congress and the Commission thought the benefit appropriate.

As we have already noted, in order for us to set aside the methodology of G.O. 11 it is necessary that the record contain proof that its application is unfair and unreasonable. Here, we again can see the problems raised, but without a specific showing of unfairness or unreasonableness we cannot set aside G.O. 11 methodologies.

In light of the above we hold that Matson's fair and reasonable rate of return on rate base is between 11.5 and 12.19 percent and that given the prudent and relatively efficient manner in which Matson is operated (Finding of Fact 14) the present rates are not unfair or unreasonable. The proposed increase of 1 percent, however, is in our judgment unfair and unreasonable.

Miscellaneous

Throughout this proceeding miscellaneous issues have been raised and then abandoned. Some, however, remain in the briefs of the parties. While the record does not justify or require any detailed analysis, the following comments are appropriate. At page 11 of its Opening Brief and elsewhere, the State introduced the argument that the "I.C.C. Jurisdiction Over Matson's Tariff 2016 is Questionable" and recommends that the Commission order an investigation to "determine whether or not the Federal Maritime Commission retains jurisdiction over Tariff No. 2016." Apparently, it is arguing that the pickup service-zone arbitraries in Rule 750 disqualify Tariff 2016 as a "joint tariff" subject to ICC jurisdiction, because the individual commodity rates are for water carriage and the zone arbitraries apply uniformly to storedoor pickup service by motor carrier within the zones. We believe the rates in Matson Tariff No. 2016 are "joint" rates even though the tariff uses the format of commodity rates plus arbitraries for storedoor pickup in the several zones. Matson's joint motor/water rates were filed with the ICC pursuant to the Revised Interstate Commerce Act (49 U.S.C. 10203(a)(4)(A)), which reads:

> A motor common carrier of property may establish through routes and joint rates and classifications applicable to them with other carriers of the same type, with rail and express carriers, and with common carriers, including those referred to in Subparagraph (D) of this paragraph.[39]

The ICC accepted Tariff No. 2016 without question and absent any citation of statutory or case law to the contrary there is no basis for the FMC to question ICC's jurisdiction.

On pages 74 to 76 of its Opening Brief and pages 41 and 42 of its Reply Brief, Matson argues that "The Commission should administer The Comparable Earnings Standard With a Reasonable Amount of Flexibility," which "Requires an Analysis of Carrier Earnings Over Time." It points out that the earnings of individual, unregulated companies fluctuate between good years and bad years and that "the important point being that they have the opportunity to offset the bad years with the good years to achieve a reasonable average level of earnings over time." It argues that "A rigid single 'test year' public utility type of regulation is unfair to domestic offshore carriers because it deprives them of the opportunity to 'average out' the good and bad years."

In our view the present General Order 11 is quite generous insofar as setting rates of return is concerned. Not only does it allow the carrier to realize an average rate of return in comparison with other U.S. companies adjusted for current trends, but as this proceeding demonstrates, it allows

[39] Subparagraph (D) refers to water carriers subject to the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, and providing transportation of property between Alaska or Hawaii and the other 48 states.

for a highly favorable income tax allowance, working capital allowance and allocation factors. Further, there is nothing in the record to suggest that Matson is disadvantaged either in earnings or in the establishment of rates. Indeed, in this proceeding a backward look shows that with fuel cost at $18 a barrel, when applied to the test year 1985 and if continued into 1986, everything else being equal, Matson would realize and retain an increase of 1.35 percent on its rate of return (Ex. PHC–7). As to allowing a carrier to even out good years against bad, we believe that approach would violate the Commission's holding in *Sea-Land, supra,* where it stated:

> Allowing a carrier to achieve an unreasonably high rate of return to compensate it for its past shortfalls in earnings is impermissible rate regulation. This rule of law is not unfair to the carrier in light of the fact that confiscatory rates cannot be established on the basis of the carrier's past actual profits.

Generally, it is our view that if Matson wishes to object to G.O. 11 by comparing itself to public utilities or private U.S. corporations the comparison ought to be a full one and ought not to select isolated facts or circumstances that tend to distort the overall picture. For example, on the one hand it complains it is not a public utility with an exclusive franchise, and on the other, it cites the fact that it is regulated as a detrimental factor, ignoring the regulatory rules under which all public utilities must operate. It argues for a rate of return on capital equal to that of U.S. manufacturing companies (Value Line), and an ability to set off bad years against the good years, completely ignoring the adjustment for current trends which it is allowed and the favorable treatment of various items previously referred to which most U.S. manufacturing firms do not enjoy. In short, if Matson wishes to seek changes in G.O. 11 by comparing itself with other entities, it is, of course, free to do so. However, in our view the comparison ought to be a complete one weighing all advantages and disadvantages, not a kind of an administrative "grab-bag" that seeks piecemeal changes to the regulation.

Finally, we would again refer to the overall question of G.O. 11. We have already discussed the issues raised by the State and Tobias and they will not be reconsidered or repeated here. However, certain observations are appropriate regarding G.O. 11. First of all, in our view, given its history and its scope, the regulation represents a commendable and viable approach in dealing with rate matters, especially where general rate increases are concerned. It sensibly foresees the probable need for future changes within its terms and to this end the following comments are made.

This case does not involve a general rate increase. Under G.O. 1I the carrier is not required to file the reports required by Part 552.2(f), and it did not do so here when it initially filed its proposed 2.5 percent rate increase. This meant that neither the Commission nor any possible protestant had any idea as to the basis for the increase. Even after the Commission

issued its Order of Investigation and Suspension, the carrier did not file any supporting data. It was some time before any documents were filed in discovery and by that time the 180 day statutory period already was working to the detriment of the parties, and especially the protestants. Eventually, the carrier did place data in the record—much of it the same data that would have been required if a general rate increase has been proposed.

It is clear that both Congress and the Commission want rate cases to be handled expeditiously, and that they do not want every proposed rate increase to generate a full-blown rate proceeding. The fact that the regulation does not require detailed supporting data when the proposed increase is not a general rate increase supports this premise. We would respectfully suggest that in cases not involving a general rate increase the carrier be required to submit supporting data to all parties within 5 days of the service of the initiation of a proceeding. Further, that data should clearly set forth those specific adjustments to the carrier's most recently filed prior financial data which give rise to the proposed increase. In this manner not only would time strictures be less burdensome, but it would allow the Commission to specifically require prior financial data as a starting point, which in turn might obviate the need to begin each rate case anew, as though rate increases had never before been considered. For example, if oil prices increased dramatically causing a need to increase the rate of return, then a carrier seeking less than a general rate increase should not initially present a mass of statistical projections which may be basically unchanged. It ought to be able to refer to the last rate matter and the data involved and update it to reflect the reason for the proposed increase, i.e., the rise in fuel costs.

The last point to be made involves issues related to the reasonableness of a current rate of return litigated under section 18(a) of the Shipping Act, 1916. Cases arising under that section do not involve the time limitations contained in cases arising under the Intercoastal Shipping Act, 1933. Where, as here, the issues are many and far-reaching and the burden is on the protestant, the time limitations are inappropriate and their application may even raise questions of due process. Further, they inhibit a thorough development of facts and issues which the Commission may wish to consider. In such cases we would suggest that the proceeding be kept separate from proposed rate increase cases under the Intercoastal Shipping Act, 1933, where the burden is clearly on the carrier.

Finally, in this proceeding, an attempt has been made to cover fully all of the issues raised. However, the volume of the evidence coupled with the abbreviated time period involved does not allow for as complete a written decision as one would like. All testimony, facts and issues presented, however small and transient, have been considered in this proceeding. Where the decision does not refer to them it is because it was

felt such reference was not important to the ultimate decision and because of the time strictures involved.

(S) JOSEPH N. INGOLIA,
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1415

APPLICATION OF OOCL-SEAPAC SERVICES, INC. FOR THE BENEFIT OF KENG HUA PAPER PRODUCTS CO., INC., MANILA, PHILIPPINES

ORDER OF PARTIAL ADOPTION

July 3, 1986

The Commission determined on its own motion to review the Initial Decision (I.D.) of Administrative Law Judge Seymour Glanzer served April 2, 1986 in this proceeding.

BACKGROUND

On October 30, 1985 OOCL-Seapac Services, Inc. (OOCL-Seapac), a member of the Transpacific Westbound Rate Agreement (TWRA) offered the shipper a rate subject to booking of $1300 ($1210.00 plus $90.00 terminal receiving charges) per 20-foot container for an upcoming shipment of book binding machinery from New York, New York to Manila, Philippines. Booking occurred on November 25, 1985. Due to inadvertence the rate was not filed before the shipment sailed from New York on December 11, 1985. Subsequently, on January 17, 1986 TWRA filed the $1300 rate in its tariff with an effective date of January 20, 1986, and on February 18, 1986, OOCL-Seapac applied pursuant to section 8(e) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. § 1707(e) for permission to waive collection from the consignee Keng Hua Paper Products Co., Inc. of a portion of the freight charges payable at the rate in effect at the date of shipment.[1]

The Presiding Officer found that the applications met all the requirements of section 8(e) of the Act and granted the waiver.[2] Under review is the

[1] OOCL-Seapac's application of January 14, 1986, referred to in the Initial Decision, was deficient in that it was filed before TWRA published the $1300 rate in its tariff on January 17, 1986.

[2] Section 8(e) authorizes the Commission to permit refund or waiver relief if:

(1) there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and the refund will not result in discrimination among shippers, ports, or carriers;

(2) the common carrier or conference has, prior to filing an application . . . . , filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;

(3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, . . . that give[s] notice of the rate on which the refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and

tariff notice required by the Initial Decision to be published in the carrier's tariff.

DISCUSSION

Section 8(e)(2) of the Act requires that prior to applying for refund or waiver the carrier publish a "new" tariff (conforming tariff) showing the rate on which the refund or waiver would be based. Because it is intended to apply to shipments which sailed earlier, the effective date of the conforming tariff must be established at a date prior to the date of filing with the Commission.

In this instance, the Presiding Officer established the effective date of the conforming tariff as October 30, 1985, the date OOCL-Seapac quoted the rate to the shipper. In the Presiding Officer's opinion:

> there being no evidence that the rate was not intended to become effective, immediately, if the shipment was booked on that date. (I.D. at 28 F.M.C. 505)

Filing of the rate was contingent, however, on booking. That the booking could conceivably have taken place as soon as OOCL-Seapac offered the rate to the shipper is irrelevant in light of the fact that booking in fact occurred on November 25, 1985 when the carrier's obligation to have the rate filed arose.

In *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation (Yamashita),* 19 S.R.R. 1407 (1980) and *Application of Australia New Zealand Container Line for the Benefit of Meadowsfreiqht New Zealand Ltd.,* 28 F.M.C. 183 (1986) (Meadowsfreight New Zealand), the Commission established the effective date of the conforming tariff, as either: (1) the date the tariff omitting the intended rate becomes effective; or (2) the date the intended rate, absent the mistake, would have become effective. These decisions were recently followed in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of the Embassy of Tunisia,* Special Docket No. 1381, Order of Partial Adoption served June 9, 1986, 28 F.M.C. 421 where the Commission determined that the effective date of the conforming tariff is the date the error on which the application is based was made.

OOCL-Seapac's request for a waiver is based on the failure to file the intended rate when booking occurred on November 25, 1985. Thus, according to the decisions in *Yamashita, Meadowsfreiqht New Zealand,* and *Embassy of Tunisia, supra,* the effective date of the conforming tariff filed on January 17, 1986, should have been made to relate back to Novem-

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(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

The Commission, by regulation, has defined date of shipment to mean

the date of sailing of the vessel from the port at which cargo was loaded.

46 C.F.R. § 502.92(a)(3)(iii) (1985).

ber 25, 1985 when, absent the error, and according to the understanding between the parties, the rate would have been filed in TWRA's tariff. Furthermore, because it reflects OOCL-Seapac's independent action, application of the rate shall be limited to shipments carried by OOCL during the time specified in the tariff notice.

THEREFORE, IT IS ORDERED, That in lieu of the tariff notice mandated by the Initial Decision issued in this proceeding, the Transpacific Westbound Rate Agreement promptly publish in its tariff the following notice:

> Notice is given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1415, that effective November 25, 1985, and continuing through January 19, inclusive, the rate for Used Book Binding Machinery AG—From Atlantic Ports PC 20 is $1210.00. Such rate is subject to all applicable rules, regulations, terms and conditions of said rate and this tariff. This Notice is effective for purposes of refund or waiver of freight charge on any shipment carried by Orient Overseas Container Line during the specified period of time.

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

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

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1415

APPLICATION OF OOCL-SEAPAC SERVICES, INC. FOR THE BENEFIT OF KENG HUA PAPER PRODUCTS CO., INC., MANILA, PHILIPPINES

Application to waive collection of portions of freight charges granted.

Donna M. Forminio for applicant OOCL Seapac Services, Inc.

Gerard H. Wollweber for applicant Transpacific Westbound Rate Agreement.

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

Partially adopted July 3, 1986

By application filed January 14, 1986, OOCL-Seapac Service, Inc., asks permission to waive collection of $511.94 of freight charges due it from Keng Hua Paper Products Co., Inc., Manila, Philippines, in connection with a shipment of used book binding machinery carried by it from New York, N.Y., to Manila, Philippines, aboard the *Oriental Diplomat* which sailed from New York on December 11, 1985. The shipment weighed 777 kilograms and measured 7.023 cubic meters. Transpacific Westbound Rate Agreement joins in the application.

On October 30, 1985, OOCL-Seapac quoted a rate of $1300 (ocean freight $1210 per 20′ container plus an existing terminal receiving charge of $90 per 20′ container) for the upcoming shipment, subject to booking. The booking took place on November 25, 1985, but, due to inadvertent clerical error, the intended ocean freight rate was not published in the TWRA tariff as an independent rate as it should have been. Thus, at the time of shipment the applicable ocean freight rate was $253 W/M and the applicable terminal receiving charge was $5 M. At those rates, charges amounted to $1,811.94. The shipper was billed at the applicable rates but was told to pay at the booked rates. When the error was discovered, a corrected tariff reflecting the intended ocean rate was filed, effective January 20, 1986. There were no other shipments of the same or similar commodity to the same destination during the relevant time period and

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

there is no indication of discrimination, or the likelihood thereof. Nevertheless, the order, which follows, provides safeguards against discrimination.[2]

The application meets the criteria for approval under section 8(e) of the Shipping Act, 1984, 46 U.S.C. app. 1707(e) and the Commission's rules, 46 CFR 502.92(a).

The application is granted. OOCL-Seapac shall waive collection of $511.94 in connection with the above described shipment and TWRA shall publish the following notice at pages 1421 and 1426–Al of its Tariff FMC No. 3:

> Notice is given, as required by the decision in Special Docket No. 1415, that effective October 30, 1985, and continuing through January 19, 1986, inclusive, for purposes of refund or waiver, the rate for Item No. 84–0170 Book Binding Machinery AG—From Atlantic Ports PC 20 PHIL is 1210 00(2). ("(2)" means Applies on Used Machinery Only.) Such rate is subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

OOCL-Seapac shall make any necessary adjustment in brokerage of compensation to brokers or freight forwarders.

Within 30 days of service of notice of authorization from the Commission, OOCL-Seapac and TWRA shall furnish the Secretary with evidence of waiver and collection together with copies of the prescribed tariff notices.

(S) SEYMOUR GLANZER
Administrative Law Judge

[2] In addition to other safeguards, the notice to be published in the TWRA tariff protects against discrimination among shippers by making the rate effective as of the date the rate was quoted to the shipper, there being no evidence that the rate was not intended to become effective, immediately, if the shipment was booked on that date.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1421

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR THE BENEFIT OF EVA GABOR INT'L.

ORDER OF PARTIAL ADOPTION

July 3, 1986

The Commission determined to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) served on April 3, 1986 in this proceeding.

American President Lines, Ltd. (APL) applied, pursuant to section 8(e) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. § 1707(e), for permission to refund to the consignee, Eva Gabor International, a portion of the freight charges collected on eighteen shipments of wigs APL carried from Korea to Kansas City, Kansas and Missouri.

The Presiding Officer found that the application met all the requirements of section 8(e) of the Act and properly granted APL permission to refund $838.74 of the charges collected. However, the tariff notice required by the Initial Decision to be published in the carrier's tariff makes the rate APL seeks to apply effective as of August 29, 1985, whereas the earliest date the rate can be made applicable is August 30, 1985 when APL's independent tariff went into effect.

THEREFORE, IT IS ORDERED, That, in lieu of the tariff notice mandated by the Initial Decision issued in this proceeding, American President Lines, Ltd. promptly publish in its tariff the following notice:

> Notice is given as required by the Federal Maritime Commission in Special Docket No. 1421, that effective August 30, 1985, and through November 7, 1985, inclusive, the special rate on Wigs from Korea to Kansas City, Kansas, and Missouri is $133 W/M, for purposes of waiver or refund of freight charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

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

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

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1421

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR THE BENEFIT OF EVA GABOR INT'L.

Application to refund freight charges of $838.74, granted.

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

Partially Adopted July 3, 1986

This application [2] is for permission to refund $838.74 of freight charges arising out of 18 shipments of Wigs, beginning on September 2, 1985, moving from Busan, Korea, to Kansas City, Missouri.

The tariff involved in this proceeding is American President Lines, Ltd. (APL), Korea Freight Tariff No. I.C.C. APLS 305, FMC No. 137, which covers movements from Ports in Korea to Ports and Points in the United States (the Ports are Ports and Points are listed in Rule 1 of the tariff).[3]

On July 23, 1985, Eva Gabor International (Gabor) applied to the Conference for a rate action on "wigs from Korea" moving to Kansas City, Missouri. By letter dated August 29, 1985, the Conference confirmed the establishment of a special rate of $133 W/M on wigs to Kansas City, Kansas and Missouri, under Item No. 6595–01S.[4] The Conference published the above rate in its tariff, effective August 29, 1985.[5] However, effective August 30, 1985, APL published its own tariff APLS 305, F.M.C. No. 137, where the rate on wigs to Kansas City, Kansas and Missouri, under Item 6595 was listed as $141 W/M, and the special $133 W/M rate was inadvertently omitted.[6] The error was corrected in APL's tariff, effective November 8, 1985, when the rate was re-established at the $133 W/M level.[7] Prior to the correction being made Gabor tendered eighteen (18) shipments which were rated, billed and paid at the $141 W/M rate level.[8] The applicant now seeks a refund of the difference between the payments

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

[2] The application was filed on February 21, 1986, well within the statutory period set forth in section 8(e), Shipping Act, 1984. APL initially filed the application which was later joined in by TPFCJ/K.

[3] The Trans-Pacific Freight Conference of Japan/Korea (TPFCJ/K) Eastbound Interior Point Intermodal Tariff No. 1, ICC TPC 33, FMC No. 8, is also factually pertinent, but is not involved in the error which was made.

[4] Application, Exhibit A.

[5] Application, Exhibit B.

[6] Application, Exhibit C.

[7] Application, Exhibit D.

[8] Application, Appendix 2.

made of $16,984.14 and the payments due under the $133 W/M rate of $16,145.40 or $838.74.

Section 8(e) of the Shipping Act, 1984, permits the Commission to waive or refund collection of freight charges where it appears there was an error in a tariff of a clerical nature or an error due to inadvertence in failing to file a new tariff. Here, APL simply forgot to include the negotiated special rate in its tariff. It is the kind of mistake Congress sought to obviate in enacting section 8(e).

The application of APL conforms to the requirements of Rule 92(a), Special Docket Application, Rules of Practice and Procedure, 46 CFR 502.92(a), and therefore, after consideration of the application, the exhibits attached to it, and the entire record, it is held that:

1. There was an error of a clerical or administrative nature which resulted in the failure to have timely filed an APL tariff containing a rate of $133 W/M on Wigs from Ports in Korea (see Rule 1) to Kansas City, Kansas and Missouri, which rate would have been in effect had the error not been made.

2. The refund will not result in discrimination among shippers,[9] and there is no evidence that any carrier or ports would suffer discrimination should the application be granted.

3. Prior to applying for the refund the applicant filed a new tariff which sets forth the rate upon which the refund should be based.

4. The application was filed within 180 days from the date of the shipment.

Wherefore, in view of the above, it is,

Ordered, that permission is granted APL to refund a portion of freight charges in the amount of $838.74 to the shipper, Eva Gabor, Int'l, which refund will have no effect on the land portion of the intermodal movement, and it is,

Further Ordered, that APL promptly publish in the pertinent tariff the following notice:

> Notice is given as required by the Federal Maritime Commission in Special Docket No., 1421, that effective August 29, 1985, and through November 7, 1985, inclusive, the special rate on Wigs from Korea to Kansas City, Kansas, and Missouri is $133 W/M, for purposes of waiver or refund of freight charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[9] The applicant states that there were no other shipments of the same commodity during the time period involved here.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1354

APPLICATION OF U.S. ATLANTIC-NORTH EUROPE CONFERENCE FOR THE BENEFIT OF THE FORD MOTOR COMPANY

Application to refund $4,400 in Arbitrary charges granted. Applicant found to have conformed to the requirements of section 8(e) by filing a new, correcting tariff prior to filing its application.

Harvey M. Flitter, A.E. Phair, and *Anthony M. Ryan* for U.S. Atlantic-North Europe Conference.

REPORT AND ORDER

July 9, 1986

BY THE COMMISSION: (EDWARD V. HICKEY JR., *Chairman;* JAMES V. CAREY, *Vice-Chairman;* FRANCIS J. IVANCIE, THOMAS F. MOAKLEY; AND EDWARD J. PHILBIN, *Commissioners*)

This proceeding is before the Commission on Exceptions filed by the U.S. Atlantic-North Europe Conference (ANEC or Conference) to the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer). The Presiding Officer denied ANEC's application, submitted pursuant to section 8(e) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. § 1707(e), for permission to refund $4,400 in freight charges to the Ford Motor Company, assessed on five shipments of "Straight or Mixed Containers of Empty Steel Racks and/or Transmissions" (Mixed Containers) transported from Louisville, Kentucky to Blanquefort, France.[1] The shipments, totaling eleven 20-foot containers, moved on vessels owned by Sea-Land Service, Inc., an ANEC member, and were rated pursuant to ANEC's Port to Port and Intermodal Tariff No. FMC 1, 2nd revised page 1566. ANEC filed its application on July 24, 1985.

[1]

Date of shipment	*Bill of lading (freight bill number)*	*Total charges*
1/26/85	984816303	$2,496.00
2/4/85	984816807	2,496.00
2/25/85	984931709	2,496.00
2/25/85	984931699	1,248.00
2/25/85	984931712	4,992.00
		$13,728.00

BACKGROUND

On December 27, 1984, Sea-Land advised ANEC that it was taking independent action on Mixed Containers moving in 20-foot containers from Louisville, Kentucky to Blanquefort, France. Sea-Land informed ANEC that effective January 7, 1985 through June 30, 1985, its rate on that commodity would be $848.00 and would *include* the Bordeaux Arbitrary of $400.00 per container. After June 30, 1985, Sea-Land's rate would increase to $903.00 per container but would still include the Bordeaux Arbitrary. On January 8, 1985, ANEC filed the above rates on Sea-Land's behalf but inadvertently failed to note that the Bordeaux Arbitrary was included in the rates. Accordingly, the Arbitrary was separately assessed against the five shipments in question.

On July 22, 1985, two days before it filed the application in this proceeding, ANEC, at Sea-Land's urging, filed a new tariff page in an attempt to conform to Sea-Land's independent action instructions. This filing, 3rd revised page 1566, provided for a rate of $903.00 per container, including the Arbitrary, through June 30, 1986. The July 22nd filing did not, however, reflect the $848.00 freight rate, including the Arbitrary, that Sea-Land intended to be applied to the five shipments in issue. The Presiding Officer denied ANEC's application on the ground that "at no time prior to the filing of the application did the Conference file a corrected tariff showing the $848.00 per container rate including the Bordeaux Arbitrary". He found that the July 22nd filing was deficient because it did not precisely set forth the $848.00 per 20-foot container rate that Sea-Land intends to apply to the shipments at issue.

EXCEPTIONS

ANEC argues that although its original application may have been unclear, if the application and the July 22nd tariff filing are "liberally viewed, and from a practical standpoint," the Commission could conclude that a correct tariff was filed prior to the application. In this regard, ANEC submits that it could not have filed the $848.00 rate prior to filing the application because Sea-Land intended that rate to expire on June 30, 1985, well before ANEC discovered that it had failed to correct the January tariff filing. ANEC argues that the Commission should reverse the Presiding Officer's Initial Decision and grant the application because ANEC did correct that part of the original filing which was incorrect, *i.e.* the Arbitrary, prior to filing its application.

DISCUSSION

Section 8(e)(2) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e)(2), provides, as is here relevant, that the Commission may only permit a

carrier to refund a portion of freight charges collected from a shipper if:

> the common carrier, or conference has, prior to filing an application for authority to make a refund, filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based.[2]

ANEC argues that its July 22nd tariff filing, which included the Bordeaux Arbitrary as part of Sea Land's *then* effective freight rate of $903.00 per 20-foot container, satisfied this requirement. The Commission agrees that ANEC's July 22nd filing satisfies the tariff filing requirement of section 8(e)(2), and will therefore reverse the Initial Decision and grant Sea-Land permission to refund $4,400 to the Ford Motor Company.

As is pointed out on Exception, the error that occurred was the Conference's failure to file a tariff page indicating that the Arbitrary was included in the $848.00 freight rate that Sea-Land had established for Mixed Containers for the period of January 7, 1985 through June 30, 1985. The $848.00 rate was properly filed and assessed against the shipments here in issue. The Arbitrary was also assessed because the Conference's January 8th filing failed to note that the separately stated Arbitrary did not apply.[3]

On July 22, 1985, before it filed the application, ANEC did file a tariff page indicating that the Arbitrary charge does not apply to movements of Mixed Containers from Louisville, Kentucky to Blanquefort, France. This filing satisfies the Act's requirement that the applicant shall file a new tariff prior to filing its application that sets forth the rate basis which supports the refund. The July 22nd filing corrects that *part* of the original tariff filing that was in error and makes clear that the Arbitrary charge does not apply to shipments of Mixed Containers. Had this filing, which limits the Arbitrary's application, been effective at the time of the shipments here in issue, the shipper would not have been assessed $4,400.00 in Arbitrary charges, the amount ANEC now seeks authority to refund.

ANEC's application for authority to make a refund is not, given the circumstances of this case, barred by the fact that the July 22nd filing sets forth an underlying freight rate different from that which was in effect at the time of shipment.[4] In *Application of Pacific Westbound Con-*

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[2] ANEC's compliance with the other requirements of section 8(e) is not in issue. The record demonstrates that the application was timely filed, *i.e.* within 180 days of shipment, that there was clerical oversight and that a refund will not result in discrimination among shippers.

[3] At least two errors were committed in implementing Sea-Land's independent action with regard to "Mixed Containers". The Arbitrary was not included in the rate as Sea-Land requested, and the rate did not become effective on January 7, 1985 as also requested by Sea-Land in its telex of December 27, 1984 to ANEC. In addition, although Sea-Land notified ANEC on May 3, 1985 of the tariff filing error, ANEC did not file a correction until July 22, 1985. This series of errors regarding Sea-Land's independent action request is a matter of concern to the Commission.

[4] The $903.00 rate included in the July 22nd filing was originally published in ANEC's January 8th filing, to become effective on July 1, 1985.

ference on Behalf of Korea Marine Transport Co., Ltd. for the Benefit of Mitsui and Co. (U.S.A.) Line, Inc., 25 F.M.C. 350 (1982), and Application of Japan Line (U.S.A.) for the Benefit of Nomura (America Corp.), 22 F.M.C. 825 (1980), the applicant-carriers were granted authority to waive or refund portions of the applicable charges although their corrective tariffs reflected higher rates, due to intervening general rate increases, than the rates the carriers had negotiated with the shippers. In each of these cases, the Commission reasoned that the higher rate resulting from the rate increase included the rate that had not been filed due to error, and therefore the carrier should not be barred from making the refund. *See also Application of Sea-Land Service, Inc. for the Benefit of Seviroli, Inc.,* 22 S.R.R. 789 (1984).

Sea-Land's intervening rate increase for Mixed Containers, which became effective before ANEC filed the tariff correction on July 22nd, made it impractical, if not impossible, for ANEC to then file the expired $848.00 rate. Accordingly, the Commission finds that the July 22nd filing, which reflects Sea-Land's rate increase for Mixed Containers, does not act to bar special docket relief under section 8(e) of the Shipping Act of 1984.[5]

Accordingly, the Commission is granting ANEC's Exceptions, and is reversing the Presiding Officer's Initial decision and granting authority to refund $4,400 Arbitrary charges that were collected on the shipments here at issue.

THEREFORE, IT IS ORDERED, That ANEC's Exceptions are granted,

IT IS FURTHER ORDERED, That the Initial Decision in this decision is reversed,

IT IS FURTHER ORDERED, That Sea-Land is granted permission to refund $4,400 to the Ford Motor Company, and

FINALLY, IT IS ORDERED, That ANEC shall promptly publish in the applicable tariff, on behalf of Sea-Land Service, the following notice:[6]

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1354 that effective January 25, 1985 through July 21, 1985 the underlying 20 foot per container freight rate on any shipments of "Straight or Mixed Containers of Empty Steel Racks and/or Transmissions" transported from Louisville, Kentucky to Blanquefort, France includes the Bordeaux Arbitrary. This Notice is effective for the purpose of refund or waiver of the Bordeaux Arbitrary charged on any

[5] The special docket legislation was intended to prevent shippers from bearing the burden of carrier negligence and has been broadly construed to accomplish this congressional objective. *Nepera Chemical, Inc. v. Federal Maritime Commission,* 662 F.2d 18 (D.C. Cir. 1981).

[6] In Special Docket 1381—*Application of Lykes Bros. Steamship Co., Inc. for the Benefit of the Embassy of Tunisia,* Office of Defense Attache, 28 F.M.C. 421 (1986) the Commission determined that the effective date reflected in the tariff notice mandated by section 8(e)(3) of the Act may not exceed 180 days prior to the date the application was filed. Accordingly, the tariff notice set forth herein provides for an effective date of January 25, 1985.

shipments of the commodity described which may have been shipped during the specified period of time.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–21

RINKER MATERIALS CORPORATION

v.

PORT EVERGLADES AUTHORITY AND SEA-LAND SERVICE, INC.

NOTICE

July 11, 1986

Notice is given that no appeal has been taken to the June 4, 1986, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) TONY P. KOMINOTH
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–21

RINKER MATERIALS CORPORATION

v.

PORT EVERGLADES AUTHORITY AND SEA-LAND SERVICE, INC.

COMPLAINT DISMISSED

Finalized July 11, 1986

Complainant has filed a Notice of Withdrawal of Complaint with supporting material, explaining that complainant has reached an amicable resolution of its controversy with respondents and no longer wishes to continue this proceeding.

This case essentially concerned the alleged problems which complainant, an importer and manufacturer of cement, had been experiencing in having its vessels served by the respondent marine terminal operator and with complainant's desire to work out a plan by which complainant's vessels would be accommodated without undue delay. At the prehearing conference held on April 1, 1986, it appeared that a reasonable settlement could be achieved and that expensive litigation could and should thereby be avoided. The settlement which has been reached accords with the policy of the law and this Commission, which strongly encourages settlements and does not appear to require any further Commission attention.[1]

Accordingly, the complaint is dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

[1] The agreement to work in harmony with complainant to accommodate its ships, is one between an importer and a marine terminal operator and does not appear to require filing under section 4 or 5 of the Shipping Act of 1984, 46 U.S.C. app. sec. 1703, 1704. Furthermore, the issues settled do not concern issues involving improper rating under filed tariffs, in which event the settlement would require additional support and justification. See *Organic Chemicals* v. *Atlanttrafik Express Service* 18 SRR 1536a (1979).

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–15

KERR STEAMSHIP COMPANY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS AND RYAN-WALSH STEVEDORING CO., INC.

ORDER ADOPTING INITIAL DECISION

July 23, 1986

On April 30, 1986, Chief Administrative Law Judge Charles E. Morgan (Presiding Officer) served an Initial Decision (I.D.) in this proceeding which: (1) dismissed the complaint against the Board of Commissioners of the Port of New Orleans (Dock Board) in light of the fact that the complaint of Kerr Steamship Company, Inc. (Kerr) against it had been voluntarily withdrawn with prejudice; and (2) dismissed Kerr's complaint against Ryan-Walsh Stevedoring Co., Inc. because there had been no showing that it violated the shipping statutes. Subsequently, an Exception was filed by the Association of Ship Brokers and Agents (U.S.A.), Inc. (ASBA), an intervener in this proceeding. ASBA excepts solely to the statement in the I.D. that "[n]o explanation . . . is required as to any reason for this withdrawal of complaint." ASBA submits that it would be in the public interest to ascertain the reasons for the withdrawal of the complaint and suggests that if it was the result of a settlement, the Commission may wish to review it and place any settlement agreement on the record. No replies to this Exception were submitted.

However, ASBA later filed a "Motion to Include Settlement Document in Record of this Proceeding, and Thereupon, Suggestion of Mootness as to Intervener's Exception" (Motion). The Motion noted that ASBA had received a settlement document titled "Receipt and Release Assignment and Subrogation" from counsel for the Dock Board and requested that the document be included in the record of this proceeding. The Commission's Bureau of Hearing Counsel filed a Reply to ASBA's Motion which requested that the Commission make the settlement agreement a part of the record and then discontinue the proceeding.

The Commission has determined to adopt the Initial Decision. The Commission concurs with the Presiding Officer that under the circumstances no explanation was required as to why Kerr voluntarily withdrew its complaint against the Dock Board. However, in light of the Dock Board's subsequent release of a settlement agreement to ASBA, with no apparent

restrictions on its dissemination, the Commission also agrees that no harm will ensue by making this settlement agreement a part of the record.

THEREFORE, IT IS ORDERED, That the Motion of the Association of Ship Brokers and Agents (U.S.A.), Inc. to include the "Receipt and Release Assignment and Subrogation" in the record of this proceeding is granted, and

IT IS FURTHER ORDERED, That the Initial Decision in this proceeding, served April 30, 1986, is adopted by the Commission.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–15
KERR STEAMSHIP COMPANY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS AND RYAN-WALSH STEVEDORING CO., INC.

1. Complaint against Board of Commissioners of the Port of New Orleans withdrawn with prejudice. Complaint dismissed.
2. Complaint against Ryan-Walsh Stevedoring Co., Inc. dismissed because of no showing that this respondent violated the Shipping Acts.
3. In view of dismissal of complaint against Ryan-Walsh on the merits, it is unnecessary to decide whether Ryan-Walsh is a person subject to jurisdiction under the Shipping Acts, in the circumstances of this proceeding.

Eliot J. Halperin, Robert B. Acomb, Jr., and *Donald L. King* for the complainant, Kerr Steamship Company, Inc.

Edward J. Sheppard and *Edward F. LeBreton III* for respondent, The Board of Commissioners of the Port of New Orleans.

Thomas D. Wilcox for respondent, Ryan-Walsh Stevedoring Co., Inc.

Robert Eikel, for intervener, the West Gulf Maritime Association.

J. Alton Boyer for intervener, Association of Ship Brokers and Agents (U.S.A.), Inc.

Aaron W. Reese, Director, for the Bureau of Hearing Counsel.

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

Adopted July 23, 1986

On January 7, 1986, the complainant, Kerr Steamship Company, Inc. (Kerr), served notice of its "Withdrawal of Complaint in Part," insofar as it was directed against one respondent, The Board of Commissioners of the Port of New Orleans (the Board). This withdrawal was with prejudice to all issues raised in the complaint against the Board. No explanation was offered nor is required as to any reason for this withdrawal of complaint.

The other respondent herein is Ryan-Walsh Stevedoring Company, Inc., (Ryan-Walsh). The complaint insofar as it is against Ryan-Walsh was not withdrawn, and it remains to be decided herein.

[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 complaint against both respondents alleged violations of sections 16 and 17 of the Shipping Act, 1916 (the Act). The above provisions of the 1916 Act, respectively, are included in sections 10(d)(3) and of 10(d)(1) of the Shipping Act of 1984.

In brief, this complaint is about certain demurrage charges on a shipload of steel imported through the Port of New Orleans. This cargo was left on the docks of, or on the premises of, the Port of New Orleans beyond the free time allowed for pick-up of such cargo. The cargo's owners or their agent paid $30,000 of the demurrage charges, but the remaining $184,729.18 of the demurrage charges were not paid.

The Board sought to collect the remaining demurrage charges from Kerr, which had obtained the berth assignment, and was the husbanding agent, for the vessel which brought the cargo to New Orleans.

The history of this proceeding is that the complaint was filed with the Commission, a first prehearing conference was held, and later a motion was served by the complainant for leave to withdraw the complaint in its entirety and for its dismissal without prejudice, inasmuch as a suit had been filed by the Board against Kerr, Ryan-Walsh, and the owner-consignees of the cargo, in the United States District Court for the Eastern District of Louisiana, New Orleans Division.

The said motion to withdraw was granted by the Presiding Officer subject to the condition that any party might file a motion to reopen the proceeding, depending upon the outcome of the suit in the District Court, for the reason, among others, that there was no certainty that the District Court would settle all of the Shipping Act issues in the complaint.

The District Court rendered judgment in favor of the Board, and against Kerr. Kerr next appealed to the United States Court of Appeals for the Fifth Circuit, which granted Kerr's motion to stay further proceedings "pending administrative agency determination." Accordingly, the proceeding in No. 82–15 herein was reopened by the Presiding Officer on March 27, 1984.

The demurrage in issue herein arose from a complicated series of financial transactions. Intercontinental Metals Corporation (IMC) or Intercontinental Metals Trading Corporation (IMTC), North Carolina companies, bought steel from Metalimportexport, a Rumanian government corporation. Metalimportexport chartered the *Vidraru* and other vessels from NAVROM, another Rumanian government corporation, to transport cargoes of steel plate to the United States on a "free-out" basis.

Cardinal Shipping Corporation, as agent for IMC and IMTC, arranged for Ryan-Walsh to do the stevedoring in New Orleans. Based on expectations of 100,000 tons of steel to be imported through New Orleans Ryan-Walsh requested a first call on berth at the Governor Nicholls Street Wharf in New Orleans, which request was granted by the Board on April 1, 1981.

In 1982 both IMC and IMTC filed petitions in bankruptcy, staying all claims against them.

The import cargo herein was imported under so-called "free out" terms, meaning that the cargo owners, and not the vessel owner, were responsible for unloading the cargo from the ship. Ryan-Walsh was the stevedore for the cargo owners, and thus took the responsibility for unloading the cargo from the ship.

Kerr was not the agent for the cargo owners, but applied to the Board on behalf of the vessel owner for a berth assignment for the vessel. At the request of Ryan-Walsh, Kerr designated the Governor Nicholls Street Wharf as the place for berthing the ship.

Ryan-Walsh applied to the Board for a First Call on Berth Privilege at the Governor Nicholls Street Wharf to provide its stevedoring services for the cargo owners herein, and for "others." On April 1, 1981, the Board issued to Ryan-Walsh a Grant of First Call on Berth Privilege, which Ryan-Walsh accepted on April 15, 1981. The Board's tariff and all subsequent changes, etc. thereof were made a part of the said grant.

The vessel herein, the *Vidraru,* completed its discharge on April 30, 1981, and the free time allowance for maintaining the cargo on the docks expired May 15, 1981. Removal of the cargo from the docks began on June 3, 1981, and was completed in August, 1981.

The Board sent demurrage invoices to Kerr, which Kerr forwarded to Ryan-Walsh. Kerr notified Ryan-Walsh that since free time had expired and demurrage charges had not been paid, that no cargo should be released from the docks until all demurrage charges were paid. Ryan-Walsh forwarded these messages to the cargo-owners or their agent, Cardinal Shipping Corp. In turn, Cardinal instructed Ryan-Walsh to continue releasing the cargo. As a result all of the *Vidraru's* cargo herein was removed from the docks without all demurrage charges having been paid.

Cardinal, having received Kerr's notice to Ryan-Walsh not to release the cargo until all demurrage had been paid, responded directly to Kerr by telex on July 29, 1981:

> SIR, WE HAVE RECEIVED A COPY OF YOUR TELEX WHICH WAS SENT TO RYAN WALSH. PLEASE NOTE WE HAVE BEEN AND STILL ARE NEGOTIATING WHARFAGE/DEMURRAGE ON THE ABOVE VESSEL WITH THE DOCK BOARD DIRECTLY. THUSLY WE ASSUME RESPONSIBILITY FOR SAID CHARGES AND WITH COPY OF THE TELEX TO RYAN WALSH ARE INSTRUCTING THEM TO RELEASE CARGO IN THE USUAL MANNER. YOU TOO REALIZE AS CHARGES ACCRUE DAILY AND WE ARE DOING OUR UTMOST TO MOVE THE CARGO OUT OF THE PORT AREA AS SOON AS POSSIBLE. HOPE THE ABOVE SUFFICES TO YOUR REQUIREMENTS. WE REMAIN.

Ryan-Walsh followed the instructions of Cardinal Shipping Corp. and released all of the cargo, although demurrage charges had not all been paid.

In its complaint Kerr had alleged that the Board's tariff provisions and the Board's actions in seeking to collect demurrage on such "free out" cargo from Kerr were unlawful, for the reason in part that Kerr was not the agent for the owner-consignee of the cargo, whose duty it was to pick up the cargo before the expiration of free time.

Kerr's complaint against Ryan-Walsh is that Ryan-Walsh, as an alleged terminal operator for the cargo and as stevedore for the unloading of the cargo, was the terminal agent for the cargo-owner. Kerr alleges further that Ryan-Walsh did not fulfill its alleged responsibility to pay or collect the inbound demurrage charges before releasing the cargo to the owner-consignee.

Kerr alleged that Ryan-Walsh had custody and control over the cargo when the demurrage accrued, and that in proceeding allegedly in concert with the Board in its efforts to collect the demurrage charges from Kerr, that Ryan-Walsh was in violation of the Act.

Specifically, Kerr alleges that in failing to enforce the Board's tariff rules applicable to Ryan-Walsh's terminal operations, and instead engaging in terminal practices to avoid collection and payment of the demurrage charges, Ryan-Walsh (a) granted itself an undue and unreasonable preference and advantage, and subjected Kerr to an unreasonable prejudice and disadvantage; and (b) established and enforced unjust and unreasonable practices relating to the receiving, handling, storing and delivering of property, in violation of sections 16 and 17 of the Act.

At the prehearing conference held for the reopened proceeding, a petition to intervene by The Association of Ship Brokers and Agents (U.S.A.), Inc. (ASBA), and a petition to intervene by the West Gulf Maritime Association, were granted. Both interveners represented that they did not wish to introduce factual matters, but would limit their participation to the filing of briefs. The Bureau of Hearing Counsel already had been permitted to intervene at the time of the first prehearing conference.

The legal positions of ASBA and of West Gulf Maritime Association relate mainly to the complaint against the Board rather than the complaint against Ryan-Walsh. ASBA cites many reasons why the Board's tariff provisions may be unlawful.

At the prehearing conference held on the reopened proceeding, also it was ruled that the facts of the case might be submitted in writing by all parties, if they were unable to stipulate the facts, inasmuch as the parties already had tried the matter orally in large part before the District Court.

Ryan-Walsh on brief stated that the facts in this proceeding had been stated accurately by the Presiding Officer in his ruling (order) served December 5, 1984; that the facts stated in the opening brief of Hearing

Counsel were sufficient to decide the real issue; and that the operative facts never had been in dispute. Kerr said the dispute related to legal conclusions drawn from the facts.

The Board owns and provides marine terminal facilities for the use of shipping interests. The Board is a landlord port, and does not itself conduct terminal operations. The Board assigns berths and assesses charges for the use of its facilities.

Ryan-Walsh's First Call on Berth Privilege granted by the Board, was inclusive of all equipment and appurtenances, as shown on page 2 of Attachment 2 to the statements of facts submitted on behalf of Kerr. The Governor Nicholls Street Wharf, as shown on said page 2 included various wharf and shed areas. It is located on the Mississippi River. FMC Agreement No. T–3967 between the Board and Ryan-Walsh, originally approved by the Commission June 21, 1981, relates to operations of Ryan Walsh at another location which is on the Mississippi River-Gulf Outlet, which is part of the Intracoastal Waterway system.

Some discussion of the complaint against the Board is deemed helpful in putting into perspective the complaint remaining against Ryan-Walsh.

As pointed out, by Hearing Counsel, as a general rule in order to hold a steamship agent (vessel agent) responsible for port charges of any nature, those port charges must be related to the vessel's use of the port. In other words, a principal (vessel) must be responsible for certain port charges, such as demurrage on outbound cargo or wharfage, for the principal's agent (vessel's agent) also to be held responsible for the same port charges.

On *inbound cargo* occupying terminal space after the expiration of the free time allowed for the pick up of that inbound cargo, the vessel (ocean carrier) no longer has any transportation obligation relative to such cargo.

Since the vessel (*Vidraru*) no longer had any transportation responsibility on the cargo in the present case after the expiration of free time for pick-up of the cargo, the vessel had no obligation to pay demurrage on this inbound cargo. Since the vessel had no obligation to pay demurrage, likewise its agent could have had no responsibility to pay such demurrage merely because of its agency relationship.

If the Board's tariff provisions holding vessel agents responsible (item 145–0) for demurrage charges due and payable before the cargo is removed from the public wharves, were deemed lawful, this is another question, but it need not be resolved here.

The responsibility for demurrage on inbound cargo is explained in *West Gulf Maritime Association* v. *Port of Houston Authority*, 22 F.M.C. 420 (1980), at page 439:

> The difference in responsibility between inbound and outbound cargo is based upon the respective legal responsibilities for removal of the cargo from the terminal. On inbound cargo the responsibility for removal after the expiration of free time is on the cargo interests.

The record herein does not disclose any proceeding in which it has been determined that demurrage on inbound cargo may be charged properly against vessel interests.

Although it does not have to be decided herein, a terminal practice, or a tariff provision holding vessel interests responsible for demurrage on inbound cargo would appear to be unreasonable and unlawful.

GENERAL DISCUSSION AND CONCLUSIONS

In the present case on the inbound cargo, the responsibility for the demurrage after the expiration of free time was primarily on the cargo owners (consignees), IMC and IMTC, and secondarily on their agent, Cardinal Shipping Corp.

There remains the question whether the stevedore, Ryan-Walsh, was responsible somehow for this demurrage. Ryan-Walsh had a contract to stevedore the cargo, that is, to unload it from the ship, but Cardinal Shipping gave orders to Ryan-Walsh as to the disposition of the cargo, and Ryan-Walsh acceded to Cardinal's instructions to release the cargo, whether or not the demurrage bill had been paid in full.

Ryan-Walsh had no contract or duty toward Kerr. The Board did not direct Ryan-Walsh to hold the cargo under the Board's tariff provisions until the demurrage was paid in full. Rather, the Board chose to negotiate with Cardinal, and to attempt to collect the demurrage from Kerr.

There is not a shred of specific evidence that the Board and Ryan Walsh acted in concert, with the intent to foist the payment of the demurrage charges on Kerr. Ryan-Walsh acted independently as it saw its duty to Cardinal.

The Board exercised what it believed was its option to collect the demurrage from Kerr. The Board chose not to exercise its option to impound the cargo.

Whether or not the cargo was released improperly to the cargo-owners or their agent before the payment of demurrage, is a matter apparently covered in part by the terms of the tariff of the Board.

The Board's tariff item 145–0 covered demurrage on inbound cargo, and provided in part:

> At the option of the Superintendent of Docks, the cargo may be sent to warehouse storage for account of whom it may concern.

This tariff item also provided in part:

> The owner, charterer and agent of the vessel discharging the cargo are responsible for the payment to the Board of the demurrage charges which are due and payable before the cargo incurring same is removed from the public wharves.

The Board by the above tariff provisions clearly showed its general intent to collect demurrage charges before the cargo was removed from the Board's premises. But, as seen, the Board did not exercise its option

to hold the cargo in warehouse storage. Rather, the Board was negotiating with Cardinal Shipping Corp., which stated on July 29, 1981, that "we have been and still are negotiating wharfage/demurrage on the above vessel with the Dock Board directly."

Ryan-Walsh was not a vessel agent, and under the Board's tariff concluded that it was not responsible for the payment, or the collection and remittance, to the Board of demurrage charges assessed by the Board's tariff.

The Board owned the terminal facility, and collected for its own account wharfage, dockage, and demurrage. Ryan-Walsh occupied the terminal facility, furnished the labor and experience to discharge the vessel, and to deliver or release the cargo to its owners. Ryan-Walsh had custody of the cargo while it remained in the terminal facility. Ryan-Walsh physically occupied the terminal facility and by virtue of that fact and the facts that Ryan-Walsh took custody and control of the cargo, Ryan-Walsh apparently acted as a terminal operator. The *Vidraru* was not a common carrier by water, but Ryan-Walsh's First Call on Berth Privilege specified that it would unload the cargo of the *Vidraru* and "others." If these others included or were to include common carriers by water, then it could be determined that Ryan-Walsh was providing terminal services in connection with common carriers by water.

Nevertheless, in view of the findings and conclusions herein as to the merits (whether or not Ryan-Walsh was in violation of the Shipping Acts), it is unnecessary to decide whether in the circumstances of this proceeding that Ryan-Walsh was an "other person" or terminal operator subject to our jurisdiction.

It is ultimately concluded and found:

1. The complaint against the Board of Commissioners of the Port of New Orleans has been withdrawn with prejudice. Said complaint is dismissed.

2. The complaint against Ryan-Walsh is without merit, because there has been no showing that Ryan-Walsh acted in concert with the Board of Commissioners of the Port of New Orleans in connection with the charging, collecting, or failure to collect demurrage, etc., and there has been no showing that Ryan-Walsh violated the Shipping Acts. The said complaint is dismissed.

3. In view of the dismissal of the complaint against Ryan-Walsh on the merits, it is unnecessary to decide whether Ryan-Walsh is a person or terminal operator subject to jurisdiction under the Shipping Acts, in the circumstances of this proceeding.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1353

APPLICATION OF COMPANIA CHILEANA DE NAVEGACION INTEROCEANICA S.A. FOR THE BENEFIT OF GENERAL BOARD CHURCH OF NAZARENE, KASH, INC. AND CALCO HAWAIIAN MGT., INC.

ORDER OF REMAND

August 14, 1986

This proceeding is before the Commission on Exceptions filed by Compania Chileana de Navegacion Interoceanica S.A. (CCNI) to the Initial Decision (I.D.) of Chief Administrative Law Judge Charles E. Morgan (Presiding Officer). The Presiding Officer denied CCNI's application, submitted pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e), for permission to waive portions of the applicable freight charges on two shipments that moved from Los Angeles, California to certain Chilean ports. He also denied relief with regard to a third shipment on the basis that the "shipment was overcharged and no waiver is appropriate for it." CCNI excepts to the I.D. with regard to the first two shipments.

BACKGROUND

On June 7, 1985, CCNI sent certain correspondence from its home office in Valparaiso, Chile to its Los Angeles traffic manager advising him of "cargoes and quoted rates pertaining to three potential shippers." This correspondence was misrouted and was not received by the traffic manager until June 12, 1985, three days before CCNI's vessel on which the cargo was loaded, the *Asia Sun*, sailed.

CCNI's Los Angeles traffic manager had established a procedure "to avoid the mischance of publishing rates without transporting the intended cargo." That procedure required the traffic manager to receive documentation that the cargo was at the pier ready to be loaded before he would authorize CCNI's tariff publisher to file the rates quoted to him from the home office in Valparaiso, Chile. On the shipments here in issue, the traffic manager allegedly did not receive documentation that the cargo was ready to be loaded, until June 17, 1985, two days after the *Asia*

Sun sailed.[1] As a result, one of the quoted tariff rates was not published until June 20; the other was published on June 21, 1985.[2]

The Presiding Officer denied CCNI'S application on the ground that there was no error of a clerical or administrative nature. In so doing, he relied upon the Commission's recent decision in *Application of Philippines, Micronesia & Orient Navigation Co. for the Benefit of Himmel Industries, Inc.*, 28 F.M.C. 219 (1986). In *Himmel,* the Commission determined that there was no clerical or administrative error warranting the requested relief because the carrier's deliberate decision to withhold publishing the quoted rate until "on board bills of lading" were issued indicated that the carrier did not intend to publish the quoted rate until after the vessel had sailed. The Presiding Officer in the present proceeding determined that CCNI's procedure is similar enough to that considered in *Himmel* to warrant denying its application.

CCNI, in its Exceptions, argues that its procedures and the facts of this proceeding are distinguishable from *Himmel.* First, it points out that its tariff publication procedure only requires documentation that the cargo is ready for loading, while in *Himmel* the carrier required "on board bills of lading." Second, CCNI argues that the record supports a finding that there was clerical and administrative error. In this regard, CCNI notes that the ALJ acknowledged that the relevant documents were misrouted and that CCNI's procedure would not always result in the vessel sailing before the quoted rate is published. Finally, CCNI points out that the traffic manager is located at the point of loading and could authorize the quoted rates to be published, while in *Himmel,* the documents had to be sent over 3,000 miles before the rates could be published. CCNI, therefore, urges the Commission to reverse the Initial Decision and to allow it to waive a portion of the applicable freight charges.

DISCUSSION

Section 8(e) of the Shipping Act of 1984 provides, in relevant part, that the Commission may authorize a refund or waiver if:

> [T]here is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff . . . . 46 U.S.C. app. § 1707(e)(1).

[1] CCNI's application indicates that while the traffic manager became aware that the cargo was at the pier late on June 14, 1985, he was not able to verify the cargo status with the necessary documentation until after the vessel had sailed.

[2] On the first shipment, a 20-foot container containing a pick-up truck, CCNI negotiated a rate of $3,100.00 and seeks to waive collection of $2,045.08 in freight charges. On the second shipment, an empty refrigerated container on a chassis, CCNI negotiated a rate of $3,500 and now seeks to waive $34,673.67 in freight charges.

The quoted rate for the third, uncontested shipment was published on June 20, 1985. On this shipment, a 20-foot container containing waterbeds, CCNI negotiated and collected a flat rate of $4,100.00. The Presiding Officer concluded that CCNI had, at the time of shipment, a rate which would have resulted in freight charges of $3,743.50. He concluded, therefore, that the shipper had been overcharged in the amount of $356.50. CCNI did not except to the Presiding Officer's findings with regard to this shipment.

In *Himmel*, the Commission held that there was no evidence of clerical error because the procedure there provided that the quoted rate would not be published until "on board bills of lading" were received at the home office in San Francisco, which was over 3,000 miles from the port of origin. CCNI argues that its tariff publishing procedure is distinguishable from that considered in *Himmel* and that the evidence of record, as well as the Presiding Officer's findings, demonstrates the required clerical or administrative error.

A basis may exist to distinguish CCNI's procedures. As is pointed out in CCNI's Exceptions, the procedure here at issue requires that the traffic manager receive certain documents indicating that the cargo is at the pier and ready for loading, as opposed to being loaded on the ship as in *Himmel*, before he could authorize the quoted rates to be published in CCNI's tariff. Moreover, the traffic manager is, as CCNI points out, physically located at the port of origin and could have immediately given such authorization if he had received the proper notification, unlike in *Himmel* where the tariff publishing authority was 3,000 miles distant.

In *Himmel*, the Commission denied the application because it was unlikely, if not impossible, under the procedure there in issue, that the quoted rate could have been published before the ship sailed. The cargo not only had to be loaded aboard the ship, but the "on board bill of lading" had to be transmitted over 3,000 miles to the carrier's home office to obtain authority to publish the quoted rate. In the present proceeding, the Presiding Officer stated that CCNI's procedures would not always result in the vessel sailing before the quoted rates were published. Although not conclusive, this may establish a basis to distinguish CCNI's procedures and support its claim of clerical error.

There are, however, certain evidentiary gaps concerning CCNI's tariff publishing procedures with respect to the shipments at issue that preclude a determination on the present record that those procedures are *in fact* distinguishable from those in *Himmel*. The evidence of record does not, for instance, fully describe nor include the correspondence sent from Valparaiso, Chile to the traffic manager in Los Angles, nor does it include or describe the documentation which the traffic manager eventually received to inform him that the cargo was at the pier ready for loading. In addition, the record evidence does not fully describe the circumstances under which the traffic manager became aware, on the evening before the ship sailed, that the cargo may have been on the pier. *See* footnote 1, *supra*. The record also does not indicate when the cargo was actually delivered to the pier for loading, nor does it indicate when the quoted rates would have been published if the required documents had not been misrouted. Further development of the record to cure these deficiencies should shed further light on CCNI's claim of clerical or administrative error and whether, in the final analysis, the relief requested should be granted. Given the

remedial purposes of the special docket legislation, a remand is warranted to consider these matters.[3]

THEREFORE, IT IS ORDERED, That the Presiding Officer's Initial Decision is vacated to the extent it denies CCNI's application for authority to waive the collection of $3,045.08 and $34,673.67 in freight charges for the shipments described herein.

IT IS FURTHER ORDERED, That CCNI's application is remanded to the Presiding Officer for further proceedings consistent with this opinion.

IT IS FURTHER ORDERED, That the Presiding Officer shall issue a Supplemental Decision.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

[3] The special docket legislation was intended to prevent shippers from bearing the burden of carrier negligence and has been broadly construed to accomplish this congressional objective. *See Nepera Chemical, Inc.* v. *Federal Maritime Commission*, 662 F.2d 18 (D.C. Cir. 1981).

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 510, 580, 582]

DOCKET NO. 86–19

ANTI-REBATING CERTIFICATION BY THOSE ENGAGED IN THE FOREIGN COMMERCE OF THE UNITED STATES

August 26, 1986

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission amends its rules governing the filing of anti-rebating certificates in the foreign commerce of the United States. The purpose of the rule is to establish uniform application of anti-rebating rules with respect to ocean common carriers, non-vessel operating common carriers and freight forwarders, and provide that companies which function in more than one capacity need file only one anti-rebating certificate. The rule also specifies the time period covered by the anti-rebate certification and provides a uniform due date for submission of the certificate.

EFFECTIVE DATE: October 28, 1986.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on May 15, 1986 (51 FR 17754), the Commission proposed to amend certain of its rules concerning the filing of anti-rebating certificates. The proposed amendment established a common due date of December 31 by which all certificates must be filed. The purpose of this revision was to eliminate any confusion resulting from the different filing dates facing certain regulated parties, and to clarify the period of validity of a certificate. The proposed amendments also required each common carrier to file a certificate with its initial tariff and each ocean freight forwarder to file its initial certificate with its license application, and specified the time period for which each certificate is valid.

Additionally, provisions were proposed to permit an individual firm to submit only one certificate when it functions in more than one capacity, i.e., both as a non-vessel operating common carrier and an ocean freight forwarder. The Commission also proposed to remove the tariff notification requirement contained in 46 CFR 582.3. That provision was deemed duplicative of that contained in 46 CFR 580.5(c), where it properly resides.

Comments on the proposed rule were received from three parties, Associated Container Transportation (Australia) Ltd. (ACT), the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) and Inter-

state International, Inc. (Interstate). All three generally supported the proposed rule.

ACT offered two suggestions. The first would include a provision with respect to joint services, providing that the joint service, rather than the individual parties, be held responsible for the certification. This suggestion has merit. The purpose of the anti-rebating certification is to aid in the enforcement of the prohibitions against rebating found in section 10 of the 1984 Act. Section 10(e), 46 U.S.C. app. 1709(e), states:

> For purposes of this section [section 10], a joint venture or consortium of two or more common carriers *but operated as a single entity* shall be treated as a single common carrier, (emphasis added).

Because a joint service *operated as a single entity* would be treated as a single common carrier for purposes of any violation of section 10 involving rebates, it seems appropriate to treat such joint services as single carriers for purposes of the certification. Accordingly, we have incorporated this suggestion in the final rule (section 582.1(a)).

ACT also recommended that paragraphs (a) through (d) of proposed 46 CFR 582.2 be eliminated. ACT stated that the requirements contained therein were duplicative of material contained in Appendix A to Part 582, while using dissimilar language. We believe that the provisions in question are substantive and should remain in the body of the rule. However, the final rule, has been modified to make it more consistent with Appendix A to Part 582.

NCBFAA pointed out that the proposed rule failed to take into account the situation wherein an application for an ocean freight forwarder license is granted in a year subsequent to the year in which the application was filed. NCBFAA suggested that the certification filed with the application be valid for the remainder of the calendar year in which the license is granted. This recommendation has merit and has been adopted in the final rule (section 582.3(c)).

NCBFAA also noted that the proposed rule fails to distinguish between "applicants" and "licensed ocean freight forwarders," and offered certain changes to the proposed rule to take into account this distinction. The thrust of this comment is that applicants file the initial certificate, while licensed ocean freight forwarders must comply with the annual certification requirement. NCBFAA is correct and the final rule has been revised accordingly.

Interstate, which functions as both an ocean freight forwarder and a non-vessel operating common carrier, endorsed the provision that a single certificate would satisfy the annual filing requirement for companies or firms which function in more than one capacity.

The final rule also reflects certain non-substantive technical changes.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, February 27, 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 effect on competition, employment, investment productivity, innovations, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that, although this rule may affect a substantial number of small entities, particularly small businesses, the economic impact is not considered to be significant.

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget (O.M.B.) for review under section 3504(h) of the Paperwork Reduction Act. 44 U.S.C. 3504(h). A copy of the request for O.M.B. review and supporting documentation may be obtained from the Commission's Secretary. Comments on the information collection aspects of this rule should be submitted to the Office of Information and Regulatory Affairs of O.M.B., Attention: Desk Officer for the Federal Maritime Commission. Collection of information requirements contained in original Parts 510, 580, and 582 were approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and assigned control numbers 3072–0009, 3072–0018 and 3072–0028.

List of Subjects

46 CFR Part 510

Exports, Freight forwarders, Maritime carriers, Rates and fares, Reporting and recordkeeping requirements, Surety bonds.

46 CFR Part 580

Anti-trust, Cargo, Cargo vessels, Contracts, Exports, Harbors, Imports, Maritime carriers, Rates and fares, Reporting and recordkeeping requirements, Water carriers, Water transportation.

46 CFR Part 582

Cargo, Cargo vessels, Exports, Foreign relations, Freight forwarders, Imports, Maritime carriers, Rates and fares, Reporting and recordkeeping requirements, Water carriers, Water transportation.

Therefore, for the reasons set forth above, Parts 510, 580, and 582 of Title 46, Code of Federal Regulations, are amended as follows:

PART 510—(AMENDED)

1. The Authority Citation to Part 510 is revised to read:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716, and 1718.

2. Section 510.25 is revised to read as follows:

§ 510.25 Anti-rebate certifications.

(a) Every licensed ocean freight forwarder shall file an anti-rebating certificate on or before each December 31.

(b) Every applicant for an ocean freight forwarder license shall file an anti-rebating certificate with its license application. Such certificate shall be valid through December 31 of the year in which the license is granted.

(c) The anti-rebating certificate shall comply with the requirements of Part 582 of this title, and, except for a certificate filed with a license application, shall apply to the calendar year following the December 31 filing date.

PART 580—(AMENDED)

1. The Authority Citation to Part 580 is revised to read:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 1702–1705, 1707–1709, 1712, 1714–1716, and 1718.

2. Section 580.5(c) (2) is revised to read as follows:

§ 580.5 Tariff contents.

* * * * *

(c) The body of the tariff shall contain the following:

(1) * * *

(2) (i) The full legal name of each participating common carrier, appropriately identified as a Non-Vessel-Operating Common Carrier or Vessel Operating Common Carrier and the address of its principal office. Where a joint service participates, the FMC number of the agreement authorizing the joint service shall also be shown.

(ii) An anti-rebate tariff provision to be effective upon filing which shall read substantially as follows (see Exhibit No. 2 to this part):

> (Name of company) has a policy against the payment of any rebate by the company or by any officer, employee, or agent thereof, which payment would be unlawful under the United States 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 582.

(A) When the common carrier's tariff is a conference tariff, the common carrier shall ensure that the conference publishes the common carrier's anti-rebate tariff provision in the conference tariff.

(B) In addition to the anti-rebate tariff provision, an anti-rebating certificate shall be filed by every common carrier with its initial tariff, and on each succeeding December 31. The anti-rebating certificate shall comply

with the requirements of Part 582 of this title, and, except for a certificate filed with an initial tariff, shall be valid for the calendar year following the December 31 filing date.

PART 582—(AMENDED)

1. The Authority Citation to Part 582 is revised to read:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. APP. 1701, 1702, 1707, 1709, 1712, AND 1714–1716.

2. Section 582.1 is revised to read as follows:

§ 582.1 Scope.

(a) The requirements set forth in this part are binding upon every common carrier by water and ocean freight forwarder in the foreign commerce of the United States and, at the discretion of the Commission, will apply to any shipper, shippers' association, marine terminal operator, or broker. In the case of a joint service operated as a single entity, the joint service, rather than the participants, is responsible for the provisions of this part.

(b) Information obtained under this part will be used to maintain continuous surveillance over common carrier and ocean freight forwarder activities and to deter rebating practices. Failure to file the required certificate may result in a civil penalty of not more than $5,000 for each day such violation continues.

3. Section 582.2 is revised to read as follows:

§ 582.2 Form of certification.

The Chief Executive Officer, *i.e.*, the most senior officer within the firm designated by the board of directors, owners, stockholders, or controlling body as responsible for the direction and management of the firm, of each common carrier and ocean freight forwarder and, when so ordered by the Commission, the Chief Executive Officer of any shipper, shippers' association, marine terminal operator, or broker, shall file with the Secretary, Federal Maritime Commission, a written certification, under oath, as prescribed in the format in Appendix A to this part, attesting:

(a) That it is the stated policy of the firm that the payment, solicitation or receipt by the firm of any rebate which is unlawful under the Shipping Act of 1984, is prohibited;

(b) That this policy was recently promulgated to each owner, officer, employee, and agent of the firm; and

(c) That the firm will fully cooperate with the Commission in any investigation of illegal rebating.

A description of the details of the measures instituted within the firm or otherwise to prohibit its involvement in the payment or receipt of illegal rebates shall be attached to the certification.

4. Section 582.3 is removed.

5. Section 582.4 is renumbered 582.3 and revised to read as follows:

§ 582.3 Reporting requirements.

(a) Every common carrier required by this part to file a written certification in the form prescribed by §582.2, shall file such certification with its initial tariff and, thereafter, on or before December 31 of each year.

(b) Every licensed ocean freight forwarder, required by section 510.25 of this title to file a written certification in the form prescribed by section 582.2 of this part, shall file such certification on or before December 31 of each year. Every applicant for an ocean freight forwarder license shall file such certification with its license application.

(c) The certification required by this section shall be valid for the remainder of the calendar year following the initial filing of a tariff or granting of an ocean freight forwarder license and, thereafter, shall be valid for the calendar year following the December 31 filing date specified in 46 CFR §§510.25, 580.5(c)(2)(ii), and 582.3 (a) and (b).

(d) Every person other than a common carrier or ocean freight forwarder which is ordered by the Commission pursuant to §582.2 to file a written certification shall file such certification in the manner prescribed by the Commission.

(e) In those instances in which a single firm operates in more than one capacity, such as both a non-vessel-operating common carrier and an ocean freight forwarder, a single certificate may be submitted to satisfy the annual reporting requirements of this section.

6. Appendix A to Part 582 is revised to read as follows:

APPENDIX A—CERTIFICATION OF POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

46 CFR PART 582

I, ________(Name of affiant)________, state under oath that I am the Chief Executive Officer ________(state exact title)________ of ________(Exact names of firm)________, hereinafter referred to as "The Firm", and that:

1. It is, and shall continue to be, the policy of The Firm to prohibit its participation in the payment, solicitation, or receipt of any rebate, directly or indirectly, which is unlawful under the provisions of the Shipping Act of 1984.
2. Each owner, officer, employee and agent of The Firm was notified or reminded of this policy on ________(Date)________.
3. The Firm affirms that it will cooperate fully with the Federal Maritime Commission in any investigation of suspected rebating in United States foreign trades.
4. Attached hereto is a description of the details of measures instituted, within the Firm or otherwise, to prohibit its involvement

in the payment or the receipt of illegal rebates in the foreign commerce of the United States.

The period covered by this Certification is from ____(Date)____ to ____(Date)____.

The Firm is a (check each block applicable):

________ Broker
________ Freight Forwarder (License No. ________)
________ Marine Terminal Operator
________ Non-Vessel-Operating Common Carrier
________ Shipper
________ Shippers' Association
________ Vessel Operating Common Carrier

(S) ________________________________
(Signature of affiant)

Subscribed to and sworn before me this ____________ day of ____________________, 19______.

(S) ________________________________
Notary Public

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1395

APPLICATION OF TRANSPACIFIC WESTBOUND RATE AGREEMENT AND SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF DARRELL J. SEKIN & CO., INC. AS AGENT FOR BRUCE INTERNATIONAL CORPORATION

ORDER OF REMAND

August 29, 1986

By Notice issued July 9, 1986, the Commission determined to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) served June 25, 1986, in which he granted Sea-Land Service, Inc. permission to refund and waive a portion of certain freight charges. Upon review, the Commission is remanding the matter to the Presiding Officer for further proceedings.

BACKGROUND

Sea-Land Service, Inc., a member of the Transpacific Westbound Rate Agreement (TWRA or Conference), had agreed with Bruce International Corporation (BIC) to a rate of $2,090 per 40-foot container for the transportation of hardwood flooring from Nashville, Tennessee to Yokohama, Japan. On May 8, 1985, Sea-Land requested a majority telephone vote on the proposed rate. A few days later Sea-Land was erroneously advised that the rate had been adopted on May 13, 1985. Upon notification that the rate had been approved, BIC, on May 15, 1985, delivered one shipment of hardwood flooring to Sea-Land at Nashville for overland transportation to Long Beach, California where it was placed aboard a vessel for the movement to Yokohama.[1] The $2,090 rate, agreed to between Sea-Land and BIC, was, pursuant to section 8 of the TWRA, published in the Conference's tariff on May 21, 1985.[2]

Subsequently, Sea-Land Corporation on behalf of Sea-Land Service, Inc. applied under section 8(e) of the Shipping Act of 1984, 46 U.S.C. § 1707(e), and section 92(a) of the Commission's Rules of Practice and Procedure,

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[1] The shipment sailed from Long Beach on May 27, 1985.

[2] Section 8 of the TWRA (FMC Agreement No. 202–010–689), as amended, reads in part:

> If the Agreement does not adopt the proposed change, it shall, unless withdrawn, become effective ten (10) calendar days from the Manager's receipt of the original notice [in this instance Sea-Land's notice of May 8, 1985].

46 C.F.R. § 502.92(a),[3] for permission to waive collection of $32,130.31 and to refund $10 of the freight charges applicable at the time of shipment.[4] TWRA joined in the application. The Presiding Officer found that the application met the requirements of section 8(e) and granted the relief requested.

DISCUSSION

Section 8(e) provides that a carrier or conference subject to the Act may be allowed to refund or waive collection of a portion of freight charges if "there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff." 46 U.S.C. app. § 1707(e)(1).

Sea-Land does not allege error in TWRA's tariff in effect on May 15, 1985. In view of TWRA's refusal to adopt the rate proposed by Sea-Land, the rate in effect on May 15, 1985, when BIC tendered its shipment, was the rate TWRA intended be applied to BIC's cargo.[5] Accordingly, no inadvertent failure on the part of TWRA to file the $2,090 per container rate before May 15, 1985 may be found on this record.

Nor does Sea-Land argue that the alleged erroneous advice in any manner affected its ability to obtain the filing of the intended rate under TWRA's independent action provisions. The thrust of Sea-Land's claim is that upon being informed that the Conference had adopted the proposed rate, it advised the shipper "that the rate was in effect and that cargo movement could commence." (Affidavit of Raymond T. Savoie Accompanying Application). As a consequence BIC tendered its shipment in reliance on Sea-Land's advice. This, as Sea-Land explains, caused higher charges than those intended and agreed upon to be assessed.[6]

The record is silent on who gave the erroneous advice and when. Also unknown is the timing of Sea-Land's negotiation of the $2,090 rate with the shipper, a fact necessary to the determination of whether Sea-Land was in a position to implement the rate before the shipment moved.

Thus, the record as it now stands is inadequate to properly establish the basis for Sea-Land's claim for relief and the facts necessary to support the grant of the application for special docket relief.[7] Consequently, the matter must be remanded to the Presiding Officer for the purpose of obtaining from Sea-Land additional information on the alleged tariff filing error.

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[3] The application was filed on November 8, 1985 (inadvertently shown as November 8, 1986 in the Notice of June 27, 1986).

[4] Under TWRA Tariff—FMC No. 2, orig. p. 21, in effect on March 15, 1985, BIC's shipment was subject to a Cargo, N.O.S. rate of $500 W/M, plus a $5 RT container yard receiving charge. The $10 refund results from an adjustment in container yard receiving charges collected by Sea-Land.

[5] TWRA concurrence in the application is not taken to signify a change of position but rather indicates its consent to publish a tariff notice, if required.

[6] Application at p. 4.

[7] The Presiding Officer did, by letter dated December 31, 1985, ask Sea-Land to furnish an affidavit from the person who conveyed the incorrect information. The letter remains unanswered.

THEREFORE, IT IS ORDERED, That the Initial Decision served July 1, 1986 in this proceeding is vacated.

IT IS FURTHER ORDERED, That the application of Sea-Land Corporation on Behalf of Sea-Land Service, Inc. is remanded to the Presiding Officer for further proceedings consistent with this Order.

FINALLY, IT IS ORDERED, That the Presiding Officer shall issue a Supplemental Decision.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–21

AMTROL, INC.

v.

U.S. ATLANTIC-NORTH EUROPE CONFERENCE, ET AL.

NOTICE

September 4, 1986

Notice is given that no appeal has been taken to the August 1, 1986, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–21

AMTROL, INC.

v.

U.S. ATLANTIC-NORTH EUROPE CONFERENCE, ET AL.

COMPLAINT DISMISSED

Finalized September 4, 1986

Complainant and respondents have filed a joint motion asking that the complaint be dismissed without prejudice. The parties explain that they have reached an amicable resolution of their controversy and therefore do not wish to litigate the issues raised in the complaint.

In its complaint served June 25, 1986, complainant, a manufacturer of steel expansion tanks, empty steel cylinders, and related products, alleged that respondent Conference and its member lines had unreasonably preferred and given advantage to competitors of the complainant and had subjected complainant to unreasonable prejudice and discriminatory rates in violation of section 10(b) of the Shipping Act of 1984. Essentially complainant alleged that the Conference published certain rates on empty steel cylinders, which included ancillary charges, from Columbus, Ohio, to ports in the United Kingdom and Continental Europe. Complainant alleged that these rates preferred competitors of complainant located in Columbus and that respondent had refused to amend its rates applicable to complainant's shipments by including the incidental charges and otherwise equalizing the rates, although agents of certain respondent carriers had agreed that the Conference's rate structure was preferential to complainant's competitors. Complainant alleged that it had lost sales and had suffered other injury and asked for reparations plus interest and costs and for an order that would remove the alleged preference and prejudice.

The policy of the law and the Commission, of course, favors settlements and presumes that they are fair and reasonable. See *Old Ben Coal Company* v. *Sea-Land Service, Inc.*, 21 F.M.C. 505, 512 (1978); *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162*, 24 F.M.C. 315 (1981). Furthermore, in this case, no answer to the complaint has been filed. In such circumstances, under the federal rules applicable in courts, which the Commission follows in the absence of a Commission rule, a complainant has the right to withdraw its complaint without the permission of the court. See F.R.C.P. 41(a)(1), 28 U.S.C.A.; *Companhia Siderurgica Nacional* v. *Lloyd Brasileiro,* 25 F.M.C. 655 (1983), and cases

cited therein; 9 Wright and Miller, *Federal Practice and Procedure*, Section 2363; see also *Gardiner* v. *A.H. Robins*, 747 F. 2d 1180, 1189 (8th Cir. 1984) (Rule 41 of the Federal Rules of Civil Procedure allows a lawsuit to be dismissed at any time by the consent of all parties without judicial approval in the normal case). See also *Roberts Steamship Agency, Inc.* v. *The Board of Commissioners of the Port of New Orleans and Atlantic and Gulf Stevedores, Inc.*, 21 F.M.C. 492 (1978) ("We recognize that in a complaint proceeding we cannot require the parties to litigate against their wishes . . .").

The parties have not furnished information as to the nature of the settlement or its details. However, this case does not involve allegations that respondents charged rates other than those specified in their tariff in violation of section 10(b)(1) of the Shipping Act of 1984 (formerly section 18(b)(3) of the Shipping Act, 1916), in which case particular justification would have been required. See *Organic Chemicals* v. *Atlanttrafik Express Service*, 18 SRR 1536a (1979). Nor does this settlement between a shipper and respondent carriers appear to require filing under section 4 or 5 of the Shipping Act of 1984. *Old Ben*, cited above, at 512–513. Under such circumstances, there is nothing to prevent my granting the motion. Cf. *Kerr Steamship Company, Inc.* v. *The Board of Commissioners of the Port of New Orleans*, Docket No. 82–15, Order Adopting Initial Decision, July 23, 1986 28 F.M.C. 516 (no explanation required as to why complainant voluntarily withdrew its complaint; placing settlement agreement in the record permitted but not required).

Accordingly, the motion is granted. The complaint is dismissed without prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–31

ARCTIC GULF MARINE, INC., PENINSULA SHIPPERS ASSOCIATION, INC., SOUTHBOUND SHIPPERS, INC.

NOTICE

September 12, 1986

Notice is given that no exceptions were filed to the August 5, 1986, initial decision, in part, 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.

Pursuant to the decision, Arctic Gulf Marine, Inc. will pay the sum of $40,000, together with all accumulated interest since March 25, 1986, to the Federal Maritime Commission by September 19, 1986.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–31

ARCTIC GULF MARINE, INC., PENINSULA SHIPPERS ASSOCIATION, INC., SOUTHBOUND SHIPPERS, INC.

Arctic Gulf Marine, Inc., a Respondent, ordered to pay a civil penalty in the amount of $40,000 pursuant to terms of its offer to settle an assessment proceeding seeking to determine whether said Respondent violated section 2 of the Intercoastal Shipping Act, 1933, and section 15 of the Shipping Act, 1916.

Timothy S. O'Neill for Respondent, Arctic Gulf Marine, Inc.

Aaron W. Reese, Director, Bureau of Hearing Counsel, and *Charna Jaye Swedarsky* as Hearing Counsel.

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

Finalized September 12, 1986

This proceeding was instituted by Order of Investigation and Hearing ("Order"), served September 10, 1984, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. app. 821) to determine, as pertinent, whether one of the named Respondents, Arctic Gulf Marine, Inc. ("AGM") violated section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 844) (a) by charging a different compensation for the transportation of property than the rates filed with the Federal Maritime Commission and in effect; (b) by absorbing drayage charges without a tariff provision authorizing absorptions; and whether AGM, Peninsula Shipping Association, Inc. ("PSA") and/or Southbound Shippers, Inc. ("SSI"), the latter two also named as Respondents, entered into and carried out unfiled and unapproved preferential and cooperative working arrangements, and agreements granting special rates and accommodations, in violation of section 15 of the Shipping Act, 1916 (46 U.S.C. app. 814); and if AGM is found to have violated either of those provisions, whether civil penalties should be assessed and, if so, the amount of such penalties.[2] Hearing Counsel became a party to the proceeding pursuant to Rule 42 of the Commission's Rules of Practice and Procedure, 46 CFR 502.42.

[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 Order also contains provisions seeking to determine: whether PSA and/or SSI violated section 2 of the Intercoastal Shipping Act, 1933, by operating as a common carrier by water in the Seattle, Washington/Alaska trade without a tariff, containing a schedule of rates and charges, on file with the Commission; whether PSA and/or SSI violated section 15 of the Shipping Act, 1916; and whether civil penalties should be assessed against either of them, and, if so, the amount of such penalties.

Procedural Background

After the conclusion of extensive discovery procedures, an evidentiary hearing was held. It began on June 10, 1985, at Seattle, Washington, and was provisionally closed[3] on August 16, 1985, at that location. In all, the hearing was conducted over a period of 18 days in Seattle and Anchorage, Alaska.

Hearing Counsel filed an opening brief on December 3, 1985. This filing initiated a request by AGM that it be permitted to file a petition for settlement instead of a response to Hearing Counsel's brief. The request was granted. On January 31, 1986, AGM's "Offer of Compromise and Settlement" was received by the Office of the Secretary and filed, together with another document entitled "Proposed Compromise Agreement." These filings triggered additional discussions between Hearing Counsel and AGM which culminated in the filing of a new "Offer of Settlement" by AGM on March 28, 1986, as a substitute for the one filed in January. On April 11, 1986, there was filed a supplemental document entitled "Proposed Settlement of Civil Penalty." Simultaneously, Hearing Counsel filed their reply to AGM's offer.

This initial decision will deal only with the proposed settlement, which Hearing Counsel endorse. A Separate initial decision with respect to PSA and SSI[4] will be issued.

The Offer of Settlement

Without admitting that any violations of the cited statutes were committed by AGM, AGM offers to pay the sum of $40,000, which already has been deposited in an interest bearing escrow account, within fifteen days of approval of the settlement by the Commission.

Substantive Provisions

Section 2 of the Intercoastal Shipping Act, 1933, provides in pertinent part:

> That every common carrier by water in intercoastal commerce shall file with the Federal Maritime Commission and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation . . . nor shall any common carrier by water in intercoastal commerce charge or demand or collect or receive a greater or less or different compensation for the transportation, of passengers or property or for any service in connection therewith than the rates, fares, and/

[3] The hearing was formally closed by an order issued September 19, 1985.

[4] Hearing Counsel's status report, filed January 24, 1985, states that SSI was involuntarily dissolved as a corporation by the State of Alaska on November 16, 1984. SSI neither appeared in the proceeding nor defended against any allegations of violations.

> or charges which are specified in its schedules filed with the Commission and duly posted and in effect at the time. . . .

At the time of the activities which are the subject of this proceeding, section 15 of the Shipping Act, 1916, provided, as pertinent:

> Every common carrier by water . . . shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier . . . giving or receiving special rates, accommodations, or other special privileges or advantages; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement. . . .
>
> Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission. . . .

Penalty Provisions

Section 2 of the Intercoastal Shipping Act, 1933, provides, as pertinent, "whoever violates any provision of this section shall be subject to a civil penalty of not more than $1,000 for each day such violation continues.

Section 15 of the Shipping Act, 1916, provides, as pertinent, "whoever violates any provision of this section shall be subject to a civil penalty of not more than $1,000 for each day such violation continues."

With respect to the section 2 violations, Hearing Counsel agree that fourteen alleged instances of misrating and one alleged instance of absorption constitute discrete violations of one day's duration, each. Thus, the maximum total penalty for these alleged violations of section 2 is $15,000.

Insofar as the duration of the section 15 violations are concerned, there is some uncertainty, but AGM concedes that the maximum penalty which may be assessed upon findings of violations is $240,000.

The Record

The record presented for consideration of the offer of settlement is comprised of the following:

(1) The evidentiary record, consisting of the transcript of testimony and exhibits received in evidence.

(2) Opening Brief of Hearing Counsel.

(3) AGM's March 28th Offer of Settlement.

(4) AGM's April 11th Proposed Settlement of Civil Penalty.

(5) Reply of Hearing Counsel to Offer of Settlement.

(6) A letter, dated May 22, 1986, from AGM's counsel to the Secretary of the Commission, with attachments, which attest that AGM was administratively dissolved by the State of Washington, on April 17, 1986.

FACTS [5]

1. AGM, was organized as a corporation in the State of Washington on or about January 20, 1982. Its charter authorized it to engage in the business of operating barges and other vessels for the transportation of freight. It was dissolved April 17, 1986.

2. PSA is an Alaskan corporation. It was incorporated November 22, 1971, as a non-profit association authorized to consolidate, transport and deliver proprietary goods of its members.

3. As seen, SSI is a dissolved Alaskan corporation.

4. AGM operated a barge service in the Seattle/Alaskan trade as a common carrier by water pursuant to its tariff FMC–F No. 1 which was filed February 18, 1982, and became effective March 1, 1982. AGM terminated its common carrier service when it canceled its tariff on December 3, 1982.

5. At the hearing, AGM stipulated it misrated fourteen freight bills for common carrier cargo transported by it during the period between April 23, 1982, and October 29, 1982. Ten of those shipments involved non-PSA cargo and resulted in undercharges of $22,079.51. The other four involved PSA cargo and resulted in undercharges of $185,652.50.

6. Prior to the hearing, Hearing Counsel alleged five instances of absorption of drayage charges without tariff authority on the part of AGM. Hearing Counsel have withdrawn allegations of violation concerning four of those five. With respect to the remaining shipment, AGM's invoice No. 8456 shows that it did absorb charges in the amount of $11,529.00 for drayage services performed on July 6 and 7, 1982.

7. Hearing Counsel introduced a multiplicity of evidence to establish that PSA and SSI were non-vessel operating common carriers in the Seattle/Alaska trade. Each of them held out to the general public to provide a regular service port to port via barge. In addition to oral representations, PSA advertised its service in newspapers and other publications while SSI did the same in newspapers. Each did perform the service that was advertised. In the case of PSA, the common carrier service was provided to PSA members and non-members, for profit. Among other things, there is in evidence a letter, dated November 3, 1982, from counsel for SSI to the Interstate Commerce Commission, stating that SSI was operating as a non-vessel operating common carrier, under regulation by the Federal Maritime Commission, in port to port service, with no motor carrier service involved.

[5] For the purposes of the offer of settlement and this decision, it may be assumed that PSA and SSI were non-vessel operating common carriers subject to the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, albeit neither had an effective tariff on file with the Commission at the time the events, which are the subject of this proceeding, occurred. However, this assumption and any other findings contained herein with respect to PSA or SSI are without prejudice to what may be decided as to either of them by way of a separate decision.

8. Hearing Counsel introduced a massive amount of evidence to show an intricate linkage of interest, personnel and finances involving AGM, PSA and SSI. For example, PSA advanced funds and provided employees, office space and other services to AGM to enable AGM to initiate and carry on its barge service until operating revenues were produced.

9. On February 25, 1982, AGM and PSA entered into a space charter agreement for a four month term beginning March 15, 1982. Under the terms of the agreement,[6] AGM agreed to provide whatever space PSA required for the carriage of goods to or from Valdez and other Alaska ports at a particular per container rate. For its part, PSA agreed to pay for a minimum of 200 units on AGM's first barge voyage, regardless of actual use. It was commonly known at the time the agreement was made that there would be a serious dearth of available vessel space in the trade during the life of the agreement. The right to use whatever space it required gave a special preferential advantage to PSA over other non-vessel operating common carriers and other shippers that AGM held itself out to serve under its tariff.

10. On June 15, 1982, AGM and PSA entered into a voyage charter agreement, for the remainder of the calendar year. The agreement involved southbound cargo from anchorage or Valdez to Seattle. Among other things, it provided that AGM would operate the vessels but not as a common carrier. PSA would charter all cargo space on the vessels and would assume all liability and responsibility for the cargo, including loading and unloading. AGM's compensation was not a flat fee, but was based on the amount of cargo, all of which was generated by SSI.

11. Hearing Counsel introduced ample evidence to show that the operational relationships between AGM, PSA and SSI, during the period from March 18, 1982 to December 3, 1982, constituted a cooperative working arrangement resulting in preferential and advantageous treatment for PSA and SSI. No copy of any agreement nor any copy of any memorandum reflecting the arrangements described above was ever filed with the Commission. Of course, none of the arrangements received Commission approval. It must be noted, however, that on May 13, 1982, approximately two months before termination of the space charter, a Commission employee was given a copy of that agreement by AGM, voluntarily.

12. The testimony of AGM's president indicates he sought to distance AGM from PSA as early as 1982. But it was a difficult task, complicated by the fact that a "consultant" who was a guiding force in PSA was also a stockholder/director of AGM.

13. On the first day of hearing AGM offered to settle the proceeding. The offer was not acceptable to Hearing Counsel and was deemed unsup-

[6] The agreement was part of an arrangement which included oral understandings as well as one other written instrument.

ported and premature. Nevertheless, AGM was advised it was not precluded from renewing its efforts to settle when appropriate.

14. In making the instant offer, AGM has given up its right of argument in response to Hearing Counsel's opening brief, but AGM does proffer, generally, what its defenses would have been.

With respect to the substantive aspects of the misrated shipment, AGM would have contended the misratings were the result of rating clerks' errors and were not knowing or willful. With respect to penalties for the misrated shipments, AGM would assert, by way of mitigation, that it cooperated with the Commission's investigators before the formal proceeding was instituted by giving them full access to AGM documents on various occasions in 1982; that when requested, AGM furnished additional documents later in 1982 and in 1983; that after the Order was issued, AGM continued to cooperate with Hearing Counsel by allowing access to documents and otherwise; and that AGM sent corrected invoices for the shipments after the original invoices were reviewed by AGM's tariff service.[7]

Insofar as the drayage absorption instance is concerned, AGM would contend that the payment was made pursuant to a verbal amendment to its space charter agreement with PSA, which was believed by AGM to be a private contract of carriage not subject to Commission jurisdiction or approval .

With regard to the section 15 allegations, AGM points out that there are various areas of factual disputes between Hearing Counsel and AGM, but AGM stresses that the major thrust of its argument in brief would have been a denial that any agreement or arrangement it had with PSA was subject to section 15, as a matter of law. Its contentions would have consisted of the following: (1) that neither the space nor the voyage charter arrangements was preferential to PSA or to SSI; (2) that AGM believed PSA was a valid shippers association performing services for members only, and not as a common carrier; (3) that AGM had no actual knowledge SSI was a non-vessel owning common carrier, and AGM carried SSI cargo under the representation SSI was a member of PSA; (4) that AGM did not file either charter agreement as it believed they were private contracts of carriage; (5) that there is no evidence any employee or consultant of Penn Van, Inc., Transportation Accounting and Traffic Services, Inc., PSA, SSI, Consulting Traffic Services, R&R Northern, ODI, or ODI of Alaska, Inc.,[8] who allegedly performed work for AGM, had actual knowledge that either PSA or SSI were common carriers, and that such knowledge could not be imputed to AGM as a matter of law; (6) that PSA's "consultant" was not an employee or officer of AGM; (7) that AGM was not incorporated solely for the purpose of serving PSA or SSI; (8) that the increased volume of cargo carried by AGM for PSA in 1982 was due to amendments to

[7] AGM's efforts to collect met with no success.

[8] There is extensive evidence linking these companies to PSA and its "consultant."

AGM's tariff to include "Freight All Kind" rates; and (9) that no evidentiary presumptions could be made against AGM for the failure of certain witnesses to appear or testify at the hearings.[9]

Discussion

AGM submits that its offer is reasonable, taking into consideration: the factual and legal disputes and, therefore, the uncertainty of the outcome; the factors in mitigation; and AGM's current financial condition. AGM stresses the latter position in that the amount offered is the most that could be collected from AGM were a penalty to have been imposed by way of assessment rather than settlement.

Hearing Counsel ". . . endorse AGM's offer of settlement. We believe that AGM's offer satisfies both the regulatory and statutory criteria for settlement."[10] The statutory and regulatory criteria for settlement of penalties are the same as those for assessment of penalties. *Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line*, 28 F.M.C. 355 368–369 (1986).

The statutory criteria are set forth in section 13(c) of the Shipping Act, 1984 (46 U.S.C. 1712(c)).[11] As pertinent, it provides:

> Assessment Procedures.— . . . the Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. The Commission may compromise, modify, or remit, with or without conditions, any civil penalty.

The regulatory criteria is set forth in 46 CFR 505.3(b). It provides:

> *Criteria for determining amount of penalty.* In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's

[9] Some witnesses, including the "consultant," could not be served with subpenas to testify at the hearing although they were deposed pursuant to subpena. Other subpenaed witnesses claimed the protection of the Fifth Amendment to the Constitution.

[10] Reply of Hearing Counsel to Offer of Settlement, p. 1.

[11] The Shipping Act, 1916, under which this proceeding was instituted, did not contain criteria for settlement or assessment. However, standards were promulgated by the Commission in rules implementing that statute. Generally, those rules incorporated government-wide criteria established by the Comptroller General of the United States and the Attorney General of the United States appearing in 4 CFR Parts 101–105. It has been said that the earlier criteria and those currently in force under section 13(c) of the 1984 Act and its implementing regulations, 46 CFR 505.3(b) are substantially the same. See discussion in *Armada Great Lakes/East African Service, Ltd.; Great Lakes Transcaribbean Line, supra*, 28 F.M.C. at 368–369.

> degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

It is appropriate to note that a settlement may be justified by any one or more of the applicable criteria. *Far Eastern Shipping Company Possible Violation of Section 16, Second Paragraph, 18(b)(3) and 18(c) Shipping Act, 1916*, 24 F.M.C. 991, 1014 (1982).

Hearing Counsel agree with AGM that the latter's ability to pay and the Government's ability to collect is the dominant factor dictating settlement for the amount proffered. There is no dispute between them, based both on evidence in the record and post record submissions of AGM's financial statements to Hearing Counsel, that $40,000 is the most that AGM could pay and that the Government could collect. There is no question about the accuracy of the statement, in the proposed settlement, that "AGM ceased operations as a common carrier in December 1982, went out of business in November 1984 as a private contract carrier, and is now awaiting final dissolution pending this agreement." It is a measure of AGM's good faith that it created the interest bearing escrow account in the Government's favor before it was dissolved by the State of Washington, thus insuring that the penalty will not only be collected, but that it will be collected at the least expense to the Government. See *Armada Great Lakes/East Africa Service Ltd.; Great Lakes Transcaribbean Line, supra*, 28 F.M.C. 370–271.

A sound argument is made by Hearing Counsel that there has been at least a prima facie showing that AGM engaged in a pattern of conduct culminating in violations of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933 [12] and that such conduct, if left unpunished, could undermine the regulatory scheme established by the Congress for the shipping industry. It is clear, however, that given AGM's financial condition and its voluntary cooperation with the Commission, from its first contact with investigators through the hearing process, that the amount of $40,000 vindicates the Government's position and should serve to foster deterrence by others in the future.

Conclusion

I find that the statutory and regulatory standards for settlement of a civil penalty have been satisfied. Under the circumstances presented, particularly the diminished finances of AGM, the settlement strikes a proper balance of the Government's interests and those of AGM.

[12] Hearing Counsel concedes there is a "good faith dispute between Hearing Counsel and AGM as to the law and facts of this case" (Reply, p.5, n. 2) with the exception of the misrating issue. As seen AGM admits the fact of misrating without admitting a violation.

Order

It is ordered that the offer of settlement be approved. It is further ordered that AGM pay the sum of $40,000, together with all interest accumulated in an escrow account on deposit since March 25, 1986, within fifteen (15) days of final approval of the offer by the Commission. It is further ordered that the terms and conditions of the Proposed Settlement of Civil Penalty, a copy of which is attached as an appendix, hereto, are incorporated in this paragraph as if more fully set forth herein.[13] It is further ordered that, if the offer is approved by the Commission, AGM shall not be bound by the principles of res judicata or collateral estoppel in connection with any findings affecting AGM which may be made in any subsequent decision in this proceeding.

(S) SEYMOUR GLANZER
Administrative Law Judge

[13] N.B. the last "whereas" paragraph on p. 2 of the Proposed Settlement, indicates that AGM is awaiting final dissolution as a corporation. Subsequent thereto, as found, AGM was dissolved. Consequently that paragraph may be deemed amended.

APPENDIX

BEFORE THE FEDERAL MARITIME COMMISSION

Arctic Gulf Marine, Inc.
Peninsula Shippers Association, Inc.,
Southbound Shippers, Inc.

DOCKET NO. 84–31

PROPOSED SETTLEMENT OF CIVIL PENALTY

Respondent Arctic Gulf Marine, Inc., (AGM), by its attorney, respectfully, submits this proposed Settlement Agreement to the Presiding Administrative Law Judge for approval pursuant to Section 505.3, of the Commission's General Order 30, 46 C.F.R. 505.3, and for incorporation into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served September 10, 1984, (Order), the Commission instituted this proceeding to determine, among other things, whether AGM had violated section 2 of the Intercoastal Shipping Act, 1933, (46 U.S.C. §844) and section 15 of the Shipping Act, 1916, (46 U.S.C. §814), and further, the Order includes the issue of whether a civil penalty should be assessed for any such violations and, if so, the amount of such penalty; and

WHEREAS, the Order alleges that AGM may have violated section 2 of the Intercoastal Shipping Act, 1933, by charging a different compensation for the transportation of property than the rates in its tariff on file and in effect with the Commission during the period April 23, 1982–October 29, 1982, and by absorbing drayage charges without a provision in its tariff during the period July 7, 1982–October 14, 1982; and

WHEREAS, the Order alleges that AGM may have violated section 15 of the Shipping Act, 1916, by carrying out an unfiled and unapproved preferential and cooperative working arrangement and agreement with Peninsula Shippers Association, Inc., and Southbound Shippers, Inc. during the period March 15, 1982–November 10, 1982; and

WHEREAS, the parties, in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order, are desirous of expeditiously settling this matter in accordance with the terms and conditions of this Agreement, and

WHEREAS, Section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. §847, section 32(e) of the Shipping Act, 1916, 46 U.S.C. 831(e), section 32(e) of the Shipping Act, 1916, as amended, 46 U.S.A. App. 831(e), and Section 13(c) of the Shipping Act of 1984, 46 U.S.C. App. 1712(c), authorize the Commission to assess or compromise civil penalty claims arising from the alleged violations set forth above; and

WHEREAS AGM ceased operations as a common carrier in December, 1982, went out of business in November, 1984 as a private contract carrier,

and is now awaiting final dissolution as a corporation pending this agreement;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the Order and factual record submitted in this proceeding, the parties hereto agree as follows:

1. AGM agrees to pay a monetary amount of $40,000 to the Federal Maritime Commission according to the terms and conditions set forth below:

AGM has deposited the good faith sum of $40,000 into a segregated, interest bearing escrow account in the name of Bauer, Moynihan & Johnson and the Federal Maritime Commission at First Interstate Bank of Washington, N.A. as of March 25, 1986. Upon the approval and acceptance of this Proposed Settlement by the Federal Maritime Commission, and within fifteen (15) days after service of a Final Order in this proceeding incorporating approval of the Proposed Settlement, the sum in such segregated account, including all accrued interest shall be paid to the Federal Maritime Commission. In the event this settlement offer is not accepted and approved by the Federal Maritime Commission, such sums with all accrued interest shall be returned to AGM.

2. Upon approval of this Agreement by the Commission, this Agreement shall forever bar the commencement or institution of any assessment proceeding, civil action or other claim for recovery of civil penalties from AGM arising from or in any way related to the alleged violations set forth and described in the Commission's Order and in the record in this proceeding.

3. This Agreement is entered into voluntarily by both parties, and no promises or representations have been made by either party other than the agreements and consideration herein expressed.

4. It is expressly understood and agreed that this Agreement is not to be construed as an admission by AGM to the violations alleged in the Order.

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

ARCTIC GULF MARINE, INC.

BY: ______________________________

TIMOTHY S. O'NEILL, BAUER, MOYNIHAN & JOHNSON, 247 FOURTH & BLANCHARD BLDG., 2121 FOURTH AVENUE, SEATTLE, WASHINGTON 98121, (206) 443-3400

ATTORNEY FOR ARCTIC GULF MARINE, INC.

FEDERAL MARITIME COMMISSION.

BY: ______________________________

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–2
NEW ORLEANS STEAMSHIP ASSOCIATION

v.

PLAQUEMINES PORT HARBOR AND TERMINAL DISTRICT
ORDER ADOPTING INITIAL DECISION

September 16, 1986

This proceeding was instituted by the filing of a complaint pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. app. § 821 (1916 Act), by the New Orleans Steamship Association (NOSA),[1] against the Plaquemines Port, Harbor & Terminal District (Port).[2] The complaint alleges that the Port has published a tariff assessing fees for the use of terminal facilities which are unjust and unreasonable and unduly prejudicial in violation of sections 16, First and 17 of the 1916 Act, 46 U.S.C. app. §§ 815 and 816.[3] Administrative Law Judge Joseph N. Ingolia (Presiding Officer) has issued an Initial Decision (I.D.) finding that the tariff is discriminatory in some respects but is otherwise lawful. Exceptions and Replies to Exceptions have been filed by both parties to the proceeding. The Commission heard oral argument.

BACKGROUND

The relevant attributes of the Port have been the subject of prior Commission proceedings, and have been reviewed and discussed in a prior case, *Louis Dreyfus Corp.* v. *Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59 (1982) (*Dreyfus*), as well as in the I.D. in this case. The Commission has reviewed the record and finds substantial evidence supporting the material factual findings of the Presiding Officer. Accordingly, they are adopted by the Commission. The following is a brief summary of those findings.

The Port consists of the first 100 miles of the Mississippi River from its mouth in the Gulf of Mexico and is coextensive with the Parish of Plaquemines in the State of Louisiana. The Port does not own or operate

[1] NOSA is a non-profit association of vessel owners, agents and stevedores.

[2] The Port is a local waterway authority coextensive with the Parish of Plaquemines, Louisiana situated at the mouth of the Mississippi River.

[3] Specifically, the complaint alleges that: (1) the charges are an unconstitutional toll or duty on tonnage on a public waterway; (2) the charges are assessed in a discriminatory manner previously found unlawful by the Commission in a complaint proceeding; (3) the settlement of the prior case on appeal was unfair and discriminatory to non-parties; (4) vessel agents cannot be made liable for any Port assessments; and (5) a harbor fee cannot be imposed on vessel owners not responsible for the loading or unloading of cargo.

any facilities serving common carriers by water. Several private facilities are located within the Port serving, among others, common carriers by water. There is a large amount of commercial waterway traffic in and through the Port for which the Port maintains significant "necessary and essential, direct and indirect, port, harbor and marine services to port and harbor users and other persons located in proximity to and affected by such activities . . . ."[4] In 1977, the Port filed with the Commission a tariff which imposed fees: (1) on vessels docking or anchoring within the Port, the so-called Harbor Fee; and (2) on cargo loaded or unloaded at private facilities within the Port, the so-called Supplemental Harbor Fee. The tariff also contained a number of exceptions and certain liability and surety provisions.

In 1979, after some preliminary litigation in the United States District Court for the Eastern District of Louisiana[5] over the constitutionality of the tariff, Louis Dreyfus Corporation and other parties subject to the fees filed a complaint against the Port with the Commission. This complaint led to the above-referenced *Dreyfus* decision finding the tariff in violation of sections 16 and 17 of the Shipping Act, 1916. The Port filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit, but the case was settled before a decision was issued. Under the terms of the settlement the Port refunded 80% of the fees assessed the complainants. The Port then withdrew its appeal of the Commission's decision[6] and held public hearings concerning the redrafting of the contested tariff provisions.

A new tariff was published, effective May 21, 1982, superseding the 1977 tariff. The new tariff reduced the fee against cargo and eliminated or modified some of the exemptions found unlawful by the Commission. The liability/surety provisions, which had been upheld by the Commission, were also modified.

The fees collected pursuant to the tariff are utilized to maintain two patrol/rescue/fire vessels, manned by firefighting and medical personnel, along with certain shoreside support facilities and personnel, and a ferry equipped with some firefighting equipment. A helicopter, seaplane and another airplane are also utilized by the Port. Two additional river ferries are diverted to firefighting duties in extreme emergencies. There is a full-time Port staff. Additionally, a significant portion of the Parish government operating expenses is attributed to Port matters. In 1983, total Port expenses were $1,242,168, consisting of $1,002,385 in direct expenses and $239,783 allocated from other Parish departments. In 1984, total Port expenses were

[4] Preamble to Plaquemines Parish Port, Harbor and Terminal District Tariff; *quoted in*, I.D. (28 F.M.C. 573, at 577, 589).

[5] *Louis Dreyfus Corporation* v. *Plaquemines Port, Harbor and Terminal District, et al.*, Civ. No. 78–860 (E.D. La. stayed Jan. 31, 1980).

[6] The case was dismissed in response to a Consent Motion, pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, *Plaquemines Port, Harbor and Terminal District* v. *F.M.C., et al.*, No. 82–1941 (D.C. Cir. May 17, 1983) (per curiam).

$1,394,369, consisting of $1,158,293 in direct expenses and $236,076 allocated from other Parish departments.

The exemptions from the fees levied by the Port are: (1) all privately owned commercial wharves and docks; (2) commercial fishing vessels and crew boats; (3) supply boats for oil rigs; (4) all inbound inland barges; (5) the first 500 tons of cargo handled by a vessel; and (6) persons obtaining long-term permits at reduced rates. The Port also has an unwritten agreement with a major facility in the Parish, Electro-Coal Transfer Corporation, exempting incoming ocean barges from the fees.

DISCUSSION

The Exceptions to the Initial Decision and Replies to Exceptions address the major issues raised in the proceeding below, namely: (1) whether the Commission has jurisdiction over the Port; (2) whether the Port has the Constitutional authority to levy fees; (3) whether the settlement of the *Dreyfus* case on appeal resulted in unlawful discrimination; (4) whether vessel agents and other parties not in privity with the Port may be made liable for Port tariff fees; and (5) whether the Port's fees are unreasonable and discriminatory. For reasons stated below, the Commission finds that it has jurisdiction in this case and, except for certain exemptions, the Port's tariff is lawful under the Shipping Act of 1984, 46 U.S.C. app. §§ 1701–1720 (1984 Act).[7]

Jurisdiction

The threshold issue which must be addressed is whether the 1984 Act confers on the Commission jurisdiction over the Port and its tariff practices.

This issue of the Commission's jurisdiction over the activities in question under the 1916 Act was fully litigated and decided in the affirmative by the Commission in *Dreyfus*. As in *Dreyfus*, the Port argues that the Commission has no jurisdiction over its tariff because it does not own or operate physical "terminal facilities" and there is no evidence that it serves common carriers. The Port further contends that the *Dreyfus* decision is a nullity because the doctrines of *res judicata* and "collateral estoppel" do not apply to findings concerning the jurisdiction of administrative agencies.

NOSA argues that the Port is precluded from raising the issue of jurisdiction now due to the Port's failure to successfully appeal *Dreyfus*. NOSA also maintains that the Port is estopped from contesting jurisdiction because it conceded the issue in its answer to the NOSA complaint.

[7] The Presiding Officer held that findings under the 1916 Act, as it applied prior to the enactment of the 1984 Act, also apply to the 1984 Act, "where it contains similar and relevant sections." I.D. at 618, n. 3. The Commission adopts this analysis, and, as discussed in more detail below, holds that in the context of this case references to violations of the former 1916 Act will be construed as violations of the appropriate corresponding sections of the 1984 Act. *See, infra,* notes 8, 10 and 11.

The Presiding Officer did not directly address whether *Dreyfus* is *res judicata* on the issue of jurisdiction because that issue was not raised below. His finding of jurisdiction was predicated on his view that *Dreyfus* is precedent on point.

The Commission is in fundamental agreement with the Presiding Officer's conclusions. However, because of the jurisdictional arguments raised on Exceptions, the Commission finds it necessary to supplement the I.D. on this issue.

In *Dreyfus* the Port was found to be an "other person" subject to the 1916 Act furnishing "terminal facilities" and, therefore, was found to be subject to the antidiscrimination standard of section 16, and the reasonableness standard of section 17.[8] Although the language used in the 1984 Act differs in some respects from that of the 1916 Act, it establishes the same basic jurisdictional parameters with respect to marine terminals and the anti discrimination and reasonableness standards applicable to them. While section 1 of the 1916 act included a marine terminal operator in the definition of an "other person subject to this Act," the 1984 Act separately defines it in section 3(15) as, *inter alia,* a person "furnishing . . . other terminal facilities in connection with a common carrier."[9] This is the same language the Commission relied upon in *Dreyfus* in finding jurisdiction over the Port.[10] Similarly, section 10(d)(1) of the 1984 Act is, with reference to "marine terminal operators," a recodification of section 17 of the 1916 Act.[11] Likewise, section 10(b)(11) and section 10(b)(12) of the 1984 Act, made applicable to marine terminal operators by section 10(d)(3), essentially recodify the standards of section 16, First of the 1916 Act.[12]

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[8] *Dreyfus*, 25 F.M.C. at 65, 67.

[9] Section 1 of the 1916 Act (formerly 46 U.S.C. 801) defined "other person" subject to the Act as meaning:

> . . . any person not included in the term common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water.

Section 3(15) of the 1984 Act, 46 U.S.C. app. 1702(15), defines "marine terminal operator" as:

> . . . a person engaged in the United States in the business of furnishing wharf age, dock, warehouse, or other terminal facilities in connection with a common carrier.

[10] See, Dreyfus, 25 F.M.C. at 65.

[11] Section 10(d)(1) of the 1984 Act, 46 U.S.C. app. 1709(d)(1), provides:

> (1) No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Section 17 of the 1916 Act (formerly 46 U.S.C. 816) required 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. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[12] Section 10(d)(3) of the 1984 Act, 46 U.S.C. app. 1709(d)(3), provides:

> (3) The prohibitions in subsection (b) (11), (12), and (14) of this section apply to marine terminal operators.

Sections 10(b) (11) and (12) of the 1984 Act, 46 U.S.C. app. 1709(b) (11) and (12), provide:

Continued

Because, there is no substantial difference between the 1916 Act and the 1984 Act in the operative language relevant to the Commission's jurisdiction over the Port and the standards to be applied to determine the lawfulness of its practices, the findings in Dreyfus must be given application in this case.[13] The precise legal question presented is whether the decision in *Dreyfus* operates as *res judicata*, "collateral estoppel"[14] or merely *stare decisis*[15] *on the issue of jurisdiction.*

This distinction is important because the contention by NOSA that *Dreyfus* is *res judicata* carries with it the argument that the jurisdictional findings in *Dreyfus* are binding in all forums where the issue is raised.[16] Under this theory the Port could not challenge the findings of the Commission in *Dreyfus* at any stage of this proceeding[17] in the absence of a showing of a material change in circumstances, an assertion the Port has not made.[18]

> (b) COMMON CARRIERS.—No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—
>
> * * * * *
>
> (11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;
>
> (12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 16, First of the 1916 Act (formerly 46 U.S.C. 815, First) states 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 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. . . .

[13] *See, United Shoe Workers of America, AFL–CIO* v. *Bedell*, 506 F.2d 174, 183 (D.C. Cir. 1974).

[14] "Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the same cause of action. *Montana* v. *United States, 440 U.S., at 153; Parklane Hosiery Co.* v. *Shore*, 439 *U.S. 322, 326, n. 5 (1979).* The Restatement of Judgments speaks of res judicata as 'claim preclusion' and of collateral estoppel as 'issue preclusion.' Restatement (Second) of Judgments § 27 (1982).

* * * * *

> Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. *Parklane Hosiery, supra*, at 326, n.4."

United States v. *Mendoza*, 464 V.S. 154, 158–159, n. 3, 4 (1984); *see also*, Davis, Administrative Law Treatise, Res Judicata, §§ 21:5, 21:7 (2d. Ed. 1983).

[15] *Stare decisis* has been defined as the "[d]octrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." Black's Law Dictionary 1261 (5th ed. 1979). This doctrine has been applied to administrative agencies, *Greater Boston Television Corp.* v. *F.C.C.*, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied 403 U.S. 923 (1971), and generally* falls under the "arbitrary and capricious" review standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

[16] *Cf., Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981).

[17] *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 512 (1953).

[18] *Cf., Montana* v. *United States*, 440 U.S. 147, 157–162 (1979); *National Classification Committee* v. *United States*, 765 F.2d 164, 170 (D.C. Cir. 1985); *see generally*, Restatement (Second) of Judgments § 28 (1982). The Port has asserted on Exceptions that there is no evidence in this case that common carriers call at facilities under its control, an essential element of Commission jurisdiction. However, because this claim is in the nature of an affirmative defense to the application of *Dreyfus*, the burden of proof is on the Port, not NOSA. This is especially true in light of the Port's admission of jurisdiction in its answer and the fact that it never raised this issue during the course of the proceeding.

After considering applicable law in light of the record, we conclude that a limited application of the doctrine of collateral estoppel is appropriate here. Specifically, NOSA may assert offensive collateral estoppel against the Port at least as to the relitigation of the underlying jurisdictional facts found in *Dreyfus*. The Port has not presented any valid legal basis to deny the *Dreyfus* decision this limited collateral estoppel effect. However, although *Dreyfus* does not preclude relitigation of the purely legal aspects of the issue of jurisdiction in this proceeding, for reasons stated below, the statutory interpretation upon which the Commission based jurisdiction in *Dreyfus* is *stare decisi* and has continuing validity under the 1984 Act.

As a threshold matter, NOSA's argument that raising the jurisdiction issue at this time is barred by the Port's admission of jurisdiction in its answer to the complaint must be rejected. Jurisdictional issues may be raised at any phase of the adjudicative process because the question goes to the basic authority of the tribunal to entertain the case.[19] Moreover, rules of pleading and practice are not as strictly applied to administrative proceedings as they are to court proceedings.[20] Therefore, the Commission concludes that the Port's admission of jurisdiction in its answer to NOSA's complaint does not estop it from now raising this issue.

Another argument that can be readily rejected is the assertion by the Port that *res judicata* and its corollary doctrine, collateral estoppel, do not apply to administrative proceedings. The Supreme Court has ruled that if the fundamental procedures applicable to the adjudicative process are followed, the doctrines apply to administrative determinations.[21] There is no question that proper adjudicative procedures were followed in *Dreyfus* and that the Port, in fact, fully litigated the question and was afforded a full opportunity to appeal the decision.[22] All the other elements of "issue preclusion" (or more precisely offensive collateral estoppel)[23] are also present in this proceeding.

However, to the extent the issue involves a purely legal determination, collateral estoppel may not be applied so as to preclude the Commission from reviewing the statutory basis of its jurisdiction over the Port. We could find no clear authority holding that the doctrine of collateral estoppel can be applied to an administrative finding of jurisdiction. The closest cases on this point state that an agency's determination of *facts* underlying

[19] *Cf., Eisler* v. *Stritzler*, 535 F.2d 148, 151 (1st Cir. 1976) (and cases cited therein).

[20] *See, Citizens State Bank of Marshfield, Mo.* v. *Federal Deposit Insurance Corp.* 751 F.2d 209, 213 (8th Cir. 1984); *Aloha Airlines, Inc.* v. *C.A.B.*, 598 F.2d 250, 262 (D.C. Cir. 1979).

[21] *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966); *see also*, Restatement (Second) of Judgments §83 (1982).

[22] *See, Dreyfus*, 25 F.M.C. at 63, 65; *see also, supra*, note 5.

[23] There is authority for the proposition that offensive collateral estoppel cannot be asserted by a plaintiff that could have joined in the prior proceeding. *See, Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329–330 (1979). However, NOSA is challenging the Port's 1982 tariff, not its 1977 tariff. Moreover, NOSA's interests are not the same as those of the *Dreyfus* complainants. It is unlikely they could have joined in the 1979 case. *See also*, Restatement (Second) of Judgments §29(3), Reporter's Note, comment e (1982).

its conclusion that jurisdiction was *lacking* must be given effect in subsequent litigation.[24]

The qualified language of the court decisions on this issue appear to limit the application of the doctrines of *res judicata* and collateral estoppel to factual determinations underlying administrative findings concerning jurisdiction. These doctrines do not apply to the unreviewed administrative determination of the ultimate legal issue of jurisdiction, thus preserving the court's role as the ultimate interpreter of an agency's jurisdiction under a statute. One of the fundamental objectives of *res judicata* and collateral estoppel is preserved, however, because substantial "repose" is afforded to resolutions of factual disputes between parties once litigated and decided.

It appears then that collateral estoppel may only apply to the factual findings underlying the prior jurisdictional determination involving the party against whom the prior decision is being asserted. Applied here, this means that "issue preclusion" extends only to the facts the Commission found to be sufficient to establish jurisdiction over the Port in *Dreyfus*. To escape these preclusive effects, the burden was on the Port to prove a significant change in circumstances which removes the factual basis of the Commission's previously found jurisdiction. No such change in circumstances was shown.

Furthermore, the Commission finds no legitimate reason to gainsay its jurisdiction as a matter of statutory interpretation. The same respondent is challenging the Commission's authority to decide the same alleged violations of law under the same jurisdictional facts under substantially identical statutory provisions. Therefore, the Commission reaffirms the jurisdictional finding in *Dreyfus*.

To reiterate those findings, the Port is a "marine terminal operator" subject to the 1984 Act, because its exclusive ability to provide essential health, safety and security services to vessel and cargo interests in commercial cargo handling transactions, its assessment of selective cargo transfer fees, and its control of access to private terminal facilities results in fundamental control over the rates and practices of terminal facilities. Further, the Port's practice of assessing, on the basis of cargo transactions, a fee for providing to vessels and cargo essential health, safety and security services constitutes the furnishing of "other terminal facilities" within the meaning of the 1984 Act.

The Port's Constitutional Authority To Levy Fees

NOSA argues that the tariff charges assessed by the Port are in violation of Article I, Section 10, Clause 3 of the United States Constitution because they are a prohibited "duty on tonnage."[25] Under this theory, because

[24] *See, Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 809 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1093 (1969); *McCulloch Interstate Gas Corp.* v. *F.P.C.*, 536 F.2d 910, 913 (10th Cir. 1976).

[25] Article I, Section 10, Clause 3 of the U.S. Constitution provides: "*No state shall, without the Consent* of Congress, lay any Duty of Tonnage. . . ."

the Port tariff is unconstitutional, it is also "otherwise unlawful" and is therefore a violation of section 17 of the 1916 Act.

The Port maintains that allegations concerning the constitutionality of its tariff are beyond the decisional authority of the Commission. The Port further argues that, in any event, its charges are constitutional because they are levied as compensation for actual services rendered by the Port.

Although the Presiding Officer indicated that it was not strictly necessary to determine whether the Port's fees are constitutional, he nevertheless found that the tariff fees in question are not a toll charge in contravention of the United States Constitution. Rather, he found that those fees represent the establishment of regulations and practices related to or connected with the receiving, handling, or delivering of property; namely, they are fees to provide for the policing of the waterway so as to ensure the safety and facility of movement of vessels and cargo using it. I.D. at 618.

The Commission has no express statutory authority to determine the constitutionality of port tariffs promulgated pursuant to local enactments. Moreover, an administrative proceeding is considered to be a forum ill-suited to the resolution of constitutional claims.[26] Administrative agencies are entitled to refuse to pass on constitutional claims unless the law or facts applicable to a particular controversy compel such an action.[27]

In certain circumstances the Commission may take into consideration constitutional limitations on its authority in deciding cases. Questions of "due process" and other constitutional standards often enter into Commission determinations.[28] However, it does not appear that these considerations apply in this case.

More importantly, as explained in the I.D.,[29] determining the issues of Commission jurisdiction and the lawfulness of the Port tariff under the Shipping Act does not require reaching the constitutional issue. Jurisdiction over the Port is based upon a finding that the Port is charging for providing "other terminal facilities." The Commission's enabling legislation allows it to evaluate such charges only under the Shipping Act's reasonableness and antidiscrimination standards. We find no legal directive in the statute or its legislative history to include within the scope of these standards constitutional considerations which are more appropriately the province of the courts. Because this case can be fully decided under the Shipping Act without reference to constitutional issues, the Commission declines to address the constitutionality of the Port's tariff charges.

[26] *Downen* v. *Warner*, 481 F.2d 42, 643 (9th Cir. 1973).

[27] *See, Motor and Equipment Manufacturers Assoc.* v. *E.P.A.*, 627 F.2d 1095, 1114–1115 (D.C. Cir. 1979). Indeed, the courts clearly encourage such a policy of abstention by administrative agencies. *Id.*

[28] *See, e.g., Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162,* Motion to Compel Discovery Denied, 20 S.R.R. 489 (1980).

[29] I.D. at 616–618.

The Dreyfus Settlement

NOSA argues that the settlement between the Port and the complainants in *Dreyfus* was improper and unlawful because it was discriminatory. Because that settlement made no provision for other persons who paid charges under the provisions found to be unlawful by the Commission in *Dreyfus*, NOSA urges that the Port be ordered to make similar refunds to such other persons.

The Port submits that NOSA's arguments are unfounded in law and fact. The Port maintains that such settlements are favored at law and that NOSA has shown no injury to it resulting from the settlement.

The Presiding Officer found that public policy favors settlements of litigation and that the settlement of the *Dreyfus* case by the Port does not unjustly discriminate against others who are not parties or privy to the former proceeding and who are not identified in this proceeding as having suffered an injury, much less the amount of such injury.

The Presiding Officer was correct that it is the policy of the Commission to favor settlements of disputes rather than force litigation. Settlements are given a presumption of validity and are construed as a final termination of a controversy. However, the cases cited by the Presiding Officer that declare these policies involve settlements of Commission proceedings.[30] There is no Commission policy concerning the settlement of appeals from administrative decisions in cases where violations of the Shipping Act are found.

There is some merit to NOSA's argument that private settlements in the factual context of *Dreyfus* could be a subterfuge for unlawful discrimination. Unjust discrimination is a consideration when the Commission evaluates a proffered settlement agreement in a proceeding where the parties want to compromise contested tariff charges.[31] However, the Commission is not always privy to the settlement agreements in complaint cases when they are appealed, and usually has no direct oversight authority over such settlements.[32]

In any event, given the remedy NOSA has requested we need not decide whether the *Dreyfus* settlement violated the antidiscrimination provisions of the Shipping Act. NOSA specifically advises that it is not requesting reparations for the *Dreyfus* settlement. Rather, it wants the Commission to require the Port to give notice to all affected parties that similar refunds are available. The issue then is whether the Commission has the statutory authority to require the Port to refund money to persons not parties to *Dreyfus* that paid the assessments found unlawful in that case.

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[30] I.D. at 616. *Levatino & Sons* v. *Prudential Grace Lines*, 18 F.M.C. 83 (1974) involved the settlement of a complaint case before the Commission. *Behring International, Inc.—Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973 (1981) involved the settlement of a civil penalty claim.

[31] *See*, *Old Ben Coal Company* v. *Sea-Land Service, Inc.*, 21 F.M.C. 505, 513 (1978).

[32] There is no allegation here that the settlement agreement in *Dreyfus* fell within the Commission's jurisdiction under former section 15 of the 1916 Act, formerly 46 U.S.C. § 814.

The Commission is without authority to order a general refund of illegally collected charges in a complaint case.[33] This is also not a proceeding under section 8(e) of the 1984 Act, 46 U.S.C. app. § 1707(e), where general notices of the availability of refunds can be directed.[34] Moreover, even if the *Dreyfus* appeal had gone to conclusion and the complainants there had obtained a full refund of the illegal charges, the question would remain as to whether the Commission has authority to order refunds to persons not party to that proceeding.

Because the Commission does not have the authority to order *general* refunds in complaint cases, the Presiding Officer was correct in finding that such relief could not be ordered in this proceeding. However, the Commission notes that, as a general matter, injured parties are free to file their own complaints and use favorable Commission decisions to their advantage.

Vessel Agent Liability

NOSA argues that vessel agents do not use port services and, therefore, cannot be made liable for charges under the tariff. It also contends that state agency law to the effect that an agent cannot be held liable for the debts of a disclosed principal protects them from such liability. The Port disagrees. It argues that this vessel agent liability issue was decided in its favor in *Dreyfus* and, therefore, NOSA is collaterally estopped from relitigating the issue in this case. Moreover, it submits that the rationale of *West Gulf Maritime Ass'n* v. *Port of Houston Authority,* 21 F.M.C. 244 (1978), *aff'd mem. sub nom. West Gulf Maritime Ass'n* v. *F.M.C.,* 610 F.2d 1001 (D.C. Cir. 1979), *cert. denied* 449 U.S. 822 (1980) (*WGMA I*) applies here and should be followed. The Presiding Officer concurred in the Port's position concerning the applicability of *WGMA I.*

The Port's imposition of liability on vessel agents for tariff charges was addressed in *Dreyfus.*[35] The Commission there determined that vessel agents could be held liable under the rationale of *WGMA I,* because they were deemed to be "users" of port services. However, NOSA was not a party in *Dreyfus* nor did it have privity of interests with the complainants in that case. Therefore, NOSA is not precluded from litigating the vessel agent liability issue.[36]

The Commission has established a basic rule on liability provisions in terminal tariffs. Any person that is a "user" of a terminal facility may

[33] *See* section 11 of the 1984 Act, 46 U.S.C. app. § 1710. *Compare,* section 3(c)(2) of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. § 845(c)(2).

[34] *Compare,* section 8(e)(3) of the 1984 Act, 46 U.S.C. app. § 1707(e)(3).

[35] *Dreyfus,* 25 F.M.C. at 70.

[36] *Id.; see,* Restatement (Second) of Judgments §29; *see also, supra,* note 12. NOSA also correctly points out that the issue of vessel agent liability under the provisions of the tariff was not a major issue in *Dreyfus.* Indeed, the question of vessel agent *primary* liability for the Supplemental Harbor Fee was not even addressed in *Dreyfus* because that issue arises under a new provision in the Port's 1982 tariff.

be held liable for the tariff charges related to that use.[37] The rationale is that a terminal operator has the right to impose reasonable conditions on the use of its facilities to ensure the collection of tariff charges.[38] The term "user" includes those that indirectly, *i.e.*, as agents of direct users, utilize terminal facilities.

In *WGMA I*, the terminal operator had experienced significant difficulties, and resulting financial losses, in collecting fees from vessel owners and operators that maintained no permanent presence in the port. The vessel agents that profited from the use of the facilities by their principals would not pay nor aid in the collection of delinquent accounts, citing state agency law as holding them immune from liability for the charges. The terminal operator responded by inserting agent liability and surety provisions in its tariff.

The Commission upheld the provisions because, in the absence of evidence of overreaching or abuse, they were deemed to be a reasonable method of collecting fees lawfully due the terminal operators. Furthermore, in the absence of evidence of a monopoly on terminal facilities or other forms of duress, the agents by their course of conduct were held to have separately contracted with the terminal operator to be responsible for the fees owed by their principals. Also, the Commission found that vessel agents could protect themselves from losses by appropriate contractual arrangements with their principals. Holding vessel agents liable as sureties for port tariff charges incurred by their principals was therefore deemed to be a minimal imposition or burden on vessel agents in light of the financial benefit they received by conducting business at the terminal facility.[39]

Applying *WGMA I* the critical question is whether, by doing business within the port, agents, either directly or indirectly, voluntarily use port facilities and derive a benefit substantial enough to justify the potential liability for the charges owed by their principals. WGMA I's reasonableness standard is distinct from that enunciated in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261 (1968) (*Volkswagenwerk*).[40] Liability and surety provisions are not an apportion-

[37] *WGMA I*, 21 F.M.C. at 248.

[38] *Id.* at 249.

[39] *Id.* at 249–250; *see also*, *Harrington & Co. Inc.* v. *Georgia Ports Authority*, 23 S.R.R. 753 (1986) (rulings on motions for summary judgment), *affirmed*, *Harrington & Co., Inc.* v. *Georgia Ports Authority*, 23 S.R.R 1276 (F.M.C. 1986).

[40] NOSA's Exceptions are ambiguous as to whether they are challenging the Presiding Officer's finding that *Volkswagenwerk* is not the appropriate test of reasonableness on this issue. *See*, NOSA's Exceptions at 21–22. In any event, it appears that the Presiding Officer was correct. The *Volkswagenwerk* test is applied in determining the reasonableness of terminal charges based upon a comparative cost/benefit analysis of concurrent users of a facility. "The proper inquiry under § 17 [of the 1916 Act] is, in a word, whether the charge levied is reasonably related to the service rendered." 390 U.S. at 282. This is not the analysis of the issue proffered by NOSA. They assert that they receive no benefit from the Port services at issue, have no privity with the Port and therefore cannot be made liable for any of the charges. This argument does not apply the *Volkswagenwerk* test of reasonableness of a charge, but rather is an application of the rationale of the Commission in *WGMA I*, separately cited and argued by NOSA.

ment of charges and neither the costs of the provisions nor the benefits of indirect use of terminal facilities can be measured and compared against those costs incurred and benefits received by direct users of such facilities.[41]

The essential elements of *WGMA I* exist in this case. There is no indication in the record that vessel agents are under any duress to do business in the Port. Indeed, one of the largest port and terminal facility complexes in the nation, New Orleans, is immediately upstream from the Port. It is reasonable to assume, therefore, that vessel agents obtain sufficient economic benefits to justify locating their businesses in the Port. Vessel, cargo and private terminal interests, including agents, benefit economically from the safety and health services provided by the Port. Moreover, as in *WGMA I*, the agents have voluntarily engaged in a course of conduct by which they have agreed to the conditions imposed on their use of the Port and its terminal services. Vessel agents may protect themselves from losses through appropriate arrangements with their principals.

The only distinction between the situation here and that existing in *WGMA I* is the nature of the terminal facilities for which the charges are being imposed. The Port's services are not the direct cargo handling services involved in *WGMA I*. They are essential "supports" services provided all commerce in the Port. In this sense all "users" of Port services are "indirect." Therefore, the "privity" between the Port and vessel agents for services rendered the vessel and cargo interests may be somewhat more attenuated than in *WGMA I*.

However, the absence of direct privity between the Port and vessel agents would be significant only if it indicated a lack of "use" of Port terminal facilities and services by the agents. As stated above, the Commission finds that agents do "use" terminal support services as much as any other economic interest involved in the commercial cargo handling activities in the Port. Because the Port services have been found to be "other terminal facilities," "relating to or connected with receiving, handling, storing, or delivering property" for which a charge may be assessed under the Shipping Act, the Port tariff liability and surety provisions are held to be lawful and reasonable under the rationale of *WGMA I*, notwithstanding the absence of direct privity between vessel agents and the Port.[42]

The Port's Fee Structure

The substantive issues in this case concern the lawfulness of the Port's Harbor Fee and Supplemental Harbor Fee under the Shipping Act. NOSA argues that the Port's services are primarily for the benefit of local residents,

[41] *See, Harrington & Co., Inc.* v. *Georgia Ports Authority*, 23 S.R.R. at 767–771, *Harrington & Co., Inc.* v. *Georgia Ports Authority*, 23 S.R.R. at 1283.

[42] The issue raised by NOSA's exception concerning liability for the Supplemental Harbor Fee when vessels operate under "FIO" charter contracts is similar to the vessel agent liability issue. ("FIO" cargo deliveries are made by vessels under charter where all costs of loading and unloading are for the account of a party other than the vessel owner.) *See*, NOSA's Exceptions at 26. Just as vessel agents receive an indirect benefit from the Port services rendered vessels, vessel owners derive an indirect benefit from the Port services rendered cargo interests in "FIO" cargo deliveries.

are not of a commercial marine nature, and therefore cannot be charged against oceangoing vessels. NOSA also contends that the Port has failed to justify the various exceptions which allegedly favor local interests, thereby invalidating the tariff under the antidiscrimination standards of the Shipping Act. The Port, on the other hand, argues that its fees are reasonably related to the costs it incurs in providing essential services to non-local commercial marine interests and that valid reasons exist for the exemptions it allows from the tariff fees.

The Presiding Officer concluded that while there exists a reasonable relationship between total Port costs and total assessment revenues, the Harbor Fee and Supplemental Harbor Fee[43] violate: (1) section 17 of the 1916 Act to the extent such fees do not bear a reasonable relationship to the comparative benefit obtained by the assessed parties in light of the benefits obtained by exempted parties from the services provided by the Port; and (2) violate section 16, First of the 1916 Act to the extent the various exceptions contained in the tariff relating to private terminals, supply boats, crew boats, fishing vessels, inland barges, as well as the five hundred ton and the permit/discount rate features are unjustified and therefore unjustly discriminatory.

The threshold challenge to the Presiding Officer's finding that the Port's fee structure is unlawfully discriminatory rests on the contention that the burden of proof was wrongly placed on the Port. The Port is correct in asserting that the ultimate burden of proof in a complaint proceeding is on the complainant.[44] However, this does not necessarily relieve the respondent from an evidentiary burden under all circumstances; that is, although the burden of proof ultimately lies with the complainant, the burden of "going forward" with evidence can shift to a respondent. This is common in many administrative proceedings, and was the case in *Dreyfus*.[45]

The Presiding Officer cited *Dreyfus* in shifting the burden of going forward to the Port in this case. He found that NOSA had made a showing that the services for which the Port had assessed fees also accrued to the benefit of other classes of Port "users" that were exempted from the fees. Because these exemptions did not, on their face, relate to the nature of the cargo involved or other valid transportation factors, a *prima facie* case of discrimination was established and the burden of going forward shifted to the Port to explain or justify the differentiation in the treatment of Port "users." Evidence in support of the exemptions was proffered by the Port. NOSA then submitted rebuttal evidence. The Presiding Officer weighed all the evidence of record to determine whether NOSA had shown

[43] The Presiding Officer also held that the Supplemental Harbor Fee is not an improper charge against vessels.

[44] *See*, 46 C.F.R. 502.155.

[45] *Dreyfus* 25 F.M.C. at 68.

a violation of the Shipping Act by a preponderance of the evidence.[46] In so doing, the Presiding Officer did not unlawfully place the burden of proof on the Port.

NOSA's allegation that the allocation of Parish expenses to the Port's operations is unjustly discriminatory because it includes non-marine expenses is unfounded. Unlike *Dreyfus*, the Parish Council in this case carefully reviewed Parish and Port operations and expenses to isolate those costs incurred in providing services to Port users.[47] The "marine related" expenses it computed are reasonably related to the actual cost of services resulting from activities and operations within the Port's jurisdiction. The resulting revenue needs are more reasonable than in *Dreyfus* because they are limited to actual Port costs. This is reflected in the new tariff by a significant reduction in the basic tonnage charge on cargo and the elimination of the more egregious exemptions stated in the 1977 tariff. The Presiding Officer was correct in finding that the overall method of determining the costs that can be attributed to overall Port services was proper and reasonable.

The Presiding Officer was also correct in finding that certain exemptions were unlawful under the *Dreyfus* rationale. He held that the entities benefiting from the challenged exemptions derive substantial benefits from the Port services cited as the basis for the tariff charges but do not pay the otherwise applicable fees. He further held that evidence of record shows that there are no alternative revenues derived by the Port from these entities which would offset the fees forgiven by the tariff exemptions. Finally, he found that the exemptions are not required administratively.

The Port now reargues contentions advanced below in support of the exemptions. The Port's justifications for the marine terminal exemption are that such terminals pay *ad valorem* taxes, act as sureties for the vessel fees and have their own fire protection equipment. This is largely the same argument proffered and rejected in *Dreyfus* and correctly found insufficient by the Presiding Officer here. There does not appear to be any difference between the situation here and that existing in the *Dreyfus* case that would justify a different conclusion.[48] We therefore concur in the Presiding Officer's disposition of the marine terminal exemption.

The Commission also concurs in the Presiding Officer's findings concerning the "first 500 tons" exemption. While this exemption was not specifically found unlawful in *Dreyfus*, the Presiding Officer's holding that it is *prima facie* discrimination favoring local interests over non-local interests appears to be correct. The Port's argument, that this is a *de minimis* exemption that many ports recognize, is not meritorious. The Port's exemption amounts to a $20.00 loss of revenue per shipment. The evidence that the Port proffered shows that most ports impose a $20.00 *minimum*

[46] *Cf., Investigation of Ocean Rate Structures*, 12 F.M.C. 34, 57–59 (1968).
[47] I.D. 28 F.M.C. at 609–613.
[48] *See*, I.D. 28 F.M.C. at 620–622; *Dreyfus* 25 F.M.C. at 70.

charge, and that it is economically feasible to bill for these amounts. Therefore, the Presiding Officer's finding that the Port has failed to justify the exemption is upheld.

The Port has also failed to justify the small craft exemption. However, the Port tariff's definition of small craft has been altered from that considered in *Dreyfus*. In the *Dreyfus* tariff any vessel under 100 feet was exempt from the Harbor Fee. In the revised tariff only vessels that are not "commercial cargo vessels" are exempt. This has been construed by the Port to mean that commercial fishing vessels and crew boats are exempt but that the supply boats must pay the Harbor Fee. The Presiding Officer is correct that the Port has not satisfactorily justified this exemption and has failed to rebut NOSA's *prima facie* showing of discrimination. The assessment of some charge appears necessary.

However, it also appears that the allocable portion of Port service costs to small charter fishing vessels and crew boats is small. Therefore, a *de minimis* rule applying to certain of these vessels may be warranted. While it does not appear to be reasonable to exempt large commercial fishing vessels unloading tons of fish at the Port each day, small charter fishing vessels and crew boats whose "mother ship" pays the fees stated in the tariff may reasonably fall within a *de minimis* class. If the tariff could be clarified to differentiate between the "mosquito fleet," that might be exempted under a *de minimis* rule, and substantial commercial interests, that must bear some fee burden, a small craft exemption might be justified.[49] Nevertheless, given the present language of the tariff exemption and the construction of this language by the Port, the Presiding Officer's conclusion that it violates the *Dreyfus* standards is upheld.

The exemption from the Supplemental Harbor Fee for "inbound inland barges" was also correctly found to be improper by the Presiding Officer. Transshipped cargo that is unloaded from inbound inland barges and loaded onto vessels or barges departing the Port is subject to the Supplemental Harbor Fee. However, if the cargo is local cargo, *i.e.*, cargo that is unloaded from inland barges and stays in the Parish, it is totally exempted from the fee. The Port's justification is that it is inappropriate to require a towboat owner to apportion the fees on local inbound cargo, and financially impractical to alter the assessment system to cover these movements. However, the Port failed to support these allegations with any financial analysis and their expert admitted that no attempt was made to do so.[50] We therefore concur in the Presiding Officer's disallowance of the exemption.

The specialized treatment that the Electro-Coal Company facility has been accorded by the Port is also unjustified. By private agreement this facility pays the Supplemental Harbor Fee on movements of coal outbound from the Port but pays no fee on movements of phosphate inbound to

[49] At a minimum the Port must clarify the language of the tariff to indicate that supply boats are subject to the fees. *See, Dreyfus* 25 F.M.C. at 68.

[50] I.D. 28 F.M.C. at 627–630.

the Port. The Port justifies this arrangement on the basis that the phosphate is transshipped to outbound barges and fees are assessed on that movement, fulfilling the *intent* of the tariff.[51] Because the basic method of assessment of cargo is on inbound movements, specialized treatment by agreement not reflected in the tariff is unjustified and unlawful.[52]

The final tariff provision found to be unjustly discriminatory relates to the permit system. Vessels purchasing long-term permits obtain a substantial "discount" on the usual Harbor Fee. This tariff provision is applicable only to vessels under 250 feet and the discounts range from 50% for a 30-day permit to 78% for a one-year permit. NOSA believes that this is unjustified favoritism towards local interests. The Presiding Officer agreed and found that the Port's "wholesale/retail" arguments are generalizations that are not supported by any cost/benefit analysis.[53]

It would appear that the permit system discounts were arbitrarily set at levels that, on their face, appear to unfairly favor local interests. In any event, the Port has failed to rebut NOSA's evidence of *prima facie* discrimination with any substantial evidence showing the reasonableness of the discount levels. The Presiding Officer therefore correctly found the permit system to be unlawful.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted consistent with this Order; and

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision filed by the New Orleans Steamship Association and Plaqemines Port, Harbor and Terminal District are granted to the extent indicated in this Order and denied in all other respects; and

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

By the Commission.[54]

(S) JOSEPH C. POLKING
Secretary

[51] The tariff states that outbound barges that can show that the cargo has already been assessed are exempt from paying any additional fees. I.D. 28 F.M.C. at 602.

[52] *See, Dreyfus*, 25 F.M.C. at 68.

[53] I.D. 28 F.M.C. at 630–631.

[54] Commissioner Thomas F. Moakley's dissenting opinion is attached.

Commissioner Moakley, dissenting

For the second time in as many cases,[1] I disagree with the majority's assertion of both personal and subject matter jurisdiction over Plaquemines Port, Harbor and Terminal District's charges for police, health and fire protection.

Plaquemines did not meet the definition of "other person" subject to the Shipping Act, 1916, 46 U.S.C. app. § 801, and it fails to meet the definition of Marine Terminal Operator contained in section 3(15) of the Shipping Act of 1984, 46 U.S.C. app. § 1702(15). As the majority acknowledges, Plaquemines does not own or operate any facilities serving common carriers by water.[2] This should end the inquiry.

Moreover, a finding of personal jurisdiction does not mean that every activity of that regulated entity is subject to regulation. Therefore, assuming, *arguendo*, that the Port could meet the definition of Marine Terminal Operator, the Commission has no greater claim to regulate its police, health and fire protection services than we would have to regulate an amusement park operated by the Port.[3]

I also disagree with the majority's analysis of the impact of the 1984 Act on their theory of jurisdiction over Plaquemines. While I concur that the applicable definitions are substantially the same under the 1916 and 1984 Acts, neither definition on its face supports jurisdiction over an entity that provides no facilities. The majority recognized this dilemma in the *Dreyfus*[4] decision and addressed it by focusing on the broad regulatory scheme of the 1916 Act.

> In construing the scope of the Commission's jurisdiction under section 1, the Supreme Court has focused upon the integrity of the legislative scheme of the Shipping Act and has required a broad construction of its terms to effect its purposes. The statutory scheme contemplates *regulation of any entity* if it exercises *sufficient control* over terminal facilities to have a *discernible effect*

[1] See *Louis Dreyfus Corp. et al.* v. *Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59 (1982), dissenting opinion of Vice Chairman Moakly.

[2] After reiterating the statutory definition of marine terminal operator, the Commission's regulations (46 CFR 515.6(b)) define the term "port terminal facilities" as,

> "*one or more structures comprising* a terminal unit and include, but are not limited to *wharves, warehouses*, covered and/or open storage *spaces*, 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 *in the interchange of same between land* and water carriers or between two water carriers." (emphasis supplied).

As broad as this definition is, Plaquemines furnishes none of these *facilities* in connection with a common carrier by water and is therefore not a marine terminal operator. The *services* that it performs are irrelevant to this determination of personal jurisdiction.

[3] The Commission's regulations are also helpful in determining what type of terminal services the Commission believes it has authority to regulate. Definitions of terminal services set forth in 46 CFR § 515.6(d) include "Dockage", "Wharfage", "Free Time", "Wharf Demurrage", "Terminal Storage", "Handling", "Loading and Unloading", "Usage", "Checking" and "Heavy Lift". This rule was republished subsequent to the *Dreyfus* decision (note 1, *supra*) with no indication whatsoever that police, health and fire protection were to be considered terminal services.

[4] Note 1, *supra*.

> on the commercial relationship between shippers and carriers involved in that link in transportation. 25 F.M.C. 65 (footnote omitted, emphasis supplied).

The legislative scheme of the 1984 Act is virtually opposite to that of the 1916 Act in this respect. The broad regulatory thrust of the earlier statute has been replaced with clear guidance from the 98th Congress to minimize government intervention and regulatory costs. These very words are used in the statute's declaration of policy[5] and in several places in the relevant legislative history.[6] Perhaps the most specific reflection of Congressional intent to effect a major change in the legislative scheme is found in the following language from the report of the House Merchant Marine and Fisheries Committee on H.R., 1878, the House version of the bill which became the Shipping Act of 1984:

> Specifically, H.R. 1878 accomplishes seven major purposes.
>
> * * * * *
>
> Seventh, the entire method of regulation is changed to minimize government involvement in shipping operations. H.R. Rep. No. 53, 98th Cong., 1st Sess. 3, 4 (1983).

To omit any mention of the statutory scheme of the 1984 Act in this decision after relying so heavily upon the statutory scheme of the 1916 Act in the *Dreyfus* decision is a curious approach for an impartial adjudicative body.

I would dismiss this complaint for lack of personal jurisdiction over the respondent and for lack of subject matter over the services in question.

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[5] 46 U.S.C. app. § 1701.

[6] *E.g.* S. Rep. No. 3, 98th Cong., 1st. Sess. 1 (1983); H.R. Rep. No. 600, 98th Cong., 2d Sess. 27 (1984).

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–2
NEW ORLEANS STEAMSHIP ASSOCIATION
V.
PLAQUEMINES PORT, HARBOR & TERMINAL DISTRICT

1. Where the Plaquemines Port, Harbor and Terminal District is duly constituted by the laws of the State of Louisiana and where the Port has the exclusive ability to provide essential health, safety and security services to vessel and cargo interests in commercial cargo-handling transactions, its assessment of selective cargo transfer fees and its control of access to private terminal facilities result in the fundamental control over the rates and practices of terminal facilities. Under such circumstances the Port is an "other person" and/or terminal operator subject to the Shipping Acts of 1916 and 1984. The Port's involvement in the business of common carriers, marine terminals and commerce of the United States confers on the Commission jurisdiction over the Port under the pertinent provisions of the Shipping Acts and subjects the Port's fees to scrutiny under those provisions.
2. Where the Port assesses a Harbor Fee and a Supplemental Harbor Fee for providing to vessels and cargo essential health, safety and security services, such acts constitute the furnishing of "other terminal facilities" within the meaning of the Shipping Acts of 1916 and 1984. The term "other terminal facilities" contemplates not only physical assets such as docks, wharves and warehouses, but also encompasses services rendered "in connection" with the marine terminal in "link" in transportation modes.
3. Where the Port established a Harbor Fee and a Supplemental Harbor Fee to defray the expense of providing various services insuring the safety and facility of the movement of vessels and cargo using it, the fees do not represent a "toll charge" which contravene provisions of the Constitution of the United States. Rather, the fees represent the establishment of regulations and practices related to or connected with the receiving, handling, or delivery of property which comes under the jurisdiction of the Federal Maritime Commission.
4. Where in a previous proceeding the Port entered into a settlement agreement with the litigating parties, the settlement agreement does not discriminate against other persons who were not parties in the prior proceeding and who are not identified in the instant proceeding. Further, where there has been no showing of any injury, much less the amount of injury, any adjudication in the proceeding regarding reparations from alleged unjust or undue discrimination is impossible.
5. Where the Port's tariff contains various exceptions and exemptions relating to beneficiaries of the Port's services such as private terminals, supply boats, crew boats, fishing vessels, and inland barges as well as a five hundred exemption and permit/discount rate features, which *prima facie* show that the charges do not bear a reasonable relationship to the comparative benefit obtained from Port services; where the respondent's primary witness testifies no attempt was made to correlate the charges made to users under the tariff to the benefits received by such users; and where the record fails to contain sufficient evidence to demonstrate that either other revenue considerations of the exempted classes are reasonably related to the fees forgiven or that such exemptions are required administratively, then the fees assessed in the tariff do not bear a reasonable relationship to the comparative benefit obtained by either the assessed or exempted parties from the services provided by the Port.

6. Where the Port's tariff contains a provision holding agents primarily liable for tariff fees where there is no showing of hardship or injustice, and where the agent is a user of the Port, the provision is not unreasonable. A terminal operator can hold liable for tariff fees all direct and indirect users of its services.
7. Where the Port's tariff imposes a fee against the vessel, and where the complainant argues carrier-shipper contracts place the responsibility for payment of the fee on the shipper or consignee but does not furnish any further additional evidence as to why the carrier-shipper contract standing alone should prevent the imposition of the fee on the vessel, the Supplemental Harbor Fee assessed against the vessel is not improper.

Edward S. Bagley for complainant New Orleans Steamship Association.

Louis B. Porterie, Robert E. Fontenelle, Jr. and *Edward J. Sheppard* for respondent Plaquemines Port, Harbor & Terminal District.

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

Partially Adopted September 16, 1986

Findings of Fact

The parties in this proceeding each requested findings of fact in their briefs. The facts set forth below either are specifically uncontested facts taken from their proposed findings or are facts taken directly from the record. References to the complainant's Proposed Findings will be made as "C–PF" followed by a number designation, "C–PF 1," for example. References to the respondent's Proposed Findings will be preceded by an "R," such as "R–PF 1," for example. Also, it should be noted that references to the transcripts in this proceeding will be made by giving the date of the transcript followed by the page numbers of the transcript (Tr. 2/15/84, pp. 60–65, for example).

1. Complainant, New Orleans Steamship Association, is a non-profit association of owners, stevedores and agents of vessels which are common carriers by water in the foreign commerce of the United States calling at New Orleans, including some vessels that call at the Plaquemines Port, Harbor and Terminal District. (C–PF 138; R–PF 1)

2. Plaquemines Parish, which is comparable to county government in other states, was governed by a council of five at-large members until March of 1983, and since then by nine council members, each of whom is elected from a single member district. The council, as a whole, acts as a legislative body, while each individual council member also is the head of one or more executive departments of the Parish. (R–PF 2)

3. The Port district is a political subdivision of the State of Louisiana, geographically coextensive with Plaquemines Parish. The governing body

[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).

for the Port is the same nine member council that governs the Parish. (R–PF 3)

4. Plaquemines Parish has a population of approximately 26,000 people and some 10,000 itinerant oil field workers temporarily reside in the Parish. The latter number includes those living on offshore oil platforms. (R–PF 4)

5. The geography of the Parish is unique. It is totally dominated by the Mississippi River. Ninety-four percent of Parish land lies outside the flood protection levees and is susceptible to tides from time to time. Virtually all of the Parish is below sea level so that habitation is possible only because of massive levees that exclude the waters of the Gulf of Mexico. Most points on dry land protected by the levees are no more than one or one-half miles from the river. There are only two highways running north and south, one on each side of the river. (R–PF 5, 7)

6. Plaquemines is peninsular into the Gulf of Mexico. It is the most southern parish in Louisiana and is divided in half by the river. Most of the Parish's industry and development is on the west bank of the river. The largest populated area is located at Belle Chasse on the northern portion of the west bank. (R–PF 6)

7. There are no bridges across the river in the Parish. The closest bridge is 14.7 miles north of the Parish boundary. The only public facilities within the Parish for cross-river traffic are two Parish owned ferries. One is at Belle Chasse, the other at Pointe-a-la-Hache. A third ferry is located at Belle Chasse for peak morning and evening traffic. (R–PF 8)

8. The Mississippi River has two navigable channels down river from Head of the Passes to the Gulf of Mexico, Southwest Pass and South Pass. Distances on the river are measured from the Head of the Passes. All mileage upriver from that point is designated as River Mile AHP, and all distances below that point are designated, BHP. The Parish extends upriver from Head of the Passes to Mile 81.6 AHP and downriver 20.2 miles BHP on the Southwest Pass and 13.5 miles BHP on South Pass. (R–PF 9)

9. Upriver from Head of Passes there are only two places where vessels can pass through flood protection levees, the Ostricia lock on the east bank at approximately Mile 25 AHP, and the Empire lock on the west bank at approximately Mile 29.5 AHP, with navigation depths of 10 feet. (R–PF 10)

10. The only other pass with any navigational significance is Tiger Pass at the south end of the west bank highway, with a 12 foot draft limitation that excludes oceangoing vessels, but not oil field supply and other small vessels. Overland truck service connects with offshore oil activities at Tiger Pass. There is no oceangoing vessel activity at Tiger Pass. (R.PF 11)

11. The Port of New Orleans is adjacent to and upriver from Plaquemines, extending 33.4 miles from Mile 81.6 AHP to Mile 115 AHP. The South Louisiana Port extends 53.0 miles upriver from New Orleans, from Mile

115 AHP to Mile 168 AHP. At that point the Port of Baton Rouge begins and extends upriver to Mile 225 AHP. On the river north of Baton Rouge are numerous other ports such as Vicksburg, Memphis and St. Louis. (R–PF 12)

12. From the northern limits of the Port of Plaquemines through the most commonly used Southwest Pass, to the Gulf of Mexico, the Port extends a total distance of 102 miles. Every oceangoing vessel serving any port on the Mississippi River goes through the Plaquemines Port district twice; once going upriver and once going down river. (R–PF 13)

13. There are approximately 9,200 vessel arrivals and departures through the Port annually, for an average of one oceangoing cargo vessel approximately every hour. (R–PF 14)

14. The total tonnage of the ports within the lower Mississippi River (Gramercy, New Orleans, Baton Rouge, Destrehan and St. Rose) is 160 million tons. An additional 22 million tons is handled in the Port District for a total of 182 million tons passing through the Port District. (R–PF 15)

15. The Plaquemines Parish Council, as governing authority of the Port District, initially adopted Plaquemines Port, Harbor and Terminal District Tariff No. 1, effective September 1, 1977. The tariff provided in pertinent part that:

> All vessels engaged in foreign, coastwise, or intercoastal and intra-coastal trade and certain cargoes, shall be assessed fees as provided in the Plaquemines Port, Harbor and Terminal District Tariff to assist in defraying necessary and essential, direct and indirect, port, harbor and marine services to port and harbor users and other persons located in proximity to and affected by such activities due to the unique geographic and environmental characteristics of the Plaquemines Parish Port, Harbor and Terminal District.* Such fees and charges are to be used for the expenses of the administration and maintenance of the port and harbor, including:
>
> administering, regulating, and monitoring of the shipping traffic and handling of cargo in the harbor; supervising shipping of the Port with the view of preventing collisions and fires; policing the river and riverfront and all navigable waterways, as well as the banks, batture, and contiguous and adjacent areas affected by port, harbor, terminal, water, and marine activities; and emergency service to vessels in distress, including extinguishing fires in vessels and equipment and in cargo of those vessels; and providing all such services for cargo handled in and upon the areas of the Port's contiguous waterways and located in wharves and facilities upon the banks, battures, contiguous and adjacent areas in Port administered facilities;

without additional charge (except for the cost of supplies, materials, and equipment expended by the Plaquemines Port, Harbor and Terminal District in the performance of such services).

* (See Preamble to Plaquemines Parish Zoning Ordinance #142, hereinafter set out. Reference is also made to requirements of laws and regulations that require ever expanding Port, Harbor and marine services, regulations and inspections by such districts at local governmental levels, such as:

Rivers and Harbors Act	Ocean Dumping Act
National Environmental Policy Act	Safe Drinking Water Act
Clean Water Act	Noise Control Act
Clean Air Act	Occupational Safety and Hazards Act
Toxic Substances Control Act	Federal Pesticide Acts
Coastal Zone Management Acts—(Federal and State Solid Waste Disposal Act)	Energy Regulations

SECTION I—DEFINITIONS

Subject	Definition
Inland Watercraft	Wherever used in this Tariff the term "Inland Watercraft" shall include all vessels, private and public, operated exclusively on the United States inland waterways, employed in any maritime service, task, venture, voyage, or mission, commercial or noncommercial, of a private or public nature.
Ship	Any self-propelled seagoing vessel.
Tugs and Towboats	Vessels which do not carry freight or passengers but are used to tow or push other vessels.
Vessel	Any ships, tugs, tows, towboats, packets, barges, lighters, or other watercrafts, self-propelled or non-self-propelled, any types of floating equipment, including work barges, offshore oil platforms, oil rigs, derricks, etc.
User	"User" shall be deemed to include and apply to any vessel or person using any District property, facility or equipment or to whom or for whom any service, work or labor is furnished, performed, done or made available by the District.

Wharfage	A charge against cargo, based on the number of tons received or discharged by vessels, as manifested, and passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water) when berthed at a public wharf or when moored adjacent to such wharf.
Supplemental Harbor Fee	That fee charged against cargo handled in midstream or at anchorage or at a privately owned wharf for other than the wharf owner.

SECTION II—GENERAL INFORMATION, RULES & REGULATIONS

Governing Authority and Jurisdiction	The Plaquemines Parish Commission Council is the governing authority of the Plaquemines Port, Harbor and Terminal District. The territorial limits of the District are coextensive with the Parish of Plaquemines Louisiana, as presently constituted. Louisiana Revised Statutes 34:1351–1365, as ratified by Article 6, Section 43 of the Louisiana Constitution of 1974, which is the legal authority for this District, is contained in Appendix I and is specifically made a part of this tariff.
Application and Interpretation of Tariff and Amendments	The rates, rules and regulations contained in this tariff shall apply equally to all users of the waterways and facilities and shall apply on all traffic on the waterways and facilities on the effective dates shown on this tariff or any amendments thereto. Amendments shall be issued to cover changes in this tariff, but this tariff is subject to change without notice. The Plaquemines Port, Harbor and Terminal District shall be the sole judge as to the interpretation of this tariff.

Consent to Terms of Tariff

The use of the waterways and facilities under the jurisdiction of the Plaquemines Port, Harbor and Terminal District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified in this tariff and be governed by all rules and regulations herein contained. It is incumbent upon the Master of any vessel operating within the limits of Plaquemines Port, Harbor and Terminal District or others whose operations are affected by these rules and regulations, to familiarize themselves with these rules and regulations. Noncompliance, through ignorance, with these rules and regulations will not affect the liability of the Master or others, or the application of the penalties.

General Anchorages

The General Anchorages for the Plaquemines Port, Harbor and Terminal District are the following:

1. Fairway Anchorages
   A. South Pass Mississippi River Anchorage.
   B. Southwest Pass Mississippi River Anchorage.
2. Pilottown Anchorage 1.5–6.7 RDB.
3. Boothville Anchorage 12.2–18.5 RDB.
4. Ostrica Anchorage 23.5–24.4 RDB.
5. Port Sulphur Anchorage 37.5–39.7 LDB.
6. Deer Range Anchorage 53.5–54.5 LDB.
7. Alliance Anchorage 63.6–65.8 RDB.
8. Cedar Grove Anchorage 70.6–71.2 RDB.
9. August Anchorage 71.4–72.0 RDB.
10. Belle Chasse General Anchorage 73.6–75.2 RDB.
11. 12 Mile Point Anchorage 79.0–80.8 RDB.

The rules and regulations concerning the General Anchorages are prescribed by the U. S. Army, Corps Engineers, and their enforcement is a responsibility of the U.S. Coast Guard.

Vessels anchored in the river, except as below noted, shall be anchored in the above listed General Anchorages.

Laying Up of Vessels

Masters requiring anchor berths for the purpose of laying-up their vessels shall apply to the Director for permission to lay-up at the proposed berth or anchorage; such permission has no connection with property rights. No vessel, towboat, barge or raft may tie up or lay up alongside any property without first obtaining permission of the riparian owner or his lessee.

Penalties for Violation

(a) It shall be unlawful for any person, firm, or corporation to utilize or make use of the Plaque mines Port, Harbor and Terminal District or any of its facilities without paying to the District the proper toll, charge or fee therefore as fixed and specified in this tariff, or by designation otherwise, and every person, firm or corporation violating any provision of this order, respecting the payment of any toll, charge or fee shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred ($500.00) Dollars, or by imprisonment in the Parish Jail, for a period of not more than thirty days, or by both such fine and imprisonment. The Court in its discretion may consider each day on which the violation occurs as a separate offense.

(b) It shall be unlawful for any person, firm or corporation to fail, refuse or neglect to comply with any of the provisions of the rules and regulations prescribed by this tariff or supplement thereto, or by designation otherwise, and any person, firm or corporation violating any of the provisions of these rules and regulations shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred ($500.00) Dollars, or by imprisonment in the Parish Jail for a period of not more than thirty days, or by both such fine and imprisonment. The Court in its discretion may consider each day on which the violation occurs as a separate offense.

SECTION III

Charges which may be incurred by vessels:

Item 135 Harbor Fee Each vessel which docks, moors, or anchors within the District, including Lash and Seabee barges and movable oil rigs and platforms, shall be assessed a Harbor Fee, as provided herein, to assist in defraying the expense of the administration and maintenance of the Plaquemines Port, Harbor and Terminal District, including the supervision of the shipping of the District, with the view of preventing collisions and fires, policing the river and river front, rendering aid to vessels in distress, and to aid in extinguishing fires in vessels and equipment and in their cargoes aboard such vessels or upon wharves and other facilities in the District.

Fee Per Vessel

Vessels over 100 and under 250 feet in length—$100.00

Vessels 250 feet and over in length—$150.00

This Harbor Fee is due for the first five days or any part thereof that the vessel remains within the District, and for each day or any part thereof over five days that the vessel remains within the District, the Harbor Fee due shall be one-fifth of the above stated Fee Per Vessel.

The payment of the Harbor Fee shall be the *primary obligation of the owner, agent, or user of the vessel,* but the owner of the facility handling or storing the cargo and the cargo owner whose cargo is loaded unto a vessel outbound from the Port District from any wharf, dock, facility, mooring facility, or anchorage within the Port District shall be liable *in solido as surety* for the payment of the Harbor fee due by the owner, agent or user of

the vessel unto which such cargo has been loaded; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner, agent, or user of the vessel against the owner, agent, or user of the vessel, who is primarily liable for all amounts paid by those responsible in solido but not primarily obligated. (See Item 145, Supplemental Harbor Fee and Item 165, Payment of Bills hereof.)

Item 136	Vessels Exempted From Harbor Fee	(A) Vessels passing through the port which do not berth any wharf, anchor within the District, or in any way moor themselves within the District limits. Vessels stopped within the District for the sole purpose of changing pilots, or because of inclement weather remaining less than twelve hours within the limits of the District. (B) Government vessels not engaged in carrying cargo, troops, or supplies. (C) Private, non-commercial pleasure craft. (D) Special permits, vessels over 100 ft. in length as set forth in Item 137.
Item 137	Special Annual Temporary Port Permit Vessels	Annual special permits will be issued by Plaquemines Parish Port Authority to every vessel over 100 ft. in length that is appraised for Ad Valorem taxes in the Parish of Plaquemines upon payment of the Parish taxes resulting from such Parish assessments. Special Permits will be issued by Plaquemines Parish Port Authority upon the payment of the following fees:

I

Vessels over 100 ft. to 200 ft. in length:

a. For 30 days—$100.00
b. For 90 days—250.00
c. For 180 days—450.00
d. For 365 days—750.00

II

For non-self propelled Barges, lighters or other watercraft over 100 feet in length, and not more than 200 feet in length.

a. For 30 days—$50.00
b. For 90 days—125.00

c. For 180 days—225.00
d. For 365 days—375.00

III

For non-self propelled barges, lighters or other watercraft over 200 feet in length and not more than 300 feet in length:

a. For 30 days—$200.00
b. For 90 days—500.00
c. For 180 days—900.00
d. For 365 days—1,500.00

Such permits will exempt such vessels from payment of Harbor and Lay-Up Fees, as set out in Items 135, 136 and 140 hereof.

Item 140 Lay-Up Fee

Any vessel, whether seaworthy or not, which docks, moors or anchors within the District, for a continuous period of more than five days for repairs, construction, "moth balling", drydocking or storage except one which is removed from the water by drydocking, shall after the first five days pay the following fees.

Fees Per Vessel

Vessels to 200 ft. in length—None.

Vessels 200 ft. and over in length—$150.00 per day.

Item 145 Supplemental Harbor Fee

All cargo when first handled within the District in midstream or at anchorage shall be assessed, in addition to Items 135, 137, and 140, $ .10 per net ton or fraction thereof over 500 tons of the weight of cargo handled, provided that no cargo shall be assessed a Supplemental Harbor Fee more than one time.

The payment of Supplemental Harbor Fee shall be the *primary obligation of the owner of the cargo,* but the owners, the agents, or other users of the vessels and the owners of the facilities handling or storing such cargo shall be bound and responsible *in solido as surety* for the payment of such charges; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated.

The cargo of the owner of a privately owned wharf shall be handled by the owner of the wharf without the payment of this fee to the District.

The Harbor Fee of Item 135 on any vessels involved in the handling of cargo subject to this Supplemental Harbor Fee shall be credited against this Supplemental Harbor Fee.

The cargo is assessed the Supplemental Harbor Fee when it is first handled within the District, but because of the exemption granted for cargo owned by the handling wharf owner, the reporting of cargoes should be made when the cargo leaves the wharf or facility, and the assessment calculation shall then be made since the joint ownership of the cargo and the wharf cannot be finally determined until the cargo leaves the wharf or facility. The Harbor Fee credit is given for the outbound vessels onto which the cargo is loaded from the wharf, and the reporting to the Port District as to cargoes, vessels, and ownership thereof is to be made at the instant before the cargo leaves the wharf or facility.

A Supplemental Harbor Fee shall be assessed for cargo not owned by the owner of the wharf or facility irrespective of the manner in which the cargo leaves the wharf or facility other than by vessel, for example by pipeline, rail, truck, etc., and therefore no Harbor Fee is assessed with such outbound cargo, there is no Harbor Fee to be credited against the Supplemental Harbor Fee.

All cargo handled by a privately owned wharf shall be deemed midstream unloading and shall be subject to the Supplemental Harbor Fee imposed above which includes midstream unloading.

(See Item 135 Harbor Fee and Item 165 Payment of Bills as to the responsibilities among the parties.)

Item 155 Wharfage Rates at Public Wharfs

The rate of wharfage on all commodities shall be $ .50 per net ton, or fraction thereof unloaded by and with the equipment furnished by the owner of cargo. The minimum wharfage for any shipment shall be $5.00.

Item 160 Basis for Assessment of Wharfage Charge

All cargo or freight, shall be subject to the wharfage charge as follows:

1. When cargo or freight is placed onto public wharves, docks, landings, mooring facilities, or other structures for handling to or from vessels; or

2. When cargo is placed on the public wharves for outbound movement and is not subsequently loaded aboard a vessel, but is removed from the wharves.

3. When such cargo or freight is transferred over or under such wharves, docks, landings, mooring facilities, or other structures to or from vessels; or

4. When such cargo or freight is delivered to or received from vessels by other watercraft, or when transferred over the side of vessels directly to or from the water:

a. When said vessels are occupying berths at wharves, docks, landings, mooring facilities or other structures;

b. When said vessels are moored outside of other watercraft occupying berths at wharves, docks, landings, mooring facilities, or other structures.

Item 165 Payment of Bills

All bills are due upon presentation by the District and failure to pay when presented shall place the name of the vessel, its owners and agents, or other user of the facilities, upon a Delinquent List, conditions of which are hereinafter defined.

The payment of Supplemental Harbor Fee shall be the *primary obligation of the owner of the cargo,* but the owners, the agents, or other users of the vessels and the owners of the facilities handling or storing such cargo shall be bound and responsible *in solido as surety* for the payment of such charges; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated. All other charges applicable to this Tariff shall be assessed to owners of the vessels, their agents, cargo owners, or owners of facilities in solido.

The responsibility for the Harbor Fee is as set out in Item 135 and the crediting of the Harbor Fee is as set out in Item 145.

Parties entering and using the Port District, so as to become liable for any Port District Fees whatsoever as provided in this Tariff, do by such entry and usage thereby contract to pay and are responsible for all Port District Fees whatsoever as provided for in this Tariff.

The Plaquemines Port, Harbor and Terminal District reserves the right to estimate and collect in advance all charges which may accrue against cargo owners, common carriers vessels, their owners and/or agents, or against cargo loaded or discharged by such vessels or other users of the facilities of the Plaquemines Port, Harbor and Terminal District, whose credit has not been properly established with the District or who are habitually on the Delinquent List. Use of the facilities may be denied until such advance payment or deposits are made.

The District reserves the right to apply any payment received against the oldest bills rendered against common carriers, vessels, their owners and/or agents or users of the facilities.

All cargo owners, common carriers, vessels, their owners and/or agents, and/or owners, assessors, or lessors of wharves or other users of the Port or facilities of the Plaquemines, Port, Harbor and Terminal District placed on the Delinquent List for reasons hereto stated shall be denied further use of the port or facilities by the District until all such reports have been filed and all charges thereon, together with any other charges due, shall have been paid.

Item 165a Interest When any Tariff debtor fails to pay any charges or portion thereof due under the provisions of this Tariff within 30 days of the invoice date, there shall be added to the amount of charges due interest at the rate of one and one-half per centum (1½%) per month from the due date until paid. Such interest shall be an obligation to be collected and accounted for in the same manner as if it were part of the charges due and can be enforced in a separate action or in the same action for collection of the charges, and shall not be waived or remitted.

Item 165b	Attorney's Fees	If any charges, penalties, or interest due under this Tariff are referred to an attorney at law for collection, an additional charge for attorney's fees, in the amount of ten per centum (10%) of the charges, penalties, and interest due shall be paid by the Tariff debtor.

(R–PF 18; Ex. R–58)

16. As a result of a complaint brought by the Louis Dreyfus Corp, the Commission in affirming an Administrative Law Judge's Initial Decision found that the tariff described in paragraph (15) above, violated sections 16 and 17 of the Shipping Act, 1916. (R–PF 18; *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59 (1982), affirming Initial Decision at 25 F.M.C. 73.)

17. After the issuance of the aforementioned Initial Decision (Docket No. 79–45), the Plaquemines Parish Commission Council held five open public hearings at which the question of appropriate port tariff charges was specifically addressed. Effective May 21, 1982, the Commission filed a new tariff which amended and superseded the 1977 tariff. (R–PF 19, 43; Ex. R–14)

18. The new tariff provides in pertinent part that:

PREAMBLE TO PLAQUEMINES PARISH PORT, HARBOR AND TERMINAL DISTRICT TARIFF:

All vessels engaged in foreign, coastwise, or intercoastal and intra-coastal trade and certain cargoes, shall be assessed fees as provided in the Plaquemines Port, Harbor and Terminal District Tariff to assist in defraying necessary and essential, direct and indirect, port, harbor and marine services to port and harbor users and other persons located in proximity to and affected by such activities due to the unique geographic and environmental characteristics of the Plaquemines Parish Port, Harbor and Terminal District.* Such fees and charges are to be used for the expenses of the administration and maintenance of the port and harbor, including:

administering, regulating, and monitoring of the shipping traffic and handling of cargo in the harbor; supervising shipping of the Port with the view of preventing collisions and fires; policing the river and riverfront and all navigable waterways, as well as the banks, batture, and contiguous and adjacent areas affected by port, harbor, terminal, water, and marine activities; and emergency service to vessels in distress, including extinguishing fires in vessels and equipment and in cargo of those vessels; and providing all such services for cargo handled in and upon the areas of the Port's contiguous waterways and located in wharves and facilities upon the banks, battures, contiguous and adjacent areas in Port administered facilities;

without additional charges (except for the cost of supplies, materials, and equipment expended by the Plaquemines Port, Harbor and Terminal District in the performance of such services).

*(See Preamble to Plaquemines Parish Zoning Ordinance #142, hereinafter set out. Reference is also made to requirements of laws and regulations that require ever expending Port, Harbor and marine services, regulations and inspections by such districts at local governmental levels, such as:

Rivers and Harbors Act	Ocean Dumping Act
National Environmental Policy Act	Safe Drinking Water Act
Clean Water Act	Noise Control Act
Clean Air Act	Occupational Safety and Hazards Act
Toxic Substances Control Act	Federal Pesticide Acts
Coastal Zone Management Acts—Federal and State	Energy Regulations
Solid Waste Disposal Act)	

SECTION I—DEFINITIONS

Subject	Definition
Inland Watercraft	Wherever used in this Tariff the term "Inland Watercraft" shall include all vessels, private and public, operated exclusively on the United States inland waterways, employed in any maritime service, task, venture, voyage, or mission, commercial or non-commercial, of a private or public nature.
Ship	Any self-propelled seagoing vessel.
Tugs and Towboats	Vessels which do not carry freight or passengers but are used to tow or push other vessels.
Vessel	Any ships, tugs, tows, towboats, packets, barges, lighters, or other watercrafts, self-propelled or non-self-propelled, any types of floating equipment, including work barges, offshore oil platforms, oil rigs, derricks, etc.
User	"User" shall be deemed to include and apply to any vessel or person using any District property, facility or equipment or to whom or for whom any service, work or labor is furnished, performed, done or made available by the District.
Private Wharves	Those wharves that are not public wharves.

Harbor Fee	All commercial cargo vessels which dock, moor, or anchor within the District shall be assessed a Harbor Fee per each arrival within the geographical limits of the District, to assist in defraying the expenses of the administration and maintenance of the port and harbor, including the supervision of the shipping of the port, with the view of preventing collisions and fires, policing the river and riverfront, providing services of all kinds as required for an orderly and safe port operation, including response to vessels in distress with the means available, and to aid in extinguishing fires on vessels and equipment and in the cargo aboard such vessels or upon the public wharves, public banks and battures of the waterways of the District, and in the harbor, and upon the private wharves, docks, and immediately adjacent facilities connected thereto without any additional charge (except for the cost of supplies, material and equipment expended by the District in the performance of such services.)
Supplemental Harbor Fee	A fee charged to supplement revenue necessary for the purposes herein set forth under "Harbor Fee" based on the weight of non-liquid cargo and on barrels of liquid cargo handled or transferred in midstream or when anchored at or moored to any dock, wharf, or mooring facility, or at a public wharf if, in the future, the District has any public wharves, which it does not now have.
Conventional Barge	The term conventional barge, as referred to in Item 135—Harbor Fee, shall include inland (river) barges and shall also include LASH and SEABEE barges when not aboard the barge carrying vessel (mother vessel). However, when LASH and SEABEE barges are loaded and/or unloaded from the barge carrying vessel (mother vessel) within the Port District, the mother vessel shall be assessed fees as set forth in Item 135—Harbor Fee. The term conventional barge does not include ocean or seagoing barges.

SECTION II—GENERAL INFORMATION, RULES & REGULATIONS

Item 5	Governing Authority and Jurisdiction	The Plaquemines Parish Commission Council is the governing authority of the Plaquemines Port, Harbor and Terminal District. The territorial limits of the District are coextensive with the Parish of Plaquemines Louisiana, as presently constituted. Louisiana Revised Statutes 34:1351–1365, as ratified by Article 6, Section 43 of the Louisiana Constitution of 1974, which is the legal authority for this District, is contained in Appendix I and is specifically made a part of this tariff.
Item 15	Consent to Terms of Tariff	The use of the waterways and facilities under the jurisdiction of the Plaquemines Port, Harbor and Terminal District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified in this tariff and be governed by all rules and regulations herein contained. It is incumbent upon the Master of any vessel operating within the limits of Plaquemines Port, Harbor and Terminal District or others whose operations are affected by these rules and regulations, to familiarize themselves with these rules and regulations. Non-compliance, through ignorance, with these rules and regulations will not affect the liability of the Master or others, or the application of the penalties.
Item 35	Reporting-Arrivals and Departures Revised	The arrival and departure of all vessels engaged in Foreign, coastwise, and intercoastal trade which anchor within the Port District shall be immediately reported by telephone (504–682–0081, a 24-hour telephone service) by the agent of the vessel. A written report shall be rendered within five (5) days after departure from the Port Distract on reporting forms to be obtained from the District.

The arrival and departure of all vessels engaged in Foreign, coastwise, and intercoastal trade which dock at a private facility within the Port District shall be immediately reported by telephone (502–682–0081, a 24-hour telephone service) by the private facility. A written report shall be rendered within five (5) days after departure from the Port District on reporting forms to be obtained from the District.

The arrival and departure of all other vessels shall be reported by the private facility at which the vessel docks by written report rendered within five (5) days after departure of the vessel from the District on reporting forms to be obtained from the District.

All reportings shall be subject to the verification and inspection of the Director's agents and/or employees. If the arrival and departure are not reported by the party responsible therefor, the District shall have the right to obtain the information needed from the vessel owner, vessel agent, vessel master, cargo owner, or other user of the vessel.

It shall not be required to report the arrival and departure of any vessels that obtain temporary or annual permits/licenses pursuant to Item 135—Harbor Fee.

Item 36	Reporting of Loading and/or Unloading of Vessels	The private facility from which cargo is either loaded and/or unloaded aboard a vessel shall render, within five (5) days after the departure of a vessel, a written report on reporting forms to be obtained from the District of the type and amount of cargo loaded and/or unloaded on or from the vessel.
Item 50	General Anchorages	The General Anchorages for the Plaquemines Port, Harbor and Terminal District are the following:

1. Fairway Anchorages
   A. South Pass Mississippi River Anchorage.
   B. Southwest Pass Mississippi River Anchorage.
2. Pilottown Anchorage 1.5–6.7 RDB.
3. Boothville Anchorage 12.2–18.5 RDB.
4. Ostricia Anchorage 23.5–24.4 RDB.

5. Port Sulphur Anchorage 37.5–39.7 LDB.
6. Deer Range Anchorage 53.5.54.5 LDB.
7. Alliance Anchorage 63.6–65.8 RDB.
8. Cedar Grove Anchorage 70.6–71.2 RDB.
9. Augusta Anchorage 71.4–72.0 RDB.
10. Belle Chasse General Anchorage 73.6–75.2 RDB.
11. 12 Mile Point Anchorage 79.0–80.8 RDB.

The rules and regulations concerning the General Anchorages are prescribed by the U.S. Army, Corps Engineers, and their enforcement is a responsibility of the U.S. Coast Guard.

Vessels anchored in the river, except as below noted, shall be anchored in the above listed General Anchorages.

Item 70 — Laying-Up of Vessels

Masters requiring anchor berths for the purpose of laying-up their vessels shall apply to the Director for permission to lay-up at the proposed berth or anchorage; such permission has no connection with property rights. No vessel, tow-boat, barge or raft may tie up or lay up alongside any property without first obtaining permission of the riparian owner or his lessee.

Item 130 — Penalties for Violation

(A) It shall be unlawful for any person, firm, or corporation to utilize or make use of the District or any of its facilities without paying to the District the proper toll, charge, or fee therefor as fixed and specified in this Tariff, or without having established a mutually agreeable procedure for such payment to the District, and every person, firm, or corporation violating any provision of this order respecting the payment of any toll, charge, or fee shall be deemed to have violated the provisions of this Tariff and the Ordinances of this District and the laws of the State of Louisiana and of the United States.

(B) It shall be unlawful for any person, firm or corporation to fail, refuse, or neglect to comply with any of the provisions of the rules and regulations prescribed by this Tariff or supplement thereto, or by designation otherwise.

(C) The Plaquemines Port, Harbor and Terminal District shall have all the remedies for collection of any Tariff charges, or may seek to enforce any provision of the Tariff in any manner as provided by law. In connection herewith, note the provision of Item 165, providing for payment of bills.

SECTION III

Changes imposed by this section shall apply to the following areas:

1. The Mississippi River and its passes within Plaquemines Parish.
2. That portion of the Algiers Cut Off Canal (Intercostal Alternate Waterway) situated within Plaquemines Parish, being that portion lying between the Orleans-Plaquemines Parish line (at Donner Canal) westward along such Intracoastal Waterway to its intersection with the Barataria at the Jefferson-Plaquemines Parish line.
3. Empire Doullut Canal from the Mississippi River to the Gulf of Mexico.
4. Jump Basin, Tiger Pass, Grand Pass, and Baptiste Collette from the Mississippi River to the Gulf of Mexico.

Charges which may be incurred by vessels:

Item 135 Harbor Fee All commercial cargo vessels which dock, moor, or anchor within the District shall be assessed a Harbor Fee per each arrival within the geographical limits of the District to assist in defraying the expenses of the administration and maintenance of the port and harbor, including the supervision of the shipping of the port, with the view of preventing collisions and fires, policing the river and riverfront, providing services of all kinds as required for an orderly and safe port operation, including response to vessels in distress with the means available, and to aid in extinguishing fires on vessels and equipment and in the cargo aboard such vessels or upon the public wharves, public banks and battures of the waterways of the District, and in the harbor, and upon the private wharves, docks, and immediately adjacent facilities connected thereto, without any additional charge (except for the cost of supplies, material, and equipment expended by the District in the performance of such services).

Fee Per Commercial Cargo Vessel for Port Entry and Usage

Vessels under 100′ in length—$5.00 per day

Vessels 100′ and under 250′ in length—$10.00 per day

Vessels 250′ and under 500′ in length—$30.00 per day

Vessels 500′ and over in length—$ 75.00 per day

Non-powered, conventional barges are exempt from this Harbor Fee Item and this Fee shall be calculated on tugboats, towboats, or push boats on the length of the powered vessel only.

In lieu of daily charges, vessels may obtain temporary or annual permits/ licenses upon payment of the following fees:

Vessels under 100′ in length:
- a. For 30 days—$75.00
- b. For 90 days—$200.00
- c. For 180 days—$300.00
- d. For 365 days—$400.00

Vessels 100′ and under 250′ in length:
- a. For 30 days—$150.00
- b. For 90 days—$400.00
- c. For 180 days—$600.00
- d. For 365 days—$ 800.00

A vessel shall have thirty (30) days after its first entry into the District in which to obtain a temporary or annual permit/license. If the vessel does not obtain such a permit/license, it shall be assessed the daily fee.

Notice of this Item 13—Harbor Fee shall be given to each vessel arriving in the District by the facility and/or wharf owner. Notice shall be given either by giving the vessel a written copy of this Item 135—Harbor Fee or by posting notice that each vessel must contact the District's office upon arrival.

The address and telephone number of the District area:

Woodlawn Building, Route 1, Box 53A, Braithwaite, Louisiana 70040, (504) 682–0081.

Supplemental Harbor Fee

All commercial cargo vessels handling or transferring cargo in midstream or when anchored at or moored to any dock, wharf, or mooring facility, shall be assessed, in addition to the above, regular Harbor Fee, a Supplemental harbor Fee on non-liquid cargoes of Four ($0.04) Cents per ton of 2000 pounds or fraction thereof over Five Hundred (500) tons, based on the weight of the cargo so handled or transferred, and a Supplemental harbor Fee on liquid cargoes of One-Half Cent (½¢ per barrel for each barrel over 4000 barrels of the cargo so handled or transferred.

Non-powered, conventional barges are exempt from this Supplemental Harbor Fee Item, as are tugboats, towboats, or push boats, which are assessed the Harbor Fee only as hereinabove stated. (See Supplemental Harbor Fee below).

Supplemental Harbor Fee for Tows Leaving the Port District

All commercial cargo carrying barges in tows handling or transferring cargo in midstream or when anchored at or moored to any dock, wharf, or mooring facility, shall be assessed a Supplemental Harbor Fee on non-liquid cargo in all barges of such tow of Four ($0.04) Cents per ton of 2000 pounds or fraction thereof over Five Hundred (500) tons, based on the weight of the cargo so handled or transferred, and there shall be a Supplemental Harbor Fee on liquid cargo in all barges of such tow of One-Half Cent (½¢) per barrel thereof over 4000 barrels. Both such Supplemental Harbor Fees are assessed against the towboat owner, operator and owner of the cargo that leaves a wharf or other facility within the Port District for a destination outside the Port District.

		If such boat owner, operator, or person in charge of the towboat is able to show to the Port Manager with supporting paid tariff evidence that all such cargo has previously been the subject of a tariff charge when it entered the Port District aboard any vessel which paid a Supplemental Harbor Fee on such cargo, there shall not be a dual charge for such cargo and such towboat owner, operator and owner of the cargo shall be exempt from the payment of this Supplemental Harbor Fee. This Tariff charge shall be based on the towboat or ship manifest or other shipping paper accompanying the tows leaving the Port District, and the towboat owner, operator, and owner of the cargo, as shown on the manifest or other shipping paper shall be jointly liable for the payment of such Supplemental Harbor Fee to the Port District. (See Item 165—Payment of Bills as to joint liability for Harbor Fees and Supplemental Harbor Fees.)
Item 136	Vessels Exempted From Harbor Fee	(A) Vessels passing through the port which do not berth at any wharf, anchor within the District, or in any way moor themselves within the District limits; vessels stopped within the District for the sole purpose of changing plots, or because of inclement weather, remaining less than twelve hours within the limits of the District. (B) Government vessels not engaged in carrying cargo, troops, or supplies. (C) Private non-commercial pleasure craft. (D) Annual permits/licenses as set forth in Item 135.
Item 137	Special Annual or Temporary Port Permit Vessels	This Item is repealed in its entirety. However, any vessel having a valid permit in effect before the date of repeal of this Item shall not be assessed any Harbor Fees until the permit has expired.

Item 140	Lay-Up Fee	Any vessel, whether seaworthy or not, which docks, moors or anchors within the district, for a continuous period of more than five days for repairs, construction, "moth balling," dry docking or storage except one which is removed from the water by dry docking, shall after the first five days pay the following fees: Fee Per Vessel Vessels to 200 ft. in length—None. Vessels 200 ft. and over in length—$150.00 per day.
Item 155	Wharfage Rates at Public Wharves	(The Plaquemines Port, Harbor and Terminal District does not, nor does any entity on its behalf, at the present time have public wharves which it owns, controls, or operates with any fee as provided under this Tariff. The Plaquemines Parish Commission Council, the governing authority of the Plaquemines Port, Harbor and Terminal District and the Parish of Plaquemines, owns marinas which are limited to use for vessels operating in land waterways, and which are not physically susceptible to accommodate any vessels engaged in foreign, coastwise, or intercoastal trade. Such marinas are not subject to this Tariff, and are the subject of separate fees and charges as promulgated by ordinances of the Plaquemines Parish Commission Council.
Item 165	Payment of Bills	All bills are due upon presentation by the District and failure to pay when presented shall place the name of the vessel, its owners and agents, or other user of the facilities, upon a Delinquent List, the conditions of which are hereinafter defined.

The payment of the Harbor Fee and the Supplemental Harbor Fee shall be the *primary obligation of the owner, agent, or user of the vessel,* but the owner of the facility handling or storing the cargo and the cargo owner whose cargo is loaded and/or unloaded from any wharf, dock, facility, mooring facility, or anchorage within the District shall be liable *in solido as surety* for the payment of the Harbor Fee and the Supplemental Harbor Fee; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner, agent, or user of the vessel, who is primarily liable for all amounts paid by those responsible in solido but not primarily obligated. All other charges applicable to this Tariff shall be assessed to owners of the vessels, their agents, cargo owners, or owners of facilities in solido.

Parties entering and using the District, so as to become liable for any District fees whatsoever as provided in this Tariff, do by such entry and usage thereby contract to pay and are responsible for all District fees whatsoever as provided for in this Tariff.

The District reserves the right to estimate and collect in advance all charges which may accrue against cargo owners, common carrier vessels, their owners and/or agents, or against cargo loaded or discharged by such vessels or other users of the facilities of the District, whose credit has not been properly established with the District or who are habitually on the Delinquent List. Use of the facilities may be denied until such advance payment or deposits are made.

The District reserves the right to apply any payment received against the oldest bills rendered against common carriers, vessels, their owners and/or agents or users of the facilities.

		All cargo owners, common carriers, vessels, their owners and/or agents, and/or owners, lessors or lessees, of wharves or other users of the port or facilities of the District placed on the Delinquent List for reasons hereto stated shall be denied further use of the port or facilities by the District until all such reports have been filed and all charges thereon, together with any other charges due, shall have been paid.
		The District shall pay Five (5%) Percent of all fees remitted directly to the District by an agent for a vessel or a dock, wharf, or mooring facility owner as compensation for such collection by said vessel agent or dock, wharf, or mooring facility owner.
		Upon the execution of a written agreement by an agent for a vessel or a dock, wharf, or mooring facility owner relative to their collecting for the District tariffs owed by their principal or for vessels at their dock, wharf, or mooring facility, they may be relieved of their joint liability with the vessel owner.
Item 165A	Interest	When any Tariff debtor fails to pay any charges or portion thereof due under the provisions of this Tariff within 30 days of the invoice date, there shall be added to the amount of charges due interest at the rate of one and one-half per centum (1½%) per month from the due date until paid. Such interest shall be an obligation to be collected and accounted for in the same manner as if it were part of the charges due and can be enforced in a separate action or in the same action for collection of the charges, and shall not be waived or remitted.
Item 165B	Attorney's Fees	If any charges, penalties, or interest due under this Tariff are referred to an attorney at law for collection, an additional charge for attorney's fees, in the amount of Twenty (20%) Percent of the charges, penalties, and interest due shall be paid by the Tariff debtor.

19. The Port tariff assesses a two-factor fee against vessels. One a "Harbor Fee" and the other a "Supplemental Harbor Fee." (R–PF 22, 32; Ex. R–14)

20. Both the Harbor Fee and the Supplemental Harbor Fee apply to "commercial cargo vessels" which by definition in the tariff does not include pleasure craft, fishing boats, oyster boats or passenger vessels. (R–PF 23, 32; Ex. B–14)

21. Ninety-seven percent of the total number of ocean going vessels calling in the Port District remain for an average of three days. From June 1, 1983 through February 14, 1984, only 25 of 889 vessels entering the Port stayed in the Port District 14 days or more. (R–PF 27, 28)

22. Item 36 of the Tariff exempts certain categories of vessels from payment of the Harbor Fee. Included in the exemption are holders of annual permits/licenses as set forth in Item 135. (R–PF 31; Ex. R–14)

23. The Supplemental Harbor Fee as more fully set forth in the Tariff, places a fee of 4 cents per ton of 2000 pounds or fraction thereof over 500 tons based on the weight of the cargo handled or transferred. The Supplemental Harbor Fee for liquid cargoes is ½ cent per barrel for each barrel over 4000 barrels of cargo handled or transferred. (R–PF 35; Ex. R–14, Item 135)

24. The amount of coal, grain, phosphate, crude oil and refined petroleum products transferred to or from the vessel is the basis for the Supplemental Harbor Fee. (R–PF 35; Ex. R–14)

25. Prior to the adoption of the present tariff, the costs incurred by the Parish on account of the Port District Office, the marine radio operators, and the Port District rescue/patrol/fire vessels were directly allocated to the Port. A percentage of each department's costs was also allocated to the Port as follows:

Department	*Docket No. 83–2 (percent)*
Councilmen	5
Aviation	5
Fire Protection	20
Ferries	5
Safety Engineer	0
Ambulance	0
Itinerant Labor	0
Coroner	0
Health	0
Waterworks	0
Garbage	0
Sewerage	0
Purchasing	0
Internal Auditor	0
Data Processing	5
Accounting/Payroll	0

Department	Docket No. 83–2 (percent)
Sheriff	0

(R–PF 47, 48; Ex. R–55)

26. The Port District operates two patrol/rescue/fire vessels, Authority I and II, each 50 feet long and made of aluminum, capable of a top speed of 26 knots. The boats were placed in service in 1983. Each is capable of pumping $2,000 GPM of water and approximately 30 minutes of foam application. In addition, each is equipped with a boarding platform for retrieving people from water and with facilities for medical emergencies. The vessels are manned 24 hours a day with a total crew of six deckhands, six captains and one maintenance relief man. One vessel covers the Mississippi River from the District's northern boundary at Mile 82 AHP to the Pointe-a-la-Hache area. The second vessel covers the area from Southwest Pass north to Pointe-a-la-Hache. (R–PF 50; Ex. R–3)

27. Several of the crew members of the vessels are trained in marine fire fighting and some are attending Emergency Medical Technician (EMT) training. (R–PF 51; Ex. R–3)

28. Both vessels maintain marine VHF radio surveillance and also have direct radio contact throughout the Port District with the Port District Office, the Parish Sheriff's Office and the several Parish fire departments via the Parish's private channel frequency. The vessels are on call 24 hours daily, from the dispatch station located in the Port District's Office. (R–PF 52)

29. The vessels are also available to transport emergency medical personnel, fire fighting teams from the various fire departments of the Parish, and personnel from the Sheriff's Office and any other Parish, State or Federal agency. They also patrol the District for vessel pollution violations and aid in the water quality sampling program. (R–PF 53)

30. An example of the operation of the Port District patrol/rescue/fire vessels occurred on December 18, 1983. Then a tug rammed a butane-laden barge containing 4,000 barrels of liquid petroleum gas at the Gulf-Alliance Refinery dock in the Port District, causing an explosion and fire. Two men were injured in the incident. The Authority I was dispatched directly to the scene. It extinguished the fire aboard the tug, conducted a search and rescue operation for any injured persons, contained the fire aboard the butane barge, ascertained the source of the leaking butane and eliminated the leak. In addition to Authority I, the Belle Chasse Volunteer Fire Department responded with Mobile Marine Unit #2 and other shore based fire trucks, and extinguished extensive shoreside fires that were caused by the flash from the explosion of the barge/tug collision. The *M/V Louisiana,* with nine firemen aboard, was also dispatched to the scene. (R–PF 54; Ex R–3, pp. 6–8; Tr. 2/15/84, pp. 60–65)

31. Examples of other incidents of the use of the patrol/rescue/fire vessels include medical evacuations on October 24, November 29, December 7 and 15 of 1983, of sick or injured seamen aboard ocean vessels; the removal of a mental patient on December 8, 1983; and the transport of prisoners taken from vessels. The patrol/rescue/fire vessels also have assisted vessels aground and have secured a runaway barge. (R–PF 55; Ex. R–3, pp. 6–12)

32. The Parish's fire fighting efforts, in addition to acquisition, manning, and operation of the patrol/rescue/fire vessels include:

(a) execution of a fire fighting agreement with the United States Coast Guard;
(b) formulation of a marine fire plan;
(c) formulation of commitments from private facilities to provide assistance during emergencies;
(d) acquisition of a bigger snorkel fire truck than would be needed for land fires, with additional snorkel length to reach the decks of large vessels;
(e) refitting of the ferry *M/V LOUISIANA* as an auxiliary fire fighting vessel;
(f) purchase of two land-based mobile marine pumping units;
(g) purchase and stockpiling of foam to be used in fighting chemical and other fires.

(R–PF 56; Ex. R–35, pp. 14–15)

33. The ferry *M/V Louisiana* is outfitted with fire fighting capability at a cost of $272,683.00. It is equipped with a 2000 GPM pump that draws river water for ejection through fire nozzles. Two fire nozzles are for water streams at the front and two combination nozzles are at the rear for foam. In addition there are eight to ten other nozzles that can be connected to various size pieces of fire equipment for using hoses, so the pumping capacity of the vessel itself can be channeled through hoses that are made of lightweight, modern materials and can be carried up into all parts of any vessel. Additionally, the decks of the *M/V Louisiana* are capable of taking aboard any piece of Parish fire equipment, including a snorkel truck able to position its nozzles as high as approximately 50 feet above the deck of the vessel. The *M/V Louisiana* also has two 1,000 gallon capacity foam tanks attached to the pumping station. (R–PF 62; Ex. R–15, pp. 5–6)

34. The Port District has also purchased and it maintains two mobile marine 2,000 GPM pumps, which can be towed on the highways running parallel to the river. Each pump has extra hose capacity; can be lifted by crane and placed on vehicles or vessels; can be hooked into the system of the ferry and be used along with fire trucks; and can be drawn from any water source to provide a waterborne firefighting capability. Mobile Marine Unit #1 is customarily assigned to and located on the east bank

of the Mississippi River at the Woodlawn fire station. Mobile Marine Unit #2 is customarily stationed at Belle Chasse on the west bank of the river. (R–PF 63; Ex. R–15, pp. 6–7)

35. An example of the coordinated use of landbased fire department equipment with the Port's marine firefighting equipment under the Parish's marine fire plan was tested in the case of the tug/barge fire at the Gulf-Alliance Refinery. (R–PF 64; Ex. R–3, pp. 6–8; Ex. R–8

36. Another example of the coordinated use of landbased Parish Fire Department facilities and marine facilities under the marine fire plan occurred in 1982, prior to the acquisition of the patrol/rescue/fire boats, in connection with a fire in the engine room of the *M/V Dubrovnik* at the Electro-Coal Transfer Facility. The vessel was tied to a private dock when the fire took place. She was cut loose from the dock, due to the combined efforts of landbased Mobile Marine Unit #1, the *M/V Louisiana* and a private vessel borrowed by the Port. The firemen of the Woodlawn and Belle Chasse fire departments boarded the *M/V Dubrovnik* and, along with the ship's crew, were able to extinguish the fire before the arrival of the *M/V Louisiana*. (R–PF 65; Ex. 3, pp. 8–9)

37. A further example of the type of problems handled by the Port involved the world's largest drilling rig, the *Rowan Gorilla I*. The rig was undergoing repairs in the Belle Chasse area in November 1983. Three ships were anchored close to the drilling rig and due to high winds and lack of current the ships swung around endangering themselves and the *Rowan Gorilla I*. The situation had the potential for a catastrophic accident involving in excess of 300 people aboard the vessels involved. After considerable pressure from the Port District office, all Crescent Pilots were notified by their president to maintain a safe distance from the *Rowan Gorilla I*. (R–PF 71; Ex. R–3, pp. 9–10)

38. The Port District staff consists of a Port Manager, a Chief Marine Inspector, three marine inspectors, four full-time and one part-time marine radio operator and five clerks. The marine communication system is manned 24 hours a day and it enables the Port to communicate with the patrol/rescue/fire boats and the marine inspector, as well as with the Parish ferries, seven volunteer fire departments, ambulances, and all Parish radio-equipped vehicles. The Port maintains a program of safety inspection. It spends most of the inspection time inspecting smaller vessels and little if any time inspecting docks and wharves. In 1983, 107 smaller, non-commercial vessels were inspected. (R–PF 68, 69, 70; Ex. R–35, pp. 2–4; Ex. R–3, pp. 4–5)

39. The Plaquemines Parish Commission Council is responsible for Port planning and development and overall supervision of the Port District. In 1983 the President of the Council spent at least 25 percent of his Parish time on Port matters. In 1984 the President, as well as two or three other council members spent 20–25 percent of their Parish time on Port matters. Taking the Commission as a whole, not less than five percent

of the aggregate time of all nine Commissioners will be dedicated to Port matters. (R–PF 73; Ex. R–55, p. 11; Ex. R–27, pp. 1–2; Ex. R–28, p. 2; Ex. R–57)

40. The Parish's ferries are an integral part of its transportation and fire fighting system. In addition to the fire fighting capability of the *M/V Louisiana*, two other vessels can be used to transport landbased fire equipment for use against fires on the water and to transfer such equipment from one bank of the river to another. The Port has allocated five percent of the budget of the Ferry Department to the Port District expenditure. (R–PF 74; Ex. R–55, p. 17)

41. Plaquemines Parish owns one Bell helicopter and two fixed-wing aircraft, one of which is a seaplane. In the event of marine casualty, the helicopter would locate the scene of the incident and coordinate marine rescue and fire fighting efforts. For example, in January of 1983, a collision occurred in the river near Venice, Louisiana, involving two vessels where four people were killed. The helicopter was used to direct search and rescue operations for survivors. (R–PF 75; Ex. R–33, pp. 4–5)

42. The Parish aircraft are also employed in aerial surveillance of vessels on the 102 miles of River within the Port District to locate any problems that may arise such as fires, collisions, runaway barges, congestion, and any illegal activities. The helicopter is also used to observe and determine sources of pollution along the river. Since July 1983, the Aviation Department's expenditures allocated to the Port District have been 5 percent. (R–PF 76, 77)

43. The Port District uses the Parish's Water Processing Department for invoicing tariff fees and compiling data, including a list of Port District users. The Port is invoiced by the Data Processing Department for computer time and data processing personnel time at the rate of an allocation of 5 percent. (R–PF 78; Ex. R–20)

44. The costs of Port District services for the calendar year 1983, as computed by the Port, total $1,242.168.00. They are as follows:

TABLE I—PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

1983—Preliminary Expenditures

Port District staff salaries (5 full time employees and Port Manager, H.R. Benvenutti); Salaries of 4 marine inspectors; Attorney's fees; Office overhead; Maintenance and expenses of 5 automobiles; Dues of port associations and conferences. [$554,698 minus $30,000 for deck barge cost listed in Item 400] (See page 2 of Exhibit ________)	$524,698.00
Operating costs of two 50 foot patrol/rescue vessels:	

Salaries of 6 captains, 6 deckhands, Maintenance; fuel costs; Materials and supplies; insurance premium for both vessels (See Page 2 of Exhibit ________)		$300,643.00
Amortization for cost of two 50 foot vessels and radar equipment. (Total cost of $633,040.71 divided by 10 year life expectance)		$63,304.00
Amortization of cost of Deck Barge B–11 and improvements thereto, which is dock for *AUTHORITY* I vessel		
Cost of Barge	$30,000	
Cost of Improvements	14,870	
(Total cost of $44,870 divided by 10 year life expectancy)		$4,487.00
Marine Radio Operators, 4 full-time and 1 part-time. (See Page 2 of Exhibit ________)		$60,775.00
Life & Health Insurance for Port Employees		$31,401.00
Retirement for Port Employees		$17,077.00
PORT DISTRICT		$1,002,385.00
OTHER PARISH DEPARTMENTS		$1,242,168.00

TABLE II—PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

1983—Preliminary Expenditures

Fire Protection: [$598,167.00 (1983 preliminary expenditures) − 143,116.00 (cost of new equipment) $455,051.00 × 20%]	$91,010.00
Amortization of new fire equipment [Total cost of $143,116.00 divided by 20 year life expectancy × 20%]	$1,431.00
Ferries [$1,482,555.00 (1983 preliminary expenditures) × 5%]	$74,128.00
Aviation [$164,379.00 (1983 preliminary expenditures) × 5%]	$8,219.00
Data Processing (1983 preliminary expenditures)	$36,221.00
Councilmen [$575,474.00 (1983 preliminary expenditures)	

× 5%]	$28,774.00
TOTAL OTHER DEPARTMENTS	$239,783.00

(R–PF 79, 80, 81; Ex. R–35, pp. 9–10; Ex. R–55, p. 11, Ex. R–27, pp. 1–2; Ex. R–28, p. 2)

45. The costs of Port District services for the calendar year 1984, as computed by the Port, total $1,394,369.00. They are arrived at as follows:

TABLE III—PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

1984 Budget

Port District staff salaries (5 full time employees and Port Manager, H.R. Benvenutti); Salaries of 4 marine inspectors; Attorney's fees; Office overhead; Maintenance and expenses of 5 automobiles; Dues of port associations and conferences. (See Page 1 of Exhibit _______)		$483,960.00
Operating costs of two 50 foot patrol/rescue vessels: Salaries of 6 captains, 6 deckhands, Maintenance; fuel costs; Materials and Supplies; (See Page 2 of Exhibit _______)		$406,650.00
Insurance premium for both vessels		$81,253.00
Amortization for cost of two 50 foot vessels and radar equipment. (Total cost of $633,040.71 divided by 10 year life expectancy)		$63,304.00
Amortization of cost of Deck Barge B–11 and improvements thereto, which is dock for *AUTHORITY I* vessel		
Cost of Barge	$30,000	
Cost of Improvements	14,870	
(Total cost of $44,870 divided by 10 year life expectancy)		$4,487.00
Marine Radio Operators, 4 full-time and 1 part-time. (See Page 3 of Exhibit _______)		$70,160.00
Life & Health Insurance for Port Employees		$31,401.00
Retirement for Port Employees		$17,077.00
PORT DISTRICT		$1,158,293.00
OTHER PARISH DEPARTMENTS		$236,076.00
		$1,394,369.00

TABLE IV—PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

1984 Budget

Fire Protection:	
[$1,268,960.00 (total 1984 budget) − $751,264.00 (cost of new equipment) $517,696.00 (1984 operating funds) × 20%]	$103,539.00
Amortization of new fire equipment [Total cost of $751,264.00 divided by 20 year life expectancy × 20%]	$7,512.00
Ferries [$1,487,500.00 (total 1984 budget) × 5%]	$74,375.00
Aviation [$187,500.00 (total 1984 budget) × 5%]	$9,371.00
Data Processing [$355,342.00 (total 1984 budget) × 5%]	$17,767.00
Councilmen [$470.241.00 (total 1984 budget) × 5%]	$23,512.00
TOTAL OTHER DEPARTMENTS	$236,076.00

(R–PF 82; Ex. R–35, pp. 14, 15.)

46. The terminal facilities along the river are privately owned. Under the tariffs involved here the wharves, docks and other waterside facilities are not assessed any charges by the Port District for the various services (fire-protection, rescue, etc.) rendered by it. (Ex. R–14.)

47. The private wharves and docks receive substantial benefits from the services provided by the Port. (Tr. 2/16/84, pp. 103, 133; Tr. 2/17/84, pp. 9, 10, 15; Tr. 2/21/84, pp. 150, 156, 157, 177.)

48. The companies owning the terminals pay Parish ad valorem taxes, and some provide their own land-based fire protection. There is no proof in the record that either the revenues derived from the ad valorem taxes or the benefit to the Parish from the land based fire protection are comparable to the fees that would otherwise be assessed the private wharves and docks under the tariff. (Entire Record.)

49. Commercial fishing vessels and crew boats do not pay any fees under the tariff, although they both are benefited by the services rendered by the Port. (Ex. R–14; Tr. 2/15/84, pp. 107, 108, 124, 139.)

50. Supply boats are benefited by the Port's services but the record is devoid of any evidence comparing the benefits received to any fees paid by such boats. (Entire Record.)

51. The record does not contain sufficient evidence to justify the 500 ton exemption contained in the Supplemental Harbor Fee. There is no factual comparison of relevant factors relating to the benefits derived from or the cost of Port services, nor is there any evidence as to the resultant economies in Port overhead expense. (Entire Record.)

52. Inland barges are not assessed any charge under the Supplemental Harbor Fee when they enter the Port. They are charged a fee on leaving the Port only if the cargo they are carrying has not previously been subject

to the tariff charge when it entered the Port. (Ex. R–14; Tr. 2/17/84; pp. 60, 61; Tr. 2/21/84, pp. 80–83.)

53. Despite the terms of the tariff which would charge a fee to oceangoing barges entering the Port, oceangoing barges carrying phosphate to the Electro-Coal Transfer Corporation private wharf were not charged a fee under an oral "agreement" between the Port and the company. (Ex. R–14; Tr. 2/21/84, pp. 106–119, 126–134, 163–166.)

54. The record does not contain any evidence indicating that there was any weighing of the benefit and comparable cost in relation to inland barges as opposed to such benefit and cost to other users, so as to justify the exemption of such barges. Further, there is no real evidence of administrative difficulty warranting the exemption. (Entire Record.)

55. The permit/discount feature of the tariff does favor local interests over non-local commercial cargo vessels. The evidence of record does not establish that the fees paid by the smaller vessels reasonably represents the benefit they receive from Port services when compared with other users. (Ex. R–14; Tr. 2/17/84, pp. 43, et seq.)

56. After the decision in the *Dreyfus* case the Port settled the case by offering the parties to the suit a reduction, remission or rebate of 80 percent of the Harbor Fees and Supplemental Harbor Fees. (R–PF 18.)

57. The Port tariff does assess a fee against Port users for providing to vessels and cargo essential health, safety and security services. (Ex. R–14.)

58. The Port does have primary responsibility for furnishing fire and rescue protection in the Port. While the Coast Guard has some general responsibility its resources are limited and it looks to this Port as well as other local ports to be primarily responsible. (Exs. R–38, 48, 49.)

Ultimate Findings of Fact

59. The Plaquemines Port, Harbor and Terminal District is a subdivision of the State of Louisiana and is an "other person" subject to the Shipping Acts of 1916 and 1984. The combination of the Port's exclusive ability to provide essential health, safety and security services to vessel and cargo interests in commercial, cargo-handling transactions, its assessment of selective cargo transfer fees and its control of access to private terminal facilities results in fundamental control over the rates and practices of terminal facilities. Such pervasive involvement in the business of common carriers, marine terminals and commerce of the United States confers on the Commission jurisdiction over the Port under the pertinent provisions of the Shipping Acts of 1916 and 1984 and subjects the Port's fees to scrutiny under those provisions.

60. The Port's practice of assessing, on the basis of cargo transactions, a fee for providing to vessels and cargo essential health, safety and security services constituted the furnishing of "other terminal facilities" within the meaning of the Shipping Acts of 1916 and 1984. The term "other terminal

facilities'' contemplates not only physical assets such as docks, wharves and warehouses, but also encompasses services rendered ''in connection'' with the marine terminal ''link'' in transportation modes.

61. The settlement of the *Dreyfus* case by the Port does not unjustly discriminate against others who are not parties or privy to the former proceeding and who are not identifiable in this proceeding as having suffered any injury, much less the amount of such injury. Further, public policy favors the settlement of litigation.

62. The tariff fees in question are not a toll charge in contravention of the United States Constitution. Rather, those fees represent the establishment of regulations and practices related to or connected with the receiving, handling, or delivering of property; namely, they are fees to provide for the policing of the waterway so as to insure the safety and facility of movement of vessels and cargo using it.

63. The Harbor Fee and Supplemental Harbor Fee do not bear a reasonable relationship to the comparative benefit obtained by the assessed parties from the services provided by the Port and, further, the various exceptions contained in the tariff relating to private terminals, supply boats, crew boats, fishing vessels, inland barges, as well as the five hundred ton and the permit/discount rate features are unduly preferential and unjustly discriminatory. The record fails to contain sufficient evidence to either demonstrate that other revenue considerations of the exempted classes are reasonably related to the fees forgiven or that such exemptions are required administratively.

64. The surety provisions of the tariff relating to agents are not unreasonable. A terminal operator can hold liable for tariff fees all direct and indirect users of its services. All parties made sureties for the Port's fees are either direct or indirect users of the Port's services. Furthermore, there is no evidence that the Port has abused these liability provisions or that a hardship or injustice has resulted from their application.

65. The Supplemental Harbor Fee in this proceeding is not an improper charge against vessels because the evidence does not establish why the carrier-shipper contract should prevent the imposition of the fee on the vessel, either under the facts or the law.

Discussion and Conclusions

This case involves several issues and a voluminous record containing extensive oral testimony and documentary evidence. The issues as we understand them and as set forth in the briefs of the parties are discussed below. Those issues which are preliminary in nature will be disposed of first. Those dealing with the merits will then be dealt with in turn.

Issue No. 1—*The Louis Dreyfus Settlement*

On July 30, 1982, the Commission, in *Louis Dreyfus Corp. v. Plaquemines Port Harbor and Terminal District,* 25 F.M.C. 59 (1982), aff'd.

21 SRR 219, held that the tariff then on file (Exhibit R–58) was improper in that the Harbor Fees and Supplemental Harbor Fees were unlawful and were in violation of section 16, First, and section 17 of the Shipping Act, 1916. The Port has offered a reduction, remission or rebate of 80 percent of the Harbor Fees and Supplemental Harbor Fees to parties who were port users and were parties to the litigation. The complainant argues that:

> The practice engaged in by the District in refunding, only to parties in litigation, the charges found by the Commission to be unlawful in the *Louis Dreyfus* case was patently discriminatory and requires that the Parish make such refunds as to all parties disadvantaged by its unlawful charges. [Complainant's Initial Brief, (pp. 28, 48)]

The complainant cites no facts indicating who the other parties might be nor does it cite any law in support of its assertion. Apparently, it is invoking section 22(a), Shipping Act, 1916, as a basis for reparations to the "other parties."

We believe the complainant's argument on this issue is without merit. Where, as in the *Dreyfus* case there was an open public settlement of a legitimate claim there is no basis for a finding that such a settlement unjustly discriminates against other parties not privy to the proceeding. *Levatino & Sons* v. *Prudential Grace Lines*, 18 F.M.C. 89, 112–114 (1973), adopted in relevant part at 18 F.M.C 83 (1974). This is especially true in light of the public policy favoring the settlement of litigation. See *Behring International-Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973, 981–986 (1981), and the cases cited therein. Further, under section 22(a) reparations can only be awarded where actual injury can be shown to be caused by violation of the Shipping Act and where the amount of injury suffered can be proven. Here, the record is devoid of any such evidence so that even if one wanted to refund a portion of the tariff charges to other persons not parties to the *Dreyfus* action, this record would not allow him to do so. In short, even if there was discrimination as to "other parties," that discrimination is not properly at issue in this case nor is there any basis for relief in this proceeding.

Issue No. 2—*Whether or Not the Charges Contained in the Tariff Are Unlawful Under the Constitution of the United States*

At pages 35 through 40 of its Initial Brief and pages 1 through 13 of its Reply Brief the complainant argues that the charges imposed by the Port's tariff are prohibited by the Constitution of the United States which at 37 U.S.C. 10 states "all the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways," and which at Art. I, § 10, Clause 3, forbids any state to "lay any duty of tonnage" without the consent of Congress. The argument goes to the Commission's jurisdiction. It is surprising because it

is tantamount to arguing that the charges in the tariff cannot be collected by the Port as an "other person" establishing "just and reasonable regulations and practices related to or connected with the receiving, handling, storing or delivering of property" under section 17 of the Shipping Act, 1916. Coupled with the complainant's argument that the Port is a non-entity generally and provides no services it would mean that the Commission would have no jurisdiction over the Port and that it could not entertain the complaint or grant the relief sought by the complainant. In essence, were we to hold in favor of the complainant on this issue, we should dismiss the complaint and discontinue the proceeding.

However tempting and easy a solution the above alternative may be, we must disagree with the complainant on this issue. The old and long-standing Supreme Court cases the complainant cites do indeed forbid the imposition of a duty or tax which is measured by tonnage and the capacity of the vessel and which is in essence a contribution claimed for the privilege of arriving and departing from a port of the United States.[2] However, some of these same cases recognize, as does the complainant, that where actual services are rendered charges for those services are not forbidden even where specific benefit cannot be shown. As was stated in *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935), a case cited by the complainant:

> * * * the policing of a harbor so as to insure the safety and facility of movement of vessels using it differs from wharfage or other services which benefit only the particular vessels using them. It is not any the less a service beneficial to the appellant because its vessels have not been given any special assistance; and further:
>
> * * * charges levied by state authority to defray the cost of regulation of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible. *Idem* p. 267.

See also *Huse* v. *Glover, supra*, and *Indiana Port Commission* v. *Bethlehem Steel Corp.*, 534 F.Supp. 858 (USDC, N.D. Ind. 1981).

The real jurisdictional issue in this proceeding, of course, is whether or not the Port is an "other person" who provides a service to the ocean commerce going through the Port. The complainant asserts in its briefs that the Port "renders nothing but its presence"; "is a non-existent entity providing no facility"; "does not provide the anchorages"; "has not in any manner constructed or improved the Mississippi River"; and is "only a paper entity." We cannot agree with those assertions. The record in

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[2] *Huse* v. *Glover*, 119 U.S. 543 (1886); *Transportation Co.* v. *Parkerburg*, 107 U.S. 691 (1883); *Southern Steamship Co.* v. *The Masters and Wardens of the Port of New Orleans*, 73 U.S. (6 Wall.) 31 (1867); *Peetle* v. *Morgan*, 86 U.S. (19 Wall.) 581 (1874); *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577 (1874); *Moran* v. *New Orleans*, 112 U.S. 69 (1884).

the proceeding establishes that the Port Authority was duly established by the State of Louisiana, that while it does not own the terminal and shoreside facilities, it controls and regulates them, and most importantly, that it does provide fire and safety protection for the Port by having available substantial amounts of fire-fighting equipment, personnel, communication, helicopter and other services that are used to service the Port and the vessels and facilities that use the Port. Further, contrary to the complainant's allegations, the facts indicate that the Coast Guard looks to the Port to provide the day to day fire protection and is far less able to provide timely fire protection than is the Port itself. All of the pertinent evidence, including the testimony of the Coast Guard Commandant, establishes those facts. Given them we must agree with the holding in *Dreyfus, supra,* where the Commission said:

> * * * Local governmental authorities are not categorically exempted from the requirements of the Shipping Act, nor is there any court or Commission precedent requiring ownership of a facility in order to confer jurisdiction under Section 1 of the Act. Thus, the Plaquemines Port, Harbor and Terminal District, a subdivision of the State of Louisiana, is an "other person" subject to the 1916 Act. The combination of the Port's exclusive ability to provide essential health, safety and security services to vessel and cargo interests in commercial, cargo-handling transactions, its assessment of selective cargo transfer fees and its control of access to private terminal facilities results in fundamental control over the rates and practices of terminal facilities. Such pervasive involvement in the business of common carriers, marine terminals and the commerce of the United States confers on the Commission jurisdiction over the Port under Section 1 and subjects the Port's fees to scrutiny under the substantive provisions of the 1916 Act. * * *

So here, we hold that the charges made under the tariff related to a service rendered by the Port and were not in the nature of toll charges. As such, they did not violate any provision of the Constitution of the United States or any other statute.

Issue No. 3—*Whether or Not the Harbor Fee and Supplemental Harbor Fee Bear a Reasonable Relationship to the Comparative Benefit Obtained by the Assessed Parties From the Services Provided by the Port*

If the charges collected under the tariff do not bear a reasonable relationship to the comparative benefit obtained by the assessed parties from the services provided by the Port then the tariff violates the Shipping Act of 1916[3] and must be set aside. While a determination of this issue involves

[3] While the Shipping Act of 1916 is referred to throughout this decision the holding also applies to the Shipping Act of 1984 where it contains similar and relevant sections.

a matching of the overall costs to the overall benefit, the fact that the overall costs justify the overall benefit is not dispositive of the issue. Rather as was stated in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261 (1968), at page 282:

> The question under § 17 is not whether the petitioner has received some substantial benefit * * *, *but whether the correlation of that benefit to the charges imposed is reasonable*; and further,
>
> The proper inquiry under § 17 is, in a word, whether the charge levied is reasonably related to the service rendered.

Here the complainant argues that "the alleged services are not a benefit for which charges may be imposed" and that oceangoing vessels should not "be required to pay for the fire and police protection and other services afforded by the Port." It argues further that the "district charges are unreasonable, unduly preferential, prejudicial and discriminatory." As to the latter argument it cites *Baton Rouge Marine Contractors Inc.* v. *Federal Maritime Commission*, 655 F.2d 1210 (C.A., D.C., 1981) and the language:

> * * * if the challenger pays more than other parties pay, for fewer benefits than other parties receive, then the charge is unreasonable under § 17 * * * the FMC "failed to conduct any comparative analysis of the relative benefits insuring to the several users of the facility. This comparison * * * was at the heart of the Commission's earlier approach and is essential to a determination that 'the charge levied is reasonably related to the services rendered.'" Separate slip op. at 4, J.S. 182 (quoting from Volkswagenwerk, supra, at 282, 88 S.Ct. at 940–41). We agree that, at this juncture the Commission's order cannot stand given the absence of any "exposition of the relative benefits [of the automated gallery] to stevedores and, other segments of the distribution channel." Id. at 2, J.A. 180.

In our view, we think it clear from this record that the Port does furnish some services that benefit commercial cargo vessels and we reject the complainant's view that the services are not a benefit for which charges may be imposed. We also believe that the facts and evidence in this proceeding support the finding that the *overall* costs allocated to the various services are reasonable or at least are not unduly or unreasonably discriminatory. However, they should be allocated evenly and fairly to the recipients of those services. Stated differently the charges must be so allocated as to not unduly or unreasonably discriminate against one or more recipients so as to violate the pertinent provisions in the Shipping Acts.

Here the complainant avers that the charges[4] are unduly discriminatory because:

[4] We have difficulty in some cases in ascertaining just what discrimination the complainant would have us find specifically as to the Harbor Fee vis-a-vis the Supplemental Harbor Fee.

(1) "there is no contribution to the District by the wharves, docks or other waterfront facilities in the District,"

(2) "supply boats are benefited but do not pay appropriate charges,"

(3) "commercial fishing vessels are benefited but do not pay any charges,"

(4) "launches used by vessels to carry crewmen back and forth between ship and shore are benefited and do not pay any charges,"

(5) "the five hundred ton exemption is not reasonable,"

(6) "inland barges transporting cargo into the District are not assessed a Supplemental Harbor Fee."

(7) "The Permit/Vessel Length features of the tariff are unjustly discriminatory."

There is no factual dispute in this record as to what the tariff provides regarding the interests enumerated above. Certainly, the tariff does not exact the same fee from them as it does from "commercial cargo vessels." In this sense it discriminates. What we must decide is whether or not that discrimination is so unreasonable as to violate the Shipping Acts. In reaching our findings we should note that while the tariff involved here is patterned after the tariff involved in the *Dreyfus* case, the amounts involved are quite different and some provisions which were found to be improper in *Dreyfus* have either been changed or deleted entirely. For example, under the new tariff all commercial cargo vessels, including those under 100 feet, pay the Harbor Fee and there is no longer a free Harbor Fee Permit for vessels that pay ad valorem taxes. Further, the tariff here, unlike its predecessor, does not credit payment of either the Harbor Fee or the Supplemental Harbor Fee against the other fee. The new tariff does not provide for fines and criminal penalties for failure to pay tariff charges, nor does it provide that the Port District is the sole interpreter of the tariff provisions. Finally, the amounts of both the Harbor Fee and the Supplemental Harbor Fee have been changed, the latter being reduced from 10 to 4 cents per ton of 2000 pounds or fraction thereof, of 500 tons based on the weight of the cargo so handled or transferred.

All of the above, coupled with numerous other facts in the record[5] convince us that the Port District and the commissioners who were responsible for its operation and management at least attempted to address the objectionable parts of the tariff before the Commission in *Dreyfus*. However, we must determine the viability of their actions, not on the basis of their good faith or good intentions, but rather on the basis of the provisions contained in the tariff now in effect.

[5] For example, the cost and budget estimates of various Parish Departments allocated to the Port were drastically reduced. See Findings of Fact, Number R–48.

As to the exclusion of the wharves and docks from the payment of fees under the tariff, both the Harbor Fee and Supplemental Harbor Fee have as their purpose the collection of fees:

> to assist in defraying the expenses of the administration and maintenance of the port and harbor, including the supervision of the shipping of the port, with the view to preventing collisions and fires, * * * and to aid in extinguishing fires on vessels * * * and in the harbor, *and upon private wharves, docks, and immediately adjacent facilities connected thereto* * * * (Emphasis supplied.)

The language of the tariff as well as both the testamentary and documentary evidence clearly establishes that the private wharves and docks do and were meant to derive some benefit from the services provided by the Port.[6] Yet, the tariff does not provide for the payment of any fees by the owners of the wharves or docks. The respondent seeks to justify the omission by asserting that, "The Landbased Marine Terminals are Not Substantial Beneficiaries of Port Services and Thus Should Not be Assessed a Portion of the Supplemental Harbor Fee." In support of its assertion the respondent notes that, "all of the privately-owned terminal facilities within the Port pay *ad valorem* taxes to the Parish" and that they "are therefore subsidizing the Port's firefighting costs," and that if they were required to "share in the payment of Harbor and/or Supplemental Harbor Fees, they would be saddled with a dual burden, i.e., the burden of paying indirectly through their *ad valorem* taxes to the Parish a portion of the Port District's safety costs, plus the burden of paying directly some share of the Harbor Fees and/or Supplemental Harbor Fees to the Port District." The respondent also submits that, "The terminals make an additional contribution to the Port District in that under the Tariff they are liable as sureties for the payment of the Harbor Fees and Supplemental Harbor Fees by vessels. In addition, they are committed, under the Marine Fire Plan, to provide support and facilities for the loading of land-based equipment upon privately-owned vessels assisting in marine firefighting." Finally, the respondent alleges that, "The record demonstrates * * * that the terminals are not materially dependent upon the Port's firefighting services for their protection" and "do not require marine rescue services." It describes the concrete and steel construction of the terminals and how "the marine portions of the terminals' facilities are substantially fireproof." It says that, "to the extent that any risk of fire at all may attach to the water-side terminal facilities, that risk is generated by the presence of a vessel loading or discharging cargo."

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[6] The testimony of various witnesses, some of them offered by the respondent, refers to the private facilities as being part of the Port benefiting from its services. Further, the evidence regarding various catastrophes and emergencies clearly involve activities taking place on or near wharf facilities.

We believe that the record in this proceeding clearly establishes that the terminal and wharf facilities are an integral part of the Port District and that the services provided by the Port do benefit those facilities. We have already cited that portion of the tariff that specifically refers to the need to collect monies to service "private wharfs and docks." In addition, the respondent's own witnesses testified that these facilities were part of the Port or marine area and that they benefited from the services provided by the Port. Respondent's expert testified that wharfs were "related to marine problems" (Tr. 2/16/84, p. 103); and a Port Commissioner stated that, "I would say they were marine," when asked if the private docks were part of the marine or inland port of the parish (Tr. 2/16/84, p. 131) and that the services rendered by the Port "are of benefit to everyone * * * and not only the ships that use the harbor, but the facilities along the river, the privately owned facilities, wharves" (Tr. 2/16/84, p. 133); another of respondent's expert witnesses testified that, "If there were a fire in a waterfront—in a waterfront facility, I believe that it would be fought from the water * * * the marine fire fighting equipment and consequently, the shoreside terminal would benefit" (Tr. 2/17/84, pp. 9, 10), and further that, "By the term 'shipping community,' I mean primarily to be vessels that transit the waterway. But I would have to include the shoreside terminals as well"; (Tr. 2/17/84, p. 15); the Port Director when asked to define the port area stated as to the facilities along the river, "Definitely, those are part of the port * * * and certainly they are part of our regulatory requirements for application of certain safety standards. What I am saying * * * is * * * laws and regulations not only deal with the vessels but also the facilities that are located on its edge" (Tr. 2/21/84, p. 150), and that in fire and safety inspections, "at least equal effort is spent on inspection of facilities along the river as is spent in both the vessel categories" (Tr. 2/21/84, pp. 156, 157); and further in answer to the question, "How about the facilities along the waterfront? Are they part of your responsibility? The wharves and the docks?", the answer was, "I would say, yes, sir?" (Tr. 2/21/84, p. 177); another Port Commissioner in answer to the question, "Do you consider the private wharfs and dockages along the river are part of the Plaquemines Port?", stated, "Yes, sir, to the extent that they provide services to river transportation or transportation forms that use the river," (Tr. 2/24/84, p. 158).

In addition to the above, the record is replete with evidence that the services provided by the Port significantly benefit the private terminals. The various documents and testimony concerning certain emergencies and catastrophes at the Port[7] indicate that disasters are just as likely to occur because of activities taking place on the wharves and docks as they are in other parts of the port. Indeed, considering the type of material being

[7] These involve (1) the Gulf-Alliance Refinery Dock, (2) the International Marine Terminal Dock, and, (3) the Electro Coal Dock.

handled at the docks, i.e., liquid petroleum, sulfuric acid and chemicals, grain, butane gas, etc., the threat of explosion and fire is obvious.[8]

So here, we must reject the respondent's argument that, "the landbased marine terminals are not substantial beneficiaries of Port services." We believe they do benefit from Port services and that the failure to even consider the payment to be made by terminals under the tariff is unjustly discriminatory. (Tr. 2/17/85, p. 35) We also reject the view that the terminals "do not require marine rescue services" because "they provide their own fire protection" and because "the marine portions of the terminals' facilities are substantially fireproof." In our view, the fact is they are susceptible to catastrophic fires and/or explosions which might do extensive damage to life and property and the services provided by the Port which are available to the terminals are just as valuable to the terminals as to commercial cargo vessels.[9]

As to the argument relating to the payment of *ad valorem* taxes by the private terminals and their liability under the tariff as sureties and their commitment under the Parish's Marine Fire Plan, we do not agree with Respondent that these considerations should allow the terminals to pay nothing under the tariff in issue. The *ad valorem* taxes are what any business or citizen would pay and are quite small to begin with. They have nothing to do with the marine services involved here. As to the surety clause in the tariff there is no evidence in the record that the terminals paid anything as surety, and even if they had that fact alone would not excuse their obligation to pay for the Port services which benefited them. Finally, as to their willingness to provide emergency fire services, it is the duty of every Parish citizen and ought not be looked upon as a reason for exempting the terminals from paying their fair share under the tariff.

Surprisingly, the argument advanced here by the respondent is substantially the same position taken in the earlier *Dreyfus* case, and unlike the other objectionable provisions cited in *Dreyfus*, the Port did nothing in the new tariff regarding terminal facilities. In *Dreyfus* the Commission decided that:

> A measurement of the reasonableness of the exemptions would be whether the other revenue considerations of the exempted classes are reasonably related to the fees forgiven. None of the exemptions appears to meet this standard. * * * there is no showing that the cargo protection costs saved through the expenditures of private wharf owners equals or exceeds the foregone revenue resulting from their exemption. Finally, there is no proof that

[8] It is interesting to note that on November 13, 1985, an Exxon oil tank barge was simply "blowing out" gas fumes at the Gretna Machine & Iron Works, a private dock in the Port of New Orleans. It exploded killing one person, injuring others and doing substantial damage to the dock. While this accident did not occur in the Plaquemines Port, certainly it could have and is the kind of occurrence the Port's fire fighting and rescue service is meant to prevent or care for.

[9] See Tr. 2/15/85; pp. 64, 98, 170; Tr. 2/21/85, p. 33.

> the revenue derived from ad valorem taxes paid by the port users exempted from harbor fees are generally comparable to the fees that would otherwise be assessed these users. Indeed, the low ad valorem taxes and the admission by the Port that ad valorem revenues represent a small portion of Port revenues undermine the validity of the harbor fees exemption and support the complainants' allegation that the fees are a device whereby non-local interests subsidize the governmental services rendered Parish residents.

So too here, we hold that the Port similarly violated the Shipping Acts in its assessment of a harbor fee and supplemental harbor fee.

As to the complainant's argument that the tariff violates the Shipping Acts in that supply boats, fishing vessels and crew launches benefit from the Port services in question but do not pay any or adequate fees, we believe that these boats do derive some benefit from the services provided by the Port, albeit not as much as commercial cargo vessels or the private wharves and docks. Certainly, they can catch fire or explode or have a need for medical evacuation—any one of which could trigger the use of the Port's fire fighting or emergency equipment. The respondent alleges that they ought not to come under the tariff either because they do not use the main portion of the river, do not pose any real danger or because it would cost more to collect fees from them than the amount of the fees themselves.

In *Dreyfus, supra,* on similar facts the Commission decided that:

> Because there is no differentiation as to the nature of the cargo or other transportation factors involved in the assessment of fees, a competitive or "triangular" relationship need not be proven to establish a violation of Section 16 First. The Port has treated different classes of persons and descriptions of traffic unequally in the imposition of its fees. Because the exemptions from the tariff fees create a situation where a minority of port users pay substantial fees to defray general port expenses while the majority of users pay little or nothing, Complainants have made a prima facie showing of undue preference and prejudice. This shifts the burden to the port to justify the exemptions which burden the port has failed to meet. (25 F.M.C. 59, 68)

Further on the Commission stated:

> Complainants have also made a prima facie showing under Section 17 that charges do not bear a reasonable relationship to the comparative benefit obtained from the port services by the assessed parties. The charged parties have not received benefits from the Port's services proportionate to the costs allocated to them. Moreover, other users of the services obtain equal or greater benefits and have not been shown to have paid their allocable share of Port costs. The charges are not based upon the actual use of the Port services by the charged parties. Even if the "generalized benefit" concept advanced by the Port were acceptable it appears

> that the exempted users obtain the same generalized benefit as the charged parties. Yet, as mentioned above, there is no evidence that these exempted classes have made other contributions to the operating costs of the Port that approved the level of fees that would have been paid under the Port tariff if an exemption were not granted. Moreover, the tariff is applicable only to users of the navigable waterways of the Port, although a large portion of "marine related" Parish expenses allocated to the Port arises from Parish services provided outside the navigable waterways. While there need not be a precise correlation between "marine related" costs allocated to the Port by the Parish and the classes of Port users assessed fees, they must be reasonably related. Here, there is a broad basis for determining "marine related" costs and a narrow class of Port users assessed those costs. (25 F.M.C. 59, 68–69)

We believe the above citations from *Dreyfus* are equally applicable in this case and that if fishing vessels, supply boats and crew launches are to be exempted under the tariff, the respondent has the burden to and must actually justify the exemptions, however reasonable one might otherwise assume them to be. Unfortunately, on the record made here, we cannot hold that the burden has been met. The testimony of the respondent's primary expert witness indicates that while she considered and made a determination as to the reasonableness of the overall costs and the overall fees under the tariff, she did not even consider the reasonableness of the allocation of the fees vis-a-vis one user against another. (Tr. 2/17/84, p. 31 et seq.) She mistakenly believed that supply boats and crew boats paid a fee, when, in fact, they do not. When asked if they benefited from Port services and should pay a fee she stated she was told that the administrative burden of assessing the vessels was greater than the worth of the assessment.

In considering this issue respondent would have us differentiate between the fishing boats, "oil rig service boats" and commercial cargo carrying vessels because, "The nature of the operation of these types of vessels and the Port services afforded them is different from that afforded to commercial cargo ships on the River," and because, "These considerations (those relating to the carrying of heavy industrial equipment versus the carrying of bananas as discussed in the Volkswagen *werk* case, *supra*) are precisely applicable to the distinction made in the tariff between commercial and cargo vessels on the one hand and fishing and oil rig service boats on the other. These categories of vessels and their respective demands for Port services are as different as heavy equipment and bananas." (Parenthesis supplied.) The respondent then states that, "It is noteworthy that NOSA, while condemning the exemption of fishing boats and smaller oil rig service boats has neither shown that it is harmed by these exemptions, nor has it suggested any more desirable 'alternative imperfect rule' than

the one the Tariff contains. The exemptions have, in summary, not been shown by substantial proof to be unjustly discriminatory."

We believe the respondent's argument cannot be adopted. Certainly, we would readily agree that the commercial cargo vessels which pay fees under the tariff differ in appearance, size and use from fishing vessels, crew boats and supply boats. However, that consideration is not determinative of the issue. In its tariff the Port, in essence, imposes a fee to supply Port services, "with the view of preventing collisions and fires, policing the river and riverfront, providing services of all kinds as required for an orderly and safe port operation. . . ." As to the fishing boats, crew boats and supply boats there is no question but that the tariff anticipates and provides services to them if needed, especially in the area of fire prevention and rescue. The respondent's own witnesses describe how a substantial part of the Port's marine inspectors' activities involve inspection of the offshore supply vessels and crew boats (Tr. 2/15/84, pp. 107, 108, 134, 139), and how the Port helicopter is used to observe small vessels (Tr. 2/21/84, pp. 35, 36, 39, 43, 44, 45).[10]

Given the above we believe the real question as to the smaller vessels is what portion of the costs is allocable to the benefits they derive from Port services. That they differ in size, appearance and use from commercial cargo vessels is not of itself a controlling factor, but rather, how much more or less do they benefit. In light of all of the above, as well as the absence of any definitive evidence in the record that there was any weighing of benefits and fees regarding the fishing boats, crew boats and supply boats as against the commercial cargo vessels we must hold that the respondent has failed to sustain its burden of showing that the above named vessels reasonably should not be required to pay *some* reasonable fee under the tariff. In so doing we note that the respondent's attempt to place the burden on the complainant to come up with a "more desirable 'alternate imperfect rule'" is invalid. As we have noted, under *Dreyfus*, the burden for justifying exemption is on the respondent and it is not necessary for the complainant to show harm or suggest alternatives for it to prevail.

As to the complainant's argument that the five hundred ton "exemption" used in the computation of the Supplemental Harbor Fee is unreasonable, once again we must deal with the fact that it is an exemption and that the burden is on the respondent to justify it. It argues that, "the exemption of vessels carrying less than 500 tons is supported by both the resulting economies in Port overhead expense and by the lesser risk of catastrophe presented by such vessels." It also submits that, "the 500 ton exemption applies impartially to all vessels and all commodities. . . ."

[10] The helicopter pilot testified that any service he performed regarding fishing boats was charged to the "Commission Council" and not the Port Authority.

Once again, as with the supply boats and crew boats, it may well be that the action taken by the Port is reasonable, but the record does not contain enough evidence to allow us to hold that the respondent has sustained its burden. For example, it is true that the exemption applies impartially to all vessels and all commodities—but only as to those users who pay a fee under the tariff. It does not apply to users carrying less than 500 tons and as to them it is an exemption and is not "impartial." Insofar as the argument of lesser risk of catastrophe it stands on the same footing as it did with respect to fishing boats, crew boats and supply boats. Vessels carrying less than 500 tons may well be a lesser risk than vessels carrying more, but certainly they benefit from the services provided by the Port and ought to pay for these services, unless the facts of record justify an exemption. In this proceeding that is not the case and the only remaining argument is "the resulting economies in Port overhead," which have not been clearly established or identified in the record.

The complainant argues that the tariff violates the Shipping Act in that it unjustly discriminates by exempting inland barges transporting cargo into the District from being assessed under the Supplemental Harbor Fee. The fact is that under the tariff inland barges coming into the Port do not pay a Supplemental Harbor Fee. Such barges going out of the Port are liable for the Fee, only if "such cargo has (not) previously been the subject of a tariff charge when it entered the Port aboard any vessel which paid a Supplemental Harbor Fee on such cargo, (in which event) there shall not be a dual charge for such cargo and such towboat owner, operator and owner of the cargo shall be exempt from this payment of this Supplemental Harbor Fee." (Parenthesis supplied.) Once again, because an exemption is involved, under the holding in *Dreyfus, supra,* the burden for justifying it is on the respondent. It argues that, "This treatment of barge traffic is not discriminatory, but instead is reasonable and justified by valid transportation considerations." It describes how barge traffic coming into the Port consists mostly of coal and grain brought in from upriver, and how it would not be feasible to have the tug bringing in the barges to "calculate the amount of cargo in the Plaquemines-destined barges contained in the tow, and to locate and to pass on to the owner of each barge its pro rata share of Supplemental Harbor Fee." It compares the incoming cargo to outgoing barge tows of phosphate and crude oil or petroleum products where it concludes that, "The towboat operator can without undue burden pass the Supplemental Harbor Fee on to the owner or charterer of the individual barges, or to the cargo owners." The respondent also argues that charging all inbound and outbound vessels $.02 per ton rather than the outbound vessels $.04 per ton would greatly increase the Port's overhead costs, "because it would have to collect twice as many payments as it now does," because, "a charge of only $.02 per ton against outbound seagoing ships would result in their paying less than a fair share of the Port's costs, taking into consideration the fact that

the large vessels are the greater beneficiaries of the Port's safety efforts,'' and because, ''if the Supplemental Harbor Fee were changed to assess $.02 per ton for inbound *and* outbound vessels, half of the substantial Supplemental Harbor Fee revenues derived from vessels and barges carrying crude oil and refined products outbound from Plaquemines . . . would be lost to the Port.''

While the respondent's arguments may have some validity we cannot sustain them on the basis of the record made here. As we have noted, the respondent's own expert witness testified she did not make any determination regarding the reasonableness of the allocation of the tariff fees as between various users and that she was told tonnage figures were not available for purposes of allocating the Supplemental Harbor Fee insofar as barges were concerned (Tr. 2/17/84, pp. 43, 44). Not only that, when questioned about inland barges the colloquy was as follows (Tr. 2/17/84, pp. 60, 61):

> THE WITNESS: * * *
>
> And the supplemental harbor fee was developed to be assessed against vessels on the basis of cargo loaded or discharged with the intent of ships that have a lot of cargo activity. A lot of tons loaded and discharged would bear a cost against that activity as opposed to a ship that had minimal cargo loading and discharge.
>
> BY MR. BAGLEY:
>
> Q. But on the other hand, if it is a barge being discharged by inbound cargo, you would have no assessment against the activity; is that correct?
>
> A. If it's a barge being loaded—
>
> Q. Being unloaded
>
> A. —being discharged with inbound cargo, it is not charged a supplemental harbor fee.
>
> Q. So that activity, using ''activity'' as the word, is not assessed; is that correct?
>
> A. It's not assessed a supplemental harbor fee; yes.
>
> Q. Can you—how would you justify the reasonableness if your going to assess activity—or one activity being so assessed and another identical activity not being assessed?
>
> A. I understand the rationale for why the Port District constructed its tariff as it did. It is hard for me to understand the justification.
>
> Q. And you can offer nothing other than the fact that they did it as they did; is that correct?
>
> A. That is correct.

and further (Tr. 2/17/84, pp. 72–74):

> Q. All right.

> Let's take the volume of tonnage in Louisiana in grain and coal. This is all shipped in by barge and not by ship; is that correct?
>
> A. I would think so, yes.
>
> Q. And the shipment in bears no part of it? The shipment out bears all of the supplemental harbor fee?
>
> A. The shipment in bears no harbor fee.
>
> Q. The harbor fee is borne seven percent by [by] inland tugs and tows and ninety-three percent by ocean vessels?
>
> A. The harbor fee is borne seven percent by tugs and tows according to my estimate, and probably something less that (than) ninety-three because we do have some supply boats in there.
>
> Q. All right.
>
> Now do you think there is something—do you [think] something closer to perfect than that can be achieved?
>
> A. I don't know the answer to that question. I meant I'd have to look into [it] in detail. I would have to see what the records are and see how they actually go about the collection process.
>
> I don't know the answer to that question.
>
> Q. Well, would you not have first to start assessing tugs and tows? Would you not have to first start assessing supplemental harbor fees against inbound barges?
>
> A. I'm sorry. State that again.
>
> Q. In order to establish an approach to a balance, would you not have to begin assessing supplemental harbor fees against tugs and tows?
>
> A. I assume you mean against—
>
> Q. Inbound.
>
> A. Yes, I think your correct.
>
> Q. And this would be a more perfect assessment; would it not?
>
> A. Considering that the fee is an assessment against the vessels on the basis of—assessment on the basis of cargo going in, I would agree that a more perfect situation would be to assess the inbound tugs and tows.

In addition to the above testimony, the Port Director, another of the respondent's witnesses, testified that he knew of no reason why the Port could not assess the tug that transports inland barges and their cargo "in just the same way that you assess the ship that brings the cargo in." (Tr. 2/21/84, pp. 80–83) Further, he testified that not only did inland barges not pay a Supplemental Harbor Fee when coming into the Port, but that sometime in 1983 the Port and the Electro-Coal Transfer Corporation (an owner of one of the private wharves) entered into an "agreement" whereby incoming oceangoing barges loaded with phosphate coming to Electro-Coal paid no Supplemental Harbor Fee, but that outgoing inland

barges loaded with coal going from Electro-Coal paid such a fee. The agreement seems to violate the clear language of the tariff. All of the testimony involving the "agreement" is unduly vague and beclouded but one thing is certain, its effect is to favor one user over another in contravention of the terms of the tariff. (Tr. 2/21/84, pp. 106–119, 126–134 [especially page 131], 163–166)[11]

We think consideration of all of the above as well as other portions of the record leads to the conclusion that the exemption for inland barges from the Supplemental Harbor Fee is not justified in this record. Indeed, it is clear that intentional or not, the exemption has the effect of favoring local interests over non-local commercial vessels. In addition, we do not believe either the facts of record or the reasons advanced by the respondent warrant the exemption in favor of inland barges. The evidence not only fails to justify the exemption, but the testimony regarding Electro-Coal seems to indicate clearly that the Port allowed Electro-Coal to enlarge the exemption to oceangoing incoming vessels carrying phosphate in contravention of the tariff to the benefit of Electro-Coal and the detriment of other users.

So here, we think there is no valid reason to exempt incoming inland barges from the Supplemental Harbor Fee and their failure to pay a fee under the tariff while deriving benefit from Port services violates the Shipping Acts because it unjustly and unduly discriminates against other users.

Finally, the complainant argues that, "the permit vessel length" features of the tariff are unjustly discriminatory. In support of its argument the complainant notes that the permit feature of the tariff is "locally biased" because it applies only to commercial vessels under 250 feet in length but not those over 250 feet, which later category is comprised of oceangoing vessels. The permits are issued as follows:

Length of Permit	Discount (percent)
30 Days	50
90 Days	56
180 Days	66⅔
365 Days	78

From the above the complainant argues that, "while some reduction would be justified, it is submitted that the discount of 78% accorded to a vessel obtaining an annual permit license is plainly excessive. . ." and further that, "this is precisely what is represented by the relationship of a 365 day license at a cost of 80 days occupancy without a license." The complainant concludes that, "Surely if the benefit for a year's occupancy is

[11] The testimony of the Manager, Administration of Electro-Coal, regarding the "agreement" is also pertinent and enlightening. (Tr. 4/24/84, pp. 68–89).

equivalent to only 80 days of the daily fee, the daily fee is not commensurate with the benefits accorded."

The respondent argues that absent the permit virgule option "the imposition of the daily fee upon a vessel under 250 feet in length that is resident within the Parish would result in unreasonably burdensome charges upon such vessels. For example, a Plaquemines-based commercial cargo vessel between 100 to 250 feet in length would have to pay as much as $3,650 annually at the daily rate of $10.00. With an annual permit, it pays $800. . . ." After citing overhead billing savings to the Port resulting from the on-time permit fee, the complainant concludes that, "It is reasonable that such vessels be permitted a reduction of the daily fee in the nature of a 'wholesale' discount. In contrast, vessels that enter the Port on only an occasional basis, should logically be subject to the fee on a 'retail' basis."

At the outset it should be noted that the issue regarding permit/discount rates favoring local users is like the other issues raised involving the apportionment of the costs, based on whether or not the fees charged satisfy the requirements of the holding in *Volkswagenwerk,* that is, does the fee paid fairly and reasonably represent the benefit derived by the user. The issue is not properly whether there ought to be a "wholesale" or "retail" rate because the Port seeks to favor local interests, but rather whether the Port ought to establish such a dichotomy between the rates because the service to local interests warrants it vis-a-vis the service to oceangoing vessels. Here again, the record contains little evidence which would justify the "wholesale" rate set forth in the tariff for local interests and the "retail" rate set forth for oceangoing vessels. Certainly, one might reasonably assume that the smaller local vessels require lesser services than do the larger oceangoing vessels, but even where the assumption is made, one cannot, with the documentary or oral evidence of record, arrive at the discounts set forth in the tariff. As far as we can determine they are amounts chosen at random without any definitive, reasonable assessment as to benefits derived from Port services for the smaller local vessels as opposed to the larger oceangoing vessels. In short, the discounts are arrived at arbitrarily. As such they are discriminatory and violate the pertinent provisions of the Shipping Acts.

Issue No. 4—*Whether or Not the Port May Look to the Vessel Agents for Payment of Charges Imposed Under the Tariff*

The tariff involved here at item 165 provides in essence that the Harbor Fee and Supplemental Harbor Fee are the "primary obligation of the owner, *agent* or user of the vessel" (emphasis supplied). It states that, "Parties entering and using the District . . . do so by such entry and usage thereby contract to pay and are responsible for all District fees whatsoever as provided for in this tariff." The tariff here (Ex. R–14) contains identical

of Section 17 of the Act because its tariff provisions hold liable for the debts of shippers and consignees of cargoes all parties who may have had contact with the debtors, including vessel owners, terminal operators and other 'users' of the vessel or facility." In reversing the holding of the Initial Decision the Commission stated.

> The Presiding Officer's holding that the surety provisions of the tariff are unreasonable will not be adopted. A terminal operator can hold liable for tariff fees all direct and indirect users of its services.[22]

Given the Commission's holding in *Dreyfus, supra,* which considered the very same tariff language, we must follow the precedent established in that holding. So here, the tariff provision in issue does not violate section 17 of the Shipping Act, 1916, or the companion provision of the 1984 Act.

Issue No. 5—*Whether or Not the Supplemental Harbor Fee is an Improper Charge Against Vessels*

This issue, like the agency issue discussed above, would have us hold that the Supplemental Harbor Fee is improper because it imposes the fee on the vessel which has no contractual relationship with the Port. The complainant also seems to be arguing that the fee should not be collected from vessels because the shipper/carrier contract applicable to vessels calling at the Port typically specifies that cargo will be handled on F10 terms, i.e., that the cargo interests rather than the vessel will be responsible for cargo-handling costs. The complainant also makes much of the allegation that the Port cannot collect the Supplemental Harbor Fee from the vessel interest because of improper notice.

The complainant has presented no statutory or case law which would sustain its burden of showing that the assertion of the Supplemental Harbor Fee against the vessel interest rather than the shipper interest is in any way, standing alone, violative of the Shipping Acts. While it may or may not be unusual, and while the tariff may be objectionable on other grounds, we see no basis to sustain the complainant on this narrow issue.

Finally, it should be noted that throughout the testimony and in some portions of the pleadings and brief there are other arguments made which have not been discussed in this decision either because they have been presented in vague terms or have little or no bearing on the final outcome of the case. In summary, this decision holds that:

(1) The Commission has jurisdiction in this proceeding.

(2) The Port does provide certain services such as fire and safety protection, for which it may charge users a harbor Fee and a Supplemental Harbor Fee.

[22] *West Gulf Maritime Asso.* v. *Port of Houston Authority,* 21 F.M.C. 244, 248, 18 SRR 783 (1978), aff'd mem. sub. nom., *West Gulf Maritime Ass'n* v. *FMC,* 610 F.2d 1001 (D.C. Cir. 1979) (Table), cert. denied, 449 U.S. 822 (1980).

presented in vague terms or have little or no bearing on the final outcome of the case. In summary, this decision holds that:

(1) The Commission has jurisdiction in this proceeding.

(2) The Port does provide certain services such as fire and safety protection, for which it may charge users a harbor Fee and a Supplemental Harbor Fee.

(3) The overall cost of those services is reasonable so that the total amount collected from users is justified.

(4) The allocation of fees amongst users is unduly discriminatory in that various exemptions and exceptions are made which are prima facie violative of the Shipping Act, and which prima facie violation the evidence of record fails to overcome.

It is important to emphasize that the above holding recognizes the uniqueness of the Plaquemines Port. The parties have agreed that it is unique and the evidence itemizes the various differences between Plaqemines and other ports. Because it is unique, some of the comparisons made between Plaquemines and other ports is, in our opinion, of little value. For the same reason, we believe this Port and its Port Authority need to be especially careful in allocating costs amongst the various users of the Port. For example, in the testimony given in the case one of the Port Commissioners states that the Port may well assess higher costs for "marine-related services" rendered by the Port. We would be remiss if we did not caution that such a generalized approach is the cause of the problem in the first instance. There needs to be a clear and precise definition of "marine-related" services as they relate to the users under the tariff and a correlation of the benefit of the services to the cost to the users. The correlation cannot unduly or unjustly discriminate amongst the users whether or not they are local or non-local.

In view of the above, it is held that the assessments made by the tariff involved herein are unlawful under the Shipping Acts as set forth above, and that once the decision in this proceeding becomes final the Port will immediately cease and desist assessing the unlawful fees.

(S) JOSEPH N. INGOLIA
Administrative Law Judge