FEDERAL MARITIME COMMISSION

DOCKET NO. 83–11
PRUDENTIAL LINES, INC.

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE

September 24, 1986

Notice is given that no appeal has been taken to the August 22, 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

NO. 83–11

PRUDENTIAL LINES, INC.

v.

WATERMAN STEAMSHIP CORPORATION

COMPLAINT DISMISSED

Finalized September 24, 1986

Despite being afforded two opportunities to show that it wished to litigate its complaint, complainant Prudential Lines, Inc. has failed to take either opportunity although it had been advised that failure to show any interest in continuing its complaint case could lead to dismissal of the complaint. Consequently, as I explain below, I must presume that Prudential has lost interest in the case and must dismiss its complaint with prejudice for want of prosecution.

This case began with the filing of a complaint which was originally served on February 24, 1983, and, as amended, was served again on May 31, 1983. In the complaint, as amended, Prudential alleged that respondent Waterman Steamship Corporation had violated section 18(b)(1) of the Shipping Act, 1916, by loading cargo at North Atlantic ports in violation of an intermodal tariff which allegedly required Waterman to load cargo at South Atlantic ports and by issuing all-water bills of lading for such cargo instead of intermodal bills of lading. Prudential asked for damages and other relief. The case proceeded to an evidentiary hearing which concluded on December 2, 1983, and a post-hearing briefing schedule was established at the end of the hearing. However, because Waterman had filed a petition for reorganization under the Bankruptcy Code, the proceeding had to be stayed pending conclusion of the bankruptcy proceedings, as required by law. See 11 U.S.C. sec. 362(a)(1).

In the latter part of June of this year, the press reported that the bankruptcy proceedings were about to terminate with the approval of a reorganization plan, which approval would become final on June 30, 1986. See Journal of Commerce, issues of June 20 and 24, 1986; Order Confirming Second Amended Joint Plan of Reorganization, *In re Waterman Steamship Corp.*, Case No. 83B 11732, U.S. Bankruptcy Court for the S.D.N.Y., June 20, 1986. After seeing these public announcements of the termination of the bankruptcy proceedings, I wrote the parties to inquire as to whether they wished to resume litigation. See letter dated June 25, 1986. I instructed the parties to inform me by July 25 as to whether they desired to pursue

this case and further advised them that if I heard nothing, I would presume that Prudential had no desire to prosecute its complaint, in which event I would take steps to terminate the proceeding. See letter cited at 2.

Having received no response from either party, I next issued an Order to Show Cause on July 29, 1986. Although Prudential had failed to reply to my earlier letter and although I had specifically warned Prudential that such failure could lead to termination of this proceeding, I gave Prudential another opportunity to explain its apparent lack of interest in prosecuting its complaint. I took this step because the policy of the law is to hear cases on their merits and not to dispose of controversies summarily on account of technicalities. I cited numerous authorities for this principle. See Order to Show Cause at page 3. However, there is a limit to this policy, and if a complainant fails to prosecute its complaint, continually ignores rulings, or is otherwise guilty of unexcused dilatoriness in lengthy cases, dismissal of the complaint with prejudice is an accepted sanction. See *Link* v. *Wabash Railroad Co.*, 320 U.S. 626, 629–631 (1962); *Consolidated Express, Inc.* v. *Sea-Land Service, Inc., et al.*, 19 F.M.C. 722, 724 (1977); *Ace Machinery Co.* v. *Hapag-Lloyd A.G.*, 16 SRR 1531 (1976); *Dismissal for Failure to Prosecute*, 20 A.L.R. Fed 488 (1974); 9 Wright and Miller, *Federal Practice and Procedure*, sec. 2370; Federal Rule 41(b), 28 U.S.C.A.

Despite the above efforts to elicit a response from Prudential so that this case could proceed to conclusion in the normal way, Prudential has remained totally silent. Perhaps its silence can be explained by the fact that its counsel and Director of Traffic, who had been conducting the litigation, are no longer with the company or that the company is itself in the midst of bankruptcy proceedings. Whatever the reason, Prudential has failed to prosecute its complaint and has shown no interest in keeping the case alive. Moreover, I have no authority to order Prudential to litigate against its wishes. See *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).

In view of the above situation, there is no basis for me to retain this complaint on the docket and dismissal with prejudice is warranted. Accordingly, the complaint is dismissed with prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–2
AGREEMENT NO. 203–010633

ORDER OF DISCONTINUANCE

September 26, 1986

This proceeding was instituted on January 18, 1985 to determine whether Agreement No. 203–010633 (Agreement) between Flota Mercante Grancolombiana, S.A. and Andino Chemical Shipping Company (Proponents) was an agreement between ocean common carriers subject to section 4 of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. § 1703. The Initial Decision concluded that Agreement No. 203–010633 was not an agreement among ocean common carriers and thus was not subject to sections 4, 5, 6 and 7 of the 1984 Act, 46 U.S.C. app. §§ 1703–6. Proponents challenged this conclusion in Exceptions to the Initial Decision, to which protestants to the Agreement replied.

By Petition filed September 5, 1986, all of the parties to this proceeding have now joined to request that the proceeding be terminated. The reason for the request is that P.L. 99–307, signed into law on May 19, 1986, removed "chemical parcel tanker[s]" from the definition of "common carrier" in section 3 of the 1984 Act, 46 U.S.C. app. § 1702. Additionally, by letter of September 16, 1986, Proponents have advised that they wish to withdraw Agreement No. 203–010633 concurrently with the granting of the joint Petition.

Because P.L. 99–307 has left Proponents with no basis upon which to argue that the Agreement is subject to the 1984 Act, there no longer appears to be any reason for the Commission to review the Initial Decision.

THEREFORE, IT IS ORDERED, That the Joint Petition Of All Parties To Terminate Proceeding is granted.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–3

MODIFICATIONS TO THE TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AGREEMENT, THE JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE AGREEMENT, AND THE JAPAN-PUERTO RICO AND VIRGIN ISLANDS FREIGHT CONFERENCE AGREEMENT

A provision in the Conferences' agreements which prohibits the exercise of independent action on tariffed rate or service items during the pendency of service contract negotiations affecting those items is found to be contrary to section 5(b)(8) of the Shipping Act of 1984, and ordered to be deleted from the agreements.

A provision in the Conferences' agreements which withdraws any adopting independent action whenever the originating independent action is withdrawn prior to its effectiveness is found to be contrary to section 5(b)(8) of the Shipping Act of 1984, and ordered to be deleted from the agreements or modified to ensure that an adopting independent action stands on its own unless the adopting member line voluntarily advises otherwise.

Charles F. Warren, George A. Quadrino, and *Benjamin K. Trogdon* for the Trans-Pacific Freight Conference of Japan, the Japan-Atlantic and Gulf Freight Conference, and the Japan-Puerto Rico and Virgin Islands Freight Conference.

Stanley O. Sher and *Marc J. Fink* for the Asia North America Eastbound Rate Agreement.

Robert A. Peavy for the U.S.-Flag Far East Discussion Agreement.

Douglass H. Ginsburg, Charles F. Rule, James R. Weiss, Craig W. Conrath, and *Alan L. Silverstein* for the U.S. Department of Justice.

Aaron W. Reese and *William D. Weiswasser* for the Bureau of Hearing Counsel.

REPORT AND ORDER

September 30, 1986

BY THE COMMISSION: (EDWARD V. HICKEY, JR., *Chairman;* JAMES J. CAREY, *Vice Chairman;* THOMAS F. MOAKLEY and EDWARD J. PHILBIN, *Commissioners;* FRANCIS J. IVANCIE, *Commissioner,* concurring in part and dissenting in part)*

PROCEEDING

The Commission instituted this proceeding by Order served January 22, 1986, directing the Trans-Pacific Freight Conference of Japan, the Japan-Atlantic and Gulf Freight Conference, and the Japan-Puerto Rico and Virgin Islands Freight Conference (Conferences or Respondents) to show cause why certain provisions in their respective agreements dealing with a member

* Commissioner Ivancie's opinion concurring in part and dissenting in part is attached.

line's right of independent action (IA) should not be found to be contrary to section 5(b)(8) of the Shipping Act of 1984 (the Act or the 1984 Act), 46 U.S.C. app. § 1704b)(8). At issue are provisions in the respective agreements of the Conferences which: (1) prohibit the exercise of independent action on tariffed rate or service items during the pendency of service contract negotiations affecting those items; and (2) automatically withdraw any adopting independent action whenever the originating independent action is withdrawn prior to its effectiveness.

The Commission's Order to Show Cause named the Commission's Bureau of Hearing Counsel (Hearing Counsel) as a party in this proceeding and further directed any person having an interest and desire to intervene to file an appropriate petition pursuant to Rule 72 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72.

Petitions for leave to intervene were timely filed by the Asia North America Eastbound Rate Agreement (ANERA), the U.S.-Flag Far East Discussion Agreement (Agreement 10050), and the United States Department of Justice (DOJ).[1] On April 1, 1986, these petitions for leave to intervene were granted. *See* "Order Granting Petitions for Leave to Intervene and Amending Order to Show Cause."

On March 27, 1986, the Conferences filed a memorandum of law (Conferences' Memorandum) and a statement of R. D. Grey, the Conferences' Chairman (Grey Statement), in support of the agreement provisions in question. ANERA filed a one-page document indicating that it had nothing further to add in support of the Conferences' position.

On April 28, 1986, Hearing Counsel filed a reply memorandum (Hearing Counsel Memorandum) together with an affidavit of Roland E. Ramlow, Jr. (Ramlow Affidavit). The Department of Justice filed a reply memorandum (DOJ Memorandum). Both Hearing Counsel and DOJ argue that the agreement provisions in question are unlawful.

On May 13, 1986, the Conferences filed a response to the memoranda of Hearing Counsel and DOJ (Conferences' Response) together with a supplemental supporting statement of R. D. Grey (Grey Supplemental Statement). Agreement 10050 filed a response to the DOJ Memorandum (Agreement 10050 Response).[2]

[1] On April 28, 1986, the United States Department of Transportation submitted a document styled "Comments Amicus Curiae of the United States Department of Transportation." The Commission declined to accept this document inasmuch as the submission failed to comply with the procedural schedule established in the Order to Show Cause and was submitted without obtaining the leave of the Commission. *See* "Order Granting Motion to Reject Comments Amicus Curiae of the United States Department of Transportation," served June 3, 1986.

[2] The Agreement 10050 Response urges the Commission to avoid the allegedly unnecessarily sweeping pronouncements advocated by DOJ and contends that the Interstate Commerce Commission (ICC) precedents cited by DOJ are not relevant to ocean shipping regulation.

BACKGROUND

At the time that this proceeding was instituted, Article 13(a) of the Conferences' agreements restricted the right of independent action during the pendency of service contract negotiations for an indefinite period of time. Subsequent to the initiation of this proceeding, on March 31, 1986, the Conferences filed amendments which modified Article 13(a) of their agreements by limiting the restriction on independent action to a maximum 30-day negotiation period. By Order served April 17, 1986, the Commission made these amendments part of the record in this proceeding. These amendments have since become effective.

Article 13(a) as amended and currently effective and as relevant to this proceeding provides as follows:

> Independent action may not be taken by any member in the case of any matter, including a rate, charge, or service item, associated with negotiating or providing any service contract, including time-volume contract or other similar form of contractual arrangement covering the carriage of cargo in the trades as defined in this Agreement, provided that any member shall not be prevented from exercising independent action with immediate effect in connection with any negotiation which has continued for more than 30 consecutive calendar days. The term "negotiation" refers to the process of deliberations between the Conference and a shipper or shippers' association for the purpose of entering into a service contract pursuant to the authority contained in section 8(c) of the said Act. Any such negotiation shall be deemed to have commenced from the day either the Conference, shipper or shippers' association initiates a written request to the other to enter into a service contract, and to have terminated on the day the service contract is filed with the Commission. The date of commencement and the date of termination shall be promptly advised to the members by the Conference Chairman.

Article 13(b) of the Conferences' agreements provides that an adopting independent action is automatically withdrawn if the initiating independent action is withdrawn during the notice period. Article 13(b), as relevant to this proceeding, provides as follows:

> If at any time during the notice period the member should elect to withdraw or modify its independent action, it shall advise the Chairman in writing and the Chairman shall not include the rate or service item in the Conference tariff or tariffs for that member and shall not so include it for any other member.

DISCUSSION

I. *Prohibition on the exercise of independent action during service contract negotiations*

The Conferences construe Article 13(a) to ". . . deny the exercise of independent action only upon a rate or service item which is the subject of an on-going contract negotiation up to a maximum period of 30 calendar days." (Conferences' Memorandum at p. 1). The Conferences explain that if it appears that a contract will not materialize and the contract negotiations are terminated in less than 30 days, then the restriction on independent action would correspondingly be terminated.

The Conferences state that they do not seek to prohibit their members from taking independent action on tariffed items for commodities which are also subject to an executed service contract. Nor do the Conferences argue that they may prohibit independent action on a tariff rate on a commodity shipped under a service contract for any shipper other than the shipper that is a party to the service contract. Rather, they contend that Article 13(a) allows the Conferences to prohibit independent action with respect to a shipper who has signed as a party to a service contract or when the conference is negotiating such a contract. (Conference's Response at p. 13).[3]

The Conferences acknowledge that section 5(b)(8) of the Act requires all conference agreements to provide for a member's right of independent action on any rate or service item required to be filed in a tariff. They note, however, that section 8(c) of the Act, 46 U.S.C. app. § 1707(c), authorizes conferences to enter into service contracts with shippers and that section 4(a)(7) of the Act, 46 U.S.C. app. § 1703(a)(7), allows conferences to regulate the use of service contracts by conference members. The Conferences assert that section 5(b)8) is inconsistent with sections 8(c) and 4(a)(7). (Conferences' Memorandum at p. 10). These allegedly inconsistent provisions, it is argued, must be harmonized in order to give maximum effect to each within the overall scheme of the 1984 Act. The Conferences therefore conclude that the Commission should interpret the

[3] The Conferences state that the purpose of this provision is to preserve their ability to negotiate viable service contracts. In enacting such provisions the Conferences sought to avoid ". . . a situation where a member could take advantage of its special knowledge and on the basis thereof, during the negotiation, tender more favorable rates, terms or conditions to the shipper with whom the negotiation is taking place, for the purpose of undermining the negotiations and capturing the cargo for itself by taking independent action on the commodity or commodities which are the subject of the negotiation." (Grey Statement at p. 12). Two such instances are cited, both involving the Trans-Pacific Freight Conference of Japan (TPFCJ). In March of 1985 during TPFCJ negotiation on a one-year service contract for the carriage of engine assemblies, transaxles and transmissions, a conference member is said to have taken independent action and published time-volume rates on these commodities. The Conferences believe that TPFCJ lost this contract because of the independent action taken. (Grey Statement at pp. 14–15). In October of 1985, negotiation by TPFCJ on an all-water intermodal contract with a shipper of tires and tubes allegedly was disrupted by the independent action taken by a member during the negotiation period. The result was that the conference contract covered only 50,000 revenue tons instead of the proposed 130,000 revenue tons. (Grey Statement at pp. 15–16).

Act in such a way as to allow a restriction on independent action, such as that contained in Article 13(a), during service contract negotiations.

Hearing Counsel construes Article 13(a) as prohibiting ". . . independent action on existing conference tariff rates if a service contract is being negotiated for the commodities covered by those rates." (Hearing Counsel Memorandum at p. 1). Similarly, the Department of Justice construes Article 13(a) as prohibiting a conference member ". . . from taking independent action on any rate or service item in a tariff that is associated with the conference's negotiating or providing a service contract." (DOJ Memorandum at p. 3).

Hearing Counsel argues that the two cited examples of alleged interference in TPFCJ service contract negotiations merely show that independent action was used by a member line to vigorously compete and that a shipper was able thereby to obtain more favorable terms. Hearing Counsel contends that these two examples do not show that the Conferences have suffered "insurmountable harm." Hearing Counsel points out that during calendar year 1985 TPFCJ entered 186 service contracts and JAGFC entered 88 service contracts. (Ramlow Affidavit). Hearing Counsel concludes that the Conferences' problem would seem to be substantially overstated.

Both Hearing Counsel and DOJ disagree with the Conferences' assertion that the Act's independent action and service contract provisions are "plainly inconsistent." Hearing Counsel states that these provisions may be "in tension" but that this is part of the Act's overall approach. DOJ states that there is no inherent conflict between these two features of the Act. DOJ points out that these provisions deal with two distinct concepts: service contracts and tariff rates. DOJ argues that these two means of providing service are fully consistent with one another. According to Hearing Counsel and DOJ, there is no need to resolve any alleged inconsistency.

DOJ also takes issue with what it describes as the "unwarranted premise" of the Conferences' argument, namely that the Act permits a conference to prohibit its members from taking independent action on a tariff rate for commodities subject to an executed service contract. DOJ argues that this premise is wrong and that it cannot be extended to service contract negotiations.

Article 13(a) of the Conferences' agreements restricts for a period of up to 30 days, a member's right of independent action on a tariffed rate or service item if such an item is the subject of service contract negotiation by the Conferences. The Conferences all but concede that such a restriction on a member's right of independent action is not permitted by the language of section 5(b)(8). However, they argue against a literal reading of section 5(b)(8). They assert that there is a plain inconsistency between the independent action and service contract provisions of the Act. In order to fully preserve the Conferences' ability to enter into service contracts, they argue that section 5(b)(8) should be interpreted to allow restrictions on IA during a 30-day negotiation period. Otherwise they contend that the

statutory scheme will be upset. The issue therefore is whether the independent action and service contract provisions of the Act are plainly inconsistent. If no such inconsistency exists, then the restriction on the right of independent action in Article 13(a) would appear, on its face, to be contrary to section 5(b)(8) of the Act.

The Shipping Act of 1984 continues a system of common carriage of cargo pursuant to publicly filed tariffs. Under this system of tariffed carriage, a common carrier or conference of carriers offers its transportation services to the shipping public at large. With the exception of certain specifically named commodities, section 8(a) of the Act requires that all rates, charges, conditions and other terms of such service be published in a tariff and filed with the Commission. An independent common carrier, of course, maintains its own individual tariff. Conferences of ocean common carriers, on the other hand, file a conference tariff which sets forth the rates, charges and other terms of service which have been collectively agreed upon.

The new feature under the 1984 Act in the system of tariffed service is the mandatory right of independent action. Section 5(b)(8) provides that a member of a conference retains a right to take independent action with respect to those collectively agreed to rate or service items that are required by section 8(a) to be filed in a tariff. Conference agreements must contain a provision which provides for such a right. A conference member may be required to give the conference notice of its independent action and to observe a waiting period of up to 10 days before the independent action becomes effective. No other conference-imposed restrictions on the exercise of the right of independent action on tariffed rate or service items are authorized by section 5(b)(8).

At the same time, the 1984 Act establishes for the first time a system of quasi-contract carriage of cargo. Section 8(c) authorizes service contracts between an ocean common carrier or a conference and a shipper or shippers' association. While the essential terms of a service contract must be made available to the general public in tariff format, a service contract is essentially a contract between carrier and shipper which involves mutual commitments by both parties and which is enforced as any other commercial contract by an action in an appropriate court.[4]

An independent ocean common carrier's section 8(c) authority to enter into service contracts is not restricted. When an ocean common carrier becomes a member of a conference, however, that section 8(c) authority becomes subject to conference control. Section 4(a)(7) authorizes a conference to regulate the use of service contracts by the conference and by its members. Conferences may agree to prohibit entirely the use of service contracts, to offer service contracts only by the conference or to allow individual conference members to offer their own service contracts.

[4] Service contracts are, of course, subject to certain statutory requirements as well as other conditions that the Commission may impose consistent with the statute.

Tariffed service and service contracts are distinct ways of providing ocean transportation services under the 1984 Act. Each has its own separate status under the Act. One does not take precedence over the other. There is nothing in the language of the Act which in any way supports the argument that there is an inconsistency between tariffed service by a conference subject to a mandatory right of independent action and service pursuant to a service contract which the conference may regulate.

The Conferences argue that maximum effect should be given to all provisions of the Act. The Conference's interpretation of the Act, however, would subordinate the right of independent action on tariffed items to the authority of a conference to regulate service contracts. There is simply no basis in the language of the statute for such a limitation of the right of independent action.

Because the language of the statute is clear, resort to legislative history is not necessary. Nevertheless an examination of the legislative history supports the interpretation of the Act given above. The legislative history indicates that the authority to enter into service contracts under section 8(c) and to regulate service contracts under section 4(a)(7) cannot be interpreted to allow restrictions on the right of independent action on tariffed items guaranteed by section 5(b)(8). The Conference Report states that:

> The independent action section (5(b)(8)) of the bill requires that each conference provide for independent action on rates or service items required to be filed in a tariff under section 8(a) of the bill.

H.R. Rep. No. 600, 98th Cong., 2d Sess. 29 (1984). The Conference Report reiterates what is expressly stated in the statute, *i.e.*, that if an item is required by section 8(a) to be filed in a tariff, then a conference agreement must provide for independent action.

The Conference Report explains further that the reason why a mandatory right of independent action *on service contracts* is not required is because service contracts are not required by section 8(a) to be filed in a tariff:

> Section 8(a) does not require that service contracts be filed in a tariff. Consequently, section 5(b)(8) does not require conferences to permit their members a right of independent action on service contracts.

Conference Report at p. 29. The Conference Report thus distinguishes between tariffed service and service contracts with respect to the right of independent action. Because service contracts are not required to be filed under section 8(a), a conference need not provide for a right of independent action *on service contracts.*

The Conference Report explains that although an ocean common carrier is authorized by section 8(c) to use service contracts, that section 8(c) authority may be circumscribed if the ocean common carrier is a member of a conference:

> The conferees agree that section 8(c) of the bill, which authorizes the use of service contracts, cannot be read as undermining the authority of a conference to limit or prohibit a conference member's exercise of a right of independent action on service contracts.

Conference Report at p. 29. Thus it is the section 8(c) authority to enter into service contracts that cannot be used independently by a conference member to "undermine" the authority of the conference to limit or prohibit a conference member's use of service contracts. This passage from the Conference Report clarifies the interrelationship between the section 8(c) power to enter into service contracts and the section 4(a)(7) authority of conferences to regulate service contracts. A conference may regulate a member line's use of service contracts.[5] However, a conference may not place restrictions not found in the Act on the exercise of independent action *on tariffed items.*

The Conferences therefore misread this passage from the legislative history when they rely on it as support for their position that the right of independent action on tariffed items may be restricted. The Conference Report, for example, states that:

> . . . conference agreements must permit independent action on time-volume rates in section 8(b), since time-volume rates must be filed under section 8(a).

Conference Report at p. 29. This statement is most significant because it points out that time-volume rates, which bear some similarities to service contracts, are nevertheless subject to independent action because those rates must be filed under section 8(a).

The legislative history thus illuminates and supports the distinction between a mandatory right of independent action on tariffed rate or service items and the power to enter into service contracts subject to conference regulation and control. There is nothing in the legislative history that would support the view that independent action rights on tariffed items may be suspended for a period of time during which a conference is negotiating a service contract. To follow the interpretation of the Act advanced by the Conferences would be to subordinate independent action rights on

[5] The following passage from the Conference Report explains the authority which a conference has under section 4(a)(7) to regulate the use of service contracts:

> The net result is that a member of a conference does not have a statutory right to enter into a service contract in violation of the conference agreement. Under section 4(a)(7), the conference agreement may prohibit its members from entering into service contracts or it may allow them to enter into a service contract subject to such conditions as the conference may establish. Thus, while a conference agreement is not required to provide each member a right of independent action on service contracts, neither is it prohibited from doing so.
>
> Under the bill, a conference may enter into a service contract. If it does so, the individual members do not, under the bill, have a right of independent action to deviate from that service contract unless the conference agreement so provides.

Conference Report at pp. 29–30.

tariffed items to conference authority to enter into and regulate service contracts and would read into the Act a restriction on the right of independent action that is not supported by the language of the Act or its legislative history.

As construed by the Conferences, Article 13(a) of their agreements prohibits a member line from exercising independent action with respect to a shipper who has signed as a party to a service contract or when the conference is negotiating such a contract. Such a prohibition unlawfully restricts the right of a member line to take independent action on tariffed rate or service items at any time for any shipper. The limitation of the prohibition on IA to a 30-day negotiation period does not cure the unlawfulness of this provision. Accordingly, the Conferences will be required to delete this provision from their agreements.

II. *Withdrawal of adopting independent action*

Article 13(b) permits a member line to adopt an initiating member's independent action as its own with the same or a later effective date. Article 13(b) allows the initiating member, within the 10-day notice period, to withdraw its independent action, in whole or in part, with the effect of causing the automatic withdrawal of any adopting independent actions which may have been taken in response to the original filing. The Conferences explain that the purpose of this provision is to enable the originating member to retain full control over its own independent action as well as the other members' responses to that action.

The Conferences argue that the sole purpose of the adopting IA provision in section 5(b)(8) of the Act is to allow other members of a conference to remain competitive with the member initiating independent action. Allegedly, the withdrawal of adopting IA's has not created any problems for adopting carriers and the Conferences have not received any complaints from shippers regarding misreliance on an adopted IA rate or service item. The Conferences argue that cancellation of this prohibition would have an inhibiting effect on the taking of IA because once IA was taken the originator would be locked in if another member adopted that rate. (Grey Statement at pp. 19–23).

The Conferences submit that the "plain meaning" of section 5(b)(8) is that the existence and effectiveness of an adopting independent action is wholly dependent on the existence and effectiveness of the initiating independent action. An adopting action, it is argued, has no separate existence of its own and therefore ceases to exist when the originating IA is withdrawn.

The Conferences contend that the language of section 5(b)(8) supports this position. The Conferences state that "* * * there is no dispute [between the parties to this proceedings] over the meaning of the term 'adopt'

in section 5(b)(8)." (Conferences' Response at pp. 7–8).[6] They argue, however, that merely defining the term "adopt" does not establish the independence of adopting IA from that of the originating IA, as contended by Hearing Counsel and DOJ.

While denying any conclusive significance of the definition of the term "adopt," the Conferences rely heavily on the language in section 5(b)(8) which states that an adopting IA may become effective "on or after * * * [the] effective date" of the originating independent action. They construe section 5(b)(8) to mean that if the originating IA is withdrawn prior to its effectiveness, then there is no "effective date" for the adopting IA. The Conferences state:

> [Section 5(b)(8)] does not condition effectiveness of matching filings upon the date on which the original filing *could have become effective.* Nor does it measure effectiveness from the date the original *notice* of independent action is filed. Instead, the effectiveness of any matching action is tied directly to the 'effective date' of the originating carrier's independent action. (Conferences' Memorandum at pp. 14–15). (Emphasis in original).

The Conferences conclude that when an originating action is withdrawn, there is no "effective date" and therefore no date on which an adopting action may become effective.

The Conferences assert further that the legislative history "* * * reveals no intention by Congress to set out any separate rights for following carriers other than the right to meet the independent rate or service item of the originating carrier 'on or after' the effective date of the original action." (Conferences' Memorandum at p. 16). Moreover, the Conferences note that the right of adopting IA as provided for in the 1984 Act, is more restricted than in earlier bills introduced in the legislative process. They conclude that this evidences a Congressional intent to restrict adopting independent action.

The Conferences point out that various versions of H.R. 1878 adopted by the Merchant Marine and Fisheries Committee, by the Judiciary Committee and, jointly by both Committees, provided that once independent action was taken by one member, a conference was required to publish the new rate or service item "for use by any member." Noting further that instead of this provision which called for a single publication in the conference tariff for use by all members, Congress adopted a provision which requires other members to submit filings that adopt the originating carrier's filing, the Conferences argue that if any conclusion can be drawn from this legislative history, "* * * it is that placing increased burdens

[6] The Conferences accept either the Random House Dictionary definition, *i.e.,* "to make one's own by selection or assent," or the second meaning of "adopt" listed in Webster's Third New International Dictionary of the English Language (Unabridged), G. & C. Meriam & Co., Springfield (1964) at p. 24, *i.e.,* "to take up or accept esp. as a practice or tenet often evolved by another." (Conferences' Response at p. 8)

on matching carriers and making specific reference to the effective date of the original action confirms Congress' intention not to permit matching actions to take effect in the absence of the effectiveness of the original filing." (Conferences' Response at p. 10).

Both Hearing Counsel and DOJ argue that an adopting independent action once taken has an identity apart from the initiating independent action and should not be automatically revoked when the original independent action is withdrawn.

Hearing Counsel and DOJ argue that the use of the term "adopt" in section 5(b)(8) supports their position that adopting IA is a separate and independent action in its own right. Hearing Counsel states that: "The language chosen by Congress compels the conclusion that a matching independent action is not dependent on the original action but, rather, is a separate thing with independent existence." (Hearing Counsel Memorandum at p. 5).[7] DOJ states that: "When a member chooses to adopt an independent action, it becomes the adopter's own independent action. The Act itself recognizes this by using the word 'adopt' in section 5(b)(8), a word the dictionary meaning of which in this context is to 'make one's own by selection or assent.'" (DOJ Memorandum at p. 12).[8]

Hearing Counsel contends that the reference to the "effective date" does not support the Conferences' conclusion that adopting action is dependent upon the effectiveness of the original IA filing. Hearing Counsel explains the reference as follows: "The date of the original independent action simply determines when the following action comes into effect and there is nothing in the statute to indicate that the latter's effectiveness is intended to depend on the former's not having been withdrawn." (Hearing Counsel Memorandum at p. 5). Finally, Hearing Counsel argues that earlier versions of H.R. 1878 do not support the conclusion that adopting action is dependent on the originating IA.

Hearing counsel argues that the present text of Article 13(b) is unlawful but could be made lawful if it were modified to allow the adopting member line the option to continue or rescind its adopting action. DOJ also maintains that the adopting member line should be able to choose whether to retain or withdraw its adopting independent action.

Article 13(b) of the Conferences' agreements provides that when the initiator of independent action withdraws that action prior to its effective date, then the IA's of any other member lines that have adopted the original independent action are also automatically withdrawn. The issue in this proceeding is whether the adopting independent action provided for in section 5(b)(8) of the Act is fully equivalent to originating inde-

[7] Hearing Counsel cites the first definition of "adopt" listed in Webster's Third New International Dictionary of the English Language: "to take by free choice into a close relationship previously not existing esp. by formal legal act."

[8] The definition cited by DOJ is taken from the Random House Dictionary of the English Language, Unabridged Edition (1971).

pendent action or is subject to the control of the originating IA during the period prior to the effectiveness of the originating independent action.

Section 5(b)(8) provides in relevant part that:

Each conference agreement must—

> (8) provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff . . . and that the conference will include the new rate or service item in its tariff for use by that member . . . 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 . . .

Section 5(b)(8) describes two circumstances in which a conference member may exercise its statutory right of independent action. A member line may initiate its own independent action by notice to the conference. The conference may require a waiting period of up to 10 calendar days before the independent action becomes effective at which time the conference is required to publish the item in its tariff for use by the member.

Section 5(b)(8) also provides that a member line may adopt the independent action of another. A member line exercising adopting IA must also notify the conference of its action. The adopting IA becomes effective on or after the effective date of the originating independent action.

The language of section 5(b)(8) supports the view that adopting independent action is not contingent upon originating independent action. The term "adopt" signifies an action whereby a following member line takes the action of the initiating member line and makes it its own without any connotation of its having been another's.[9] The use of the term "adopt" therefore suggests that following IA has the same independent status as the originating IA and is not contingent on the continuing effectiveness of the originating IA.

The parties have conflicting interpretations of the significance of the phrase "on or after its effective date" in section 5(b)(8). The Conferences argue that this language means that a following IA can become effective only if the originating IA actually becomes effective. Hearing Counsel argues that the reference to "effective date" merely establishes the date on which following IA is to become effective.

[9] The parties appear not to dispute the meaning of the term "adopt" although they offer various definitions of the term such as "to take up or accept as a practice," or "to make one's own by selection or assent," or "to take by free choice . . ." The 12-volume Oxford English Dictionary lists seven definitions of the term "adopt." The relevant definitions are definition 4, "To take up (a practice, method, word, or idea) from some one else, and use it as one's own; to embrace, espouse," and definition 5, "To take (a course, etc.) as one's own without the idea of its having been another's, to choose for one's own practice." Oxford English Dictionary, Oxford University Press, London (1933), Vol. 1 at p. 124.

Black's Law Dictionary offers four definitions of the term "adopt." The relevant one would appear to be the first one listed, *i.e.*, "to accept, appropriate, choose, or select; to make that one's own (property or act) which was not so originally." Black's Law Dictionary, Revised Fourth Edition, West Publishing Co., St. Paul (1968) at p. 70.

The reference to "effective date" does not appear to be intended to be a restriction on the right of adopting independent action. Rather, it would appear to be merely the means of preserving the competitive parity of originating and following independent actions.

The legislative history relevant to adopting IA is sparse and subject to conflicting interpretations. Various versions of H.R. 1878 provided that an independent action would be published in the conference tariff "for use by any member." The fact that Congress ultimately required other member lines to indicate their "adoption" of the originating IA, however, does not necessarily support the position that a following IA may become effective only if the originating IA does.

Finally, there is the question regarding the fundamental purpose of adopting IA. While in many instances adopting IA may be taken for the purpose of maintaining competitive parity with the originating IA, there is nothing in the language of the Act or its legislative history which would indicate that maintaining competitive parity is the exclusive purpose of adopting IA. A member line adopting the IA rate originated by another may have many reasons for doing so. One of them might be that a potential shipper has expressed an interest in the rate. Whether or not a potential shipper may be relying on an anticipated rate, however, is not determinative. The key point is that there is no indication of any legislative intent to limit the right of adopting IA only to those situations where the following member line wishes to remain on the same competitive footing as the originating member line.

The decision to take adopting independent action is a unilateral action by a member line. There is nothing in the language of the Act or its legislative history which would indicate that such a unilateral decision was intended to be subject to the control of the originating member line prior to an item's effectiveness. The decision to retain or withdraw an adopting IA should also be considered the unilateral independent decision of the adopting member line. It would appear that the right of adopting independent action is a completely independent action that, if taken prior to the withdrawal of the originating IA, continues to exist regardless of the action of the initiating member. Such a decision may not be burdened by any procedure which deems or presumes an adopting action to be withdrawn and places an obligation on the adopting member line to reaffirm its action.

The exercise of adopting independent action should therefore be treated as having the same status and effect as the exercise of originating independent action, unless there is some basis for not doing so. The Conferences have the burden to come forward and show that such a basis exists. No basis for limiting the exercise of adopting independent action has been established in this proceeding. Inasmuch as the cited language in Article 13(b) of the Conferences' agreements has not been demonstrated to be in conformity to the requirements of section 5(b)(8) of the Act, this provi-

sion must be deleted or, alternatively, modified to ensure that an adopting action stands on its own unless the adopting line voluntarily and unilaterally advises otherwise.

The alternative to modify Article 13(b) would make this provision consistent with section 5(b)(8) inasmuch as it would preserve the adopting member line's option in such cases. The Conferences state that their agreements already provide for the withdrawal of initiating or adopting actions and contend that such a modification is "tantamount to a rejection of the challenged portion of Article 13(b)." (Conferences Response at p. 11). The preservation of such an option, however, is essential to maintaining the independence of adopting action. Moreover, the adopting member is the person who is fully aware of the circumstances and purpose for taking independent action. If the sole purpose of the adopting member is to preserve competitive parity with the originating member line, then the adopting member may elect not to maintain its action. On the other hand, if the adopting member line has a reason to maintain its action, it may elect to keep its adopting IA and thereby avoid the inefficiency of being required to refile its action as an originating independent action.

CONCLUSION

The Conferences have not demonstrated the lawfulness of the provision in Article 13(a) of their respective agreements which prohibits a member line from taking independent action during service contract negotiations. The Conferences therefore will be required to delete this provision from their agreements.

The Conferences also have not adequately demonstrated the lawfulness of the adopting IA provision in Article 13(b) of their agreements. The Conferences therefore will be required to delete the language in question from their agreements or to modify their agreements so as to ensure that the adopting action of a member line is maintained unless the adopting member voluntarily advises otherwise.

Finally, we note that the Order to Show Cause indicated that a final decision in this proceeding would be issued by September 24, 1986. This date has been slightly extended because the complexity of the issues in this proceeding has required additional time for analysis and resolution.

THEREFORE, IT IS ORDERED, Pursuant to section 11(c) of the Shipping Act of 1984, That the Trans-Pacific Freight Conference of Japan, the Japan-Atlantic and Gulf Freight Conference, and the Japan-Puerto Rico and Virgin Islands Freight Conference, on or before the 60th day after the date of this Report and Order, shall each file an amendment with the Secretary which deletes the provision in Article 13(a) of their respective agreements prohibiting the exercise of independent action during service contract negotiations;

IT IS FURTHER ORDERED, That the Trans-Pacific Freight Conference of Japan, the Japan-Atlantic and Gulf Freight Conference, and the Japan-

Puerto Rico and Virgin Islands Freight Conference, on or before the 60th day after the date of this Report and Order, shall each file an amendment with the Secretary which deletes the provision in Article 13(b) of their respective agreements withdrawing an adopting independent action whenever the originating independent action is withdrawn prior to effectiveness or shall file an amendment which modifies Article 13(b) in accordance with this Report and Order;

IT IS FURTHER ORDERED, That if the amendments required by this order are not filed as required on or before the 60th day after the date of this Report and Order, then any agreement which does not fully comply shall be disapproved pursuant to section 11(c) by further order of the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) JOSEPH C. POLKING
Secretary

Commissioner Ivancie, concurring in part and dissenting in part.

I fully concur in that portion of the Commission's Report and Order dealing with Article 13(a) of the conference agreements, which would restrict independent action on the subjects of ongoing service contract negotiations.

However, I am compelled to dissent from the second part of the decision, involving Article 13(b), which automatically withdraws adopting independent actions upon withdrawal of the originating independent action. I do not find Article 13(b) to violate section 5(b)(8) of the Shipping Act of 1984, and would not order its deletion from the conference agreements or its modification.

The majority's basic premise is that an adopting or following independent action "stands on its own" and by law cannot be presumed to be contingent upon an originating independent action. The language of the Shipping Act or its legislative history does not in my opinion dictate this conclusion. The very term "adopt" connotes that the action's relationship to the originating independent action is the critical aspect of the action.

The fundamental purpose of an adopting IA as I see it is to maintain parity with the originating IA. The majority argues that there may be "many reasons" behind a matching IA, such as "that a potential shipper has expressed an interest in the rate." (Report and Order, at 24). If this were the reason for a line's IA, however, it could and probably would file it as an *originating* IA, without needing to match or adopt another line's coincidentally identical rate action. The majority's decision, in declaring that matching IA's have an unattached life, seems to encourage a type of rate action which I do not believe was intended by the Shipping Act: a stand-on-its-own, non-contingent IA which is not subject to the notice period which section 5(b)(8) authorized the conferences to require for such IA's. The sole purpose of allowing adopting IA's to become effective on less than the conference's required notice period is to allow members to match other members' proposed rates in a timely fashion, not to provide an exception to the notice requirement so that a member line may satisfy a "potential shipper."

By choosing the "adopting" route, a member line is, in my opinion, notifying the conference that it wants to match the originating member's rate, *because of* the originating member's rate. Here, the conferences, which the members voluntarily join, have a rule stating that an adopting IA will be interpreted to be contingent on the effectiveness of the originating IA, and that it will be automatically withdrawn upon the pre-effective withdrawal of the originating IA. As all members are aware of this rule when they take their rate action, they have a choice of designating their IAs as original, non-contingent actions, using the required conference notice period, or as contingent, matching IA's, in which the effective date of the original may be matched irrespective of the conference's notice rule.

Such a system does no harm in my view to either the language or intent of the Shipping Act.

I find some minor consolation in the fact that the majority's decision states that the conference rule may be modified to give the adopting member line an option: the adopting IA will be presumed non-contingent (and therefore not automatically withdrawable by the conference), unless the line designates up front or indicates after the fact that its IA is contingent upon the effectiveness of the first IA. I could more easily support the presumption that an adopting IA is *contingent*, unless the member designates otherwise. The Commission Order unnecessarily imposes a burden on the individual member to affirmatively state what can already be reasonably inferred from its choice of the adopting procedure.

The language of section 5(b)(8) of the Act is less than explicit on the issue of the status of matching IAs, and the Act's legislative history is, as noted in the majority's decision, "sparse and subject to conflicting interpretations." (Report and Order at 23). I regret that rather than to allow the conferences to interpret and implement the statute in a reasonable way which appears to be working satisfactorily for them and their member lines, the Commission has opted for what I believe is an unnecessary, overly regulatory stance, unsupported by the statute and not responsive to any particular problems. The record contains no evidence of shipper complaints, and the proceeding attracted no industry comment which suggested there was disagreement with the conference rules. Within the conferences, there is no evidence that the will of member lines was being thwarted by the rule. The record, in fact, reflects the opposite. There are *no* apparent instances where, upon the conference's automatic withdrawal of adopting IAs, an adopting member line reestablished its rate by filing another independent action. (Statement of R.D. Grey, at 21.) This clearly indicates, I submit, that the conference rule is neither overreaching nor inaccurate in its presumption that matching IA's are for the purpose of meeting preceding IA's, and that the "domino"-type withdrawal of the former upon the withdrawal of the latter is the parties' actual intention.

The majority appears to be guided by a desire not to allow conferences to emasculate the mandatory independent action provisions of the Shipping Act. It is ironic that it is the majority's decision here that may well have an inhibiting effect. A member line may think twice about originating an IA now that its subsequent withdrawal is perhaps more likely, under the Commission's decision, to leave in place other "matching" rate actions, and with the benefit of reduced notice in the bargain.

I therefore respectfully dissent from that portion of the Commission's Report and Order which orders deletion or modification of the conferences' Article 13(b).

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–18

MEMBER LINES OF THE TRANSPACIFIC WESTBOUND RATE AGREEMENT—POSSIBLE VIOLATIONS OF THE SHIPPING ACT OF 1984

ORDER ADOPTING INITIAL DECISION

October 9, 1986

The Commission instituted this proceeding by Order of Investigation served on July 15, 1985. The Order called into question certain rate activities of the Transpacific Westbound Rate Agreement (TWRA or Agreement) lines in early 1985. The Commission set down for investigation issues raised under sections 10(a) (2)–(3) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. § 1709(a) (2)–(3), regarding the relationship between the TWRA lines' collective establishment and maintenance of minimum tariff and service contract rates, and the individual lines' right of independent action.

On August 29, 1986, Administrative Law Judge Seymour Glanzer issued an Initial Decision (I.D.).* The I.D. approves a settlement negotiated by the Bureau of Hearing Counsel and the carrier respondents, whereby the respondents will pay civil penalties totaling $300,000 and also will take certain actions that are intended to compromise the issues involved in this investigation. Specifically, the respondents undertake to modify certain terms of the Agreement dealing with the relationship of independent action to minimum rates; to maintain a prescribed course of conduct that safeguards the members' right to take independent action from multi commodity minimum rates; to refrain for a stated period of time from establishing a minimum rate program, the purpose of which is revenue improvement or maintenance, if those rates are subject to a right of independent action; and to report to the Director, Bureau of Agreements and Trade Monitoring, any actions taken during that stated period that establish or modify minimum rates. No party filed exceptions to the I.D.

The Commission has determined to adopt the I.D. and approve the settlement negotiated by the parties. The terms of the settlement appear reasonable under the circumstances of this case. The parties have stipulated that the respondents' activities cited in the Order of Investigation are not continuing and in fact were terminated prior to the commencement of settlement

* Subsequent to issuing his I.D., Judge Glanzer became Director of the Bureau of Hearing Counsel. He has recused himself from any further participation in this proceeding.

discussions. It is therefore unnecessary to determine whether a cease and desist order should be issued against the respondents. Respondents have proposed to modify Article 5 of the TWRA to provide that any minimum rates adopted under the Agreement in the future shall remain subject to further adjustment or revocation under the Agreement's ratemaking processes, including its independent action provisions. This assures the integrity of independent action under the TWRA, and renders unnecessary any further investigation of whether the Agreement should be disapproved or modified because of possible violations by the member carriers of the independent action requirements of section 5 of the 1984 Act, 46 U.S.C. app. 1704.

As part of their offer of settlement, respondents also have committed not to establish any minimum rate programs designed to improve their revenues (with certain qualifications and exceptions). While this commitment strengthens the beneficial effects of the Agreement modification discussed above, the Commission notes that the commitment will expire on November 7, 1987. The basic legal issue in this investigation was whether an agreement among carriers to establish across-the-board minimum rates intended to improve revenues is inherently inconsistent with the free exercise of independent action and is therefore unlawful. While the Commission's approval of the settlement between the parties makes unnecessary a decision on this issue, a new attempt by the respondents to improve their revenues through broad minimums could revive the issue. The Commission therefore cautions the parties to the TWRA that any future minimum rate programs similar to those agreed to at Vancouver, B.C., in January 1985 will receive close scrutiny.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

NO. 85–18

MEMBER LINES OF THE TRANSPACIFIC WESTBOUND RATE AGREEMENT—POSSIBLE VIOLATIONS OF THE SHIPPING ACT OF 1984

Transpacific Westbound Rate Agreement, a Respondent, ordered to pay a civil penalty in the amount of $300,000 ($15,789.47 per Respondent member of that Agreement) and undertake other action pursuant to terms of an offer to settle an assessment proceeding seeking to determine whether said Respondents violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984.

H. Donald Harris, R. Frederic Fisher, John H. Riddle, Lawrence M. Minch and *Harold E. Mesirow* for Respondents Transpacific Westbound Rate Agreement, American President Lines, Ltd., The East Asiatic Company, Evergreen Marine Corp., Hanjin Container Lines, Ltd., Hapag-Lloyd Trans-Pacific Service, Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Korea Marine Transport Co., Inc., Lykes Bros. Steamship Co., Inc., Mitsui O.S.K. Lines, Ltd., A.P. Moller-Maersk Line, Neptune Orient Lines, Ltd., Nippon Yusen Kaisha, Ltd., Orient Overseas Container Line, Inc., Showa Line, Inc., United States Lines, Inc., Yamashita-Shinnihon Steamship Co., Ltd., and Zim Israel Navigation Co., Ltd.

Robert T. Basseches and *David B. Cook* for Respondent American President Lines, Ltd.

Stanley O. Sher and *Marc J. Fink* for Respondent A.P. Moller-Maersk Line.

Neal M. Mayer for Respondent Showa Line, Ltd.

Stuart R. Breidbart and *Terry Spilsbury* for Respondent Sea-Land Service, Inc.

Daniel W. Lenehan for Respondent United States Lines, Inc.

Jim J. Marquez, Rosalind A. Knapp, Diane R. Liff, Mary Bennett Reed, Michael B. Jennison, Robert J. Patton, Jr., and *James P. Moore* for the United States Department of Transportation, as amicus curiae.

Aaron W. Reese, Paul J. Kaller, and *William D. Weiswasser* as Hearing Counsel.

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

Adopted October 9, 1986

This proceeding was instituted by Order of Investigation and Hearing ("Order") served July 15, 1985, pursuant to section 11(c) of the Shipping Act of 1984, 46 U.S.C. app. §1710, to determine whether the Transpacific Westbound Agreement (TWRA) and its member lines had engaged in certain

[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).

activities in violation of sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984, 46 U.S.C. app. §1709(a) (2) and (3). TWRA and its member lines were named Respondents. Appendix I, attached, is a list identifying each of the Respondents. The Bureau of Hearing Counsel was named a party to the proceeding. In particular the Order sought to determine whether the Respondents:

> (1) have violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984 (46 U.S.C. app. §1709(a) (2) or (3)) by agreeing not to exercise independent action at levels below their minimum tariff rates, which agreement was subject to the filing requirements of section 5 of the Shipping Act of 1984 (46 U.S.C. app. §1704), or inconsistent with the independent action provisions of the Transpacific Westbound Rate Agreement as required by section 5(b)(8) of the Act (46 U.S.C. app. §1704(b)(8));
>
> (2) have violated section 10(a)(3) of the Shipping Act of 1984 by establishing and maintaining a program of minimum tariff rates in a manner inconsistent with the independent action provisions of the Transpacific Westbound Rate Agreement required by section 5(b)(8) of the Act;
>
> (3) have violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984 by agreeing on minimum rates applicable to service contracts between individual carriers, or combinations of carriers, and shippers, which agreement was subject to the filing requirements of section 5 of the Shipping Act of 1984, or inconsistent with the service contract and independent action provisions of the Transpacific Westbound Rate Agreement;
>
> (4) have violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984 by agreeing not to exercise independent action at levels below their minimum service contract rates, which agreement was subject to the filing requirements of section 5 of the Shipping Act of 1984, or inconsistent with the service contract and independent action provisions of the Transpacific Westbound Rate Agreement;
>
> (5) have violated section 10(a)(3) of the Shipping Act of 1984 by maintaining a system of minimum service contract rates in a manner inconsistent with the service contract and independent action provisions of the Transpacific Westbound Rate Agreement;
>
> (6) have violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984 by agreeing not to negotiate or execute new or renewed service contracts for a period of time, which agreement was subject to the filing requirements of section 5 of the Shipping Act of 1984, or inconsistent with the service contract and independent action provisions of the Transpacific Westbound Rate Agreement;

The Order went on to provide that if any findings of violations are made, it should also be determined whether the Respondents:

(1) should be assessed civil penalties and, if so, the amount of such penalties; and/or

(2) should have their Transpacific Westbound Rate Agreement disapproved, cancelled or modified by the Commission; and/or

(3) should be ordered to cease and desist from such activity;

The United States Department of Transportation was designated as an amicus curiae. See Summary of Proceedings, served April 10, 1986.

The Regulatory Scheme and the Relevant Statutes

I. *THE SUBSTANTIVE PROVISIONS*

Section 10 of the Shipping Act of 1984 is entitled "PROHIBITED ACTS." As pertinent, it provides:

(a) IN GENERAL—No person may—

* * * * *

(2) operate under an agreement required to be filed under section 5 of this Act that has not become effective under section 6, or that has been rejected, disapproved, or canceled; or

(3) operate under an agreement required to be filed under section 5 of this Act except in accordance with the terms of the agreement or any modifications made by the Commission to the agreement.

Section 5(a) of the Shipping Act of 1984, 46 U.S.C. app. § 1704(c), requires that any agreement described in section 4(a) of the Shipping Act of 1984, 46 U.S.C. app. § 1703(a), be filed with the Commission. In addition, section 5(b) of that Act, 46 U.S.C. § 1704(b), prescribes certain mandatory provisions of conference agreements.

Section 4 of the Shipping Act of 1984 is entitled, "AGREEMENTS WITHIN SCOPE OF ACT." Section 4(a) applies to agreements by or among ocean common carriers to—

(1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) pool or apportion traffic, revenues, earnings, or losses;

(3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel common carriers;

(6) control, regulate, or prevent competition in international ocean transportation; and

(7) regulate or prohibit their use of service contracts.

As pertinent, section 5(b) of the 1984 Act provides:

> (b) CONFERENCE AGREEMENTS.—Each conference agreement must—
>
> * * * * *
>
> (8) 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.

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. See *Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line*, 28 F.M.C. 355, 357 (1986) (*Armada*).

II. *THE PENALTY PROVISIONS AND PROCEDURES*

Section 13 of the Shipping Act of 1984, 46 U.S.C. app. § 1712, is entitled PENALTIES. Applicable penalty provisions for violations of sections 10(a)2 and 10(a)(3) of the 1984 Act are set forth in section 13(a) of that Act, as follows:

> (a) ASSESSMENT OF PENALTY.—Whoever violates a provision of this Act, a regulation issued thereunder, or a Commission order is liable to the United States for a civil penalty. The amount of the civil penalty, unless otherwise provided in this Act, may not exceed $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate offense.

Section 13(c) of the 1984 Act is entitled ASSESSMENT PROCEDURES. Among other things, it sets forth the criteria for determining the amount of a penalty to be imposed in an assessment proceeding. It provides, as pertinent:

> (c) 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 Commission's regulations which implement section 13 of the Shipping Act of 1984 appear at 46 CFR Part 505. As pertinent, 46 CFR 505.3 provides:

> (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.

The statutory and regulatory criteria for settlement of penalties are the same as those for assessment of penalties. *Armada, supra,* 28 F.M.C. at 368.

The Offer of Settlement

The matter is before me on Respondents' Further Amended Offer of Settlement, a copy of which is attached as Appendix II. The relevant background to the offer is set forth in the Stipulation Respecting Proposed

[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.

Settlement entered into by the Respondents and Hearing Counsel. The offer, which Hearing Counsel support in its entirety, came about after extensive discovery and discussions. One of those discussions was conducted during a publicly noticed informal conference attended by the United States Department of Transportation as an amicus curiae. The Department of Transportation advises that it has no interest in addressing the Further Amended Offer of Settlement and it takes no position with regard to the proposed settlement.

The offer is made without any admission of violation of law by any Respondent. It calls for the payment of $300,000 ($15,789.47 per carrier Respondent) all of which is on deposit in a trust account in a bank in California, together with accumulated interest from August 13, 1986, August 14, 1986, or August 15, 1986 (depending upon the date when the monies were deposited), upon final approval of the settlement. Also, upon final approval, Respondents undertake: to modify certain terms of the TWRA agreement dealing with the relationship of independent action to minimum rates; to maintain a prescribed course of conduct not to surrender any member's right to take independent action to depart from multicommodity minimum rates; to refrain from establishing a minimum rate program whose purpose is revenue improvement or maintenance for a stated period of time if those rates are subject to a right of independent action; and to report to the Director, Bureau of Agreements and Trade Monitoring, any actions taken during that stated period which establish or modify minimum rates. Further details of the offer appear in the Discussion, *infra*.

The Record

The record presented for consideration of the offer of settlement is comprised of the following:

(1) The Order of Investigation and Hearing (Order)

(2) Further Amended Offer of Settlement

(3) Response of Hearing Counsel to Respondent's Further Amended Offer of Settlement (Response)

(4) Stipulation Respecting Proposed Settlement

(5) Stipulation for Amendment to Order of Confidentiality

(6) Letter from R. Frederic Fisher to me dated August 13, 1986

(7) Letter from Hearing Counsel to me, dated August 18, 1986

(8) Letter from the United States Department of Transportation to me, dated August 15, 1986

(9) Telex Supplement to No. 6, above, dated August 15, 1986

(10) Letter from Hearing Counsel to me, dated August 20, 1986.

Facts

The following is a verbatim restatement of the Stipulation Respecting Proposed Settlement submitted by Respondents and Hearing Counsel.

1. All statements in this Stipulation are made exclusively for use by the Administrative Law Judge and the Commission for consideration of the proposed settlement of this proceeding and are made without prejudice to and shall not be used by any party or person in this or any other proceeding or forum in the event the settlement agreed to by the parties should for any reason not receive final approval by the Commission by way of Commission order or administrative finality of an initial decision.

2. The parties agree that this proceeding be finally resolved by settlement of all issues and claims in the proceeding as provided in Respondents' Further Offer of Settlement.

3. The Transpacific Westbound Rate Agreement (TWRA) is a conference agreement as defined in the Commission's regulations. TWRA's jurisdiction covers the trade from United States and Canadian ports and points to ports and points in Asia. The TWRA Agreement was filed with the Commission, under the Shipping Act of 1984, on November 1, 1984, and became effective on January 4, 1985. At that time, TWRA consisted of 21 ocean common carriers operating in the westbound trade from the United States to the Far East. At present TWRA consists of 14 ocean common carriers in this trade. Respondents in this proceeding are TWRA, its 14 current members and 5 former members, all of whom attended an initial meeting of senior TWRA member executives on January 30–31, 1985.[SN1] The Commission's Bureau of Hearing Counsel was designated a party by the Order of Investigation. The United States Department of Transportation has been permitted to participate as amicus curiae to comment concerning policy issues in the case and concerning its settlement.

4. TWRA's basic Agreement provides authority in Article 5(a) for its members to:

> consider all aspects of transportation and service in the trade and to discuss, agree upon, establish, abolish or change all rates, charges, classifications, practices, terms, conditions, and rules and regulations applicable to transportation of cargo moving within the trade covered by this Agreement and applicable to services provided in connection therewith.

[SN1] ("SN" indicates that these notes appear in the Stipulation Respecting Proposed Settlement.) Seawinds, Ltd. resigned from the TWRA prior to TWRA first meeting of senior executives on January 30–31, 1985. Barber Blue Sea Line resigned from TWRA prior to such meeting. Neither is a respondent in this proceeding. Subsequent to the January 30–31, 1985, meeting, EAC Lines TPS Service, Zim Israel Navigation Co., Evergreen Marine Corp., Hapag-Lloyd AG and Lykes Bros. Steamship Co. withdrew from TWRA. The following present members of TWRA are named as respondents in this proceeding: American President Lines, Hanjin Container Lines, Japan Line, Mitsui OSK Lines, Kawasaki Kisen Kaisha, Showa Line, Korea Marine Transport (now operated by Hyundai Merchant Marine), A.P. Moller-Maersk Line, Orient Overseas Container Line, Neptune Orient Lines, Sea-Land Service, United States Lines and Yamashita-Shinnihon Steamship Co. In addition, Evergreen Line, HapagLloyd, Zim Israel and Lykes remain respondents in the proceeding.

This authority is also stated, in more specific terms, as including, but not limited to (as here relevant), "minimum rates," "service contracts" and to "relationships between" these subjects and other subjects listed.[SN2] Such authority may be implemented by resolutions and decisions of TWRA which are "binding on the parties." (Article 17, TWRA Agreement) All such authority is "subject in all cases to the right of independent action set forth in Article 13" of the TWRA Agreement. Article 5(d) of the TWRA Agreement provides that "any party may enter into a service contract(s)" but must file the essential terms of such contracts with the Agreement Manager.

5. The TWRA replaced several predecessor conferences operating in portions of the present TWRA trade. The largest of these conferences was the Pacific Westbound Conference which had collapsed in 1984 and been dissolved. The collapse was preceded by rapidly declining rates in the TWRA trade. At the time of TWRA's formation, the TWRA members were operating under a large variety of individual carrier tariffs with diverse rates filed with the Commission.

6. Rate levels in the transpacific westbound trade had, as of January 1985, fallen to unusually low levels which the TWRA carriers regarded as unremunerative and which the carriers had advised the Commission were well below levels prevailing in 1979.[SN3] A meeting of senior executives of the newly formed TWRA was held in Vancouver, B.C., on January 30–31, 1985. At that meeting the parties agreed by unanimous vote, accord-

[SN2] Section 5(a) reads: "Subject in all cases to the right of independent action set forth in Article 13 of this Agreement, the Parties are authorized to consider all aspects of transportation and service in the trade and to discuss, agree upon, establish, abolish, or change all rates, charges, classifications, practices, terms, conditions, and rules and regulations applicable to transportation of cargo moving within the trade covered by this Agreement and applicable to services provided in connection therewith. Such authority includes, but is not limited to, the following subjects and relationships between or among them: Port-to-port rates (including all water routes to and from ports and/or places or points on inland waterways tributary to all said ports and ranges), overland rates, minilandbridge rates, interior point intermodal rates, port area intermodal rates, proportional rates, through rates, the inland portion of through rates, joint rates, minimum rates, surcharges, arbitraries, volume rates, time/volume rates, project rates, freight-all-kind rates, volume incentive programs, loyalty arrangements conforming to the antitrust laws of the United States, fidelity commission systems, service contracts, consolidation, consolidation allowances, freight forwarder compensation, brokerage, the conditions determining such compensation or brokerage and the payment thereof, receiving, handling, storing and delivery of cargo, destination of base ports and points, pick-up and delivery charges, free time practices, detention, demurrage, container freight stations, port and inland container yards and container depots, terminals and other points of cargo receipt, vanning, devanning, equipment positioning, furnishing equipment to or leasing equipment from shippers/consignees/inland carriers/others, collection agents at designation, maintaining and distributing information and data and statistics and all other rules, regulations and matters ancillary to transportation of this Agreement, including rules regarding the time and currency in which payments hereunder shall be made, credit conditions, financial security arrangements, suspension and restoration of credit privileges, handling of delinquent accounts and interest thereon. The parties may in any manner discuss any rate or rule on which independent action has been taken, matters on which rates are 'open' with or without minimum requirements, and individual, group or Agreement service contracts."

[SN3] The Order of Investigation states, in listing the objectives of the TWRA furnished to the Commission at the time the Agreement was filed, that one objective was "to stabilize rates in the westbound trades, which the parties [TWRA] characterized as having deteriorated to below-cost levels as a result of excess capacity." (Order of Investigation, p. 4)

ing to the minutes of that meeting filed with the Commission, to adopt, inter alia, the following measures:

(a) Voted to adopt and publish by April 15, 1985, a common agreement tariff to replace disparate individual tariffs and rates;

(b) Voted that "all tariffs [of] all member lines be amended to establish a minimum charge rule. This rule will provide minimums which will be observed on all cargo" effective March 6, 1985.[SN4]

(c) Voted that effective January 31, 1985, "there shall be a minimum charge established for any new service contract or renewal of existing contracts entered into by any party, any combination of parties or the Agreement. Such minimums to remain in effect until changed or amended consistent with the Agreement's Revenue Recovery Program."

(d) Voted to adopt a general rate increase effective March 6, 1985.

7. Shipper reaction to the TWRA rate actions was negative and the Commission received complaints and inquiries commencing almost immediately after the January 30–31 meeting. (See Order of Investigation, p. 8) These complaints were most extensive in the case of shippers of the lowest rated commodities. Bringing rates on the lowest rated commodities up to the minima necessarily meant that these commodities experienced the largest percentage increases. (See Order of Investigation, p. 8) The complaints in some cases alleged a tacit understanding reached at the Vancouver meeting that TWRA members would not grant requests for independent action (or other rate action) below the minimums agreed. (Order of Investigation, pp. 8–9).

8. In response to the complaints the Commission asked TWRA, by telex of February 21, 1985, to postpone the increases pending further discussions with the Commission staff. Several of such meetings were held (Order of Investigation, p. 9), and TWRA postponed the rate increases until March 20, 1985. TWRA met again in Honolulu, Hawaii, on March 6–8 and thereafter informed the Commission that the full rate increases adopted by the Vancouver meeting as minimum rates would be deferred to June 20, 1985.[SN5] As so reduced, the minimum rates became effective on March 20, 1985.

On March 12, 1985, the Commission issued an Order under section 15 of the 1984 Shipping Act to TWRA and its members to which TWRA responded.

9. On March 27, 1985, after the reduced minima had been in effect for six days, TWRA further reduced the minimum rates in question and

[SN4] The minimum rates adopted ranged from $750 (for a west coast 20' dry cargo container to North Asia) to $5,000 (for refrigerated 40' containers moving from the east coast to South Asia). (See Order of Investigation, p. 7) These minima varied according to container size and type and with origin and destination. They did not vary according to the commodity shipped except insofar as particular commodities move in particular types of or size of containers.

[SN5] The minimum on a 40 dry cargo container from west coast points to North Asia, for example, was reduced from $1000 to $800 per container. (Order of Investigation, p. 9)

postponed the balance of the increase.[SN6] (Order of Investigation, p. 11.) Although future increases in the TWRA minimum rates were scheduled, they did not take effect. Also on March 27, 1985, TWRA amended its rate action as to individual member service contracts to treat the rates adopted as non-binding guidelines and to reduce the suggested service contract rates to the tariff minimum level. TWRA minutes also reflect that TWRA passed a resolution on March 27, 1985 for the purpose of refuting allegations that it had surrendered the right of independent action and resolved that "each member had an unqualified right to take independent action from all rates, including minima."

10. At a meeting in Hong Kong on June 6–7, 1985, TWRA exempted eight major moving low-rated commodities, which had been the subject of complaints from shippers, from the minimum rates. (Order of Investigation, pp. 11–12.)

11. On July 15, 1985, the Commission issued the present Order of Investigation.

12. Apart from the foregoing paragraphs Hearing Counsel and Respondents are in conflict on all issues and as to most of the central facts in this case of first impression under the 1984 Shipping Act.

13. The main point in dispute is whether, in adopting minimum rates applicable to all commodities, TWRA reached a tacit agreement, as set forth below, which was contrary to the basic TWRA agreement and/or to provisions of the Shipping Act, 1984. Specifically:

(a) Whether TWRA, at the January 30–31 Vancouver meeting, entered into a separate agreement, contrary to its basic approved agreement, to surrender the right of each TWRA member to take independent rate action as guaranteed to each carrier in the basic TWRA Agreement?

(b) Whether TWRA's adoption of across-the-board minimum rates in its tariffs is unlawful on the ground that such rates are inherently inconsistent with free exercise of the right of independent action required by section 5 of the 1984 Shipping Act to be set forth in all conference agreements?

(c) Whether TWRA was authorized under its basic agreement to adopt minimum rates on individual carrier service contracts? and

(d) Whether TWRA agreed at the Vancouver meeting that its members would not enter into individual service contracts?

14. If this matter were to proceed to hearing, Hearing Counsel assert that they would introduce documents which would prove the allegations made in the Commission's Order of Investigation; that this evidence would show that the TWRA members carried out certain unfiled agreements which violated section 10(a)2) of the shipping Act of 1984, and/or were contrary to the terms of the TWRA Agreement in violation of section 10(a)(3)

[SN6] The minimum on a 40' dry cargo container moving from west coast ports to North Asia was reduced to $700 effective March 27, 1985, and scheduled to increase to $800 July 1 and to $1000 on September 1, 1985. (Order of Investigation, p. 11)

of the Act; that they would produce witnesses whose testimony would demonstrate that TWRA members and their representatives acted in a manner consistent with their carrying out these agreements and that specifically, their evidence would demonstrate the following:

(a) On January 30 and 31, 1985, TWRA members met in Vancouver, British Columbia, and agreed to a "Revenue Stabilization program" which established a program of minimum tariff rates against which independent action or rate initiative would not be taken unless unanimously approved by the Agreement members. Hearing Counsel contend that this minimum rate program was inherently inconsistent with the independent action provisions of the TWRA Agreement and section 5(b)(8) of the Shipping Act of 1984 which requires those Agreement provisions, and that by operating under the unfiled agreement not to take independent action against the minimums the TWRA members violated section 10(a)(2) and/or section 10(a)(3) of the Act.

(b) At the Vancouver meeting, the TWRA carriers established a program of minimum rates for service contracts and agreed not to enter into service contracts for rates below those minimums or to exercise independent action against those minimum rate levels. The TWRA members also agreed not to enter into new or renewed service contracts for a period of 90 days and, for a period of time, in fact, did refuse to negotiate such contracts. Hearing Counsel believe these actions were inconsistent with the service contract and independent action provisions of the TWRA agreement and violated sections 10(a)(2) and/or 10(a)(3) of the Shipping Act of 1984.

(c) Finally, Hearing Counsel would assert that facts alleged by TWRA in defense of its position would be contradicted by evidence available to Hearing Counsel and that whatever commercial reasons TWRA might assert to explain its actions are not relevant to the issues set forth in the Order of Investigation.

15. TWRA denies that there was any agreement, explicit or tacit, among TWRA members to inhibit the right of independent action. TWRA asserts that at hearing, TWRA would show:

(a) That, whether taken separately or together, each of the factors relied upon by Hearing Counsel in alleging an unlawful agreement constitutes lawful, normal conduct under a conference agreement, that a conference's central function is to agree upon, establish and maintain common rates, and that TWRA's actions were authorized by the TWRA agreement and not prohibited by any decision, regulation or statutory provision;

(b) That to the extent that any of TWRA's members expressed resolve to adhere to or actually adhered to rates newly adopted by unanimous vote, without independent action therefrom, such activity does not constitute evidence of conduct prohibited by the Act; that deferral and reduction of the minima adopted from March 6, 1985, through June, 1985, made independent actions below the minima unnecessary for members; that in the absence of a common tariff and a common rate base, the use of

uniform minima was the only way to create a common conference rate level in the short term for most commodities that, without minimums the general rate increase would fail because it would exaggerate existing rate differentials between the members, that another reason for the minima was to adopt a consensus as to what rate was minimally necessary to assure that any given shipment covered out-of-pocket costs in transporting cargo plus some contribution to total costs;

(c) That minimum rates are used by other carriers and conferences and that they are wisely used in inland and ocean transportation ard have been required and enforced by the ICC and this Commission in a number of domestic rate regulation cases particularly to avoid below cost rates; that nothing in the 1984 Act or in Commission regulations or decisions suggests that minimum rates are unlawful; that the Shipping Act requires only that a conference agreement guarantee to a carrier member its right of independent action and that even if broadly based minimum rates were to reduce the incentive for a carrier to exercise that right, the statute does not forbid such rates for that reason; that if there is to be new policy enunciated on these issues that is not stated in the statute, in regulations or existing decisions, it would be inequitable to apply it to TWRA in an enforcement case simultaneously with announcing such a new rule;

(d) That Article 5(a) of TWRA's agreement authorized both agreement on "service contracts" and on "relationships between or among" service contracts and rates, including "minimum rates";

(e) That there was no agreement by TWRA members that the members would not enter into individual service contracts.[SN7]

16. All parties have proceeded with preparation of the case for hearing, including substantial discovery proceedings.

17. Hearings were scheduled to commence in December 1985 and extend into January 1986, but were deferred pending attempts by the parties to resolve the issues between them. The parties negotiated extensively in October and November, 1985 and submitted a settlement agreement. This agreement was withdrawn in January, 1986 and further negotiated to incorporate provisions (now set forth in paragraph 5 of the proposed Ordering paragraphs in TWRA's Further Offer of Settlement) respecting adoption by TWRA of broadly based minimum rates pending the possibility of the Commission issuing a guideline for the industry as to lawfulness of such rates.

18. The estimated time required to hear the case would be at least 4 to 6 weeks, with most hearings required, for the convenience of witnesses, to be held on the West Coast. Both Hearing Counsel and respondents

[SN7] TWRA says that service contracts are not a rate or service item required to be subject to independent action. TWRA also says that in response to complaints it both drastically reduced the service contract minima and made them nonbinding and further that, to eliminate the dispute with the Commission as to the scope of TWRA's authority over individual member service contracts, it amended its basic agreement to state affirmatively that the conference could limit, prohibit or set mandatory standards on service contracts of its members. The Commission permitted this amendment to become effective.

(a number of whom are separately represented) are facing full-time and intense involvement in the case, at very substantial cost to the Commission and to respondents alike, in order to bring this case to hearing and conclusion. Commission personnel as well as many witnesses located throughout the world are expected to testify as witnesses.

19. Hearing Counsel make no claim that the conduct alleged to be unlawful is continuing, and, in the view of all the parties, the large expenses and disruption of the parties' other responsibilities is not warranted, in view of the settlement reached.

20. In the absence of the settlement, due to the large burdens that this case places upon Hearing Counsel, an additional delay in the scheduled proceedings would be requested by Hearing Counsel to allow further discovery and full preparation. As a consequence of the foregoing and other related factors, costs for both sides are mounting rapidly, will continue to grow and will be experienced through at least the balance of 1986 and well into 1987.

21. Hearing Counsel do not claim that Respondents were carrying out an unlawful agreement respecting independent action or service contracts at the time they commenced settlement negotiations in the fall of 1985 or that they are doing so at present. Accordingly, the parties agree that there would be no regulatory purpose served by the issuance of an order to cease and desist. In view of modifications of the TWRA agreement already made under the Settlement agreed to and in view of the provision in the settlement offered by Respondents, the Parties further agree that there is no need to consider other modifications to or cancellation of the TWRA agreement.

22. The settlement which Respondents propose is an integrated settlement reflecting basic elements which were intensively bargained; without these elements one or the other of the parties would not have been able to resolve their differences.

Discussion

Realistically, Respondents' offer of settlement is the culmination of extensive negotiations between Respondents and the Commission's Hearing Counsel. It reflects their agreement designed to reach a disposition of issues raised by the Order without going through costly trial and appellate litigation. The settlement seems to me to be a comprehensive retrospective and prospective resolution of those issues and encompasses much more than the payment of civil penalties, although the proffered payment is substantial. The proposal appears to be reasonable and to satisfy settled criteria for approval. I find that the monetary portion of the offer fits within a zone of reasonableness and that the overall settlement "is neither a coercive attempt to exact exorbitant punishment nor a 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, 24 F.M.C. 992, 1013 (1982).

The first of Respondents' non-civil penalty undertakings requires it to modify Article 5 of their agreement and to file that modification within ten days after final approval of their offer. The modification clarifies the interplay of independent action and minimum rates adopted under that agreement and provides that any minimum rates which are subject to a right of independent action shall remain subject to further adjustment or, even, revocation, pursuant to normal ratemaking processes under the agreement. This modification is reinforced by the second of Respondents' commitments whereby they agree, for the future, not to enter any agreement to surrender any member's right to take independent action departing from any multicommodity minimum rates that are subject to a right of independent action. Hearing Counsel states that these provisions of the first numbered paragraph of Respondents' offer "assure that Respondents will not use minima to limit independent action . . ." and that the commitment in the second numbered paragraph "memorializes the absolute predominance of the right of independent action."[3] I agree that numbered paragraphs 1 and 2 of the offer contain clear and reasonable statements assuring preeminence of independent action under the TWRA agreement.

The third numbered paragraph of the settlement recognizes that the service contract issue raised by the Order became moot by virtue of the filing of an amendment to the TWRA agreement which the Commission allowed to become effective,[4] and, which eliminates any question about the scope of the Commission's authority over member's service contracts. The amendment accomplishes this result by inclusion of a provision permitting TWRA to limit, prohibit or set standards on service contracts.

The fourth numbered paragraph contains the offer to pay a civil penalty without admission of violation.

Under provisions of the fifth numbered paragraph, for a stated period of time, the Respondents commit not to establish any minimum rate program, the purpose of which is revenue improvement or maintenance. The term "minimum rate program" is defined to mean "a program which applies minimum rates to commodities that are subject to TWRA commodity, class or FAK rates set forth in TWRA tariffs." By notation, the proposal confirms the understanding of the parties that "Neither FAK[5] nor class rates shall be construed as constituting minimum rates subject to this [provision]." Particular minimum rates or charges are exempted

[3] Response, p. 3.

[4] Hearing Counsel notes that, when this amendment became effective, "the Commission directed the staff to prepare a proposed rule which would assure uniform application of Commission policy regarding the degree to which conference agreement provisions will be required to specify the nature of any limitation imposed upon members' use of service contracts." Response, p. 4.

[5] FAK rates apply either to multiple or to all commodities and tend to be used by non-vessel operating common carriers, shipper associations and other shippers of a range of commodities moving together.

from the minimum rate program restraints. These exceptions[6] are: (a) minimum rates on commodities for which rates are not required by statute or by the TWRA Agreement to be subject to a right of independent action;[7] (b) minimum charges or cargo quantity minima imposed to induce a direct vessel call at a port not ordinarily served by a TWRA member; (c) minimum charges required for issuance of a single bill of lading[8] (d) per container minimum charges or minimum container capacity utilization rules where the shipper obtains exclusive use of the container for a cargo movement;[9] or (e) establishment of minimum rates for a commodity or commodities whose rates have been declared "open".[10] But this exemption from the prohibition shall not be construed to bar an individual member of TWRA from exercising its right of independent action against a floor beneath an open rated commodity. See paragraph 1 and 2 of the offer. The restraint will expire on November 7, 1987, or sooner, if, before then, in a proceeding of general applicability, the Commission determines that a minimum rate program, applicable to commodities that are also subject to separate commodity, class or FAK rates, established for the purpose of revenue maintenance or improvement, is lawful. Provision is also made for the elimination of any exemption which may in the future be found improper.

The sixth numbered paragraph calls for the filing of reports by TWRA with the appropriate Commission office to enable the Commission to monitor TWRA's use of minimum rates and charges.

The seventh numbered paragraph is procedural and provides for the return, to the producing party, of any material obtained pursuant to discovery in this proceeding.

[6] The Commission recognizes that "the use of minimum rates is a long standing commercial practice, usually designed to improve container utilization and deployment." Order, p. 24. The Order did not specifically identify, nor place in issue, any of the minima excepted from the restraint, presumably because the majority—save (a) dealing with a statutory exemption and (e) dealing with open rates—are associated with that practice and because it did not appear that there was any linkage between these minima and possible thwarting of independent action. However, inasmuch as the Commission has not determined the validity of the usage and practice under the Shipping Act of 1984, the inclusion of these exceptions in the order, which follows, should not be construed as a determination on the merits. On the other hand, no useful purpose would be served by excising the exceptions because the restraint, itself, is of limited duration and, because, as will be seen, *infra*, the order also provides that the exceptions must yield to applicable laws and regulations. The exception concerning open rates is examined separately, *infra*.

[7] Currently, under the TWRA agreement, rates for what would otherwise be statutorily exempt commodities pursuant to section 8(a)(1) of the Shipping Act, 1984, 46 U.S.C. app. §1707(a)(1) are subject to a right of independent action.

[8] Minimum bill of lading charges are designed to recover carrier costs in the event shippers request multiple bills of lading covering small portions of a shipment.

[9] Minimum charges for exclusive use of a container are adopted to compensate a carrier for wasted container space. Typically, it is imposed upon small shipments taking a weight basis rate if the shipper insists on exclusive use of the container.

[10] Open rates occur when a conference decides not to publish a "conference" rate and allows each member to state its own rates. Commonly, a floor level or minimum is set in lieu of a conference rate. The practice of establishing a floor for open rates is acknowledged in the Commission's tariff rules. (See 46 CFR 580.6(m)(2)(ii).)

The eighth, and last numbered paragraph simply provides that the proceeding has come to rest upon approval of the settlement and that no further claims may be asserted against the Respondents for alleged violations arising out of the facts alleged in the Order.

The Stipulation contains a sufficient showing to establish that Hearing Counsel would be able to present a prima facie case of violations. But, it is equally clear from the Stipulation's numbered paragraphs 13 through 16, inclusive, that there is a wide rift between Hearing Counsel and the Respondents on factual and legal issues, which, if the case were to go to trial, would require weeks, if not months, of evidentiary hearing. The costs of litigation would not be limited to this event alone. It is also estimated that Hearing Counsel will require additional and lengthy discovery. One must include other preparations for trial by counsel for both sides in calculating costs. Further, there must be added the costs of appellate procedures, which, in this case of novel impression under the Shipping Act of 1984, seem inevitable, whichever side might prevail at the trial level. Given those probabilities, manifestly the potential litigation costs to the Respondents would exceed the offered payment by a considerable margin.[11] It is also evident that Hearing Counsel would be required to expend a great deal of time, resources and money to pursue this matter to a contested and successful conclusion.

Balancing those considerations against the alleged unlawful conduct, which if proved, would constitute serious and not merely technical violations, see, e.g. *Armada, supra,* 28 F.M.C. at 369–370, the penalty amount of $300,000 does not appear inequitable. The fact that the principal is already on deposit with a bank in an interest bearing trust account, with accrued interest payable to the Government together with the principal upon approval, justifies the conclusion that the penalty not only will be collected, but that it will be collected at the least expense to the Government. Moreover, the substantial sum involved, given the nature, circumstances, extent and gravity of the alleged violations, permits the conclusion that the settlement is likely to have a long term deterrent effect on the Respondents and others subject to regulation.

With respect to the nature and circumstances of the alleged violations, Hearing Counsel confirm that the Respondents did not attempt to conceal the activities that resulted in this proceeding and that Respondents dealt responsibly and cooperatively with Commission staff personnel, even before the proceeding was instituted, by postponing the effective date of their rate actions and by modifying levels of minima in order to reduce the impact upon the shipping public. Hearing Counsel advise, too, that after the proceeding was commenced, Respondents continued to maintain a responsible and cooperative relationship during the adjudicatory process. As

[11] Given, too, the extensive preparation and bargaining mentioned in the record, it seems fair to speculate that Respondents' counsel fees to date may already exceed the monetary settlement.

to the extent of the alleged violations, Hearing Counsel assert that none of the alleged unlawful activities is ongoing and that any such conduct was terminated prior to the time that settlement negotiations began in the fall of 1985.

The interests of justice do not require any further modification of the TWRA agreement or the entry of a cease and desist order. It is clear that the service contract modification, which already has been permitted to become effective, and the proposed modification to paragraph 5, together with the other commitments incorporated in the offer and the order which follows, provide sufficient, mandatory safeguards for the future.

Conclusion

I find that the statutory and regulatory criteria for settlement of a civil penalty have been satisfied.[12]

Order

It is ordered that the settlement be approved.

It is further ordered:

1. That Respondents shall modify existing language in Article 5 of their Agreement with respect to the relationship of independent action to any minimum rates adopted by an amendment to Article 5(a), to be adopted by the parties and filed with the Commission no later than 10 days after the date that this Order becomes final. Such language shall be as follows:

> Any minimum rates (other than minimum rates applicable to commodities that are not required by statute or this Agreement to be subject to a right of independent action) that are agreed upon or otherwise adopted by the Parties under this Agreement shall in all cases be subject to further adjustment or revocation under the normal ratemaking processes of the Agreement as set forth in this Article and in Article 8 and to the right of independent action set forth in Article 13.

2. That neither the Agreement nor its members will enter into any agreement to surrender any member's right to take independent action to depart from any multicommodity minimums adopted by the Agreement if rates on the commodity to which such minimums are applicable are required by statute or the Agreement to be subject to a right of independent action.

3. That issues as to the authority and the future conduct of Respondents respecting individual carrier service contracts have been mooted by their amendment to the TWRA Agreement filed by Respondents on October

[12] The discussion addressed the dominant criteria and touched on subordinate criteria developed in the record. It is appropriate to note, however, that a settlement may be justified by any one or more of the applicable criteria. *Far Eastern Shipping Company Possible Violations of Section 16, Second Paragraph, 18(b(3) and 18(c) Shipping Act, 1916, supra,* 24 F.M.C. at 1014.

15, 1985, providing specific authority concerning individual TWRA members' service contracts which amendments became effective under section 6 of the Shipping Act of 1984.

4. That this Order shall become effective as to the Agreement and each Carrier Respondent upon satisfaction of their offer to pay to the Federal Maritime Commission, without admission of violation of law or liability, the sum of $300,000 ($15,789.47 per Carrier Respondent).

5. That, TWRA and its members will refrain from establishing any minimum rate program applicable to essentially all types of cargo handled subject to the TWRA Agreement, the purpose of which program is revenue improvement or maintenance. The term "essentially all types of cargo" does not necessarily mean 100% of the commodities named in the TWRA tariff(s). The term "minimum rate program" means a program which applies minimum rates to commodities that are subject to TWRA commodity, class or FAK rates set forth in TWRA tariffs.[13] This prohibition is not applicable however, to: (a) minimum rates on commodities for which rates are not required by statute or by the TWRA Agreement to be subject to a right of independent action; (b) minimum charges or cargo quantity minima imposed to induce a direct vessel call at a port not ordinarily served by a TWRA member; (c) minimum charges required for issuance of a single bill of lading; (d) per container minimum charges or minimum container capacity utilization rules where the shipper obtains exclusive use of the container for a cargo movement; or (e) establishment of minimum rates for a commodity or commodities whose rates have been declared "open". The prohibition contained in this paragraph respecting adoption of a minimum rate program shall cease to apply on November 7, 1987, or any earlier date on which the Federal Maritime Commission has determined the lawfulness of such minimum rates. None of the alphabetized categories of rates above should be construed as overriding or limiting any other requirements of any current or future applicable laws or regulations.

6. That during the period that paragraph 5 is in effect, TWRA will report to the Director, Bureau of Agreements and Trade Monitoring, any and all TWRA actions taken during such period establishing or modifying any minimum rates and will provide applicable tariff references; provided, however, that no tariff matter described in paragraph 5(b) and established by independent action need be reported. Reports under this paragraph shall be filed no later than 14 calendar days after the date of the TWRA action establishing such rates.

7. That the Order of Confidentiality dated September 27, 1986, be further amended by adding a new paragraph thereto as follows:

> As of the date this proceeding is terminated by an administratively final order, all written material (and all copies thereof)

[13] Neither FAK nor class rates shall be construed as constituting the minimum rates subject to this Order.

produced pursuant to discovery in this proceeding or pursuant to or in connection with the Commission's Section 15 Order served March 12, 1985, that have not been offered into evidence in the proceeding shall be immediately returned to counsel for the parties which produced them by every person which has received copies thereof.

8. That, upon final approval of this Order, any assessment proceeding, civil action, or other claims for recovery of civil penalties or for other relief, in any way related to claims or alleged violations of the Shipping Act of 1984 by any Respondent, arising out of any matter referred to in the Commission's July 15, 1985, Order of Investigation in this proceeding shall be forever barred. No finding in this proceeding may be used by any person against any Respondent in any way in any other proceeding, in this or any other forum.

(S) SEYMOUR GLANZER
Administrative Law Judge

APPENDIX I

Transpacific Westbound Rate Agreement, P.O. Box 800, Iselin, New Jersey 08830

American President Lines, Ltd., 595 Market Street, Ste. 2175, San Francisco, California 94104

The East Asiatic Company Ltd. A/S, Holbergsgade 2, DK–1099 Copenhagen K, Denmark

Evergreen Marine Corp. (Taiwan) Ltd., 63, Sung Chiang Road, Taipei, Taiwan

Hanjin Container Lines, Ltd., C.P.O. Box: 6289, Seoul, Korea

Hapag-Lloyd AG, Postfach 10 26 26, Ballindamm 25, 2000 Hamburg 1, Federal Republic of Germany (West)

Japan Line, Ltd., Tokusai Building, 1–1, Marunouchi 3-Chome, Chiyoda-ku, Tokyo 100 Japan

Mitsui O.S.K. Lines, Ltd., 1–1, Toranomon 2-Chome, Minato-ku, Tokyo 105 Japan

Kawasaki Kisen Kaisha, Ltd., Hibiya Central Building, 2–9, Nishi-Shinbashi 1-Chome, Minato-ku, Tokyo 105 Japan

Nippon Yusen Kaisha, 3–2, Marunouchi 2-Chome, Chiyoda-ku, Tokyo, C.P.O. Box 1250, Tokyo 100–91 Japan

Showa Line, Ltd., Hibiya Kobusai Building, 2–3, Uchisaiwaicho 2-Chome, Chiyoda-ku, Tokyo 100 Japan

Korea Marine Transport Co., Ltd., 23rd Floor, KAL Building, 118, 2-ka, Namdaemoon-Ro, Chung-Ku, Seoul, Korea

Lykes Bros. Steamship Co., Inc., Lykes Center, 300 Poydras Street, New Orleans, Louisiana 70130

A.P. Moller-Maersk Line, 50, Esplanaden, DK–1098 Copenhagen K, Denmark

Orient Overseas Container Line, c/o Seapac Services, Inc., 433 Hegenberger Road, Suite 200, Oakland, California 94621

Neptune Orient Lines Ltd., 456 Alexandra Road, NOL Building, Singapore 0511, Republic of Singapore

Sea-Land Service, Inc., 10 Parsonage Road, P. O. Box 800, Iselin, New Jersey 0830

United States Lines, Inc., 27 Commerce Drive, Cranford, New Jersey 07016

Yamashita-Shinnihon Steamship Co., Ltd., 1–1, Hitotsubashi 1-Chome, Chiyoda-Ku, Tokyo 100, Japan

Zim Israel Navigation Company Ltd., Zim Container Service, One World Trade Center, Suite 2969, New York, New York 10048

APPENDIX II

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–18

MEMBER LINES OF THE TRANSPACIFIC WESTBOUND RATE AGREEMENT—POSSIBLE VIOLATIONS OF THE SHIPPING ACT OF 1984

FURTHER AMENDED OFFER OF SETTLEMENT

WHEREAS, by its Order of July 15, 1985, the Federal Maritime Commission commenced an investigation as to whether certain actions of Respondents may have constituted violations of the Shipping Act of 1984; and

WHEREAS, Respondents believe and assert that their actions were fully and publicly disclosed and authorized by Article 5 and other provisions of their conference agreement, that their actions were in all respects within the scope thereof and otherwise lawful and believe that their position would be vindicated in this proceeding; and

WHEREAS, Respondents have nonetheless found that their legal expenses in the proceeding are escalating rapidly and that the proceeding is diverting substantial time and attention of Respondents' senior management; and

WHEREAS, in order to terminate their escalating legal expenses and diversion of management time and in settlement of issues raised by the first and second ordering paragraphs of the July 15, 1985 Order, Respondents are willing to consent (1) to file an amendment to their conference Agreement responsive to the concerns set forth in the July 15, 1985 Order, (2) to make certain undertakings as set forth herein concerning future operations under the conference Agreement, (3) not to adopt a program of minimum rates, as defined below, and applicable essentially to all commodities for a period ending no later than November 7, 1987, and (4) by a monetary payment, all on the specific condition that such amendment, undertakings and monetary settlement be without any admission of violation of law or liability of any kind or admission that any allegation or statement in the Order of Investigation is true; and

WHEREAS, this offer of settlement is conditioned upon a final Order disposing of the proceedings, as provided below, that states that any claims by the Commission for or based on violation of law or liability for penalties under the Shipping Act of 1984 as to any matter set forth in or arising out of the events described in the Order of July 15, 1985, are resolved without admission of liability or violation of law by any Respondent; and

WHEREAS, the Commission's Bureau of Hearing Counsel has advised Respondents that it will not oppose this offer of settlement and considers it reasonable;

NOW, THEREFORE, Respondents do make this offer of settlement.

1. That Respondents shall modify existing language in Article 5 of their Agreement with respect to the relationship of independent action to any minimum rates adopted by an amendment to Article 5(a), to be adopted by the parties and filed with the Commission no later than 10 days after the date that this Order becomes final. Such language shall be as follows:

> Any minimum rates (other than minimum rates applicable to commodities that are not required by statute or this Agreement to be subject to a right of independent action) that are agreed upon or otherwise adopted by the Parties under this Agreement shall in all cases be subject to further adjustment or revocation under the normal rate making processes of the Agreement as set forth in this Article and in Article 8 and to the right of independent action set forth in Article 13.

2. That neither the Agreement nor its members will enter into any agreement to surrender any member's right to take independent action to depart from any multicommodity minimums adopted by the Agreement if rates on the commodity to which such minimums are applicable are required by statute or the Agreement to be subject to a right of independent action.

3. That issues as to the authority and the future conduct of Respondents respecting individual carrier service contracts have been mooted by their amendment to the TWRA Agreement filed by Respondents on October 15, 1985 providing specific authority concerning individual TWRA members' service contracts which amendments became effective under Section 6 of the Shipping Act of 1984.

4. That this Order shall become effective as to the Agreement and each Carrier Respondent upon satisfaction of their offer to pay to the Federal Maritime Commission, without admission of violation of law or liability, the sum of $300,000 ($15,789.47 per Carrier Respondent).

5. That, TWRA and its members will refrain from establishing any minimum rate program applicable to essentially all types of cargo handled subject to the TWRA Agreement, the purpose of which program is revenue improvement or maintenance. The term "essentially all types of cargo" does not necessarily mean 100% of the commodities named in the TWRA tariff(s). The term "minimum rate program" means a program which applies minimum rates to commodities that are subject to TWRA commodity, class or FAK rates set forth in TWRA tariffs.[1] This prohibition is not applicable however, to: (a) minimum rates on commodities for which rates are not required by statute or by the TWRA Agreement to be subject to a right of independent action; (b) minimum charges or cargo quantity minima imposed to induce a direct vessel call at a port not ordinarily served by a TWRA member; (c) minimum charges required for issuance of a single bill of lading; (d) per container minimum charges or minimum con-

[1] Neither FAK nor class rates shall be construed as constituting minimum rates subject to this Order.

tainer capacity utilization rules where the shipper obtains exclusive use of the container for a cargo movement; or (e) establishment of minimum rates for a commodity or commodities whose rates have been declared "open". The prohibition contained in this paragraph respecting adoption of a minimum rate program shall cease to apply on November 7, 1987 or any earlier date on which the Federal Maritime Commission has determined the lawfulness of such minimum rates. None of the alphabetized categories of rates above should be construed as overriding or limiting any other requirements of any current or future applicable laws or regulations.

6. That during the period that paragraph 5 is in effect, TWRA will report to the Director, Bureau of Agreements and Trade Monitoring, any and all TWRA actions taken during such period establishing or modifying any minimum rates and will provide applicable tariff references; provided, however, that no tariff matter described in paragraph 5(b) and established by independent action need be reported. Reports under this paragraph shall be filed no later than 14 calendar days after the date of the TWRA action establishing such rates.

7. That the Order of Confidentiality dated September 27, 1986 be further amended by adding a new paragraph thereto as follows:

> As of the date this proceeding is terminated by an administratively final order, all written material (and all copies thereof) produced pursuant to discovery in this proceeding or pursuant to or in connection with the Commission's Section 15 Order served March 12, 1985 that have not been offered into evidence in the proceeding shall be immediately returned to counsel for the party which produced them by every person which has received copies thereof.

8. That, upon final approval of this Order, any assessment proceeding, civil action, or other claims for recovery of civil penalties or for other relief, in any way related to claims or alleged violations of the Shipping Act of 1984 by any Respondent, arising out of any matter referred to in the Commission's July 15, 1985 Order of Investigation in this proceeding shall be forever barred. No finding in this proceeding may be used by any person against any respondent in any way in any other proceeding, in this or any other forum.

Dated: 11 August, 1986.

(Identification and signatures of attorneys for the parties not included.)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–11
"NEUTRAL CONTAINER RULE"—U.S. ATLANTIC-NORTH EUROPE CONFERENCE

ORDER DISCONTINUING PROCEEDING

November 7, 1986

By Order of Investigation and Hearing served April 4, 1986 (April Order), the Commission initiated this proceeding to investigate the use of the neutral container system by the U.S. Atlantic-North Europe Conference (ANEC). Although the April Order addressed ANEC's prior use of the neutral container system, its primary focus was on the legality and effects of a tariff rule which ANEC had recently adopted.[1] ANEC was named respondent and several container leasing companies, shippers, and the Department of Justice were named protestants.[2]

In response to a motion filed by ANEC, the Commission, by Amended Order of Investigation and Hearing served June 6, 1986 (Amended Order), subsequently modified the April Order to include two additional issues. The first concerned whether any shipper may have violated the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. §§ 1701–1720, by taking advantage of the neutral container system and the second raised the issue of whether a container leasing company could be found in violation of the 1984 Act under such circumstances.

Several container leasing companies which were named protestants by the April Order (Protestants) have now filed a "Notice of Intention to Withdraw as Protestants and Motion to Terminate Investigation" (Notice and Motion).[3] Replies to the Notice and Motion were filed by ANEC, the Minnesota Mining and Manufacturing Company (3M), the Pacific Coast European Conference and the Pacific/Australia-New Zealand Conference, the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference, and the Commission's Bureau of Hearing Counsel.

[1] Tariff Rule 21.J (Rule) states that after January 1, 1986:

> [the] carrier will not accept responsibility for the payment of any charge, including but not limited to, rental/leasing, drop-off, termination or maintenance and repair charges, for or in connection with the use of any dry trailer/container not owned or leased (prior to its delivery to a shipper for loading) by the carrier or any affiliate thereof during its transit by water or by land.

[2] These protestants had previously participated in support of a petition for a show cause order against the Rule, which was denied by the Commission. *See* Order Denying Petition for Order to Show Cause, served February 18, 1986.

[3] The Notice and Motion was filed on behalf of Interpool, Ltd.; ITEL Containers International Corporation; Nautilus Leasing Services, Inc.; Sea Containers America Inc.; Trans Ocean Leasing Corporation; and Transamerica ICS Inc.

By memorandum dated September 5, 1986, Chief Administrative Law Judge Charles E. Morgan transmitted the Notice and Motion to the Commission, with his recommendation that the proceeding be terminated.

POSITIONS OF THE PARTIES

Protestants contend that they cannot continue to participate in this proceeding because of heavy expenses and other attendant burdens. They expect that in response to their withdrawal as parties, the Commission will terminate the proceeding and return all parties to the *status quo ante*, at which point they could pursue other unspecified forms of relief. Protestants continue to maintain that ANEC's Tariff Rule 21.J, which was the impetus for this proceeding, is unlawful. However, they also contend that the costs of proving the Rule unlawful are not justified given current economic conditions.

ANEC has no objection to Protestants' dismissal from the proceeding and supports a concurrent termination of the proceeding. ANEC notes that it is unlikely that Protestants could be prevented from withdrawing from the proceeding, because they were not originally designated as "respondents." ANEC further notes that the Protestants have been the only parties opposing Rule 21.J in the instant proceeding.[4] ANEC also contends that the expenses and burdens of this proceeding have been heavy on it as well, and will continue to be so if it must continue to defend its Rule.

ANEC notes that certain issues raised by the April Order relate to the lawfulness of Rule 21.J, but maintains that the Commission has already found the Rule to be *prima facie* lawful. As for the other issues, ANEC argues that they relate to pre-Rule 21.J conduct, and that implementation of Rule 21.J has righted any wrong which may have existed. In light of the non-participation of the leasing companies and the fact that the remaining issues are allegedly of little more than academic interest, ANEC believes the Commission should exercise its discretion and terminate the proceeding.

3M does not oppose granting the Notice and Motion. It notes, however, that doing so will leave unresolved the issue of the lawfulness of Rule 21.J. 3M also contends that the present procedural format is ill-suited to the needs of many of those adversely affected by the Rule, and suggests that it may be incumbent on the Commission to devise an alternative procedure to assess the Rule. At the very least, 3M suggests that the Commission should ". . . officially encourage the carrier conferences and their individual members to entertain proposals for modification of joint container rules and independent container practices . . . ."

[4] ANEC points out that of the eight shippers also named as protestants in the Order of Investigation, three have been dismissed as parties at their request, and all but one of those remaining have ignored the proceeding. In addition, the Department of Justice, which was also named a protestant, indicated that it would not participate in the hearing stage of the proceeding.

The Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference support the Notice and Motion. They also note 3M's suggestion that the proceeding might be carried on against the conferences, but oppose any such one-sided continuation. The Pacific Coast European Conference and the Pacific/Australia-New Zealand Conference simply note that they have no objection to termination of the proceeding.

In light of what it terms Protestants' "effective withdrawal" from this proceeding, Hearing Counsel likewise does not oppose termination of the proceeding. Hearing Counsel also contends that without Protestants' participation, any further investigation would be inefficient and more costly for the remaining parties, particularly ANEC. In addition, Hearing Counsel does not believe that termination will affect the rights of any other parties and contends that 3M is still free to file a complaint if it so desires. Hearing Counsel does note, however, that serious allegations of violations of the 1984 Act have been raised during the course of the proceeding. It suggests that the Commission may want to pursue them through another unstated procedural avenue.

DISCUSSION

Interpool, Ltd., a container leasing company, initially sought a show cause order against ANEC's implementation of Rule 21.J, a rule which would prohibit conference members from using neutral containers, except to the extent they were leased by a carrier prior to their delivery to a shipper. Although Interpool was not successful in that endeavor, the allegations raised during consideration of its petition did prompt the Commission to institute the instant proceeding pursuant to section 11(c) of the Shipping Act of 1984, 46 U.S.C. app. § 1710(c).

The April Order attempted to address these allegations in the context of the ANEC trade and set forth eight issues for consideration. ANEC was the only party named as a "respondent" and container leasing companies and others who had previously filed comments were named "protestants." Although a subsequent order modified the April Order to include two additional issues, the status of the parties remained unchanged. At that stage, the Commission did not believe that an adequate basis existed to make the particular container leasing companies respondents in this investigation. In fact, one of the additional issues raised by the Amended Order was whether a container leasing company could theoretically violate the 1984 Act under the circumstances presented. In any event, the Commission will honor the Protestants' request and permit them to withdraw as parties from this proceeding.

Given the fact that we will no longer have the Protestants' active participation in this proceeding, we must now decide whether it remains in our best interest to continue this proceeding. In this regard, we find it significant that all parties involved favor a termination of the proceeding. They contend that it would be inequitable to make ANEC defend its use

of the neutral container system and implementation of Rule 21.J, while at the same time allowing certain practices of the container leasing companies to escape full scrutiny. Some also point out the difficulties inherent in litigating the issues presented, if the leasing companies are not parties.

The Commission shares these concerns. Although it might be possible to continue the investigation without the active participation of the container leasing companies, it would be considerably more difficult to do so. Moreover, the resources which would be expended, both by the Commission and the remaining parties, would appear to militate against a continuation of the proceeding. Accordingly, the Commission has determined to discontinue this proceeding. While doing so, however, we note that we will informally investigate the matters complained of which formed the basis for this proceeding to ascertain whether regulatory issues of sufficient magnitude are present to warrant future action by the Commission.

One final matter needs to be addressed. 3M has suggested that the Commission should "officially encourage" ANEC to modify its rule concerning the use of neutral containers. This the Commission cannot do, especially in view of the fact that there has been no determination of the lawfulness *vel non* of ANEC's Rule 21.J and its neutral container practices. The Commission does note, however, that conference agreements must establish a procedure for promptly and fairly considering shippers' requests, 46 U.S.C. app. 1704(b)(7), and that 3M is certainly free to avail itself of such a procedure.

THEREFORE IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–49
REEFER EXPRESS LINES, PTY., LTD.

v.

UITERWYK COLD STORAGE CORPORATION, ELLER AND COMPANY, INC. AND TAMPA PORT AUTHORITY

ORDER PARTIALLY ADOPTING INITIAL DECISION ON REMAND

November 14, 1986

This proceeding was initiated by the complaint of Reefer Express Lines, Pty., Ltd. (REL or Complainant) alleging that the charge for "warehouse checking" assessed against REL's vessels under the tariffs of the Tampa Port Authority (Port Authority), Uiterwyk Cold Storage Corporation (Uiterwyk), and Eller and Company (Eller)[1] (collectively referred to hereinafter as Respondents) was an unjust and unreasonable practice in violation of section 17 of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. § 816.

BACKGROUND

REL is a common carrier by water in the U.S. foreign commerce which serves the export trade from the Port of Tampa (Port) with refrigerated vessels. Uiterwyk was the operator of a cold storage terminal facility at the Port. Eller, through its wholly-owned subsidiary, Harborside Refrigerated Services, Inc. (Harborside), was the successor to Uiterwyk's operation at the Port. The Port Authority is a public body established by statute to prescribe rules, regulations and rates for the Port of Tampa.

The disputed charge is for warehouse checking, defined in the Port Authority's Tariff FMC No. 8, Item 285 as:

> The employment of warehouse clerks and checkers, as differentiated from shipside clerks and checkers, in delivery of inbound cargo upon commencement of discharge of cargo and the end of the Free Time allowance; or, in receipt of outbound cargo from the beginning of the Free Time allowance until completion of the loading aboard vessel of the cargo. "Warehouse Checking" is assessed against the carrying vessel based on total inbound and outbound cargo manifest weight.[2]

[1] Uiterwyk, however, did not participate in this proceeding.

[2] After the complaint was filed and at REL's urging, the Port Authority's tariff was amended, effective October 1, 1982, to shift responsibility for the warehouse checking charge from the vessel in all cases to

Continued

Complainant charged that "warehouse checking" is in violation of section 17 of the 1916 Act because it is a charge for a service not actually performed, and the charge is not reflected in the Uiterwyk and Harborside tariffs, but is based on cross-referencing in those tariffs to the Port Authority's tariff. REL also alleged that the Port Authority's tariff represents an agreement among terminal operators which is not approved by the Commission in violation of section 15 of the 1916 Act.[3]

Hearings were held in 1983 before Chief Administrative Law Judge Charles E. Morgan (Presiding Officer) who issued an Initial Decision on March 7, 1984 27 F.M.C. 14 (1984 I.D.) finding that the physical activity of warehouse checking had been performed and was of some benefit to REL as well as the shipper; the charge for warehouse checking was not shown to be unjust and unreasonable; Uiterwyk's and Eller's practice of incorporating by reference in their tariffs the warehouse checking charge of the Port Authority was not unjust or unreasonable; and the Port Authority's tariff was not an unapproved agreement among terminal operators.

The 1984 I.D. also determined that warehouse checking is an actual service performed by terminal personnel, which consists of tallying cargo on receipt by the terminal from an overland carrier, and upon discharge from the cold storage facility to the vessel, and includes preparation of dock receipts and loading lists as well as acting as the interface of product/cargo information between the terminal and the vessel's stevedore so that the cargo can be delivered to the vessel for loading in an efficient and reasonable manner. (27 F.M.C. at 17–18.)[4]

That 1984 I.D. was adopted in part by the Commission and the case was remanded to the Presiding Officer for further hearings on several

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the "party responsible for stevedoring charges," and to permit the party responsible for payment to request that warehouse checking not be performed. However, in the latter instance, the amended tariff provides that "the terminal operators will not be responsible for any overages and/or shortages." Port of Tampa Tariff FMC No. 8, Item 285. Since October, 1982, REL has requested that warehouse checking not be performed.

[3] Section 15, 46 U.S.C. 814 (1984), as applicable herein, provided in part that every agreement "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential or cooperative working arrangement . . ." among "other persons subject to the Act," including those who provide warehouse or terminal services in connection with a "common carrier" by water, must be filed with the Commission for its approval. Any agreement not filed and approved by the Commission would be unlawful.

[4] Warehouse checking was described by Eller's witness Francis S. Cunningham, General Manager of Harborside, on cross examination as

> "tallying upon receipt from trucks or railcars of cargo by mark or lot number, by count, at times by weight and condition before placement into the warehouse . . . to tallying, the checking of condition, marks, lot numbers upon presentation of that cargo to a stevedore for loading on board a vessel." (Transcript, 69).

REL's Director of Terminal Operations admitted in both his written direct testimony and at the hearing that he had seen warehouse employees, other than forklift operators, checking and tallying export cargo both upon arrival at the refrigerated terminal facility (Direct Testimony, 2, Transcript, 13) and discharge from the warehouse to the vessel (Transcript, 16).

issues which had been raised on Exceptions and Replies to Exceptions to the Initial Decision. 27 F.M.C. 5 (1084). The Commission sustained the Presiding Officer's findings that the physical activity of warehouse checking had been performed and was of benefit to the vessel. However, it noted that, having found the function to benefit the shipper as well, the 1984 I.D. made no attempt to allocate the charges between the cargo interests and vessel interests based upon benefits conferred.

REL's argument that its tariff provided "tackle-to-tackle" rates under which it would not be liable for services rendered to cargo before it was brought within reach of the ship's tackle was also considered, although the Commission noted that the record was not clear as to REL's practices and rates actually in effect for shipments through Tampa. The Commission therefore remanded the proceeding to the Presiding Officer to determine whether:

(1) any of the charges for warehouse checking in the Port Authority's tariff may lawfully be charged for the account of the vessel in light of REL's tariff provision for tackle-to-tackle rates and the Commission's prior decisions;

(2) if such charges may be assessed against the vessel, the charges should be allocated among the vessel and the shipper/consignee in proportion to the benefits conferred on each by the service, and whether any proportion of the costs should be borne by the terminal operator; and

(3) the amended Port Authority tariff definition of warehouse checking unlawfully exculpates the terminal operators from possible liability for their own negligence.

Another evidentiary hearing was held on remand, at which four witnesses were heard through written direct testimony and live cross-examination. The parties generally adhered to their original positions, REL insisting that it received no benefit from warehouse checking and performed its own checking function, and the Respondents maintaining that warehouse checking was performed on behalf of the vessel. No party supported allocation of the charges between cargo interests and vessel interests.

In his Initial Decision on Remand, served March 4, 1986, 28 F.M.C. 693 (1986 I.D.), the Presiding Officer again found the tariff provisions relating to warehouse checking and assessment of the charges therefor to be lawful, except as to the 1982 amendment to the tariff under which the "terminal operators will not be responsible for any overages and/or shortages" when it is requested that warehouse checking not be performed. He concluded that the tariff provision as revised in 1982 unlawfully exculpated terminal operators from liability arising from their own negligence.

The 1986 I.D. found that the warehouse checking function is actually performed twice, once upon receipt of the cargo for intake into the refrigerated storage facility and once for marshalling the cargo for loading on board the vessel. Warehouse checking was again found to benefit the vessel by permitting the segregation and orderly loading of cargo in a timely

manner necessary for refrigerated or frozen cargo in Tampa's climate and for vessel efficiency.

Alluding to evidence offered by the Port Authority, it was noted that charges for similar functions performed at other ports are assessed solely against vessel interests, and some terminal tariffs explicitly provide that any allocation of the charges between vessel and cargo must be made by the parties to the contract of affreightment.[5] The latter practice, the Presiding Officer found, is consistent with the terminal practices found lawful by the Commission in *Terminal Rate Structure-Pacific Northwest Ports*, 5 F.M.B. 53 (1956), reconsidered at 5 F.M.B. 326 (1957).

The 1986 I.D. found the warehouse checking function to be appropriately assessed against the vessel because the carrier controls the flow of transportation through the terminal at Tampa, choosing the terminal and instructing the shipper as to where and when to deliver his cargo. The Presiding Officer noted that the REL tariff reflects a variety of tariff terms in addition to "tackle-to-tackle" rates—"Free In and Out," "Liner Terms," "Full Liner Terms" and "Liner In and Free Out." Although Respondents contend that, for most of the rates offered, these terms connote services beyond ship's tackle, which Complainant disputes, the Presiding Officer held that to be a matter of the contract of affreightment between the carrier and the shipper rather than the relationship between the carrier and the terminal operator. He took note that the terminal operator is not a party to, and is not made aware of, the contract of affreightment between shipper and carrier.

The 1986 I.D. further determined that a common carrier's responsibilities, regardless of its tariff terms and contracts of affreightment, include providing a safe and convenient place for the receiving of cargo from the shipper and the giving of a receipt for the cargo. These functions, the Presiding Officer explained, are performed by the terminal as the agent of the vessel, and are, of necessity, performed prior to the time the cargo is delivered to ship's tackle.[6] The Presiding Officer concluded that the provision of a convenient and safe place to receive export refrigerated cargo required delivery to a refrigerated warehouse and included the function of warehouse checking.

Exceptions to the 1986 I.D. were filed by Complainant to which Respondents replied. The Commission heard oral argument.

DISCUSSION

On Exceptions, REL argues that terminal charges are appropriately to be assessed against the party which "controls" the cargo, which in this case is said to be the shipper, and that the determination of when "legal control" of the cargo passes from the shipper to the carrier is to be

[5] *See* Initial Decision on Remand, 28 F.M.C. at 703, discussing the tariffs of the Port of Seattle; Port of Palm Beach; Georgia Ports Authority; Port of Portland, Oregon; and South Carolina State Ports Authority.
[6] *See Terminal Rate Increases - Puget Sound Ports*, 3 U.S.M.C. 21, 23–4 (1948).

determined from the facts, in which a "dominant determinant" is the contract of affreightment. (Complainant's Exceptions and Brief at 5.) In this connection, it is alleged that the shipper elects the port and pier at which REL vessels call; all physical services to cargo, including movement from delivery at the warehouse into cold storage, are billed to and collected from the cargo owner; the dock receipt provided by the terminal is in the terminal's name; and the terminal moves cargo to shipside only upon written release from the owner. All of this is said to indicate the shipper's continuing control over the cargo until it reaches shipside or ship's "tackle." REL further contends that actions by the terminal, as well as the assessment of wharfage charges against cargo, are consistent with its own tackle-to-tackle rates which limit its assumption of responsibility for the cargo to receipt at the end of ship's tackle subject to its own count.

REL's insistence that the shipper retains control of the cargo until it is delivered by the terminal operator to a point of rest on the pier within reach of ship's tackle is neither borne out by the record nor otherwise dispositive of the issue of which party should bear the cost of warehouse checking. Although the shipper is asked to "release" the cargo, it is the carrier which determines when the cargo will be loaded and in what order it will be moved from the terminal. Moreover, it does not appear from the record that the shipper "chooses" the terminal from which its cargo will be picked up, as REL asserts. Although a shipper may "choose" to make its shipment from one port rather than another, once it has done so, it delivers its cargo to the terminal designated by the carrier.[7] REL's own witness admitted on cross-examination that only in exceptional circumstances would an REL vessel call to pick up cargo from more than one terminal facility within a port. (Hearing Transcript, March 5, 1985, at 190.)

REL's main argument that the choice of party to be charged is unlawful in this case turns upon the type of service it allegedly offers. Thus, REL argues that its tariff sets forth "tackle-to-tackle" rates which limit the inception of its obligations to the point at which cargo is placed beneath ship's tackle. The cases, statutes and other authorities cited by REL for this proposition,[8] however, appear to be irrelevant to the question of the

[7] The Harborside facility operated by Eller's subsidiary is apparently the only refrigerated terminal in Tampa.

[8] *E.g., Scrutton on Charter Parties and Bills of Lading,* Knauth, *Ocean Bills of Lading.* REL also argues that its own obligations to the cargo are limited to those defined by the Carriage of Goods By Sea Act, 46 U.S.C. §1301, the Harter Act, 46 U.S.C. 190, and its contracts of affreightment. Cases cited by REL indicate that a carrier may limit its statutory liability for damage to cargo under those Acts by charter or affreightment contract terms which define its service as beginning or ending at end of tackle. The cases cited by Respondents, however, indicate that the carrier's statutory liability for damage to cargo continues to apply through delivery to a safe and convenient location. Respondents argue by analogy that the carrier's liability attaches at the point at which safe and convenient delivery of cargo to the carrier can be made. *See e.g., F.J. Walker, Ltd.* v. *The M.V. LEMONCORE,* 561 F.2d 1138 (5th Cir. 1977); *Philip Morris* v. *American*

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lawfulness of the terminal operator's choice of party to be assessed for the function in question. The carrier's liability for damage to cargo under the Harter and Carriage of Goods by Sea (COGSA) Acts is not definitive of its common carrier service obligations under the Shipping Act, or the lawfulness of terminal operators' charges and tariffs. The common carrier's obligation to provide a safe and convenient place for the receipt and delivery of cargo under the Shipping Act cases is, nevertheless, consistent with the Harter Act, COGSA and cases thereunder cited by the parties.[9]

The issue of whether REL's "tackle-to-tackle" rates affected its liability for the warehouse checking charges was raised on Exceptions to the Initial Decision as a result of REL's reliance on Rule 2A of its tariff. The Commission's Order of Remand specifically directed the Presiding Officer and the parties to consider the effect of this provision on the facts of this case under prior Commission decisions.[10]

REL insists that its terms of service are "tackle-to-tackle" and other terms contained elsewhere in its tariff—"Liner Terms," "Full Liner Terms" and "Free In and Out"—mean the same with respect to its responsibility to the cargo. Eller takes issue with this assertion that "tackle-to-tackle" terms and "liner terms," as used in REL's tariff, are the same. The Port Authority points out that REL's assertedly "tackle-to-tackle" rates are so "except as otherwise provided"; the actual rates as published, however, carry terms which are "questionably tackle-to-tackle * * *" (Reply of Respondent, Tampa Port Authority to Complainant's Exception and Brief, 13.)

REL's tariff Rule 2A specifies that the rates are "tackle-to-tackle" "[e]xcept as otherwise provided."[11] As Respondents point out, only the 11 cargo NOS rates in REL's tariff do not "otherwise provide"; all of the remaining specific commodity rates provide other terms: Liner, Full Liner, etc. Moreover, these are the rates which apply in practice to most cargo which moves under the tariff. (*See* Transcript of Hearing, March 5, 1985, 186–188.) Thus, if the phrase "Except as otherwise provided" has any meaning, it appears that REL's "tackle-to-tackle" rates—and its arguments based thereon—are largely illusory.

The Port Authority argues that Complainant's claim that its responsibility for services to the cargo begins at the end of its tackle is based upon an incorrect definition of the "point of rest," and that the Presiding Officer correctly concluded that the appropriate point of rest to which a shipper

Shipping Co., 748 F.2d 563 (11th Cir. 1985); and *Tapco Nigeria, Ltd.* v. *M.V. WESTWIND*, 702 F.2d 1252 (5th Cir. 1983).

[9] Neither these authorities nor the Presiding Officer's decision prevents the carrier from passing through this expense to the shipper, either in the structure of its freight rates or by charging separately therefor.

[10] Although the Commission's Order of Remand suggested that the parties address the issue of the terms of service—common carriage or contract, tackle-to-tackle or otherwise—applicable to the shipments on which the disputed charges were incurred, it does not appear from the record herein that this was done. *See* Order of Remand, 14.

[11] "Except as otherwise provided, rates named herein * * * are applicable from end of ships tackle at loading port and include only the on-shore cost or on-lighter cost of hooking sling load to ships gear."

must deliver its cargo in the case of refrigerated cargo is the entry to the refrigerated terminal at which the vessel will call. This point of rest, the Port Authority urges, is necessarily a function of the carrier's obligation under the Shipping Act and Commission case law to provide a safe and convenient place to receive cargo. Eller submits that a carrier's duties for the receipt of cargo are analogous to its duties for the delivery of cargo, as determined by the Carriage of Goods by Sea and Harter Acts, *supra,* and cited cases arising thereunder.

The Presiding Officer concluded that a common carrier's responsibilities under the 1916 Act, regardless of its tariff terms and contracts of affreightment, include providing a safe and convenient place for the receiving of cargo from the shipper and the giving of a receipt for the cargo. These functions are performed by the terminal as the agent of the vessel, and are, of necessity, performed prior to the time the cargo is delivered to ship's tackle, quoting *Terminal Rate Increases—Puget Sound Ports,* 3 U.S.M.C. 21, 23–4 (1948).[12] We agree with his conclusion that the nature of the transportation service offered—refrigerated service—and the cargo for which such service is offered—perishable commodities—require as a practical matter that the carrier provide for receipt of cargo at facilities at which its condition can be maintained during transfer from one party to another.

Because we find the Presiding Officer's reasoning valid with respect to the carrier's obligations to provide a place for delivery of refrigerated cargo, the issue of the effect of REL's tackle-to-tackle rates is irrelevant. Whether REL's tariff terms under specific rates shift the burden from one party to the other for the expense of the terminal's services does not affect the relationship between the terminal and the carrier; the terminal may charge the vessel for warehouse checking, and the carrier may itself collect it from the shipper.

The function of "warehouse checking" appears to be one of several checking functions performed by the terminal operator at the various "interface" points in the transportation process between shipper or inland carrier and physical possession of cargo by the ocean carrier. The Commission regulation which defines "checking" indicates that it may be a charge for the account of the cargo *or* the vessel or other person requesting the service.[13] REL, upon whom the burden of proof rests in this case, has failed to establish that it is unlawful for Eller to assess the charge for warehouse checking at its Tampa facility against the vessel.

[12] "The carrier must furnish a convenient and safe place at which to receive cargo from a shipper. * * * If this can be done at end of ship's tackle * * * the contracts of carriage may be limited to such service. *On the other hand, if such receipt * * * is impractical or impossible, the carrier must assume as part of its carrier obligation the cost of moving the cargo * * * from where it can be received from the shipper.* * * * *The carrier cannot divest itself of this obligation by offering a service which is not prepared to perform.*" Emphasis supplied in the I.D. on Remand, 28 F.M.C. at 708.

[13] 46 C.F.R. §515.6(d)(9).

One final point needs be addressed. In remanding the case to the Presiding Officer, the Commission ordered him to consider whether the Port Authority tariff definition of warehouse checking as amended in 1982 unlawfully exculpates the terminal operators from possible liability for their own negligence. The Port Authority has since advised on brief that it has no objection to amending the tariff to indicate that the terminal operators' non-liability for shortages or overages would not apply where such shortages or overages resulted from the "sole negligence" of the terminal operator. In his 1986 I.D., the Presiding Officer concluded that the tariff provision as revised in 1982 did unlawfully exculpate terminal operators from liability arising from their own negligence, and that the revision proposed by the Port Authority would also be troublesome. He concluded, however, that substitution of the word "substantial" for "sole" in describing the limits of the terminal operators' putative liability would be acceptable. While we agree with his reasoning and his finding that the limitation of the terminal operators' liability to damages arising from its "sole negligence" is inappropriate, we do not find the alternative formulation any more acceptable.[14] The Presiding Officer's resolution of this issue is therefore not adopted. The Port Authority's proposed formulation, without limitation or description of the degree of negligence for which it would ordinarily be liable would, we believe, be most appropriate.[15]

With the exception noted above, we find the findings and conclusions reached by the Presiding Officer in his Initial Decision on Remand to be proper and well-founded.

THEREFORE, IT IS ORDERED That, with the exception of the second paragraph of page 27, 28 F.M.C. at 709 (fifth full paragraph), the Initial Decision on Remand in Docket No. 82–49 is adopted; and

IT IS FURTHER ORDERED, That Complainant's Exceptions are denied; and

IT IS FURTHER ORDERED, That Docket No. 82–49 is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

[14] We also do not agree with the Presiding Officer's conclusion that the issue would necessarily be appropriately decided in some other forum. This portion of the Initial Decision on Remand will, therefore, also not be adopted.

[15] The Port Authority's tariff provision, as amended, would thus read:

"When warehouse checking is requested not to be performed, terminal operators will not be responsible for any overages and/or shortages, except where such shortages and/or overages resulted from the negligence of the terminal operator."

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–49

REEFER EXPRESS LINES PTY., LTD.

v.

UITERWYK COLD STORAGE CORPORATION, ELLER & COMPANY, INC., AND TAMPA PORT AUTHORITY

On remand, found that:

1. The Tampa Port Authority's tariff providing for the assessment by the Port's terminals of charges for "warehouse checking" for the account of the vessel is lawful.
2. The above charges should not be allocated by the Port's terminals among the vessel and shipper/consignee in proportion to any benefits alleged to be conferred, inasmuch as such charges are the responsibility of the vessel in providing its transportation services, including the necessity to provide for a safe and convenient place to receive cargo and issue a receipt therefor; and the costs for the service of warehouse checking should not be borne in any proportion by the Port's terminals.
3. The Port Authority's tariff definition of warehouse checking unlawfully exculpates the Port's terminals, and should be amended.

Joseph A. Klausner and *Josiah K. Adams* for complainant, Reefer Express Lines Pty. Ltd.

David F. Pope for respondent, Eller & Company, Inc.

Harold E. Welch for respondent, Tampa Port Authority.

INITIAL DECISION[1] ON REMAND OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

PARTIALLY ADOPTED NOVEMBER 14, 1986

BACKGROUND

This complaint in brief is about "warehouse checking" charges sought to be collected from the complainant on refrigerated cargoes such as frozen poultry, exported through a cold storage terminal at the Port of Tampa, Florida.

The complaint is somewhat broader in scope, insofar as it attacks the warehouse checking charges of the Tampa Port Authority which apply on imports as well as on exports, on non-refrigerated as well as on refrigerated cargoes, and at all terminals at the Port of Tampa. These terminals have their own tariffs, but generally the terms of the Port's tariff apply.

[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).

Since February 1, 1966, the tariff issued by the Tampa Port Authority, one of the three respondents herein, has included items which define, and which also list the rates to be charged for, warehouse checking.

At the Port of Tampa only one terminal specializes in providing cold storage facilities (freezer and cooler rooms for cargoes). The evidence adduced relates largely to this one cold storage facility, to one ocean carrier (the complainant, Reefer Express Lines, or REL) and to this carrier's exports of refrigerated cargoes.

The complainant is concerned about the warehouse checking (W.C.) charges sought to be assessed by the one cold storage terminal. But, also it is noted that the W.C. charges have been assessed against REL at another terminal, Garrison Terminal, used by REL at the Port of Tampa. REL has not paid this assessment by Garrison, nor has REL paid the assessment by the cold storage terminal of the W.C. charges.

The other two respondents herein were and are the operators of the cold storage facility at Tampa. Respondent, Eller & Company, Inc., purchased this facility from respondent, Uiterwyk, in May, 1981. Eller operates the facility under the name of Harborside Refrigerated Services, Incorporated. REL regularly called, and on occasion still calls at, the Uiterwyk-Eller cold storage facility to load its export refrigerated cargoes. REL moved cargo in and out of Tampa both under charter and under tariff terms. At times REL acted as a common carrier, and at other times not. In any case REL issued bills of lading. REL's practice was not to provide the Uiterwyk-Eller cold storage terminal with copies of REL's contracts of carriage or with copies of its bills of lading.

This is a remanded proceeding. The Commission's Order of Remand disposed of a number of allegations originally made in the complaint.

Concerning the remaining remanded issues, the Commission specifically asks that determinations be made as to whether:

(1) any of the charges for warehouse checking in the Port Authority's tariff may lawfully be charged for the account of the vessel in the light of REL's tariff provision for tackle-to-tackle rates and the Commission's prior decisions;

(2) if such charges may be assessed against the vessel, whether the charges should be allocated among the vessel and the shipper/consignee in proportion to the benefits conferred on each by the service; and whether any proportion of the costs should be borne by the terminal operator; and

(3) whether the amended Port Authority tariff definition of warehouse checking unlawfully exculpates the terminal operators from possible liability for their own negligence.

Both the original evidence herein and the evidence obtained at the further hearing on remand have been considered carefully to arrive at the following expanded statement.

RECORD FACTS, POSITIONS OF THE PARTIES, AND PRELIMINARY CONCLUSIONS

REL disputes the assessment of warehouse checking (W.C.) charges, billed against it, and among other things, asks that the Commission direct the respondents to cease and desist from charging, collecting, demanding, or seeking to collect the W.C. charges from complainant, for past or future sailings. From on or about October 1, 1982, no W.C. charges have been assessed against complainant. Since that date REL made three calls at the Harborside facility, in 1984 prior to October 1, 1984. The non-assessment of W.C. charges against the complainant is the result of a change in the tariff provision defining the warehouse checking service effective October 1, 1982. It was then newly provided that the party responsible for payment might specifically request in writing that warehouse checking not be performed. The complainant then so requested, that is, that warehouse checking be not performed on its shipments. Also in the past the complainant never specifically requested that warehouse checking be performed.

The complainant's past shipments of frozen or refrigerated cargo, consisted of items such as frozen poultry exported through the Uiterwyk-Eller cold storage terminal. The complainant has not listed the disputed shipments, but in its complaint refers to the W.C. charge of $0.91 per net ton for all cargo, (other than citrus and citrus products, and Iron & Steel which bear lower charges); and bananas, cattle and horses which are excepted from the W.C. charge. These $0.91 charges were in effect from October 1, 1981, through September 30, 1982.

Exhibit No. 3, by its attachments A and B, which are copies of two invoices of Uiterwyk to REL, shows certain billings to the complainant of the W.C. charges dated May, 1981, and June, 1981, based on the rate of $0.82 per net ton. The first billing above on one ship totalled $4,987.76, which computes to 6,082 net tons total; and the second billing above on another ship totalled $4,104.59, and computes to 5,005 net tons. Seven separate cargo items were listed for the first ship, with descriptions such as, Balfour, GK Chix, Hamdyiego, and Interfoods. There are four such listings for the second ship.

The actual charges for warehouse checking as provided in the tariff of the Port of Tampa in recent years on or about the times of the disputed shipments herein were:

On January 1, 1979:	
All cargo other than specified below	$0.64 per net ton
Citrus and Citrus Products	0.61 per net ton
Iron & Steel	0.53 per net ton
EXCEPTION: Not applicable on bananas, cattle, horses or to cargo loaded or discharged from vessels of 999 Gross Registered Tons or less.	
On October 15, 1979:	
All cargo (as above)	$0.71 per net ton

Citrus and Citrus Products	0.67 per net ton
Iron & Steel	0.59 per net ton
EXCEPTION: (same as 01–01–79).	
On October 13, 1980:	
All cargo (as above)	$0.82 per net ton
Citrus and Citrus Products	0.77 per net ton
Iron & Steel	0.68 per net ton
EXCEPTION (same as 01–01–79).	
On October 1, 1981:	
All cargo (as above)	$0.91 per net ton
Citrus and Citrus Products	0.86 per net ton
Iron & Steel	0.76 per net ton
EXCEPTION: Not applicable on bananas, cattle or horses.	
On October 1, 1982:	
All cargo (as above)	$1.01 per net ton
Citrus and Citrus Products	0.95 per net ton
Iron & Steel	0.84 per net ton
EXCEPTIONS: Not applicable on bananas, livestock, or containerized cargo neither stuffed nor unstuffed in the Port.	

On remand, the parties generally adhere to their original theories of this case. That is, the complainant insists that it (the vessel) receives no benefit and is not responsible for warehouse checking. And the respondents insist that the terminals performed the warehouse checking service on behalf of the vessel, and that the vessel is responsible for the charge.

No party supports allocation of W.C. charges as between vessel and shipper/consignee.

Certain other charges, in the Uiterwyk or Harborside tariff are billed to the shipper, and not to the vessel. One such charge is item 70, "Thru-Put," defined as "the charge for accumulating cargo and providing refrigerated protection prior to loading on vessel (export cargo only) and will be billed for the account of the Shipper. Does not apply to fresh citrus."

Other such charges billed to the shipper, include item 35, "Inspection U.S.D.A."; item 15, "Delivery Charge," for preparation of documents for shipping products; and item 60, "Storage," billed to the firm owning the cargo at the time it is placed into storage. Certain other items billed to the shipper were referred to, but generally relate specifically to import cargoes, rather than to export cargoes. The complainant's position is that warehouse checking is in the category of services which also should be billed to the shipper, but in any event not to the vessel.

At the original hearing, a witness for the cold storage terminal herein candidly testified on cross-examination by complainant's counsel, that every function of the warehouse checking service was done for *three purposes*, one, for the warehouse's own benefit, because of its own liability (as

bailee) for the goods; two, for the benefit of the shipper, to assure that the shipper continues to ship through this warehouse; and, three, for the benefit of the shipping line, so that the ocean carrier receives the proper cargo in order.

The same witness above also pointed out that on the refrigerated and freezer cargo handled through this terminal, there is only one way to get cargo from a truck (or railcar) to the ocean vessel, and that way is through this terminal facility. The truck does not pull up and load directly into the vessel, that is, there is no direct discharge.

This terminal facility has received at times certain cargoes with the notation of vessel "TBN" (to be named). When this happens, the ocean carrier knows that it will have to pick up cargo, for example, on the 30th of a month, and the terminal may start receiving cargo on the 1st, 2nd, or 3rd of a month. The terminal knows the name of the ocean carrier, and the ocean carrier will name its vessel in due course. Cargo may stay in this facility as long as 30 to 45 days on the outside for export cargo. An average for export cargo might be 25 to 35 days.

Export freezer cargo at times may be sold three times over in the warehouse. The terminal may receive cargo up to 5,000 tons for shipment on a vessel. In the warehouse, there may be, for example, beef livers going to 7 different consignees, and maybe going on 7 different ships, or maybe all on one Reefer Express Lines' vessel.

Quite often while a vessel is "working," that is, being loaded with export cargo, besides the original cargo intended for the vessel, additional, or other cargo, is received in the terminal to be loaded on the vessel. Also, the terminal may have in its possession cargo which was not destined originally for the vessel, but which is released subsequently to go on board the vessel. The terminal in performing its warehouse checking service in such instances in checking out cargoes from the terminal is performing a service needed by the vessel.

It is important that the vessel be loaded in an orderly manner, so that the vessel can both be loaded (and ultimately discharged in an orderly manner).

Warehouse checking services for export cargoes were performed at the Uiterwyk-Eller cold storage terminal as a normal function of this terminal at least twice on all cargoes. That is, once during receipt and assembly of cargoes for each vessel, and again at the time of delivery of these cargoes from the cold storage terminal to each vessel. The latter checking was of necessity precisely made so that cargoes could be loaded efficiently and properly aboard ship for export.

At the first hearing, the then Vice President and General Manager both of Uiterwyk and of Harborside considered it difficult if not impossible for a refrigerated warehouse to allocate the costs of the service of warehouse checking, unless the warehouse were a party to the contract of affreightment, bill of lading, or charter agreement, which established where delivery to

or from the ocean carrier would be complete and which also established the party responsible for moving the cargo to and from the place of delivery to the vessel.

On cross-examination the successor Vice President and General Manager of Harborside so employed since October 8, 1984 (who also was employed at Uiterwyk from February, 1974 to June, 1981), testified that warehouse checking on export cargo was performed in part at the time the cargo came into the warehouse on the land side of the warehouse, and in part at the time the cargo left the warehouse on the water side of it to be loaded on the ship. What actually was done in the performance of warehouse checking depended in large part on the specifics of various shipments. On first reception of the export cargo on the land side, there was a count of the merchandise, a check on the condition of the merchandise, and depending on the circumstances, also on occasion an identification of the port of discharge for the cargo, separation of the cargo by shippers, and separation by commodities. All these were done in order to determine how to put the cargoes in the warehouse. The warehouse then signed a dock receipt. These functions of warehouse checking in the land side, took place within the warehouse facility, but not in the freezer or cooler areas of the warehouse.

Later on, warehouse checking also would be performed, at least, in substantial part, immediately prior to the sailing date of a vessel from the Port of Tampa. In the case of such checking during delivery from cold storage to the vessel or to its stevedore, this checking was performed by non-deep-sea I.S.A. checkers employed by Uiterwyk. This warehouse checking included the preparation of a loading list for the vessel.

To deliver the products, to the ocean carrier, requires the warehouse checking, of lots, the tallying, and the delivery of cargo in the right order, by the right lot, to the stevedore, which loads the export cargo on the ocean carrier.

As stated in the original initial decision warehouse checking is defined as follows:

> Warehouse checking is a service performed by terminal personnel (of Uiterwyk or Eller), using tally clerks and checkers to:
>
> (1) Tally, by count, lot, supplier, and/or mark the product/cargo into the cold storage terminal facility and record where, in the cold storage terminal facility, the various lots, marks, or shipper's product/cargo is stored;
>
> (2) Tally and withdraw from the cold storage terminal facility, by count, lot, mark, and/or shipper the product/cargo to the vessel's side, or the overland carrier's equipment, to insure correct count and delivery by lot, mark, or shipper of the overall product/cargo furnished to the vessel or overland carrier; and
>
> (3) Act as the interface of product/cargo information, both as to count and lot/mark/shipper information between the cold storage

terminal facility and the contract stevedore for the vessel so that the vessel can be loaded and the product/cargo delivered to the vessel's side for loading in an efficient and reasonable manner.

In the cold storage terminal's (now Harborside's) dock office is a master board which shows where products are stored, that is, for example, in what area of the freezer or in what cooler. Notations are made on this board after the products are placed in the freezer or in a cooler.

When the ocean vessel arrives at the dock, or prior to such arrival, a shipper or a number of shippers will provide the warehouse by telex a release, which provides for the releasing of certain cargo to the ocean vessel or to the vessel's agent, the stevedore. A customer may have 1,000 tons of a product in the warehouse, and might release only 500 tons to go on the particular ocean vessel at the time. Five-hundred tons would be released by designated lot number.

In other words, while some warehouse checking occurs at the time the cargo enters the freezer or cooler facilities, other warehouse checking of necessity must occur at the time or just prior to when the cargo leaves the freezer or cooler facilities, for loading aboard ship. A witness for the complainant admitted that this was so at the first hearing. Warehouse personnel checked to the extent at least, "as far as this lot goes to the ship, this one doesn't."

Freezer or cooler cargo when exported, because of the temperature (heat) at Tampa, must not be exposed to the elements for more than a half-hour or an hour. In other words, to make loading efficient, advance checking appears necessary to avoid undue delays between cold storage and loading on ships.

As noted above, a pertinent date in this proceeding is October 1, 1982. At this time the applicable tariff description of warehouse checking was changed to read as follows:

285 (C)	WARE-HOUSE CHECK-ING	The employment of warehouse clerks and checkers, as differentiated from shipside clerks and checkers, as defined in Item 205, for delivery of inbound cargo upon commencement of discharge of cargo and the end of the Free Time allowance; or for receipt of outbound cargo from the beginning of the Free Time allowance until completion of the loading aboard vessel of the cargo. Warehouse Checking is assessed against party responsible for stevedoring charges based on inbound or outbound cargo manifest weight.

Warehouse Checking will be performed on all inbound and outbound cargo and charges assessed as provided above, except in cases of direct discharge or direct load cargo and container cargo not stuffed nor unstuffed in port, as described in Item 330, and when party responsible for payment specifically requests, in writing, that Warehouse Checking not be performed. When Warehouse Checking is requested not to be performed, terminal operators will not be responsible for any overages and/or shortages. EFFECTIVE OCTOBER 1, 1982.

In part, above it is provided that the assessment be "against party responsible for stevedoring charges." Also, above it is provided in part that warehouse checking be performed on all cargoes, except in cases of direct discharge or direct load cargo and container cargo not stuffed or unstuffed in port, and except "when party responsible for payment specifically requests, in writing, that Warehouse Checking not be performed."

Prior to October 1, 1982, the Port of Tampa tariff provided:

285	WAREHOUSE CHECKING	The employment of warehouse clerks and checkers, as differentiated from shipside clerks and checkers, in delivery of inbound cargo upon commencement of discharge of cargo and the end of the Free Time allowance; or, in receipt of outbound cargo from the beginning of the Free Time allowance until completion of the loading aboard vessel of the cargo. "Warehouse Checking" is assessed against the carrying vessel based on total inbound and outbound cargo manifest weight. (Intended to clarify application of provision without change of past practice.) EFFECTIVE FEBRUARY 1, 1974.

As seen above, the assessment in earlier years was "against the carrying vessel."

It may or may not be significant, that Uiterwyk provided only a service as a terminal, handling refrigerated and freezer cargoes through its freezer and cooler facilities, and that Uiterwyk did not provide stevedore services. In contrast, Uiterwyk's successor terminal, namely Harborside (owned by Eller) is not only a terminal but also is a stevedore.

In other words, Harborside may have more options for recovery of its expenses for its so-called "warehouse checking" service.

The history of warehouse checking at the Port of Tampa is of interest. The rates for warehouse checking at the Port of Tampa are prescribed by the Tampa Port Authority as per Chapter 23338 of the Laws of the State of Florida, Special Acts of 1945. Also required are public notice and public hearing by the Port Authority before fixing and establishing its tariff rules, regulations and rates.

Warehouse checking at Tampa was considered originally in 1965. The charge was proposed by the terminal operators of the Port of Tampa to recoup asserted labor charges for performing this warehouse checking service. The warehouse checking was changed and increased from time to time. The charge originally was established on February 1, 1966.

At this time warehouse checking became a new item in the tariff and it was a charge against the vessel. The rate originally was 35 cents a ton of 2,000 pounds for all cargo not otherwise specified; also excepted from the warehouse checking charge were bananas, cattle, horses and certain containerized cargo.

At a public hearing held by the Tampa Port Authority on October 25, 1965, it was stated that "warehouse checking" historically had been an item absorbed by the terminal operators, with no rate for same being published in the tariff at that time. Further, it was the desire of the terminal operators to incorporate a charge for warehouse checking in the tariff, and to make it a charge against the vessel.

At another public hearing on December 22, 1965, before the Tampa Port Authority, Mr. John Imparato, a spokesman for one terminal operator at Tampa, objected to the manner of increasing the revenues of the terminal operators. For example, he opposed the warehouse checking charge as such, preferring to recoup his expenses through his stevedore rates.

In that manner he stated that he could adjust his stevedore rates as he saw fit, depending upon the nature of the cargoes handled. His objection also related to the wharfage and dockage charges, as well as to the warehouse checking charges. This terminal operator believed that he had high stevedore rates in relation to his competitors' stevedore rates. He stated that stevedoring was his terminal's main business and that "without stevedoring, we don't need terminals."

Also, he saw no need "to increase rates that are published over the area we serve and scare people away when they see these figures." He acknowledged that any increase in stevedore charges at his terminal would be paid by his steamship principals.

It was also pointed out at the above 1965 hearing, that storage, handling, and loading and unloading (of trucks and railcars) were charged against the cargo. It was pointed out that it was a constant problem as to where various charges should be placed, that is, whether against the ship or against the cargo. It was not then elaborated whether this was considered a problem of legality or not, but it is concluded that at least it was considered to be a problem of sales promotion.

At the same public hearing before the Tampa Port Authority on December 22, 1965, Mr. W. A. Freeman of Garrison Terminal Port of Tampa, testified that a number of this terminal's steamship line principals were paying warehouse checking charges in every other port which they called in the U.S. Gulf range, of from 50 cents to a dollar, and that these steamship line principals were laughing at Tampa because they were not paying in Tampa for warehouse checking. At that time, Tampa was proposing a charge of 35 cents a net ton. In this witness' view, the ocean carrier had a responsibility to the cargo during the free time period because the ocean carrier remained responsible for the care and safekeeping of the cargo including warehouse checking. Mr. Freeman took the view that he could not adjust his stevedoring rates to cover warehouse checking expenses.

At a public hearing before the Tampa Port Authority on July 21, 1982, it was testified in part that the original warehouse checking charge started out when ocean vessels handled a multitude of cargo at the same time, and further that the warehouse checking services had to be performed and could not be relied upon as being requested. At the same hearing the then counsel for REL stated that warehouse checking charges should be limited to instances where the service both is performed and is requested, but with emphasis on the service being requested in the view of REL.

Respondent, the Port of Tampa, at the hearing on remand, introduced copies of the terminal tariffs of certain other ports.

The Port of Portland, Oregon's tariff contains the following:

SERVICE AND FACILITIES CHARGE

> Service and facilities *charges are assessed against ocean vessels,* their owners, or operators which load or discharge cargo at the marine terminal facilities *for the use of terminal working areas in the receipt and delivery of cargo to and from vessel and for services in connection with the receipt, delivery, checking,* care, custody and control *of cargo required in the transfer of cargo.* (See Notes 1 through 6 and Item 1040(A–2).) (Emphasis supplied.)

Item 1040 A.2.a. provides:

> Where the contract of affreightment establishes the responsibility between the parties thereto for the payment of the service and facilities charge named in a tariff, *the full amount of such charges shall be billed to and paid by the vessels, its owners, or operators.* The term "Contract of Affreightment" as used herein shall mean tariff, charter party, ocean rate or any other arrangements under which the vessel transports cargo. *Allocation or adjustment of these charges between vessel and cargo shall be made solely by the parties to the contract of affreightment and not by the Port.* (Emphasis supplied.)

The *Port of Seattle's* terminal tariff contains a *Service and Facilities Charge* substantially the same as Portland's. In particular the full amount of such charge shall be billed and paid by the vessel, its owners . . . or operators to the terminal. Also allocation or adjustment of this charge between vessel and cargo shall be made solely by the parties to the contract of affreightment. The latter is defined in the same manner as in the Portland tariff.

The *Port of Palm Beach's* tariff refers to a service of furnishing checker foremen when vessels are loading cargo, to supervise the release of the cargo being loaded. "Charges for this service will be rendered against the vessel, their owners, or agents."

The *Georgia Ports Authority* Terminal Tariff similarly provides that the terminal will furnish checker-foremen to supervise the release of cargo being loaded on vessels, and it states, "Charges for the service will be rendered against vessels, the owners and agents."

The South Carolina State Ports Authority's tariff defines "Checking" as the service of counting and checking cargo against appropriate documents for the account of the vessel.

So far as this record shows, neither the Port of Tampa tariff, nor any other United States Port terminal tariff, contain any provisions which divide the cost and assessment of terminal services between the vessel, cargo, or stevedore, depending upon the ocean carrier's terms of affreightment.

The witness for the Port of Tampa testified, and there was no contrary testimony, that a division of a terminal's charge for terminal services as between the vessel, cargo or stevedore would not only be unworkable but unmanageable. It is concluded that this testimony should be given great weight.

It is not believed by the Presiding Officer that the W.C. checking charge in this proceeding is the type of charge or assessment that lends itself or ought to lend itself to apportionment. To do so apportion the many charges or expenses of terminals would lead to a morass in the administration and handling of such charges and expenses.

As seen above, at certain ports, such as the Port of Portland, certain charges are assessed against the vessel, and this assessment is made regardless of the terms of affreightment, such as "tackle-to-tackle," or whatever.

In *Terminal Rate Structure-Pacific Northwest Ports,* 5 F.M.B. 326, 327, with reference to handling and service charges incurred between point of rest and ship's hook, it was stated that "in every case the terminal operator may bill and collect from the *vessel,* and in instances where the charges are incurred for the benefit of the cargo the *carrier* shall bill and collect such charges from the shipper or consignee.

It is the ocean vessel, rather than the shippers which control the flow of transportation through the terminal at the Port of Tampa. The vessel decides which terminal it will use, and when a shipper wants to use that vessel, the vessel (ocean carrier) instructs the shipper to deliver his

cargo to the terminal selected by the vessel, usually to meet a specific sailing date. The cargo goes to the ship, rather than the ship going to the shipper's cargo.

The complainant emphasizes that many of its rates are "tackle-to-tackle rates. In such instances, the shipper contracts with the vessel (ocean carrier) to bring the export cargo to the ship's tackle, and the vessel unloads the cargo at its tackle in the foreign port. Thus, as between shipper and vessel, there are contractual obligations. The complainant reaches the conclusion that the warehouse checking service physically takes place in its entirety early in the export process, prior to the time when the shipper assertedly yields possession of the cargo at ship's tackle to the vessel, and that ergo the warehouse checking is in the category of services for cargo. But it does not necessarily follow that the terms of the vessel's tariff determine who is responsible for warehouse checking.

The complainant's tariff rates included eleven tackle-to-tackle rates. Other terms in its tariff are Free In and Out (one rate), Liner In and Free Out (three rates) Liner Terms (two rates), and Full Liner Terms (17 rates). The respondents admit that when the terms free in, or free out, are used the stevedoring is assessed otherwise than to the vessel. Respondents contend that full liner terms and liner terms connote services beyond the tackle of the vessel, but complainant disputes this, and avers that liner terms and full liner terms notwithstanding, that on all of its shipments, the established meaning of liner terms is that the ship shall pay all expenses from tackle to tackle. In any event, the vessel's tariff terms relate only to its contracts of affreightment with the shipper, rather than to the relationship between the vessel and the cold storage terminal.

The complainant admits that the duty to bring cargo alongside vessel, and the responsibility or risk up to that point are conceptually different, and depend upon tariff, agreement and general law.

The shipper makes no contractual arrangements with the terminal operator under ordinary circumstances, but rather the shipper makes his contractual arrangements with the land and ocean carriers, that is, with the inland carrier for movement of the cargo to or from the terminal facility, and with the ocean carrier for movement of the cargo between the ports of call.

Also, the respondent terminal operators are not made aware of the terms of the contractual arrangements as between the vessel and shipper. The respondents are not given copies of papers such as bills of lading, or charter arrangements.

It is important to recognize that it is the vessel's responsibility, (regardless of its terms of affreightment with the shipper), to provide a convenient place for receiving the cargo from the shipper, and to provide for the giving of a receipt for the cargo.

When the cold storage terminal gives such a receipt (dock receipt) to the shipper or to the rail line, or trucker, or forwarder, acting on behalf

of the shipper, the cold storage terminal then acts as agent for the vessel. It follows from this line of reasoning that the cold storage terminal become the agent of the vessel, of necessity, prior to the time that the cargo is delivered to ship's tackle.

An ocean carrier such as Reefer Express cannot avoid its obligation to provide a convenient place for receiving cargo from the shipper and cannot avoid its obligation to give a receipt for the shipper's cargo, by reliance either upon its terms of affreightment with the shipper, or upon its bill of lading.

The respondents reasonably reach the conclusion that warehouse checking is rendered by the respondent terminal operators on behalf of the vessel, which in turn is responsible for the warehouse checking, as part of the vessel's obligations to provide a convenient place to receive the cargo, to give a receipt therefor, and to see that the cargo is moved from place of receipt to ship's tackle.

While the shipper may be responsible for cargo stored in the cold storage terminal for extra long periods not covered by free time, and for some other services which may be provided by the terminal, a shipper certainly is not responsible for the vessel's obligation to provide a convenient place to receive the cargo, and the vessel's obligation to give the shipper a receipt for his cargo.

This is so regardless of any terms of affreightment as between the shipper and vessel, because of the vessel's common carrier responsibilities, and because of the impracticality of requiring a shipper to provide a convenient place for the receipt of the cargo by the vessel. In fact, the vessel chooses the terminal at which it will call. In other words, the vessel selects the place to receive the cargo.

It follows that an ocean carrier's responsibility to accept delivery of goods on a pier includes the movement of refrigerated cargo to and from a refrigerated terminal when necessary to protect the cargo from damage from the elements, while such cargo is being assembled during free time.

The complainants insist that because certain charges of the cold storage terminal are assessed to the shipper, that so also should the W.C. charges be assessed. The respondents reply that certain other cold storage terminal charges, besides warehouse checking, well might be imputed as the responsibility of the ocean carrier. Such other charges are not in issue herein, inasmuch as the cold storage terminal has not opted to assess such charges against the vessel.

Generally, while all of the statements or conclusions above are true as to the relationship of the ocean carrier with the marine terminal, it is true the above statements and conclusions are not controlling necessarily as to the relationship or relationships between the shipper and ocean carrier. The ocean carrier's terms of affreightment with the shipper and the ocean carrier's bill of lading govern between these persons. The tariffs of the Ports of Portland and Seattle explicitly so provide, that is, that certain

charges for the use of the terminals' working areas are assessed against ocean vessels, and that adjustments or allocations of these charges between the vessel and cargo shall be made solely by the parties (shipper and vessel) to the contracts of affreightment. But, how the vessel adjusts its charges, tariff rates, charter agreements, etc., with the shipper, is neither the concern nor the responsibility of the terminal operator.

GENERAL DISCUSSION AND ULTIMATE FINDINGS AND CONCLUSIONS

The complainant insists that all of its shipments of export freezer cargoes were and are under contracts of affreightment providing tackle-to-tackle rates or the equivalent. Assuming this to be so, the shippers then would be responsible for placing their cargoes under ship's tackle, and the ocean carrier would be responsible for the stevedores charge of loading the ship.

The "new" tariff item for warehouse checking (effective October 1, 1982) makes the person responsible for stevedoring charges the one assessed the W.C. charges. Also, the "old" tariff item made the vessel responsible for W.C. charges. Therefore in cases of tackle-to-tackle terms (but not, for example, "free in" and "free out" arrangements) the vessel was, and remains, the one to be assessed W.C. charges because the vessel remains responsible for stevedoring charges (loading charges for export cargoes).

To the extent that the vessel may fail to request in writing that warehouse checking be not performed, the complainant retains an interest in this proceeding as to its "future" shipments. But, for some time, at least from on and after October 1, 1982, the complainant has requested that warehouse checking services be not performed on all of its shipments.

Therefore, as far as the complainant's shipments are concerned, the present controversy relates largely, if not only, to its past shipments, those prior to October 1, 1982.

1. The first question on remand herein is in light of REL's tariff provision for tackle-to-tackle rates, whether the Port Authority's tariff lawfully provides charges for warehouse checking against the vessel.

History is one pertinent factor. Prior to 1966, the terminals at Tampa absorbed this W.C. charge or expense. At about that time and onward, W.C. charges were assessed against the *vessel*. Other ports in the Gulf of Mexico range already had done so, that is assessed the vessel. Presently, other ports assess the vessel. The Ports of Portland and Seattle assess terminal service and facilities charges against the vessel.

The experience of the witness, who was Vice-President and General Manager, both of Uiterwyk and of its successor, Harborside, at this cold storage terminal, shows that the function of warehouse checking separates and identifies the total cargo received at the cold storage terminal and delivered to the vessel into individual counts of cargo and weight by mark/lot/supplier, all of which is information required by the ocean carrier

and by the loading stevedore for proper and efficient loading and carriage by the vessel. Experience shows that warehouse checking is a service required and beneficial to vessels receiving cargo at the Port of Tampa at the dock facility adjacent to the cold storage terminal. The record shows that warehouse checking, as distinguished from simple tallying and checking, does *not* benefit the refrigerated warehouse facility. That is, simple tallying and checking is required so that the warehouse can keep track of cargoes as bailee or custodian. But, checking further for proper and efficient loading of the vessel is "warehouse checking," which benefits the vessel.

An ocean carrier has an obligation to afford to the shipper the free time necessary to assemble his cargo at a terminal for delivery to the ship. The ocean carrier may fulfill the obligation itself, or more than likely it will fulfill this obligation through an agent (terminal operator) acting on behalf of the ocean carrier. In other words, the terminal operator as agent of the vessel provides the free time to assemble cargo.

The ocean carrier also has the obligation to afford the shipper a convenient place for delivery of the shipper's cargo. This obligation cannot be avoided by the ocean carrier under the guise of the terms of affreightment, or the terms of its bill of lading.

In *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, the Commission stated in part, at pages 23 and 24, regarding an ocean carrier's obligations to the shipper in performing the carrier's transportation:

> The carrier must furnish a convenient and safe place at which to receive cargo from a shipper. . . . If this can be done at end of ship's tackle . . . the contracts of carriage may be limited to such service. *On the other hand, if such receipt . . . is impractical or impossible, the carrier must assume as part of its carrier obligation the cost of moving the cargo . . . from where it can be received from the shipper. . . . The carrier cannot divest itself of this obligation by offering a service which it is not prepared to perform.* (Emphasis supplied.)

In the present proceeding, tackle-to-tackle rates are offered by the ocean carrier, but this service cannot be performed by REL, the ocean carrier, on export refrigerated cargoes unless such cargoes are first received at a convenient and safe place to receive such cargoes, namely at a refrigerated warehouse, where such cargoes can be accumulated during free time prior to loading aboard ship.

Thus, it is concluded and found that the Tampa Port Authority's tariff may charge for warehouse checking for the account of the vessel, not withstanding REL's tariff provision for tackle-to-tackle rates. Such a charge is lawful under the Shipping Act.

2. The second question on remand is, if warehouse checking charges may be assessed against the vessel, whether these W.C. charges should be allocated by the Port's terminals between vessel and shipper/consignee in proportion to benefits conferred on each; and whether any proportion

of such costs should be borne by the terminal operator. This is in effect a question with two parts.

As to part one, there was no evidence adduced by any party as to the merits of any proportional allocation of such charges. As seen, the complainant insisted it received no benefit whatsoever from warehouse checking. The evidence is to the contrary, and the law as seen above is that the ocean carrier is responsible for providing the warehouse checking service as part of its transportation obligation to the shipper.

It is concluded and found that no allocation should be made, or is required to be made, by the Port's terminals, of warehouse checking charges as between the vessel and the shipper. The terminals are not made aware of the contracts of affreightment between the vessels and shippers. Of course, the shipper benefits ultimately from the complete transportation service provided by the ocean carrier, but the shipper pays for this complete transportation service through the tariff rates of REL or through the charter arrangements with REL.

It would be unconscionable and unreasonable to expect the terminal to recover its costs for warehouse checking by apportioning such charges between the vessel and the shipper, particularly since the terminal is not made aware of the ocean carrier's transportation arrangements with the shipper, and more particularly because the terminal is acting as agent of the ocean carrier in providing for that carrier a convenient and safe place for the carrier to receive cargo from the shipper.

As to part two, of question two, above, it is concluded and found that no portion of the warehouse checking charges should be borne by the terminal operator. While all persons, such as the shipper/consignee, the ocean carrier, and the terminal at Tampa, benefit from each other's business, in that each does not exist without the other, the key word here is responsibility, and it is the ocean carrier's responsibility or duty in performing its transportation, to move the cargo from where it can be received from the shipper to the ship. The efficient and orderly movement from the cold storage facility certainly includes warehouse checking out of the facility when this service is done to effectuate efficient and orderly loading upon the vessel.

3. The third question on remand relates to the so-called exculpatory clause in the Port's amended tariff. The latest definition, above, of warehouse checking contains the exculpatory clause:

> When warehouse checking is requested not to be performed, *terminal operators will not be responsible for any overages and/or shortages.* (Emphasis supplied.)

The respondent, Tampa Port Authority, on brief, states that it has no objection to amending its tariff to provide that the non-liability for shortages or overages would not apply in cases "*where such shortages and/or over-*

ages resulted from sole negligence of the terminal operator." (Emphasis supplied.)

The complainant in its brief on remand leaves it to the Commission to prescribe a proper formulation of the above exculpatory clause.

It is concluded and found that the word "sole" above should be deleted, and in its place substituted the words, "the substantial." This conclusion is based on the principle that a tariff provision excusing a marine terminal from its own negligence can be contrary to the Shipping Act. Of course, a determination of substantial negligence in a particular case would no doubt be a matter of law to be determined in some other forum than the Commission.

4. *OTHER MATTERS NOT SPECIFICALLY REMANDED.*

Besides the specific issues on remand, the complainant has contended that the cold storage terminal Uiterwyk-Harborside, is itself a common carrier.

The complainant argues that Uiterwyk was executing duties as a connecting carrier (sometimes at least on cargo moving on through bills of lading between land and sea carrier), that the terminal performed a common carrier duty in giving a dock receipt to the shipper, and that the terminal was protecting itself against claims for loss or goods. The complainant cites *Galveston Wharf Co.* v. *Ry. Co.*, 285 U.S. 127, 134–135 (1932).

An examination of this cited decision reveals that Galveston Wharf Co. was a connecting common carrier with its own railroad trackage, and it physically transported goods received from a steamship company to its connections with the railroad companies. Also it had on file with the Interstate Commerce Commission, tariffs naming rates for the interstate movement of goods. Furthermore, this wharf company admitted that it was a common carrier. It was only through actual transportation of goods that the wharf company was determined to be a common carrier. The distinguishing feature of the present case, is that Uiterwyk-Eller does not transport goods. It is not a common carrier, but rather an "other person" subject to the Shipping Act.

Alternatively, the complainant states that if Uiterwyk-Eller is not a common carrier, it was acting as agent for the shipper, and not as agent for the ocean carrier, REL. Complainant argues that the compilation of a loading list for the vessel is not warehouse checking, and as proof points out that the terminal continued to furnish a loading list to REL even after receiving notice from REL that warehouse checking was not desired. Assertedly, delivery of the cargo to the ship in the order required for efficient loading is not warehouse checking in complainant's view. Rather it is said to be "handling" or "through-put," and if chargeable as a separate item, would be payable by the party having the duty to bring the cargo alongside the ship. But, who is that party in the present situation? As stated heretofore, if the cargo cannot be safely and conveniently received from the shipper at ship's tackle, but must be received

in the cold storage terminal, then it is the ocean carrier's duty to move the cargo from there to ship's tackle.

In summary, it is necessary herein, to weigh the duty of the shipper to get his cargo to ship's tackle, against the conflicting duty of the ocean carrier to provide a safe and convenient place to receive the cargo from the shipper as part of its transportation service.

Considering the record as a whole, and all arguments, it is concluded and found that the ocean carrier's duty to provide a safe and convenient place . . . is paramount to the shipper's duty under its contract of affreightment with REL (tackle-to-tackle terms). The vessel selects the terminal (place to receive the cargo) and not the shipper. The terminal becomes the vessel's agent, at least insofar as such agency concerns the service of warehouse checking performed so as to provide efficient and orderly loading of the vessel. Contrariwise, warehouse checking of this nature cannot be the responsibility of the shipper.

In *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, at page 539, the Commission stated, "It is the carrier's obligation not only to afford the necessary free time but also to provide terminal facilities adequate to render such free time meaningful and realistic. . . . This obligation may be fulfilled either by the carrier itself or through an agent." At page 539, it was further stated that where the ocean carriers provided no wharfs nor piers for the receipt and delivery of cargo, and the Port of San Diego provided these facilities and free time, under such circumstances the port became the agent of the ocean carrier for the performance of these transportation obligations of the ocean carrier.

Any contentions of the parties not specifically mentioned herein have been considered, and are deemed to have been denied as not meritorious, or are considered as not necessary to the resolution of the issues herein.

The respondent shall amend its so-called tariff exculpatory clause as provided herein. The complaint is dismissed.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–18
CONTAINER DISTRIBUTION, INC.

v.

NEPTUNE ORIENT LINES, LTD.

NOTICE

November 14, 1986

Notice is given that no appeal has been taken to the October 9, 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. 86–18

CONTAINER DISTRIBUTION, INC.

v.

NEPTUNE ORIENT LINES, LTD.

ORDER OF DISMISSAL WITH PREJUDICE

Finalized November 14, 1986

On August 28, 1986, the complainant, Container Distribution, Inc. (CDI), served in this proceeding a document, titled "Dismissal of Complaint." The document in toto reads as follows:

> Plaintiff, CONTAINER DISTRIBUTION, INC., hereby dismisses without prejudice, its Complaint, dated April 8, 1986 in the above-entitled action.

Inasmuch as the complainant may not itself dismiss its own complaint, the said document has been treated as a motion by complainant for dismissal of its complaint.

The respondent, Neptune Orient Lines, Ltd. (Neptune) served on September 12, 1986, respondent's reply to complainant's motion for dismissal. Therein the respondent urges dismissal of the complaint *with* prejudice. Although time has been allowed for any response which the complainant may have deemed proper, nothing has been offered by the complainant as to why its complaint should not be dismissed *with* prejudice.

Accordingly it is concluded that the complaint should be dismissed with prejudice based upon the reasoning offered by the respondent and summarized below.

Respondent states that the circumstances of this proceeding are such that it is apparent that CDI's purpose has been to harass or to induce Neptune to enter a service contract with CDI in order to avoid litigation in this proceeding, that CDI was not similarly situated to another shipper with whom Neptune had a service contract, and that CDI had no intent to litigate in this proceeding.

A prehearing conference was scheduled by the then Presiding Officer for June 19, 1986. CDI's attorney requested more time to prepare and stated that July 22 or 23, 1986, should be the new date for the prehearing conference. Accordingly the conference was rescheduled for July 23. But CDI's attorney again requested a postponement based on a conflict with litigation in California. The then Presiding Officer declined to further post-

pone the prehearing conference unless CDI's attorney submitted affidavit evidence of the conflict. CDI was not represented at the prehearing conference, and no justification for failure to appear has been submitted. Nevertheless, the then Presiding Officer allowed CDI a further opportunity to pursue its case. A procedural schedule was established, including an August 27, 1986 date for discovery responses, which had been the date agreed between CDI's attorney and counsel for respondent.

Neptune prepared, filed and served its responses to CDI's discovery requests timely, but CDI filed no reply to Neptune's discovery requests. The result was that Neptune went to considerable effort and expense in defending this case, including attorney's fees.

Many other circumstances also are recited by Neptune, leading it to conclude that complainant's actions comprised an abuse of process, and that complainant has forfeited any right it may have had to reinstitute its complaint.

In all the above circumstances, the dismissal of the complaint herein must be with prejudice, and it is so ordered that the complaint is dismissed with prejudice.

(S) CHARLES E. MORGAN
Administrative Law Judge

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 DENYING PETITION FOR RECONSIDERATION

November 18, 1986

On June 26, 1986, the Commission issued an Order Partially Adopting Initial Decision (June Order) in the above-captioned proceeding. The June Order concluded that a proposed 2.5% overall rate increase filed by Matson Navigation Company, Inc. (Matson) in the Hawaiian Trade was unjust and unreasonable and directed, pursuant to section 4 of the Intercoastal Shipping Act, 1933 (1933 Act), 46 U.S.C. app. § 845a, that the rate increase be canceled. The June Order also found that Matson's existing rates were unjust and unreasonable to the extent they resulted in a rate of return in excess of 11.5% and ordered a 1.5% overall reduction in rates pursuant to section 18(a) of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. § 817.

Saibot Corporation d/b/a Tobias Christmas Trees (Tobias) has now filed a "Petition for Reconsideration of Tobias Christmas Trees and Tobias E. Seaman" (Petition) of the June Order pursuant to Rule 261 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.261. The Commission's Bureau of Hearing Counsel (Hearing Counsel) and Matson have filed Replies to the Petition.

DISCUSSION

Tobias argues that Matson should not be permitted to earn a 1986 rate of return in excess of 8.30% and that a 7.50% overall rate reduction plus reparations of 9.00% of 1986 test year revenues collected to date should be ordered. Reduced to its essential elements, Tobias' argument for reconsideration relies upon the following assertions: (1) Matson will realize a rate of return .30% greater than that stated in the June Order due to the continuing decline in fuel costs; and (2) the benchmark rate of return should be reduced an additional 3.20%, 1.00% to reflect a continuing decline in interest rates and 2.20% to reflect Matson's below average risk.

Matson contends that the Petition should be rejected because: (1) Tobias has not complied with the requirements of Rule 261, 46 C.F.R. § 502.261, and section 3 of the 1933 Act, 46 U.S.C. app. § 845; and (2) applicable

principles of *res judicata* preclude reopening and reconsideration of this proceeding.

Hearing Counsel likewise argues that Tobias has not substantively complied with the requirements of Rule 261, because the Petition is in large part a reargument of the issues already considered and decided by the Commission in the June Order. Further, Hearing Counsel contends that reparations may not be ordered in a rate proceeding under section 4 of the Intercoastal Shipping Act, 1933, or a Commission-instituted investigation under section 18 of the 1916 Act, but only in complaint proceedings brought under section 22 of the Shipping Act, 1916, 46 U.S.C. app. §821.

The Commission declines to reconsider the June Order. Although Tobias may have technically complied with the requirements of Rule 261(a)(1) by alleging changes in fuel costs and interest rates,[1] Tobias has not shown a sufficient change in circumstances to warrant reopening the proceeding.[2]

The Commission has held that in order to justify supplementing the record of a rate proceeding under the 1933 Act, "changes in circumstances so significant and certain as to render the original projections substantially unreliable" must be shown. *Sea-Land Service, Inc.—General Rate Increases,* 24 F.M.C. 164, 180 (1981). This standard was promulgated in deference to the legislative determination underlying the 1978 amendments to the 1933 Act,[3] that a timely and final disposition of Commission rate cases is in the public interest. *See, generally,* S. Rep. No. 1240, 95th Cong., 2d Sess. (1978). The public policy consideration underlying those amendments would also appear to apply to rate investigations ordered under section 18 of the 1916 Act, especially when these two types of rate investigations are joined in one proceeding as they were here.

Unduly protracted rate proceedings are costly to both carrier and shipper interests and impose substantial burdens on the administrative process. Moreover, unwarranted delay in disposing of such cases seriously erodes their intended benefit to the general commerce of the United States. Therefore, strong public policy considerations militate in favor of finality in the decision making process in rate investigations and against reopening on the basis of new data obtained after the close of the record. *Cf., Alaska Steamship Co.* v. *F.M.C.,* 356 F.2d 59 (9th Cir. 1966).

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[1] To the extent Tobias' Petition seeks reconsideration to reargue issues already raised and decided, *i.e.,* Matson's relative risk, it is summarily denied. *See, Sea-Land Service, Inc.—Proposed Rate Increases,* 24 F.M.C. 434, 435 (1981); 46 C.F.R. 502.261(a)(3). Similarly, Tobias' alleged "errors" in the June Order, *i.e.,* the factors involved in the determination of a benchmark rate of return, likewise constitute a reargument of issues considered and decided by the Commission. Tobias has not alleged any *bona fide* "substantive error in material fact" that warrants reconsideration. *See,* 46 C.F.R. 502.261(a)(2).

[2] Reconsideration of a Commission decision under Rule 261(a)(1), 46 C.F.R. 502.261(a)(1), necessarily requires reopening the record to admit new evidence. While this procedure is not to be confused with requests to reopen under Rule 230, 46 C.F.R. 502.230, the public policy considerations against reopening the record of a rate proceeding apply with equal force to both procedures.

[3] These 1978 amendments to the 1933 Act, Pub. L. No. 95–475, prescribed statutory time limits for Commission investigations under that Act. See, 46 U.S.C. app. §845.

As stated in the June Order, the Commission was fully aware that more detailed analysis could be achieved by further proceedings in this case and that such evidence could result in a more favorable outcome for affected shipper interests. However, the Commission weighed this potential marginal benefit against the prejudice to shipper interests that might be caused by delaying a final decision. The Commission determined that it was preferable to issue a decision that would be of immediate and substantial benefit to ratepayers, rather than delay and possibly negate any rate reductions for the 1986 test year subject to the investigation. Thus, the Commission determined that a 6-month, 1.5% rate rollback was preferred over continued proceedings resulting in an unknown, albeit possibly larger, rate rollback for a very short period of time near the end of the test year.

In this area of decision-making the Commission must utilize the full measure of its expertise and experience in fashioning an appropriate remedy that best serves the public policies underlying the Intercoastal Shipping Act, 1933. Rate regulation is an inexact science and given the volatility of the various economic factors that must be examined, difficult pragmatic determinations must often be made in rate proceedings. *See, P.R.M.S.A* v. *F.M.C.*, 678 F.2d 327 (D.C. Cir. 1982). The Commission sees no reason to disturb the findings made and conclusions reached in its June Order.[4]

THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration of Tobias Christmas Trees and Tobias E. Seaman" is denied.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

[4] In light of this disposition of the Petition, the Commission need not address the propriety of the specific remedies Tobias seeks, *i.e.*, a rate rollback and reparations. We note, however, that Hearing Counsel is correct that reparations are not available in this type of rate proceeding and may only be awarded in complaint cases filed under section 22 of the 1916 Act.

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–23
ACTIVE INTERNATIONAL SHIPPERS' ASSOCIATION

v.

KOREA SHIPPING CORPORATION

DOCKET NO. 86–25
FREIGHT-SAVERS SHIPPING COMPANY LIMITED

v.

KOREA SHIPPING CORPORATION

NOTICE

December 10, 1986

Notice is given that no appeal has been taken to the November 6, 1986, dismissal of the complaints in these proceedings 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. 86–23
ACTIVE INTERNATIONAL SHIPPERS' ASSOCIATION

v.

KOREA SHIPPING CORPORATION

DOCKET NO. 86–25
FREIGHT-SAVERS SHIPPING COMPANY LIMITED

v.

KOREA SHIPPING CORPORATION

COMPLAINTS DISMISSED

Finalized December 10, 1986

Complainants in these consolidated cases have filed a Notice of Withdrawal of Complaints. Complainants explain that they are withdrawing their complaints on the basis of settlements reached with respondent and will be filing the essential terms of service contracts embodying these settlements with the Commission in accordance with the Commission's regulations. Respondent consents to the filing of the withdrawal notice.

These two cases involved allegations by complainants, a shipper and a shippers' association, in which complainants alleged that respondent Korea Shipping Corporation had refused to make the essential terms of a service contract available, had refused to provide cargo space, and had otherwise refused to deal with or had subjected complainants to undue prejudice and disadvantage, in violation of sections 8(c), 10(b)(6), 10(b)(12), and 10(b)(13) of the Shipping Act of 1984. Complainants had asked for reparations, cease and desist orders, and other relief.

The parties have reached settlement, which action is strongly favored by Commission policy. See *Amtrol, Inc.* v. *U.S. Atlantic-North Europe Conference, et al.*, 28 F.M.C. 540 (1986). Furthermore, the settlement, being between shippers and a carrier, does not require processing under section 4 or 5 of the 1984 Act (formerly section 15 of the Shipping Act, 1916) or require further evidence as do settlements under section 10(b)(1) of the 1984 Act (formerly section 18(b)(3) of the 1916 Act). In a settlement of this kind, all that is required is the filing of the essential terms of the service contract which has now been extended to the complainants, which filing is being accomplished. See 46 CFR 580.7(b).

Under the federal rules applicable in U.S. District Courts, which rules the Commission follows absent a specific Commission rule, a complainant may withdraw its complaint without the permission of the court provided that an answer has not yet been filed. See Rule 41(a)(1), 28 U.S.C.A., and discussion in *Amtrol, Inc.* v. *U.S. Atlantic-North Europe Conference, et al.*, cited above, 28 F.M.C. at 540–541. No answer has been filed in these cases.[1] Therefore, complainants have the right to withdraw their complaints, and there is no reason for me not to dismiss the complaints. See *Amtrol, Inc.* v. *U.S. Atlantic-North Europe Conference, et al.*, cited above.

Accordingly, the complaints are dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

[1] Because the parties were actively engaged in settlement discussions, respondent requested permission to defer filing answers in the hope that settlement would make such filings unnecessary. Permission was granted both by written and oral rulings to permit the settlement discussions to reach successful conclusion.

FEDERAL MARITIME COMMISSION

[46 CFR PART 515]

DOCKET NO. 86–15

FILING OF TARIFFS BY MARINE TERMINAL OPERATORS EXCULPATORY PROVISIONS

December 18, 1986

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission amends its rules governing the filing of terminal tariffs by marine terminal operators to prohibit tariff provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold harmless terminal operators from liability for their own negligence.

EFFECTIVE DATE: February 23, 1987.

SUPPLEMENTARY INFORMATION:

By the publication of a Notice of Proposed Rulemaking in the FEDERAL REGISTER on April 25, 1986 (51 FR 15655–56) the Commission gave notice of its intent to prohibit exculpatory provisions in tariffs filed by marine terminal operators. Specifically, the proposed rule would add a new section to the Commission's regulations governing the filing of tariffs by marine terminal operators contained in Part 515, CFR. As proposed the new section 515.7, "Exculpatory Tariff Provisions," would provide as follows:

> No terminal tariff shall contain provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.

The Commission also requested comments on a possible exception to the general prohibition. The exception would allow terminal operators and users to negotiate an arrangement whereby the user may voluntarily assume liability for certain operations in exchange for operational and rate concessions from the operator. The proposed form of the exception was stated as follows:

> Terminal tariffs may contain hold-harmless and indemnification provisions for specific risks and hazards in terminal operations that port facility users have agreed to assume from the terminal operator but only if such provisions plainly indicate that such

assumption by the users is in consideration for the terminal operator's specific concomitant concessions in rates or relinquishment of control to the user over the operations for which the user is assuming liability or providing indemnification.

Comments in response to the Notice were filed by sixteen parties representing both terminal operators [1] and users [2] reflecting a range of opinion on the proposed rule and possible exception.

Two commenters, Hampton Roads Shipping Association and Hampton Roads Maritime Association, support the proposal. Crowley Maritime Corporation and Lake Charles Harbor and Terminal District endorse the exception to the proposed rule, thereby presumably also supporting the underlying rule.

Several commenters express support for the rule but oppose the exception as published. The Board of Trustees of the Galveston Wharves, Galveston, Texas requests that the exception include terminal agreements containing liability insurance requirements. New Orleans Steamship Association, West Gulf Maritime Association and the Association of Ship Brokers & Agents (USA), Inc. oppose exceptions of any kind. The Master Contracting Stevedore Association of the Pacific Coast, Inc. also opposes any exceptions, and would extend the rule to apply to terminal agreements and leases and specify the various forms of exculpatory provisions prohibited by the rule. In its initial comments, Matson Navigation Company, Inc./Matson Terminals, Inc. (Matson) opposes the exception as it applies to terminal tariffs and argues that any understanding permitted by the exception should be required to be filed as an agreement. Subsequently, Matson filed supplemental comments stating it had given this matter "further consideration" and now supports the position of the Master Contracting Stevedore Association of the Pacific Coast, Inc.

Several commenters express dissatisfaction with the rule and exception as proposed and suggest revisions or clarifications. The Port of Houston Authority of Harris County, Texas argues that ports need protection from nuisance suits and that the Commission should: (1) consider a comparative negligence rule; (2) allow terminal operators to require users to obtain liability insurance; and, (3) not require a formal agreement for the exception to apply. The Port of Seattle agrees and further points out that the exception overrides any need for the rule. The Board of Port Commissioners, City

[1] The following terminal operators filed comments: New Orleans Steamship Association, Board of Trustees of the Galveston Wharves, Galveston, Texas; Board of Port Commissioners, City of Oakland, California; Port of Houston Authority of Harris County, Texas; Lake Charles Harbor and Terminal District; Massachusetts Port Authority; Port of Seattle; South Carolina State Ports Authority; and, Global Terminal and Container Service, Inc.

[2] The following terminal user filed comments: Hampton Roads Shipping Association; Hampton Roads Maritime Association; West Gulf Maritime Association; Crowley Maritime Corporation; Master Contracting Stevedore Association of the Pacific Coast, Inc.; Association of Ship Brokers and Agents (U.S.A.), Inc.; and, Matson Navigation Company, Inc. (for itself and on behalf of its terminal operating subsidiary, Matson Terminals, Inc.)

of Oakland and the South Carolina State Ports Authority urge the Commission to clarify the proposed rule to specify that terminal users may not use the regulation to exculpate themselves from liability for which they are responsible.

Global Terminal and Container Services, Inc. (Global) opposes the rule as it applies to its particular terminal services. Its terminal facility is said to be a "wheeled" container holding yard, which allegedly renders it a "bailee" of containers. Global believes that under the proposed rule it could be held liable for damages without a showing of negligence on its part. Exculpatory clauses which would limit a bailee's liability to cases of actual negligence are alleged to be reasonable and lawful. Global submits that the published exception is insufficient to remedy the situation.

Massachusetts Port Authority (MPA) opposes any regulation in this area. It argues that the free market should dictate port tariff practices. Alternatively, MPA takes the position that if the rule is adopted then the exception should also be adopted.

Upon review of the comments, the Commission has determined to promulgate a final rule in this proceeding prohibiting exculpatory clauses in terminal tariffs with no exceptions permitted. The discussion in the Notice of Proposed Rulemaking, which is incorporated here by reference, made clear that the prohibition against any form of exculpatory provisions in terminal tariffs is one that has been firmly established by the Commission in its decisions. Nothing presented in the comments filed in this proceeding prompts the Commission to alter its position on such provisions. Accordingly, that position will be codified in a Commission regulation.

Specific liability-shifting agreements between terminal operators and users will only be permitted, if at all, in marine terminal agreements filed with the Commission under section 15 of the 1916 Act or section 5 of the 1984 Act. By separate Notice issued this date in response to a Petition for Rulemaking by the Master Contracting Stevedore Association of the Pacific Coast, Inc. the Commission is instituting a proceeding on the question of the lawfulness of exculpatory clauses in terminal leases and agreements and whether a rule should be promulgated addressing such provisions. Docket No. 86–32, *Exculpatory Provisions in Marine Terminal Agreements and Leases.*

As was noted in the Notice of Proposed Rulemaking in this proceeding, in all but one of the several Commission cases which addressed liability-shifting tariff provisions, those provisions were held to be unlawful under section 17 of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. 816, and section 10(d) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. 1709(d).[3] The provisions were found to have been unfairly imposed

[3] The only decision in which the Commission found that a liability-shifting tariff provision was justified on the basis of the arrangement between the terminal operator and the user is *West Gulf Maritime Association v. Port of Houston Authority*, 22 F.M.C. 420, 453 (1980). However, it is important to note that, in that case, it was specifically found that the liability-shifting provision was "not imposed for the purpose of escaping

by the terminal operator through the exercise of greatly superior bargaining power resulting from public-utility-type market conditions for terminal facilities. We therefore see little validity to the suggestion advanced in some comments that "free market forces" exist and should govern the promulgation of liability provisions in terminal tariffs.

Similarly, the argument that the proposed rule would somehow allow terminal users to exculpate themselves from liability for their own negligence is unfounded. There is no indication in the language of the rule or in the case law giving rise to the rule that would lend any support to this argument.

We also find unpersuasive the contention that the rule somehow infringes on the comparative negligence doctrine in maritime and admiralty law. Under that doctrine, negligence is measured in terms of percentage, and any damages allowed are diminished in proportion to the amount of negligence attributable to the person for whose injury recovery is sought. *Black's Law Dictionary* 255 (5th ed. 1979). Exculpatory tariff provisions are, in fact, an attempt to override the traditional application of the comparative negligence doctrine in damage suits resulting from terminal accidents.

Some comments argue, however, that there is nothing unreasonable, and hence unlawful, about a terminal operator and user agreeing upon a liability-shifting arrangement after an arms-length negotiation over the terms and conditions for the use of such facilities. In support of this argument, some commenters allege that actual industry conditions at particular terminal facilities are compatible with the so-called "quid pro quo" exception noted in the Notice of Proposed Rulemaking.

No exception to the general rule prohibiting exculpatory clauses in terminal tariffs is being adopted or will be permitted. The reason favoring a "quid pro quo" exception is that if there generally exists a rough equality of bargaining power between terminal users and operators in the negotiation of the terms and conditions of the use of terminal facilities, reflected in terminal tariffs, then "users" will obtain some significant consideration for their assumption of the port authorities' potential liability. Theoretically, the exception would impose no additional burdens or significant restrictions on the commercial flexibility of the parties; it would only affect terminal tariffs in situations where there is an imbalance of bargaining power. The problem is that if there is, in fact, a general absence of equality of bargaining power between "users" and operators, the exception might only serve to foster litigation over whether negotiations over the provisions are "*bona fide*" and whether consideration flowing to the "user" is adequate. In short, if general equality of bargaining power existed between operators and "users," the exception would be superfluous and unnecessary. Alternatively, where there is a general inequality of bargaining power, as we

liability for one's own negligence." *Id.* Accordingly, this case is not viewed as involving a truly *exculpatory* tariff provision.

find to be the case in the promulgation of exculpatory liability-shifting provisions in terminal tariffs, the exception would be ineffective. In either event, there appears to be no basis for providing an exception to the general rule prohibiting exculpatory provisions, at least insofar as terminal tariffs are concerned.[4]

As noted above, any exception to a general rule prohibiting exculpatory clauses in tariffs would most appropriately be permitted, if at all, through an agreement between the parties filed pursuant to the 1916 or 1984 Acts. The appropriate vehicle to consider the general propriety of such exceptions in terminal lease agreements is the separate rulemaking proceeding which the Commission is concurrently instituting.

Finally, it should be noted that the effective date of this final rule is 60 days after its publication in the FEDERAL REGISTER, rather than the customary 30 days. This extended period should allow those subject to the final rule's requirements ample time to conform their tariffs to those requirements.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographical region; or

(3) Significant adverse effects 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 government organizations.

The Paperwork Reduction Act, 44 U.S.C. 3501–3502, does not apply to this Notice of Final Rulemaking because the amendments to Part 515 of Title 46, Code of Federal Regulations, do not impose any additional reporting or recordkeeping requirements or collection of information from members of the public which require the approval of the Office of Management and Budget.

Therefore, for the reasons set forth above, Part 515 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority citation to Part 515 is revised to read as follows:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 816, 820, 841a, 1709, 1714 and 1716.

[4] Exception to the rule, although suggested as a possibility in dicta in *I. Charles Lucidi* v. *Stockton Port District*, 22 F.M.C. 20, 29 (I.D. 1979), has never been formally accepted by the Commission.

2. A new section 515.7, entitled "Exculpatory Tariff Provisions," is added to read as follows:

§ 515.7 Exculpatory Tariff Provisions.

No terminal tariff shall contain provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–5

COMPAGNIE GENERALE MARITIME AND INTERCONTINENTAL TRANSPORT (ICT), B.V.

v.

S.E.L. MADURO (FLORIDA), INC.

NOTICE

January 12, 1987

Notice is given that no appeal has been taken to the December 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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–5

COMPAGNIE GENERALE MARITIME AND INTERCONTINENTAL TRANSPORT (ICT), B.V.

v.

S.E.L. MADURO (FLORIDA), INC.

COMPLAINT DISMISSED

Finalized January 12, 1987

All the parties to this proceeding have filed a Joint Motion to Dismiss in which they are asking that the complaint be dismissed with prejudice.[1] The reason for the motion is that the parties have entered into a settlement agreement by which they have settled not only this proceeding but a larger, more involved case before a U.S. District Court in Florida and believe their settlement to be "a rational, valid and fair resolution of the dispute . . . obviating the need for further extensive and expensive litigation of genuine disputes of fact and law."(Motion at 4, quoting from *Celanese Corporation* v. *The Prudential Steamship Company,* Settlement Approved; Complaint Dismissed, 23 F.M.C. 1, 7 (1980).

The present complaint case is part of an overall controversy involving not only the parties to this case but also a steamship agent named Kerr Steamship Company. In the complaint filed with the Commission on January 30, 1986, complainants, two common carriers operating in the foreign commerce of the United States, alleged that respondent, a marine terminal operator carrying on business at Florida ports, had violated four provisions of the Shipping Act of 1984 and three provisions of the Shipping Act, 1916, by collecting money for freight handling services performed during 1983 and 1984 at Miami and Port Everglades, Florida, which money allegedly should have been collected from other interests, and by engaging in other allegedly unreasonable, prejudicial or discriminatory practices. Complainants asked for reparations and other relief.

Respondent Maduro denied any wrongdoing. In addition, however, on April 7, 1986, Maduro filed its own complaint in U.S. District Court for the Southern District of Florida, in which Maduro sued the two carriers, complainants in this case, plus Kerr Steamship Company under a variety of counts arising under admiralty, contract, and tort law. Maduro asked for payment for various stevedoring and terminal services allegedly per-

[1] The motion was received by me on December 2, 1986.

formed for the two carriers and their vessels. In this lawsuit, the two carriers filed counterclaims against Maduro relating to the same transactions as those involved in the complaint case before the Commission.

The two cases have already consumed considerable time and expense. The parties have conducted discovery and have filed a variety of pleadings on preliminary matters of law both in this proceeding and in the court case. Throughout the proceedings the parties have discussed settlement and have finally reached agreement. As relevant to the Commission proceeding, complainants agree to release Maduro in return for a monetary payment of $70,000. However, the settlement and accompanying release resolve all of the matters in dispute among all parties both before the Commission and the Court.

The action which the parties have taken to obviate the need for further litigation is fully consistent with the policy of law and the Commission which strongly favors settlements instead of costly litigation and presumes that settlements are fair and reasonable. See, e.g., *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. 316, 325–328 (I.D., 1981); *Celanese Corporation* v. *The Prudential Steamship Company*, cited above; *Perry's Crane Service* v. *Port of Houston Authority*, 22 F.M.C. 30, 33–35 (1979); *Merck Sharp & Dohme* v. *Atlantic Lines*, 17 F.M.C. 244, 247 (1973). As discussed, this case is part of more extensive litigation among the parties arising under various theories as well 95 under seven different provisions of the 1916 and 1984 Shipping Acts. Moreover, the gravamen of the complaint before the Commission is that respondents have engaged in unreasonable practices, not that respondent has charged incorrect rates under its tariff. Accordingly, the settlement does not appear to contravene any statutory scheme. *Perry's Crane Service v. Port of Houston Authority*, cited above, 22 F.M.C. at 34. Nor does the settlement appear to establish any ongoing, cooperative activities which could require filing or approval under section 5(a) of the 1984 Act or section 15 of the 1916 Act. Rather, it is a typical settlement of outstanding claims, containing mutual releases, which do not require further processing under those laws. See *Pan Ocean Bulk Carriers, Ltd.—Investigation of Rates, etc.*, 22 F.M.C. 633, 635 n. 1 (1980); *Farrell Lines, Inc.* v. *Associated Container Transportation (Australia) Ltd., et al.*, 22 F.M.C. 109, 112 (1979); *Amtrol, Inc. v. U.S. Atlantic-North Europe Conference, et al.*, 28 F.M.C. 540, 541 (1986.)

I conclude that the settlement, which the parties have reached in an effort to terminate litigation, is reasonable, violates no law or policy, and fully comports with the Commission's policy which strongly encourages

settlements. Accordingly, the motion is granted and the complaint is dismissed with prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–1

CANCELLATION OF TARIFFS OR ASSESSMENT OF PENALTIES AGAINST NON-VESSEL OPERATING COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

NOTICE

January 21, 1987

Notice is given that the time has expired within which the Commission could determine to review the Presiding Officer's "Order, Declaring Certain Tariffs to be Inactive and Cancelling Same, Dismissing Respondents, and Discontinuing the Proceeding." No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) TONY P. KOMINOTH
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–1

CANCELLATION OF TARIFFS OR ASSESSMENT OF PENALTIES AGAINST NON-VESSEL OPERATING COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER, DECLARING CERTAIN TARIFFS TO BE INACTIVE AND CANCELING SAME, DISMISSING RESPONDENTS, AND DISCONTINUING THE PROCEEDING

Finalized January 21, 1987

The Commission served on January 2, 1986, its "Order to Show Cause" in this proceeding, directed to a total of 201 respondent non-vessel operating common carriers (NVOCC's) in the foreign commerce of the United States, as named in the two appendices to the order (113 in Appendix A and 88 in Appendix B).

The said order pointed out that section 8 of the Shipping Act of 1984 (the Act) requires these NVOCC's to file tariffs showing their rates, charges, etc. for the transportation of cargo, and that section 15(b) of the Act requires these NVOCC's to certify that they have and enforce a policy prohibiting the practice of illegal rebating in ocean shipping. Also, these NVOCC's are required to publish in their tariff the address of their principal office, 46 C.F.R. 580.5(c)(2)(i).

It was ordered that pursuant to sections 8, 11, 13 and 15 of the Act it should be determined whether the 201 named respondents should be assessed civil penalties for any violations of the Act and Commission regulations, and if so the amount of such penalty, among other things ordered.

Of the 201 respondents herein, 91 respondents have been dismissed by orders of the former presiding officer, issued on March 3, March 7, May 1, and July 14, 1986. There then remained 110 respondents.

By motion served September 19, 1986, by Hearing Counsel, it was noted that ten respondents had submitted evidence that they had filed appropriate anti-rebating certificates, and it was moved that these ten respondents be dismissed without cancellation of their tariffs or imposition of penalties. Said motion hereby is granted. These ten respondents now dismissed are:

American International Consolidators, Inc.
EKG Kieserling America Corp.
Aquatran, Inc. (formerly Maritima Aquatran, Inc.)
Buccaneer Line

Compagnie D'Affretement et de Transport U.S.A., Inc.
European Ocean Freight Inc.
Mariner Container Line Ltd.
Smitty's Export/Import Inc.
Trans Ocean Consolidators Ltd.
United Cargo Corporation

Now, there remain for consideration 100 respondents. Hearing Counsel by their recent motion served October 28, 1986, move for the cancellation of certain tariffs, and the dismissal of the remaining respondents, on the principal grounds, that two of the respondents (Delf Shipping (Pty.) Limited and First International Shipping Co.) have requested that their tariffs be cancelled; that twelve respondents (listed in attachment I hereto) have shown that they are out of business; that sixteen respondents (listed in Attachment II hereto) could not be located by the U.S. Postal Service; that fifty-seven other respondents were served but did not respond to the Order to Show Cause; and that the remaining 13 respondents now have filed appropriate anti-rebate certifications, thereby complying with statutory and Commission requirements. These thirteen are Altamirano Shipping, Inc., Backgammon Container Line, C.C. Group Line, Euramer Consolidators Corp., Excel International Freight, Ocean-Air Container Service, Sam Jung Shipping USA Inc., Sesko International, Inc., Sesko Marine Trailers, Inc., TDY Freight Systems Ltd., Transcar of North America, Uniport Express Corp., and West Indies Freight, Inc.

Accordingly, these last thirteen respondents hereby are dismissed, their tariffs remain in effect, and they are deemed in compliance with the anti-rebate certification requirements of the statute.

By motion served November 5, 1986, Hearing Counsel state that Latillean Freight Consolidators erroneously was listed in their motion served October 28, 1986, as not having filed an appropriate anti-rebate certification or as not responding to various Commission orders. Accordingly Hearing Counsel now urge that Latillean be included among those NVOCC's listed in the preceding paragraph. Latillean hereby is dismissed as a respondent, its tariff remains in effect, and it is deemed in compliance with the anti-rebate requirements of the statutes.

The other 86 respondents in summary include two, Delf Shipping (Pty.) Limited and First International Shipping Co., twelve listed in Attachment I, sixteen listed in Attachment II, and fifty-six listed in Attachment III. These 86 have shown, affirmatively or by inaction, that they are not conducting business as NVOCC's. Imposition of penalties on these inactive entities would serve no regulatory purpose and would be inappropriate.

There have been no responses to the said October 28, 1986, motion of Hearing Counsel, and their additional motion of the same date for discontinuance of the proceeding. Also there has been no response to the motion of Hearing Counsel served November 5, 1986.

It is concluded and found that the 86[1] remaining respondents presently are not acting as non-vessel operating common carriers.

Good cause appearing, and to clear the tariff records of the Commission of out-of-business NVOCC's, among other reasons, the motions of Hearing Counsel served October 28, 1986, as amended by the motion of Hearing Counsel served November 5, 1986, hereby are granted.

The tariffs of the 86 respondents above listed hereby are declared to be inactive and ordered cancelled. These 86 respondents hereby are dismissed.

Inasmuch, as all 201 originally named respondents have been or are now dismissed, and inasmuch as neither oral testimony nor further pleadings appear necessary, this proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

[1] Delf Shipping (Pty.) Limited; First International Shipping Co.; 12 listed in Attachment I; 16 listed in Attachment II; and 56 listed in Attachment III.

ATTACHMENT I

D & L Latin America, Inc.

Marina Pacifica Container Line

MPCL, Inc.

Overseas Carriers, Inc.

Pan World Shipping, Inc.

Panatlantic American Freight, Inc.

Ship Corporation of Hawaii, Ltd.

Space Lines, Inc.

Stavers Corporation

Tiger Container Express, Ltd.

Valley Express, Inc.

West Coast Shipping Lines

ATTACHMENT II

Carrier Systems Inc.

CFCL, Inc.

CML Container Line, Inc.

Com-Tran, Inc.

C.T.C. Shipping SA

Euro-Con

LCL Cargo Ltd.

Maritime Company of the Pacific

Oceanaire International, Inc.

Sea Link Corporation

Southern Int'I Shipping, Inc.

Southern Unitrans, Inc.

Tank Traffic America, Inc.

Trans Yiking International Inc.

W.T.C. Holding Co., Inc.

Winchester Lines, Inc.

ATTACHMENT III

Aeropac

Albury's & Bethel's Frt. Service

Astrans USA, Inc.

Australia-Far East Shipping, Inc.

B Line Shipping Company

BIC Tran International

Cargo Procurement Agency, Inc.

Cargo Ven, Inc.

Caribbean Freightways, Inc.

Cari-Cargo International, Inc.

Denizana Shipping Unlimited, Inc.

DSL International

Fuji Express

Harbour International

Indo Atlantic Freight U.S.A. Inc.

International Express Co., Ltd.

Int'l Cargo Handlers, Inc.

Int'l Freight Consultants, Inc.

Int'l Household Export, Inc.

J I F America, Inc.

Joint Transport (USA) Inc.

L.C.L. Incorporated

Marine Consolidators, Inc.

Michael Davis (Shipping) Inc.

Mobel International, Inc.

Multi-Sea Maritime Inc.

Ned-Con Service Inc.

Ocean Freight Transport Corp.

Oceanaire Int'l Services, Inc.

P & M Line

P. T. Gesuri Lloyd
Pelican Cargo Services, Inc.
Polamer Parcel Service Company
Presto Shipping, Inc.
Progressive Pier Delivery
Refrigerated Container Serv., Inc.
Republic Shipping Line
Royal Star Shipping Corp.
Samad Shipping Services, Inc.
San Yang Yuan
Seair Transport Services, Inc.
Seven Seas Containerline Ltd.
Shipping Time Gateways Overseas Ltd.
Snyder Moving & Shipping Co. Ltd.
Special Shipping, Inc.
Square Deal Shippers
Taiwan Overseas Forwarding Company, Ltd.
Todd International, Inc.
Tradeways International Inc.
Transcontainer Atlantic Pacific Canada Corp.
Transinternational System
Transmodal Express
Transocean Shipping Inc.
Transship Inc.
Vekr's Incorporated
Virginia Int'l Air Freight Inc.

FEDERAL MARITIME COMISSION

[46 CFR PART 530]

DOCKET NO. 86–20

TRUCK DETENTION AT THE PORT OF NEW YORK INCREASE IN PENALTY CHARGES

January 21, 1987

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its truck detention rules at the Port of New York to increase penalty charges for truck delays at marine terminals from $4.00-per-15-minutes to $8.00-per-15-minutes.

EFFECTIVE DATE: February 25, 1987.

SUPPLEMENTAL INFORMATION:

By Notice of Proposed Rulemaking published in the *Federal Register* on May 21, 1986 (51 FR 18622), the Commission proposed to amend its truck detention rules which apply to pickup and delivery of cargo by motor carriers at marine terminal facilities within the Port of New York (Port) (46 CFR 530). Specifically, the proposed rule would increase the penalty charges for pickup and delivery delays in sections 530.7 (f) and (g) from $4.00-per-15-minutes to $8.00-per-15-minutes.[1] The Commission's Notice also requested comment on whether there exists a continuing regulatory need for retention of the rule.

Comments on the proposed rule and its retention were submitted by the Bi-State Harbor Carriers Conference, the U.S. Atlantic & Gulf/Australia-New Zealand Conference, the Port Authority of New York and New Jersey, the New York Foreign Freight Forwarders and Brokers Association, Inc., NYTC, and the U.S. Department of Transportation (DOT).

All commenters, with the exception of DOT, supported continuation of the rule. These supporting commenters generally contended that: the rule has played a beneficial role in reducing ambiguities as to proper documentation and other procedures, and in eliminating disputes regarding the responsibility for and levels of detention charges; the rule has effectively encouraged the responsible parties to do their best to eliminate practices and procedures which resulted in the congestion conditions and detention claims that led

[1] The proposed rule was issued in response to a petition filed by the New York Terminal Conference (NYTC) (50 FR 53012), which requested the Commission to amend its rules to increase the subject penalty charges to $8.00-per-15-minutes.

to the original issuance of the rule;[2] and improved conditions at the Port are the result of the rule, and should not serve as justification for its elimination.

Those who commented on the proposed increase in penalty charges supported the change, stating that the current $4.00 charge is no longer appropriate, given the substantial increase in operating costs since the rule was promulgated.

DOT, while taking no position on the amount of penalty charges, asserted that the proposed rule appeared unwarranted in that the petition that prompted the rulemaking gave no indication of the frequency with which the current rule is invoked. DOT explained that there has been a shift to containerized cargo and cargo handling facilities at the Port, and that the rule is unnecessary for containerized cargo and is only rarely invoked for less-than-truckload cargo. DOT contended that its Reports to Congress on the Status of the Public Ports of the United States for 1982, 1983, and 1984 do not disclose any port congestion problems for general cargo moving through the Port, and it stated that if the comments on this proposed rule from affected parties confirm that the rule has, in fact, outlived its usefulness, the rule should be suspended or eliminated. According to DOT, suspension and ultimate elimination of the rule, under those circumstances, would appear consistent with the declared purpose of the Shipping Act of 1984, 46 U.S.C. app. 1701–1720, to minimize government intervention and regulatory costs associated with the common carriage of goods by water in the foreign commerce of the United States.

Although DOT argued against retention of the rule based primarily on its information as to the lack of port congestion problems in recent years, its position was contingent upon receipt of similar comments from the industry favoring elimination of the rule. The general support for retaining the rule voiced by industry commenters and discussed below would, therefore, appear to temper DOT's suggested elimination.

The industry representatives who commented on this matter support the continuation of the rule, and did not dispute either the merit of an increase in penalty charges or the actual amount proposed. The industry perceives a need for continued Commission involvement in this area as a steadying influence to avoid the congestion problems of the past and to eliminate disputes and ambiguities. Certain comments suggested that the rule has been the catalyst for the reduction of the Port's congestion problems, and has ensured an appropriate level of cooperation and coordination among the relevant parties.

Continuation of the rule with the increased penalty charges appears to serve a valid regulatory purpose. At the same time, such continuation would not be an unnecessary intrusion by the Commission in the commercial

[2] The original rule was the subject of Docket No. 72–41—*Truck Detention at the Port of New York.* A final rule in that proceeding was published in the *Federal Register* of November 10, 1975 (40 FR 52385), and, after several postponements, the rule became fully effective on July 5, 1976.

arena, and would not unduly increase the operating costs of the industry. Instead, it wold continue to allow a marketplace consensus to dictate the industry practice and appropriate level of penalty charges. The Commission's role would be to publish the applicable rules in a format which the industry is accustomed to and with which it is apparently satisfied. The rules appear to create no compliance burden on the affected parties, and have minimal impact on agency costs or use of resources. Accordingly, the Commission is adopting the proposed increase as a final rule.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographical region; or

(3) Significant adverse effects 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 government organizations.

The Paperwork Reduction Act, 44 U.S.C. 3501–3502, does not apply to this Notice of Final Rulemaking because the amendments to Part 530 of Title 46, Code of Federal Regulations, do not impose any additional reporting, recordkeeping, or collection of information requirements on members of the public which require the approval of the Office of Management and Budget.

List of Subjects in 46 CFR Part 530, Freight, Harbors, Maritime carriers, Motor carriers, Penalties, Reporting and recordkeeping requirements.

PART 530—[AMENDED]

Therefore, for the reasons set forth above, Part 530 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority Citation to Part 530 is revised to read as follows:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 816, 841a, 1709 and 1716.

2. In paragraphs (f)(1), (f)(2) and (g) of §530.7, the "$4.00-per-15-minutes" penalty charge is increased to "$8.00-per-15-minutes."

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 568]

DOCKET NO. 86–26

SELF-POLICING REQUIREMENTS FOR AGREEMENTS UNDER THE SHIPPING ACT, 1916

January 21, 1987

ACTION: Final Rule.

SUMMARY: This action removes Part 568 from Title 46, Code of Federal Regulations. Part 568 presently imposes detailed self-policing procedures and requirements on conference and other rate agreements in the domestic offshore trades. The absence of malpractices or other abuses by the conference system in these trades has eliminated the need for these regulations.

EFFECTIVE DATE: January 26, 1987.

SUPELEMENTARY INFORMATION:

The Commission published a notice of proposed rulemaking for the removal of Part 568 in the *Federal Register* of October 8, 1986 (51 FR 36034). Part 568 sets forth detailed self-policing requirements for agreements subject to the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. 801–842, including the requirement that such agreements establish independent policing authorities. These regulations were initially adopted to ensure that agreements in the foreign commerce of the United States complied with the requirement of section 15 of the 1916 Act, 46 U.S.C. app. 814, that they be adequately policed. However, with the enactment of the Shipping Act of 1984, 46 U.S.C. app. 1701–1720, agreements in the foreign commerce of the United States are no longer subject to the requirement and the 1916 Act has been made applicable solely to the domestic offshore trades. As a result, those few agreements which exist in the domestic offshore trades must comply with Part 568, even though doing so may be prohibitively expensive and serve no clear regulatory purpose.

Comments in response to the rulemaking notice were filed by: (1) the Department of Transportation (DOT), (2) the Pacific Coast/American Samoa Rate Agreement (PCASRA), (3) the Guam Rate Agreement (GRA), (4) Sea-Land Service, Inc. (Sea-Land), and (5) the Puerto Rico Maritime Shipping Authority (PRMSA). DOT, PCASRA, and GRA support removal of Part 568 on the ground that it no longer serves a valid regulatory purpose. Sea-Land and PRMSA also favor removal, but urge clarification of Commission policy with regard to policing requirements after removal. Specifically, Sea-Land requests that the Commission "acknowledge the right of agree-

ment members to agree upon adequate self-policing procedures and include such provisions in agreements filed for approval pursuant to section 15 of the 1916 Act." With regard to future policy for evaluating the adequacy of policing, PRMSA would like the Commission "to give the parties to covered agreements some assistance in judging what is acceptable for the purpose of neutral body policing arrangements, even if it is only a reiteration of the principal elements of Part 568 or a statement that the standards of former Part 568 will be the starting point of the Commission's examination."

The removal of Part 568 does not in any way affect the statutory duty of any agreement to establish adequate self-policing procedures. Since such procedures must be agreed upon, they must also be submitted to the Commission for approval.

PRMSA's request seems to suggest that the Commission reestablish the neutral body requirements of Part 568 by stating that this will be the standard by which the adequacy of policing will be evaluated. However, such a position would be contrary to the basic purpose for removing Part 568 in the first place, i.e., to relieve agreements in the domestic offshore trades from the burden of maintaining elaborate policing systems. As indicated above, every agreement subject to the section 15 policing requirement must demonstrate its compliance with that requirement by describing its self-policing procedures in its agreement. However, whatever system is adopted will initially be left to the discretion of the parties. The Commission will not impose specific self-policing requirements on any agreement except possibly when, after a full investigation, the existing scheme is found to constitute "inadequate policing" of the agreement's obligations.

The Commission has determined that the removal of Part 568 is not a "major rule" as defined in Executive Order 12291 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) a 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.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is certified that the removal of Part 568 from Title 46 will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in 46 CFR Part 568: Antitrust, Contracts, Maritime carriers, Reporting and recordkeeping requirements, Rates.

Therefore, pursuant to 5 U.S.C. 553 and sections 14, 15, 16, 17, 18(a), 21, 35 and 43 of the Shipping Act, 1916, 46 U.S.C. app. 812, 814, 815,

816, 817(a), 820, 833(a) and 841(a), Part 568 of Title 46, Code of Federal Regulations, is removed.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1447

APPLICATION OF TRANSPACIFIC WESTBOUND RATE AGREEMENT AND SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF LUSK SHIPPING CO., INC. AS AGENT FOR KAISER ALUMINUM INTERNATIONAL, INC.

ORDER OF PARTIAL ADOPTION

January 21, 1987

The Commission determined to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) served December 5, 1986, in this proceeding.

The Transpacific Westbound Rate Agreement and Sea-Land Corporation on behalf of Sea-Land Service, Inc. 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 freight charges for Lusk Shipping Co., Inc. as agent for Kaiser Aluminum International, Inc., on a shipment of aluminum wire and cable from Baltimore, Maryland to Bangkok, Thailand.

The Presiding Officer found that the application met all the requirements of section 8(e) of the Act and properly granted permission to waive the freight charges. However, the Presiding Officer subsequently advised the Commission that the tariff notice required by the Initial Decision to be published in the appropriate tariff inadvertently made the corrected applicable rate effective as of November 3, 1985, 215 days from June 6, 1986, the filing date of the application. In *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia*, 28 F.M.C. 421, 422 (1986) the Commission held that no relief can be granted on shipments falling outside the 180-day period.

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. 1447, that effective December 8, 1985, and continuing through May 25, 1986, inclusive, the rate on Aluminum Wire is $2,040.00 per 40 foot container, plus Terminal Receiving Charges of $110.00 from U.S. Ports and Points (See Rule 1–A) to Thailand, 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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1447

APPLICATION OF TRANSPACIFIC WESTBOUND RATE AGREEMENT AND SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE INC. FOR THE BENEFIT OF LUSK SHIPPING CO., INC. AS AGENT FOR KAISER ALUMINUM INTERNATIONAL, INC.

Application to waive freight charges of $2,489.57 granted.

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

Partially Adopted January 21, 1987

This application[2] is for permission to waive $2,489.57 of freight charges arising out of one shipment of aluminum wire and cable from Baltimore, Maryland to Bangkok, Thailand.

The tariff initially involved in this proceeding is Transpacific Westbound Rate Agreement (TWRA) Westbound Local and Intermodal Freight Tariff FMC No. 3 from U.S. Ports and Points to Southeast Asia Base Ports in Singapore, Malaysia, Indonesia, Thailand, and the Philippines.[3] Sea-Land is a member of the agreement. On October 22, 1985, Sea-Land Service Inc.'s (Sea-Land) Assistant Pricing Manager was instructed to have the TWRA publish a rate of $2,040 per 40 foot container plus a $110 Terminal Receiving Charge for the shipment of Aluminum Rods and Coils (Item No. 76–0330) and Aluminum Wire (Item No. 76–0400). Instead, he inadvertently only began a rate initiative for the aluminum rods and coils. The initiative was objected to and the rate was ultimately made effective by independent action, effective on November 4, 1985.[4]

When the error in not amending the tariff for aluminum wire was discovered, the original tariff (TWRA Tariff, FMC No. 3) was being revised and was replaced by TWRA FMC No. 7. The old item number (76–0400) was changed to item number 76–4000. A second rate initiative for aluminum wire was submitted to the Conference on May 16, 1986, was objected to and was filed by independent action, effective May 26, 1986.[5] On December 10, 1985, one intermodal shipment of aluminum wire sailed

[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 Sea-Land and the Conference was filed on June 6, 1986, within the 180 day statutory period set forth in section 8(e), Shipping Act, 1984.

[3] Application, exhibit No. 1.

[4] Application, Exhibit No. 2.

[5] Application, Exhibit No. 3, page 1. The actual rate filed was $2,290 per 40 foot container which included a previous general rate increase of $250, that had been made effective April 15, 1986.

from Takoma, Washington, (after originating in Baltimore, Maryland), for Bangkok, Thailand. The rate then in effect was $233.00 W and the total freight charges were $4,639.57. The applicants now seek permission to waive the difference between that amount and the amount due under the corrected tariff of $2,150.00, which amount the shipper has paid. The difference is $2,489.57.

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, the record is clear that Sea-Land's employee simply failed to effect the tariff change which Sea-Land intended. The mistake in failing to file a timely tariff is the kind of inadvertence Congress sought to obviate in enacting section 8(e).

The application filed by Sea-Land and the Conference 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 $2,040.00 per 40 foot container, from Baltimore, Maryland to Bangkok, Thailand, 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 carriers or ports would suffer discrimination should the application be granted.

3. Prior to applying for the waiver the applicants 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 shipment.

Wherefore, in view of the above, it is,

Ordered, that permission is granted Sea-Land to waive a portion of freight charges in the amount of 2,489.57 for the benefit of Lusk Shipping Co., as agent for Kaiser Aluminum International Inc., and it is,

Further Ordered, that TWRA promptly publish in the appropriate tariff the following notice:

> Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1447, that effective November 3, 1985, and continuing through May 25, 1986, inclusive, the rate on Aluminum Wire is $2,040.00 per 40 foot container, plus Terminal Receiving Charges of $110.00 from U.S. Ports and Points (See Rule 1–A) to Thailand, for purposes of waiver or refund

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

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

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]

DOCKET NO. 86–22

MISCELLANEOUS AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

February 5, 1987

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its Rules of Practice and Procedure to: allow for appeals from Commission staff actions; establish a procedure for the filing of a brief of an amicus curiae in adjudicatory proceedings and authorize U.S. Government agencies to file amicus pleadings without first asking leave of the Commission; bring special docket procedures into conformity with the Shipping Act of 1984 and recent Commission decisions; and require persons requesting oral argument to set forth the specific issues they propose to address at oral argument.

EFFECTIVE DATE: March 12, 1987.

SUPPLEMENTARY INFORMATION:

BACKGROUND

This proceeding was initiated by a Notice of Proposed Rulemaking (Proposed Rule) published in the Federal Register on August 14, 1986 (51 FR 29124–29126). The Proposed Rule would amend the Commission's Rules of Practice and Procedure (Rules), 46 CFR Part 502, to provide for appeals from Commission staff actions; to establish a procedure for the filing of a brief of an amicus curiae in adjudicatory proceedings; to bring special docket procedures into conformity with the Shipping Act of 1984 (Act or 1984 Act), 46 U.S.C. app. 1701–1720, and recent Commission decisions; and to set forth the grounds upon which a request for oral argument should be based.

Comments in response to the Notice of Proposed Rulemaking were submitted by the Department of Transportation (DOT or Executive Agencies);[1] by the Transpacific Westbound Rate Agreement (TWRA); by Sea-Land Service, Inc. (Sea-Land); and by Messrs. C. Jonathan Benner, Joseph A.

[1] This comment was submitted by the Department of Transportation on its own behalf and on behalf of the Departments of State and Commerce and the United States Trade Representative.

Klausner, Neal M. Mayer, and Russell T. Weil, attorneys who practice before the Commission.[2]

The Commission has considered the comments received and made certain modifications to the Proposed Rule. These changes and the related comments are discussed in the following section-by-section analysis of the Final Rule.

DISCUSSION

I. *Section 502.69 Petitions—General and fee (Rule 69).*

The Proposed Rule would add the phrase "including appeals from Commission staff action," after the words "affirmative action by the Commission," in order to make clear that the petition procedure provided in Rule 69 is available in an appeal from a staff action. TWRA urges that either Rule 69 or the Supplementary Information should indicate that when reference is made to the Commission it means "the Commission acting as the sitting Commissioners and not simply a member or members of the staff."

A reasonable reading of the reference to "relief or other affirmative action by the Commission" in Rule 69 indicates that matters submitted under Rule 69 are ultimately to be decided by the Commission acting as a collegial body.[3] Therefore, no specific language to that effect is necessary in Rule 69 itself.

II. *Section 502.76—Brief of an amicus curiae (Rule 76).*

As proposed, Rule 76 would: (1) allow a United States government entity, or a State, Territory or Commonwealth, to file a brief as an amicus curiae without leave of the Commission; (2) clarify the distinction between participation as an intervener and as an amicus curiae; and (3) provide that amicus participation in oral argument will be granted only for extraordinary reasons.

The Executive Agencies support the Proposed Rule without modification. Both TWRA and Sea-Land object to the provision which would allow government entities to file an amicus brief without leave of the Commission. In addition, TWRA states that Rule 76 should be modified to: (1) limit an amicus brief to comments on law or policy questions already at issue in the proceeding; (2) grant presiding officers the discretion to determine whether or not to accept amicus briefs and to determine the timing and terms of filing such briefs; (3) require that government briefs be filed at the same time as the first brief filed by the party it supports; and (4) liberalize the oral argument standard for an amicus.

[2] A comment by the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference was not accepted because it was not timely filed and hence is not part of the record in this proceeding.

[3] Moreover, a definition of the reference to "Commission" in this instance could create uncertainty as to the meaning of that term where it appears elsewhere in the Rules.

A. *Treatment of Government Entities.*

Rule 76(a), as proposed, would permit the filing of an amicus brief only with leave of the Commission or the presiding officer, except that leave would not be required of a United States government entity, or a State, Territory or Commonwealth.

The Executive Agencies support the exception for government agencies. They argue that it is consistent with federal court rules and the practice of other federal agencies. The Executive Agencies contend that this exception will not prejudice any party because an amicus agency would be required to submit its brief at the same time as parties taking the same position. They point out that responding parties will therefore have the same amount of time to respond to an agency amicus brief. In their view, the exception will not expand or prolong a proceeding. The Executive Agencies believe the benefit of such a rule is that it will facilitate communication between the Commission and those agencies directly concerned with U.S. maritime policy.

TWRA and Sea-Land argue that no special exception should be made for government entities. Sea-Land argues that such an exception for U.S. government entities is unnecessary, preferential, and likely to unduly broaden the scope of a proceeding and increase expenses for parties to the proceeding as well as the Commission. TWRA contends that it is inappropriate to allow federal, state and local agencies to file briefs as a matter of right and without advance notice to other parties. TWRA argues that Rule 29 of the Federal Rules of Appellate Procedure, which permits such filings at an appellate level, is not analogous to trial level proceedings before an administrative law judge. TWRA also argues that if preferential treatment is to be given to U.S. government entities, it should also be given to foreign government entities in the interest of comity. TWRA points out that government entities are sometimes either regulated persons (*e.g.*, state and local port districts) or shippers and consignees. TWRA believes it is discriminatory and inappropriate to permit a government class of regulated persons or government shippers to have preferred status as compared to private sector counterparts. Finally, TWRA contends that no need or justification for granting such preferred status has been demonstrated.

The issue raised here is whether the need for and benefit derived from the proposed special treatment of government entities outweighs any potential adverse effects this provision might have such as increased expense or delay, non-observance of principles of international comity, or preferential treatment of government entities that may also be regulated persons, shippers, or consignees.

The need for a provision such as this arose during several recent proceedings in which the Department of Transportation sought to participate and submit its views. In Docket No. 85–18, the Commission upheld the presiding officer's determination that DOT had failed to satisfy the requirements for intervention but allowed DOT, upon application, to participate

as an amicus curiae. *Member Lines of the Transpacific Westbound Rate Agreement-Possible Violations of the Shipping Act of 1984*, 23 S.R.R. 574, 578 (1985). In Docket No. 86–3, the Commission rejected an untimely "comment amicus curiae" submitted by DOT in a show cause proceeding. *See* "Order Granting Motion To Reject Comments Amicus Curiae of the United States Department of Transportation," *Modifications to the Trans-Pacific Freight Conference of Japan Agreement, et al.*, 23 S.R.R. 1161 (1986). These specific instances, however, were not expressly referred to in the Supplementary Information to the Proposed Rule. This may explain why TWRA asks whether any agency has been denied amicus status or has sought preferential treatment and questions whether a need for this provision has been shown.

The benefit to be derived from the amicus rule is that it establishes a vehicle for receiving the views of other government agencies that may have an interest in maritime matters. DOT has not perhaps expressly asked for such preferred status prior to issuance of the Proposed Rule, but it has in its prior filings relied on Rule 29 of the Federal Rules of Appellate Procedure and rules of other agencies and has urged the Commission to treat sister agencies in the same way.

While the alleged potential adverse effects of the preferred status accorded U.S. Government entities are not all necessarily without merit,[4] they do not appear to be substantial enough to stand as a barrier to retaining this feature in the Final Rule. Moreover, as noted in the Proposed Rule, a number of other government agencies do in fact so provide in their rules of practice. Therefore, the Final Rule shall allow U.S. Government entities to file an amicus brief without leave of the Commission.

There is, however, merit to the contention that nonfederal government entities should not be permitted to file an amicus brief without leave of the Commission. Many states, for example, operate port authorities and these authorities are entities regulated by the Commission. There is thus a reasonable concern that allowing state authorities to file without leave could result in a burdensome avalanche of filings. There would therefore appear to be a need in the case of state government entities to exercise control over their participation in Commission proceedings. Therefore, the Final Rule is modified to delete the phrase "or by a State, Territory or Commonwealth." State government entities would, of course, still be able to participate as an amicus by filing for, and obtaining, leave.

B. *Limit Amicus Brief to Law or Policy Questions.*

As proposed, Rule 76 did not expressly limit an amicus brief to comment on law or policy questions already at issue in the proceeding. TWRA urges that the rule do so. TWRA states that an amicus should be confined

[4] There appears to be little, if any, danger, however, that permitting U.S. Government entities to file an amicus brief without leave would unduly broaden the scope of proceedings or place excessive burdens on the parties.

to the issues addressed by the parties or raised by an order. TWRA is particularly concerned that, at the trial level, an amicus might assume the role of an unofficial litigant arguing facts and making proposed findings. TWRA states that at the trial level it is important that the line between an amicus and an intervenor be clearly drawn.

The clarifying limitation urged by TWRA shall be adopted. In most cases, an amicus would address legal issues put forward by the parties or the Commission. This is the classic role of an amicus, namely to assist the court with legal issues or to call a legal matter to the court's attention which might otherwise escape the court's notice. Moreover, the clarification requested by TWRA can be accommodated without greatly diminishing the benefit of amicus participation. Therefore, section 502.76(a) shall be modified in the Final Rule by adding the following sentence: "A brief of an amicus curiae shall be limited to questions of law or policy."

C. *Broader Discretion for the Administrative Law Judge.*

As proposed, Rule 76(a) would allow the presiding officer to grant a motion for leave to file an amicus brief or to request that such a brief be filed. Proposed Rule 76(c) would allow the presiding officer to grant leave for a later filing of an amicus brief, if cause is shown.

TWRA urges that the presiding officer also be given discretion over whether or not to accept amicus briefs from any person, including a government entity, and over the time and terms of filing such briefs. This is necessary, according to TWRA, to protect litigating parties from surprise during the course of a proceeding.

The Final Rule requires that all persons, except U.S. Government entities, obtain leave of the presiding officer (or the Commission) to file an amicus brief. Thus, this discretion, except as to U.S. Government entities, is already vested in the presiding officer. The Final Rule does not expressly give the presiding officer discretion over the timing and terms of filing such briefs. However, such discretion is inherent in the presiding officer's authority to control and direct the course of a proceeding. No modification of the language of Rule 76 appears necessary.

D. *Filing With the Initial Brief.*

As proposed, Rule 76(c) would require that an amicus file its brief "* * * within the time allowed the party whose position as to affirmance or reversal the amicus brief will support."

TWRA urges "* * * that at the ALJ level, if any party is to have leave to file an amicus brief as of right it must file its brief at the same time as the due date of the *first* brief of the party with whose position the amicus is aligned (emphasis in original)." TWRA seeks to avoid a situation where an amicus files its brief on the date the last party files its reply brief.

It was intended in the Proposed Rule that an amicus file its brief at the same time as the initial brief of the party it supports. Certainly, an amicus should not be permitted to enter at the reply phase and thereby preclude any opportunity for the opposing side to address the amicus brief. An amicus must file its brief on or before the due date of the initial brief of the party it supports. In view of the presiding officer's authority to control proceedings, it does not appear necessary to expressly state this in the Final Rule.

E. *Standard for Oral Argument by Amicus Curiae.*

As proposed, Rule 76(d) would provide that: "A motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons."

TWRA argues that this standard is too restrictive. TWRA states: "It should be sufficient to require that an amicus show that the position it wished to urge on oral argument (a) would not be adequately represented by actual parties, (b) was one bearing on important issues of law and policy and (c) would be heard only in the Commission's discretion upon application."

As proposed to be amended in this proceeding, Rule 241 would set forth a standard for evaluating requests for oral argument by parties to a proceeding. Proposed amended Rule 241 attracted substantial comment which is discussed below. In light of the changes recommended and made in Rule 241, it would appear preferable to evaluate a request by an amicus curiae to participate in oral argument under the same standard as that of parties to the proceeding. Therefore, Rule 76(d) shall be modified to provide that such requests by an amicus curiae shall be governed by the requirements of Rule 241.

III. *Section 502.92(a)—Special docket applications and fee (Rule 92(a)).*

This section sets forth the special docket procedure for claiming refund or waiver relief. The proposed revisions are generally aimed at bringing Rule 92(a) into conformity with section 8(e) of the 1984 Act, 46 U.S.C. app. 1707(e).

Sea-Land maintains that the amendment to Rule 92 is unclear as to whether a shipper must file a corrected tariff when applying for a refund or waiver. It argues that the statute contains no exception to the requirement that a corrected tariff be filed with the Commission prior to the filing of the application. In Sea-Land's opinion, were the shipper allowed to file an application without the concurrence of the carrier, a simple procedure for review of mutually acknowledged mistakes might be converted into an adversarial process more appropriately handled under section 11 of the 1984 Act. Sea-Land suggests that Rule 92 be amended to require the shipper to attach to its application an affidavit from the carrier in support of the application, together with a copy of the corrected tariff.

Section 8(e), which gives the shipper the right to file an application for refund or waiver, does not subject the exercise of that right to the consent of the carrier or conference. Nor does the statute, which explicitly directs only the carrier or conference to file a new tariff, appear to contemplate the submission of a tariff by a shipper.[5] Consequently, Sea-Land's suggested amendment finds no support in the statute. Moreover, such an amendment would frustrate the shipper's right to file its own application.[6]

IV. *Section 502.241—Oral Argument (Rule 241).*

As proposed to be amended, Rule 241(b) would provide that oral argument generally will not be granted unless: (1) the requesting party demonstrates with specificity that the matter to be addressed presents a significant regulatory issue; (2) the legal arguments have not been adequately addressed on briefs; and (3) the decisional process would be significantly aided by oral presentation.

Messrs. Benner, Klausner, Mayer, and Weil, and TWRA, by its attorney Mr. R. Frederic Fisher, uniformly express the view that the proposed changes would unduly restrict the Commission's discretion to hear oral argument.[7] The commenters, all of whom are attorneys who practice before the Commission, urge rejection of the Proposed Rule and argue that oral argument provides the only opportunity for the parties to address the Commission directly. They point out that courts generally insist on hearing oral argument rather than deciding cases on briefs, and all commenters find objectionable the burden placed on a party requesting oral argument to be compelled to acknowledge the inadequacy of its briefs.

The proposed oral argument rule has generated strong opposition from members of the maritime bar. Some of the arguments advanced against the proposed changes in Rule 241 have merit and were anticipated when the rule was proposed. The fact remains, however, that the present "oral argument" procedure serves well neither the Commission nor the parties, whom the bar represents.

Clearly, and contrary to the conclusions drawn by some commenters, proposed amended Rule 241(b) was *not* intended to remove the Commis-

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[5] Section 8(e) provides in part:

(e) REFUNDS.—The Commission may, *upon application of a carrier or shipper*, permit a common carrier or conference to refund a portion of freight charges collected from a shipper or to waive the collection of a portion of the charges from a shipper if-

* * * * *

(2) 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. (Emphasis added).

[6] The Commission may one day be called upon to address the effect of a carrier's or conference's refusal to concur in a shipper's special docket application, and/or to file the conforming tariff rate and other tariff matter required by section 8(e) of the 1984 Act. However, that issue is best left to resolution in an appropriate case.

[7] None of the comments addresses the proposed changes in Rule 241(a), 46 CFR 502.241(a), which merely incorporate the Commission's practice for scheduling oral argument, either on its own initiative or at the request of a party.

sion's unfettered discretion to grant oral argument, nor to reflect any fundamental bias against oral argument on the part of the Commission. On the other hand, it would appear that something more than tacking on "we request oral argument" to the end of exceptions or replies to exceptions (which is a common existing practice), is necessary.

Under these circumstances, while it does not seem advisable to list in Rule 241(b)(2), as suggested by some commenters, the types of reasons which are likely to result in a grant or denial of oral argument, it would appear reasonable to at least require the parties to set forth in their request the issues they believe need to be addressed on oral argument. Such a declaration would serve to focus the oral argument presentations and thereby assist the deliberative process.

Finally, it should be emphasized that a request for oral argument which conforms to the technical requirements of Rule 241 does not automatically entitle the requesting party to an affirmative disposition of that request. A grant or denial of a request for oral argument remains a matter of Commission discretion.

CONCLUSION

The Final Rule, as modified where appropriate to accommodate the comments submitted, amends the Commission's Rules of Practice and Procedure by updating and clarifying certain existing sections of the Rules and by adding a new section governing amicus participation. These changes make significant improvements to the Commission's Rules which should promote greater efficiency in Commission proceedings.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193 (February 27, 1981).

The Chairman of the Federal Maritime 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 business entities.

List of Subjects in 46 CFR Part 502

Administrative Practice and Procedure.

Therefore, for the reasons set forth in the preamble, and pursuant to section 5 U.S.C. 553, section 43 of the Shipping Act, 1916, 46 U.S.C. app. 841a, and sections 8(e) and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1707(e) and 1716(a), Part 502 of Title 46, Code of Federal Regulations, is amended as follows:

1. The Authority Citation for Part 502 continues to read as follows:

AUTHORITY: 5 U.S.C. 552, 553, 559; 18 U.S.C. 207; 46 U.S.C. app. 817, 820, 821, 826, 841a, 1114(b), 1705, 1707–1711, and 1713–1716; and E.O. 11222 of May 8, 1965 (30 FR 6469).

2. Section 502.69 paragraph (a) is revised to read as follows:

§ 502.69 Petitions—general and fee.

(a) Except when submitted in connection with a formal proceeding, all claims for relief or other affirmative action by the Commission, including appeals from Commission staff action, except as otherwise provided in this part, shall be by written petition, which shall state clearly and concisely the petitioner's grounds of interest in the subject matter, the facts relied upon and the relief sought, shall cite by appropriate reference the statutory provisions or other authority relied upon for relief, shall be served upon all parties named therein, and shall conform otherwise to the requirements of Subpart H of this part. Replies thereto shall conform to the requirements of § 502.74.

* * * * *

3. Section 502.72 paragraph (c)(3) is amended by removing the word "amicus."

4. Part 502 Subpart E is revised by adding new 502.76 to read as follows:

§ 502.76 Brief of an amicus curiae.

(a) A brief of an amicus curiae may be filed only by leave of the Commission or the presiding officer granted on motion with notice to the parties, or at the request of the Commission or the presiding officer, except that leave shall not be required when the brief is presented by the United States or an agency or officer of the United States. The brief may be conditionally filed with the motion for leave. A brief of an amicus curiae shall be limited to questions of law or policy.

(b) A motion for leave to file an amicus brief shall identify the interest of the applicant and shall state the reasons why such a brief is desirable.

(c) Except as otherwise permitted by the Commission or the presiding officer, an amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support. The Commission or the presiding officer shall grant leave for a later filing only for cause shown, in which event the period within which an opposing party may answer shall be specified.

(d) A motion of an amicus curiae to participate in oral argument will be granted only in accordance with the requirements of § 502.241. [Rule 76.]

5. Section 502.92 paragraphs (a)(1) and (a)(2) are revised to read as follows:

§ 502.92 Special docket applications and fee.

(a)(1) A common carrier by water in foreign commerce which publishes its own tariff or, if the common carrier does not publish its own tariff, the carrier and the conference to which it belongs, or a shipper, may file an application for permission to refund or waive collection of a portion of freight charges where it appears that there is (i) an error in the tariff of a clerical or administrative nature or (ii) an error due to inadvertence

in failing to file a new tariff. Such refund or waiver must not result in discrimination among shippers, ports, or carriers.

(2) When the application is filed by a carrier or conference the Commission must have received prior to the filing of the application a new tariff which sets forth the rate on which refund or waiver would be based.

* * * * *

6. Exhibit No. 1 to Subpart F [§ 502.92] paragraphs 1, 3 and 4 are revised to read as follows:

EXHIBIT NO. 1 TO SUBPART F [§ 502.92]—APPLICATION FOR REFUND OF OR WAIVER FOR FREIGHT CHARGES DUE TO TARIFF ERROR

* ** * *

1. * * *

(d) Date(s) of shipment(s), i.e., sailing(s) [furnish supporting evidence].

* ** * *

3. Furnish any information or evidence as to whether grant of the application will result in discrimination among shippers, ports or carriers.

4. State whether there are shipments of other shippers of the same commodity which (i) moved via the carrier(s) or conference involved in this application during the period of time beginning on the date the tariff omitting the intended rate became effective or on the date the intended rate absent the mistake would have become effective and ending on the day before the effective date of the conforming tariff, and (ii) moved on the same voyage(s) of the vessel(s) carrying the shipment(s) described in No. 1, above.

* * * * *

7. Section 502.241 paragraphs (a) and (b) are revised to read as follows:

§ 502.241 Oral argument.

(a) The Commission may hear oral argument either on its own motion or upon the written request of a party. If oral argument before the Commission is desired on exceptions to an initial or recommended decision, or on a motion, petition, or application, a request therefor shall be made in writing. Any party may make such a request irrespective of its filing exceptions under § 502.227. If a brief on exceptions is filed, the request for oral argument shall be incorporated in such brief. Requests for oral argument on any motion, petition, or application shall be made in the motion, petition, or application, or in the reply thereto. If the Commission determines to hear oral argument, a notice will be issued setting forth the order of presentation and the amount of time allotted to each party.

(b)(1) Requests for oral argument will be granted or denied in the discretion of the Commission.

(2) Parties requesting oral argument shall set forth the specific issues they propose to address at oral argument.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]

DOCKET NO. 86–27

ATTORNEY'S FEES IN REPARATION PROCEEDINGS

February 26, 1987

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission amends its Rules of Practice and Procedure to provide a standard and procedure for awarding attorney's fees in reparation proceedings. The rule establishes a method of computing reasonable attorney's fees and specific procedures of processing fee requests.

EFFECTIVE DATE: April 2, 1987.

SUPPLEMENTARY INFORMATION:

By Notice of Proposed Rulemaking published in the Federal Register on October 27, 1986 (51 FR 37917) the Commission gave notice of its intent to establish a method of computing attorney's fees awards in reparation proceedings and specific procedures for processing fee requests. Specifically, the proposed rule deletes the previous provision in the Commission's Rules of Practice and Procedure governing attorney's fees award, Rule 253(b), 46 CFR 502.253(b), and adds a new Rule 254, 46 CFR 502.254. The new provision specifies that the so-called "lodestar" method of computing attorney's fees shall be utilized in cases under section 11 of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. 1710, wherein the complainant is awarded reparations. The rule also requires that petitions for fees be documented according to the reasonableness of the hours claimed and the customary hourly rate for such services. Finally, the rule establishes time limits for filing attorney's fees petitions and replies, and specifies where they should be filed.

Comments in response to the Notice were filed by Crowley Maritime Corporation (CMC), Asia North America Eastbound Rate Agreement (ANERA), Transpacific Westbound Rate Agreement (TWRA) and the Maritime Administrative Bar Association (MABA). CMC supports the rule as proposed and urges its adoption. AENERA opposes the rule on the grounds that it is unnecessary and in excess of the Commission's statutory authority to the extent it purports to authorize awards of attorney's fees for court proceedings.

TWRA agrees with most provisions of the proposed rule but suggests further amendments to those provisions that specify the scope of the rule and the filing of petitions for fee awards. The suggested changes to the

provisions concerning the scope of the rule would require that fees be awarded only for those portions of a proceeding directly related to a reparations award and would limit fee awards to no more than 50 percent of the reparations awarded. The suggested changes to the provision concerning the filing of a fee petition would provide for such filing after the time for appeal to a court had run or any appeal or subsequent Commission proceeding was terminated.

MABA suggests similar changes to the proposed rule to limit fee awards to only those services directly related to obtaining reparations, and in proportion to the amount of reparations awarded. Further, MABA urges that the "lodestar" hourly rate factor be stated as the rate customarily charged by the attorney actually prosecuting the complaint, or, alternatively, the average fee of a maritime attorney. MABA suggests that the time period allowed for filing a petition be tolled until after all appeals are finished. Finally, MABA argues that fees for non-attorneys and *pro se* litigants be limited to those services that an attorney would otherwise provide and exclude the complainant's time expended as a "client" in pursuit of a reparations award.

The Commission agrees with the argument that awards of attorney's fees should only be permitted for those services directly related to obtaining reparations. However, given the remedial purpose of the attorney's fees award statutory provision, no further restrictions or limits on awards appear justified.

We reject the notion that the hours claimed should be apportioned between the reparations award and other relief obtained. If 100 percent of an attorney's hours are directly related to a reparations award, but a cease and desist order is also issued, there is no justification to reduce the fees because the attorney was able to obtain such additional relief. Similarly, a cap on fees based upon a percentage of reparations awarded appears to be arbitrary and unsupported by the statute or its legislative history. If an attorney's fee claim is unreasonably disproportionate to the resulting reparations obtained, then the respondent may argue, as provided in paragraph (d) of the rule, that a mechanical "lodestar" calculation would yield an unreasonable attorney's fee award.

Conversely, an award of attorney's fees for the successful prosecution of court proceedings directly related to a reparations action is supported by general law and the legislative history of the Shipping Act of 1984. Generally, the calculation of "reasonable attorney's fees" may include hours expended on a separate proceeding, if that other proceeding is so closely related to the primary case as to be considered part of the primary litigation. *See, Webb* v. *Board of Education of Dyer County,* 85 L. Ed. 2d 233, 242 (1985). The filing of a complaint under section 11(a) is a statutory prerequisite to the filing of an injunctive action under section 11(h)(2) of the 1984 Act, and, if granted, the injunction may not exceed the complaint litigation by more than 10 days. Such linkage between the two

statutory actions indicates that the injunctive action is intended to be an adjunct to the complaint proceeding to prevent further and irreparable injury to a complainant pending a final Commission decision on the merits of a complaint. Because these two proceedings are essentially part of the same "litigation," it is appropriate that section 11(g) attorney's fees, at a minimum, include hours expended in a successful injunctive action under section 11(h)(2).

This interpretation of section 11(g) is not inconsistent with the attorney's fees provision of section 11(h)(2). The latter states only that successful defendants in injunctive actions may be awarded fees by the court. It does not address the rights of successful plaintiffs. However, the legislative history of the 1984 Act indicates that the attorney's fees awarded under section 11(g) should include hours expended on a successful injunctive action under section 11(h)(2).

The Conference Report to the 1984 Act states:

> In determining the amount of attorney's fees [in a reparation proceeding], a complainant's expenses for representation before the Commission *as well as in any federal court proceeding (such as under subsection (h))* should be considered. But a successful complaint (sic) is not entitled to attorney's fees for any portion of the proceeding for which it did not prevail or for procedural motions that are unsuccessful.
>
> * * * * *
>
> A successful private complainant will recover attorney's fees for the injunctive proceeding if ultimately successful on the merits (subsection (g)). H.R. Rep. No. 600, 98th Cong., 2d Sess. 41 (1984) (emphasis added).

In the absence of incompatibility or inconsistency with an express provision, the statute should be construed to effect its Congressional intent. *See, First National Bank of Logan, Utah* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). While the legislative history does not specify what other court actions in addition to injunctive suits fall under the attorney's fees provision of section 11(g), the "useful and necessary" *Webb* standard appears to be most appropriate.

The proposed rule does not need to be amended to account for any difference between "average" attorney's fees and "maritime" attorney's fees. The "lodestar" formula, based upon "customary" fees in the attorney's "community" is a flexible concept and may result in an hourly rate established on the basis of services rendered of a specialized nature, whether or not the particular attorney litigating a particular case is considered a "specialist" in the maritime law field. Similarly, "reasonableness of hours" will be construed to include only legal services and not other work normally required by the client in cases involving non-attorneys' and *pro se* litigants' fee claims.

Finally, the point is well taken that fees should not be awarded until any review process that may reverse a reparations award is completed. Accordingly, for purposes of the attorney's fee rule, a reparations award will not be final, and the time period for filing attorney's fees petitions will not begin to run until such review period has expired. The proposed rule has been amended accordingly.

List of subjects in 46 CFR Part 502: Administrative practice and procedure.

Therefore, for the reasons set forth above and pursuant to 5 U.S.C. 553 and sections 11 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1710, 1716, Part 502 of Title 46, Code of Federal Regulations is amended as follows:

1. The Table of Contents for Part 502 is amended as follows:

PART 502—RULES OF PRACTICE AND PROCEDURE

* * * * *

Subpart O—Reparation

* * * * *

502.253 Interest in reparation proceedings.

502.254 Attorney's fees in reparation precedence.

* * * * *

2. The Authority Citation for Part 502 continues to read as follows:

AUTHORITY: 5 U.S.C. 552, 553, 559; 18 U.S.C. 207; secs. 18, 20, 22, 27 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817, 820, 821, 826, 841a); secs. 6, 8, 9, 10, 11, 12, 14, 15, 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1705, 1707–1711, 1713–716); sec. 204(b) of the Merchant Marine Act, 1936 (46 U.S.C. app. 1114(b)); and E.O. 11222 of May 8, 1965 (30 FR 6469).

3. Section 502.253 *Interest and attorney's fees in reparation proceedings,* is amended by deleting "and attorney's fees" from the title, by deleting the paragraph designation from paragraph (a) and adding "[Rule 253]" at the end thereof; and by deleting paragraph (b).

4. A new section 502.254 is added reading as follows:

§ 502.254 Attorney's fees in reparation proceedings.

(a) *Scope.* Except for proceedings under Subpart S of this part, the Commission shall, upon petition, award the complainant reasonable attorney's fees directly related to obtaining a reparations award in any complaint proceeding under section 11 of the Shipping Act of 1984. For purposes of this section, "attorney's fees" includes the fair market value of the services of any person permitted to appear and practice before the Commission in accordance with Subpart B of this part, and may include compensation for services rendered the complainant in a related proceeding in federal

court that is useful and necessary to the determination of a reparations award in the complaint proceeding.

(b) *Content of Petitions.* Petitions for attorney's fees under this section shall specify the number of hours claimed by each person representing the complainant at each identifiable stage of the proceeding, and shall be supported by evidence of the reasonableness of hours claimed and the customary fees charged by attorneys and associated legal representatives in the community where the petitioner practices. Requests for additional compensation must be supported by evidence that the customary fees for the hours reasonably expended on the case would result in an unreasonable fee award.

(c) *Filing of Petition.*

(1) Petitions for attorney's fees shall be filed within 30 days of a final reparation award:

(i) With the presiding officer where the presiding officer's decision awarding reparations became administratively final pursuant to section 502.227(a)(3) of this part; or

(ii) With the Commission, if exceptions were filed to, or the Commission reviewed, the presiding officer's reparation award decision pursuant to section 502.227 of this part.

(2) For purposes of this section, a reparation award shall be considered final after a decision disposing of the merits of a complaint is issued and the time for the filing of court appeals has run or after a court appeal has terminated.

(d) *Replies to Petitions.* Within 20 days of filing of the petition, a reply to the petition may be filed by the respondent, addressing the reasonableness of any aspect of the petitioner's claim. A respondent may also suggest adjustments to the claim under the criteria stated in paragraph (b) of this section.

(e) *Ruling on Petitions.* Upon consideration of a petition and any reply thereto, the Commission or the presiding officer shall issue an order stating the total amount of attorney's fees awarded. The order shall specify the hours and rate of compensation found awardable and shall explain the basis for any additional adjustments. An award order shall be served within 60 days of the date of the filing of the reply to the petition or expiration of the reply period; except that in cases involving a substantial dispute of facts critical to the award determination, the Commission or presiding officer may hold a hearing on such issues and extend the time for issuing a fee award order by an additional 30 days. The Commission or the presiding officer may adopt a stipulated settlement of attorney's fees.

(f) *Appeals.* In cases where the presiding officer issues an award order, an appeal of that order may be made to the Commission under the same criteria and procedures as set forth in paragraphs (b), (c) and (d) of this section. The Commission may award additional attorney's fees to a com-

plainant that substantially prevails in such an appeal proceeding. [Rule 254].

5. Section 502.318 is amended by designating the present text as paragraph (a), and by adding a new paragraph (b) to read as follows:

502.318 Decision.

(a) * * *

(b) If the complainant is awarded reparations pursuant to section 11 of the Shipping Act of 1984, attorney's fees shall also be awarded in accordance with section 502.254 of this part. [Rule 318].

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–30
NOTICE OF INQUIRY CONCERNING INTERPRETATION OF SECTION 18(a)(4) OF THE SHIPPING ACT OF 1984

February 27, 1987

ACTION: Notice of Inquiry; Discontinuance of Proceeding.

SUMMARY: This inquiry was initiated for the limited purpose of soliciting information from interested persons. Responses have been received and are being considered by the Commission in carrying out its section 18(a)(4) mandate. No regulatory purpose is served by continuing the proceeding.

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Inquiry published in the *Federal Register* of September 6, 1984 (49 FR 35242). The limited purpose of the inquiry was to solicit views and information regarding the proper interpretation to be given the provision of section 18(a)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1717, which requires the Commission to report to Congress, *inter alia*, the cost of major regulatory proceedings. No rule or order was contemplated to be issued in this proceeding. The notice elicited five brief responses from interested parties which are being considered by the Commission in finalizing its approach to fulfilling its section 18(a)(4) mandate.

In view of the foregoing, no regulatory purpose is served by continuing this proceeding and it is hereby ordered to be discontinued.

By the Commission.

(S) JOSPEH 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

Reliance on erroneous information is not the type of error for which section 8(e) of the Shipping Act of 1984 provides a remedy.

Application for relief under section 8(e) to waive collection of a portion of freight charges is denied.

REPORT AND ORDER

February 27, 1987

BY THE COMMISSION: (Edward V. Hickey, *Chairman*; James J. Carey, *Vice Chairman*; Francis J. Ivancie, Thomas F. Moakley and Edward J. Philbin, *Commissioners*)

The Commission determined to review the Supplemental Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued in this proceeding. The Presiding Officer granted the application of the Transpacific Westbound Rate Agreement (TWRA or Conference) and Sea-Land Corporation on behalf of Sea-Land Service, Inc. (Sea-Land) filed pursuant to section 8(e) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. § 1707(e). The application requested permission to waive collection from Darrell J. Sekin & Co., Inc. (Sekin), as agent for the shipper, Bruce International Corporation, a portion of the freight charges payable on the transportation of a shipment of hardwood flooring from Nashville, Tennessee to Yokohama, Japan.

BACKGROUND

In May, 1985, Sea-Land, a TWRA member, negotiated with Sekin, the shipper's agent located in Dallas, Texas, a rate of $2090 (plus a $100 Container Yard Delivery Charge) per 40-foot container for the transportation of hardwood flooring from Nashville to Yokohama.

The circumstances and chronological sequence of events surrounding the negotiations and subsequent publication of the agreed-to rate is as follows:

On May 3, 1985, R.T. Savoie, Sea-Land's Assistant Pricing Manager in Chicago, Illinois, advised Sea-Land's office in Dallas by telephone of his agreement to have the $2090 negotiated rate filed.[1]

[1] Affidavit of Linda Christensen, Sea-Land's Market Support Coordinator in Dallas, Texas, dated October 3, 1986.

On May 6, 1985, Sea-Land's Dallas office advised R.T. Savoie by telex that it had a booking for a shipment of hardwood flooring ready to be delivered by the middle of the week, beginning May 12, 1985.[2]

On May 7, 1985, R.T. Savoie directed Al Cherry, Sea-Land's Assistant Pricing Manager in Oakland, California, to request a TWRA membership telephone vote on the proposed rate.[3]

On May 8, 1985, Al Cherry submitted the rate request to Stacey M. Adams, TWRA's Manager of Pricing Activities in San Francisco.[4]

On May 14, 1985 Ms. Adams advised Mr. Savoie that the rate initiative had passed, effective that same day. Mr. Savoie relayed the information to the Dallas office, which informed the shipper accordingly.[5]

On May 15, 1985, the shipper delivered one shipment of hardwood flooring to Sea-Land's container yard at Nashville.

On May 16, 1985, Sea-Land learned from Ms. Adams that the May 14th verbal communication was incorrect in that one of the voting members had opposed the $2090 rate and the rate initiative had failed.

On May 21, 1985, TWRA filed the $2090 rate under the Independent Action provisions of the Conference agreement.

On May 28, 1985, the shipper paid freight at the negotiated rate.

On November 8, 1985, Sea-Land applied for permission to waive collection of additional freight charges in the amount of $32,130.31, payable under TWRA's tariff in effect on May 15, 1985.

In an Initial Decision (I.D.) served June 25, 1986, the Presiding Officer granted the application based upon the finding "that inadvertent, erroneous information caused the parties to fail to file a new tariff. . . ."[6]

On review upon its own motion, the Commission vacated the I.D. and remanded the proceeding to the Presiding Officer. In its Order of Remand the Commission found that the record was inadequate to support the grant of a waiver and suggested that, in view of TWRA's refusal to adopt the proposed rate, there appeared to be no error in the TWRA tariff in effect on May 15, 1985.[7]

In a Supplemental Initial Decision (S.I.D.) served October 31, 1986, the Presiding Officer, after review of the additional evidence, granted the application.[8]

DISCUSSION

Section 8(e) of the 1984 Act provides in part:

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[2] Sea-Land's letter, dated September 26, 1986, addressed to the Presiding Officer, with attached copy of the May 6, 1985 telex.

[3] Affidavit of R. T. Savoie, dated November 7, 1985, and affidavit of Sea-Land's A. S. Cherry, dated February 26, 1986.

[4] Affidavit of Stacey M. Adams, dated February 26, 1986.

[5] Affidavit of R. T. Savoie, *supra*, note 3 at 2, and Linda Christensen, *supra*, note 1 at 2.

[6] *Application of Transpacific Westbound Rate Agreement for the Benefit of Darrell J. Sekin & Co., Inc.*, Special Docket No. 1395, slip op. at 5 (Initial Decision served June 25, 1986).

[7] *Application of Transpacific Westbound Rate Agreement*, 28 F.M.C. 536 (1986).

[8] *Application of Transpacific Westbound Rate Agreement*, 23 S.R. R. 1502 (S. I.D. 1986).

> (e) REFUNDS.—The Commission may, upon application of a carrier or shipper, permit a common carrier or conference to refund a portion of freight charges collected from a shipper or to waive the collection of a portion of the charges from a shipper 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. . . .

The Presiding Officer held on the basis of the evidence in the record that "the error which was involved here was an error due to mistake and inadvertence in failing to file a new tariff and falls within the ambit of section 8(e) of the Shipping Act, 1984."

> This conclusion is based on the following findings of fact:
>
> There is no question here that Sea-Land and the carrier [sic] agreed to a rate of $2,090.00, plus $100 CY, and that they intended that rate to be on file when the shipment in question began. There is also no question that a Conference employee, due to the volume of paperwork, mistakenly told Sea-Land on May 14, 1985, that the negotiated rate had been adopted by the Conference and that the rate would be filed that day and that the employee did not discover the error until May 16, 1985, one day after the shipment actually moved. Further, there is no question that the shipment began on May 15, 1985, because of the misinformation. We hold that had the misinformation not been given the shipment would not have begun until the independent action had been completed and the intended, negotiated rate filed in the tariff.

13 S.R.R. at 1504.

The underlying theory is that, to the extent the tariff did not reflect the rate both the carrier and the shipper intended be charged, there was an error in the tariff in effect on May 15, 1985 when the shipment moved.

The Presiding Officer distinguished on the facts and found inapposite cases in which relief was denied under arguably similar circumstances,[9] and the Presiding Officer relied on the several decisions that, in his opinion illustrated the Commission's established liberal construction of the statute.

He noted that in *D. F. Younq Inc.* v. *Cie. Nationale Algerienne de Navigation*, 18 S.R.R. 1645 (1979), relief was granted even though the carrier had inadvertently failed to ask the conference to file a negotiated rate. However, here, by contrast, TWRA was asked and declined to file the $2090 rate.

[9] The Presiding Officer limited his discussion of such precedent to *Application of Sea-Land Service, Inc. for the Benefit of Alimenta (U.S.A.), Inc.*, 19 S.R.R. 1111 (1979), *Munoz y Cabrero* v. *Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977), and *Farr Co.* v. *Seatrain*, 20 F.M.C. 441 (1978).

In the Presiding Officer's opinion, *Application of Lykes Bros. Steamship Co., Inc., for the Benefit of Wilhelm Schleef GMBH & Co. KG,* 27 F.M.C. 844 (1985), is a case where the application was granted notwithstanding a lack of affirmative evidence of a pre-shipment intent to apply a certain rate. On review we find that the issue in that case was the proper description of the cargo, which, in light of some ambiguity in the record the Commission resolved in favor of the shipper.

The Presiding Officer points out that in Application of Afram Lines Ltd. for the Benefit of Commodity Credit Corp., 23 S. R. R. 434 (1985), a waiver was granted even though the shipment had been re-routed to another port after the shipment began. But in that particular case, flood damage to a rail line at the initial point of discharge caused the diversion to a different port than the port originally intended. The application was granted on a finding that the carrier's policy was to maintain comparable low rates on relief cargo for delivery within a range of ports on the West Coast of Africa.

Finally, the Presiding Officer finds support for a liberal interpretation of the statute in *Nepera Chemical, Inc.* v. *F.M.C.*, 662 F.2d 18 (D.C. Cir. 1981), where the court found that an insignificant discrepancy between the negotiated rate and the rate shown in the tariff filed with the application was an insufficient ground to deny relief. This case does not address the failure to fulfill the basic requirements of section 8(e).

It should be noted that Sea-Land, as a TWRA member could have had the $2090 rate filed either with TWRA's concurrence or by independent action. Having submitted the rate request on May 8, 1985, Sea-Land did what was in its power to obtain the filing of the proposed rate by May 15, 1985. TWRA's refusal to approve the $2090 rate makes the rate on file on May 15, 1985 the rate TWRA intended be applied to the shipment. Under these circumstances no inadvertent failure to file the intended rate may be attributed to TWRA, by whose tariff Sea-Land was bound by virtue of its membership in the Conference, or for that matter to Sea-Land. Sea-Land could not reasonably expect that under the independent action provisions the rate would be published earlier than May 18, 1985, that is, ten days after submitting the rate request on May 8 but three days after it took delivery of the shipment.[10]

Under these circumstances, where the carrier is unable to file or obtain the filing of a proposed rate by a certain time, the mere intent to have that rate on file does not of itself create an error in the tariff. In this instance, having submitted the rate initiative on May 8, 1985, and in light of TWRA's refusal, Sea-Land was never in a position to obtain by independent action the filing of the $2090 rate before it took possession of the shipment. Consequently, the holding, in the S.I.D., that there was "an

[10] The rate was eventually published on May 21, 1985, although it should have been filed 10 days after the initial rate request on May 8, 1985. *See Order of Remand,* 28 F.M.C. at 536, note 2.

error due to mistake and inadvertence in failing to file a new tariff rate,"[11] does not find support in the record.

The Presiding Officer also found that, were it not for the erroneous information, the shipper would have waited for the rate to become effective before delivering the shipment to the carrier. However, the fact that the shipper acted in reliance on the erroneous information did not affect the validity of the rate on file. In this instance, TWRA's verbal notification that the $2090 rate was approved effective May 14, 1985 amounted to a misquotation of the applicable rate. Misquotations or incorrect information concerning rates and charges have been held to be irrelevant to the shipper's obligation to pay the rate on file. "Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed." *Louisville & N.R.R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915).[12]

Consequently, on the record as it stands on remand, the wrong alleged is not of the type for which section 8(e) provides a remedy and the application must be denied.

THEREFORE, IT IS ORDERED, That the Supplemental Initial Decision served in this proceeding on August 29, 1986 is reversed;

IT IS FURTHER ORDERED, That the application of the Transpacific Westbound Rate Agreement and Sea-Land Corporation on behalf of Sea-Land Service, Inc. filed in this proceeding is denied;

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. collect within 30 days from the service of this order from Bruce International Corporation, unpaid freight charges in the amount of $32,130.31, and adjust freight forwarder compensation charges accordingly; and

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

By the Commission.

(S) JOSEPH C. POLKING
Secretary

[11] 23 S.R.R. at 1504.

[12] To the same effect is *Louisville & Nashville R. Co.* v. *Mead Johnson & Co.*, 737 F.2d 683 (7th Cir. 1984) (and cases cited therein) *cert. denied*, 105 S. Ct. 386 (1984). *See also Mueller* v. *Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *Farr Co.* v. *Seatrain Lines*, 20 F.M.C. 411 (1978), *reconsideration denied*, 20 F.M.C. 663 (1978).

FEDERAL MARITIME COMMISSION

[46 CFR PART 503]

DOCKET NO. 87–5

IMPLEMENTATION OF FREEDOM OF INFORMATION REFORM ACT

April 21, 1987

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its Public Information regulations to incorporate the recent changes to the Freedom of Information Act regarding requests for agency enforcement records and regarding establishment and waiver of fees to be charged for search, review and duplication of records in response to FOIA requests. The rules follow the guidelines established by the Office of Management and Budget on establishment of fees and Department of Justice on fee waivers.

DATE: May 26, 1987.

SUPPLEMENTARY INFORMATION:

On October 27, 1986, President Ronald Reagan signed into law the Anti-Drug Abuse Act of 1986, an omnibus piece of legislation which includes as sections 1801–04 of the law, the Freedom of Information Reform Act of 1986 (Reform Act). This legislation expands the law enforcement protections of the Freedom of Information Act (FOIA) and also modifies its fee and fee-waiver provisions. The new law enforcement provisions were effective immediately. The fee provisions will become effective on April 25, 1987. This 180-day delay was designed to permit the Office of Management and Budget (OMB) and affected agencies time to issue new guidelines and regulations governing them. OMB published proposed guidelines on January 16, 1987 (52 FR 1992).

The Commission on March 19, 1987 (52 FR 8628) published a notice of proposed rulemaking designed to implement the above-mentioned changes mandated by the Reform Act. The proposed rules closely followed the OMB guidelines. The *Federal Register* published a correction to this notice on March 26, 1987 (52 FR 9756). No comments were submitted in response to the notice of proposed rulemaking. Subsequent to the proposed rule publication, OMB issued its final guidelines for implementation of the Reform Act (52 FR 10012; March 27, 1987). The Department of Justice, Office of Information and Privacy (DOJ), issued new fee waiver policy guidance on April 2, 1987, also designed to assist agencies in establishing rules implementing the Reform Act.

The final rules adopted herein closely follow the proposed rules. The only changes are the result of incorporation of the final OMB guidelines on fees and the DOJ guidelines on fee waivers. The final rules contain appropriate amendments to the Commission's current Public Information rules appearing in 46 CFR Part 503. The following is a section by section discussion of the rules.

1. Section 503.35 Exceptions to availability of records.

Paragraph (a)(7) of this section currently describes the circumstances under which "investigatory records may be withheld by the Commission when responding to an FOIA request. Paragraph (a)(7) is being revised to recite verbatim the revised standard promulgated by the Reform Act. The general thrust of the revised standard is to clarify and broaden the scope of the exemptions on law enforcement records or information.

A new paragraph (c) is also being added to this section implementing subsection (c)(1) of the Reform Act, to provide the agency the option of excluding from the requirements of the FOIA, law enforcement records involving a possible violation of criminal law, when there is reason to believe that the subject of the investigation is not aware of its pendency and disclosure of the existence of records could reasonably be expected to interfere with enforcement proceedings. The upshot of this provision is that the agency can, under the appropriate circumstances, withhold acknowledgment even of the existence of an investigation.

2. Section 503.41 Policy and service available.

This section is amended to incorporate a reference to the Reform Act and to conform the description of services available to the terminology used in the Reform Act and defined elsewhere in this rule. Clarification is also included regarding the non-applicability of fees to requests for certain materials.

3. Section 503.43 Fees for services.

Paragraphs (a) through (c) of this section are revised to incorporate the new fee requirements of the Reform Act. The rules closely follow the final guidelines of OMB.

Paragraph (a) sets forth the definitions of terms used in the Reform Act and these rules. They follow almost verbatim the OMB guidelines.

Paragraph (b) sets forth general guidelines regarding collection of fees for search, duplication and review. It acknowledges that, to the extent fees are assessable, they reflect full direct costs as required by the Reform Act. This paragraph also describes the types of fees to be assessed according to the identity of the requester and sets forth restrictions and limitations for assessment of fees as required by the Reform Act. Paragraph (b)(2)(vi) contains summary guidelines for waiver or reduction of fees and are patterned after the DOJ guidelines. The application of these guidelines will also be governed by the more detailed guidance provided by DOJ.

Paragraph (c) sets forth the actual schedule of fees and charges for search, review, and duplication. As indicated above, these charges reflect

full direct costs as required by the Reform Act and as defined by OMB guidelines. The fees for certification are merely restated from the current schedule and are not affected by the Reform Act.

The following information sets forth the basis upon which the charges for search, duplication and review of records are established. Direct labor costs were separated into two groups, (a) clerical/administrative, and (b) professional/executive. An average rate per hour was developed for each group plus 16 percent of that rate to cover benefits. The computations for search and duplication services exclude salaries of Commissioners and members of the Senior Executive Service. Review of records to determine whether they are exempt from disclosure under section 503.35 is performed by the Secretary of the Commission in his/her capacity as the Commission's FOIA Officer. Accordingly, the full direct costs associated with that position are recovered.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193 (February 27, 1981).

The Chairman of the Federal Maritime 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 business entities.

List of subjects in 46 CFR Part 503, Freedom of Information.

Therefore, for the reasons set forth above, Part 503 of Title 46 CFR is amended as follows:

1. The authority citation for Part 503 continues to read as follows:

AUTHORITY: 5 U.S.C. 552, 552a, 552b, 553; E.O. 12356, 47 F.R. 14874, 15557, 3 CFR 1982 Comp., p. 167.

2. Section 503.35 is amended by revising paragraph (a)(7) and by adding a new paragraph (c) to read as follows:

§ 503.35 Exceptions to availability of records.

(a) * * *

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information: (i) could reasonably be expected to interfere with enforcement proceedings; (ii) would deprive a person of a right to a fair trial or an impartial adjudication; (iii) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (iv) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; (v) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could

reasonably be expected to risk circumvention of the law; or (vi) could reasonably be expected to endanger the life or physical safety of any individual.

* * * * *

(c) Whenever a request is made which involves access to records described in paragraph (a)(7)(i) of this section and the investigation or proceeding involves a possible violation of criminal law; and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the Commission may, during only such time as that circumstance continues, treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

3. Section 503.41 is amended by revising the introductory text and paragraph (a) to read as follows:

§ 503.41 Policy and services available.

Pursuant to policies established by the Congress, the Government's costs for special services furnished to individuals or firms who request such services are to be recovered by the payment of fees (Act of August 31, 1951, 5 U.S.C. 140 and Freedom of Information Reform Act of 1986, October 27, 1986, 5 U.S.C. 552).

(a) Upon request, the following services are available upon the payment of the fees hereinafter prescribed; except that no fees shall be assessed for search, duplication or review in connection with requests for single copies of materials described in §§ 503.11 and 503.21:

(1) Records/documents search.

(2) Duplication of records/documents.

(3) Review of records/documents.

(4) Certification of copies of records/documents.

* * * * *

4. Section 503.43 is amended by revising paragraphs (a) through (c) to read as follows:

§ 503.43 Fees for services.

(a) *Definitions.* The following definitions apply to the terms when used in this subpart:

(1) "Search" means all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Search for material will be done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. Search is distinguished, moreover, from "review" of material in order to determine whether the material is exempt from disclosure. Searches may be done manually or by computer using existing programming.

(2) "Duplication" means the process of making a copy of a document necessary to respond to a Freedom of Information Act or other request. Such copies can take the form of paper or machine readable documentation (e.g., magnetic tape or disk), among others.

(3) "Review" means the process of examining documents located in response to a commercial use request to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(4) "Commercial use request" means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the agency must determine the use to which a requester will put the documents requested. Where the agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the agency will seek additional clarification before assigning the request to a specific category.

(5) "Educational institution" means a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(6) "Non-commercial scientific institution" means an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (a)(4), and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(7) "Representative of the news media" means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. "Freelance" journalists, may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but

the agency may also look to the past publication record of a requester in making this determination.

(8) "Direct costs" means those expenditures which the agency actually incurs in searching for and duplicating (and in the case of commercial requester, reviewing) documents to respond to a Freedom of Information Act request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(b) *General.*

(1) The basic fees set forth in paragraph (c) of this section provide for documents to be mailed with postage prepaid. If copy is to be transmitted by registered, certified, air, or special delivery mail, postage therefor will be added to the basic fee. Also, if special handling or packaging is required, costs thereof will be added to the basic fee.

(2) The fees for search, duplication and review set forth in paragraph (c) of this section reflect the full allowable direct costs expected to be incurred by the agency for the service. Cost of search and review may be assessed even if it is determined that disclosure of the records is to be withheld. Cost of search may be assessed even if the agency fails to locate the records. Requesters must reasonably describe the records sought. The following restrictions, limitations and guidelines apply to the assessment of such fees:

(i) For commercial use requesters, charges recovering full direct costs for search, review and duplication of records will be assessed.

(ii) For educational and non-commercial scientific institution requesters, no charge will be assessed for search or review of records. Charges recovering full direct costs for duplication of records will be assessed, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(iii) For representative of the news media requesters, no charge will be assessed for search or review of records. Charges recovering full direct costs for duplication of records will be assessed, excluding charges for the first 100 pages.

(iv) For all other requesters, no charge will be assessed for review of records. Charges recovering full direct costs for search and duplication of records will be assessed excluding charges for the first 100 pages of duplication and the first two hours of search time. Requests from individuals for records about themselves, filed in a Commission system of records,

will be treated under the fee provisions of the Privacy Act of 1984 which permit fees only for duplication.

(v) No fee may be charged for search, review or duplication if the costs of routine collection and processing of the fee are likely to exceed the amount of the fee.

(vi) Documents shall be furnished without any charge or at a reduced charge if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. In determining whether a waiver or reduction of charges is appropriate the following factors will be taken into consideration.

(A) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(B) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(C) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding;

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;

(E) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(F) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(vii) Whenever it is anticipated that fees chargeable under this section will exceed $25.00 and the requester has not indicated in advance a willingness to pay fees as high as anticipated, the requester will be notified of the amount of the anticipated fee. In such cases the requester will be given an opportunity to confer with Commission personnel with the object of reformulating the request to meet the needs of the requester at a lower cost.

(viii) Interest may be charged record requesters who fail to pay fees assessed. Assessment of interest may begin on the amount billed starting on the 31st day following the day on which the billing was sent. Interest will be at the rate prescribed in section 3717 of Title 31, United States Code and will accrue from the date of the billing. Receipt of payment by the agency will stay the accrual of interest.

(ix) Whenever it reasonably appears that a requester of records or a group of requesters is attempting to break a request down into a series

of requests for the purpose of evading the assessment of fees, such requests will be aggregated and fees assessed accordingly. Multiple requests on unrelated subjects will not be aggregated.

(x) The agency may require a requester to make advance payment only when:

(A) a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), in which case the requester will be required to pay the full amount owed plus any applicable interest as provided above, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester; or

(B) the agency estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250, in which case, the agency will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or will require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(xi) Unless applicable fees are paid, the agency may use the authorities of the Debt Collection Act (Pub. L. 97–365), including disclosure to consumer reporting agencies and use of collection agencies where appropriate to encourage payment.

(xii) Whenever action is taken under paragraphs (b)(2)(viii) and (b)(2)(ix) of this section, the administrative time limits prescribed in subsection (a)(6) of 5 U.S.C. 552 (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after the Commission has received fee payments described above.

(c) *Charges for search, review, duplication and certification.*

(1) Records search will be performed by Commission personnel at the following rates:

(i) Search will be performed by clerical/administrative personnel at a rate of $11.00 per hour and by professional/executive personnel at a rate of $23.00 per hour.

(ii) Minimum charge for record search is $11.00.

(2) Charges for review of records to determine whether they are exempt from disclosure under §503.35 shall be assessed to recover full direct costs at the rate of $38.00 per hour. Charges for review will be assessed only for initial review to determine the applicability of a specific exemption to a particular record. No charge will be assessed for review at the administrative appeal level.

(3) Charges for duplication of records and documents will be assessed as follows, limited to size 8½″ x 14″ or smaller:

(i) If performed by requesting party, at the rate of five cents per page (one side).

(ii) By Commission personnel, at the rate of five cents per page (one side) plus $11.00 per hour.

(iii) Minimum charge for copying is $ 3.50.

(4) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at $5.00 for each certification.

* * * * *

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1472

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF B.D.P. INTERNATIONAL, INC. AS AGENT FOR JAMES RIVER PAPER COMPANY

ORDER OF PARTIAL ADOPTION

April 27, 1987

The Commission determined to review the Initial Decision ("I.D.") of Chief Administrative Law Judge Charles E. Morgan ("Presiding Officer") issued in the above-docketed proceeding. The Presiding Officer properly granted permission pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. §1707(e) ("the Act"), to Sea-Land Service, Inc. ("Sea-Land") to refund a portion of the freight charges collected from B.D.P. International, Inc., as agent for James River Paper Company ("James River") on a shipment of Cotton Linter from New Orleans, Louisiana, to Bombay, India.

The only matter under review is the Presiding Officer's determination of the "critical period" during which the rate on which the waiver is based is made effective at a date earlier than the date of filing with the Commission.[1] The "critical period" in the I.D. runs from March 6, 1986, the date of the bill of lading. However, in *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corp.*, 19 S.R.R. 1407 (1980), as qualified by *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia,* 28 F.M.C. 421 (1986), the Commission held that the proper standard for establishing the effective date of the corrected tariff is the date the mistake in filing occurred, that is, either the date the tariff omitting the intended rate becomes effective, or, the date the intended rate, absent the mistake, would have become effective, but in no event earlier than 180 days before the filing of the application.

Sea-Land and James River had agreed on January 31, 1986 to a rate of $3450 per 40-foot hi-cube container for filter paper. Due to an error, the rate filed on February 6, 1986 applied to standard 40-foot containers only. The mistake was corrected by a tariff filed March 18, 1986. Following the rulings in *Yamashita* and *Embassy of Tunisia,* the earliest date the

[1] *See* section 8(e)(3) of the Act, 46 U.S.C. app. §1707(e)(3).

March 18 tariff may be made effective is February 27, 1986, that is, 180 days from the date of the filing of the application.

THEREFORE, IT IS ORDERED, That Sea-Land Service, Inc. 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. 1472, that effective February 27, 1986, and continuing through March 17, 1986, inclusive, the rate on Cotton Linter Pulp (including Filter Paper—100 pct. Cotton Linters) from New Orleans, La. to Bombay, India, per 40 ft. Std. and Hi-Cube container is $3450.00, not subject to Terminal Handling Charge U.S.A. Ports (Rule 45) and Container Service Charge (India) (Rule 41). This Notice is effective for purposes of refund or waiver of freight charges on any shipment of the commodity described which may have been shipped during the specified period of time.

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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1472

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF B.D.P. INTERNATIONAL, INC. AS AGENT FOR JAMES RIVER PAPER COMPANY

Application for permission to waive 2,326.64 of the applicable freight charges, granted.

INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Partially Adopted April 27, 1987

By application timely mailed on August 26, 1986, the applicant, Sea-Land Service, Inc., for the benefit of B.D.P. International, Inc., seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 8(e) of the 1984 Shipping Act (the Act), to waive $2,326.64 of the applicable freight charges on a shipment, in one Hi-Cube 40-foot container, of Cotton Linter Pulp (Including Filter Paper—100 pct. Cotton Linters), weighing 36,979 pounds, from New Orleans, Louisiana, to Bombay, India, sailing date March 2, 1986, and bill of lading date March 6, 1986.

The applicable rate on filter paper base, from U.S. Atlantic and Gulf Coast ports to Bombay, found in Sea-Land Service, Inc. Tariff No. 308, FMC No. 190 was $292 (W), minimum 19 tons per 40-foot container. Thus, basic applicable freight charges were $5,548. These charges were subject to certain additional charges, of $7.50 (W) per ton on 19 tons for terminal handling (U.S.), of $5 (W) per KT on 17.277 kilo tons for a container service charge in India, and of $1.30 per ton on 18.99 tons for a wharfage charge at New Orleans. These miscellaneous charges, respectively, amounted to $142.50, $86.14, and $24.69, making total applicable charges of $5,801.33. The above $24.69 wharfage charges is not in issue herein.

The sought charges are based on the 40-foot Hi-Cube container charge of $3,450, plus the above wharfage charge, and with the basic rate of $3,450 not subject to the U.S. terminal handling charge, and not subject to the India container service charge. Thus, total sought charges are $3,474.69. The difference between this figure and the total applicable charges of $5,801.33 is $2,326.64 the amount sought to be waived by this application.

[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).

As a result of negotiations between Sea-Land's Middle East Division Pricing Manager and the shipper, an agreement was made on January 31, 1986 to publish the sought $3,450 Hi-Cube container rate.

An inadvertent error was made during preparation of the tariff, which resulted in non-application of the agreed rate to Hi-Cube 40-foot containers (the tariff item listed only standard 40-foot containers at the $3,450 rate). The error was discovered and the tariff was corrected effective March 18, 1986, as per 1st revised page 29–A–2 of Sea-Land's Tariff No. 308, FMC No. 190.

The critical period herein is from March 6, 1986, bill of lading date, through March 17, 1986, the day before the effective date of the corrected tariff.

Applicant states that there were no other shipments of the same or similar commodity moved via applicant during the period in issue.

Applicant also states that Sea-Land will make any necessary adjustments in the freight forwarder compensation upon a favorable decision by the Commission.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by Sea-Land in failing to publish the agreed reduced rate so as to apply on Hi-Cube 40-foot containers, with the result that higher charges applied based on a per ton (W) rate and other charges; that the agreed rate was made effective after the shipment herein moved, and prior to this application; that the application was mailed timely; and that the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, Sea-Land Service, Inc., is authorized to waive $2,326.64 of the applicable freight charges on the shipment herein. An appropriate notice of this matter and of the details of the waiver shall be published in the pertinent tariff of the applicant.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1475
APPLICATION OF UNITED STATES LINES, INC. FOR THE BENEFIT OF CONFIBRES A.B.

ORDER OF PARTIAL ADOPTION

April 27, 1987

The Commission determined to review the Initial Decision ("I.D.") of Chief Administrative Law Judge Charles E. Morgan ("Presiding Officer") issued in the above-docketed proceeding. The Presiding Officer found that the application met all the requirements of section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. §1707(e) ("the Act"), and properly granted United States Lines, Inc. ("USL") permission to waive collection from Confibres A.B. of a portion of the freight charges assessed on a shipment of waste paper from Chicago, Illinois to Barcelona, Spain.

The only matter under review is the Presiding Officer's determination of the "critical period" during which the rate on which the waiver is based is made effective at a date earlier than the date of filing with the Commission.[1] The "critical period" in the I.D. runs from April 17, 1986, the date of the bill of lading. However, in *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corp.*, 19 S.R.R. 1407 (1980), as qualified by *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia,* 28 F.M.C. 421 (1986), the Commission held that the proper standard for establishing the effective date of the corrected tariff is the date the mistake in filing occurred, that is, either the date the tariff omitting the intended rate becomes effective, or, the date the intended rate, absent the mistake, would have become effective, but in no event earlier than 180 days before the filing of the application.

In this instance the mistake in filing occurred on April 9, 1986 and the corrected tariff was filed on May 6, 1986. Accordingly, the effective date of the tariff on which the waiver here is based runs from April 9, 1986 through May 5, 1986.

THEREFORE, IT IS ORDERED, That United States Lines, Inc. 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. 1475, that effective April 9,

[1] *See* section 8(e)(3) of the Act, 46 U.S.C. app. 1707(e)(3).

1986, and continuing through May 5, 1986 inclusive, the rate on Waste Paper is $1000 per 40-ft. container, including THC, from Chicago, IL to Barcelona, Spain. This Notice is effective for purposes of waiver or refund of freight charges on any shipment of the commodity described which may have been shipped during the specified period of time.

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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1475

APPLICATION OF UNITED STATES LINES, INC. FOR THE BENEFIT OF CONFIBRES A.B.

Application for permission to waive $606.48 of the applicable freight charges, granted.

INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Partially Adopted April 27, 1987

By application timely mailed on September 10, 1986, the applicant, United States Lines, Inc., for the benefit of Confibres A.B., seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 8(e) of the 1984 Shipping Act (the Act), to waive $608.50 of the applicable freight charges on a shipment of waste paper, in two 40-foot containers, weighing 97,036 pounds, from Chicago, Illinois, to Barcelona, Spain, sailing date and bill of lading date April 17, 1986.

The applicable rate on the waste paper was $1,000 lump sum per 40-foot container from Chicago rail terminal to Barcelona, plus a terminal handling charge of $14K per ton of 2,240 pounds. The lump sum rate for the two containers, of $2,000 is not in issue, but the terminal handling charge is in issue. Based on a total of 97,036 pounds (49,822 pounds in one container, plus 47,214 in the other container) the applicable terminal handling charge is $606.48. (In error applicant's computation of $608.50 was based on 97,360 pounds.)

The sought total charges are based on the $1,000 lump sum container rate *inclusive* of the terminal handling charge. Thus the waiver sought by this application is of $606.48.

On April 9, 1986, United States Lines agreed to file the sought lump sum rate including terminal handling and container service charges per 40-foot container from Chicago rail terminal to Barcelona of $1,000. The rate of $1,000 was filed the same day. The cargo was loaded on the vessel and sailed April 17, 1986. Inadvertently the $1,000 rate as published on April 9, 1986, did not include the terminal handling charges and container service charges. The error was caused by United States Lines' pricing supervisor's failure to verify the agreed rate against the published tariff page.

[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 error was corrected effective May 6, 1986, as shown on 17th revised page 117 of United States Lines, Inc. Intermodal Freight Tariff 729, F.M.C. No. 192. The critical period herein is from April 17, 1986, the bill of lading date, through May 5, 1986, the date prior to the effective date of the corrective tariff.

Applicant states that there were no other shipments of the same or similar commodity made by it during the period in issue. The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by applicant in failing to publish timely the agreed lump sum container rate inclusive of terminal handling charges, with the result that the latter charges were not included in the lump sum rate as published; that the intended agreed lump sum rate inclusive of the terminal handling charges was made effective after the shipment herein moved, and prior to the application; that the application was mailed timely; and that the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, United States Lines, Inc., is authorized to waive $606.48 of the applicable freight charges on the shipment herein. An appropriate notice of this matter and of the details of the waiver shall be published in the pertinent tariff of the applicant, covering the period in issue. Should there be no appropriate tariff of applicant, at this date, other appropriate action should be taken by applicant to notify the public.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1478

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF LAND JOY INTERNATIONAL FORWARDERS, INC.

ORDER OF PARTIAL ADOPTION

April 27, 1987

The Commission determined to review the Initial Decision ("I.D.") of Chief Administrative Law Judge Charles E. Morgan ("Presiding Officers") in the above-docketed proceeding. The Presiding Officer granted, pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e) ("the Acts"), the application of Sea-Land Corporation filed on behalf of Sea-Land Service, Inc. ("Sea-Land") for the Benefit of Land Joy International Forwarders, Inc. ("Land Joy"). The Presiding Officer found that the application met all the requirements of section 8(e) and properly granted Sea-Land permission to waive collection from Land Joy of a portion of the freight charges assessed on a shipment of rags from San Juan, Puerto Rico to Santo Tomas, Guatemala, C.A.

The only matter under review is the Presiding Officer's determination of the "critical period" during which the rate on which the waiver is based is made effective at a date earlier than the date of filing with the Commission.[1] The "critical period" in the I.D. runs from the date of the bill of lading, April 17, 1986. However, in *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corp.*, 19 S.R.R. 1407 (1980), as qualified by *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia*, 28 F.M.C. 421 (1986), the Commission held that the proper standard for establishing the effective date of the corrected tariff is the date the mistake in filing occurred, that is, either the date the tariff omitting the intended rate becomes effective, or, the date the intended rate, absent the mistake, would have become effective, but in no event earlier than 180 days before the filing of the application.

In this instance, the shipment of rags sailed from San Juan on April 9, 1986, while the application was filed on October 6, 1986, that is, 180 days later. Consequently, the rate on which the waiver is based should be effective from April 9, 1986 through April 17, 1986, the date preceding the filing of the corrected tariff.

[1] *See* section 8(e)(3) of the Act, 46 U.S.C. app. § 1707(e)(3).

THEREFORE, IT IS ORDERED, That Sea-Land Service, Inc. 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. 1478, that effective April 9, 1986, inclusive, and continuing through April 17, 1986, the rate on Rags, N.O.S. from San Juan, Puerto Rico to Santo Tomas, Guatemala, is $107 per kilo ton, minimum 14 tons. This Notice is effective for purposes of refund and waiver of freight charges on any shipment of the commodity described which may have been shipped during the specified period of time.

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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1478
APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF LAND JOY INTERNATIONAL FORWARDERS, INC.

Application for permission to waive $8,910.59 of the applicable freight charges, granted.

INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Partially Adopted April 27, 1987

By application timely mailed on October 6, 1986, the applicant, Sea-Land Service, Inc., for the benefit of Land Joy International Forwarders, Inc., seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 8(e) of the 1984 Shipping Act (the Act), to waive $8,910.59 of the applicable freight charges on a shipment of rags, N.O.S., in one 40-foot container, measuring 52.39 cubic meters, weighing 14.22 kilo tons, from San Juan, Puerto Rico, to Santo Tomas, Guatemala, Central America, sailing date April 9, 1986, and bill of lading date April 17, 1986.

The applicable rate on cargo, N.O.S., was $189 (M) per ton of one cubic meter, and the applicable ocean freight on 52.39 tons was $9,901.71. Other charges also were applicable. There was a container lift charge in Guatemala of $1.65 (W) per ton of 1,000 kilograms, on 14.22 kilo tons, of $23.46. This charge is not in issue herein. There was a maritime development surcharge in Guatemala of 6 percent on the ocean rate, or $594.10. There was a documentation charge of $15 per bill of lading, which is not in issue herein. There was also a wharfage (arrimo) charge in Puerto Rico of $0.85 (M) on 52.39 tons, of $44.53.

The sought ocean freight rate is $107 (W) per kilo ton, on 14.22 tons, making ocean charges of $1,521.54. The maritime development surcharge of 6 percent, as sought, is $91.29. The sought wharfage charge of $1.19 per kilo ton on 14.22 tons is $16.92.

The difference between total applicable charges of $10,578.80 and total sought charges of $1,668.21 is $8,910.59, the amount sought to be waived by this application.

The total amount of freight charges actually collected was $1,643.13. Thus, with approval of this application, remaining to be collected will be $25.08.

[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).

Sea-Land Service, Inc., publishes its own tariff, Freight Tariff No. 302, FMC No. 183, from San Juan to ports in Central America.

As a result of negotiations with the shipper, Sea-Land agreed to publish a rate of $107 per kilo ton, minimum 14 tons, for Rags, N.O.S. from San Juan to Santo Tomas. But, Sea-Land's Sales Manager failed to confirm this rate's acceptance, by the shipper, to Sea-Land's Pricing Manager for its timely publication. The Sales Manager's error was discovered after the cargo had moved. Effective April 18, 1986, the tariff was corrected to show the agreed $107 rate, on 8th revised page 89–A of Tariff No. 302.

Thus, the critical period herein is from April 17, 1986, bill of lading date, through April 17, 1986, the date prior to the effective date of the corrective tariff.

Applicant states that there were no other shipments of the same or similar commodity made by it during the period in issue.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by Sea-Land Service, Inc., in failing to publish in its tariff timely the intended agreed rate, with the result that a higher cargo, N.O.S. rate applied; that the intended agreed rate was made effective after the shipment herein moved, and prior to this application; that the application was mailed timely; and that the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, Sea-Land Service, Inc., is authorized to waive $8,910.59 of the applicable freight charges on the shipment herein. An appropriate notice of this matter and of the details of the waiver shall be published in the pertinent tariff of Sea-Land.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–14
UNION CARBIDE CORPORATION

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE

May 5, 1987

Notice is given that no appeal has been taken to the March 26, 1987, 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. 86–14
UNION CARBIDE CORPORATION

v.

WATERMAN STEAMSHIP CORPORATION

Applicable rates on dry cell battery parts found to be those in item 445 of the tariff under the sub-heading "And Parts, N.O.S.," found under the heading "Batteries, Viz." Complaint dismissed.

Paul S. Aufrichtig and *Leonard D. Kirsch* for the complainant, Union Carbide Corporation.
George H. Hearn for the respondent, Waterman Steamship Corporation.

INITIAL DECISION[1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Finalized May 5, 1987

By complaint filed April 8, and served April 16, 1986, the complainant, Union Carbide Corporation, Battery Division, alleges that the rates charged by the respondent, Waterman Steamship Corporation, on five shipments of dry cell battery parts, from the ports of Newport News, VA. (one shipment), and from New York, New York (four shipments), to Port Sudan, Sudan, bill of lading dates, respectively, December 7, 1983 (two shipments), February 21, 1984, March 23, 1984, and April 9, 1984, were unlawful, in violation of the 1984 Shipping Act (the Act).

The complainant seeks reparation in the amount of $20,923.06 for the alleged unlawful charges.

The above five shipments occurred during the period when Waterman Steamship Corporation operated under the automatic stay provisions of the Bankruptcy Act. Waterman emerged from Chapter XI on June 17, 1986.

The main issue herein is a matter of tariff interpretation, that is, what rate or rates, applied on these shipments of dry cell battery parts.

Union Carbide manufactures dry cell batteries at its plant in Khartoum, Sudan. A wide variety of products goes into the fabrication of dry cell batteries, and Union Carbide is the sole American producer of dry cell batteries in Khartoum. From at least as early as May 1, 1981, and since then, Waterman's tariff No. 18–D, F.M.C. No. 161 has provided rates on batteries, with the same description, as follows, in its item 445:

[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).

	Rate basis
Batteries, Viz:	
Storage, without Acid	W/M
And Cells, Electrical Dry (NOT Storage Type)	W
And Parts, N.O.S.	W/M

The parties' dispute is between the second and third listed descriptions above under the "Batteries, Viz." heading. The respective tariff rates for the second and third listings above effective on December 7, 1983, were $288.25 W, and $268.25 W/M (per ton of 2,240 pounds or 40 cubic feet, whichever produces the greater revenue). The rates for the second and third listings above effective for the 1984 shipments, respectively, were $302.75 W, and $281.75 W/M.

The above second listing with its rates on *the W (weight) basis produces the lower of the two possible charges* for the complainant's shipments herein, and this is the rate basis sought by the complaint. The respondent supports the third listing above, with its W/M rates as the applicable basis of rates.

The complainant relies on Waterman's Rules and Regulations found in Section I of its tariff, which in part provide:

43. *PARTS OF ARTICLES*

> Whenever rates are provided for on articles named in this Tariff, the same rate will be applicable on named parts of such articles when so described on ocean Bills of Lading, *except where specific rates are provided herein for such parts.* (Emphasis supplied.)

The complainant contends, by using Rule 43 above, that it is entitled to the same rate basis for dry cell battery parts, as applied on dry cell batteries, that is, on "And Cells, Electrical Dry (NOT Storage Type).

The respondent disputes the application of Rule 43 in the circumstances herein, contending that the rate on "And Parts, N.O.S." above specifically includes three types of battery parts, namely any parts, of storage batteries without acid, any parts of "And Cells, Electrical Dry (NOT Storage Type)," and any parts of any other batteries.

Tariffs must be interpreted reasonably, and the intention of the maker does not necessarily govern, in the case of ambiguous tariffs. The pertinent tariff herein is not ambiguous.

In the present situation we have three categories listed under the heading of Batteries. The second and third categories are preceded by the word, "And."

Reasonably, under the circumstances of the trade herein to Sudan, it is likely that a limited number of battery types moved from the United

States to Sudan, and that the volume of such movement justified only a limited listing of rates on specific types of batteries.

Specific rates were published in Waterman's tariff herein on two types of batteries, and *there was a third specific rate on battery parts, N.O.S.*

Rule 43 cannot apply, where specific rates are provided herein (in the tariff) for such parts. If, as is not the situation here, the "And Parts, N.O.S." description were not a part of item 445, then the conclusion herein might favor the complainant. But, to repeat, since there was a specific rate on battery parts in item 445, there could be no recourse to the application of Rule 43 of the tariff.

It is concluded and found that the applicable rates on complainant's shipments herein were those on the W/M basis in item 445 of the tariff under the sub-heading "And Parts, N.O.S.," found under the heading "Batteries, Viz."

The complaint is dismissed.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–31
ARCTIC GULF MARINE, INC., PENINSULA SHIPPERS ASSOCIATION, INC., SOUTHBOUND SHIPPERS, INC.

ORDER PARTIALLY ADOPTING INITIAL DECISION

May 6, 1987

The Federal Maritime Commission ("Commission" or "FMC") instituted this proceeding by an Order of Investigation and Hearing issued September 10, 1984 to determine whether respondents, Arctic Gulf Marine, Inc. ("AGM"), Peninsula Shippers Association, Inc. ("PSA") and Southbound Shippers, Inc. ("SSI"), have violated the Intercoastal Shipping Act, 1933 ("ISA") and the Shipping Act, 1916 ("1916 Act"). Specifically, the Commission directed that the proceeding address: (1) whether AGM violated section 2 of the ISA, 46 U.S.C. app. § 844, by charging rates and absorbing drayage charges not reflected in its tariff filed with the Commission; (2) whether PSA and SSI violated section 2 of the ISA by operating as common carriers by water in domestic offshore commerce without a tariff on file with the Commission; (3) whether AGM, PSA and SSI violated section 15 of the 1916 Act, 46 U.S.C. app. § 814, by entering into and carrying out unfiled and unapproved preferential cooperative working agreements; and, (4) whether civil penalties should be assessed.

The proceeding was initially assigned to Administrative Law Judge Seymour Glanzer who presided over the evidentiary hearings. Neither PSA nor SSI called any witnesses or presented any direct case. Subsequently, AGM offered to settle the case and pay a civil penalty. An Initial Decision In Part was issued on August 5, 1986, approving the proposed settlement and levying a $40,000 civil penalty against AGM. The Initial Decision In Part became administratively final pursuant to Rule 227(a)(3) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.227(a)(3).

Subsequently, the proceeding was reassigned to Administrative Law Judge Norman D. Kline ("Presiding Officer") who has issued an Initial Decision ("I.D.") finding that PSA and SSI had violated section 2 of the ISA and section 15 of the 1916 Act and assessing civil penalties of $300,000 against PSA and $50,000 against SSI. The Commission's Bureau of Hearing Counsel ("Hearing Counsel") has filed Exceptions to the I.D. urging the assessment of maximum penalties.

BACKGROUND

The critical facts as found in the I.D. can be very briefly summarized as follows.

AGM, PSA and SSI operated under an arrangement from 1982 to 1985 whereby AGM operated a barge service between Seattle, Washington and ports in Alaska and granted special preferential space accommodations to PSA and SSI who, in turn, solicited cargo as non-vessel-operating common carriers ("NVOCC's").

AGM entered into charter arrangements with PSA on a flat container rate basis with a guaranteed minimum volume. PSA, although incorporated as a non-profit "shippers' association," actively solicited cargo from the general public, accepted responsibility for the cargo and charged rates for the transportation that provided a profit. SSI also booked cargo with AGM on the account of PSA that was publicly solicited, and for which SSI accepted responsibility and rated on a profit-making basis.

PSA offered three defenses in the proceeding: (1) that it was a shippers' association and need not file a tariff; (2) that it was exempted from regulation as an Interstate Commerce Commission freight forwarder; and (3) that it did not engage in port-to-port operations. The Presiding Officer rejected these defenses. He found that PSA's status as a shippers' association was a sham, that its alleged status as a shippers' association did not exempt it from FMC regulation as an NVOCC, and that its operations were a port-to-port service with local pick-up and delivery subject to FMC jurisdiction.

Finally, the Presiding Officer noted that the maximum penalties would be approximately $1.3 million for PSA and $210,000 for SSI. Under the criteria for assessing the amount of civil penalties set forth in the Commission's Rules at 46 C.F.R. 505.3(b), the Presiding Officer determined that the violations were serious, intentional and long-standing. He further found a lack of cooperation and a pattern of impeding the Commission's investigation as well as a general lack of mitigating circumstances. Although it was noted that the respondents were no longer in business, the Presiding Officer concluded that the deterrent effect of substantial penalties and alternative avenues of collection were sufficient considerations to preclude mootness of the civil penalty issue. As a result, he recommended penalties of $300,000 against PSA and $50,000 against SSI payable in equal monthly installments over two years.

Hearing Counsel filed Exceptions to the amount of the civil penalties assessed by the Presiding Officer. It is argued that the amounts of the penalties are insufficient to adequately promote the regulatory objectives of the Commission and will not provide sufficient deterrence in relation to the potential gain from the unlawful conduct found in the I.D. Based upon the findings of the Presiding Officer of serious, willful and long-standing violations and a general absence of mitigating factors, Hearing

Counsel urges the Commission to impose the statutory maximum penalties against PSA and SSI.

DISCUSSION

No party has contested the Presiding Officer's findings of fact or excepted to the findings of violations of the 1916 Act and the ISA. The Commission finds those portions of the I.D. to be proper and well founded. Accordingly, they are adopted. Therefore, the only issue now before the Commission is whether the amount of the civil penalties assessed by the Presiding Officer is appropriate under the circumstances.

Hearing Counsel's objection is essentially with the Presiding Officer's determination of what constitutes a "severe" penalty under the facts of this case. Hearing Counsel urged below, and the Presiding Officer agreed in the I.D., that "severe penalties" are warranted, regardless of the fact that PSA and SSI are no longer viable entities. Although Hearing Counsel did not specifically urge the Presiding Officer to impose maximum civil penalties, it is now argued that, in essence, "severe penalties" means "maximum penalties" under the facts presented here. Hearing Counsel is of the opinion that anything less than maximum penalties would not have a sufficient deterrent effect.

Because this issue was not expressly raised below, the Presiding Officer did not address the question of why the maximum potential penalties should not be assessed. However, the only countervailing factor that would arguably warrant less than maximum penalties is that the respondents may no longer be viable entities. In this context, it is not inappropriate to consider the respondents' ability to pay as well as the costs and risks of collection of the amount of penalties assessed. *See* Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum.L.Rev. 1435, 1469–72 (1979). However, in light of the facts of this case, the Commission will not permit the possible abandonment and subsequent dissolution of the respondent corporate entities to be considered a mitigating circumstance or otherwise be used as a shield for the egregious violations of law documented in the record of this proceeding. *See United States* v. *Atlantica, S.p.A.*, 478 F.Supp. 833, 836 (S.D.N.Y. 1979). Accordingly, the Commission agrees with Hearing Counsel that maximum civil penalties must be assessed in this case. Based upon the Presiding Officer's findings, PSA will be assessed $1,308,000 and SSI will be assessed $210,000. *See* I.D. at 63.

While there may exist a low probability of successfully collecting maximum penalties, alternative collection avenues might be available. *See* I.D. at 69, n. 25. Because the Commission views this case as evincing a mode of business conduct that poses a serious threat to the efficacy of the programs and procedures that have been implemented to enforce the law by means of civil penalties, maximum effort will be expended to collect the penalties assessed here. Moreover, future cases of this type will be

carefully scrutinized for appropriate factual and legal bases to impose individual liability for civil penalties on corporate officials engaged in illegal conduct. The Commission will not permit the abandonment of corporate structures to be used as a tactic to erode the deterrent effects of civil penalties.

THEREFORE, IT IS ORDERED, That, except as modified in this Order, the Initial Decision issued in this proceeding is adopted by the Commission and made a part hereof; and

IT IS FURTHER 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 civil penalties in the amount of $1,308,000 are assessed against Peninsula Shippers Association, Inc.; and

IT IS FURTHER ORDERED, That civil penalties in the amount of $210,000 are assessed against Southbound Shippers, Inc.; and

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

By the Commission.*

(S) JOSEPH C. POLKING
Secretary

*Commissioner Moakley would adopt the Initial Decision in its entirety.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–31

ARCTIC GULF MARINE, INC., PENINSULA SHIPPERS ASSOCIATION, INC., SOUTHBOUND SHIPPERS, INC.

Respondents Peninsula Shippers Association, Inc. (PSA) and Southbound Shippers, Inc. (SSI) found to have operated as non-vessel operating common carriers by water (NVOCCs) between Seattle, Washington, and Alaska from 1982 to 1985 for PSA and during 1982 for SSI. Both respondents also found to have entered into and carried out cooperative working arrangements with another carrier, giving them special privileges and advantages during 1982. Neither PSA nor SSI filed their tariffs or the agreements with the other carrier, thereby violating section 2 of the Intercoastal Shipping Act, 1933, and section 15 of the Shipping Act, 1916, respectively.

PSA, SSI, and the third respondent, a carrier which has settled with the Commission, were incorporated and operated by a small group of men who coordinated the operations of PSA and SSI and other companies. Both PSA and SSI actively advertised and solicited cargo from the public and made use of the third carrier's vessels to perform the service under the terms of the agreements with that carrier. PSA's defenses, namely, that it was a shippers' association, that it offered more than port-to-port services which lay outside the F.M.C.'s jurisdiction, and that the F.M.C. ought not to follow its previous decision holding such associations to be subject to Commission jurisdiction, have no merit either in fact or in law.

Although warned about the possible violations of law in 1982, the persons behind PSA and SSI continued to operate without cooperating with the Commission's investigators or seeking advice or exemption from the Commission under proper legal procedures. Despite a record of significant culpability and non-cooperation, respondents put on no direct case and presented little or nothing in mitigation. Under such circumstances, it is imperative that penalties be assessed which will deter others from emulating these respondents even if the two companies have dissolved. Penalties amounting to $300,000 assessed against PSA and $50,000 against SSI will send the appropriate message and serve as an effective deterrent.

Joseph T. Mijich, John P. World, and *John M. Stern, Jr.,* for respondent Peninsula Shippers Association, Inc.

Aaron W. Reese and *Charna Jaye Swedarsky* for Hearing Counsel.

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

Partially Adopted May 6, 1987

This proceeding began with the issuance of the Commission's Order of Investigation and Hearing on September 10, 1984. The purpose of the proceeding was to determine whether respondent Arctic Gulf Marine, Inc.

[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).

(AGM), a barge-operating common carrier by water which had operated in the Seattle, Washington/Alaska trade under an F.M.C. tariff until December 3, 1982, had violated its tariff in certain ways and had carried out unfiled arrangements and agreements with two other entities, Peninsula Shippers Association, Inc. (PSA), and Southbound Shippers, Inc. (SSI). If so, such conduct would violate section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. sec. 844, and section 15 of the Shipping Act, 1916, 46 U.S.C. app. sec. 814.

In addition to the above matters involving AGM, the proceeding was to determine whether the other respondents, PSA and SSI, had been operating as common carriers by water in the Seattle, Washington/Alaska trade without filing tariffs in violation of section 2 of the 1933 Act and whether PSA and SSI had entered into and carried out unfiled arrangements and agreements, the former with AGM and the latter with PSA and AGM, in violation of section 15 of the 1916 Act. The Commission further explained that it had information indicating that the three named respondents had been operating in the manner described during 1982.

Finally, the Commission wished to determine whether, if the three respondents had violated sections 2 and 15, cited above, penalties should be assessed and, if so, in what amount.

After extensive prehearing discovery was conducted under schedules established by Judge Seymour Glanzer, to whom the case was assigned, the case proceeded to evidentiary hearings which consumed 18 days between June 10 and August 16 in Seattle, Washington, and Anchorage, Alaska. Hearing Counsel and AGM presented witnesses and documentary evidence at the hearing. Neither PSA nor SSI called any witnesses nor presented any direct case. Indeed, SSI never appeared throughout the entire proceeding, and Hearing Counsel reported on January 24, 1985, that SSI had been involuntarily dissolved as a corporation by the State of Washington on November 16, 1984.

After the filing of Hearing Counsel's opening brief on December 3, 1985, respondent AGM requested permission to file a petition for settlement instead of an answering brief. Permission was granted by Judge Glanzer and, on January 31, 1986, AGM filed its "Offer of Compromise and Settlement" together with another document entitled "Proposed Compromise Agreement." Following further discussions between Hearing Counsel and AGM, AGM filed a new "Offer of Settlement" on March 28, 1986, to replace the earlier one filed in January. On April 11, 1986, AGM filed a supplemental document entitled "Proposed Settlement of Civil Penalty." Simultaneously, Hearing Counsel filed their reply to AGM's offer, recommending its approval. In an Initial Decision served August 5, 1986, confined to the question of approvability of AGM's proposed settlement, Judge Glanzer approved the settlement. On September 12, 1986, the Commission made that decision administratively final and, pursuant to the decision and settlement, ordered AGM to pay the sum of $40,000, together

with accumulated interest since March 25, 1986, to the Commission by September 19, 1986. (28 F.M.C. 542.)

Effective September 4, 1986, Judge Glanzer was named to the position of Director, Bureau of Hearing Counsel, thereby becoming unavailable for the issuing of an Initial Decision dealing with the remaining issues in the case concerning respondents PSA and SSI. (In addition, Judge Glanzer, now Director of the Bureau, notified all the parties to this proceeding that he was recusing himself from participating in the case. See letter to Judge Kline, dated September 10, 1986.) When Judge Glanzer became unavailable, the case was reassigned to the undersigned judge on September 4, 1986. The parties were notified of the change of judges on the same day. (See Notice of Reassignment, September 4, 1986.) On September 8, 1986, I notified the parties that unless there was a legal impediment preventing me from deciding the remaining issues, I would, as provided by the Administrative Procedure Act (5 U.S.C. sec. 554(d)), issue such a decision. I instructed the parties to advise me if they had any reason to believe that I could not by law issue such a decision on the record developed before Judge Glanzer and to advise me of the current status of respondent PSA. The parties were to advise me by September 26, 1986.

In response to my instructions and queries, both Hearing Counsel and respondent PSA advised me that on February 14, 1986, PSA was involuntarily dissolved as a corporation pursuant to Alaskan law. Hearing Counsel responded, furthermore, that they had no objection to my issuing a decision. (See Hearing Counsel's letters of September 23 and 26, 1986, and letter dated September 22, 1986, from PSA's counsel, John P. World, with attachment.) [2]

The Commission's Order of Investigation and Hearing had established due dates for the Initial Decision and for the Commission's decision as January 10 and May 10, 1986, respectively. However, the offer of settlement submitted by AGM and other factors necessitated additional time for issuance of these decisions. At the request of Judge Glanzer, on December 18, 1985, the Commission extended the time for issuance of the decisions until July 3 and December 3, respectively. Time for consideration of the offer of settlement and for issuance of appropriate decisions on the offer as well as the remaining issues required still further time. At the request of Judge Glanzer, by order served July 16, 1986, the Commission further extended the dates to October 3, 1986, and March 3, 1987. Upon my

[2] If a party fails to request a new hearing when a case is reassigned to a new judge who has not presided at the hearing and the party attempts to request such a hearing after the decision is issued, the party has been held to have waived its rights to such a hearing. See *Millar* v. *F.C.C.*, 707 F.2d 1530, 1538 (D.C. Cir. 1983). As the court noted, furthermore, it is not crucial that the deciding judge observe witnesses when the facts are largely shown by records and documents and demeanor is not the critical factor in resolving factual disputes. 707 F.2d at 1538–1539. This record contains documentary evidence, written testimony, and records, among other things, and I do not find that demeanor of the witnesses is an essential factor in resolving such factual disputes as appear in the case.

request, the Commission extended these dates once more to November 14, 1986, and April 14, 1987.

The Initial Decision and Settlement Concerning AGM

In the settlement which Judge Glanzer approved and which the Commission finalized, respondent AGM, without admitting that it had committed any violations of law, paid $40,000 as a penalty. As shown in the Initial Decision, AGM had stipulated that certain misratings had occurred and the record showed that AGM had entered into a space-charter agreement and a later voyage-charter agreement with PSA in 1982. Furthermore, there was evidence of a cooperative working arrangement between AGM, PSA, and SSI from March 18, 1982 to December 3, 1982, but no evidence of a filing of any such arrangement with the Commission, although a copy of the space-charter arrangement was given to a Commission employee voluntarily by AGM two months before the charter was to expire. However, by settling, AGM chose not to have a decision on the merits of its defenses. However, because AGM has settled, care must be taken to ensure that the decision on the merits concerning possible violations of law by PSA and SSI is not used against AGM for any purpose. Therefore, even though the record shows "an intricate linkage of interest, personnel, and finances involving AGM, PSA and SSI" (Initial Decision at 547 and even though one of the issues involving PSA and SSI concerns the question whether PSA, SSI, and AGM were parties to unfiled agreements, it has been made clear that the findings as to PSA and SSI in this Initial Decision will not be binding on AGM under the principles of res judicata or collateral estoppel. The last ordering sentence in Judge Glanzer's Initial Decision approving AGM's settlement offer is explicit on this point. (See Initial Decision at 551.)

Accordingly, although findings made in this decision unavoidably involve AGM because of the nature of the issues, the purpose of such findings is not to undermine AGM's settlement or to decide any issues on the merits against AGM, which, in return for settlement, has waived its right to litigate its defenses fully. Consequently, the findings and orders to be issued in this decision will bind and affect only PSA and SSI. However, in order to understand the nature of the operations of PSA and SSI, which overlap with those of AGM, some findings concerning AGM must be made. Some of these findings have already been made in Judge Glanzer's Initial Decision and serve as useful background.

FINDINGS OF FACT

Arctic Gulf Marine, Inc. (AGM)

1. Arctic Gulf Marine, Inc. (AGM), which, as discussed, has settled with the Commission, was organized as a corporation in the State of Wash-

ington 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. AGM was dissolved on April 17, 1986. Prior to its dissolution, AGM had operated a barge service in the Seattle/Alaska trade as a common carrier by water under a tariff (FMC–F No. 1) which AGM had filed with the Commission effective March 18, 1982, and which AGM had canceled on December 3, 1982. Thereafter, AGM operated as a contract carrier in 1983 and 1984 and ceased operations in November 1984. AGM's address, according to its Articles of Incorporation, was 737 South Stacy St., Seattle, Washington, and its incorporator was Edward J. O'Brien, of the same address. Mr. O'Brien was also its President and registered agent. AGM's Secretary-Treasurer was Evelyn Varon, and its Directors were Francis (Jake) X. Moesh, Lewis M. Dischner, Kenneth Rogstad, and Carl Mathisen. These four were also owners of AGM together with a Mr. William (Jake) Pierce. Ms. Varon resigned as Secretary-Treasurer of AGM in August 1983 and Mr. Rogstad assumed that position. Ms. Varon had not been informed that she had been named as Secretary-Treasurer of AGM until one or two years after AGM's incorporation and had been named only as a matter of convenience to be close to the checkbooks and accounting people.

2. Mr. Moesh, a consultant to PSA as well as one owner of AGM, had promised Mr. O'Brien the job as President of AGM. Mr. O'Brien, however, had no substantive operational tasks for AGM, received no salary from AGM, and signed contracts at the direction of Mr. Pierce. Mr. O'Brien had his own consulting business when he became president of AGM and did work for a company known as Ocean Dock Industries, which was the unloading agent for PSA in Anchorage, Alaska, and was partially owned by Mr. Moesh. Mr. O'Brien resigned as an officer of AGM on November 2, 1984.

Peninsula Shippers Association (PSA)

3. Peninsula Shippers Association (PSA) was incorporated in Alaska on November 22, 1971, as a non-profit corporation authorized to consolidate, transport and deliver privately-owned goods of its members. According to its articles of incorporation, PSA was a nonstock, no-dividend corporation, and no profits were to be declared or paid to its members, each of whom had one vote. The Board of Directors was authorized to elect an executive committee which could exercise all the Board's authority in the management of the corporation except for distribution of proceeds, selection of officers, and filling of vacancies.

4. There was no requirement under PSA's articles of incorporation for regular meetings of the membership or meetings of the Board of Directors, the latter meetings being discretionary. Nor were there provisions for the time and manner of the election of officers. From 1979–1985, the officers of PSA were James Simpson, President; Fred D. Donadel, Vice-President,

and Marion Davis, Secretary-Treasurer. In 1979 and 1980, according to PSA's corporate reports filed with the State of Alaska, the directors were Bud Center, James Avey, and Volney Grace.

Persons and Companies Affiliated with PSA

5. Marion Davis was Secretary-Treasurer of PSA and was responsible for collection of accounts receivable. Mr. Davis was put in charge of PSA's Alaska operations in approximately 1980 and continued in that position until 1985. As head of PSA's Alaska operations, it was Mr. Davis's responsibility to see that freight was delivered on a timely basis, to take calls from and visit members, and to keep the PSA Board of Directors informed of the Alaska operations. Mr. Davis, who had received an annual salary from PSA as general manager, severed his association with PSA because it ceased doing business around the first part of 1985.

6. Francis X. Moesh, the part owner and director of AGM, was a consultant to PSA. As a consultant, it was part of Mr. Moesh's responsibility to arrange for cargo to move via PSA and to solicit customers to move cargo with PSA. Mr. Moesh was also responsible for entertaining, calling on members, and negotiating or dealing with water carriers. Mr. Moesh used, among other offices, the office at AGM's South Stacy Street, Seattle address, and the Commission's District Investigator, Michael F. Carley, in August 1982, contacted Mr. Moesh at that address for a telephonic interview. Mr. Moesh informed Mr. Carley that PSA had no paid employees, only agents, that PSA's agent in Seattle was a company known as Penn Van, Inc., and that PSA's agent in Alaska was a company known as Ocean Dock Industries, which was Mr. Moesh's company.

7. PSA also used the services of a company known as Consulting Traffic Services, Inc., owned by Fred D. Donadel, Vice-President of PSA. This company and Mr. Donadel called on PSA members, solicited members, provided information, sent out applications, and explained PSA's services. PSA paid Mr. Donadel for his services through Consulting Traffic Services, Inc. This company was located at AGM's South Stacy Street address in Seattle and later moved to another address in Kent, Washington, at which address a company known as Anchorage Fairbanks Freight Service (AFFS) was located, for which company AGM's Mr. O'Brien had worked.

8. PSA has had employees working for it in Alaska since 1971 or 1972. From 1982–1985, PSA had approximately 8–10 paid employees in Anchorage. PSA's accounting was done by Mr. Arnie Haugen, who was President and sole shareholder of Transportation Accounting & Traffic Services, Inc. (TATS). TATS's services for PSA included bookkeeping, payroll, and tax service. TATS was originally located at AGM's South Stacy Street address but later moved to the Kent, Washington, address shared by AFFS and PSA. PSA was billed for PSA's rental of office space by TATS. In Anchorage, PSA rented premises from a company known as F & M Investments and shared space with Ocean Dock Industries, its agent in

Alaska. F & M Investments was owned by Francis X. Moesh, the part owner and director of AGM and consultant to PSA, and by Marion Davis, general manager and Secretary-Treasurer of PSA. PSA's Seattle agent Penn Van, Inc., was formed as a partnership in 1971 between Francis X. Moesh and John Whalen, the latter one of PSA's original (1971) corporate officers and directors. In 1973, Penn Van became a corporation under Washington law. As of October 1982, Penn Van's corporate officers were: Richard Willecke, President; Marion Davis, Vice-President; and Fred D. Donadel, Secretary-Treasurer. Its four stockholders were Messrs. Moesh, Donadel, Davis, and Willecke. Penn Van had the lease at AGM's South Stacy Street address in Seattle. Penn Van allowed Mr. Haugen, PSA's accountant, to offer accounting and financial services at South Stacy Street beginning in January 1982 through Penn Van's offices without billing Mr. Haugen. Mr. Haugen's employees in 1982 were initially Penn Van's employees, paid by Penn Van. These employees also performed work for PSA. In 1982, Mr. Haugen's services were performed for, among other companies, PSA, Penn Van, AGM, and Ocean Dock Industries, which was PSA's agent in Alaska and Mr. Moesh's company.

9. All accounting functions for PSA were turned over to Mr. Haugen's service bureau in 1982, and Mr. Haugen remained a salaried employee of PSA. Mr. Haugen personally prepared PSA's tax returns between 1974 and 1982. Between 1982 and 1985, one of Mr. Haugen's staff prepared the returns under his direction. PSA also had employees in Anchorage, Alaska, who performed accounting and financial functions there for PSA. Mr. Haugen received a salary from PSA from December 1974–June 30, 1984, while was operating TATS and a motor carrier which he owned, Anchorage Fairbanks Freight Service, Inc. (AFFS), formed in April 1982 to operate between points in Washington and points in Alaska. TATS, Penn Van, and later AFFS worked with PSA and coordinated their efforts from the same office locations. Mr. Haugen bought the trucking rights for AFFS from a carrier known as United Cartage, owned by Messrs. Moesh, Willecke, Davis, and Donadel. During the period 1982–1985, AFFS performed motor carrier services exclusively for PSA. After July 1, 1984, AFFS took over the accounting functions of TATS, which became inactive, and Mr. Haugen operated his service bureaus under AFFS.

10. Penn Van, Inc., operated as the loading agent for PSA, receiving freight at its loading terminal to which PSA shippers and consignees would route their freight. Penn Van would receive and load the freight into vans going to Alaska by PSA. Ocean Dock Industries was the unloading agent for PSA in Anchorage. Mr. Davis and Mr. Moesh were officers and shareholders of Ocean Dock Industries.

11. Mr. Moesh was authorized, on July 9, 1982, to sign checks for PSA in an account with the Seattle First National Bank. So were Messrs. Donadel, Davis, Haugen, and Nancee Stanley, former Traffic Manager of PSA from 1982–1985, now Traffic Manager of AFFS, and also a former

employee of TATS, Mr. Haugen's company. Ms. Stanley was also authorized to sign checks for AGM, PSA, Penn Van, and AFFS and thought that of all the companies that she worked for, Penn Van, TATS, PSA, and AFFS, were the same employer and company. From 1982, Ms. Stanley worked for the same people, Mr. Moesh, Mr. Donadel, Mr. Willecke, and Mr. Haugen, and performed the same duties even though the company she worked for changed. From 1982 to the present, Ms. Stanley considered Mr. Moesh and Mr. Willecke to be her bosses. As traffic manager of PSA and AFFS, Ms. Stanley thought of Mr. Francis X. Moesh as the overall boss of all the companies she has worked for, with the exception of TATS and AFFS. However, Mr. Moesh gave orders to the staff people performing work for PSA as well as AFFS and Mr. Moesh gave orders to employees in the motor carrier and service bureau operations of AFFS. Mr. Haugen did not control Mr. Moesh's dealing with AFFS. As of August 12, 1985, all management decisions regarding AFFS and its operations were made by Mr. Haugen, Mr. Moesh, and a Mr. Ambrosia.

PSA's Agreements With AGM and SSI

12. As noted previously, PSA was incorporated under Alaska law on November 22, 1971, as a non-profit association authorized to carry, consolidate, transport and deliver the goods of its members. In 1982, PSA entered into two agreements with AGM. On February 25, 1982, PSA entered into a space-chartering agreement with AGM, a company which had only been formed the previous month. The space-charter agreement began on March 15, 1982, for a four-month term. The agreement was part of an arrangement which included oral understandings as well as another written instrument. Under the terms of the agreement, 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, S2,000 per 40-foot equivalent of cargo carried. 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. Therefore, PSA's right under the agreement to use whatever space it required gave it an advantage over other non-vessel operating common carriers or other shippers that AGM held itself out to serve under AGM's tariff.

13. Under the terms of the space-charter agreement, AGM agreed to provide a dock-to-dock service to PSA for the carriage of goods to or from Valdez, Alaska, or such other ports as the parties would agree upon. PSA was responsible for securing insurance to protect against loss or damage to the cargo, and PSA assumed all risk for loss, damage, delay, misdelivery, failure to deliver, and all handling charges on its behalf and on behalf of the owner, shipper and consignee of the cargo.

14. The space-charter agreement was entered into between Mr. Pierce, AGM's general manager, who discussed the agreement with Mr. Moesh on behalf of PSA. The agreement was signed by Mr. Donadel, PSA's Vice-President. Mr. Pierce had thought that PSA was a shipper's co-op which carried cargo for its members. AGM had been formed partially at least because of the need for new barge service for 1982 to carry construction materials to the North Slope, Alaska, for a company known as H.W. Blackstock Co. Furthermore, through the winter of 1981 and into the early spring of 1982, there was an abundance of cargo moving between the lower 48 states and Alaska, the two major trunk lines were full, and there was a backlog of up to six weeks to move freight from Seattle to Anchorage. Furthermore, the biggest sealift in history was to take place in the summer of 1983 between Seattle and Prudhoe Bay, Alaska, for the oil industry, and every barge from the carriers serving the trade would be utilized.

15. 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, and AGM's tariffs would not be applicable. 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 for the southbound service was based on the amount of cargo that PSA could solicit or induce to be shipped on the barges and was based on charges per platform, container, or vehicle not containerized. The agreement was signed by Mr. O'Brien, AGM's President, and by Mr. Davis, PSA's general manager in Alaska, using the name of Mr. Simpson, PSA's President. One reason for the agreement appears to be that Mr. Davis and Mr. Ray Fendenheim had crushed automobiles to move in the southbound trade from Anchorage to Seattle. AGM and PSA therefore entered into the voyage-charter agreement to move this cargo. However, freight transported on AGM on its southbound voyages for PSA actually belonged to SSI. Furthermore, in 1982, AGM advanced freight and drayage charges to SSI to move cargo southbound on AGM barges to the Puget Sound area at the request of PSA's general manager in Alaska, Mr. Davis. (As of June 1985, SSI had not paid AGM back for all of the freight charges advanced by AGM in 1982.)

The Close Working Relationships Among PSA, SSI, and AGM

16. Other events during 1982 show the close interrelationships among AGM, PSA, and SSI in addition to the formal space and voyage-charter agreements and AGM's advancement of freight charges on behalf of SSI. For example, PSA provided AGM with funds initially in 1982 to start service because the first voyage that AGM was going to make under the space-charter agreement was to carry PSA cargo, and AGM did not

have money available for start-up expenses. The record shows also that PSA's Secretary-Treasurer and general manager in Alaska, Mr. Davis, advanced expense funds on PSA's account for AGM in Anchorage, that PSA paid for airline tickets for AGM's Mr. Pierce and Mr. O'Brien prior to the formation of AGM and advanced money for start-up costs in January 1982 to Mr. Pierce, that PSA made payments to a bank on a loan to AGM, deposited funds for AGM's start-up costs in AGM's account in February 1982, paid Mr. Pierce, AGM's general manager, for expenses in connection with trips, advanced payment for AGM's payroll and equipment, loaned AGM money to pay rent on AGM's freight terminal for March 1982, and allowed AGM to use office space at 737 South Stacy Street, Seattle, rent-free. Sometimes, Mr. Pierce of AGM accompanied Mr. Donadel of PSA on joint solicitations. AGM would also call PSA before a sailing to determine how much cargo PSA was planning to book on a particular AGM sailing. That information determined how much space was available on the AGM vessel for other shippers.

17. Mr. Pierce, AGM's general manager, believed it not unreasonable to conclude that AGM had been started mainly to transport PSA cargo. In the discussions to begin AGM's service, Mr. Moesh, part owner and director of AGM and consultant to PSA, indicated that he was concerned about moving PSA cargo and wanted AGM to move PSA cargo, and, in the initial discussions, it had been decided that AGM should be a contract carrier to cover specific movements of cargo in the spring of 1982 to Valdez, Alaska, for PSA. Mr. Moesh, on behalf of PSA, was involved in the discussions as to the freight charges to be billed PSA for cargo moved in 1982 under the space-charter agreement with AGM. Mr. Davis, PSA's general manager in Alaska, was also involved in the decision to enter into both the space-charter and voyage-charter agreements with AGM.

18. AGM's tariff (FMC–F No. 1) was filed effective March 18, 1982. The first voyage by AGM departed Seattle on or about March 19, 1982, with 100 percent of the cargo carried for PSA under the space-charter agreement. A second voyage departed on or about March 19, 1982, with 80 percent of the cargo carried for PSA under contract with the remaining 20 percent carried as common carriage. PSA paid AGM freight rates as per the space-charter agreement until July 1982. Thereafter, PSA paid under the AGM northbound tariff. AGM offered one sailing a month with two barges during 1982. Eighty to 90 percent of the cargo transported by AGM in 1982 was PSA cargo. Toward the end of 1982, 90–95 percent of AGM's cargo was PSA cargo.

Details as to PSA's Operations

19. During 1982, AGM had eight barge sailings of common-carrier cargo at monthly intervals between March and October and one contract carriage barge on which common-carrier cargo was carried. Through July 12, 1982,

PSA paid AGM under the space-charter agreement. After that date, PSA paid AGM under the AGM FAK rates which had been filed in the AGM tariff with an effective date of July 14, 1982. After that date, virtually the only shipper on these barge voyages was PSA, only one non-PSA shipment being carried on the last barge voyage in October. During 1982, PSA also offered a weekly regular service using the carriers Sea-Land and Tote as well as the above monthly barge service of AGM. In 1983 and 1984, PSA used the following underlying carriers: Central Alaska Marine Lines (CAML), Tote, Seaway Express, and Sea-Land. CAML and Seaway Express had tariffs on file with the F.M.C. CAML had filed its initial tariff with the F.M.C. effective July 25, 1983. The tariff covered Seattle, Washington, to/from the Alaska ports of Anchorage, Valdez, Kenai, and Cordova. PSA paid CAML and Seaway Express the rates published in their F.M.C. tariffs, and, when using CAML, quoted its own rates and prepared the freight bills. A CAML barge docked in Anchorage the week of March 7, 1984, carrying 300-plus trailerloads of PSA cargo. On March 20, 1984, PSA shipments moved south from Anchorage on CAML barges. Actually, PSA advertised northbound and southbound service to and from Alaska as a carrier in newspapers and other publications from 1982–1985 and had advertised service as a carrier of general freight to Alaska since 1966.

20. The Commission's District Investigator, Mr. Carley, having been rebuffed in efforts to obtain detailed information about PSA's operations from PSA officials, obtained such information from AGM documents and from direct contacts with PSA's shippers and consignees whose shipments moved on AGM barges in 1982. An intensive analysis was performed on AGM's barge, Voyage No. 211, which sailed in July 1982. Mr. Carley contacted 20 shippers of various commodities. In 19 of the 20 shipments, the Alaskan consignees had paid the freight and selected the carriers. None of the shippers was a member of PSA. Most of the consignees of these shipments were either not members of PSA or didn't know if they were members. Four indicated that they were probably members and two recalled paying a small membership fee. However, none of the consignees contacted reported that they had ever received copies of PSA's by-laws or any information on members' rights, responsibilities, liabilities, benefits, etc. Even the probable members' only contact with PSA was receipt of freight bills. Most of the shippers or consignees were either dimly aware or completely unaware of AGM's role in transporting their cargoes. Those shippers and consignees that were aware of AGM believed that AGM was a subsidiary or affiliate of PSA or a partner in a joint operation with PSA. Sometimes, PSA's advertisements stated that membership in PSA was required although there were no stated restrictions on membership. However, none of PSA's 1985 ads contained any reference to a membership requirement or referred to a $10 membership fee which PSA purported to require.

21. For the nine AGM barge voyages on which PSA cargo was carried northbound between March and October 1982, Mr. Carley analyzed PSA's revenue situation. His analysis showed that PSA marked up AGM's charges to PSA between 30.85 percent and 247.34 percent on seven AGM barge sailings consisting of Anchorage-destined cargo. On two barge sailings, a considerable amount of freight was destined to Fairbanks, Alaska, and involved substantial inland costs. For all nine barge voyages, PSA derived $7.4 million in revenue and paid AGM $3.3 million in freight charges. The above calculations do not include inland transportation costs paid by shippers who delivered cargo to AGM's dock directly at their own expense.

22. PSA attempted to offer rates on which they could make a profit and still give the person paying the freight a good deal. There were no set rules by which PSA fixed rates. However, PSA would consider what competitors charged in addition to the underlying water carrier's freight rate in order to establish a PSA rate. A number of people connected with PSA appear to have been involved with quoting and fixing rates, including Messrs. Davis, Donadel, Moesh, and Ms. Stanley. With various people quoting rates, it was not common for PSA to charge the same rate to different shippers although they might be shipping the same volume of the same commodity, and different rates could be charged different shippers of the same commodities even on the same voyage. Ms. Stanley, PSA's traffic manager, did not keep track to see whether this was happening. Nor did she verify that a shipper asking for a rate quotation was a member of PSA before quoting a rate.

23. From 1982–1985, PSA solicited cargo in its own name by letter, telephone and personal sales calls, newspapers and other publications, and maintained a sales staff and consultants to solicit cargo on their behalf. Among the persons involved in these solicitation activities were Mr. Moesh, the part owner and director of AGM and consultant to PSA, Mr. Davis, the Alaska general manager, Mr. Donadel, Vice-President of PSA, through his consulting firm, and Mr. O'Brien, President of AGM. PSA employees in Anchorage were responsible for advertising PSA's services under the supervision of Mr. Davis. PSA representatives actively solicited customers from a PSA booth at the 17th Annual Gas, Oil, Mining and Construction Industry Show in Anchorage on September 12, 1984, and, according to PSA's 1983 tax return, PSA had advertised at trade shows and had spent over $25,000 in advertising expenses for that year.

24. PSA arranged transportation with underlying water carriers and was considered the shipper by those carriers. A shipper who wished to book cargo in Seattle with PSA would make the booking with Penn Van, Inc., PSA's agent in Seattle. Also, in 1982, shippers and consignees could place bookings with Ms. Stanley or contact Mr. Davis or Mr. Ray Fendenheim, a director of Southbound Shippers, Inc. (SSI), in Anchorage. A shipper of LTL (less-than-trailerload) cargo who desired to move cargo via PSA to Anchorage, could also make arrangements with a PSA salesperson in

Anchorage. The shipper would be given a rate and would send the cargo to Penn Van's terminal in Seattle via a motor carrier selected and paid by the shipper, the cargo carried under the motor carrier's bill of lading. Penn Van would consolidate the LTL cargo with other cargo, and the consolidated cargo would become a PSA shipment on the underlying water carrier. PSA would issue its own freight bill instead of a bill of lading, the bill prepared by TATS. The freight bill showed the billing party, consignee, shipper, description of the cargo, weight of and rate for the cargo and the freight charged. PSA would also prepare the underlying water carrier's bill of lading for PSA shipments. Loading and unloading operations were performed by PSA agents who were furnished equipment by PSA. The PSA loading agent in Seattle was Penn Van, Inc., and the unloading agents in Alaska were Ocean Dock Industries in Anchorage and Alcan Freight Service in Fairbanks. Fairbanks-destined cargo was received at Anchorage and moved directly to Fairbanks for Alcan to unload and deliver. In 1982, PSA also had paid costs for labor to receive and deliver freight in Valdez, Alaska.

25. Full-load PSA shipments moved initially by truck under truck bills of lading. Full-load PSA shipments delivered directly to AGM were not consolidated by Penn Van. PSA issued its own freight bill for these shipments to the shipper based on its quoted rates. AGM issued dock receipts and bills of lading and billed PSA, which AGM considered to be the shipper. In 1982, 99 percent of AGM freight consisted of full loads that were not consolidated by Penn Van. PSA competed directly with AGM for the same customers and sometimes AGM obtained the customer. PSA also competed with other underlying water carriers for full shipper-load cargo. For full-load cargo, both PSA and the underlying shipper would select the water carrier. PSA selected the water carrier for LTL freight.

26. PSA assumed the risk for loss or damage to cargo on its own behalf and on behalf of the owner, shipper, or consignee of the cargo transported and was required to procure insurance to cover such risk under the space-charter agreement between PSA and AGM. PSA acquired additional cargo insurance above what any water carrier had for the purpose of insuring the cargo that moved under its name. Claims for loss and damage were handled by PSA's Anchorage office. PSA has paid claims amounting to $119,702 in 1982 and $197,590 in 1983. Some shippers or consignees have filed suit against PSA on account of unsettled claims.

27. PSA negotiated rates with underlying water carriers. Mr. Moesh, AGM's part owner and director and consultant to PSA, negotiated these rates and also agreements with CAML and Seaway Express for PSA and agreements between AFFS and CAML and Seaway Express. PSA also had agreements with Sea-Land and Tote. These various agreements with the underlying carriers provided PSA with lower rates for volume movements.

28. Mr. Simo Belcheff, special agent for the Interstate Commerce Commission, contacted shippers and motor carriers and reviewed records of the latter. The information which he obtained indicated that PSA was still carrying shipments at least as of February 1985, and that PSA was carrying for shippers who were not members of PSA. Mr. Davis, PSA's general manager in Alaska, testified that PSA ceased doing business around the first part of 1985. According to information received by Hearing Counsel from the Corporations Section of the Department of Commerce, State of Alaska, PSA was involuntarily dissolved on February 14, 1986. (See letter dated September 23, 1986, addressed to me by Charna J. Swedarsky, with attachment, and letter dated September 22, 1986, from John P. World, with attachment.)[3]

Southbound Shippers, Inc. (SSI)

29. Southbound Shippers, Inc. (SSI), was incorporated in Alaska on July 27, 1982, to "engage in any phase of the business of transportation." According to the Articles of Incorporation, Marion G. Davis (PSA's Secretary-Treasurer and Alaska general manager) was the initial registered agent for SSI. The directors of the corporation were Raymond Fendenheim, Jim Canfield, and Marion G. Davis. The corporation address was in Anchorage at the same location as PSA, as of October 1982, according to the telephone directory. Mr. Davis testified that he believed himself to be an officer as well as registered agent of SSI. On one occasion in September 1982, District Investigator Carley contacted Mr. Canfield, SSI's Sales Manager, at the PSA phone number.

30. By letter dated November 3, 1982, John M. Stern, Jr., counsel for SSI, informed the I.C.C. that SSI was "operating as a non-vessel operating common carrier pursuant to regulation by the Federal Maritime Commission," that "Southbound Shippers, Inc. does not provide any motor transportation," and that "[t]he rates of Southbound Shippers, Inc. are port-to-port rates." However, as of December 15, 1982, there was no record of an FMC tariff, VOCC or NVOCC, ever having been filed in the name of SSI (or PSA) in the Alaskan or any other U.S. domestic offshore trade.

31. SSI transported cargo via AGM through PSA under the terms of the 1982 voyage-charter agreement between AGM and PSA. Several SSI shipments were analyzed to determine how SSI operated. On one shipment, dated October 4, 1982, SSI transported two tractors from a location in Anchorage to AGM's dock in Seattle. A freight invoice was issued in the name of SSI and contained a reference to "PSA work order # 02232."

[3] In an offer of settlement presented by PSA on May 30, 1985, PSA represented that it had terminated all activity and that its Board of Directors had resolved to dissolve the corporation on March 7, 1985. In its post-hearing brief, PSA asserts that it ceased doing business in January 1985, and is presently insolvent. (See PSA brief, dated February 21, 1986, at 16.)

That work order showed freight charges, billing party, and a description of the tractors. Also included was a statement to AGM covering hostling (drayage) performed in Alaska on the shipper's southbound shipment. A shipment of scaffolding material dated October 4, 1982, similarly referred to a PSA work order on the SSI invoice. Freight charges on the invoice corresponded to rates quoted in SSI advertisements. The shipments moved from Anchorage to Portland, Oregon. Another shipment of scaffolding material, dated November 10, 1982, shows a reference to a work order written on a PSA work-order form on the SSI freight invoice and shows also the same rates as the preceding shipment. Documents show that AGM advanced inland transportation charges to an inland carrier from AGM's Seattle dock to Portland, Oregon, for which charges SSI later paid AGM.

32. AGM possessed voyage manifests for PSA and SSI cargo on AGM's southbound voyages between July 6 and November 9, 1982. The effective date of the PSA/AGM voyage-charter agreement was June 15, 1982. On July 27, 1982, SSI was incorporated and began to advertise. The first SSI manifest was dated August 7, 1982, followed by SSI manifests dated October 4, November 8, and November 9, 1982, covering cargo moving on AGM's Voyages 2, 3, 4, and 5, respectively. These manifests showed that SSI carried 372 loads for 166 shippers. When PSA shipments are added to the AGM southbound voyages, an aggregate of 622 loads were carried on AGM's barges for PSA/SSI shipments. SSI shipments carried under SSI manifests on AGM's four voyages between August 7 and November 1982, comprised a variety of commodities, including household goods, privately owned vehicles, machinery, crushed auto bodies, trucks, boats, tires, scrap metal, scaffolding materials, rags, rendering fat, scrap wire, snowmachines, motor homes, and tractors. SSI shipments were covered by PSA work orders containing particulars on shippers, consignees, and cargo. An AGM invoice dated December 7, 1982, shows that AGM billed PSA for 622 PSA/SSI loads carried by AGM in 1982. AGM also submitted freight bills to SSI as shipper for cargo transported southbound from Alaska to Seattle on AGM barges in 1982.

33. SSI was advertising in the newspapers in late July 1982. An ad appeared in the *Anchorage Daily News* in July 1982, advertising barge service from Anchorage, Alaska, to Seattle, Washington, by 20- or 40-foot vans, at quoted rates of $400 and $650, respectively. The ad stated: "Vans to Seattle—You fill them—in Anchorage; We take them—by barge to Seattle. . . ." An almost identical ad appeared in the August 3, 1982, edition of the *Anchorage Times*. On September 10, 1982, an SSI ad appeared in the *Anchorage Daily News* soliciting bookings to transport vans to Seattle from Anchorage by barge. Among other things, the ad stated: "Book now! Call [telephone numbers]—We spot—You load—We pick up—Within 8 mile radius of downtown Anchorage—Southbound Shippers, Inc." Another SSI ad appeared in the *Anchorage Daily News* on October 15, 1982. The ad was similar to SSI's earlier ads and was entitled "VANS TO SE-

ATTLE." The ad included the statement: "Call us for quotation on anything that won't fit in van." It also proclaimed in bold-face letters: "LAST BARGE THIS YEAR. DEPARTING ANCHORAGE FIRST WEEK IN NOVEMBER." The same rate quotations appeared as those in the earlier ads.

34. According to Mr. Davis, SSI's registered agent in Alaska and a director of SSI, SSI was no longer in business as of May 15, 1985. According to the State of Alaska, SSI was involuntarily dissolved on November 16, 1984, for failure to file its biennial report and to pay its corporate tax. (See Hearing Counsel's Status Report filed January 24, 1985, referring to a letter dated December 5, 1984, from the Department of Commerce and Economic Development, State of Alaska.) There is no evidence in this record that SSI was active after 1982.

DISCUSSION AND CONCLUSIONS

The issues remaining for determination in this proceeding concern the questions whether respondents PSA and SSI operated as common carriers by water without filing tariffs as required by section 2 of the 1933 Act and whether those respondents entered into and carried out agreements without filing them for approval with the Commission as required by section 15 of the 1916 Act. If so, the proceeding is to determine whether penalties should be assessed and, if so, in what amounts.

Hearing Counsel contend that the evidence of record shows overwhelmingly that PSA and SSI operated as non-vessel operating common carriers (NVOCCs) without filing their tariffs. Hearing Counsel point out the numerous facts in the record showing this to be true. Thus, they contend, among other things, that PSA offered barge service to the general public, that PSA carried for members and non-members of PSA alike, that it offered regular service between 1982 and 1984, that it arranged transportation with underlying water carriers in its own name, assumed the risk for loss and damage to cargo, issued freight bills to shippers, advertised itself as a carrier of general freight, and offered a port-to-port service using underlying FMC-tariffed water carriers.

As for SSI, Hearing Counsel contend that although the record is not as full as it is for PSA, the evidence nevertheless shows that SSI operated as an NVOCC without a tariff between July and November 1982 in the southbound Alaska/Washington trade, that it was incorporated in the State of Alaska specifically to engage in transportation, that it advertised rates and regular service in its own name, prepared and sent freight bills to shippers in its own name and received freight bills from the underlying carrier, AGM, in its own name as shipper of the cargo, and that its counsel, in response to inquiries from the I.C.C., advised that agency that SSI was operating as an NVOCC pursuant to FMC regulation and that SSI's rates were for port-to-port service.

SSI, as noted, made no appearance and filed nothing throughout the proceeding. PSA, however, did appear and although not producing a direct case, makes several arguments in its post-hearing brief. Thus, PSA argues that throughout its history (beginning in 1971) PSA has operated as a nonprofit cooperative shippers' association which is exempted from regulation as a freight forwarder (i.e., carrier) under the Interstate Commerce Act (49 U.S.C. sec. 10562(3)); that it was organized so that its members could obtain speedy transportation of their goods to Alaska at competitive freight rates; and that it did not engage in port-to-port operations at any time nor quote port-to-port rates, all of its rates including delivery in Anchorage or to cities outside of Anchorage. PSA argues furthermore that it was desperate to move freight for its members in the spring and summer of 1982 because of severe vessel-space shortages and an upsurge of traffic, that Hearing Counsel have not proved that PSA's service was port-to-port and therefore subject to FMC jurisdiction, and that even if the F.M.C. has jurisdiction, it should not exercise jurisdiction over shippers' associations and should overrule a previous decision involving shippers' associations in the Alaskan trade, if that decision is applicable, because, among other reasons, PSA had only 436 members shipping to the railbelt area of Alaska.[4]

Hearing Counsel reply to PSA's jurisdictional arguments, characterizing them as "a clumsy attempt to avoid jurisdiction of both the FMC and the ICC." (Reply Brief of H.C. at 3.) Hearing Counsel argue that PSA's use of an underlying water carrier whose service is covered by a tariff filed with the F.M.C. brings PSA's service under F.M.C. jurisdiction. The mere fact that PSA may have provided pickup and delivery service via motor carriers and include such service within its rates does not bring PSA's service under I.C.C. jurisdiction, argue Hearing Counsel. This is because the PSA service was not one involving through routes and joint rates. Rather, the record shows that PSA assumed sole responsibility for its cargo movements and charged single rates, and if there was movement prior to or after a port-to-port leg of the service, such movement was performed by independent motor carriers under their own bills of lading with no evidence that the motor carrier had entered into a joint-rate arrangement with PSA. Nor is there evidence that any PSA shipments were carried under an I.C.C. carrier's tariff. If there were any such shipments, furthermore, that does not detract from the fact that the record shows many shipments falling within F.M.C. jurisdiction. (Reply Brief of H.C. at 11.) The record shows that PSA was not a bona fide, exempt shippers' association under I.C.C. law, argue Hearing Counsel. But even if PSA was a freight forwarder (i.e., carrier) under I.C.C. law but exempt under that law as a shippers' association, that fact would not deprive the F.M.C. of jurisdiction over PSA's activities as an NVOCC. As to PSA's arguments

[4] The decision to which PSA refers is *Investigation of Tariff Filing Practices*, 7 F.M.C. 305 (1962).

that Hearing Counsel did not show a single PSA shipment for a non-member which was port-to-port, Hearing Counsel respond by asserting that PSA's argument "represents an unsupportable desperate attempt by PSA to refute an overwhelming record. . . ." (Reply Brief of H.C. at 14.) Hearing Counsel again refer to record evidence that shows that PSA often carried cargo for non-members and that it used the underlying services of FMC-tariffed water carriers.

Applicable Legal Principles

Section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. sec. 844), 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 rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water.[5]

The standard of proof in administrative proceedings is that of a preponderance of the evidence, not "clear and convincing," or "beyond a reasonable doubt," the latter being the standard in a criminal trial. *Port Authority of New York v. New York Shipping Association*, 27 F.M.C. 614, 647 n.21 (1985); *Steadman v. S.E.C.*, 450 U.S. 91 (1981), rehearing denied, 451 U.S. 933 (1981); *McCormack on Evidence* (3d ed. 1984), section 339 at 956–957. The "preponderance of the evidence" standard is a qualitative one that means that the evidence makes the existence of a fact more probable than not. *Port Authority of New York v. New York Shipping Association*, cited above. The standard also means that a party having the burden of proof does not have to produce a "smoking gun." An agency having expertise over the subject matter is entitled to draw inferences from facts either because of its expertise or because any reasonable person would draw such inferences. *Id.* See also *Saipan Shipping Co., Inc. v. Island Navigation Co., Ltd. and Oceania Lines, Inc.*, 24 F.M.C. 934, 979–981 (1982).

The evidence in this record showing that both PSA and SSI were operating as common carriers by water without having filed tariffs does not merely preponderate; it is clear and convincing. The leading Commission decision on common carriage is *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56 (1965). In *Containerships, Inc.*, the Commission stated that the term "common carrier" as used in the shipping acts means "a

[5] Section 2 of the 1933 Act, previously 46 U.S.C. sec. 844, was not affected by passage of the Shipping Act of 1984 and is now found in 46 U.S.C. app. sec. 844.

common carrier at common law." 9 F.M.C. at 62. Several definitions of the common carrier at common law were noted by the Commission but the common theme running through these definitions is that a common carrier is a person who "holds out" to accept goods for carriage for hire "from whomever offered to the extent of his ability to carry." *Id.* That definition essentially has been adopted in the Shipping Act of 1984.[6]

In determining the status of a carrier, the Commission has stated that it is not what the carrier calls itself but rather the nature of its service which is determinative. 9 F.M.C. at 64; see also *Possible Violations of Section 18(a) of the Shipping Act, 1916, and Section 2 of the ICSA*, 19 F.M.C. 43, 52 (1975); *United States v. California*, 297 U.S. 175, 181 (1936). A close look at the carrier's activities is therefore necessary. In making such analysis, furthermore, one does not determine status by focusing on only one characteristic. As the Commission stated (9 F.M.C. at 65):

> The determination of a carrier's status cannot be made with reference to any particular aspect of its carriage. The regulatory significance of a carrier's operation may be determined by considering a variety of factors—the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging of rates.

The Commission proceeded to emphasize that "[t]he absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations." *Id.* Furthermore, the presence of some of the factors did not necessarily render a carrier common. *Id.*

It is important to consider all the factors present in each case and to determine their combined effect. Thus, in some cases the Commission has found persons to be common carriers because they exhibited a number of common-carriers' characteristics although not advertising, soliciting, or publishing sailing schedules[7] or disclaiming liability for loss or damage to cargo[8] or negotiating contracts with each shipper[9] or by claiming to act as shippers' agents in booking cargo for subsequent carriage on another carrier's line route[10] or without maintaining regular calls at ports or regular sailings[11] or without holding out to carry all types of commodities for

[6] Section 3(6) of the 1984 Act provides in pertinent part as follows (46 U.S.C. app. sec. 1702):
"common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation. . . .

[7] *Containerships, Inc.*, 9 F.M.C. at 63.

[8] *Containerships, Inc.*, 9 F.M.C. at 64; *Possible Violations of Section 18(a)*, 19 F.M.C. at 53–54.

[9] *Containerships, Inc.*, 9 F.M.C. at 64.

[10] *Possible Violations of Section 18(a)*, 19 F.M.C. at 52–53.

[11] *Containerships, Inc.*, 9 F.M.C. at 63.

all shippers[12] or claiming to be shippers' associations carrying only for their members[13] or claiming to be a nonprofit business.[14]

The fact that a carrier may not itself own or operate vessels has no significance as far as common-carrier status is concerned. All that this factor means is that the carrier may be an NVOCC rather than a VOCC (vessel-operating common carrier). See *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-Vessel Operators*, 6 F.M.B. 245, 252, 257 (1961); *Possible Violations of Section 18(a) of the Shipping Act, 1916*, cited above, 19 F.M.C. at 51, and cases cited therein.

As Hearing Counsel cogently point out in their brief, PSA satisfies the numerous factors set forth in the Commission's decisions as indicating common carrier status. Thus, as noted above, PSA offered regular service between Seattle and Alaska, regularly advertised itself as a carrier of general freight, issued freight bills to its shippers, who were both members and non-members of PSA, assumed responsibility for loss and damage to cargo, fixed its rates so as to earn a profit, and arranged for transportation with underlying vessel-operating carriers, appearing as shipper on those carriers' bills of lading. The record therefore shows clearly and convincingly that PSA was operating as a common carrier. The fact that it may have first incorporated itself as a nonprofit shippers' association is of no significance in view of the way the record shows it to have operated. Indeed, the record in this case is even more conclusive than that developed in *Investigation of Tariff Filing Practices*, 7 F.M.C. 305 (1962). In that case the Commission found two shippers' associations, Alaska Outport Transportation Association (AOTA) and Ketchikan Merchants Charter Association (KMCA), to have operated as common carriers without filing their tariffs, in violation of section 2 of the 1933 Act. The two associations made arguments which are similar to those made by PSA in this case. Thus, they argued that they were nonprofit shippers' associations set up to carry for their members and that they were exempt from the tariff-filing requirements of the 1933 Act because of the fact that they were exempt from regulation under another statute having to do with vessel inspection by the Coast Guard under a special statute (46 U.S.C.A. sec. 404, as amended). The Commission found the associations to be common carriers nonetheless. It held specifically that exemption from inspection under a different statute had no effect on the tariff-filing requirements of the 1933 Act (7 F.M.C. at 327); that the associations were common carriers if they provided their carriage to a "substantially unrestricted membership" (7 F.M.C. at 327

[12] *Id.*

[13] *Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 326–330 (1962).

[14] *Ibid.*, 7 F.M.C. at 328.

and 329–330);[15] and that "it is not necessary to make, or even seek a profit in order to be carrying for hire." (7 F.M.C. at 328).

Although not as fully detailed as in the case of PSA, as Hearing Counsel show, the record also demonstrates that SSI held out or operated as a common carrier without a tariff between July 27, 1982 and November 9, 1982, satisfying a number of the factors set forth in the Commission's decisions for this determination. Thus, SSI was incorporated in Alaska on July 27, 1982, specifically "to engage in any phase of the business of transportation." In pursuit of this objective, from July through October 1982, SSI, in its own name, advertised rates and regular barge service from Anchorage to Seattle in Anchorage newspapers. SSI transported cargo on at least four different AGM voyages in its own name, prepared and sent freight invoices to shippers, and received freight bills from AGM as the shipper of the cargo transported southbound on the AGM vessels. When asked about its status by the I.C.C., SSI's counsel advised that agency that SSI was operating as an NVOCC subject to F.M.C. regulation, that SSI did not provide any motor transportation, and that its rates were port-to-port rates. SSI shipments carried under SSI manifests on four AGM voyages between August and November 1982 consisted of a variety of commodities carried for 166 shippers. Although there is not the same evidence concerning SSI's assumption of liability for loss and damage to cargo as there was for PSA, the absence of this factor is not determinative. The Commission has several times held that the operations of a carrier such as an NVOCC may result in imposition of liability as a matter of law and this may happen even if the carrier attempts to disclaim it on its shipping documents. See *Carriers by Water—Status of Express Companies, etc.*, cited above, 6 F.M.B. at 256 (an NVOCC may have "liability imposed by law," according to the Commission's definition of such carrier); *Possible Violations of Section 18(a) of the Shipping Act, 1916*, cited above, 19 F.M.C. at 53–55, and the numerous cases discussed therein.

[15] As found earlier, the record shows that PSA carried for nonmembers as well as members and usually made no reference to a membership requirement in its ads, which requirement, in any event, was only a $10 fee. In the PSA shipments analyzed by Commission investigator Carley carried on AGM's voyage No. 211 in July 1982, none of the shippers were PSA members and most of the consignees were either not members or didn't know if they were members. Furthermore, none of the consignees, who paid the freight on these shipments, had ever received copies of PSA's by-laws or any information as to members' rights, responsibilities, benefits, etc. It is ironic that PSA, in its post-hearing brief, asks the Commission not to follow its decision in *Investigation of Tariff Filing Practices*, cited above, 7 F.M.C. 305, because PSA allegedly has only 436 members compared to the 300 members of KMCA shipping to the limited population of Ketchikan. There is no record evidence to support such a figure. Mr. Haugen, PSA's accountant, testified that he did not have a membership list and kept track of members through other means. Mr. Moosh told Mr. Carley that PSA's membership list was confidential. Mr. Carley was unable to find a membership list in the documents subpenaed by Hearing Counsel and was never able to obtain such a list during the three-year period he worked on the case.

PSA's Defenses

As noted, PSA has raised three defenses, one, that it was a shippers' association exempt from I.C.C. regulation; two, that it did not offer port-to-port service and therefore was not under F.M.C. jurisdiction; and three, even if its operations fell under F.M.C. jurisdiction, the Commission ought not to regulate such activities and ought not to follow its precedent established in *Investigation of Tariff Filing Practices*, cited above, 7 F.M.C. 305. I find no merit to any of the defenses.

First, the F.M.C.'s jurisdiction over PSA or any of its operations depends upon the nature of PSA's service and whether that service fell within the requirements of section 2 of the 1933 Act, not whether PSA might have somehow been excluded from regulation as a freight forwarder (i.e., carrier) under I.C.C. law. Furthermore, if PSA's service fell within the scope of the 1933 Act and PSA had not obtained an exemption from the F.M.C. pursuant to section 35 of the Shipping Act, 1916, 46 U.S.C. app. sec. 833a (which section applies also to the 1933 Act), PSA would have been in violation of the 1933 Act. In other words, if PSA wished this Commission not to follow its precedent which held that two so-called shippers' associations in Alaska were subject to F.M.C. regulation, it should have petitioned this Commission to consider exemption in a proper section 35 proceeding. Or, alternatively, PSA could have asked the Commission for a declaratory order under Rule 68, 46 CFR 502.68.

If PSA's service consisted of the type of port-to-port service which the F.M.C. and courts have held to fall under the 1933 Act, then PSA's operations were in violation of section 2 of the 1933 Act. If, on the other hand, PSA's service consisted of a true through-route-and-joint-rate operation or a bona fide I.C.C. freight-forwarder service, PSA's operations, in whole or in part, could have fallen outside the scope of the 1933 Act. I find no evidence in this record, however, that PSA's operations did in fact fall outside the scope of the 1933 Act, although there may be an uncertain area in some aspects of its service regarding particular shipments to Fairbanks, Alaska, or southbound to Portland, Oregon (as regards SSI).

PSA's Claim That It Was a Shippers' Association

PSA's argument that it was a shippers' association exempt from regulation pursuant to 49 U.S.C. sec. 10562(3) is relevant only to the extent that any of PSA's operations would otherwise have fallen under the Interstate Commerce Act as an I.C.C.-regulated freight forwarder (i.e., carrier). (The I.C.C. was, in fact, conducting an investigation of PSA. See *PSA v. I.C.C.*, 789 F.2d 1401 (9th Cir. 1986).) If PSA had not operated as an exempt shippers' association and if any of its operations met all of the requirements set forth in the Interstate Commerce Act as an I.C.C.-regulated freight forwarder or, as I discuss later, if any of its operations were conducted

under a through route, joint rate arrangement, then those operations would have been subject to the jurisdiction of the I.C.C. The F.M.C.'s jurisdiction over I.C.C.-regulated freight forwarder operations would have been precluded because section 33 of the 1916 Act (46 U.S.C. app. sec. 832) forbids the F.M.C. to have jurisdiction "over any matter within the power or jurisdiction of the [Interstate Commerce] Commission." See *IML Sea Transport Corp. v. United States*, 343 F.Supp. 32, 36 (N.D. Cal.) 1972); *Trailer Marine Transport Corp. v. F.M.C.*, 602 F.2d 379, 393 ns. 61, 62 (D.C. Cir. 1979).[16] Similarly, as I discuss below, if any of PSA's operations had been conducted under a true through route, joint rate arrangement, they would have been subject to the exclusive jurisdiction of the I.C.C. because of the so-called Rivers Act (P.L. 87–595, 76 Stat. 397), which amended the Interstate Commerce Act in 1962. The record in this case, however, shows that PSA never came near meeting the requirements of a bona fide, exempt shippers' association and that there was no through route, joint rate arrangement or agreement between PSA and another carrier. Furthermore, the record does not show that any particular PSA shipments were carried by PSA as a freight forwarder subject to I.C.C. jurisdiction.

First, as to PSA's claim that it had been a shippers' association exempted from I.C.C. regulation, the evidence and law is to the contrary. As the case law shows, a bona fide shippers' association must, in fact, be controlled by its shipper-members, must be non-profit, the members must bear the essential risks and burdens of conducting the operations, and the association must not carry for nonmembers. In other words, the association must be conducting its operations so that its members may obtain cheaper transportation for their goods. The association cannot turn itself into a common carrier providing service for hire to the public. See the discussion in *Sunshine State Shippers and Receivers Association, et al.*, 350 I.C.C. 391, 396–410 (1975); see also *Freight Consolidators Cooperative, Inc. v. U.S.*, 230 F.Supp. 692, 696–699 (S.D. N.Y. 1964); *National Motor Freight Traffic Association, Inc. v. International Shippers Association, Inc., et al.*, 94 M.C.C. 440, 443–447 (1964); *Atlanta Shippers Association, Inc.—Investigation of Operations*, 322 I.C.C. 273, 275–289 (1964).

The record in this case shows convincingly that PSA never qualified under the standards established by these case authorities. Thus, PSA carried for nonmembers, membership was easily obtained by anyone, its members never attended meetings or obtained literature about PSA, explaining their rights, obligations, etc., it was controlled not by its members but by certain individuals who were not members, it made money at the expense of the shippers by greatly marking up basic costs of the underlying services provided by water carriers, it assumed responsibility for cargo loss and

[16] This does not mean that the F.M.C. and the I.C.C. cannot each regulate the particular activities which fall within each agency's respective statutory jurisdiction. See *Commonwealth of Pennsylvania v. I.C.C.*, 561 F.2d 278, 292 (D.C. Cir. 1977); *Alabama Great Southern R. Co. v. F.M.C.*, 379 F.2d 100, 102 (D.C. Cir. 1967).

damage, etc. These operations bore a striking resemblance to those of the alleged shippers' association found by the I.C.C. and court to be a freight forwarder (i.e., carrier) subject to I.C.C. regulation in *Freight Consolidators Cooperative, Inc. v. U.S.*, cited above, 230 F.Supp. at 697–698.

As I discuss below, there is no evidence whatsoever that PSA had entered into a true through route, joint rate arrangement so as to remove any services provided thereunder from F.M.C. jurisdiction pursuant to the so-called Rivers Act. Nor is there any evidence in this record showing that PSA ever became a freight forwarder subject to I.C.C. regulation as to any particular shipments. To become an I.C.C.-regulated freight forwarder, it is necessary for a person to meet five standards set forth in 49 U.S.C. sec. 10102(8), formerly 49 U.S.C. sec. 1002(a)(5). These are, according to the I.C.C.: 1) holding out to the general public as a common carrier; 2) assembly and consolidation of shipments; 3) break-bulk and distribution services; 4) responsibility for transportation from point of receipt to destination; and 5) utilization of services of underlying rail, motor, or water carriers subject to I.C.C. jurisdiction. See *Sunshine State Shippers and Receivers Association, et al.*, cited above, 350 I.C.C. at 400. I find no evidence in this record that all of these elements had been satisfied by PSA. For example, none of its full trailerload shipments could qualify because it is necessary under the definition for the forwarder to consolidate and deconsolidate. Furthermore, when PSA utilized F.M.C.-tariffed carriers such as AGM, CAML, or Seaway Express, there is no evidence that an I.C.C.-regulated motor carrier was directly employed by PSA. Also, PSA's pickup or delivery around the Anchorage area was not shown to have been performed by a motor carrier subject to I.C.C. regulation. As I discuss below, such pickup and delivery service has long been considered to be incidental to F.M.C.-regulated water service. When PSA carried shipments from Seattle to Fairbanks or Valdez or SSI carried southbound to Portland, Oregon, via Seattle, it is possible that PSA (or SSI) utilized directly an I.C.C.-regulated motor carrier but I cannot determine that fact from this record. Unless all of the factors are shown on the record and PSA was shown to have utilized directly, not indirectly, a motor carrier not exempt from I.C.C. regulation, the common-carrier operations would have been those of an F.M.C. NVOCC and not an I.C.C.-regulated freight forwarder. See *IML Sea Transit, Ltd. v. United States*, 343 F.Supp. 32 (N.D. Cal. 1972). However, PSA chose not to put on any direct case or to show which of its operations may have been those of an I.C.C.-regulated freight forwarder, evidently not wishing to be found subject to the jurisdiction of either the F.M.C. or I.C.C.[17]

[17] Had PSA wished to claim an exemption from F.M.C. jurisdiction because any of its operations had been conducted as an I.C.C.-regulated freight forwarder, it would have been incumbent upon PSA to come forward with the evidence showing which operations and shipments fully qualified as I.C.C.-regulated freight for-

Continued

The Status of a Port-to-Port Service Which Includes Pickup and Delivery

As to the 1933 Act, PSA's main defense is that it did not provide a port-to-port service. PSA contends that all rates which it quoted included delivery in Anchorage or included drayage to cities outside of Anchorage, whether LTL or TL shipments. PSA cites testimony of its general manager in Alaska, Mr. Davis, that Ocean Docks Industries performed unloading and delivery functions in Anchorage and that Alcan Freight Service performed identical services in Fairbanks. PSA contends, furthermore, that Hearing Counsel "forgot to prove that PSA performed port-to-port transportation." (Brief of PSA at 9.) PSA cites testimony of Commission investigator Carley regarding PSA's service from Seattle to Fairbanks and delivery in Anchorage and vicinity. Having cited such testimony, PSA relies upon two court decisions limiting the F.M.C.'s jurisdiction, namely, *Totem Ocean Trailer Express v. F.M.C.*, 662 F.2d 563 (9th Cir. 1981); and *Alaska Steamship Co. v. F.M.C.*, 399 F.2d 623 (9th Cir. 1968).

It is ironic that PSA would rely upon *Totem* and *Alaska Steamship Co.* as authority for its contention that the F.M.C. has no jurisdiction over its allegedly non-port-to-port service. That is because in *Totem* the carrier had asked this Commission for a declaratory order that would have required all Alaskan carriers which had established through routes with motor carriers to file tariffs showing rates for the port-to-port portion of the through route, and in *Alaska Steamship Co.*, the carrier, which had established through routes and joint rates with a motor carrier, had, in fact, filed its tariff with the I.C.C. In this case, of course, PSA filed no tariff with either agency and argues that it is exempt from both F.M.C. and I.C.C. jurisdiction.

As I mentioned earlier, if PSA's service had been one involving a true through route and joint rate established with an I.C.C.-regulated carrier or if PSA's service had been that of an I.C.C. forwarder, PSA would not have fallen within the scope of the 1933 Act. The *Alaska Steamship Co.* case is one of several in which it was held that the F.M.C.'s jurisdiction over carriers operating in the Alaskan or other domestic offshore trades was limited to so-called port-to-port service and did not embrace through route, joint rate arrangements. The latter were held to fall within the exclusive province of the I.C.C. As pertains to Alaska, that is because Congress amended former sections 216(c) and 305(b) of the Interstate Commerce Act (49 U.S.C. secs. 316(c) and 905(b)), recodified as 49 U.S.C. sec.

warders and not merely rely upon its thin argument that it was a shippers' association. It was not Hearing Counsel's job to prove negatives or exemptions. See, e.g., *Freight Consolidators Cooperative, Inc. v. U.S.*, cited above, 230 F.Supp at 698–699; *McKelvey v. United States*, 260 U.S. 353, 357 (1922); *Federal Trade Commission v. Morton Salt*, 334 U.S. 37, 44–45 (1949). The fact that PSA obviously chose not to show which, if any, of its shipments may have qualified as I.C.C.-regulated freight forwarding because it did not wish to be regulated by the I.C.C. or to be found in violation of the Interstate Commerce Act does not excuse its failure to come forward with evidence. It rather shows a lack of cooperation with two agencies and supports Hearing Counsel's argument "that PSA's violative conduct was a purposeful and flagrant attempt to avoid regulation. . . ." (Reply Brief of H.C. at 18.)

10703(a)(4), by passing the so-called Rivers Act, P.L. 87–595, 76 Stat. 397, in 1962. These amendments, among other things, provided that I.C.C.-regulated motor carriers and F.M.C.-regulated water carriers (including NVOCCs) who had established through routes and joint rates in the Alaskan and Hawaiian trades would be subject to the exclusive jurisdiction of the I.C.C. for the services encompassed within their through route, joint rate arrangements. The reason for the passage of the Rivers Act, according to its legislative history, was that motor carriers attempting to establish through routes and joint rates with water carriers between Alaska and the contiguous 48 states could not get their tariffs filed with either the I.C.C. or the F.M.C. See *Sea-Land Service, Inc. v. Federal Maritime Commission,* 404 F.2d 824, 826, 827 n. 14 (D.C. Cir. 1968); H.R. Report No. 1769, 87th Cong., 2d Sess. (1962); S. Rep. No. 1799, 87th Cong., 2d Sess. (1962). *Totem Ocean Trailer Express, Inc.,* 20 SRR 509, 510 n. 4 (1980), affirmed, *Totem Ocean Trailer Express v. F.M.C.,* cited above, 662 F.2d 563.

The fact that true through route, joint rate arrangements between I.C.C.-regulated motor carriers and water carriers fall within the exclusive jurisdiction of the I.C.C. was established not only by the decision in *Alaska Steamship Co.,* cited above, but also by the court in *Sea-Land Service, Inc. v. F.M.C.,* cited above, 404 F.2d 824. In the latter case, it was made clear that the F.M.C. "lost" jurisdiction over such arrangements only if they were true through route, joint rate arrangements. However, to constitute such an arrangement, as the court held (404 F.2d at 827):

> What is required is that both motor and water carriers hold themselves out to the public as participants in a joint transportation endeavor and file appropriate tariff schedules reflecting these joint rates and through services.

The court further distinguished the true through route, joint rate arrangement from the single-carrier service. In the former arrangement, the water carrier "is a participant with a motor carrier in a joint undertaking" and "there is a contract of carriage between both carriers and the shipper (or consignee), and both carriers are jointly and severally liable." 404 F.2d at 828. In the single-carrier operation, in which the water carrier offers port-to-port service with an incidental pickup and delivery by motor carrier included in the water carrier's rates, as the court stated, "the regulation . . . remains within the authority of the FMC." (404 F.2d at 827.) See also *IML Sea Transit, Ltd. v. United States,* 323 F.Supp. 562, 566 (N.D. Cal. 1971) ("A true joint rate for through routes consists of a joint undertaking between two carriers who share the responsibility for delivering consigned goods, and who divide the fee paid by the shipper."); *IML Sea Transit, Ltd. v. United States,* 343 F.Supp. 32, 41 ("the crucial factor in both of these recent decisions [i.e., *Alaska Steamship Co.* and *Sea-Land Service, Inc.*] is whether the carriers hold themselves out to

the public as joint participants in a through route.") Furthermore, as Hearing Counsel point out (Reply Brief at 6–7), in a true through route, joint rate situation, one carrier publishes a single charge as the rate that applies to a through movement from point of origin on the line of the carrier to point of destination on the line of the others, the other carriers concur in that charge, each retains a "division" of the joint through rate agreed upon by the carriers, and the carrier where the cargo originates issues its bill of lading which covers the entire through movement. See *Commonwealth of Pennsylvania v. I.C.C.*, 561 F.2d 278, 281–282 (D.C. Cir. 1977); *McLean Trucking Co. v. U.S.*, 346 F.Supp. 349, 351 (M.D.N.C. 1972), affirmed, 409 U.S. 1121 (1973).

As Hearing Counsel show in detail (Reply Brief at 9–12), the evidence in this record in no way supports the idea that PSA conducted a through route, joint rate operation. Instead, PSA offered a service and assumed responsibility for the entire movement on its own, advertised and quoted rates in its own name, employed underlying FMC-tariffed water carriers (although not always), paid those carriers either under a space-charter agreement or under their tariffs, and, when employing a motor carrier for delivery in Alaska, did so without entering into a joint-rate agreement with the motor carrier. All of these facts show no arrangements with I.C.C.-regulated motor carriers such as would place the service under the exclusive jurisdiction of the I.C.C. under the Rivers Act. Moreover, even PSA unwittingly corroborates this analysis when it points out on brief that PSA's rates included delivery in Alaska by motor carriers. (Brief of PSA at 8.)[18] The record does indeed support this statement. However, PSA obviously made this admission in the belief that the inclusion of delivery service beyond dockside removed the F.M.C. from jurisdiction.[19] As I proceed to show, PSA was badly mistaken.

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[18] It does not matter if PSA charged for its water plus incidental pickup and delivery service under one single-factor rate or charged separately for the pickup and delivery beyond dockside in Alaska. The essential point is that PSA's service included the additional delivery service, PSA assumed responsibility for the cargo when delivering it or picking up in Alaska, and that shippers are supposed to be able to tell what is the exact price of PSA's total service offered to themselves and their competitors by looking at a filed tariff. See *Certain Tariff Practices of Sea-land Service, Inc.*, 7 F.M.C. 504 (1963); see also *J.G. Boswell Company et al. v. American-Hawaiian Steamship Company et al.*, 2 U.S.M.C. 95 (1939) (separate charges for incidental services beyond ship's tackle allowed).

[19] Thus, elsewhere in its brief, PSA argues (PSA Brief at 12):

> In the case at hand, we are going even further and not talking about joint through rates, but through rates established by an exempt shippers association. These through rates involve at least incidental terminal pickup and/or delivery services and in many cases more inland transportation than just terminal services. PSA's contention is that the FMC has no jurisdiction over any shipments handled by PSA which involved any provision of terminal motor pickup and/or delivery services.

PSA also chastises Hearing Counsel, claiming that she "forgot to prove that PSA performed port-to-port transportation" (PSA Brief at 9). However, as the record shows, and as PSA itself points out, PSA's freight bills and testimonial evidence show that PSA's services included pickup and delivery in Alaska. The mistake was not Hearing Counsel's but PSA's, which believed that such services did not constitute port-to-port services because of the incidental pickup and delivery, apparently ignoring all of the Commission cases discussed below so holding.

In fact, what the record does show is that PSA was conducting a port-to-port service with an ancillary delivery service in Anchorage, among other services, and that PSA employed motor carriers for delivery to consignees in Alaska and paid their charges. But such a service has long been considered to be an F.M.C.-regulated operation. The courts in *IML Sea Transit, Ltd., Alaska Steamship Co.,* and *Sea-Land Service, Inc.* all recognized this fact. See *IML Sea Transit, Ltd.,* cited above, 343 F.Supp. at 40; *Alaska Steamship Co.,* cited above 399 F.2d at 627; *Sea-Land Service, Inc.,* cited above, 404 F.2d at 827. In discussing the fact that the F.M.C. had jurisdiction over a water carrier (Matson) operating in the Hawaiian trade with an ancillary pickup and delivery service in port areas, the court in *Alaska Steamship Co.* distinguished this type of operation from that of a true through route, joint rate operation. The court stated as to Matson (399 F.2d at 627):

> The ICC does not dispute the FMC's decision in *Matson.* An arrangement between carriers whereby one employs the other as agent for terminal delivery service, paying that carrier the ICC tariff rate, simply does not entail a joint rate. It does not entail obligations to the shipper such as are found in through routes. It does not present the regulatory problems presented by through-route and joint-rate arrangements.

The *Matson* decision to which the court refers is actually one of several in which the F.M.C. has exercised jurisdiction over water carriers who provided pickup and delivery services in sizeable port areas. In that decision, *Matson Navigation Co.—Container Freight Tariffs,* 7 F.M.C. 480 (1963), the Commission held that Matson, a vessel-operating common carrier, could file its tariff under the 1933 Act, such tariff publishing single-factor rates for service between California ports and Hawaii, which service included pickup and delivery within sizeable areas around San Francisco, Stockton, and Los Angeles, California. For this pickup and delivery service, Matson employed a motor carrier certificated by the I.C.C. and paid whatever charges that motor carrier assessed. The Commission rejected arguments that Matson was precluded from offering a service beyond docksides and from including such service within its rates, that Matson's use of commercial zones and other criteria to establish the port area within which it offered the pickup and delivery service was unreasonable, and that the Commission's acceptance of Matson's tariff would encroach upon the I.C.C. because of Matson's employment of I.C.C.-regulated motor carriers. In rejecting all of these arguments, the Commission held that "common carriers by water," as that term is defined in the Shipping Act, 1916 (and consequently in the 1933 Act), were not restricted "solely to the performance of 'transportation by water . . . on the high seas . . . .'" (7 F.M.C. at 490.) Rather, such carriers were permitted to perform "terminal" or "incidental services" which would include Matson's pickup and delivery service, and the "terminal area" within which the water carrier could perform such

service was not limited to "the particular terminal structures at the point where a vessel berths." (7 F.M.C. at 490–491.) The Commission commented on the Matson service as follows (7 F.M.C. at 491):

> Matson has undertaken to provide a more efficient and less costly service to its shippers. A part of this containerized operation is a pickup and delivery service which is physically performed by common carriers by motor vehicle who act as agents for Matson. Throughout the entire operation Matson is the principal charged with the direction of and liability for the services performed. The service is offered by Matson in its capacity as a common carrier by water and it is in this capacity that Matson is subject to the regulatory jurisdiction of this Commission.

The Commission proceeded to state that the pickup and delivery services were services "commonly considered as incidental to line haul transportation by water" but that the Commission's decision should not "be taken as extending our findings and conclusions as applying to other combinations of services such as two line hauls," and that the decision did not mean that the motor carriers were removed from I.C.C. jurisdiction or that the F.M.C. was attempting to exercise concurrent jurisdiction over the motor carriers which was precluded by section 33 of the 1916 Act. (*Id.*)

The Commission's findings with regard to Matson's definitions of "port areas" within which, under its tariff, pickup and delivery service was provided, are significant in view of PSA's argument that all of its rates and services included delivery in Anchorage or Fairbanks. The F.M.C. decided that a water carrier's designation of these "port areas" as terminal areas could be based upon practical considerations on a case-by-case basis as regards their geographical extent. The water carrier could consider such factors as "[t]he coincidence of the terminal area with a homogeneous industrial or business community surrounding the port," or "[p]resent and potential traffic patterns, commercial zones and the concentration of a carrier's shippers . . . ." (7 F.M.C. at 493.) In the *Matson* case, as the Commission noted, Matson had considered, among other things, the fact that the port areas it had selected around the cities contained large numbers of its shipper customers who shipped more than 5 tons per month. The maximum distance within the port areas under Matson's tariff was found to be 40 miles. (7 F.M.C. at 493–494.)

As I mentioned, the *Matson* decision is one of several in which the F.M.C. has found that water carriers providing pickup and delivery services in conjunction with port-to-port transportation by water should file their tariffs with this Commission. See, e.g., *Certain Tariff Practices of Sea-land Service*, 7 F.M.C. 304 (1963) (water carrier's service included pickup and delivery 15 miles within Puerto Rico plus an unspecified distance inland); *North Carolina Line-Rates To and From Charleston, S.C.*, 2 U.S.S.B. 83 (1939) (pickup and delivery service within corporate city limits of Charleston, S.C., and Baltimore, Md.); *Increased Rate—Kuskokwim River,*

Alaska, 4 F.M.B. 124 (1952) (water carrier also performed drayage to places of business); *J.G. Boswell Company et al. v. American-Hawaiian Steamship Company et al.,* 2 U.S.M.C. 95 (1939) (water carrier providing incidental terminal services beyond ship's tackle entitled to charge separately for such services). All of these cases amply support the Commission's statements in *Matson* regarding the propriety of a water carrier's providing inland delivery services, quoted as follows (7 F.M.C. at 490):

> We think it clear that the Shipping Act does not preclude a common carrier by water performing services other than "transportation by water . . . on the high seas," but contemplates and authorizes the performance by such carriers of so-called incidental services.

To conclude, therefore, I find that PSA's operations using F.M.C.-tariffed water carriers from Seattle to Anchorage were port-to-port services with incidental delivery by motor carrier in Anchorage and, as such, were within the scope of section 2 of the 1933 Act. PSA's argument that because it made delivery in Anchorage, its service somehow was no longer port-to-port and therefore not subject to F.M.C. jurisdiction is, as discussed, invalid and rests either on the mistaken belief that an incidental delivery service converts a port-to-port service to a through route, joint rate arrangement or the equally mistaken belief that a water carrier's service cannot be extended beyond dockside without the carrier's losing its status as one subject to F.M.C. jurisdiction.[20]

The Commission's Precedent and Policies as to Shippers' Associations

PSA's next argument is that the F.M.C. ought not to follow its precedent in *Investigation of Tariff Filing Practices,* 7 F.M.C. 305 (1962), in which

[20] I cannot determine with certainty the correct classification of the PSA service to Fairbanks as opposed to the service to Anchorage. Although there is no record evidence that PSA had a through route, joint rate agreement with Alcan Freight Service, Inc., the motor carrier operating between Anchorage and Fairbanks, it is possible that Fairbanks, being more than 300 miles from Anchorage, cannot be considered a terminal or port area even under the Commission's flexible standards enunciated in the *Matson* case. If Alcan was not exempted from I.C.C. regulation, any LTL shipments of PSA moving to Fairbanks could possibly have been those of a freight forwarder subject to I.C.C. jurisdiction. If Alcan were exempted from I.C.C. regulation, the shipments could possibly have been those of an F.M.C.-regulated NVOCC as was the carrier in *IML Sea Transit, Ltd.,,* cited above, 343 F. Supp. 32, which carrier had utilized motor carriers in Hawaii who had been exempted from regulation by the I.C.C. This problem does not, however, exist with regard to PSA's Anchorage service. As large as Anchorage is (the borough of Anchorage being some 1,732 square miles in area, according to the 1986 *Rand McNally Commercial Atlas and Marketing Guide* at page 243) it is still a borough or municipality and could quality as a port or terminal area under the *Matson* standards which allowed an inland service of 40 miles. According to I.C.C. regulations, furthermore, the borough or municipality of Anchorage appears to qualify as a "terminal area" or "commercial zone" and motor carriers operating within may qualify under some circumstances for exemptions. See 49 CFR 1049; 1048.100; 1048.101. There is no evidence in this record that Ocean Dock Industries, the Anchorage motor carrier used by PSA, was certified by the I.C.C. or subject to I.C.C. regulation. SSI's southbound service to Portland, Oregon, presents similar problems as service to Fairbanks. However, because PSA took responsibility from the Seattle dock, the shippers arranging for motor carriage to Seattle under separate motor-carriers' bills of lading, there is no problem as regards the Seattle end of the PSA service.

the Commission found that two shippers' associations operating in the Alaskan trade were common carriers by water and had to file their tariffs notwithstanding their claims that they served only their members and were exempt from regulation under another federal statute. PSA argues that one of those associations consisted of 300 members, virtually every business in the area. PSA, without record evidence (which PSA previously would not furnish, as I noted earlier), now argues that there were only 436 members of PSA, a small number compared to the population of the railbelt area of Alaska. Also, PSA argues that the F.M.C. has indicated that shippers' associations will not be subject to ongoing regulation under the Shipping Act of 1984. These arguments are also without merit.

Even if I were to accept PSA's belated, non-record figure of 436 as showing the true number of members, the record shows that PSA carried for non-members as well as members and that membership was very easy to obtain. Furthermore, because PSA may not have been able to obtain the business of every shipper in the railbelt area does not mean that it was not holding out to the general public, seeking to obtain as much business as it possibly could. Moreover, as I have noted earlier, it is not necessary to hold out to every member of the public to carry everything in order to become a common carrier. There is no more reason to excuse PSA's failure to file a tariff than there was to excuse the two Alaskan associations in the case cited. In fact, if anything, in this case there is less reason because the persons behind PSA were not naive, unsophisticated novices in the transportation business, they had been warned in the first half of 1982 by F.M.C. investigators, they had carried on activities indicating a deliberate intention to avoid lawful tariff-filing requirements, and, of course, they had the benefit of the Commission's decision which had been issued in 1962 right on point.[21] Furthermore, if they really believed that they were exempt or should have been exempt from regulation, PSA could have petitioned the Commission for an exemption pursuant to section 35 of the 1916 Act (46 U.S.C. app. sec. 833a) or for the Commission's advice as to their status by seeking a declaratory order, as provided by Rule 68, 46 CFR 502.68. Neither PSA nor SSI nor any of the persons running those companies took either action. On the contrary, they resisted the Commission's investigation both before and after the proceeding was docketed.

PSA's argument that the Commission's policies toward shippers' associations under the 1984 Act regarding limited ongoing regulation should somehow justify PSA's violation of the 1933 and 1916 Acts is way off base. Whatever the 1984 Act does for shippers' associations and whatever rights

[21] Contrast these facts with those which existed in the 1962 case. In that case, *Investigation of Tariff Filing Practices*, cited above, the Commission noted that the law had been unclear as to respondents' statuses and indicated that one or more respondents might even have been given advice by the Commission's staff that they did not have to file tariffs. Therefore, the Commission felt that it would be "harsh" to seek penalties. See case cited, 7 F.M.C. at 330.

or privileges that Act confers on such associations have nothing whatsoever to do with an association which acted as a common carrier and violated the 1933 and 1916 acts. Neither the 1933 Act nor the 1916 Act, of course, even mentions shippers' associations. Therefore, it is senseless to argue that such associations should be given exemptions in those acts because of something that happened in a different act for different purposes. As the Commission noted in *Investigation of Tariff Filing Practices,* cited above, 7 F.M.C. at 327–329, exemptions conferred in one statute for a specific purpose have no bearing on the requirements of a different statute where no exemptions are mentioned.

Moreover, the recognition of shippers' associations in the 1984 Act, even if that Act were somehow applicable to this case, has nothing to do with tariff-filing or agreement-filing requirements of the earlier acts. As the legislative history to the 1984 Act indicates, shippers' associations were defined in that Act in order to identify them and to allow them to negotiate rates with carriers. Moreover, as the legislative history also clearly states (Conference Report No. 98–600 to accompany S. 47, 98th Cong. 2d Sess. at 27–28):

> A shippers' association would continue to be subject to laws other than the Shipping Act of 1984.

Finally, as if the above were not enough to refute PSA's argument, as this record so abundantly shows, PSA didn't even come close to meeting the definition of a bona fide shippers' association, as defined in the Interstate Commerce Act (49 U.S.C. sec. 10562(3), which definition is virtually identical to that set forth in section 3(24) of the 1984 Act (46 U.S.C. app. sec. 1702(24). See also *NEC Petition for Rule Re "Shipper"*, 23 SRR 1381, 1385 (1986).

Conclusions as to the Section 2 Issue

Although the facts concerning SSI's operations in 1982 are not as detailed as those of PSA, this record shows that SSI also held itself out and performed services as a common carrier by water and more specifically as an NVOCC between July and November 1982. SSI, in its own name, advertised rates and regular barge service from Anchorage to Seattle in Anchorage newspapers, transported cargo on at least four barge voyages of an F.M.C.-tariffed carrier, AGM, prepared and sent freight invoices to its shipper customers, and received freight bills from AGM as the shipper of the cargo with respect to that underlying vessel-operating common carrier. Indeed, SSI, when queried by the I.C.C., replied through its counsel that SSI was operating as an NVOCC pursuant to F.M.C. regulation. Further-

more, SSI informed the I.C.C. that SSI rates were port-to-port rates and that SSI did not provide any motor transportation.[22]

The record, therefore, supports the finding that both respondents, PSA and SSI, operated as NVOCCs without filing their tariffs as required by section 2 of the 1933 Act. As Hearing Counsel correctly contend (Brief of Hearing Counsel at 102–103), the tariff-filing requirements of that and similar acts are unambiguous and absolute and should not be taken lightly in view of their very essential purposes, which are to prevent discrimination among shippers and to enable shippers to ascertain their exact costs of transportation as well as those of their competitors. These principles have been enunciated many times in many cases. See, e.g., *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 421 (. . . Section 2 . . . "imposes a positive duty on respondents . . . one of the principal aims of the law is uniformity in treatment"; the law enables the shipper to ascertain his exact rates and charges and his competitors'; the failure to file the tariff "is as serious a violation of law as its failure to observe strictly such rates, charges, and rules after they have been properly published and filed."); *Intercoastal Rates of Nelson S.S. Co.*, 1 U.S.S.B.B. 326, 327 (1934); *Tariff Filing Practices of Containerships, Inc.*, cited above, 9 F.M.C. at 69–70; *Matson Navigation Co.—Container Freight Tariffs*, cited above, 7 F.M.C. at 487–488; *Certain Tariff Practices of Sea-land Service, Inc.*, 7 F.M.C. 504, 509 (1963); *Sea-Land Service, Inc. v. TMT Trailer Ferry, Inc.*, 10 F.M.C. 395, 398–399 (1967) (precise rates and charges must be filed to "achieve the purpose sought—that of closing the door on possible unlawful rebates or concession to favored shippers.").

All of the salutary purposes of tariff-filing law, of course, are defeated when carriers such as PSA and SSI fail to file. The record in this case serves as a reminder of the pernicious effects of such failure. It shows that PSA quoted rates on a case-by-case basis without regard to uniformity among similarly situated shippers with the result that different shippers of the same commodity were, in fact, probably charged different rates even on the same voyage. Obviously, as Hearing Counsel point out (Brief of Hearing Counsel at 103), it was PSA's intention to obtain the cargo and make a profit without concern for competing carriers. Not only is such conduct unfair among shippers but it is unfair to such carriers which complied with law and filed their tariffs.

The Section 15 Issue

To determine whether persons have entered into agreements without filing them with the Commission, in violation of section 15 of the 1916 Act,

[22] This advice from SSI's counsel is curious in view of the fact that SSI advertised a spotting and pickup service "within 8 mile radius of downtown Anchorage" and sometimes without designating any particular radius. How did the vans get from the shipper's place of business to dockside in Anchorage if not by motor carriage, and if that is a port-to port service, as the letter indicates, then its author agrees with my preceding discussion that port-to-port service may include an incidental pickup and delivery service in a port area.

there are three necessary elements. In *Hong Kong Tonnage Ceiling Agreement,* 10 F.M.C. 134, 140 (1966), the Commission listed them as follows: 1) an agreement; 2) common carriers by water or other persons subject to the 1916 Act; 3) anticompetitive or cooperative activity of the types specified in section 15. Furthermore, it has been established that to qualify as an agreement subject to section 15, the agreement must be one between two or more carriers subject to Commission jurisdiction, which agreement constitutes an ongoing relationship over which the Commission has a continuing duty of surveillance. See *F.M.C. v. Seatrain Lines, Inc.,* 411 U.S. 726, 729 (1973); *Agreement No. 9955–I,* 18 F.M.C. 426, 451–458 (1975).

Section 15 of the 1916 Act (46 U.S.C. app. sec. 814) provides in pertinent part:

> 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; before approval . . . it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement. . . .

This record contains ample evidence of agreements between PSA, SSI, and AGM, in which PSA and SSI enjoyed special privileges and advantages and in which they engaged in cooperative working arrangements without filing such agreements.

The evidence on this issue is well summarized by Hearing Counsel. (See Brief of Hearing Counsel at 106–111.) As they state, PSA, SSI, and AGM, the parties to these agreements, were all common carriers by water subject to the 1916 Act. AGM was in fact incorporated in 1982 in order to fill a need for vessel space in the face of an upsurge of traffic. A space-charter agreement was entered into in 1982 between AGM and PSA to run from March 15 to July 1982, specifically to guarantee space to PSA for forthcoming movements of PSA cargo and, in fact, 80 to 90 percent of AGM's space ultimately went to PSA. Under the terms of the space-charter agreement, AGM agreed to provide PSA with space that PSA required at a guaranteed rate, and PSA agreed to pay for a minimum of cargo units on the first AGM voyage regardless of whether it furnished that volume of cargo. PSA therefore obtained a particularly valuable advantage in securing space in view of the expected shortage of vessel space at that time. Beyond this special privilege and advantage, the space-charter agreement embodied a cooperative working arrangement

between AGM and PSA which, among other things, enhanced both carriers' competitive abilities. Thus, for example, in return for the space privileges, PSA also assisted AGM in various ways, for example, by advancing certain of AGM's expenses, giving loans, providing office space, etc. Officers and shareholders of AGM shared common interests with PSA as either consultants or employees. For example, Mr. Moesh, a director and part owner of AGM, acted as "consultant" to PSA, helping to set rates and negotiating rates with underlying water carriers on PSA's behalf. Edward O'Brien, named President of AGM after being promised the job by Mr. Moesh, performed public relations for PSA and certain tasks for Ocean Dock Industries, PSA's unloading agent in Anchorage. Consultants employed by PSA to solicit cargo in PSA's name were also employed by AGM to conduct sales and solicitation. Mr. Donadel, PSA's Vice-President, solicited customers for PSA and AGM and he and Mr. Pierce, AGM's general manager, engaged in joint solicitation of customers. Mr. Pierce even provided sales leads to PSA through Mr. Donadel and discussed using PSA as an alternative to using AGM, even though PSA and AGM were competing for the same cargo.

In addition to the above working arrangements, AGM and PSA entered into a voyage-charter agreement on June 15, 1982, to run to the end of the 1982 calendar year. Under the terms of this agreement, PSA agreed to charter space on AGM barges returning from Anchorage to Seattle. AGM was responsible for providing fully-equipped vessels and operating them while PSA agreed to assume all liability and responsibility for the cargo. This agreement was entered into between Mr. Pierce, AGM's general manager, and Marion Davis, Secretary-Treasurer and general manager of PSA. It was designed to give Mr. Davis and Ray Fendenheim, a consultant to AGM and PSA and a director of SSI, the ability to ship crushed automobiles from Anchorage to Seattle under the name of SSI.

SSI, which was incorporated on July 27, 1982, to "engage in any phase of the business of transportation," transported its cargo on AGM barges through coordinated efforts with PSA, whose work orders covering the SSI cargo were used. In addition, AGM billed both SSI and PSA as the shipper for the freight charges and AGM advanced freight and drayage charges to SSI. Mr. Davis, PSA's general manager in Alaska, had moreover, requested AGM to advance freight charges to SSI on southbound voyages.

The written space-charter and voyage-charter agreements, the coordinated efforts and interrelationship among employees and officers of the three companies, and the evidence showing actual voyages and cargo carried by AGM in the name of PSA and SSI are more than sufficient to support the finding that PSA, SSI, and AGM had entered into and carried out

cooperative working arrangements and had enjoyed special privileges and advantages in conducting their common-carrier solicitations and services.[23]

The Penalty Issues

The final issues set forth in the Commission's Order of Investigation and Hearing concern the questions whether penalties should be assessed against PSA and SSI and, if so, in what amounts.

Hearing Counsel urge significant penalties against these two respondents. They argue that PSA and SSI knowingly violated the law and, in the case of PSA, the violations were by "obvious design." (Brief of Hearing Counsel at 111.) They argue, furthermore, that the Commission should consider PSA's and SSI's deliberate actions which impeded the Commission's investigation and the administrative proceeding. They contend that "the PSA and SSI violations were a well thought out deliberate scheme" (Brief at 112) and that "the nature, extent, and gravity of the violations in this case are all severe." (*Id.*) They urge a "severe" penalty under the factors set forth in the Commission's regulations (46 CFR 505). They cite the fact that the maximum penalty for violation of both section 2 of the 1933 Act and section 15 of the 1916 Act is $1,000 per day for each day such violation continues. For PSA, which operated without a tariff from March 15, 1982, to around January 1, 1985 (1019 days), this would be over $1 million in penalties for the section 2 violation; for section 15, the amount would be $289,000 (for the period March 15, 1982, to December 31, 1982, i.e., 289 days). The maximum penalty for PSA would therefore be almost $1.3 million. For SSI, the maximum penalty for the section 2 violation would be $105,000 (July 27, 1982 to November 9, 1982, i.e., 105 days); and for the section 15 violation, $105,000 (July 27, 1982 to November 9, 1982). Thus, the maximum penalty for SSI would be $210,000. Total maximum penalties for both PSA and SSI would amount to approximately $1.5 million.

As discussed in Judge Glanzer's decision, cited above, at 11–12, the Commission considers a number of factors when determining the amount of penalties to assess, which factors are set forth in 46 CFR 505.3(b). The factors to consider are: "the nature, circumstances, extent and gravity of the violation committed and the policies of 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." Moreover, under the previous regulations of the Commission regarding assessment of penalties, the Commission recognized the specific

[23] It bears repeating, however, that respondent AGM, which has settled with the Commission and is now dissolved, according to the terms of the settlement which the Commission has finalized, has waived the defenses it would have argued and in return is not to be bound by the above findings as matters of res judicata or collateral estoppel. (Initial Decision of Judge Glanzer, cited above, at 14.)

consideration that "willful and substantial violations" could be dealt with more severely than violations which were "accidental or technical" in nature. These criteria have, in effect, been carried forward into the current regulation. See *Marcella Shipping Co., Ltd.*, 28 F.M.C. 259, 272 (1986); *Cari-Cargo International, Inc., Jorge Villena, and Sea Trade Shipping*, 28 F.M.C. 394, 407 (1986); Judge Glanzer's Initial Decision, cited above, at 12 n. 11, and case cited therein.

In considering the "nature, circumstances, extent and gravity of the violation committed and the policies of deterrence and future compliance" with law in this case, it appears that the violations were particularly egregious. As was noted in *Cari-Cargo International, Inc.*, cited above, 28 F.M.C. at 405–406, the requirement that carriers file their tariffs and adhere to them strictly is extremely important to effective protection of the shipping public and industry. Indeed, as was observed in that case, "[T]he 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 (i.e., tariff-filing and adherence laws). *Id.* In fact, the Commission has emphasized the critical need to enforce tariff-filing laws and has stated in one case (*Ghiselli Bros. v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 179, 182 (1968):

> 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.

Not only were the violations committed by PSA and SSI extremely serious but they were not merely inadvertent. The Commission has long held that one who "intentionally disregards" law or is "plainly indifferent" to law or persistently fails to inform or even attempt to inform himself of the requirements of law has acted "knowingly and willfully." See *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954); see also the discussion and cases cited in *Marcella Shipping Co., Ltd.*, cited above, 28 F.M.C. 273.

The record in this case shows more than a pattern of indifference. It shows that a group of people operating PSA and SSI, who were not unsophisticated novices, chose to ignore the tariff-filing requirements of law, in the case of PSA, for almost three years, at least, as far as this record shows. Furthermore, in the case of SSI, its counsel advised the I.C.C. that it was operating as a carrier subject to F.M.C. regulation. In the case of PSA, furthermore, its Vice-President, Mr. Donadel, was informed by Mr. Carlos Niemeyer, F.M.C. District Investigator, that even if PSA were a shippers' association, it might have to file a tariff with the Commission as shown by previous Commission decisions. Mr. Donadel was so informed in May of 1982. (Ex. 6 at 4–5.)

Both during the pre-docketed investigation of PSA's and SSI's activities and during the docketed proceeding, these respondents exhibited scant cooperation and, on the contrary, impeded the investigations. F.M.C. investigator Carley was given no access to PSA's documents from the time he began his investigation until after May of 1985, after the formal proceeding had been docketed, and then, only pursuant to a subpena duces tecum. PSA's failure to respond to Mr. Carley's telephone calls and office visits made it necessary for Mr. Carley to send certified letters in late November 1982 to PSA's Vice President, Mr. Donadel, and PSA's general manager in Alaska, Mr. Davis, requesting information and documents. PSA was again advised that it might have been operating as a common carrier by water subject to F.M.C. jurisdiction. Mr. Carley's letters and inquiries were referred to Mr. Stern, PSA's counsel in Anchorage, and Mr. Carley was advised to contact Mr. Stern. However, Mr. Carley's contacts with Mr. Stern were fruitless. First, Mr. Stern assured Mr. Carley that written responses would be forthcoming. Later, during the months of May and June 1983, Mr. Stern refused to accept or return any telephone calls although Mr. Carley was told that Mr. Stern was in the office working.

Even when PSA later answered Hearing Counsel's interrogatories, which had been served in October 1984, PSA, through Mr. Davis, gave answers regarding PSA's employees which were later shown to be erroneous. Attempts to serve PSA officials, employees, or consultants with subpenas were difficult and on one occasion the process server was told that PSA persons were purportedly out of town. PSA documents were, however, eventually furnished to Mr. Carley by Mr. World PSA's counsel, pursuant to subpena.

In the face of evidence showing the gravity of the violations, knowing and willful refusal to comply with law or even to attempt to comply with law, refusal to cooperate with the Commission's investigators, and a history extending over several years of persistent violations, there is little or nothing in the nature of mitigating factors. SSI never appeared or offered any defense. PSA's defenses consist of a thin, transparent argument that it was a shippers' association and that its services included delivery beyond portside in Alaska, neither of which defenses is valid according to previous Commission decisions. Its final defense, namely, that the Commission ought not to follow its previous decision holding shippers' associations in the Alaskan trade to be subject to tariff-filing requirements under the 1933 Act, is equally empty. If PSA really believed it had good reasons to be exempt from tariff-filing, it could have asked the Commission for a declaratory order under Rule 68 or for an exemption under section 35 of the 1916 Act. The request, in any event, might not have qualified in view of the fact that PSA engaged in discriminatory, ad hoc rating practices.

Aside from the above defenses presented in its post-hearing brief, PSA presented no direct case at the hearing. Therefore, there is little for me

to consider in mitigation, such as ability to pay. All that PSA says on brief is that it "ceased business in January 1985, and is presently insolvent." As I comment below, this untested assertion does not warrant inaction by the Commission.[24]

The primary consideration, in view of the above record showing culpability and the gravity of the offenses committed by PSA and SSI is the factor of deterrence. This Comimission has been an active body for enforcement of the shipping laws. It would be ludicrous in the face of a record such as that in this case to excuse PSA and SSI on the ground that they have ceased business and have been dissolved and simply to terminate the proceeding. Such inaction would make a travesty of law enforcement and have absolutely no deterrent effect. This record warrants imposition of severe penalties for the lengthy and serious violations committed by PSA and SSI, especially PSA, as Hearing Counsel urge. Anything short of such action would send a message to persons engaged in the Alaskan and other trades that they may violate laws with impunity, no matter how egregrious and willful the violations and no matter what harm they may have caused to shippers and law-abiding carriers competing with them. Furthermore, the record shows that PSA earned gross revenues of $7.4 million on 9 AGM voyages in 1982 (paying AGM $3.3 million in freight charges). Therefore, excusing PSA now because of an untested assertion of insolvency would send a similar message to entrepreneurs in Alaska, namely, go into the common carrier business, earn sizeable revenues, totally ignore federal shipping laws, and when you are finally investigated, close down the business, let the corporation be dissolved, and plead insolvency. If such behavior is excused, why would not other persons be encouraged to try to do the same thing in the future or even the same persons who ran PSA and SSI?

In *United States of America v. Atlantica, S.p.A.*, 478 F.Supp. 833 (S.D.N.Y. 1979), a case involving four and one-half years of rebating by a carrier in the foreign trade, the court considered such factors as willfulness of the violation, degree of harm to the public, the extent to which the carrier may have profited by the violations, and ability to pay. (478 F.Supp. at 836.) The court, however, found the most important factor to be that of deterrence. *Id.* It found that the carrier had profited from its rebating by earning $1.5 million in net freight revenues and had acted willfully. Furthermore, although the carrier had argued that "it cannot pay any penalty because it is in voluntary liquidation under Italian law," the court found this not to be a serious consideration (*Id.*) and imposed heavy penalties ($1,345,000) (478 F.Supp. at 837).[25]

[24] As regards PSA's finances, furthermore, the record shows that Hearing Counsel's efforts to obtain certain financial information about PSA from PSA were resisted and were unsuccessful.

[25] The question of how the Commission may ultimately recover any penalties from dissolved corporations is one for enforcement officials and should not inhibit the Commission from sending the necessary message of deterrence by assessing significant penalties. However, it should be noted that the mere dissolution of a corporation may not mean that no moneys can ever be recovered. The Model Business Corporation Act,

For the sake of effective law enforcement and deterrence and for the sake of carriers, shippers, and the public whose interests have been violated over a long period of time by a pattern of willful violations of law, a severe penalty is warranted. Determination of the precise amount of penalties is, as the Commission has noted, "not an exact science," and there 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). In two recent cases, *Cari-Cargo International, Inc.* and *Marcella Shipping Company, Ltd.*, cited above, respondents were assessed $100,000 and $150,000, respectively, for tariff-filing violations occurring over varying periods of time. Respondents in this proceeding were more sophisticated, however, and had even fewer mitigating factors in their favor. Furthermore, the degree of culpability and willfulness are greater in this case. In *Saipan Shipping Co., Inc. v. Island Navigation Co. et al.*, cited above, 24 F.M.C. 934, a case involving violations of section 15 and failure to file tariffs, reparation was awarded amounting to over $250,000 plus further amounts to be determined even though the violations had ceased many months earlier. That case, somewhat like the instant one, involved the establishment of companies by one man or a small group of men as part of a deliberate plan.

After careful consideration of this record and the various factors relevant to the determination of the proper amount of penalties with special consideration of the need to deter other persons from trying to profit by conduct which constitutes willful disregard of law and consideration of the lack of meaningful mitigating factors, I find that a penalty of $300,000 assessed against respondent PSA and $50,000 assessed against respondent SSI, which was far less involved in the violations, will send the appropriate message of deterrence. Such penalties may be paid in equal monthly installments over a period not to exceed two years, commencing within 30 days after the Commission finalizes this order, or in such manner as the Commission may otherwise order if it reviews or modifies this decision. As was done in the *Cari-Cargo* and *Marcella* cases, furthermore, if respondents make good-faith payments over a minimum period of time, here, six months, they may, upon a proper and persuasive showing of changed events, petition

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which the State of Alaska has substantially adopted, provides for suits and claims against corporations for two years after the corporation has dissolved. See *VII Martindale-Hubbell Law Directory* (1986 ed.) *Alaska Law Digest at 5*; section 105 of that Act; see also 19 Am Jur 2d, Corporations, secs. 2882; 2896-2900 (rev. ed. 1986). Criminal prosecutions have been continued against dissolved corporations, and fines have been levied against them notwithstanding their dissolution when state law allowed suits to continue against dissolved corporations. See *Melrose Distillers, Inc. v. U.S.*, 359 U.S. 271 (1959); *United States v. P.F. Collier & Son Corp.*, 208 F.2d 936 (7th Cir. 1953); 18B Am Jur 2d, Corporations, sec. 2140 (rev. ed. 1985); Annotation: 40 A.L.R. 2d 1396. Sometimes, even aside from the doctrine of "piercing the corporate veil," shareholders who continue in business may become personally liable for the wrongdoing of the dissolved corporation. See 19 Am Jur 2d, Corporations, sec. 2897 at 675 n. 10. In *Saipan Shipping Co., Inc.* v. *Island Navigation Co. et al.*, cited above, 21 SRR at 647, 651, reparation was awarded for violations of sections 15 and 18(b)(1) of the 1916 Act even though one or more of the respondents had ceased operations.

the Commission for a modification of this order and possible remittance of some or all of the remaining penalties.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 500–587]

DOCKET NO. 85–6

NOTICE OF INQUIRY CONCERNING INTERPRETATION OF SECTION 8(a) AND SECTION 8(c) OF THE SHIPPING ACT OF 1984

May 6, 1987

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission discontinues its inquiry concerning the interpretation of sections 8(a) and 8(c) of the Shipping Act of 1984 with regard to excepted commodities. The Commission determines that the issues raised are generally not subject to administrative resolution based on the record established in this proceeding. The Commission will include this record in the section 18 report to be submitted to Congress in 1989.

DATES: May 12, 1987.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

The Commission initiated this proceeding by a Notice of Inquiry published in the *Federal Register* (50 FR 10807–10810, March 18, 1985) which solicited public comment on the interpretation to be given to section 8(a), 46 U.S.C. app. 1707(a), and section 8(c), 46 U.S.C. app. 1707(c), of the Shipping Act of 1984 (Act or 1984 Act) with regard to excepted commodities.[1] The purpose of this inquiry was to obtain the most complete information available regarding the proper interpretation of sections 8(a) and 8(c) of the 1984 Act, and to establish a record which would enable the Commission to determine whether the questions raised could be addressed administratively or whether they require legislative clarification.

Interested persons were invited to comment on the proper treatment of excepted commodities and to respond to the following specific questions:

A. Is it lawful for an ocean common carrier or a conference of such carriers voluntarily to file a tariff with the Federal Maritime Commission covering a commodity which is excepted from mandatory tariff filing under section 8(a) of the Shipping Act of 1984?

B. Is it lawful for a conference, whether or not it has express enabling authority in its agreement, to agree on a rate covering a commodity which

[1] Those commodities which are excepted from mandatory filing of tariffs or service contracts are: bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste. 46 U.S.C. app. 1707(a)(1).

is excepted from mandatory tariff filing under section 8(a) of the Shipping Act of 1984?

C. May the Federal Maritime Commission require that a conference, which has agreed to a rate and filed a tariff covering an excepted commodity, allow for a right of independent action as provided for under section 5(b)(8) of the Shipping Act of 1984?

D. Is it lawful for an ocean common carrier or a conference to voluntarily file a service contract which covers an excepted commodity?

A total of 20 comments were filed in response to this Notice of Inquiry.[2] Comments were received from the following persons: (1) United States Department of Justice (DOJ); (2) Chemical Manufacturers Association (CMA); (3) American Paper Institute, Inc. (API); (4) National Association of Recycling Industries, Inc. (NARI); (5) Western Shippers Group (WSG); (6) Great Southern Paper; (7) Central National-Gottesman, Inc.; (8) Tampa Port Authority (Tampa); (9) Terminal Operators Conference of Hampton Roads (TOCHR); (10) The Pacific and Arctic Railway and Navigation Company and Skagway Terminal Company (PARN/STC); (11) Journal of Commerce; (12) Sea-Land Service, Inc. (Sea-Land); (13) U.S.-Flag Far East Discussion Agreement (Agreement No. 10050); (14) Inter-American Freight Conference (IAFC); (15) Transpacific Westbound Rate Agreement (TWRA); (16) "8900" Lines, U.S. Atlantic & Gulf Ports/Italy, France & Spain Freight Conference, and U.S. Atlantic Ports/Eastern Mediterranean & North African Freight Conference (Mediterranean Conferences); (17) Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference (Japan/Korea Conferences); (18) Atlantic and Gulf/West Coast of South America Conference, United States Atlantic and Gulf/Colombia Conference, United States Atlantic and Gulf/Ecuador Conference, United States Atlantic and Gulf/Venezuela Freight Association, United States Atlantic and Gulf/Southeastern Caribbean Conference, and United States Atlantic and Gulf/Hispaniola Steamship Freight Association (Latin American Conferences); (19) North Europe-U.S. Pacific Freight Conference, Pacific-Australia/New Zealand Conference, and Pacific Coast European Conference (Pacific Conferences); and (20) United States-European Carrier Associations (USECA).[3] A summary of the comments is attached as an Appendix to this Notice of Discontinuance.[4]

[2] The California Association of Port Authorities submitted a letter, dated April 15, 1985, that declined comment inasmuch as the subject matter of the inquiry did not include terminal tariffs. Subsequently, the Association inadvertently submitted a letter, dated May 15, 1985, that did make a substantive comment on the issues in this proceeding. On May 20, 1985, the Commission received a telex from the Association stating that the May 15, 1985 letter had been mistakenly filed and requesting that it be withdrawn. Accordingly, the May 15, 1985 letter of the California Association of Port Authorities is not part of the record in this proceeding.

[3] USECA consists of the following conferences: North Europe-U.S. Gulf Freight Association, Gulf-European Freight Association, North Europe-U.S. Atlantic Conference, U.S. Atlantic-North Europe Conference, and Pan-Atlantic Carrier Trade Agreement.

[4] The Appendix is not included in the *Federal Register* publication of this notice.

II. DISCUSSION

A. Voluntary Tariff Filing.

The first question raised in the Notice of Inquiry is whether a common carrier or conference may voluntarily file a tariff on an excepted commodity. Section 8(a) of the 1984 Act requires common carriers and conferences to file tariffs with the Commission showing their rates and charges. Certain commodities, however, are expressly excepted from this mandatory tariff filing requirement. As relevant to this Inquiry, section 8(a)(1) provides that:

> Except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste, each common carrier and conference 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 8(a) basically continues the tariff filing requirement of section 18 of the Shipping Act, 1916, 46 U.S.C. app. 817. The class of excepted commodities first created by Congress in 1961 has been further expanded by the 1984 Act to include recycled metal scrap, waste paper and paper waste. Section 8(a), like its predecessor section 18, does not expressly address the question of whether a common carrier or conference may voluntarily file a tariff on an excepted commodity.

The conferences' comments generally contend that there is no need to go beyond the plain language of the statute for an answer to this question. They argue that the statute merely excepts certain commodities from mandatory tariff filing and that nothing in the language of section 8(a) or any other section of the 1984 Act prohibits voluntary filing. In the absence of an express prohibition, they argue that voluntary filing is lawful and should be permitted. The conferences point out that nowhere in the legislative history is voluntary filing prohibited. Moreover, they note that voluntary filing is a long standing practice of which Congress was aware and which it had several opportunities to change. They argue that in the face of Congressional knowledge and inaction, it can be presumed that Congress has endorsed this practice.

The shipper groups and the Department of Justice recognize that the Act does not prohibit voluntary filing. They do not agree, however, that the analysis should be terminated at that point. Rather, they proceed to the legislative history of the 1984 Act, as well as amendments to the 1916 Act, to determine the underlying purpose for excepting certain commodities from filing and how that purpose is affected by allowing filing. They find in the legislative history of the 1984 Act, especially in the legislative history of the debate over whether to retain a tariff filing system, a Congressional intent not to expand that system. In the legislative history

of the amendments to section 18 of the 1916 Act, they see a purpose to preserve an unregulated market for excepted commodities.

In 1961, Congress passed an amendment to the 1916 Act, Pub. L. No. 87–346, 75 Stat. 764 (1961) (1961 Amendment), which for the first time provided for the mandatory filing of tariffs with the Federal Maritime Commission. This same legislation, however, excepted from mandatory tariff filing "cargo loaded and carried in bulk without mark or count."[5] The Notice of Inquiry noted the benefits to shippers of bulk cargo in terms of greater pricing flexibility afforded by the 1961 Amendment. In addition, the conference comments draw attention to the fact that carriers and conferences were also intended beneficiaries of the 1961 Amendment.

In 1963, Congress further amended the 1916 Act, Pub. L. No. 88–103, Stat. 129 (1963 Amendment), to exclude lumber from the mandatory tariff filing requirement. Again, both carriers' and shippers' interests were apparently served by this expansion of the list of excepted commodities. Carriers in the Northwest found themselves in intense competition with Canadian carriers and desired an exception from tariff filing for lumber in order to meet the competitive conditions in this market. Lumber exporters also supported the exception in order to meet the strong competition of Canadian lumber interests.

In 1965, Congress passed yet another amendment to the 1916 Act, Pub. L. No. 89–303, 79 Stat. 1124 (1965) (1965 Amendment), which cut back on the lumber exception. It distinguished between softwood and hardwood lumber and restored mandatory tariff filing for hardwood lumber. This legislation was intended primarily to benefit the hardwood lumber industry which sought the more stable ocean transportation rates that could be achieved by tariff filing.

As is well known, the entire tariff filing regulatory regime was intensely debated during the legislative process that led to the passage of the 1984 Act. A number of legislative proposals would have eliminated tariff filing and enforcement by the Commission. Although Congress continued tariff filing, it specifically directed the Commission to report on the continuing need for the statutory requirement that tariffs be filed with and enforced by the Commission. Congress also expanded the list of excepted commodities by adding recycled materials. The purpose of this change was to enable recycled materials to compete with virgin commodities.

[5] The comment filed by USECA identifies an earlier instance in which bulk cargo was excepted from a tariff filing requirement. In 1935, the Shipping Board undertook an investigation pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b), into certain rate-cutting practices in the export trades of the United States. This investigation ultimately led to a rule which required common carriers in the export trade to file tariffs with the Board. The rule, however, expressly excepted "cargo loaded and carried in bulk without mark or count." The purpose of the bulk cargo exception was to exclude tramp operators from the rule because ". . . the evidence of record in this investigation does not show that competitive methods employed by such carriers in our export trades have produced conditions unfavorable to shipping." *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470, 499 (1935).

Having reviewed the legislative history of the 1916 Act and 1984 Act with regard to excepted commodities, it is difficult to give a definitive answer to the first question posed in the Notice of Inquiry, namely, whether voluntary filing of a tariff covering an excepted commodity is lawful. A simple answer may be that there is nothing in the language of the Act or the relevant legislative history which expressly prohibits it. Nevertheless, there remains an apparent contradiction in allowing voluntary filing. The fundamental purpose of excepting certain commodities, beginning with the 1961 Amendment, was to remove those commodities from the requirements of the tariff system. That purpose would appear to be undermined, if not defeated, by voluntary filing.

Voluntary filing appears to run counter to the apparent purpose of allowing excepted commodities to be priced in a free market. There is no indication, however, that Congress directly considered the impact of voluntary filing on the underlying policy of excepting certain commodities. Therefore, any further action on this question appears problematic. There simply does not appear to be an adequate basis for resolving this question administratively. This is particularly so in light of the fact that voluntary tariff filing has been permitted since 1961. There would need to be a clearer basis for reversing this policy at this time.

Such a basis does not appear in the record established in this Notice of Inquiry. Although shippers opposed voluntary filing on legal grounds, none suggested the presence of any existing problems brought about by allowing voluntary filing. Carrier interests, on the other hand, did point out areas in which business operations or carrier-shipper relationships would be disrupted by a change in policy. The Commission therefore will continue its current policy and maintain the status quo by continuing to accept tariffs on excepted commodities that are voluntarily filed and subjecting such filings to the same tariff regulations as apply to non-excepted commodities.

B. Collective Ratemaking.

The second question raised in the Notice of Inquiry is whether collective ratemaking on excepted commodities is lawful. Section 4(a)(1) of the 1984 Act, 46 U.S.C. app. 1703(a)(1), establishes jurisdiction over agreements by or among ocean common carriers to "discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service." Section 4(b)(1) of the 1984 Act, 46 U.S.C. app. 1703(b)(1), applies to marine terminal operator agreements to "discuss, fix, or regulate rates or other conditions of service." These provisions essentially continue in the 1984 Act similar provisions from the 1916 Act. *See* 46 U.S.C. app. 814.

Conferences contend that the language of section 4(a) confers general ratemaking authority upon conferences and does not in any way limit that authority with regard to particular commodities. They argue that this grant of authority is so clear that there is no need to resort to legislative

history. The conferences argue further that the legislative history does no reveal any intent to exclude excepted commodities from their ratemaking authority. In fact, they contend one of the purposes of the 1961 and 1963 Amendments was to enable conferences and carriers to compete with tramps for bulk and other excepted cargoes. They contend that Congress was aware of conference ratemaking on excepted commodities and may be presumed to have endorsed it.

The Department of Justice and shipper groups argue that section 4 must be read in light of the purpose to be achieved by excepting certain commodities from tariff filing. They contend that the legislative history of the excepted commodity amendments to the 1916 Act reveals an intent to preserve an unregulated market for rates on excepted commodities. That purpose is undermined, they contend, if collective ratemaking on excepted commodities is permitted. Moreover, they point out that with mandatory independent action, regular tariffed commodities are subject to more flexible pricing than excepted commodities. From their perspective, this is an ironic and incongruous result.

Prior to the 1961 Amendment, it appears that conferences fixed rates on all commodities including those which later were excepted by subsequent amendments. It also appears that during the consideration of the 1961, 1963, and 1965 Amendments, Congress was aware that conferences exercised ratemaking authority over excepted commodities. Moreover, in the 1984 Act, Congress did not remove such commodities from the Commission's jurisdiction.

With regard to the question of collective ratemaking, further review and analysis of the legislative history clarifies a number of factors which support conference authority: (1) both the 1916 Act and the 1984 Act in unambiguous and unqualified language provide for a grant of general ratemaking authority to conferences; (2) the legislative history of the tariff filing amendments dealing with excepted commodities does not reveal any express intent to restrict conference ratemaking authority over those commodities; (3) the Commission in the past has not challenged conference ratemaking authority over excepted commodities; and (4) Congress was aware that conferences exercised collective ratemaking on excepted commodities prior to 1961 and expressed no intention to prohibit that practice. The record in this proceeding supports, rather than calls into question, the authority of a conference to fix rates covering a commodity that is excepted from mandatory tariff filing under section 8(a). Therefore, no change in current Commission policy, which recognizes that authority, is warranted.

C. Independent Action.

The third question raised in the Notice of Inquiry is whether a conference, which has elected to agree upon a rate and file a tariff for an excepted commodity, may be required to allow its members a right of independent action on such a rate as provided for under section 5(b)(8) of the 1984 Act, 46 U.S.C. app. 1704(b)(8).

The conference comments argue that section 5(b)(8) of the 1984 Act mandates independent action only with respect to those commodities which are required to be filed in a tariff by section 8(a) of the Act. The conferences contend that the language of section 5(b)(8) is clear and that there is no need to examine legislative history. One conference argues that this construction of section 5(b)(8) does not lead to an illogical result, but rather merely allows conferences to set rates on vital base cargo (*i.e.*, excepted commodities), but to provide for independent action on 8(a) tariff items.

Shipper comments generally dispute the premise assumed by this question, inasmuch as they argue that collective ratemaking is not permissible. Assuming *arguendo* that collective ratemaking is lawful, shippers contend that independent action should be permitted. Otherwise, according to the shipper comments, excepted commodities would enjoy less rate flexibility than commodities subject to mandatory tariff filing. These comments argue that the Commission could mandate a right of independent action on any tariff voluntarily filed for an excepted commodity. One comment states that the Commission could promulgate such a rule pursuant to its general rulemaking authority under section 17(a) of the Act, 46 U.S.C. app. 1716(a).

Section 5(b)(8) mandates that each conference agreement provide a right of independent action to its members with respect to any "rate or service item *required* to be filed in a tariff under section 8(a)." (Emphasis added.) Section 5(b)(8) does not "require" independent action on rates on excepted commodities because such rates by definition are not subject to the section 8(a) tariff filing requirement. The introduction of a broad mandatory right of independent action into the scheme of the 1984 Act appears to have resulted in an anomaly with regard to the treatment of excepted commodities. A conference may fix rates and file tariffs covering these commodities but does not appear to be required by the Act to allow members to take independent action. Thus, commodities subject to mandatory tariff filing may enjoy greater pricing flexibility than excepted commodities voluntarily filed in a tariff.

The Commission might attempt to address this dichotomy under its general rulemaking authority. However, given the unambiguous language of section 5(b)(8), the lack of legislative history indicating Congressional intent, the absence of a factual record upon which to base administrative action, and the unknown implications of any modification of the existing regulatory regime, it would appear at this time that the matter is best left to resolution by Congress. Therefore, the Commission will continue the current policy which allows a conference to determine whether or not to allow its member lines to take independent action on excepted commodities.

D. Service Contracts.

The fourth question raised in the Notice of Inquiry is whether an ocean common carrier or a conference may voluntarily file a service contract which covers an excepted commodity.

The conferences generally take the position that the Commission should continue to allow the voluntary filing of service contracts covering excepted commodities. A number of conferences point out that nothing in the 1984 Act prohibits such voluntary filing. One conference states that filing promotes competition by providing better information on market conditions to shippers. Other comments allege that certain adverse consequences would occur if voluntary filing were prohibited.

The Department of Justice and shipper groups oppose voluntary filing. One shipper group alleges that voluntary filing reduces rate flexibility on excepted commodities. Another argues that voluntary filing is contrary to the policy of the 1984 Act.

Voluntary filing of service contracts covering excepted commodities does not appear to trigger the same concerns as arise in connection with the voluntary filing of tariffs. Service contracts are negotiated in an open market between carrier and shipper. The stability established by the contract is mutually agreed to by both parties. Service contracts exist for an extended period of time. There is therefore less concern for speedy and flexible adjustments in terms. Moreover, the legislative history of the excepted commodity amendments to the 1916 Act does not have direct relevance to service contracts. Nevertheless, the question of service contracts on excepted commodities has been raised in Docket No. 86–6, *Service Contracts*, and appears to be more appropriately handled in that proceeding. *See* "Notice of Proposed Rulemaking," 51 FR 5734 (February 18, 1986).

III. CONCLUSION

The Notice of Inquiry focused on certain issues which arise in conforming the concept and treatment of an excepted commodity with the tariff filing, concerted ratemaking, independent action and service contract provisions of the 1984 Act. A fundamental tension occurs in the statutory scheme when an excepted commodity, which apparently is intended to be governed only by free market forces, is subjected to the additional regulatory restraints associated with tariff filing or the collective control of concerted ratemaking. This inherent tension existed under the 1916 Act. It continued under the 1984 Act and was complicated further by the Act's inclusion of a mandatory right of independent action on rate or service items required to be filed in a tariff.

The purpose of the Notice of Inquiry was to reconcile, if possible, apparently conflicting provisions of the 1984 Act and to better define the parameters of the regulatory scheme envisioned by Congress. In particular, the Notice raised certain issues to determine if there were areas where the apparent conflict could be resolved through rulemaking. The key to this effort is determining Congressional intent.

The language of the 1984 Act, as well as that of the predecessor 1916 Act, and relevant legislative history, does not always clearly reveal that intent. Moreover, one limitation of the legislative history is that it is now

25 years old and addresses a different statutory scheme. It would appear, therefore, that the broad policy issues raised in the Notice of Inquiry require legislative attention because there does not appear to be a clear enough basis for an administrative resolution through rulemaking. In this posture, the best course appears to be to maintain the status quo.

In summary, the Commission will continue to accept tariffs on excepted commodities filed on a voluntary basis. The longstanding authority of conferences to collectively set rates on excepted commodities will continue to be recognized. A right of independent action on excepted commodity rate or service items will remain a matter of conference discretion. And the issue of filing service contracts covering excepted commodities will be resolved in Docket No. 86–6, *Service Contracts.*

Although no change is being made in current policy, the Commission believes that the issues raised in the Notice of Inquiry are significant and are of continuing concern and should be included in the reports required by section 18 of the 1984 Act, 46 U.S.C. app. 1717, which, among other things, requires that the Commission report to the Congress on mandatory tariff filing. The issues raised in the Notice of Inquiry relate to tariff filing and the implications and consequences thereof. The Commission therefore will make the record established in this proceeding a part of its section 18 report.

THEREFORE, IT IS ORDERED, That the record in this proceeding, consisting of the Notice of Inquiry, the comments received, and this Notice of Discontinuance and Appendix summarizing the comments, shall be included in the report prepared by the Commission pursuant to section 18 of the Shipping Act of 1984; and

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

By the Commission.

(S) JOSEPH C. POLKING
Secretary

APPENDIX—SUMMARY OF COMMENTS

I. Voluntary Tariff Filing

A. Comments Opposing Voluntary Tariff Filing

The comments filed in opposition to voluntary filing of tariffs on excepte commodities recognize that the 1984 Act is silent on the question of whethe voluntary filing is lawful. These comments therefore rely on the legislativ history of the amendments to the 1916 Act dealing with excepted commoc ities.

DOJ argues that the legislative history of the excepted commodity amenc ments to the 1916 Act indicates that Congress intended to remove excepte commodities from the restrictions and limitations imposed by the tari filing system, and that voluntary tariff filing by a single common carrie or a conference is contrary to the Congressional purpose.

API contends that the legislative history of the 1961, 1963 and 196 Amendments to the 1916 Act demonstrates that Congress intended th excepted commodities be unregulated with regard to carrier or conferenc rate practices. According to API, the purpose of excepting certain commoc ities was to preserve their competitive standing. API contends that mark forces should be permitted to determine applicable rates.

CMA contends that voluntary tariff filing is inconsistent with the legisl tive history of the 1916 Act Amendments. CMA notes that the objective of tariff filing are to apprise shippers and the Commission of lawful rat and to enable the Commission to enforce the 1984 Act's prohibition again unjust discrimination among similarly situated shippers. According to CM the harmful byproducts of tariff filing include its stabilizing effect on rat and the increased regulation required to enforce the tariff filing syste CMA finds nothing in the history of the 1961, 1963 and 1965 Amendmen to the 1916 Act that would suggest that Congress intended to permit vo untary filing of tariffs covering excepted commodities. In particular, CM notes that the 1965 Amendment reinstated tariff filing for hardwood lumbe but continued the exception for softwood lumber in order to retain ra flexibility. If voluntary filing is permitted, CMA asserts that the Congre sional purpose is defeated.

WSG points out that, historically, excepted commodities have move in a free market where rates can change dramatically in response to mark conditions. WSG states that the Commission should preserve this compet tive market and declare that voluntary filing of tariffs is unlawful.

A number of comments suggest that the extensive debate over retentio of the tariff filing system and enforcement by the Commission in th legislative history leading to the passage of the 1984 Act supports th position that voluntary filing should not be permitted. API notes that som legislative proposals would have eliminated tariff filing and enforcemer in order to encourage greater competition in rates and services. API contenc that these proposals were put aside in favor of other means of offsettin

carrier and conference market power. API notes, however, that certain commodities were excepted from tariff filing. API contends that the rates for these commodities were intended to be subject to market forces. API concludes that the legislative history of the debate over tariff filing is wholly inconsistent with any interpretation which would permit voluntary filing of tariffs, where not required, and the subsequent enforcement of such tariffs by the Commission.

DOJ also refers to the debate over tariff filing and states that even though Congress decided to retain the tariff filing system under the 1984 Act, it recognized that tariff filing is inconsistent with consumer interests and that any expansion of the tariff regime is contrary to the Congressional compromise in the 1984 Act, which retained the tariff system but reduced its anticompetitive impact with other specific new reforms. DOJ contends that the purpose of excepting certain commodities is to remove them entirely from the price stabilizing effect of a tariff and thereby provide shippers of those commodities with the flexibility to negotiate rates. DOJ asserts that voluntary tariff filing inhibits that flexibility because once a tariff is filed no other rate can be charged and because any rate increase is subject to a 30-day notice requirement. According to DOJ, voluntary filing frustrates the purpose of the Act because it removes the commodity from an unregulated market.

NARI contends that excepted commodities are not subject to the jurisdiction of the Federal Maritime Commission and have been deregulated by law under the 1984 Act. NARI contends that Congress was responding to *National Association of Recycling Industries, Inc. v. Federal Maritime Commission*, 658 F.2d 816 (D.C. Cir. 1980) when it added recycled metal and paper to the list of excepted commodities, and that its intent was to remove them from the Commission's jurisdiction. NARI states that when tariff filing was continued, it was understood that there would be no filing of tariffs on excepted commodities.

Finally, a number of comments argue that policy considerations support a prohibition on voluntary filing.

CMA notes that the 1984 Act added recycled commodities in order to put recycled commodities on the same footing as virgin bulk commodities. Permitting voluntary filing of tariffs on recycled commodities allegedly would allow a carrier to disrupt this competitive parity.

NARI expresses concern over the potential for discrimination that may arise from allowing ocean common carriers and conferences to voluntarily file tariffs on excepted commodities. NARI fears that this would enable carriers and conferences selectively to discriminate against recycled commodities by voluntarily filing tariffs and service contracts applicable to them while other tariffs and service contracts covering competing virgin commodities are fixed in secret and seldom, if ever, filed. NARI argues that this flies in the face of Congress' determination to promote the competitiveness of recycled commodities. NARI finds further evidence of this Con-

gressional policy in the field of railroad legislation and court decision interpreting that legislation.

CMA also contends that voluntary filing is contrary to the minima government intervention purpose of the 1984 Act. For example, in th case of bulk carriers, CMA argues that the Commission would be require to expend resources to determine whether a bulk carrier was a commo carrier. The Commission would then be required to enforce the Act's tarif provisions and thereby allegedly incur further unnecessary administrativ burdens.

CMA argues that voluntary filing does not achieve benefits and tha no legitimate regulatory purpose would be served by allowing it. CMA states that voluntary filing would not enable the Commission to enforc the prohibited acts that are intended to protect against discrimination amon similarly situated shippers because voluntary filing would not provide ship pers with an adequate "price list."

CMA also notes that the 1984 Act directs the Commission not to regulat excepted commodities in the area of terminal tariffs. CMA concludes tha the legislative history thus demonstrates that voluntary filing produces result at odds with Congressional objectives. Finally, CMA argues that voluntar filing is harmful to U.S. trade, particularly in the export of bulk commod ities.

B. Comments Supporting Voluntary Tariff Filing

Several conferences argue that there is nothing in the legislative histor of the amendments to the 1916 Act regarding excepted commodities tha would indicate that Congress intended to preclude the voluntary filing o tariffs on those commodities. TWRA, for example, states that the purpos of the 1961 Amendment was to lessen the administrative burden on carrier and permit them to compete with tramp vessels. IAFC states that th purpose of the 1961 Amendment was to assist conferences as well a shippers and enable liner carriers to compete with tramps for "botto cargo." IAFC finds support for this assertion in the following testimon of Chairman Stakem before the Merchant Marine and Fisheries Committee

> MR. DREWRY. Now, on page 7 of the statement, you would exclude from the filing requirements cargoes loaded in bulk without mark or count.
>
> Take the case of a big shipper who deals in all kinds of things, one of these big American enterprises that produces hard manufactured goods and also deals, maybe, in chemicals in bulk or other bulk commodities.
>
> Would he be thus protected as far as any shipments he was to make of bulk cargoes? Would his shipper contract with the conference allow him to be free to ship any way he wanted to in this type of commodity?

> MR. STAKEM. I think that he would be protected, Mr. Drewry. As you know, the bulk cargo is usually an open rate item for most of the conferences, and the liner ships are in competition with the tramps to put this cargo in as filler cargo.
>
> It seems to us that it is the type of commodity that we would not necessarily require an advance filing of rates on.
>
> I think it would be a little bit impossible in the light of the fact that the tramps are free to do as they please, and it would put the liners in a very bad position in connection with the bottom cargo that they constantly seek.

To Provide for the Operation of Steamship Conferences: Hearings on H.R. 4299 Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries, 87th Cong., 1st Sess. 35–36 (1961).

Similarly, IAFC argues that the 1963 Amendment merely added lumber to the commodities excepted from the mandatory tariff filing requirement of the 1961 Amendment. Again, IAFC notes that the purpose of the 1963 Amendment was to benefit conferences as well as shippers by making lumber ratemaking more flexible and therefore more competitive. IAFC argues that the 1963 Amendment was merely an enabling statute which permitted an additional exception from mandatory tariff filing. IAFC states that there is no evidence in the legislative history of any intention to prohibit the voluntary inclusion of lumber in any tariff on file with the Commission.[1] Finally, IAFC argues that the 1965 Amendment merely reestablished mandatory tariff filing for hardwood lumber.[2]

The conclusion drawn by IAFC and TWRA in their discussion of the 1961, 1963, and 1965 Amendments is that these amendments merely address the question of mandatory tariff filing and that there is no evidence of any Congressional intent to preclude voluntary filing.

USECA also argues that the amendments to the 1916 Act do not reflect any intention to prohibit voluntary tariff filing. USECA suggests that the origin of the 1961 exception for bulk cargo is the Shipping Board Bureau's decision, *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 490 (1935). USECA states that the Board promulgated tariff filing rules that, nevertheless, did not apply "to cargo loaded and carried in bulk without mark or count." This exclusion allegedly was later codified in the 1961 Amendment to the 1916 Act. USECA states that the purpose of the bulk cargo exception

[1] IAFC quotes from a letter dated April 11, 1963 in which the Commission commented that the bill which became P.L. 88–103 was unnecessary because conferences already had sufficient flexibility with regard to rate decreases. H.R. Rep. No. 630, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S. Code Cong. & Adm. News 826, 829–830.

[2] IAFC cites a Commission letter dated September 15, 1965 commenting on the bill which became P.L. 89–303. IAFC suggests that this letter confirms, by implication, conference ratemaking authority over excepted commodities. S. Rep. No. 873, 89th Cong., 1st Sess. (1965) *reprinted in* 1965 U.S. Code Cong. & Adm. News 3834, 3835–3836.

was to provide ocean common carriers with the opportunity to more readil compete with non-regulated ocean tramp carriers.

A number of comments argue that there is no need to go beyond th language of the 1984 Act to resolve the question of the permissibilit of voluntary filing. The Mediterranean Conferences, for example, state tha there is nothing in section 8(a) of the Act, or any other section of th 1984 Act, that precludes voluntary filing. They conclude that, in the absenc of any prohibition, voluntary filing is permitted. Moreover, the Mediterra nean Conferences state that because the language of the Act is clear ther is no need to resort to legislative history and reliance on it is improper

USECA argues that the plain language of section 8(a) merely state it is unlawful not to file tariffs required to be filed by section 8(a). USEC states that it cannot be interpreted to mean that it is unlawful to fil tariffs covering excepted commodities. USECA contends that there is n ambiguity in the language of section 8(a) and so there is no need t go to extrinsic sources such as legislative history. USECA also provide an extensive section-by-section analysis of the 1984 Act in which it contend that the plain language of the Act taken as a whole demonstrates th lawfulness of voluntary filing. USECA also makes a detailed analysis o the legislative history of each of the excepted commodity amendment to the 1916 Act and concludes that nothing in that history precludes vo untary filing. Finally, USECA discusses other relevant legislative histor of the Act and policy considerations which it believes support voluntar filing.

Agreement No. 10050 states that section 8(a) merely excepts certai commodities from mandatory tariff filing requirements. Tampa states tha if Congress had intended to deregulate excepted commodities, it woul have provided for deregulation in all sections of the 1984 Act rather tha merely the tariff filing section. Tampa also states that the Act does no prohibit voluntary filing. TOCHR states that the Act does not preclud voluntary filing and that therefore it is lawful.

A number of carriers note that the Commission's own rules (46 CF 580.1(a)) allow for the voluntary filing of tariffs covering excepted commod ities and that the Commission has permitted such filings since 1961. Th Latin American Conferences state that Congress had three opportunitie since 1961 to prohibit voluntary filing and did not do so. They and othe conferences argue that Congress was aware the Commission's long standin practice of accepting voluntary filings, and therefore may be presume to have confirmed, ratified and sanctioned the Commission's constructio of the statute.

Finally, a number of comments argue that policy considerations favo voluntary filing. TWRA and others point out that one of the benefit of permitting voluntary filing is that shippers will then be afforded th protection against discrimination and the 30-day notice of any rate increase Sea-Land believes that filing subjects the tariff to the mandatory adherenc

requirements of sections 10(b) (1)–(4), 46 U.S.C. app. 1709(b) (1)–(4), and that it would also not be excepted from sections 10(b) (6) (A), (10), (11) or (12), 46 U.S.C. app. 1709(b) (6) (A), 10, 11, 12. Agreement No. 10050 also believes that filing subjects the tariff to sections 10. Thus some argue that voluntary filing should be permitted because it triggers the protections of the tariff filing system.[3]

Central National Gottesman, Inc., a "forest products merchant," states that the 1984 Act does not prohibit filing of rates on excepted commodities. It favors such filing because it, in effect, makes a price list available to shippers and enables a shipper to know if it has obtained the best available rate.

PARN/STC states that the Commission should allow carriers, conferences and marine terminal operators voluntarily to include rates, charges and regulations on excepted commodities in tariffs, but require those provisions to be included in a separate appendix to the tariff reserved exclusively for excepted commodities. This would allow for dissemination of price information without inhibiting pricing flexibility.

The Journal of Commerce also argues that voluntary filing should continue to be permitted because it is a useful vehicle for disseminating information on rates and service.

A number of comments allege that if voluntary filing were not permitted, adverse effects would result. The Pacific Conferences, PARN/STC, and the Journal of Commerce all note ambiguities in the definitions for some excepted commodities. The Pacific Conferences state that a cautious carrier or conference should file a tariff rate so that there is no question of possible violation of section 8 of the Act. PARN/STC foresees even direr consequences, including possible antitrust exposure. IAFC states that a prohibition on voluntary filing would have a deleterious effect on carrier-shipper relationships. It gives as an example project rates which include commodities which are excepted as well as required to be filed. At present, a single project rate covers all such commodities. This allegedly would be interfered with if voluntary filing were prohibited. Finally, Sea-Land argues that time-volume rates on excepted commodities would be unlawful if voluntary filing were prohibited.

[3] A number of conferences, however, do not believe that voluntary filing makes other tariff provisions applicable. The Mediterranean Conferences argue that the 1984 Act tariff requirements pursuant to section 8(a) do not apply to excepted commodities. Thus, the 30-day notice requirement of section 8(d) is not applicable and so filing does not interfere with maximum rate flexibility. The Japan/Korea Conferences argue that even though rates on excepted commodities are voluntarily filed, this does not subject them to the filing and notice requirements of the Act.

The Journal of Commerce also questions whether voluntary filing necessarily subjects the filing party and the tariffs to all the Act's regulatory provisions.

II. Collective Ratemaking

A. Comments Opposing Collective Ratemaking

The commenters opposing voluntary tariff filing on excepted commodities also oppose collective ratemaking on excepted commodities. DOJ, CMA, API, NARI and WSG all oppose allowing conferences to collectively establish rates on excepted commodities. These comments do not dispute the fact that there is nothing in the 1984 Act which expressly excludes excepted commodities from the grant of general ratemaking authority. Rather, they argue from the legislative history of the 1984 Act, and previous amendments to the 1916 Act, that collective ratemaking on excepted commodities was never intended by Congress.

DOJ, for example, asserts that the legislative history indicates that Congress intended to deregulate excepted commodities. DOJ also notes that in the case of terminal services there is a specific Congressional directive in the legislative history of the 1984 Act to the Commission, not to impose any terminal tariff filing requirements for excepted commodities. DOJ states that allowing private parties to voluntarily set such rates would be inconsistent with the intent of Congress.

CMA contends that Congress did not intend to immunize from the antitrust laws the collective activity of ocean common carriers at least with respect to bulk commodities (including bulk chemicals). CMA cites the following passage from the legislative history of H.R. 1878:

> [A] small change was made in the definition of ocean common carrier by deleting the words "bulk cargo vessels". However, the elimination of the term is not intended to extend coverage of this Act to bulk shipments, but merely removes an ambiguity. That is, antitrust immunity granted in H.R. 1878 does not extend to agreements relating to rates and service practices for the transportation of bulk commodities.

Joint Report of the House Merchant Marine and Fisheries Committee and Judiciary Committee on H.R. 1878, 129 *Cong. Rec.* H. 8124 (October 6, 1983). Through this and other references to legislative history, CMA concludes that the Shipping Act of 1984 was not intended to immunize the collective activity of common carriers of bulk commodities.

API contends that allowing collective ratemaking on excepted commodities is particularly anomolous in light of the independent action provision of the 1984 Act. It allegedly would lead to a result which was the opposite of that intended by Congress, *e.g.*, less competition and less price flexibility for excepted commodities than for tariffed commodities. These unintended effects include the following: (1) less competition for excepted commodities than for tariffed commodities; (2) less price flexibility for excepted commodities than for tariffed commodities; (3) less ability of shippers to meet the collective market power of the conference; (4) less rate flexibility

because they must be acted on by a conference; and (5) less rate flexibility because of tariff filing requirements.

NARI asserts that collective ratemaking should not be permitted because excepted commodities were, in effect, deregulated by the 1984 Act.

WSG urges the Commission to declare that collective ratemaking on excepted commodities is unlawful. WSG also states that antitrust immunity should not be extended to excepted commodities.

B. Comments Supporting Collective Ratemaking

IAFC maintains that under the 1916 Act there was no question as to the authority of conferences to collectively establish rates. Section 15 of the Act authorized agreements among common carriers by water "fixing or regulating transportation rates or fares." 46 U.S.C. app. 814. Prior to the Bonner Amendment in 1961, which established mandatory tariff filing, there was no distinction between bulk and other commodities. Therefore, there could be no question of the effect of tariff filing requirements on the scope of conference ratemaking. The authority to fix rates prior to 1961 applied to all kinds of liner rates, including rates on bulk cargo and other excepted commodities.

IAFC contends further that at the time that Congress considered the 1961 Amendment, it was aware that conferences fixed rates on bulk cargo. Congress did nothing to change this. According to IAFC, the 1961 Amendment merely permitted conferences to exclude bulk cargo from their tariffs. There was no intent to remove bulk cargo from conference ratemaking authority.

IAFC contends that subsequent amendments in 1963 and 1965 did nothing to take away conference ratemaking authority. IAFC notes that both amendments were desired by conferences as well as shippers and that conferences would not have supported the bill if it was intended to restrict ratemaking authority.[4]

The conferences generally point out that the language of section 4(a)(1) of the 1984 Act clearly authorizes ocean common carriers to "discuss, fix, or regulate transportation rates." The Japan/Korea Conferences argue that this language is clear on its face and that there are no restrictions as to the commodities on which conferences may fix rates. USECA states that section 4(a)(1) clearly states that the Act applies to carrier agreements to "discuss, fix, or regulate transportation rates," and that there is no qualification of this ratemaking authority. Sea-Land points out that section 4(a)(1) is a general grant of ratemaking authority and that there are no words of limitation in that grant. Agreement No. 10050 states that the

[4] IAFC quotes passages from the Commission's letter of April 11, 1963 commenting on the legislation that stated that the legislation was not necessary because conferences already had enough flexibility with regard to rate decreases. IAFC also quotes from a September 15, 1965 letter of the Commission commenting on the 1965 Amendment which IAFC believes confirms by implication that conferences have ratemaking authority over excepted commodities.

Act does not exclude any commodity from the grant of ratemaking authority IAFC states that section 4(a)(1) is not limited to rates required to b filed in a tariff and that the 1984 Act does not distinguish different kind of commodities as far as ratemaking is concerned. TWRA and the Pacifi Conferences state that section 4(a)(1) authorizes collective ratemaking wit respect to excepted commodities.

The Mediterranean Conferences state that the language of section 4(a (1) is completely clear and therefore controlling and must be adhered to The Japan/Korea Conferences state that the language of section 4(a)(1 is clear and that there is therefore no need to inquire into legislativ history other than to determine whether Congress intended to link section 4, 5 and 6 with section 8(a).

Tampa states that sections 4, 5 and 6 of the 1984 Act neither relieve nor prohibit common carriers or marine terminal operators from filing agree ments that include fixing of rates on commodities which are either excepte from or required to be filed with the Commission. Tampa concludes tha it is lawful for carriers or terminals to fix rates under filed agreements

PARN/STC states that sections 4, 5, 6 and 7 constitute a clear gran of ratemaking authority and antitrust immunity to agreements of carrier and marine terminal operators without regard to the commodities transporte or handled.

TOCHR states that the Act does not exclude excepted commodities fron the grant of general ratemaking authority.

IAFC asserts that the 1984 Act merely expanded the list of excepte commodities. The 1984 Act allegedly did not disturb a conference's author ity to set rates on excepted commodities.

As with voluntary tariff filing on excepted commodities, the carrier and conferences assert that Congress was aware for many years that con ferences agreed upon rates on excepted commodities. TWRA states that under the 1916 Act, conferences set rates on all commodities. IAFC state that Congress knew that conferences fixed rates on bulk commodities an did not prohibit this practice when it passed the 1961 Amendment. Th Latin American Conferences point out that Congress had three separat opportunities to change this practice and did not. The Mediterranean Con ferences conclude that Congress thereby codified this practice. Sea-Lan describes collective ratemaking on excepted commodities as a "long stand ing" practice. The Pacific Conferences state that collective ratemaking i a "barnacle-encrusted" practice.[5]

Finally, the conferences advance two policy arguments as to why collec tive ratemaking should be permitted.[6] TWRA notes that a prohibition o

[5] IAFC notes that, subsequent to the passage of the 1984 Act, Congress corrected certain provisions th were inconsistent with its intent, but did not address collective ratemaking. *See* Pub. L. No. 98-585.

[6] IAFC also suggests a number of adverse effects that would result if collective ratemaking authority denied. IAFC enumerates a number of uncertainties in connection with commodities excepted by the FM pursuant to 46 CFR 580.1(c), special permissions under 46 CFR 580.15, and under section 8(e) of the Ac

collective ratemaking would undermine the conference system and destroy the potential stability which it represents. The Pacific Conferences state this argument in terms of the base cargo that excepted commodities represent. The Pacific Conferences state that taking away ratemaking authority over this base cargo would undermine the conference system.

III. Independent Action

A. Comments Supporting Independent Action

Several commenters dispute the assumed premise of this question, namely that collective ratemaking is permissible.[7] Assuming *arguendo* that such ratemaking would be found to be permissible, then these commenters contend that independent action must also be permitted.

Although CMA disputes the premise of this question, it nevertheless states that it would be inconceivable for the Commission to permit collective ratemaking and voluntary tariff filing on excepted commodities without requiring a conference to permit independent action on such tariffs. CMA argues that it would be a perverse result if excepted commodities, which were intended to be non-tariffed and therefore subject to greater rate flexibility, would not be guaranteed a right of independent action. CMA argues that the Commission could mandate a right of independent action on any tariff voluntarily filed for an excepted commodity. But it concludes that this situation should be avoided by prohibiting voluntary filing of such tariffs.

API states that it would be a travesty and mockery of the Act to allow conferences to prohibit independent action on the very commodities whose rates Congress intended to be particularly responsive to competitive forces. API states that the right of independent action should be guaranteed by the Commission and implemented without disclosure to the conferences and without filing of tariffs. Such a requirement would mitigate the worst effects of conference-initiated tariffs and rules governing excepted commodities. The following effects, however, would allegedly still remain: (1) the inherent inflexibility of rates embodied in tariffs; (2) the restrictions on any independent action which some carriers have placed in their agreements; and (3) the unofficial institutional pressures of conferences against the exercise of independent action. API therefore maintains it would be preferable to prohibit conferences from agreeing upon excepted commodity rates or filing such tariffs.

Central National-Gottesman, Inc. has no objection to voluntary tariff filing, ". . . as long as carriers retain the right of independent action."

[7] NARI states that the question is based on a false premise. WSG says there is no need for independent action if collective rates are not established. CMA and API also dispute the premise of the question but offer comments on the need for independent action should collective ratemaking be permitted. DOJ did not comment on the question of independent action, presumably because it does not accept the premise that conferences may set rates on excepted commodities.

On the question of independent action, U.S.-flag carriers and one termina operator broke ranks with the position of the conferences. Sea-Land state that the Commission can, under its section 17(a) rulemaking authority mandate a right of independent action on excepted commodities. Moreover Sea-Land states that the Commission would be warranted in requiring tha voluntary filing by a conference be accompanied by a voluntary undertakin to allow member lines to take independent action with respect to such items. In addition, Agreement No. 10050 (the U.S.-Flag Discussion Agreement) also takes the position that the Commission should make independen action mandatory on excepted commodities. TOCHR also believes that independent action should be allowed on excepted commodity rates.

B. Comments Opposing Independent Action

TWRA states that section 5(b)(8) of the Act only mandates independen action on items required to be filed in a tariff. TWRA states that the Commission has no power to expand the right of independent action beyond that provided in section 5(b)(8).

USECA states that Congress did not mandate independent action with regard to excepted commodities but left the matter to conferences to determine for themselves. USECA believes the Commission may not mandate independent action by regulation because such a regulation would not be consistent with the intent of the Act.

The Mediterranean Conferences state that the clear language of section 5(b)(8) is controlling. Independent action is required only for items subject to mandatory tariff filing. The Mediterranean Conferences state that independent action on excepted commodities is permissive and that conferences cannot be required to provide it.

The Latin American Conferences also believe that the plain language of section 5(b)(8) is controlling.

The Japan-Korea Conferences state that the Commission has no authority to require independent action on excepted commodities. They state that the language of section 5(b)(8) is clear and so there is no need to examine legislative history.

The Pacific Conferences state that the Commission cannot go beyond section 5(b)(8) and has no authority to force an across-the-board modification of conference agreements.

IAFC states that the plain meaning of the statute is that there shall be independent action only on section 8(a) tariff items. IAFC argues that this does not lead to an illogical result. It merely allows conferences to set rates on vital base cargo but to allow independent action on 8(a) tariff items.

Finally, Tampa states that section 5(b)(8) refers only to items that were required to be filed in a tariff. Tampa concludes that independent action is not mandatory on excepted commodities.

V. Service Contracts

A. Comments Opposing Voluntary Filing of Service Contracts

DOJ contends that voluntary filing of service contracts on excepted commodities is unlawful. DOJ notes that section 8(c) of the Act distinguishes excepted commodity service contracts from other types. DOJ interprets this distinction to mean that such contracts are to be unregulated and not subject to the collective market power of conferences. DOJ also contends that the absence of a mandatory right of independent action with regard to service contracts indicates that service contracts are not to be subjected to any tariff filing regime.

CMA argues that voluntary filing of the essential terms of service contracts covering excepted commodities should not be allowed as it would reduce the rate flexibility on excepted commodities. In addition, CMA states that the Commission could not adequately regulate such filings to ensure fair treatment of similarly situated shippers because a common carrier or conference could selectively choose to file some contracts and not others.

Great Southern Paper supports the position that service contracts covering excepted commodities should not be required to be filed. According to Great Southern Paper, a filing requirement would ". . . circumvent the rate filing exemption that our industry so actively and successfully pursued in the Shipping Act of 1984.

API states that the same legislative and policy considerations which render unlawful the filing of tariffs on such commodities also render unlawful the filing of service contracts.

NARI's position is that the filing of service contracts covering excepted commodities should not be permitted.

WSG also states that the Commission should not permit the voluntary filing of service contracts covering excepted commodities.

B. Comments Supporting Voluntary Filing of Service Contracts

The Japan/Korea Conferences note that the Commission's own regulations (46 CFR 580.7(b) (1) and (2)), currently allow the filing of the terms of service contracts on excepted commodities. The Japan/Korea Conferences state that there is no difference between voluntary filing of tariffs covering excepted commodities and voluntary filing of service contracts.

USECA states that neither the plain language of the Act nor its legislative history or purpose reveals any legislative intent to render it unlawful for carriers or conferences to file service contracts, either including both excepted and non-excepted commodities or excepted commodities only.

The Mediterranean Conferences and Agreement No. 10050 note that section 8(c) merely exempts service contracts covering excepted commodities from mandatory filing and assert that voluntary filing is permissible. The Pacific Conferences, IAFC, and TOCHR all contend that the same reasoning which supports voluntary filing of tariffs applies to voluntary filing of

service contracts. The Latin American Conferences state that voluntary filing is lawful.

TWRA states that it is easier to make the case for voluntary filing of service contracts because service contracts cover an extended period of time. Thus, there is less concern for speed and flexibility than there is with tariffs. TWRA also notes that filing promotes competition by giving better notice of market conditions to interested parties.

The Journal of Commerce supports retention of existing Commission rules allowing voluntary filing of essential terms of service contracts. Central National-Gottesman, Inc. urges the Commission to permit the voluntary filing of essential terms of service contracts because it provides useful information to shippers.

Sea-Land believes that voluntary filing should be permitted but that this should trigger the same regulatory requirements as apply to service contracts subject to mandatory filing. Agreement No. 10050 believes that optional filings should be permitted.

TOCHR believes that voluntary filing should be permitted. Tampa states that voluntary filing is not unlawful. If it were, then any contract covering a mixture of excepted and non-excepted commodities would have to be prepared as separate contracts. IAFC points out a number of adverse effects that would result if voluntary filing were prohibited.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1459
APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR THE BENEFIT OF FICKS REED CO.

ORDER OF PARTIAL ADOPTION

May 6, 1987

The Commission determined to review the Initial Decision ("I.D.") issued in this proceeding in which the Administrative Law Judge ("Presiding Officer") granted permission pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. §1707(e) ("the Act"), to American President Lines, Ltd. ("APL") to refund $585.00 of the freight charges collected from Ficks Reed Co. on a shipment of rattan furniture that moved from Jakarta, Indonesia, to Cincinnati, Ohio.

BACKGROUND

The Asia North America Eastbound Rate Agreement ("ANERA"), of which APL is a member, approved, on October 3, 1985, a rate of $4090 per 40-foot container, including a $290 CY destination delivery charge, for the transportation of rattan furniture from Jakarta to Cincinnati. The rate was to be filed in APL's independent tariff, as ANERA did not, at the time, publish tariffs on behalf of its members. A telex message from APL's Hong Kong office to its Pricing & Government Cargo Service in Oakland, California, directing the filing of the $4090 rate, was misplaced. As a result, the rate was not on file with the Commission when the shipment sailed from Jakarta on January 14, 1986. APL apparently did not discover the error until June, 1986. It applied for a waiver on July 11, 1986.

The Presiding Officer held that the failure to file the intended rate was the kind of mistake contemplated by section 8(e) of the Act and granted the application.[1] As to the tariff notice required by section 8(e)(3), the Presiding Officer accepted a tariff filed by ANERA on June 26, 1986,

[1] Section 8(e) authorizes 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 he 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, ...
46 U.S.C. app. §1707(e).

in which a "NOTE" at the bottom of the page indicates that certai rates, including the $4090 rate, "were effective for APL . . . during th period October 8, 1985, through January 25, 1986. . . ."

DISCUSSION

The Presiding Officer correctly determined that the error which led t APL's failure to timely file the intended rate was of a type for whic section 8(e) of the Act affords relief. Therefore, review here is limite to the tariff filed in this proceeding by ANERA on June 26, 1986 ("Jun 26 filing"), on which the waiver is based, and the Presiding Officer failure to order the publication of the tariff notice referred to in sectic 8(e)(3).

Section 8(e)(2) requires the carrier to file a "new tariff" before applyin for a refund or waiver, while section 8(e)(3) refers to a "notice" whic is to be published in the carrier's tariff by order of the Commissio after the application is granted. The Presiding Officer held the June 2 filing to be the new tariff referred to in section 8(e)(2) and also viewe the "NOTE" in that same tariff as eliminating the need for the publicatic of a section 8(e)(3) notice, thus finding one filing to satisfy the requiremen of both sections 8(e)(2) and 8(e)(3).[2]

The first issue, therefore, is whether the Presiding Officer is corre and the June 26 filing may also be considered to be the "new tariff referred to in section 8(e)(2). The use in the statute of two different tern tends to indicate different types of filings with different functions. Whi section 8(e)(2) sets forth the rate the carrier seeks permission to appl section 8(e)(3) reflects the rate approved by the Commission. A sectic 8(e)(3) notice is published at the discretion of the Commission. The filir of a section 8(e)(2) tariff, however, is mandatory: unless the carrier, pri to applying for relief, files the tariff referred to in section 8(e)(2), t Commission has no authority to consider the merits of the application In this instance, the $4090 rate is shown to have been in effect at a earlier date and to have expired before the June 26 tariff was filed wi the Commission.[4]

The retroactive nature of the June 26 filing raises yet another issu Neither the statute nor the rules governing the filing of rates in forei commerce authorize such a filing.[5] Section 8(d) of the Act provides th a rate may become effective at the earliest upon filing with the Commissio 46 U.S.C. app. § 1707(d), except by action of the Commission taken purs

[2] I.D. at 3–4.

[3] *Louis Furth, Inc. v. Sea-Land Service, Inc.*, 20 F.M.C. 186 (1977); *Oppenheimer Intercontinental Co v. South African Marine Corp.*, 15 F.M.C. 49, 52 (1971). These cases were decided under former sect 18(b)(3) of the Shipping Act, 1916 (formerly 46 U.S.C. §817(b)(3)) (the 1916 Act), the predecessor to sect 8(e) of the 1984 Act.

[4] The rate was, in fact, canceled before it was filed.

[5] *See* Publishing and Filing of Tariffs by Common Carriers in the Foreign Commerce of the United Stat 46 C.F.R. Part 580, section 580(b) and (c)(1) (1985).

ant to section 8(e)(3). Furthermore, section 8(f), 46 U.S.C. app. § 1707(f), provides that the Commission "may reject a tariff that is not filed in conformity with this section and its regulations."[6] Consequently, the June 26 filing could have been rejected for failure to comply both with the statute and the Commission's rules.

However, the Commission has in the past, on at least two occasions, granted relief on tariffs filed by a carrier or a conference effective earlier than the date of filing.[7] In *Application of Japan Line (U.S.A.) Ltd. for Japan Line Ltd. for Benefit of Nomura (America) Corp.*, 28 F.M.C. 825 (1980) ("*Japan Line*"), the Commission adopted the Initial Decision granting relief on the basis of a tariff filed by the Pacific Westbound Conference that contained two rates for the same commodity: a higher rate which appeared in the body of the tariff and a lower rate set forth in a notice with an earlier effective date. In Special Docket No. 901, *Application of Delta Steamship Lines, Inc. for the Benefit of Commodity Credit Corp.* (Initial Decision served June 17, 1982) ("*Delta Lines*"), the Presiding Officer accepted as valid the new tariff filed by the carrier in which the rate sought to be applied was shown as being effective earlier than the date of filing with the Commission. The decision became administratively final by notice served August 5, 1982.[8]

In view of the carrier's apparent reliance on the *Japan Line* and *Delta Lines* decisions, and because of the failure to timely reject the June 26 tariff, the Commission will adopt the Presiding Officer's grant of the waiver. However, a tariff of the type filed in this proceeding will not in the future be deemed to satisfy the "new tariff" requirement in section 8(e)(2). The decisions in *Japan Line* and *Delta Lines, supra*, are, to that extent, overruled.

The Commission finds inappropriate, however, the Presiding Officer's reliance on the "NOTE" in the June 26 filing as a substitute for the Commission ordered notice referred to in section 8(e)(3) of the Act. As mentioned the "NOTE" shows the $4090 as having been in effect from October 8, 1985 through January 25, 1986. Under the guidelines established in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia,* 28 F.M.C. 421 (1986), the effective date of the corrected tariff, referred to in section 8(e)(2), on which the refund or waiver is to be based runs from the date the mistake in filing occurred through the day preceding the filing of the corrected tariff, but in no event earlier than 180 days from the date of the filing of the application, which in this

[6] *See also* 46 CFR 580.10(b) (1985).

[7] These decisions were also rendered under section 18(b) of the 1916 Act.

[8] It should be noted that in neither *Japan Line* nor *Delta Lines* did the Commission address the propriety of the tariffs under former sections 18(b)(2) and 18(b)(4) of the 1916 Act (the predecessors to sections 8(d) and (f) of the Act).

instance would be January 11, 1986.[9] Although the application does n explain the January 25 termination date, the Commission takes offici notice of a tariff filed by APL, effective January 26, 1986, with a differe rate for the same service, which would have cancelled the $4090 ra had it been timely filed.[10] Consequently, ANERA will be required to fi in its tariff a notice, as set forth below showing the rate on which th waiver is based.

THEREFORE, IT IS ORDERED, That the Asia North America Eastbour 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. 1459, that effective January 11, 1986, and continuing through January 25, 1986, inclusive, the rate on Rattan Furniture from Jakarta, Singapore to Cincinnati, OH per 40/G container is $4090.00, not subject to CY Destination Delivery Charge. This Notice is effective for purposes of refund or waiver of freight charges on any shipment of the commodity described which may have been carried by APL during the specified period of time.

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

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

By the Commission.

(S) JOSEPH POLKING
Secretary

[9] Citing the decision in *Application of Sea-Land Corporation on behalf of Sea-Land Service, Inc. for th Benefit of Forwarding Services, Inc. as Agent for Pana-York Shipping Corporation/Frito Lay*, 28 F.M.C. 42 (1986), the Presiding Officer made the rate applicable 180 days from the date the application was filed– that is, January 11, 1986, rather than October 8, 1985, as appears in the "NOTE."

[10] American President Lines, Ltd. Eastbound Intermodal Tariff No. 715-B I.C.C. APLS 715-B, FMC No 124, 15 Rev. page 155, effective January 26, 1986.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1459

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR THE BENEFIT OF FICKS REED CO.[1]

Application to refund freight charges of $585.00 granted.

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

Partially Adopted May 6, 1987

This application[3] is for permission to refund $585.00 of freight charges arising out of one shipment of Rattan Furniture from T.G. Priok, Jakarta, to Cincinnati, Ohio.

The original tariff involved in this proceeding is American President Lines, Ltd. (APL) Eastbound Intermodal Freight Tariff No. 715–B, I.C.C. APLS 715–B, FMC No. 124, from Foreign Ports as noted in Rule 1–A to Destination Carriers' Terminals in the United States. Prior to October 3, 1985, the rate in the tariff for Rattan Furniture to Cincinnati was $4,385.00 plus a CY Destination Delivery Charge of $290.00.[4] On October 3, 1985, members of the Asia North American Eastbound Rate Agreement (ANERA) met in Hong Kong. APL proposed a set of rates for Rattan Furniture of $4,090 per 40 foot container, inclusive of the Destination Delivery Charge. The conference member lines agreed to adopt the proposed rate,[5] which rate should then have been filed in APL's independent tariff, since ANERA did not then have any tariffs filed on behalf of member lines. A telex message directing the tariff filing was sent from APL's Hong Kong office to the Pricing & Government Services Cargo Services office in Oakland, California. However, the telex was misplaced and the tariff was not timely filed.

The shipment involved here began on January 14, 1986. At that time the $4,385.00 rate, plus CY destination charges, was on file and the shipper paid the freight bill of $4,675.00.[6] The applicant did not discover the error until June of 1986. By that time APL's independent tariff had been superseded by ANERA Common Rate Tariff No. FMC–17, and the corrected

[1] The original title of the case indicated the beneficiary was the Westinghouse Elevator Co. This was due to a computer error and the correct beneficiary (shipper) is set forth above.

[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] The application was mailed on July 11, 1986, within the 180 day statutory period set forth in section 8(e), Shipping Act, 1984.

[4] Application, Exhibit 2.

[5] Application, Exhibit 4 (enclosed with the letter dated November 4, 1986, from Douglas A. Grandt).

[6] Application, Exhibit 1.

rate was then filed.[7] The applicant now seeks permission to refund th difference in the freight charges between the old and the negotiated rat such difference being $585.00.

Section 8(e) of the Shipping Act, 1984, permits the Commission t waive or refund collection of freight charges where it appears there wa an error in a tariff of a clerical nature or an error due to inadvertenc in failing to file a new tariff. Here, there is no question but that fo the misplacing of a telex communication the rate APL intended to fil would have been controlling in regard to the shipment involved here. Th mistake involved is precisely the kind of error Congress sought to rectif in enacting section 8(e).

The application conforms to the requirements of Rule 92(a), Specia Docket Application, Rules of Practice and Procedure, 46 CFR 502.92(a) and therefore after consideration of the application, the exhibits attache to it, and the entire record, it is held that:

1. There was an error of a clerical or administrative nature which resulte in the failure to have timely filed a tariff containing a rate of $4,09 per 40 foot container, inclusive of Destination Delivery Charge, on Ratta Furniture moving from T.G. Priok, Jakarta, to Cincinnati, Ohio, whic rate would have been in effect had the error not been made.

2. The refund will not result in discrimination among shippers,[8] an there is no evidence that any carrier or ports would suffer discriminatio should the application be granted.

3. Prior to applying for the refund the applicant filed a new tariff whic sets forth the rate upon which the refund should be based.[9]

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

Wherefore, in consideration of the above and the entire record, it is *Ordered*, that permission is granted APL to refund a portion of freigh charges in the amount of $585.00 to the Ficks Reed Company, subjec to any necessary adjustments to freight forwarder fees or the like.

Also, it is noted that the pertinent ANERA tariff already contains notice that the $4,090.00 rate, including CY destination charges, was i effect from October 8, 1985, through January 25, 1986, so that no furthe notice is required at this time. However, insofar as shipments occurrin before January 11, 1986, are concerned, the Commission would deny per mission to allow any waiver or refund of freight charges.[10]

(S) JOSEPH N. INGOLIA
Aministrative Law Judge

[7] Application, Exhibit 3.

[8] The applicants state that there were no other shipments of the same commodity during the pertinent tim period involved here.

[9] As has been noted, at the time the correction was made ANERA's tariff had superseded the APL Tarif and therefore, the correction was made in the applicable tariff then extant.

[10] See *Application of Sea-Land Corporation on Behalf of Sea-Land Service, Inc. as Agent for Pana-Yor Shipping Corporation/Frito-Lay (Pana-York)*, Special Docket No. 1412 (28 F.M.C. 427).

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 516, 559, AND 572]

DOCKET NO. 85–10

MARINE TERMINAL AGREEMENTS

May 14, 1987

ACTION: Final Rule.

SUMMARY: This exempts marine terminal agreements (other tha marine terminal conference, interconference, joint ventur and discussion agreements) from the waiting period re quirement of the Shipping Act of 1984 and from th approval requirement of the Shipping Act, 1916. Th Final Rule establishes a uniform exemption procedur conditioned upon the filing of the agreement and *Federa Register* publication. The exemptions become effectiv upon the filing of the agreement with the Federal Mari time Commission. The Final Rule shall be publishe as amendments to Part 559 and Subpart C of Part 57 of the Code of Federal Regulations, respectively.

EFFECTIVE DATE: The amendments to Part 559 shall become effective Jul 20, 1987, or upon the receipt of OMB clearance fo the collection of information requirements, whichever i later. OMB approval will be published when receive The amendments to Part 572 shall become effective Jul 20, 1987.

SUPPLEMENTARY INFORMATION:

By Notice of Proposed Rulemaking published in the *Federal Registe* on April 5, 1985 (50 FR 13617) pursuant to sections 16 and 17 of th Shipping Act of 1984 (1984 Act), 46 U.S.C. app. 1715 and 1716, an sections 35 and 43 of the Shipping Act, 1916 (1916 Act), 46 U.S.C app. 833a and 841a, the Commission invited comments on the exemptio of certain classes of marine terminal agreements from the filing and/o waiting period requirements of section 5 of the 1984 Act, 46 U.S.C. app 1705, and from the filing and/or approval requirements of section 15 o the 1916 Act, 46 U.S.C. app. 814.[1] The Proposed Rule implemented the Commissioner Robert Setrakian's recommendations in *Report of Inquir Officer—Part I* (served September 26, 1984 (49 FR 38987)) in Federa Maritime Commission Docket No. 83–38, *Notice of Inquiry and Inten to Review Regulation of Ports and Marine Terminal Operators.*

[1] A correction to the Supplementary Information of the Proposed Rule was published in the *Federal Reg ister* on May 10, 1985 (50 FR 19727).

The Proposed Rule would have incorporated the exemptions for marine terminal agreements in a new Part 516 of Title 46 of the Code of Federal Regulations. In the interest of maintaining the integrity of the current organizational scheme, the exemptions will now be included in existing Parts 559 and 572 of the Code of Federal Regulations, which currently set forth agreements that are exempt from requirements of the 1916 Act and the 1984 Act, respectively.

Fifteen port, marine terminal operator, trade association and ocean common carrier interests filed comments in response to the Commission's Notice. These are: (1) the Maryland Port Administration (MPA); (2) the Port of Sacramento (Sacramento); (3) the Terminal Operators Conference of Hampton Roads (TOCHR); (4) the Virginia Port Authority and Virginia International Terminals (collectively, VPA); (5) the Port of Houston Authority of Harris County, Texas (Port of Houston); (6) American President Lines, Ltd. (APL); (7) the Port of Oakland (Oakland); (8) Matson Terminals, Inc. (Matson); (9) the Houston Port Bureau, Inc. (Houston Port Bureau); (10) the Tampa Port Authority (Tampa); (11) the American Association of Port Authorities (AAPA); (12) the Port of Seattle (Seattle); (13) Sea-Land Service, Inc. (Sea-Land); (14) the United States Atlantic & Gulf Ports/Italy France & Spain Freight Conference (Conference); and (15) the Jacksonville Port Authority (Jacksonville).

All of the commenters support at least a partial exemption for marine terminal agreements, other than marine terminal conference and interconference agreements, from the waiting period/approval requirements of the 1984 and 1916 Acts. A majority recommend that all exempt agreements be filed with the Commission for *Federal Register* publication. Some of the commenters favor a pre-effectiveness review procedure while others support the proposal that the exemption become effective immediately upon an agreement's filing. A number of commenters also addressed the Commission's policy concerning agreements that relate back to events or activities that occurred before the agreement became effective or was approved pursuant to the appropriate Shipping Act.[2]

DISCUSSION [3]

After careful consideration of the comments, we are establishing a uniform waiting period/approval exemption procedure for all classes of marine

[2] On December 17, 1985, the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (50 FR 51418) in Docket No. 85-22, *Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984*. Docket No. 85-22 proposed to add a new paragraph (h) to Part 572 setting forth the Commission's policy with regard to agreement provisions that relate back to events that occurred before the agreement's effectiveness or approval. By separate Notice served this date, the Commission has determined to withdraw the proposed rule and to continue to address retroactive agreement provisions on an *ad hoc* basis.

[3] This discussion addresses those sections of proposed Part 516 that are being retained in the Final Rule. Certain sections, such as proposed section 516.3 "Policy and Scope," are not being retained and will not be addressed herein. It indicates, however, where the retained provisions of Part 516 will appear in Parts 559 and/or 572.

terminal agreements, other than marine terminal conference, interconference, joint venture, and discussion agreements. This procedure requires agreements to be filed and published in the *Federal Register,* with the exemption becoming effective upon the agreement's filing. The Final Rule should serve to reduce regulatory delays to a minimum while preserving the benefits derived from prompt public notice of the existence and content of marine terminal agreements. For the reasons more fully explained below, we have determined that the Final Rule will not substantially impair effective regulation by the Commission, be unjustly discriminatory or detrimental to commerce within the meaning of section 16 of the 1984 Act and section 35 of the 1916 Act; nor result in a substantial reduction in competition within the meaning of section 16 of the 1984 Act.

We have considered all of the comments received in this proceeding and the Supplementary Information discusses some of the more significant issues raised by the comments. Any comments not expressly discussed have either been incorporated as a technical change without discussion, have been found to be mooted by the changes incorporated in the Final Rule, or have been found to be irrelevant or without merit.

A. Proposed sections 516.4(a) and (e)—"Agreement" and "Marine Terminal Agreement" (now section 559.7(a) and section 572.307(a))

Proposed section 516.5(a) defined the term "agreement" for the purposes of the rule. This definition was narrowly drawn to exclude agreement provisions relating back to activity or events that occurred prior to an agreement's execution. Proposed section 516.4(d) defined the term "marine terminal agreement." The Final Rule combines these definitions under the term "marine terminal agreement." However, because the Final Rule exempts the agreement only upon filing, the term "marine terminal agreement" is defined to only include agreements that apply to "future, prospective activities" that occur after filing. In response to comments filed in this proceeding and consistent with the Commission's action taken this date in Docket No. 85–22, *supra,* the Final Rule deletes specific references to unacceptable types of agreement provisions. It is extremely difficult, if not impossible, to prescribe a rule which addresses the legitimate concerns of the commenters while at the same time providing clear, definitive guidelines covering all potential variant situations. Accordingly, determinations as to retroactivity will continue to be made on an *ad hoc* basis.

Four commenters urge clarification as to the manner in which the exemption should apply to agreement provisions relating to activity or events occurring prior to an agreement's execution. VPA notes that neither the 1916 and 1984 Acts nor the cases interpreting them provide adequate guidance in this area, and states that a number of valid factors in the business environment could result in entirely reasonable circumstances where parties to marine terminal agreements—wholly lacking unlawful intent—

might lock in triggering events or dates ultimately predating the agreement's actual effectiveness. APL believes that the Proposed Rule may blur the distinction between agreement provisions which are, on the one hand, prospective in effect, but which quite properly relate back in terms of an accounting or an adjustment period or some other measure of future performance, and, on the other hand, provisions which on their face provide for performance which predates the filing of an agreement. Accordingly, APL recommends revising the proposed definition to exclude agreement provisions that on their face become effective as of a date, or as of an event, or as of any activity, occurring prior to the agreement' s execution, rather than categorically excluding all agreement provisions relating back to pre-execution activity or events.

Oakland is encouraged to see a clear statement on the retroactivity issue in the Proposed Rule, stating that it has found some uncertainty concerning the acceptability of pre-execution provisions under the Commission's precedents. AAPA urges the Commission to advise whether preapproval events may properly be included in marine terminal agreements.

The complexity of the retroactivity issue is amply attested to by the comments which have been received in this proceeding and in Docket No. 85–22, *supra*. The Commission limited the exemption provided by the rule proposed in this proceeding to those agreements which relate to prospective events or activities on the grounds that is unlawful to implement an agreement that has not been approved, become effective or exempted from applicable 1916 or 1984 Act requirements. *See* 46 U.S.C. app. 816, 833a, 1704, 1706(a), 1709(a) and 1715. The Commission may not therefore exempt, or otherwise act to grant antitrust immunity to an agreement or the activity that occurred thereunder prior to the agreement being made lawful under the applicable Shipping Act. *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966). *See also, Carnation v. Pacific Westbound Conference*, 383 U.S. 213 (1966); *Pacific Coast European Conference v. FMC*, 439 F.2d 514 (D.C. Cir. 1970); *River Plate and Brazil Conference v. Pressed Steel Car Co.*, 327 F.2d 60 (2d Cir. 1955). The Final Rule continues the limitation to the exemption conferred and defines the term "marine terminal agreement" in sections 559.7(a) and 572.307(a) to limit the exemption provided to those arrangements which apply solely to prospective activities or events.

Finally, the Final Rule also clarifies that the definition of "marine terminal agreement" (and therefore any exemption accorded herein to that class of agreement) does not apply to joint venture arrangements among marine terminal operations. Given their significant and possible competitive impact, these arrangements will continue to be subject to the filing and approval/waiting period requirements of the 1916 and 1984 Acts.

B. Proposed sections 516.5(a) and (b)—Marine Terminal Agreements—Exemptions (now sections 559.7(f) and 572.307(e))

Proposed sections 516.5(a) and (b) contained the operative provisions exempting certain classes of marine terminal agreements from the filing and/or waiting period requirements of the 1984 Act, or from the filing and/or approval requirements of the 1916 Act, depending on which Act applies to the agreement in question. Two types of exemptions were proposed, which were differentiated on the basis of the likely anticompetitive impacts of the classes of agreement involved. The Supplementary Information to the Proposed Rule also invited comment on an alternative to each type of exemption.

The first alternative was set forth in section 516.5(a) and proposed an exemption from both Acts' filing requirements (hereinafter referred to as the "Paragraph (a) Exemption") for four classes of agreements: (1) landlord-tenant marine terminal facility leases; (2) agreements relating to marine terminal facilities or services used in connection with the handling of proprietary cargo; (3) agreements relating to the financing or construction of marine terminal facilities; and (4) agreements relating to off-dock container freight station facilities or services (the four classes hereinafter referred to as "Paragraph (a) Agreements").

We also invited comments on a procedure that would exempt Paragraph (a) Agreements from only the waiting period/approval requirements, on condition that they be filed for informational purposes and *Federal Register* publication (hereinafter referred to as the "Paragraph (a) Exemption Alternative"). The exemption provided by the Paragraph (a) Exemption Alternative would become effective upon filing as the Commission did not intend to substantially review these agreements before they were implemented. The Commission proposed this Alternative because of its concern that agreements should generally be made available to the maritime community as a matter of public information.

The second type of exemption, as proposed in section 516.5(b), provided an exemption from the 1984/1916 Acts' waiting period/approval requirements (hereinafter referred to as the "Paragraph (b) Exemption") for classes of marine terminal agreements other than Paragraph (a) Agreements, with the exception of marine terminal conference, marine terminal interconference and marine terminal discussion agreements, on condition that they be filed for *Federal Register* publication. (These "other" marine terminal agreements are hereinafter referred to as "Paragraph (b) Agreements").[4] Again, no substantive pre-implementation review of these agreements would be undertaken.

We also invited comments on an alternative exemption for Paragraph (b) Agreements which would provide a substantive pre-effectiveness review procedure to ensure overall conformity with the exemption's standards and the Commission's rules (hereinafter referred to as the "Paragraph (b) Ex-

[4] Terminal services arrangements, berthing agreements and other such arrangements are examples of Paragraph (b) Agreements.

emption Alternative''). Under this Alternative, the exemption would take effect on the earlier of: (1) twenty-one days after the filing of the agreement; or (2) the date of the letter from the Commission advising that the agreement has been accepted for exemption. An agreement not accepted for exemption under the Paragraph (b) Exemption Alternative would instead be processed for effectiveness or approval under the normal procedures prescribed in 46 CFR Part 572 or 560, as appropriate for the category of agreement involved.

Fourteen commenters specifically addressed proposed section 516.5(a): one favors the Paragraph (a) Exemption in its proposed form; four recommend that certain other agreements be designated Paragraph (a) Agreements; and nine urge adoption of the Paragraph (a) Exemption Alternative. TOCHR favors adoption of the Paragraph (a) Exemption in its proposed form.

Of the four commenters recommending that other types of agreements be designated Paragraph (a) Agreements, MPA and APL suggest inclusion of marine terminal leases where the lessor retains some control over the facility through its public tariff. Matson urges the Commission to classify marine terminal services agreements between marine terminal operators and their common carrier customers as Paragraph (a) Agreements. Matson argues that there is competition among terminal operators performing terminal services and there is therefore no regulatory need to file such agreements. However, if this suggestion is not adopted, Matson urges enforcement of the requirement that complete marine terminal services agreements be filed, including the rates and charges agreed to by the parties involved.

The Conference recommends that all marine terminal agreements, except marine terminal conference agreements, be classified as Paragraph (a) Agreements. The Conference argues that the majority of such agreements have no anticompetitive effects, due to the availability of such facilities and services, as well as the innocuous, purely operational nature of the arrangements involved. The Conference also urges elimination of section 516.5(a)(3), which requires furnishing exempted agreements to any interested party, stating that this procedure is without precedent in Commission practice and is susceptible to abuse through ''fishing expeditions'' by carriers and terminals solely interested in keeping abreast of competitors' terminal rates and conditions.

Whatever the merits of the various recommendations to expand the types of agreements classified as Paragraph (a) Agreements, they are beyond the scope of this rulemaking and will not be addressed further. With regard to Matson's comments concerning the need to file complete marine terminal agreements, we believe that the Final Rule makes clear that agreements

are not entitled to the exemption if they do not completely set forth the rates and charges agreed to by the parties.[5]

A majority of commenters support the Paragraph (a) Exemption Alternative in one form or another, on the grounds that it would allow all interested parties timely and accurate notice of the existence and content of agreements that may affect them, protect the Commission and other interested parties from the loss of relevant information that would otherwise be in the agreement parties' private files,[6] and enable negotiations and decisions in the industry to be based on actual knowledge of the relevant facts.

Many commenters urge the Commission to avoid artificial distinctions between classes of agreements and to treat all classes the same. The division of marine terminal agreements into different categories for exemption purposes, some of which would no longer be filed and others continuing to be filed but exempt from subsequent waiting period/approval requirements, allegedly would create uncertainty concerning which agreements should be filed; may be discriminatory as between the types of agreements and carriers involved, particularly as to off-dock CFS agreements; and would render effective regulation of agreements entitled to the Paragraph (a) Exemption impossible, since there would be no effective, uniform and timely procedure to ascertain the nature of an agreement to ensure that it properly falls within the exemption. Several of these commenters note that the Paragraph (a) Exemption Alternative would create no additional burden for marine terminal operators in comparison to the system currently in place, and is similar to current procedures, while affording a significant savings in time.

The reasons advanced in support of the Paragraph (a) Exemption Alternative are meritorious and this Alternative, modified as discussed below, is adopted in the Final Rule. The common thread running through virtually all of the comments supporting this Alternative is that marine terminal agreements falling within the scope of the 1984 or 1916 Acts should generally be made available to the maritime community as a matter of public information. The concern here is that all interests that are not parties

[5] The Commission has recently received numerous inquiries and requests concerning its requirement that marine terminal operators' charges for terminal services be set forth in an agreement on file with the Commission or separately reflected in a filed tariff. As a result of these inquiries, and the apparent confusion regarding the Commission's requirements, the Commission gave notice that it would waive assessing penalties for the pre-filing implementation of such terminal services agreements until a formal study of the issue had been completed. *Notice of Waiver of Penalties*, 51 FR 23154 (June 25, 1986). Because there still appeared to be some continuing confusion regarding its requirement, the Commission on October 15, 1986 extended indefinitely the waiver of penalties provided by the June Notice. The Commission, by separate Order served this date is instituting Fact Finding Investigation No. 17 to study this matter. The Commission is also issuing this date a Second Supplemental Notice of Waiver of Penalties to extend the June Notice.

[6] Sea-Land argues that the Paragraph (a) Exemption would be counterproductive to the Commission's obligations under section 18 of the 1984 Act, 46 U.S.C. app. 1717, which requires the Commission to collect and analyze information concerning the Act's impact on the international ocean shipping industry, and to submit a report thereon specifically addressing, among other things, the need for antitrust immunity for ports and marine terminals.

to an agreement—but nonetheless may be affected by the agreement—have timely and accurate knowledge of the agreement's existence and content.

The objections to dividing marine terminal facility and services agreements into classes for exemption purposes are also well supported. Marine terminal facility and services agreements are often "mixed" in their characteristics. As a result, the proposed Paragraph (a) Exemption would not apply to agreements which, while primarily landlord-tenant leases or other arrangements described in section 516.5(a) of the Proposed Rule, also include other activities which would not fit within the Paragraph (a) Agreement category. Moreover, the several recommendations for aggregating all marine terminal facility and services agreements into a single class for uniform treatment for exemption purposes are well supported in logic. The adoption of this approach should result in a significantly clarified and more easily administered Final Rule.

Eleven commenters specifically address proposed section 516.5(b): four support the Paragraph (b) Exemption as proposed; another would classify intra-port discussion agreements as Paragraph (a) Agreements; two suggest that some or all of the agreements included as Paragraph (b) Agreements be instead classified as Paragraph (a) Agreements; and four support the Paragraph (b) Exemption Alternative.

Sacramento, Tampa, Seattle and Sea-Land favor the Paragraph (b) Exemption without substantive change. They state that this procedure would allow all interested parties sufficient and timely notice of agreements that may affect them, provide adequate safeguards to make the Paragraph (b) Exemption Alternative unnecessary and avoid significant and unnecessary delay to the parties. Tampa believes that this exemption would provide a basis for ensuring that Congress continues the antitrust exemption presently afforded marine terminal agreements by the 1916 and 1984 Shipping Acts. Seattle suggests clarifying the effective date of the Paragraph (b) Exemption to deem an agreement to be "filed" when deposited in the United States mail or delivered to a courier for delivery. Seattle also urges the Commission to reduce the number of copies required to be filed to the absolute minimum necessary—perhaps a true original and two copies—in view of the cost and time consumed in providing the oversized exhibits often included in a terminal lease.

The Final Rule does not adopt Seattle's suggested technical modifications. The filing "date" for exemption purposes is consistent with our procedures for agreements in general, and the requirement that an original and fifteen copies be filed is based on our need to have sufficient number of copies available to facilitate agency processing, the *Federal Register* notice and assure prompt public access to copies of filed agreements. We will, however, continue the current practice of accepting agreement copies that have had oversized exhibits reduced to standard paper size, provided that they are complete, legible and reproducible.

MPA suggests that intra-port discussion agreements be classified as Paragraph (b) Agreements, stating that such agreements warrant special treatment. A discussion agreement involving local port interests is said to present a much different set of regulatory options than do two-port or range-wide discussion agreements.

Two other commenters recommend that certain or all of the Paragraph (b) Agreements be instead classified as Paragraph (a) Agreements and therefore entitled to the less stringent Paragraph (a) Exemption. Matson believes that marine terminal services agreements should be classified as Paragraph (a) Agreements for the reasons summarized in the discussion of section 516.5(a); and the Conference urges that all agreements proposed as Paragraph (b) Agreements be instead afforded the Paragraph (a) Exemption, for the reasons summarized in the discussion of section 516.5(a). As noted earlier, we cannot consider the merits of recommendations to expand the scope of this proceeding beyond that originally set forth in the Proposed Rule.

TOCHR, VPA, Oakland and Houston Port Bureau favor adoption of the Paragraph (b) Exemption Alternative in one form or another. They note that it is consistent with the shortened review procedure now requested by many parties under the 1984 Act, and argue that it is preferable to the Paragraph (b) Exemption since the latter exemption may permit agreements that do not conform to the Commission's requirements to become effective without even a cursory review. These commenters argue that Paragraph (b) Exemption is inconsistent with the Commission's obligations, and would be inequitable to other parties who might well be damaged if they did not have the opportunity to review and challenge an agreement before it became effective.

The Final Rule adopts the Paragraph (b) Exemption for all classes of marine terminal agreements, other than marine terminal conference, interconference, joint venture and discussion agreements, with the exemption becoming effective upon the filing of an agreement with the Commission. Thus, the Final Rule implements a uniform procedure consisting of the Paragraph (a) Exemption Alternative and the Paragraph (b) Exemption for all classes of marine terminal agreements, excepting marine terminal conference, interconference, joint venture and discussion agreements.

On balance, we agree with the many views favoring a uniform exemption procedure. There is merit to the objections to the classification system upon which the Proposed Rule was predicated. Another factor we considered in adopting this Final Rule is the disproportionate amount of the Commission's own resources that would have been required to administer an exemption alternative that would subject all agreements filed thereunder to a substantive pre-effectiveness review procedure within twenty-one days following filing (as suggested under proposed section 516.5(b) (the Paragraph (b) Exemption Alternative)) or within fourteen days following *Federal Register* publication (as suggested by some of the commenters favoring this

alternative). The Commission will, however, monitor those agreements that are filed for exemption pursuant to the Final Rule to ensure that the agreements otherwise conform to the Commission's statutory and regulatory requirements. In this connection it should be noted that the Final Rule makes it clear that only agreements that apply to prospective activities, *i.e.*, events or payments that occur after filing are entitled to the exemption. The exemption also does not apply to agreements which fail to completely set forth the rates and charges agreed to by the parties. Parties who implement agreements that do not qualify for the exemption or which otherwise are in violation of the Commission's requirements will be subject to substantial penalties of the applicable statute.

The Federal Maritime Commission has determined that this Final Rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse 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 Federal Maritime 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 or small governmental jurisdictions. The primary economic impact of this rule would be on marine terminal operators and 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 Federal Maritime Commission has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, no environmental assessment or environmental impact statement was prepared.

The collection of information requirements contained in this regulation have been previously approved under 46 CFR 516, OMB Control Number 3072–0049. Since that Part is being discontinued, the requirements that are being codified in Part 559 are being resubmitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504). No clearance is necessary for the requirements being codified in Part 572 as these requirements do not add to the burden already present therein. A copy of the request for OMB review and supporting documentation may be obtained from John Robert Ewers, Director, Bureau of Administration, Federal Maritime Commission, 1100 L Street, N.W., Room 12211, Washington, D.C. 20573, telephone number (202) 523–5866. Comments

may be submitted to the Agency and the Office of Information and Regu latory Affairs, Office of Management and Budget, Washington, D.C. 20503 Attention: Desk Officer for the Federal Maritime Commission.

List of Subjects in 46 CFR Parts 559 and 572, Antitrust, Contracts Maritime carriers, Administrative practice and procedure, Rates and fares Reporting and record-keeping requirements.

Therefore, pursuant to 5 U.S.C. 553, and sections 5, 16 and 17 c the Shipping Act of 1984, 46 U.S.C. 1704, 1715, 1716 and sections 15 35 and 43 of the Shipping Act, 1916, in order to exempt certain marin terminal agreements from the waiting period requirement of the 1984 Act and from the approval requirement of the 1916 Act, Title 46 of the Cod of Federal Regulations is amended as follows:

1. The authority citation to Part 559 continues to read:

AUTHORITY: 5 U.S.C. 553; sections 15, 35 and 43 of the Shippin Act, 1916, 46 U.S.C. app. 814, 833a and 841a.

2. Section 559.7 to Part 559 in Subchapter C in Title 46 of the Cod of Federal Regulations is redesignated § 559.8.

3. A new § 559.7 to Part 559 in Subpart C in Title 46 of the Cod of Federal Regulations is added to read as follows:

§ 559.7 Marine Terminal Agreements—Exemption

(a) *Marine terminal agreement* means an agreement, understanding, ar rangement or association, written or oral (including any modification, can cellation or appendix) that applies to future, prospective activities betwee or among the parties and which relates solely to marine terminal facilitie and/or services among marine terminal operators and among one or mor marine terminal operators and one or more common carriers in interstat commerce that completely sets forth the applicable rates, charges, term and conditions agreed to by the parties for the facilities and/or service provided for under the agreement. The term does not include a joint ventur arrangement among marine terminal operators to establish a separate, distinc entity that fixes its own rates and publishes its own tariff.

(b) *Marine terminal conference agreement* means an agreement betwee or among two or more marine terminal operators and/or common carrier in interstate commerce for the conduct or facilitation of marine termina operations in connection with waterborne common carriage in the domesti commerce of the United States and which:

(1) (i) Provides for the fixing of and adherence to uniform marine termina rates, charges, practices and conditions of service relating to the receipt handling and/or delivery of passengers or cargo for all members; and or

(ii) Provides for the conduct of the collective administrative affairs o the group; and

(2) May include the filing of a common marine terminal tariff in th name of the group and in which all the members participate, or, in th

event of multiple tariffs, each member participates in at least one such tariff.

(c) *Marine terminal discussion agreement* means an agreement between or among two or more marine terminal operators and/or marine terminal conferences and/or common carriers in interstate commerce solely for the discussion of subjects including marine terminal rates, charges, practices and conditions of service relating to the receipt, handling and/or delivery of passengers or cargo.

(d) *Marine terminal interconference agreement* means an agreement between or among two or more marine terminal conference and/or marine terminal discussion agreements.

(e) *Marine terminal facilities* means one or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to, docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage spaces, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landing and receiving stations, which are used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and common carriers by water in interstate commerce, or between two common carriers by water in interstate commerce. This term is not limited to waterfront port facilities and includes so-called off-dock container freight stations at inland locations and any other facility from which inbound waterborne cargo may be tendered to consignees or at which outbound cargo may be received from shippers for vessel or container loading.

(f) All marine terminal agreements as defined in § 559.7(a), with the exception of marine terminal conference, marine terminal interconference and marine terminal discussion agreements, as defined in § 559.7 (b), (c) and (d) are exempt from the approval requirements of section 15 of the Shipping Act, 1916 on the condition that they be filed with the Commission. Such filing shall consist of:

(1) A true copy and 15 additional copies of the filed agreement;

(2) A letter of transmittal, which shall:

(i) Clearly state that the agreement is being filed for exemption pursuant to this paragraph;

(ii) Identify all of the documents being transmitted including, in the instance of a modification to an approved or exempted agreement, the full name of the approved or exempted agreement, the Commission-assigned agreement number of the approved or exempted agreement and the revision, page and/or appendix number of the modification being filed;

(iii) Provide a concise summary of the filed agreement or modification separate and apart from any narrative intended to provide support for the acceptability of the agreement or modification;

(iv) Clearly provide the typewritten or otherwise imprinted name, position, business address and telephone number of the filing party; and

(v) Be signed in the original by the filing party or on the filing party' behalf by an authorized employee or agent of the filing party.

(3) To facilitate the timely and accurate publication of the *Federal Reg ister* Notice, the letter of transmittal shall also provide a current list c the agreement's participants where such information is not provided else where in the transmitted documents.

(f) Agreements filed for and entitled to exemption under this paragrap will be exempted from the approval requirements of the Shipping Ac 1916 effective on the date they are filed with the Commission.

4. The authority citation to Part 572 continues to read:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 1701–1707, 1709–171(1712 and 1714–1717.

5. Section 572.307 to Part 572 in Subpart C of Subchapter D of Titl 46 of the Code of Federal Regulations is redesignated § 572.308.

6. A new § 572.307 to Part 572 in Subpart C of Subchapter D, Marin Terminal Agreements—Exemption is added to read as follows:

§ 572.307 Marine Terminal Agreements—Exemption

(a) *Marine terminal agreement* means an agreement, understanding, c association written or oral (including any modification, cancellation or ap pendix) that applies to future, prospective activities between or amon the parties and which relates solely to marine terminal facilities and/c services among marine terminal operators and among one or more marin terminal operators and one or more ocean common carriers that completel sets forth the applicable rates, charges, terms and conditions agreed t by the parties for the facilities and/or services provided for under th agreement. The term does not include a joint venture arrangement amon marine terminal operators to establish a separate, distinct entity that fixe its own rates and publishes its own tariff.

(b) *Marine terminal conference agreement* means an agreement betwee or among two or more marine terminal operators and/or ocean commo carriers for the conduct or facilitation of marine terminal operations i connection with waterborne common carriage in the foreign commerce o the United States and which:

(1) (i) Provides for the fixing of and adherence to uniform marine termina rates, charges, practices and conditions of service relating to the receipt handling and/or delivery of passengers or cargo for all members; and or

(ii) Provides for the conduct of the collective administrative affairs o the group; and

(2) May include the filing of a common marine terminal tariff in th name of the group and in which all the members participate, or, in th event of multiple tariffs, each member participates in at least one suc tariff.

(c) *Marine terminal discussion agreement* means an agreement betwee or among two or more marine terminal operators and/or marine termina

conferences and/or ocean common carriers solely for the discussion of subjects including marine terminal rates, charges, practices and conditions of service relating to the receipt, handling and/or delivery of passengers or cargo.

(d) *Marine terminal interconference agreement* means an agreement between or among two or more marine terminal conference and/or marine terminal discussion agreements.

(e) All marine terminal agreements, as defined in § 572.307(a), with the exception of marine terminal conference, marine terminal interconference and marine terminal discussion agreements as defined in § 572.307 (b), (c) and (d) are exempt from the waiting period requirements of section 6 of the Shipping Act of 1984 and Part 572 of this Chapter on the condition that they be filed in the form and manner presently required by Part 572 of this Chapter.

(f) Agreements filed for and entitled to exemption under this paragraph will be exempted from the waiting period requirements effective on the date of their filing with the Commission.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 85–22

AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

May 14, 1987

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission is discontinuing its proposed rulemaking proceeding concerning provisions in agreements subject to the Shipping Act of 1984 that affect or relate back to activities or events which occurred prior to the agreements becoming effective. The Commission will continue to address these matters on an *ad hoc* basis.

DATES: May 19, 1987.

SUPPLEMENTARY INFORMATION:

The Commission initiated this proposed rulemaking proceeding by Notice published in the *Federal Register* (50 FR 51418–51420, December 17, 1985). The proposed rule would have amended the Commission's agreement rules by adding a new subparagraph to 46 CFR 572.103 to read as follows:

> (h) An agreement filed under the Act shall apply only to prospective, future activities of the parties and may not in any way directly or indirectly affect or rely upon activities, events or payments which occurred prior to the effective date of the agreement.

In proposing this rule, the Commission advised that it had been receiving an increasing number of agreements which contained provisions affecting activities or events which occurred prior to the effective dates of the agreements. The Commission noted that these provisions were particularly pervasive in the area of marine terminal agreements, where ocean common carriers often agree to use port facilities in the future, but in so doing attempt to credit prior use to future formulas or rerate prior use at a new and lower rate once the agreement becomes effective. The Commission explained that agreements with retroactive application raised legal concerns under various provisions of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1701–1720.

Comments in response to the Notice were received from ocean common carriers, ocean carrier conferences, port authorities, terminal operators, law firms, and the Department of Justice. Some commenters supported the rule as proposed or in a modified form. Several commenters expressed

the view that there is no particular need for a rule on "retroactivity" because the parameters of acceptable conduct under the 1984 Act are already clear, as a matter of law. In addition, many of the commenters raised concerns about portions of the proposed rule which appeared to be overbroad, in that they would condemn agreement provisions which have heretofore been considered legitimate. In this regard, some commenters requested that any final rule identify with particularity unacceptable retroactive provisions.

Upon careful consideration of all of the comments submitted, and in light of the regulatory objectives underlying this proceeding, the Commission has decided to withdraw the proposed rule. We do not believe that a formal regulation defining the limits of an agreement's application to past events is either feasible or necessary, at least at this time. Section 10(a)(2) of the 1984 Act, 46 U.S.C. app. 1709(a)(2), prohibits anyone from "operat[ing] under an agreement required to be filed under section 5 . . . that has not become effective under section 6 [of that Act] . . . . " Similarly, section 7 of the Act, 46 U.S.C. app. 1706, conveys no antitrust immunity on activity which has occurred prior to an agreement becoming effective. As a result, and because it would be extremely difficult, if not impossible, to prescribe a rule which would address the legitimate concerns of the commenters while at the same time providing clear, definitive guidelines covering all potential variant situations, the Commission has decided to discontinue this rulemaking proceeding and continue to address the issue of possible retroactive agreement provisions on an *ad hoc* basis.

THEREFORE, IT IS ORDERED, That the rule proposed in this proceeding is withdrawn and the proceeding discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–5

FAILURE OF NON-VESSEL OPERATING COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES TO COMPLY WITH THE ANTI-REBATE CERTIFICATION FILING REQUIREMENT OF SECTION 15 (b) OF THE SHIPPING ACT OF 1984

DISCONTINUANCE OF PROCEEDING

June 1, 1987

The Commission instituted this proceeding on March 7 1985, by Orde to Show Cause (''March Order'') directed to 367 named non-vessel oper ating common carriers (''NVOCCs'' or ''Respondents'') as to why the should not be found in violation of section 15(b) of the Shipping Ac of 1984, 46 U.S.C. app. 1714 for failure to file the anti-rebate certificat required by that section for calendar year, 1984.

On December 9, 1985, the Commission issued a further order whic dismissed the majority of Respondents in the proceeding and at the sam time referenced the institution of Docket No. 86–1, *Cancellation of Tarif or Assessment of Penalties Against Non-Vessel Operating Common Carrier in the Foreign Commerce of the United States.* Docket No. 86–1 wa initiated, in part, as a vehicle for canceling the tariffs of non-respondin NVOCCs to the March Order.

This proceeding has remained open primarily to allow for follow-u action to be taken on certain matters; i.e., the issuance of warning lette to certain Respondents by the Commission's Bureau of Hearing Counse the refiling of correct anti-rebate certificates by a number of Respondent and for a last attempt to serve the March Order on certain other Respondent for which more current addresses had been discovered. As a result c these actions, there now remain six non-responding NVOCCs which requir some final disposition by the Commission.

This proceeding did not provide for the assessment of penalties or tari cancellation. Docket No. 86–1, which as indicated was initiated in pa as a vehicle for canceling these tariffs, was discontinued on January 2 1987.

The Commission's Bureau of Domestic Regulation is currently consid ering options for action against other non-vessel operating common carrier which have failed to file anti-rebate certifications for 1987. The six Re spondents remaining in this proceeding fall within this category since the also have failed to file a current certification. For this reason, this matte

as it pertains to these Respondents will be referred to the Bureau of Domestic Regulation for appropriate action.

THEREFORE, IT IS ORDERED, that the Respondents identified in the attached Appendix are dismissed from this proceeding and this matter is referred to the Bureau of Domestic Regulation for appropriate action; and

IT IS FURTHER ORDERED, that this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

Attachment

Mundial Enterprises, Ltd., c/o Peter Morales, Pres., 540 Militia Hill Road, Southampton, Pennsylvania 18966

Pan Caribbean Freightliners, Inc., 2780 SW Douglas Road, Suite 200A, Miami, Florida 33133

Seven Star Container Line, Port of Sacramento, World Trade Center, Suite 101, West Sacramento, California 95691

Stalker Enterprises Inc., 10320 Little Patuxent Pkwy, Equitable Bank Center, Columbia, Maryland 21044

Trans World Export Boxing Corp., 808 Garfield Avenue, Jersey City, New Jersey 07305

Worldwide Consolidators, Inc., 9032 South Vermont Avenue, Torrence, California 90502

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–1

CANCELLATION OF TARIFFS OR ASSESSMENT OF PENALTIES AGAINST NON-VESSEL OPERATING COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER OF LIMITED REOPENING

June 5, 1987

On January 2, 1986, the Commission initiated this proceeding by Order to Show Cause ("1986 Order") directed to 201 non-vessel operating common carriers ("Respondents" or "NVOCCs") in the foreign commerce of the United States. The 1986 Order was issued to determine whether the Respondents should be assessed civil penalties for any violations of the Shipping Act of 1984 ("the Act"), 46 U.S.C. app. §1701–1720, and Commission regulations, principally the failure to file a current anti-rebate certification. Subsequently, on January 21, 1987, the Commission issued a notice advising that the Administrative Law Judge's Order, Declaring Certain Tariffs to be Inactive and Canceling Same, Dismissing Respondents and Discontinuing the Proceeding ("1987 Order") had become "administratively final."

Included among the tariffs canceled by the 1987 Order was that of Fuji Express. Fuji's tariff was declared to be inactive and ordered canceled because Commission records did not indicate any response to the various orders issued in this proceeding.

The Commission's Bureau of Hearing Counsel has now filed a petition to reopen this proceeding for the limited purpose of amending the 1987 Order by deleting Fuji Express from the list of canceled NVOCC tariffs. A current review of Commission records indicates that Fuji had responded to the 1986 Order by filing its anti-rebate certification. Fuji did not follow the procedural requirements set forth by the Administrative Law Judge, thereby causing its filing not to be included in the record of the proceeding. The fact remains that Fuji was in compliance with Commission regulations and, therefore, its tariff should not have been ordered canceled.

Hearing Counsel's petition falls outside of the time limits for a petition for reconsideration as set forth in Rule 261 (46 CFR 502.261) of the Commission's Rules of Practice and Procedure. However, Rule 10 (46 CFR 502.10) allows for a waiver of the Commission's Rules in "any particular case to prevent undue hardship, manifest injustice. . . ." The instant situation would appear to be appropriate for relief under Rule 10 and Hearing Counsel's petition will be granted.

THEREFORE, IT IS ORDERED, That the petition to reopen this proceeding is granted for the limited purpose of amending the 1987 Order, by deleting Fuji Express from the list of those NVOCCs whose tariffs were canceled.

IT IS FURTHER ORDERED, That the proceeding is discontinued.

(S) TONY P. KOMINOTH
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–17
MOBIL OIL CORPORATION V. BARBER BLUE SEA LINES

ORDER OF REMAND

June 17, 1987

The Commission determined to review the decision of Administrative Law Judge Joseph N. Ingolia ("Presiding Officer"), titled "Complainant's Motion to Withdraw Complaint Granted, With Prejudice," dated March 12, 1987, approving an agreement in settlement of a complaint filed by Mobil Oil Corporation ("Mobil" or "Complainant") against Barber Blue Sea Line ("BBS"), an ocean common carrier subject to regulation under the Shipping Act of 1984 ("the Act") 46 U.S.C. app. §1701, *et seq.*, and granting Mobil's Motion to Withdraw the Complaint ("Motion").

BACKGROUND

The complaint alleged freight overcharges by BBS in violation of section 10(b)(1) of the Act on a shipment transported from New York, New York to Singapore.[1] In its answer to the complaint BBS denied any violation of the Act. Subsequently, Mobil filed the proposed settlement agreement and the Motion.

DISCUSSION

The Presiding Officer approved the settlement agreement and granted the Motion on the grounds "the settlement of administrative proceedings is favored by the Congress, the Courts and administrative agencies themselves . . . ." Presiding Officer's decision at 2. No other explanation is given for the Presiding Officer's action.

The Commission, as a matter of policy, encourages the settlement of disputes. However, in claims alleging freight overcharges, the Commission requires that the settlement be scrutinized in order to ensure that the agreement between the parties does not result in an unlawful refund or rebate. A settlement of an overcharge claim "can only be approved on a finding that the settlement reflects a reasonable interpretation of the carrier's tariff, unless circumstances make such a finding infeasible." *Clark International Marketing S.A., a Division of Clark Equipment Company v. Venezuelan*

[1] Section 10(b)(1), 46 U.S.C. app. §1709(b)(1), provides:
(b) Common Carriers.—No common carrier, either alone or in conjunction with any other person, directly or indirectly, 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 or service contracts; . . . .

Line, 22 S.R.R. 464, 465 (1983) (Order of Remand). Therefore, partie which propose to settle a claim alleging freight overcharges in violatio of the carrier's tariff must:

(1) submit to the Commission a signed settlement agreement;

(2) file with the settlement agreement, an affidavit setting forth the rea sons for the settlement and attesting that the settlement is a bona fid attempt by the parties to terminate their controversy and not a devic to obtain transportation at other than the applicable rates and charges c otherwise circumvent the requirements of the Shipping Act;

(3) show that the complaint on its face presents a genuine dispute an the facts critical to the resolution of the dispute are not reasonably ascertain able. *Organic Chemicals (Glidden-Durkee) Corp. v. Atlanttrafik Expres Service*, 18 S.R.R. 1536a, 1539–40 (1979).[2]

While Complainant here filed the settlement agreement with its Motio to Withdraw the Complaint, it failed to meet the requirements referre to above. The Presiding Officer granted the Motion without any commer or finding on the propriety of the settlement under BBS's tariff and sectio 10(b)(1) of the Act. In the absence of such a determination, approva of the settlement is, at best, premature.

The proceeding will consequently be remanded to the Presiding Office for an analysis of the settlement agreement under the standards set fort above.

THEREFORE, IT IS ORDERED, That the Presiding Officer's decisio titled "Complainant's Motion to Withdraw Complaint Granted, With Preju dice," is vacated; and

IT IS FURTHER ORDERED, That this proceeding is remanded to th Presiding Officer for further action consistent with this Order.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

[2] This standard was established in a case arising under section 18(b) (3) of the Shipping Act, 1916, fo merly 46 U.S.C. 817(b)(3). Section 18(b)(3) was substantially the same as section 10(b)(1) of the Shippi Act of 1984.

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–24
M–C INTERNATIONAL

v.

HANJIN CONTAINER LINES, LTD.

ORDER OF ADOPTION

June 17, 1987

Upon review on its own motion, the Commission has determined to adopt the decision of Administrative Law Judge Joseph N. Ingolia, titled "Complainant's Motion to Withdraw the Complaint Granted, With Prejudice," served April 2, 1987, in which he approved an agreement in settlement of a complaint filed by M–C International against Hanjin Container Lines, Ltd.

THEREFORE, IT IS ORDERED, That the decision of the Administrative Law Judge, titled "Complainant's Motion to Withdraw the Complaint Granted, With Prejudice," is adopted;

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

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86–24
M–C INTERNATIONAL

v.

HANJIN CONTAINER LINES, LTD.

COMPLAINANT'S MOTION TO WITHDRAW COMPLAINT GRANTED, WITH PREJUDICE

Adopted June 17, 1987

This proceeding was begun by a complaint filed by M–C Internation against Hanjin Container Lines, Ltd., on September 15, 1986. The complai alleges that the respondent violated "sections 10(b) (3) (6) (C) (11) (1 of the Shipping Act of 1984" by discriminating against the complaina in cancelling eight reefer bookings it had previously made and confirme The complainant sought reparations of $7,581.00 with interest as well certain other relief from the Commission.

On March 16, 1987, the parties filed a settlement agreement whi in pertinent part states:

> . . . After negotiations, the parties have agreed that Hanjin will pay to M–C $3,750.00 in return for which M–C International will withdraw its complaint.
>
> Hanjin is aware of no other shipper which can make the same claim as M–C, so settlement would not improperly favor M–C or discriminate against any other shipper.

The complainant has filed a motion to withdraw its complaint in accordan with the above.

Wherefore, in view of the above and the entire record as well as t fact that the settlement of administrative proceedings is favored by t Congress, the Courts and the administrative agencies themselves,[1] it i

[1] *Quality Food Corporation v. Tropical Shipping Co., Ltd.*, 23 F.M.C. 602 (1981); see also the authorit summarized in *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 23 F.M.C. 707 (1981); and *Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978).

Ordered, that the complainant's unopposed motion to withdraw the complaint is granted subject to the payment of $3,750.00 by the respondent to the complainant and the proceeding is hereby dismissed, with prejudice.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 580 AND 581]
DOCKET NO. 86–6
SERVICE CONTRACTS

June 23, 1987

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is adopting a Fin Rule that substantially revises its existing service contra regulations and places them in a newly created pa Those changes that are primarily technical in nature a intended to better assist the Commission in meeting i statutory responsibilities over service contracts. In add tion, other changes have been adopted to ensure th service contracts comply with all statutory requirement

DATE: July 27, 1987.

SUPPLEMENTARY INFORMATION:

The Commission initiated this proceeding by Notice of Proposed Rul making published in the *Federal Register* on February 18, 1986 (51 F 5734–5744). The proposed rule reflected the Commission's experience dealing with the large number of service contracts that had been file with it since the Shipping Act of 1984 ("Act" or "1984 Act"), 46 U.S.C app. 1701–1720, was enacted. It was intended to ensure that service co tracts more fully comply with all statutory requirements and the inte of Congress, to update and streamline the service contract filing proces and to make non-substantive technical revisions. As a result, the propose rule altered the existing service contract rules in several ways.

Thirty-three commenters submitted their views on the proposed rule. A tachment A lists these commenters and the acronyms by which they wi be referred throughout this discussion. The specific comments of each com menter are discussed below in the context of each section of the propose rule.

ANALYSIS OF COMMENTS

The following addresses, in numerical order, each section of the propose rule that received comment. For each section, the proposed language i set forth and a brief description of its purpose and effect is include This is followed by a discussion and analysis of the comments of th parties and an explanation, where appropriate, of the course of action take in the final rule.

A. Proposed section 581.1(e)

(e) "Contract party" means any party signing a service contract as an ocean common carrier, conference, shipper or shippers' association.

This provision revises the present definition of "contract party," 46 CFR 580.7(a)(1), by including a "conference" as an entity which can sign a service contract. It also deletes language in the present rule which includes "any other named entity associated with such a party entitled to receive or authorized to offer services under the contract as a contract party.

The South/Central American Conferences contend that the rule should be revised to again include a reference to "named entities associated with" in the definition of "contract party." The North European Conferences likewise support restoration of the deleted language. They note that the proposed rule otherwise treats such entities as contract parties, citing as examples proposed sections 581.3(a)(3)(v)(B) and 581.4(a)(1)(v–vi).

The proposed definition of "contract party" will be adopted without charge. It is consistent with the basic concept that the only entity which can be a party to a contract is one which *signs* the contract. Other affiliated entities may take advantage of the provisions of a service contract as a third party beneficiary, if named as an affiliate pursuant to proposed section 581.4(a)(1)(vi), but they are not *obligated* under the contract itself unless they too have signed it.

B. Proposed section 581.1(f)

(f) "Essential Terms Publication" means the single publication which is maintained by each carrier or conference for service contract(s) and which contains statements of essential terms for every such contract.

This new definition, together with the proposed definition of "statement of essential terms" in section 581.1(r), is intended to clarify the different uses of the words "essential terms," *i.e.*, (1) the "essential terms" which must be included in a service contract pursuant to section 8(c) of the 1984 Act, 46 U.S.C. app. 1707(c), (2) the "statement of essential terms" which must be filed with the Commission, and (3) the "essential terms publication" which must contain the various statements of essential terms of a carrier or conference.

Hercules questions whether the contents of a service contract should become public by way of an "essential terms publication." It contends that service contracts are commercial transactions which should be of no concern other than to those who are parties to the contract. Hercules further contends that even though the name of a shipper is not an essential term, it could be ascertained by other information available in a statement of essential terms, contrary to the interests of the shipper. DuPont suggests that the word "only" be inserted between the words "which contains" in the proposed definition. It believes that this will ensure further confiden-

tiality of service contracts by prohibiting carriers or conferences from volu tarily including anything else in an essential terms publication.

The proposed definition of "essential terms publication" will be adopte without change. The comments by Hercules indicate a basic misconceptic about the confidential nature of service contracts. Although service contrac must be filed "confidentially" with the Commission, the 1984 Act requir that a concise statement of their essential terms must also be made availab to the general public and those essential terms must be available to a shippers similarly situated. DuPont's suggestion also appears to be unnece sary. It is clear from the definition that the "essential terms publication is to contain only statements of essential terms.

C. Proposed section 581.1(h)

(h) "Geographic area" means the general location from which an or to which cargo subject to a service contract will move in intermod service.

This definition of "geographic area" is essentially the same as the prese definition, 46 CFR 580.7(a)(2). The North European Conferences sugge that the term "through service" be substituted for the term "intermod service" in the proposed definition. They contend that this would mo accurately reflect the terminology employed in sections 3(25) and 3(2 of the 1984 Act.

The Commission agrees that the Conferences' suggested language is mo consistent with the statute and it will therefore be included in the fin rule.

D. Proposed section 581.1(m)

(m) "Port range" includes those ports of loading or unloading of servic contract cargo that are regularly served by the contracting carrier or co ference, as specified in its tariff of general applicability, even if the contra itself contemplates use of but a single port within that range.

This provision is substantially the same as the present definition c "port range," 46 CFR 580.7(a)(3). It does, however, omit language i the present rule which limits coverage to ports "in the countries" c loading or unloading.

The North European Conferences object to the deletion of the word "in the countries," and the substitution of "includes" for the wor "means" in the proposed definition of "port range." They argue tha the current definition should be retained, except for the unexplaine pluralization of "country." The Mediterranean Conferences, ANERA, an Sea-Land believe that the proposed definition is too broad and sugges that it be limited to the ports actually specified by the contracting carrie or conference in a service contract. They further contend that whateve is done vis-a-vis foreign port ranges should also apply to the definitio of U.S. port range. The Japanese Conferences likewise believe that th

proposed definition is too broad and support retention of the existing definition.

APL contends that there is no clear Congressional indication of what was intended by the term "port range." It contends, therefore, that the Commission's definition should conform to trade practices and include only "ports in the same general location as the ports covered in the initial service contract."

As suggested by the North European Conferences, the Commission will retain the existing definition of "port range," modified to include the words of limitation—"in the country." We agree that this is more consistent with the intent of Congress, as expressed by the Senate Committee on Commerce, Science, and Transportation when it stated:

> The term "port range" is intended to encompass those ports *in the country of loading or unloading* of the contract cargo that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

S. Rep. No. 3, 98th Cong., 1st Sess. 31 (1983) (emphasis added). The Commission will also make two minor alterations to the present definition which were suggested by the North European Conferences. Given the language of the statute and its legislative history, the Commission cannot, however, limit the geographic scope of "port range" further, as was suggested by other commenters.

E. Proposed section 581.1(n)

(n) "Service contract" means a contract between one or more shippers or shippers' associations and one or more ocean common carriers or conferences, in which the shipper makes a commitment to provide a certain minimum quantity of its cargo or freight revenue over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as, assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of either party.

The proposed definition alters the existing definition of "service contract," 46 CFR 580.7(a) (4), by permitting *one or more* shippers, shippers' associations, ocean common carriers, or conferences to enter into service contracts. This revision was explained as being a clarification of existing law.

The North European Conferences do not believe that the proposed definition is consistent with the definition set forth in section 3(21) of the 1984 Act. They find no support in the Act or its legislative history for the proposition that two or more unrelated or unaffiliated shippers or shippers' associations may join together on a single service contract. The South/

Central American Conferences likewise recommend that the Commission retain the existing definition of "service contract," on the assumption that it was not the Commission's intent to permit unrelated shippers or groups of shippers' associations to enter into service contracts.

USL contends that the net effect of the proposed definition would be the establishment of *de facto* shippers' associations, on the one hand, or associations of carriers on the other, with the membership varying from contract to contract. It submits that such a result is beyond the Commission's statutory jurisdiction. Lastly, Sea-Land avers that the proposed definition is not a clarification, but rather a misreading, of the 1984 Act. It argues that more than one carrier can enter a service contract only by joining or creating a conference and that more than one shipper may enter a service contract only by joining or forming a legitimate shippers' association.

The proposed definition of "service contract" will not be adopted. The Commission will instead retain the existing definition, which is essentially the definition of "service contract" which is contained in the 1984 Act. Under this definition, shippers can continue to affiliate to take advantage of service contracts, if that affiliation meets the definition of a "shippers' association."

F. Proposed section 581.1(p)

(p) "Shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

This definition is the same as that in the Commission's existing rules 46 CFR 580.7(a)(5). Moreover, it is a verbatim restatement of the definition of "shipper" contained in section 3(23) of the 1984 Act, 46 U.S.C. app 1702(23).

ANERA, Sea-Land, and the Australia-New Zealand Conference suggest that the Commission more precisely define the term "shipper" to preclude certain middlemen from taking advantage of the Act, without subjecting themselves to regulation under it. They suggest that the Commission adopt the definition of "shipper" which was proposed by the North European Conferences in a petition filed with the Commission on February 3, 1986 (57 FR 5402 (1986)). This proposal would require any person who transports cargo for its own account, but resells the transportation services to underlying shippers at higher rates, to have a tariff on file in order to enter into a service contract.

While opposing the North European Conferences' proffered definition of "shipper," AISA suggests that the Commission's proposed definition be modified to include "owners or *other* persons on whose account the ocean transportation is provided." It contends that this would correspond to the definition of "shipper" at 46 CFR 572.104(aa), and would clarify

that shippers' associations are shippers for the purposes of the service contract regulations.

The proposed definition of "shipper" will be adopted without change. The Commission addressed the North European Conferences' proposed revision in the context of its order denying the Conferences' petition to amend the definition of shipper. *See In the Matter of Petition of the U.S. Atlantic-North Europe Conference and North Europe-U.S. Atlantic Conference for a Rule Regarding the Term "Shipper,"* 23 S.R.R. 1381 (1986). Moreover, as a result of that petition, the Commission initiated a fact finding investigation into the use of shippers' associations and service contracts by various middlemen. *Fact Finding Investigation No. 15,* Order, served September 17, 1986. Any revision of the existing definition of "shipper" should appropriately await the conclusion of this investigation.

AISA's suggestion that the definition be modified to include "owners or *other* persons" is likewise rejected. The definition of "service contract" in the 1984 Act clearly distinguishes between shippers and shippers' associations. Given the fact that the 1984 Act and the Commission's rules define a service contract as one by a shipper or shippers' association, there is no need to attempt to include shippers' associations within the ambit of "shipper." It appears that Congress has created shippers' associations as distinct entities, and has specifically delineated their rights and obligations throughout the Act. Again, any possible modification of the definition of "shipper" to include, directly or indirectly, shippers' associations should await completion of Fact Finding Investigation No. 15.

G. Proposed section 581.1(t)

(t) "Tariff of general applicability" means the effective tariff, on file at the Commission under Part 580 of this chapter, that would apply to the transportation in the absence of a service contract.

This new definition was proposed because the term "tariff of general applicability was used in several other places in the proposed rule.

Sea-Land recommends that this definition be deleted. It contends that there is no direct relation between rates set forth in tariffs and rates set forth in service contracts, and believes that any definition which implies such a connection may be confusing.

The Commission agrees with Sea-Land that there is not always a direct relationship between a rate contained in a service contract and a rate in a tariff. A service contract stands on its own, if properly drafted by its parties. However, there are certain administrative requirements in the final rule that necessitate a definition of "tariff of general applicability." Moreover, the term is used in the context of voluntarily filed contracts on exempt commodities. Accordingly, this definition will be retained.

H. Additional comments on proposed section 581.1 (definitions)

APL, ANERA, and IBP suggest various definitions for "similarly situated shipper," which each believes should be incorporated into the final rule. APL alleges that the lack of a definition of "similarly situated shipper" is inhibiting service contracting, because a carrier entering into a service contract for a commodity does not know whether it must grant the same rate to a shipper in a completely different industry shipping a similar commodity.

Even if the Commission were to agree that a definition of "similarly situated shipper" is desirable, it cannot do so in the context of this rulemaking proceeding. Any action along these lines is outside the scope of this proceeding, and would have to be proposed as a new rule. In any event, the Commission does not find that a definition of "similarly situated shipper" is necessary or appropriate, at least at this time.

It is extremely doubtful that the lack of a definition of "similarly situated shipper" is in any way inhibiting the use of service contracts. While it is true that the number of "me-too" contracts is a very small percentage of the service contracts filed with the Commission, this may merely reflect the fact that any shipper which can come close to meeting the terms of a service contract is probably in a position to negotiate its own. Moreover, concepts like "similarly situated" are perhaps best left to resolution on an *ad hoc* basis, especially given the infinite variety of terms in a service contract.

Warner-Lambert and NYCCI raise identical objections to any provision in the proposed rule which could be interpreted as restricting non-vessel-operating common carriers ("NVOs") from offering service contracts to shippers in their capacity as carriers. They contend that the language of the 1984 Act does not support such an interpretation.

Presumably, these commenters are referring to the definition of "service contract" in proposed section 581.1(n), which indicates that a service contract can only be offered by an *ocean common carrier* or conference. Contrary to the assertions of Warner-Lambert/NYCCI, there is nothing in the statute which authorizes NVOs to offer service contracts as "carriers." In fact, as section 8(c) of the Act makes clear, a service contract can *only* be offered by a "ocean common carrier," and an NVO cannot qualify as an ocean common carrier since it does not operate *vessels*.

I. Proposed section 581.2(a)

(a) Geographical Scope. Service contracts shall apply only to transportation of cargo moving from, to or through a United States port in the foreign commerce of the United States.

This amendment to the existing rule is designed to limit service contracts to those involving transportation of cargo which moves through a U.S. port in the foreign commerce of the United States.

The Mediterranean Conferences, HPB, the North European Conferences, NITL and USL support the provision.

CMA, Hercules, DuPont, Stauffer, Ford, NYCCI and PPG believe that the scope of service contracts should be broad enough to include foreign-to-foreign traffic because shippers and carriers often negotiate a single contract package covering both the foreign commerce of the U.S. and foreign-to-foreign commerce. Their main concern is with the movement of Canadian cargo.

Sea-Land suggests amending the proposed rule to permit service contracts to include foreign-to-foreign cargo that moves through a U.S. port even if it does not enter the foreign commerce of the United States.

In arguing that the scope of service contracts should be broad enough to include foreign-to-foreign cargo, the commenting parties appear to be treating the issue as purely one of policy which is within the Commission's discretion to decide. The Commission, however, cannot expand by its own regulations the power given to it by Congress. *Austasia Intermodal Lines, Ltd.* v. *Federal Maritime Commission*, 580 F.2d 642, 646 (D.C. Cir. 1978). Accordingly, the threshold question is whether the scope of the jurisdiction over service contracts conferred on the Commission by section 8(c) of the 1984 Act, 46 U.S.C. app. 1707(c), extends to foreign-to-foreign cargo.

Only service contracts offered by "an ocean common carrier or conference" are subject to section 8(c) of the 1984 Act. The term "common carrier," which subsumes the term "ocean common carrier, is defined in section 3(6) of the 1984 Act, 46 U.S.C. app. 1702(6), as meaning a carrier holding itself out to the general public to provide transportation between the United States and a foreign country that:

> . . . utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes *between a port in the United States and a port in a foreign country* . . . . (emphasis added).

The Report of the Senate Committee on Commerce, Science, and Transportation on S. 504, contains the following explanation of the definition of "common carriers":

> This definition applies only to the extent the passengers or cargo transported are loaded or discharged at a U.S. port. Thus, a liner carrier that accepts U.S.-origin intermodal cargo (or, for that matter, Canadian-origin cargo) at Halifax and calls at Boston for further loading en route to Rotterdam would be a "common carrier" for purposes of the bill only with respect to the Boston-Rotterdam leg of its voyage.

S. Rep. No. 3, 98th Cong., 1st Sess. 19 (1983). Likewise, the House Report makes it clear that the definition does not encompass cargo that is transported by land from the United States to a contiguous foreign country and from there by water to an overseas foreign country. H.R.

Rep. No. 53, 98th Cong., 1st Sess. 29 (1983). It appears, therefore, that inclusion of foreign-to-foreign cargo, over which the Commission has no jurisdiction, in service contracts subject to filing under section 8(c) of the 1984 Act would be contrary to the intent of Congress to limit the scope of the 1984 Act to cargo moving in the ocean commerce of the United States which is loaded or discharged at a U.S. port.

Even if the Commission were to conclude that there was no legal impediment to the inclusion of foreign-to-foreign cargo in service contracts, enforcement problems would remain. The Commission would have no legal means of obtaining information relating to foreign-to-foreign movements. This could seriously hamper the Commission's ability to enforce the provisions of section 8(c). Accordingly, the Commission is adopting proposed section 581.2(a) as a final rule. In so doing, the Commission notes that carriers and shippers are not prevented from making separate service contracts for the carriage of foreign-to-foreign cargo. Section 8(c) of the 1984 Act does not purport to regulate or prohibit service contracts which a carrier may enter into while *not* acting in the capacity of an ocean common carrier in the United States foreign commerce.

J. Proposed section 581.2(b)

(b) Parties: NVOs and Forwarders—

(1) A non-vessel-operating common carrier may sign a service contract only in its capacity as a shipper to the offering ocean common carrier or conference.

(2)(i) A licensed ocean freight forwarder may sign a service contract only in its capacity either as the actual shipper or as forwarding agent for and on behalf of a named shipper contract party.

(ii) Whenever a licensed ocean freight forwarder:

(A) Signs a service contract as the actual shipper, all bills of lading covering shipments under the contract shall indicate as "shipper" [on the shipper line of the bill of lading] the name of the licensed ocean freight forwarder, and in no event may the forwarder collect ocean freight compensation on such shipments; or

(B) Acts as forwarding agent in signing a service contract, written authorization for such signature as agent shall be submitted to the carrier or conference contract party; shall accompany the service contract filing under § 581.3(a) (1); and shall be kept confidential under § 581.9.

The proposed rule clarifies that NVOs and ocean freight forwarders, which cannot offer service contracts as carriers, may enter into them as shippers, but only under certain conditions.

NCBFAA supports the rule, but suggests that it be modified to cover the situation in which the exporter activity is performed by an affiliate of a freight forwarder.

TWRA contends that the proposed rule would permit freight forwarders to sign service contracts and offer them to shippers without filing a tariff

as an NVO. It suggests that the proposed rule be amended to make it clear that an ocean freight forwarder may only sign a service contract as: (1) an agent on behalf of a named shipper; (2) a shipper having a beneficial interest in the cargo; or (3) an NVO. ANERA, Australia-New Zealand Conference, APL, the South/Central American Conferences, and USL filed similar comments.

Hercules believes that NVOs and freight forwarders may execute service contracts and hold themselves out to the public to provide transportation. Its only concern seems to be that NVOs and freight forwarders have sufficient financial resources in case of default on the service contract.

NITL opposes the rule, apparently in the belief that it would require shippers to utilize the services of a freight forwarder when entering into a service contract.

NEPFC, PCEC, Sea-Land and the North European Conferences believe that the rule is unnecessary and should be deleted. Sea-Land points out that only ocean common carriers, conferences, shippers and shippers' associations can be parties to a service contract. Each of these entities has already been defined. If an NVO or forwarder is to be a party to a service contract, it must fall within the definition of "shipper."

NYCCI and Warner-Lambert have no objection to the rule, but believe that the issue of whether a freight forwarder, acting as a shipper, should receive compensation is a matter best left to the contracting parties.

It appears that the proposed rule pertaining to NVOs and ocean freight forwarders is subject to misinterpretation. Moreover, it does not appear necessary. As Sea-Land has pointed out in its comments, only ocean common carriers, conferences, shippers, and shippers' associations can be parties to a service contract. If an NVO or forwarder is to become a party to a service contract, it must be a "shipper," as defined in section 3(23) of the 1984 Act, 46 U.S.C. app. 1702(23).

Accordingly, the Commission is deleting section 581.2 (b) from its final rule. It should be noted, however, that even in the absence of section 581.2(b), section 19(d)(4) of the 1984 Act, 46 U.S.C. app. 1718(d)(4), prohibits freight forwarders from receiving compensation from a carrier for any shipment in which the forwarder has a direct or indirect beneficial interest.

K. Proposed section 581.3(a)(2)

(2) Statement of essential terms. At the same time as the filing of the service contract under paragraph (a)(l) of this section, the statement of essential terms of the contract shall be submitted:

(i) In form and content as provided in §§ 581.4(b) and 581.5;

(ii) In tariff format;

(iii) On page(s) to be included in the Essential Terms Publication as described in paragraph (b) of this section; and

(iv)(A) With an accompanying transmittal letter in an envelope which contains only matter relating to essential terms; and

(B) The envelope and the inside address on the transmittal letter are to be addressed to the "Director, Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573."

This is substantially the current rule, 46 CFR 580.7(i), with the clarification that the statement of essential terms pages are to be filed in the Essential Terms Publication.

The North European Conferences note that, under current rules, the statement of essential terms filing requirements may be met by filing the entire text of the service contract, absent the name of the shipper. They assume that this option is still available.

The North European Conferences are correct that the requirement to file the statement of essential terms can still be met by filing the entire text of the service contract, minus the shipper's name. As the Commission previously stated, "[t]o the extent that a service contract meets all the essential terms format requirements and is appropriately stated in terms of geographic areas or port ranges, it could be submitted, minus the shipper's name, in lieu of a statement of essential terms." Docket No. 84–21, *Publishinq and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States—Service Contracts and Time/Volume Contracts,* 27 F.M.C. 323 at 333 (1984). This alternative filing procedure remains available under the final rules.

L. Proposed section 581.3(a)(3)

(3) Notices of: change to contract, contract party or rate; availability of changed terms to similarly-situated shippers; and settlement of account. There shall be filed with the Commission pursuant to the procedures of paragraph (a)(1) of this section, a detailed notice, within 30 days of the occurrence, of:

(i) The making available of newly operable essential terms to similarly situated shippers under § 581.6(b)(5);

(ii) Termination by mutual agreement, breach or default not covered by the service contract under § 581.7(b);

(iii) The adjustment of accounts, by rerating, liquidated damages, or otherwise under §§ 581.5–581.8;

(iv) Final settlement of any account adjusted as described in paragraph (a)(3)(iii) of this section, attested to by the involved shipper or shippers' association; and

(v) Any change to:

(A) The name of a basic contract party under § 581.4(a)(1)(v); and

(B) The list of affiliates under § 581.4(a)(1)(vi) of any contract party entitled to receive or authorized to offer service under the contract.

This section, which is new, was proposed to assist the Commission in monitoring and auditing contracts. The Commission was concerned that

many substantive changes in existing service contracts may not have been made available as essential terms to similarly situated shippers, nor been brought to the attention of the Commission in a timely manner. Accordingly, the proposed rule required that the Commission be given notice within 30 days of certain specified events.

The Japanese Conferences object to proposed section 581.3(a)(3)(i), arguing that notification to the Commission of newly operable essential terms would be burdensome.

Sea-Land suggests that the proposed rule be revised by deleting subparagraphs (i) through (iv). It argues that, as a practical matter, substantive changes to the essential terms cannot be made available at mid-course to similarly situated shippers in any equal or comparable way and, hence, such changes should be prohibited, as should termination by mutual agreement. It suggests that adjustments made by liquidated damages and final settlement can be handled in section 581.7(b), in a non-confidential manner.

The North European Conferences support the notice requirement of the proposed section, but contend that notice of newly operable essential terms to similarly situated shippers under subparagraph (i) and termination by mutual agreement not covered by express contract provision under subparagraph (ii) should not be confidentially filed with the Commission, but rather made publicly available. They contend that this would provide the public the opportunity to ascertain the essential terms of service contracts and allow public monitoring of potential abusive practices. In addition, these Conferences request the deletion of the requirement that notices of final settlements of accounts under subparagraph (iv) be "attested to by the involved shippers or shippers' association," because carriers do not have the authority to obtain such documentation.

TWRA, NEPFC, PCEC and USL also endorse the notice requirements. However, some of these commenters urge that the section be modified to require that all occurrences for which notice must be given to the Commission also be published in the Essential Terms Publication to allow other shippers and carriers the opportunity to assist in the enforcement of the rules and to protect their own interests.

USL contends that any change in the rate structure of a service contract should be prohibited, because a rate change on the basis of events occurring subsequent to the contract's execution is contrary to the purposes of the proposed rule's provision that each filed service contract must be made available for 30 days to all similarly situated shippers. USL also supports notice to the Commission of any final settlement made under a contract, but suggests that such notice include a statement of the actual amount of cargo carried in order to discourage unauthorized settlements.

DuPont questions the basis for the rule, maintaining that the Commission should not seek to assess the correctness of the adjustment of accounts. It argues such matters are for appropriate courts under the standard application of contract law. Ford opposes the notification requirements, maintaining

that they would discourage the use of service contracts by adding substantially to the cost and burden for both the carrier and shipper. Hercules again asserts that a service contract is a commercial agreement between consenting parties and should not become a matter of public information.

IBP objects to the mechanism for making the new essential terms available to similarly situated shippers, indicating that the proposed section does not state how the new essential terms are to be made available, *i.e.*, who are similarly situated shippers.

RCA sees no need for the proposed section, maintaining that parties to a contract should be free to negotiate mutually acceptable terms and conditions. It suggests that shippers would be adequately protected through the use of "most favored shipper" clauses and through the use of warranties and/or covenants by the carrier with respect to its non-discriminatory treatment of similarly situated shippers.

NITL opposes the proposed rule, maintaining that it significantly increases paperwork and is unnecessary regulation. It points out that compliance with the terms of service contracts is presently achieved through the use of random audits, and suggests this is still adequate.

DOT sees no need for the Commission to require carriers to provide notice of a newly operable essential term to a shipper that entered into a service contract as a similarly situated shipper. DOT argues that the invocation of any express or implied *force majeure* or commercial contingency clause depends on circumstances which may be unique to a particular shipper and of no concern to a similarly situated shipper.

The commenters' main concerns are that the notice requirement of "newly operable" essential terms in section 581.3(a)(3) (i): (1) would create additional paperwork and other unnecessary burdens; and (2) should not be confidentially filed with the Commission, but rather made public through a filing in the Essential Terms Publication. For the reasons stated below, the Commission rejects both of these arguments.

All the instant rule requires is that, when certain changes occur during the course of a contract, the Commission be given notice thereof. This can be accomplished by providing the Commission a copy of whatever document is transmitted between the parties. This should not prove to be particularly burdensome or unreasonable. Moreover, this information will enable the Commission to be better aware of the status of service contracts, and to ensure that they meet all statutory and regulatory requirements.

As indicated in the Supplementary Information to the proposed rule, the Commission considered the non-confidential filing of such notices, but rejected this approach because there appeared to be substantial practical difficulties. For instance, there could be problems protecting the confidentiality of the shipper's name. Moreover, the types of events which require notice to the Commission do not appear to warrant notice to the general public. The only event that does require notice to someone other than the Commission is the availablity of newly operable essential terms, pursuant

to section 581.6(b)(5), and this is accomplished directly between the carrier and any similarly situated shipper.

However, lest there be any confusion or uncertainty as to the nature of the changes contemplated by paragraph (a)(3)(i), the essential terms that are subject to that paragraph are referred to in the final rule as "contingent" rather than "newly operable." This designation appears to be more appropriate.

Lastly, the North European Conferences' concern that ocean common carriers and conferences may lack authority to obtain a "shipper's attestation" of a final settlement of any account described in paragraph (a)(3)(iv) of this section has merit. Accordingly, this requirement has been deleted from the final rule.

M. Proposed section 581.3(c)

(c) Who must file: (1) As further provided in paragraph (c)(2) of this section, the duty under this part to file service contracts, statements of essential terms and notices, and to maintain an Essential Terms Publication, shall be upon:

(i) A service-contract signatory carrier which is not a member of a conference for the services covered by the contract; or

(ii) The conference which:

(A) Is signatory to the service contract; or

(B) Has one or more member carriers signatory to a service contract for a service otherwise covered by the conference agreement.

(2) When a conference files a service contract for and on behalf of one or more of its member lines and the contract covers service from, to or between ports and/or points not included within the scope of the conference, the complete text of the statement of essential terms shall be simultaneously filed in the Essential Terms Publications of both the conference(s) and carrier(s) involved, which shall comply with all other Essential Terms Publication filing and maintenance requirements under paragraph (b) of this section and § 581.4(b).

The proposed rule identifies those who have the duty of filing and maintaining service contract materials. The purpose of this section is to clarify the service contract filing obligations as between conferences and their member lines.

TWRA contends that a mandatory requirement that conferences file service contracts and statements of essential terms for individual members' service contracts is inappropriate. It claims that timeliness may be affected by additional conference action and such filings should be left to the choice of the carrier or conference.

IBP objects to the requirement that conferences file service contracts, statements of essential terms and notices when the signatory is a member line of the conference. It argues that the confidentiality of contracts will inevitably be lost and, in addition, conferences will informally regulate

the contents of such service contracts. It suggests an additional rule prohibiting conferences from interfering with independently negotiated service contracts that were concluded in the manner permitted by the conference agreement.

The requirement that the Essential Terms Publication of a conference also contain the statements of essential terms issued by one or more of the members of a conference is necessary to ensure that the shipping public is aware of any statement of essential terms offered by a conference or any of its members in a particular trade. The form and manner requirements applicable to Essential Terms Publications are, except as provided in these regulations, the same as those applicable to tariffs. Under current rules, it is a common carrier's obligation to file its own tariffs when the common carrier is not a party to an agreement, and when it is a party to an agreement, to participate in a single tariff filed by the conference. Under the tariff filing format of conference tariffs, the conference rate on a commodity and a member line's rate on the same commodity are contained in the same rate item of the conference tariff, thus allowing interested parties immediate access to all current, available rates on a particular commodity. The same benefit would flow to shippers by allowing them to be aware of all service contract rates in the trade by perusal of the conference's Essential Terms Publication. In addition, the proposed filing procedure will allow the Commission to monitor conference members' activities more effectively.

We see no need for IBP's recommended rule prohibiting conferences from interfering with service contracts independently negotiated by member lines. There is no indication or suggestion that such interference presently occurs. Nor is there any basis to assume that the mere filing by conferences somehow results in the informal regulation of the contents of members' service contracts. Where member line service contracts are negotiated independently from the conference, such negotiations are concluded prior to the member line transmitting the final contents of the contract to the conference for filing with the Commission. The conference in this instance is merely acting as a filing agent for the member line and nothing more. In such instances, the conference would have an obligation to maintain appropriate confidentiality of the subject matter.

N. Proposed section 581.3(d)

(d) Exempt commodities: (1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, this section does not apply to contracts relating to bulk cargo, forest products, recycled metal scrap, waste paper or paper waste.

(2) An exempt commodity listed in paragraph (d)(l) of this section may be included in a service contract filed with the Commission, but only if there is a tariff of general applicability for the transportation which contains a specific commodity rate for the exempted commodity.

(3) Upon filing under this paragraph, the service contract and essential terms shall be subject to the same requirements as those contracts involving non-exempt commodities.

This provision amends the present sections relating to exempt commodities, 46 CFR 580.7(b)(1) and (b)(2), by requiring that, before a service contract on an exempt commodity can be filed, there must be a rate on that same commodity in a tariff of general applicability. The Supplementary Information which accompanied the proposed rule states that this requirement was included to cover situations in which a contract was rejected or otherwise had to be rerated. Under these circumstances, there would then be a rate in a governing tariff to use as the basis for determining the proper charges.

APL suggests that subsection (d) should be revised to permit service contracts on exempt commodities to be filed, but without the requirement that there be a tariff of general applicability covering the exempt commodity. APL further suggests that the Commission could accomplish its intended result by requiring service contracts for exempt commodities to contain *bona fide* deadfreight or liquidated damages provisions. APL contends that it is unnecessary to subject exempt commodities to the full panoply of tariff regulation just because a service contract is entered covering such traffic.

ANERA and TWRA likewise oppose the requirement that a tariff of general applicability be filed covering any exempt commodity included in a service contract. They support a rule that would simply require any necessary rerating provisions to be included in a service contract covering an exempt commodity. NITL also opposes the requirement as "unnecessary."

Sea-Land does not believe that rerating is an appropriate remedy for breach or non-performance of a service contract because such a contract stands on its own, with actual or liquidated damages for enforcement. It further contends that it makes no sense to rerate a service contract on exempt commodities which is rejected, because Congress intended that these commodities not be governed by tariffs.

CMA agrees that if the Commission continues to allow the filing of tariffs on exempt commodities, it should not accept a service contract on such a commodity unless there is a generally applicable tariff rate on file for the exempt commodity. CMA contends, however, that the Commission should not allow the voluntary filing of rates in tariffs which cover exempt commodities. CMA notes that the issue of whether to permit exempt commodities to be included in tariffs is presently before the Commission in Docket No. 85–6, *Notice of Inquiry Concerning Interpretation of Section 8(a) and Section (c) of the Shipping Act of 1984,* and contends that a decision in that proceeding may render the instant issue moot. DuPont likewise notes the pendency of Docket No. 85–6, and contends that until

it is resolved, there is no legal precedent for proposed sections 581.3(d)(2) and (3).

NARI suggests that all of proposed section 581.3(d) should be withdrawn. In its place, NARI suggests a rule that any tariff or service contract applicable to exempt commodities which is tendered to the Commission for filing will be rejected pursuant to section 8(f) of the 1984 Act.

There is, of course, no requirement that service contracts covering bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste be filed with the Commission in the first instance. Indeed, they are statutorily *exempt* from filing by section 8(c) of the 1984 Act. Most commenters agree, however, that once service contracts on exempt commodities are voluntarily filed with the Commission, they should be subject to all of the regulations governing service contracts in general. The only provision in the proposed rule which has raised concern is the requirement that there must also be a rate in a tariff of general applicability which covers the exempt commodity.

The Commission will not preclude the voluntary filing of service contracts on exempt commodities, as was suggested by some commenters. This approach is consistent with the Commission's treatment of the voluntary filing of tariff rates on exempt commodities. *See Notice of Inquiry Concerning Interpretation of Section 8(a) and Section 8(c) of the Shipping Act of 1984*, [Docket No. 85–6], 28 F.M.C. 841 (1987). That Notice also indicated that the issue of whether to allow the voluntary filing of service contracts on exempt commodities would be decided in this proceeding.

Permitting the filing of service contracts on exempt commodities should benefit the shipping public. Shippers who would otherwise be unaware of the existence of a service contract on an exempt commodity may now take advantage of such a contract as a similarly situated shipper. Even if a shipper has no intention of taking advantage of a service contract on an exempt commodity on a "me-too" basis, the information contained in the statement of essential terms may be commercially useful to it. The Commission will also be in a better position to monitor activity in certain trades if it is made aware of movements on exempt commodities by way of the filing of service contracts. Moreover, the voluntary filing of such contracts is not specifically precluded by the 1984 Act.

The choice of whether or not to voluntarily file a service contract on an exempt commodity is one which involves both parties to the contract. In this regard, the Commission notes that service contracts often include a mixture of exempt and non-exempt commodities, so that a shipper can obtain a better contract rate. Presumably, the ability to offer service contracts on mixed commodities also benefits carriers.

Because service contracts on exempt commodities will be permitted to be filed, the Commission continues to believe that some provision must be made in the event the contract is terminated or rejected. If there is a tariff rate covering the same exempt commodity, it will apply in such

circumstances. However, carriers or conferences are not required to maintain a tariff rate on any exempt commodity which they wish to include in a voluntarily filed service contract. The contract itself can contain a rate or charge which will be applied in the event the contract is rejected or terminated. This will allow parties the optimum degree of flexibility, consistent with their election to file a service contract on an exempt commodity, while at the same time ensuring that there is some basis upon which to rerate the contract in the event it is rejected or terminated. The proposed rule has been modified to reflect this decision.

O. Proposed section 581.4(a)

(a) Service contract. Every service contract shall clearly, legibly and accurately set forth in the following order:

(1) On the first page, preceding any other provisions:

(i) A unique service contract number bearing the prefix "SC";

(ii) The FMC number [FMC No. _____] of the carrier's or conference's Essential Terms Publication;

(iii) A reference to the statement of essential terms number ["ET No. _____"] as provided in paragraph (b)(l)(iii) of this section;

(iv) The FMC number(s) [FMC No. _____] of the tariff(s) of general applicability;

(v) The names of the contract parties. Any further references in the contract to such parties shall be consistent with the first reference (e.g., "[exact name]," "carrier," "shipper," or "association," etc.); and

(vi) Every affiliate of each contract party named under subparagraph (a)(l)(v) of this section entitled to receive or authorized to offer services under the contract, except that in the case of a contract signed by a conference or shippers' association, individual members need not be named. In the event the list of affiliates is too lengthy to be included on the first page, reference shall be made to the exact location of such information; and

(2) Following the first page of the service contract:

(i) The complete terms of the contract, including all essential terms required under § 581.5; and

(ii) (A) A description of the shipment records which will be maintained to support the contract; and

(B) The name, address and telephone number of the individual who will make shipment records available to the Commission for inspection under § 581.10.

This proposed section is intended to facilitate processing of service contracts and establish format requirements that will allow the Commission to readily identify responsible parties from whom documentation relevant to the contract can be obtained.

NEPFC and PCEC support the proposed section, but note that it puts additional paperwork burdens on carriers and conferences.

The Japanese Conferences express concern over language in section 581.4(a) that requires service contract provisions to be set forth "clearly, legibly and accurately." They contend that such a standard requires a subjective determination that could result in unwarranted encroachment upon, and rejection of, an otherwise valid contract. The Japanese Conferences also suggest that section 581.4(a)(2)(ii)(B) be amended to provide that the named individual be the person who will "respond to requests," because determining whether the records would be made available normally would be beyond the authority of an employee of a carrier or conference. The South/Central American Conferences suggest that section 581.4(a)(1)(vi) be modified to read ". . . a contract signed by *or on behalf of* a conference or *by or on behalf of* a shippers' association . . . ."

NITL opposes sections 581.4(a)(1) (i), (ii), (iv) and (vi), stating that negotiations between the parties and implementation of the contract would be significantly hampered and delayed by excessive attention to detail, regulatory technicalities and increased paperwork that would necessarily be involved.

The North European Conferences suggest that section 581.4(a)(2) be revised by adding the language "Commencing on or" at the beginning of the provision. They contend that this will allow the parties to include additional material, other than that required on the first page, and will result in a decrease in the number of pages of service contracts. The North European Conferences also object to the language of section 581.4(a)(2)(ii)(B), which requires service contracts to name an individual "who will make" shipment records available to the Commission. They suggest that the rule be modified to provide that the contract parties shall advise the Commission of the person to contact for a record inspection. They further note that the Commission has legal remedies under the 1984 Act if its request for documents was not honored.

APL, ANERA, and TWRA suggest that section 581.4(a)(2)(ii)(B) be amended to permit designation of an office where document requests can be lodged. DuPont urges deletion of the section, arguing that Congress did not give the Commission responsibility for contract enforcement.

The suggested modification of section 581.4(a)(l)(vi), *i.e.*, adding the language "or on behalf of," might clarify that agents could execute contracts for the parties, but appears unnecessary since basic contract law allows such action. The Commission will, however, delete the words "signed by" and substitute in their place the words "entered into by." This should clarify the intent of the proposed rule and satisfy some commenters' concerns.

Additionally, sections 581.4(a)(1)(vi) and 581.5(a)(3)(vi) have been amended to clarify that if the terms of a service contract are limited to less than the full membership of a conference or shippers' association, a conference or shippers' association must list the members to whom the contract applies in the service contract.

The North European Conferences' suggested revision of section 581.4 (a)(2), adding the language "Commencing on or," also has merit, and will be adopted. This language clarifies that service contracts may include contract provisions on the first page following the required material as specified in section 581.4(a)(1).

The suggestion that section 581.4(a)(2)(ii)(b) be amended to eliminate the requirement to designate a *named* individual to make shipment records available is being incorporated into the final rule. The final rule will allow the *title* of the person who will respond to a request for shipment records (rather than the person's name) to be contained in the service contract. This change will eliminate the need for contract modifications when a company changes its personnel during the course of a contract and should not inhibit the Commission's surveillance efforts.

P. Proposed section 581.4(b)(1)

(b) Essential terms.

(1) Statement of essential terms. Every statement of essential terms shall:

(i) Be printed in black on yellow paper;

(ii) Be subject to the form and manner requirements applicable to governing tariffs as set forth in Part 580 of this chapter;

(iii) Be identified by an essential-terms number bearing the prefix "ET No." which shall be located on the top of each page of the statement of the essential terms; and

(iv) Contain on the first page, in a manner similar to that set forth in §§ 580.5(a)(8) and 580.5(a)(10) of this chapter, the period of availability of essential terms to similarly situated shippers under § 581.6(b), *i.e.*, both the beginning date [which shall be the date the contract is filed at the Commission] and the expiration date [which shall be no less than 30 days after the beginning date].

This section revises the existing rule by requiring the period of availability of terms to shippers under proposed section 581.6(b) to have a definite beginning and expiration date. DuPont recommends that this section be modified to provide that the time period for making essential terms available to similarly situated shippers be precisely 30 days.

The Commission is adopting the rule as proposed. For reasons stated more fully below in our discussion of section 581.6, carriers must make the essential terms of service contracts available for at least 30 days, but can offer them for a longer period, if they so desire. There has been no compelling reason offered for limiting the period of availability to *exactly* 30 days.

Q. Proposed section 581.(4)(b)(2)

(2) Essential Terms Publication. The Essential Terms Publication shall:

(i) Have all its pages printed in black on yellow paper;

(ii) Be subject to the form and manner requirements applicable to gov erning tariffs as set forth in Part 580 of this chapter;

(iii) (A) Contain a currently maintained "Index of Statements of Essentia Terms" structured as follows:

ET No.	Effec-tive Date	Expira-tion Date	Page No(s).	Section No(s).	Date of Can-cellation of Page(s)

The Index shall include for every statement of essential terms, the ET number, as provided in paragraph (b)(1)(iii) of this section, the effectiv duration, as provided in § 581.5(a)(3)(i), the page and section number(s [where used], and a column for cancellation dates which shall be use as an alternative to cancelling each individual page of the Essential Term Publication; and

(B) The statement of essential terms may not be cancelled until afte the duration of the contract, including any renewal or extension, has expired

(iv) Include an alphabetical index of the commodities covered by th service contracts in which each commodity shall make reference to th relevant ET number or numbers;

(v) Contain on its title page, or in a rule, reference to each carrier' or conference's tariff of general applicability; and

(vi) Be referenced in each of the carrier's or conference's tariffs o general applicability, where required to be filed under the Act and thi chapter.

In addition to format refinements, this proposed section adds a require ment that the Essential Terms Publication contain an index of the statement of essential terms.

The Japanese Conferences suggest that section 581.4(b)(2)(iii)(B) b amended to permit cancellation of a statement of essential terms followin the termination of a contract, as well as after it has expired.

DuPont recommends that section 581.4(b)(2)(iii)(B) be revised to provid that the "statement of essential terms must be removed from the essentia terms publication upon expiration of the period of availability to similarl situated shippers." It contends that maintaining the statement in an essentia terms publication serves no purpose after the expiration of the period o availability to similarly situated shippers.

Hercules believes that only a full contract and subsequent amendment should be filed with the Commission.

The Japanese Conferences' suggestion that the rule be amended to permi the cancellation of the statement of essential terms pages when such can cellation is effected by a "termination" of a service contract has meri and has been incorporated in the final rule. The proposed rule was intende to make known the status of each statement of essential terms, includin a date on which the essential terms are cancelled, and to provide carrier

and conferences with an alternative to cancelling each individual page of the statement of essential terms. The reason for the cancellation of any particular statement of essential terms—*i.e.*, whether the statement of essential terms is placed in a cancelled status because it terminated, expired under the original terms of the service contract, or was extended or renewed—is irrelevant for purposes of the rule.

The Commission does not agree with DuPont's position that maintaining the statement of essential terms serves no purpose after the expiration of the period of availability to similarly situated shippers. Removing the statement of essential terms from the Commission's files after the period of availability would deprive the public of knowledge of the terms of the service contract while it is still in effect. This information allows the shipping public to be aware of all of a carrier's or conference's rates (tariff rate or service contract rate) that are in effect in a trade.

The Commission has made one technical modification to the proposed rule. It has been clarified to indicate that multiple contracts may be represented by a single statement of essential terms.

R. Proposed section 581.5(a)

(a) Essential terms:

(1) May not be uncertain, vague or ambiguous;

(2) May not contain any provision permitting modification by the parties other than in full compliance with this part; and

(3) Shall include the following:

(i) The duration of the contract, stated as a specific, fixed time period, with a beginning date and ending date;

(ii) The origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements, except that, in service contracts, the origin and destination of cargo moving under the contract need not be stated in the form of "port ranges" or "geographic areas" but shall reflect the actual locations agreed to by the contract parties;

(iii) The contract rate, rates or rate schedule(s), including any additional or other charges [i.e., general rate increases, surcharges, terminal handling charges, etc.] that apply, and any and all conditions and terms of service or operation or concessions which in any way affect such rates or charges;

(iv) The commodity or commodities involved;

(v) The minimum quantity of cargo or freight revenue necessary to obtain the rate or rate schedule(s), except that the minimum quantity of cargo committed by the shipper may not be expressed as a fixed percentage of the shipper's cargo.

(vi) The service commitments of the carrier or conference;

(vii) Liquidated damages for nonperformance, if any; and

(viii) Where a contract clause provides that there can be a deviation from an original, essential term of a service contract, based upon any

stated event occurring subsequent to the execution of the contract, a clea and specific description of the event, the existence or occurrence of whic shall be readily verifiable and objectively measurable. This requiremer applies to, inter alia, the following types of situations:

(A) Retroactive rate adjustments based upon experienced costs;

(B) Reductions in the quantity of cargo or amount of revenues require under the contract;

(C) Failure to meet a volume requirement during the contract duratio in which case the contract shall set forth a rate, charge, or rate basi which will be applied;

(D) Options for renewal or extension of the contract duration with c without any change in the contract rate or rate schedule;

(E) Discontinuance of the contract;

(F) Assignment of the contract; and

(G) Any other deviation from any original essential terms of the contrac

This provision changes the existing service contract regulations concernin the content of essential terms, 46 CFR 580.7(g), by: (1) strengthenin the requirement for "concise" essential terms to clearly prohibit uncertainty vagueness or ambiguity; (2) imposing a prohibition against contract mod fications, except when permitted by contingency clauses published wit the original filed contract; (3) requiring the contract's term to be state as a specific date-to-date time period; (4) allowing contracts to reflec the specific origin and destination locations to be served (as opposed t port ranges and geographic areas that must be published in the statemer of essential terms); (5) prohibiting cargo commitments to be stated a a fixed percentage of a shipper's cargo; (6) treating cargo rerating provisio for failure to meet volume commitments as a form of contingency claus instead of a form of liquidated damages; and (7) requiring contingenc clauses to be tied to an objective and verifiable event.

Virtually every commenter expressed opinions on the various aspec of this proposed section. Accordingly, no attempt has been made to cata logue each commenter's views in detail. The essential arguments of th parties on the issues presented by the proposal are summarized belo in the discussion of each subsection.

Section 581.5(a)(1): uncertainty, vagueness or ambiguity

Several comments challenged the authority of the Commission to contr the clarity of service contract language. These comments are generall from shippers or shippers' organizations and essentially state that the lan guage of a service contract is a private commercial agreement not subje to oversight by the Commission.

Other comments in support of the requirement were filed, mostly b carriers, but also including at least one shipper. They generally agree wit the Commission that because third parties have rights involved, clarit

in the contractual terms is essential and that, therefore, uncertain, vague or ambiguous language should not be permitted.

The final rule will require service contract essential terms to be clear and definite. Parties opposed to this requirement are confusing the concept of "flexibility," which service contracts should afford the contract parties, with "uncertainty, vagueness or ambiguity," which impedes the statutory rights of third parties and the Commission's enforcement responsibilities. Arguments that continue to insist at this late date that service contracts are purely private commercial arrangements are irrelevant. The fact that these contracts must be filed and their essential terms published in tariff format and made available to similarly situated shippers necessarily charges them with an element of the public interest. *See, Publishing and Filing Tariffs in Foreign Commerce,* 27 F.M.C. 323 (1984). Additionally, although service contracts are exempt from many of the "prohibited acts" applicable to tariff rates and practices, they are not exempt from all of them. *See* 46 U.S.C. app. 1709(b). The Commission's regulatory authority over service contracts can only be exercised if the essential terms of filed contracts are sufficiently precise to inform interested third parties of the exact nature of the obligations undertaken by the contract parties. Accordingly, section 581.5(a)(1) will be adopted as proposed.

Section 581.5(a)(2): modifications

Apart from those who generally support restricting the ability of contract parties to modify a contract during its term, few commenters addressed section 581.5(a)(2). Some argued, however, that this section was too restrictive and suggested that it be amended to allow for modifications necessary because of mistakes of fact or changes in commercial conditions.

The Commission again rejects the suggestion that it lacks authority to restrict the rights of contract parties to modify a service contract during its term on the basis that they are purely private commercial arrangements. *See* 27 F.M.C. at 330. The relevant questions are whether the essential terms of service contracts can be modified at all after publication, and, if so, how can the statutory interests of third parties be protected against potential abuses of modification rights. The solution the Commission has accepted is to require the parties to provide for potential modifications through contingency clauses published with the essential terms publication. *See* 27 F.M.C. at 335. Because utilizing these provisions does not require any change in the contract itself, they are not true "modifications" but rather "contingency clauses." Permitting contingency clauses, but not contract modifications, strikes a balance between the commercial flexibility service contracts are supposed to provide and the meaningful commercial disclosure of the terms of the contract that publication of the essential terms is intended to achieve.

Section 581.5(a)(3): content of essential terms

The focus of the comments on the content of essential terms was on those concerning "fixed percentage" contracts and cargo commitments (section 581.5(a)(3)(v)), service commitments (section 581.5(a)(3)(vi)), liquidated damages (section 581.5(a)(3)(vii)), and contingency clauses (section 581.5(a)(3)(viii)). The comments on these essential terms generally fall into two categories: (1) those that favor more Commission control and less flexibility in contract provisions (mostly carriers); and (2) those that favor less Commission control and more flexibility in contract provisions (mostly shippers). Although a few comments addressed other essential terms, none raises significant legal issues or sufficient policy considerations to warrant a change in the proposed rule or discussion here.

The comments that suggest permitting "fixed percentage" service contracts rely for the most part upon a technical, legal argument concerning the definition of "loyalty contract" at section 3(14) of the 1984 Act, 46 U.S.C. app. 1702(14). They contend that, because the definition specifically excludes service contracts, such contracts stated in "all or a fixed portion" of a shipper's cargo are not loyalty contracts and may be filed under section 8(c) of the 1984 Act.

The meaning of "loyalty contract" as defined in the 1984 Act, cannot be solely ascertained by a reading of the statute. Further guidance can be obtained by reference to the overall statutory scheme and the legislative history of the 1984 Act. As the Commission explained in a prior rulemaking on this subject, to permit "fixed percentage" service contracts:

> . . . would, in effect, convert a service contract to a 'loyalty contract' as that term is defined by the Act (46 U.S.C. app. 1702(14)). It would be inconsistent with Congress' treatment of loyalty contracts elsewhere in the Act (46 U.S.C. app. 1709 (b)(9)). . . .

27 F.M.C. at 327. Nothing in the comments submitted in this proceeding warrants a departure from the Commission's previous determinations of this issue. Accordingly, the prohibition against "all or a fixed percentage" service contracts will be retained.

The majority of comments on the content of essential terms concerned the issue of "contingency clauses." Again, comments were generally divided between those favoring strict regulation or even a ban on contingency clauses, and those opposed to any Commission regulation on the matter. The former stressed the need for meaningful contract commitments and the protection of third party rights, while the latter stressed contract freedom and commercial flexibility. Some comments supported the proposed rule as a reasonable balance between these competing policies.

The proposed rule was generally designed to allow less flexibility in those areas susceptible to contract malpractices, while retaining the maximum amount of contract freedom in all other areas. The Commission

has attempted to strike a balance between the need for regulations to prevent service contract abuses and the commercial flexibility service contracts are intended to afford shippers and carriers. However, the Commission rejects the extreme arguments in some comments that it has no authority to promulgate any substantive regulations concerning service contracts. Section 17(a) of the 1984 Act, 46 U.S.C. app. 1716(a), grants broad rulemaking authority to the Commission with no exception in the area of service contracts. The Commission is cognizant of the Congressional policy of minimum government intervention expressed in section 2(1) of the Act, and has been guided by the policy in drafting these rules. It does not, however, read section 2(1), 46 U.S.C. app. 1701(1), as a limitation on its section 17(a) authority to promulgate rules. We believe that the regulations promulgated in this proceeding are fully consistent with the overall statutory and legislative intent relevant to service contracts and are a reasonable response to industry conditions. For reasons stated above, and in a prior rulemaking proceeding on service contracts, *see* 27 F.M.C. at 320, the Commission will adopt the proposed rule.

S. Proposed section 581.5(b)

(b) Notice. Detailed notice shall be given to the Commission under §581.3(a)(3) within 30 days of:

(1) Any account adjustment resulting from either liability for liquidated damages under paragraph (a)(3)(vii) of this section, or the occurrence of an event described in paragraph (a)(3)(viii) of this section; and

(2) Final settlement of any account adjusted under paragraph (b)(l) of this section.

This provision requires notice to the Commission within 30 days of account adjustments due to contract breaches or deviations.

TWRA favors this provision and additionally suggests that notice be given in essential terms tariff publication for reasons stated in its comments on section 581.3(a), *infra*. DOT urges that the Commission not impose surveillance reporting requirements. Ford also opposes the imposition of these notification requirements, maintaining that they would discourage the use of service contracts by adding substantially to the cost and burden for both the carrier and shipper.

The proposed notice requirement is necessary to enable the Commission to perform its contract surveillance role and ensure that the terms of contracts are met. The notice requirements should not be burdensome since such information is exchanged in the normal course of business by the contract parties. Compliance with the notice requirement can be met merely by providing the Commission with a copy of whatever documents are exchanged between the parties under such circumstances.

In the Supplemental Information to the proposed rule the Commission noted that it had considered the nonconfidential filing of the notices, as was suggested by TWRA, but rejected this approach since there appeared

to be substantial practical difficulties, such as protecting the name of shippers. One exception to the confidential filings of notices would be a change in the duration of a contract as a result of any renewal, extension or termination implemented pursuant to the terms of a service contract. Such "notices" would be made public through amendments to the Index of Statements of Essential Terms.

T. Proposed section 581.5(c)

(c) Issuance of proposed final accounting. Any proposed final account adjustment resulting from liability for liquidated damages or the occurrence of an event under paragraph (b)(l) of this section shall be issued to the appropriate contract party within 30 days of the termination or discontinuance of the service contract.

This section is intended to prevent abuses in the collection or non-collection of the final amount due under service contracts.

NEPFC and PCEC suggest that the final accounting rule be expanded to require that carriers file a "certification" with the Commission at the conclusion of a particular service contract attesting that the contract has been fulfilled in accordance with its terms.

The North European Conferences contend that the 30-day proposed final account period is impractical and unrealistic. They request that the time period be enlarged to no less than 90 days. DOT urges that the Commission not impose any surveillance reporting requirements in this area. TWRA's comments are the same as for section 581.5(b). AISA's comments are the same as for section 581.5(a)(1).

The suggestion that the Commission require a certification that every contract has been fulfilled in accordance with its terms would place an unnecessary burden on carriers and conferences and the Commission's staff. The proposed rule was intended to apply to only those service contracts where there has been a change to the basic compensation required by the terms of the service contract. Therefore, when no account adjustment is necessary, no regulatory purpose would be served by requiring the filing of a final accounting certifying completion of those contracts.

The 90-day proposed final account period suggested by the North European Conferences appears too long, considering that the widely accepted commercial practice for the settlement of accounts is 30 days, as evidenced by the carriers' and conferences' credit privileges published in their tariffs of general applicability. However, considering the volume of paperwork inherent in service contract activities and the time that may be involved in collecting the data necessary in preparing a proposed final accounting, the Commission, in the final rule, is extending the period prescribed for issuance of such final accounting to 60 days.

U. Proposed section 581.6

(a) Availability of statement. A statement of the essential terms of each service contract as set forth in tariff format shall be made available to the general public pursuant to the requirements of this section and §§ 581.3, 581.4(b) and 581.5.

(b) Availability of terms.

(1) The essential terms of each service contract shall be made available to all other shippers or shippers' associations similarly situated under the same terms and conditions for a specified period of no less than thirty (30) days from the date of filing of the service contract as may be adjusted under 581.8(d).

(2) Whenever a shipper or shippers' association desires to enter into a service contract with the same essential terms, a request shall be submitted to the carrier or conference in writing.

(3) The carrier or conference shall reply to the request by mailing, or other suitable form of delivery, within 14 days of the receipt of the request, either a contract offer with the same essential terms which can be accepted and signed by the recipient upon receipt, or a valid reason in writing why the applicant is not entitled to such a contract.

(4) The service contract resulting from a request under this section may not go into effect until an executed copy, signed by all necessary parties, is filed with the Commission under this section.

(5) In the case of any expressly described event which results in a change to an original essential term by the operation of a contract clause in the service contract under § 581.5(a)(3)(viii), the newly operable essential term(s) shall be immediately made available in writing to other shippers and shippers' associations subject to the same, original essential terms, with copies to the Commission under § 581.3(a)(3)(ii).

This section amends the present procedures for a similarly situated shipper to obtain a service contract's essential terms, 46 CFR 580.7(g)(1)(ii), in several ways: (1) the request by a similarly situated shipper seeking the same contract terms must be in writing; (2) a carrier or conference must respond to such a request within 14 days, with either a similar contract offer or an explanation why the carrier or conference does not believe that the shipper is entitled to the contract; and (3) a contract executed by a similarly situated shipper cannot itself go into effect until it is filed with the Commission. In addition, when a service contract provides for a deviation from an essential term and such an event occurs, the proposed section would require that notice be provided to any other shipper which is subject to the same terms so that it can have the opportunity to avail itself of the altered terms.

APL has no objection to the proposed section but suggests that the term "similarly situated shipper" be defined. The North European-U.S. Pacific Freight Conference and PCEC also generally concur with the proposed procedures. They suggest, however, that a copy of a carrier's "rejec-

tion letter" also be sent to the Commission. ANERA and the Mediterranean Conferences do not take issue with the proposed regulation, except to recommend that a deadline by which a similarly situated shipper must return an executed copy of a proffered contract be established. They suggest three working days.

The Japanese Conferences request that proposed section 581.6(b)(3) be amended by deleting the words "a valid reason" and substituting therefor "an explanation." Otherwise, they believe that they could be found in violation of the rule if at a later time a reason given in good faith is found to be invalid. The Japanese Conferences also believe that the words "signed by all necessary parties" in section 581.6(b)(4) should be deleted, because the requirement that such a contract must be "executed" is sufficient. Those Conferences oppose the present wording of subparagraph (b)(5), which would require all changes in essential terms which result from operation of a contract clause (*e.g.*, a force majeure clause) to be immediately made available to all shippers subject to the same essential terms. They believe that this could provide an unfair windfall to a shipper which is not itself subject to the conditions which caused the change in the essential terms. They would amend the subparagraph to indicate that the changed terms need only be made available to shippers which are "similarly affected" by the change. Lastly, the Japanese Conferences contend that paragraph (b)(5) should be clarified to require that notice need only be given to similarly situated shippers which have in fact entered into a like contract.

The North European Conferences believe that the phrase "signed by all necessary parties" in subparagraph (4) should be revised to read "signed by *or for* all necessary parties." They contend that this would clarify that service contracts may be executed on behalf of the contract parties by duly authorized representatives. The North European Conferences also correctly note that the reference to "§581.3(a)(3)(ii)" in subparagraph (5) should actually be "§581.3(a)(3)(i)."

In accord with its comments on proposed section 581.5(a)(3)(viii), Sea-Land suggests that proposed section 581.6(b)(5) be deleted, on the ground that commercial contingency clauses should not be permitted in service contracts. Moreover, even if the proposed section were retained, Sea-Land questions whether a change in terms permits a total reopening of the contract or only allows shippers who already have a "me-too" contract to avail themselves of the changed terms.

TWRA generally agrees with the proposed section, but believes that 14 days may be too short a period of time to respond to a shipper, if a good faith determination is to be made as to whether a shipper is "similarly situated." TWRA also urges that the rule be amended to define "similarly situated shipper."

While expressing no objection to the basic 30-day availability period set forth in proposed section 580.6(b)(1), USL suggests that the period should commence on the date the essential terms are published in the

carrier's or conference's tariff. USL further urges that the proposed rule be clarified to provide that the 30-day availability period only applies to the initial essential terms' filing. It contends that when a similarly situated shipper takes advantage of a previously filed service contract, the filing of the essential terms for the subsequent contract should not extend the availability period for an additional 30 days. In this regard, USL advocates the elimination of the filing of such subsequent essential terms. Lastly, USL takes the position that the Commission should not attempt to define "similarly situated shipper" and instead proposes that for a shipper to take advantage of an existing contract, it must be ready, willing, and able to execute the same contract as did the original shipper.

AISA suggests that, with respect to proposed section 581.6(b)(5), if the Commission is merely seeking to ensure that similarly situated shippers have changed terms made available to them, the provision should be revised to provide that a shipper and carrier may mutually agree not to invoke the provision after receiving the requisite notice. DuPont contends that the 30-day period of availability in section 581.6(b)(1) is reasonable, but it should not be permitted to extend any longer.

IBP questions whether *all* essential terms of a requested service contract must be identical to those in the original contract. IBP also takes issue with the mechanism created by proposed section 581.6(b)(5) for making new essential terms available to similarly situated shippers. Because of perceived ambiguities in this subparagraph, IBP fears that carriers will become unwilling to negotiate service contracts, to the detriment of the shipping public.

The NYCCI and Warner-Lambert contend that the notice requirement of proposed section 581.6(b)(5) imposes an unreasonable burden on carriers and also unreasonably discloses the business affairs of the shipper. They argue that if a shipper encounters a condition which triggers a deviation from the original essential terms, either all other shippers encounter the same condition, in which case they can also deviate or opt not to, or they do not encounter the same condition and are not similarly situated.

The issue of whether to adopt a definition of "similarly situated shipper" has been addressed elsewhere and will not, therefore, be further discussed here.

Some of the comments offer suggestions of a technical nature which would appear to clarify or otherwise improve the proposed rule. The suggestion of the Japanese Conferences that the words "a valid reason" be deleted from subparagraph (b)(3) and the words "an explanation" be substituted, has merit and is adopted. In addition, we agree that it is not necessary to state that an executed service contract be "signed by all necessary parties," as is presently required by subparagraph (b)(4), since an executed copy would perforce be signed by all parties. Also, as pointed out, the reference in subparagraph (b)(5) to "§ 581.3(a)(3)(ii)" should read "§ 581.3(a)(3)(i)."

The Commission is not convinced, however, that the rule should contain a specific deadline for a requesting shipper to return a proffered contract to a carrier, as was suggested by ANERA. Carriers or conferences making offers to similarly situated shippers, pursuant to subparagraph (b)(3), are certainly free to impose their own deadlines. Presumably, any similarly situated shipper requesting a "me-too" contract might want to begin using the contract as soon as possible and would, therefore, return its executed copy quickly. In any event, subparagraph (b)(3) has been amended to indicate that a carrier or conference may require a contract offer to be accepted by a date certain.

We also find merit to the proposal that subparagraph (b)(5) be amended to clarify that similarly situated shippers which have entered into "me-too" contracts are entitled to altered essential terms as a result of contingencies stated in the initial contract only if they are similarly affected by the described event. This would prevent some shippers from otherwise experiencing a windfall even though they did not likewise experience the event which occasioned the change in terms.

We are not adopting the remainder of the comments or suggestions. They appear to be either unwarranted by the circumstances, or reveal a misconception about the purpose and effect of the proposed rule. Moreover, many of these comments would require additional rulemaking before they could be implemented, since they were not within the scope of the proposed rule.

In this regard, there is no reason at this time to require that a copy of a rejection letter prescribed in subparagraph (b)(3) be filed with the Commission. Any shipper aggrieved lay a carrier's decision not to offer a "me-too" contract can easily bring the matter to the Commission's attention. We also see no need to amend subparagraph (b)(5) to clarify that the notice of newly operable essential terms must only be given to shippers that have in fact entered into the same contract. The present wording is unambiguous. The notice must be made to "other shippers and shippers' associations subject to the *same, original* essential terms." (Emphasis added). Nor do we agree that it is unclear whether a change in essential terms subject to subparagraph (b)(5) requires a reopening of the contract. Again, these changes are *only* made available to other shippers which have entered into a contract having the *same* essential terms.

Only one commenter has suggested that 14 days is too short a period of time to respond to a request for a similar contract. This time limit was originally proposed so that carriers or conferences could not unnecessarily delay acting on such a request. Nothing presented convinces us that the period prescribed is unreasonable. We are therefore retaining the 14-day limit.

Likewise, we see no need to change the beginning of the 30-day availability period to the date the essential terms are *published,* as was suggested. The publication of the statement of essential terms should generally coincide

with the filing of the service contract. In any event, the date of the *filing* of a service contract is a date which is readily ascertainable by the Commission and will be retained. On the same subject, it was the proposed rule's intention that the availability period only apply to the initial service contract filed and that any "me-too" contract which was also filed did not extend the availability period for an additional 30 days. This also appears to be the interpretation which has been adopted by carriers and conferences in practice. Nevertheless, to avoid any potential confusion in this area, subparagraph (b)(1) will be amended to more clearly indicate that the availability period only applies to the essential terms of an *initial* service contract.

DuPont has suggested that the 30-day minimum availability period should not be allowed to extend beyond 30 days. It has not, however, provided any compelling reason for imposing such a limitation. Carriers or conferences should be free to determine their own availability periods, so long as they are at least 30 days.

There is nothing in subparagraph (b)(5) which requires a similarly situated and affected shipper to also adopt newly operable essential terms after receiving notice thereof. The decision as to whether to do so is solely the shipper's, and it is not therefore necessary to provide that a shipper and carrier may mutually agree *not* to invoke the provision.

V. Proposed section 581.7(a)

(a) Modification. The essential terms originally set forth in a service contract may not be modified during the duration of the contract.

This section is essentially the same as the existing prohibition against contract modifications, 46 CFR 580.7(d)(1). Comments on proposed section 581.7(a) were generally divided between those opposed to any Commission regulation restricting the contract parties' rights to modify a contract and those in favor of a general ban on contract modifications. For a discussion of this basic issue see the discussion of proposed section 581.5(a), *infra.*

The Commission will continue the prohibition against contract modifications, while at the same time permitting parties to the service contract to provide for known and ascertainable commercial contingencies.

Specific comments requesting that some grace period be allowed for contract modification were also filed. However, we do not view these proposals as feasible at this time and believe that the provisions in proposed section 581.5(a) allowing for contingency clauses will satisfy these concerns. Requiring contract parties to carefully and skillfully draft their agreements before putting them into effect, does not appear to impose an unreasonable burden on those parties.

W. Proposed section 581.7(b)

(b) Termination or breach not covered by contract. In the event of a contract termination which is not provided for in the contract itself

and which results from mutual agreement of the parties or from breach or default because the minimum quantity required by the contract has not been met:

(1) Further or continued implementation of the service contract is prohibited;

(2) The cargo previously carried under the contract shall be rerated according to the otherwise applicable tariff provisions of the carrier or conference in effect at the time of each shipment; and

(3) Detailed notice shall be given to the Commission under § 581.3(a)(3) within 30 days of:

(i) The occurrence of the contract termination, breach of default under this paragraph;

(ii) Any rerating or other account adjustment resulting from the contract termination, breach or default under this paragraph; and

(iii) Final settlement of the account adjusted under subparagraph (3)(ii) of this paragraph.

(4) Any proposed rerating or other final account adjustment resulting from termination, breach or default under this paragraph shall be issued by the carrier or conference to the shipper or shippers' association within 30 days of the termination of the service contract.

The proposed rule does not change the existing provision allowing termination of service contracts by mutual agreement of the parties. Similarly, the proposed rule continues to allow the parties to provide for termination and breach remedies in their contract. The amendments proposed in this proceeding are intended to address those terminations and breaches that are not provided for in the contract. In these cases, the proposed rule provides: (1) cessation of contract implementation; (2) rerating of cargo according to the otherwise applicable tariff; and (3) notification to the Commission and the shipper of termination or breach actions proposed or performed by the carrier. In essence, when a service contract is repudiated and the parties are no longer acting pursuant to the contract, the Commission will require adherence to the otherwise applicable tariff.

The comments filed on proposed section 581.7(b) are generally divided into three groups: (1) those that support the Commission's suggested method of regulating terminations and breaches of contracts when the contract does not cover such a contingency; (2) those that argue that actual or liquidated damages be imposed; and (3) those that argue that the Commission has no authority to prescribe remedies and procedures caused by a termination or breach of a contract.

The proposed rule was intended to address two situations: (1) when carrier and shipper mutually agree to terminate a service contract and (2) when a shipper fails to meet its minimum volume commitment. The purpose of this provision is *not* to enforce contracts or prescribe particular remedies for contract breaches as between the parties themselves. That function is the role of the courts under section 8(c) of the 1984 Act.

Rerating applies only to cargo actually shipped and has no direct relationship to "deadfreight" or other measures of damages for contract breaches. The purpose of this provision is to prevent collusive action between the parties to a service contract to terminate or "breach" their commitments without seeking appropriate remedies. The rule is intended to prevent carriers and shippers from using service contracts as a device to unlawfully evade tariff rates. Service contracts with no meaningful cargo or service commitments could, at a minimum, violate section 10(a)(1) of the Act, 46 U.S.C. app. 1709(a)(1).

The report of the House Merchant Marine and Fisheries Committee expressed a clear Congressional intent that service contracts not become a "device" to undermine common carriage under public tariffs when it stated:

> The Committee is seriously concerned that service contracts not be employed so as to discriminate against all who rely upon the common carriage tradition of the liner system. The purpose of this legislation is to regulate fairly a system of common carriage. . . .
>
> . . . [T]he Committee expects the FMC to be cognizant of the effects of [sic] common carriage that abuse of service contracting may occasion.

H.R. Rep. No. 53, Part 1, 98th Cong., St. Sess. 17 (1983).

Proposed section 581.7(b) does, in effect, impose a type of regulatory consequence for contract breach or termination consistent with Congress' intent that service contracts not be abused. However, if the parties include in their contracts in the first instance provisions concerning mutual termination and shipper failure to meet the minimum commitment, there is no need to invoke this provision. Another option to rerating, particularly if the shortfall is slight, is for the shipper to pay for what has not moved at the contract rate. This would in effect constitute compliance with the shipper's cargo commitment.

Finally, to conform section 581.7(b)(4) to section 581.5(c), the period within which to issue a proposed rerating or other final account adjustment has been extended to 60 days.

X. Proposed section 581.8

(a) Initial filing and notice of intent to reject.

(1) Within 30 days after the initial filing of the contract and statement of essential terms, the Commission may notify the filing party of the Commission's intent to reject a service contract and/or statement of essential terms that does not conform to the form, content and filing requirements of the Act or this part. The Commission will provide an explanation of the reasons for such intent to reject.

(2) The parties will have 20 days after the date appearing on the notice of intent to reject to resubmit the contract and/or statement of essential

terms, modified to satisfy the Commission's concern as set forth in paragraph (a)(l) of this section.

(b) Rejection. The Commission may reject the contract and/or statement of essential terms if the objectionable contract or statement:

(1) Is not resubmitted within 20 days of the notice of intent to reject; or

(2) Is resubmitted within 20 days of the notice of intent to reject as provided in paragraph (a)(2) of this section, but still does not conform to the form, content or filing requirements of the Act or this part, as set forth in paragraph (a)(l) of this section.

(c) Implementation; prohibition and rerating.

(1) Performance under a service contract may begin without prior Commission authorization on the day both the service contract and statement of essential terms are on file with the Commission, except as provided in paragraph (c)(2) of this section:

(2) When the filing parties receive notice that the service contract or statement of essential terms has been rejected under paragraph (b) of this section:

(i) Further or continued implementation of the service contract is prohibited;

(ii) All services performed under the contract shall be rerated in accordance with the otherwise applicable tariff provisions for such services with notice to the shipper or shippers' association within 30 days of the date of rejection; and

(iii) Detailed notice shall be given to the Commission under § 581.3(a)(3) within 30 days of:

(A) The rerating or other account adjustment resulting from rejection under this paragraph; and

(B) Final settlement of the account adjusted under paragraph (c)(2)(iii)(A) of this section.

(d) Period of availability. The minimum 30-day period of availability of essential terms required by § 581.6(b) shall be suspended on the date of the notice of intent to reject a service contract and/or statement of essential terms under paragraph (a)(l) of this section and a new 30-day period shall commence upon the resubmission thereof under paragraph (a)(2) of this section.

This proposed section amends the procedures for return and rejection of contracts or statements of essential terms. These procedures provide the Commission 30 days to reject a service contract, with a written explanation of the reasons for rejection. The filing party will then have 30 days to correct the contract. Failure to correct a contract will result in rejection, thereby prohibiting continued service under the contract.

APL, ANERA, TWRA, Ford, and NITL oppose the proposal to increase the time within which notification of intent to reject a service contract

must be given by the Commission. They favor the current 15-day period for notice to reject and the 15-day period for resubmission.

The Mediterranean Conferences and the Japanese Conferences suggest that the filing parties should have 30 days to respond to a notice of intent to reject, the same period the Commission has for considering a rejection. In addition, the Japanese Conferences oppose the retroactive rerating required by proposed section 581.8(c) due to a service contract rejection, maintaining that the contract rates are the only lawful rates on file at the time of shipment. The North European Conferences suggest the 30-day period in section 581.8(c)(2)(ii) is impractical and unrealistic. They request that the time period be enlarged to no less than 90 days.

Sea-Land suggests the rule be revised to delay implementation of service contracts (14 days after filing) to permit an initial Commission review in order to protect the parties against having to rerate cargo due to a rejection.

DuPont suggests that "shall" be substituted for "may" in section 581.8(a)(1) to make the notification a more definite requirement. Lastly, DOT urges that the Commission not adopt the proposed section 581.8(c) rerating obligation and surveillance reporting requirements for partial performance of a service contract prior to its rejection by the Commission.

Experience has proven that the current 15-day period is sometimes inadequate for the contract parties to resolve problems and for the Commission to process the contracts. On the other hand, it appears, based on the comments, that the proposed 30-day period may be too long a time to expose the parties to possible rejection and to commercial problems which could arise as a result of rejection. Therefore, as a compromise, the final rule will provide for a 20-day period for both the notice of intent to reject and the period for resubmission.

Sea-Land's suggestion of requiring service contracts and statements of essential terms to be filed in advance of the effective date has previously been considered by the Commission in its interim rule to implement the 1984 Act. The Commission rejected such a course of action in favor of the present procedure because advanced filing appears to be more detrimental to the interests of the contracting parties. Further, there is no statutory authority to require an advance notice of filing of service contracts. However, contract parties are always free to file service contracts in advance of their effective dates to accommodate the possibility of rejection.

In response to comments opposing retroactive rerating in the event of rejection, the Commission reaffirms its position expressed in the Supplemental Information. If a shipper was permitted to obtain the rate contained in a "contract" that was rejected because it did not comply with all statutory or regulatory requirements, it would be obtaining an unlawful benefit. The rules expressly put the parties on notice that a service contract may possibly be rejected during the short review period. If they desire to avoid the possibility of rerating for cargo carried prior to rejection,

they could elect the course suggested by Sea-Land and simply file their contracts well in advance of any cargo moving under them.

ADDITIONAL ISSUES

The Supplementary Information to the proposed rule also advised that the Commission was concerned about four additional areas and accordingly solicited comment as to whether further rulemaking proceedings should be pursued in any or all of them. Specifically, the Commission questioned whether: (1) the definition of "port range" should be adjusted to address problems relating to the scope of foreign port ranges; (2) it should adopt specified minimums for shipper cargo commitments, carrier service commitments, or liquidated damages; (3) it should require a single form, with detachable sections, for filing all relevant service contract information; and (4) "most-favored-shipper" clauses were a problem and, if so, whether they should be limited in some manner.

A discussion of the comments and analysis of each of these issues follows.

Y. Foreign Port Ranges

The Notice of Proposed Rulemaking invited comments on the application of the current port range requirement to foreign port ranges, which are often dispersed over a wide geographic area, and queried whether this was inhibiting the use of service contracts. Commenters were asked to identify any problem areas and propose solutions.

In response, CMA, DuPont, Stauffer and Union Carbide advise that they had experienced no difficulties as a result of the application of the port range rule to foreign port ranges.

On the other hand, APL, ANERA, the Mediterranean Conferences, the Japanese Conferences, PCEC, the North Europe-U.S. Pacific Freight Conference, and TWRA believe that there is a need to limit the geographic scope of foreign port ranges in service contracts. This is also the view of the North European Conferences which further urge that the description of origin and destination non-U.S. port ranges included in essential terms filings should only identify ports: (1) in a country where cargo is to be loaded or discharged under the terms of the underlying service contract; and (2) which are regularly served by a contracting carrier or contracting members providing service. The North European Conferences would define the term "regularly served" to include only those ports in the range that are served in a manner that would enable the carrier to meet its obligations under the service contract.

The legislative history of the 1984 Act supports the view that ocean common carriers and conferences may restrict the foreign port range in a service contract to ports in a single country which are regularly served by the carrier or conference. The Report of the Senate Committee on Commerce, Science and Transportation states in pertinent part:

> The term "port range" is intended to encompass those ports *in the country of loading or unloading of the contract cargo* that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

S. Rep. No. 3, 98th Cong., 1st Sess. 31 (1983) (emphasis added). Accordingly, and in response to comments on the definition of "port range," the final rule defines "port range" to only encompass "ports *in the country* of loading or unloading."

Whether a port in the range is "regularly served," as that term is used in the rule, appears to be a question of fact that would be particularly difficult to address in a rule of general application. Moreover, no compelling need has been demonstrated to justify such action. In any event, even if a need and basis had been shown to define the term "regularly served," this could not be done in this rulemaking since it is beyond the scope of the proceeding. Accordingly, the Commission will not modify the rule here to add a definition of the term "regularly served."

Z. Minimum Volume Commitments, Carrier Service Commitments and Liquidated Damages

In addressing this topic in the Supplementary Information to the proposed rule, the Commission identified three areas of concern: (1) low volume commitments; (2) *de minimis* carrier service commitments; and (3) miniscule liquidated damages for breach of a service contract. The Commission suggested that requiring specified minimums to apply to these situations might possibly solve these problems, and therefore invited comment on the need for additional regulations in these areas.

Most, but not all, commenters oppose any additional regulation which might impose service contract minimums in the areas suggested by the Commission. They contend that there is no demonstrated need for regulation and that carriers and shippers will not enter into a service contract in the first place unless they each receive a benefit therefrom. Some (*e.g.*, PCEC, AISA, CMA, PPG, and DOJ) contend that the Commission has no legal authority to impose minimum levels for cargo and service commitments or for liquidated damages. One commenter (Stauffer) believes that minimums are not consistent with the spirit of the 1984 Act, which it contends favors a more commercial and less bureaucratic "interface" between the service contract parties. Several commenters raise concerns about the effects of minimums on small or medium shippers, contending that they may result in fewer service contract opportunities for such shippers. The inherent problems in determining a specific minimum level have also been raised, especially in light of the large number of variables which would have to be considered in the process. The Japanese Conferences,

NEPFC, and PCEC suggest that the Commission could adequately address any problems which may exist on an *ad hoc* basis.

TWRA argues that a fixed volume or revenue minimum would inhibit the flexibility to deal with small shippers. It contends that the solution is to put in place a regulatory mechanism which creates a commercial incentive for both parties to arrive at meaningful commitment levels. TWRA therefore suggests that the Commission should require all service contracts to state a maximum as well as minimum number of cargo units and to further require that the maximum cannot exceed the minimum by more than a reasonable proportion (*e.g.*, 33⅓%).

The North European Conferences and the Australia-New Zealand Conference share the Commission's concerns about low volume commitments on the part of shippers and therefore support adoption of a rule providing for a minimum volume commitment. The Australia-New Zealand Conference notes that, while drafting such a rule may be a complex matter, there is nonetheless a need for it.

IBP also supports the establishment of a minimum volume of cargo for a service contract. It suggests that the minimum volume could be based on a specified percentage (*e.g.*, 1%) of the shipping market for a given commodity or some other reasonable absolute number (*e.g.*, 200 TEUs/year in a containerized trade). IBP also contends that it probably would be more advantageous for shippers with less than 1% of a market to use a shippers' association, rather than attempt to negotiate small-volume service contracts.

Only the South/Central American Conferences specifically address service contract minimums as they apply to carrier service commitments. They argue that the Commission should not proceed further in this area, unless it has specific evidence that carriers or conferences are failing to provide adequate service and space to fulfill their contractual obligations.

Two commenters oppose any further rulemaking in this area. The South/Central American Conferences do not believe that minimum cargo commitments are realistic or fair to small shippers in smaller trades. The other, DuPont, contends that, to the extent that low volume commitments exist, they are attributable to the Commission's positions on percentage requirements contracts and loyalty contracts.

The North European Conferences share the Commission's concerns about *de minimis* liquidated damages for shipper breach of its volume commitment. Along with USL, ANERA, and the Mediterranean Conferences, the North European Conferences support the consideration of further rulemaking in this area. They contend, however, that in the interim the Commission could reject service contracts containing *de minimis* liquidated damages on an *ad hoc* basis pursuant to existing rules.

TWRA maintains that the 1984 Act permits liquidated damages as an alternative to actual damages for breach of a service contract. It further contends that the Act does not permit a "no damages" option or liquidated

damages that do not closely approximate actual damages. TWRA thus urges the Commission to require carriers to collect deadfreight in the event of a cargo or revenue shortfall or require the use of actual damages (deadfreight less the carrier's avoided incremental costs) or some other reasonable liquidated approximation of actual damages. The South/Central American Conferences offer yet another alternative measure of liquidated damages—15 percent of the freight charges for any shortfall from the minimum volume.

DuPont believes that the matter of whether or not to specify liquidated damages in the event of breach is one that should be left to the contracting parties. It submits that if the Commission eventually sets specific limits on liquidated damages, carriers and shippers will simply elect not to specify any at all.

As the above discussion indicates, there was no clear consensus among the commenters in any of the three areas the Commission asked to be addressed. However, the Commission presently has pending before it a petition for rulemaking, submitted the International Council of Containership Operators, that includes the issue of *de minimis* liquidated damages. That issue is more appropriately addressed in the context of that petition.

As for the remaining issues, *i.e.*, shipper cargo and carrier service commitments, it would be difficult if not impossible, as a practical matter, to specify absolute specific minimums. What is a reasonable number in one trade may not be in another. Moreover, small or medium sized shippers could be adversely affected by arbitrary minimums. While some sort of formula may alleviate this problem, the task then becomes one of choosing the right formula. For this reason and because the Commission's experience with service contracts over the last three years has not demonstrated a compelling need for the Commission to prescribe rules governing shipper cargo and carrier service commitments, no such rulemakings are contemplated at this time.

The Commission cautions, however, that there must be meaningful commitments on the part of both parties in order for there to be a valid service contract. In this regard, the service commitment of a carrier or conference must be more than a mere recitation of their basic common carrier obligations. Similarly, the shipper's cargo commitment must be commercially reasonable in light of all relevant factors.

AA. More Convenient, Combined Form

The proposed rulemaking indicated that the Commission was considering a new format for filing service contracts that would eliminate multiple submissions. This could consist of one filing, with detachable sections, as follows:

1. A machine-readable ADP form (data confidential, where necessary);
2. The essential terms; and
3. Shipper data and signature (confidential).

All commenters, except DuPont, support this proposal for a service contract filing procedure that would eliminate multiple submissions to the fullest extent possible. DuPont, however, fears that an abbreviated filing procedure would not ensure the confidentiality of information in the service contract.

Under the suggested provision, one portion of the form would contain the essential terms of the contract, excluding the name and signature of the shipper(s) and any other information considered as a non-essential term of the contract (if the filers desire to conceal such information from the public). This procedure would avoid time now spent by the staff in ensuring that the separately filed statements of essential terms contained in the Essential Terms Publication represent a true summary of the service contract's essential terms, a process which is now very time-consuming.

Although implementation of the procedure will require special equipment and appropriate rulemakings to prescribe form and format, the Commission intends to pursue this matter.

BB. Most-Favored-Shipper Clauses

In the Notice of Proposed Rulemaking the Commission noted the growing use of the so-called "most-favored shipper" clauses, a type of "contingency clause" which allows the shipper to obtain a lower rate if one is offered to another shipper in a given trade. The Commission asked for comments on whether this practice should be prohibited or limited.

The comments filed concerning Commission regulation of most-favored-shipper clauses are divided between: (1) the carriers and conferences who oppose such provisions and advocate a prohibition against their use; and (2) the shippers and shipper interest groups which state that such provisions are legitimate commercial arrangements that the Commission should not inhibit. Carriers argue that these clauses cause serious depression of freight revenues and rate instability, contrary to one of the intended purposes of service contracts. It is also argued that such clauses substantially negate a shipper's commitment to the carrier. Shippers, on the other hand, argue that rate flexibility in a contract ensures that the shipper will honor its volume commitments to a carrier, and, that the clauses also deter carriers from excessive rate cutting in their tariffs, thereby contributing to rate stability.

Whatever the merits of these contentions relating to most-favored-shipper clauses, they were not intended to nor will they be decided here. Since the issuance of the Notice of Proposed Rulemaking in this proceeding, the Commission has received and presently has before it the above-mentioned petition of the International Council of Containership Operators, which raises the same issues. The Commission will, therefore, consider them in the context of that proceeding.

CONCLUSION

The Commission has carefully considered all comments submitted to the proposed rule and, as discussed above, has made a number of changes to accommodate valid suggestions therein, while still giving effect to the 1984 Act provisions governing service contracts and the Act's legislative history. Other nonsubstantive technical or style changes have also been made, but not expressly discussed. Any comment not specifically mentioned has nonetheless been considered and found to be without merit, unwarranted, or unnecessary.

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

List of subjects in 46 CFR Parts 580 and 581: Administrative practice and procedure; Antitrust; Automatic data processing; Cargo vessels/ Confidential business information; Contracts; Exports; Freight; Freight forwarders; Imports; Maritime carriers; Penalties; Rates and fares; Reporting and record keeping requirements.

Therefore, pursuant to 5 U.S.C. 553 and sections 3, 8, and 17 of the Shipping Act of 1984, Title 46, Code of Federal Regulations, is amended as follows:

1. The Authority Citation to Part 580 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702–1705, 1707, 1709, 1712, 1714–1716 and 1718.

2. Section 580.7 is removed.

3. A new Part 581 is added to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 581]

SERVICE CONTRACTS

Sec.

581.1

Definitions.
581.2 Scope.
581.3 Filing and maintenance of service contract materials.
581.4 Form and manner.
581.5 Content of essential terms; contingency clauses.
581.6 Availability of essential terms.
581.7 Modification, termination or breach not covered by the contract.
581.8 Contract rejection and notice; implementation.
581.9 Confidentiality.
581.10 Recordkeeping and audit.
581.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

AUTHORITY: 46 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1707, 1709, 1712, 1714–1716 and 1718.

SOURCE: 49 FR 18849, May 3, 1984; 49 FR 20817, May 17, 1984; 49 FR 23183, June 5, 1984; 49 FR 24696 and 24701, June 14, 1984; 49 FR 45364, Nov. 15, 1984; 49 FR 48927, Dec. 17, 1984.

§ 581.1 Definitions.

In this part:

(a) "*Act*" means the Shipping Act of 1984 [46 U.S.C. app. 1701–1720].

(b) "*Common carriers*" or "*carrier*" means a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker. As used in this paragraph, 'chemical parcel-tanker' means a vessel whose cargo-carrying capability consists of individual cargo tanks for bulk chemicals that are a permanent part of the vessel, that have segregation capability with piping systems to permit simultaneous carriage of several bulk chemical cargoes with minimum risk of cross-contamination and that has a valid certificate of fitness under the International Maritime Organization Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.

(c) "*Commission*" means the Federal Maritime Commission.

(d) "*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. The term shall also include any association of ocean common carriers which is permitted, pursuant to an effective agreement, to fix rates and to enter into service contracts,

but the term does not include a joint service, consortium, pooling, sailing or transshipment agreement.

(e) "*Contract Party*" means are party signing a service contract as an ocean common carrier, conference, shipper or shippers' association.

(f) "*Essential—Terms Publication*" means the single publication which is maintained by each carrier or conference for service contract(s) and which contains statements of essential terms for every such contract.

(g) "*File*" or "*Filing*" of service contract materials means actual receipt at the Commission's Washington, D.C. offices.

(h) "*Geographic area*" means the general location from which and/or to which cargo subject to a service contract will move in through service.

(i) "*Non-vessel-operating common carrier*" means a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier.

(j) "*Ocean common carrier*" means a vessel-operating common carrier.

(k) "*Ocean freight forwarder*" means a person in the United States that:

(l) Dispatches shipments tram the United States via common carriers and books or otherwise arranges pace for those shipments on behalf of shippers; and

(2) Processes the documentation or performs related activities incident to those shipments.

(1) "*Person*" includes individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(m) "*Port range*" means those ports in the country of loading or unloading of service contract cargo that are regularly served by the contracting carrier or conference, as specified in its tariff of general applicability, even if the contract itself contemplates use of but a single port within that range.

(n) "*Service contract*" means a contract between a shipper or shippers' association and an ocean common carrier or conference, in which the shipper makes a commitment to provide a certain minimum quantity of its cargo or freight revenue over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level— such as, assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of either party.

(o) "*Shipment*" means all of the cargo carried under the terms of a single bill of lading.

(p) "*Shipper*" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(q) "*Shipper's association*" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(r) "*Statement of essential terms*" means the concise summary of all essential terms of a service contract required to be filed with the Commission and made available to the general public in tariff format by the carrier or conference in its Essential Terms Publication.

(s) "*Submit*" or "*submission*" means "file" or "filing" under this section.

(t) "*Tariff of general applicability*" means the effective tariff, on file at the Commission under Part 580 of this chapter, that would apply to the transportation in the absence of a service contract.

§ 581.2 Scope.

Service contracts shall apply only to transportation of cargo moving from, to or through a United States port in the foreign commerce of the United States.

§ 581.3 Filing and maintenance of service contract materials.

(a) *Filing.* There shall be filed with the Director, Bureau of Domestic Regulation, the following:

(1) *Service contract.* On or before the effective date of every service contract, a true and complete copy of the contract shall be submitted in form and content as provided by §§ 581.4(a) and 581.5, in single copy contained in a double envelope which contains no other material, as follows:

(i) The outer envelope shall be addressed to the Director, Bureau of Domestic Regulation, Federal Maritime Commission, Washington, D.C. 20573.

(ii) The inner envelope shall be sealed, contain only the executed contract, and shall state: "This Envelope Contains a Confidential Service Contract."

(iii) The top of each page of a filed service contract shall be stamped "Confidential."

(2) *Statement of essential terms.* At the same time as the filing of the service contract under paragraph (a)(1) of this section, the statement of essential terms of the contract shall be submitted:

(i) In form and content as provided in §§ 581.4(b) and 581.5;

(ii) In tariff format;

(iii) On page(s) to be included in the Essential Terms Publication as described in paragraph (b) of this section; and

(iv) (A) With an accompanying transmittal letter in an envelope which contains only matter relating to essential terms; and

(B) The envelope and the inside address on the transmittal letter are to be addressed to the "Director, *Bureau of Domestic Regulation*, Federal Maritime Commission, Washington, D.C. 20573."

(3) Notices of: change to contract, contract party or rate; availability of changed terms to similarly-situated shippers; and settlement of account.

There shall be filed with the Commission pursuant to the procedures of paragraph (a)(1) of this section, a detailed notice, within 30 days of the occurrence, of:

(i) The making available of contingent essential terms to similarly situated shippers under § 581.6(b)(5);

(ii) Termination by mutual agreement, breach or default not covered by the service contract under § 581.7(b);

(iii) The adjustment of accounts, by rerating, liquidated damages, or otherwise under §§ 581.5–581.8;

(iv) Final settlement of any account adjusted as described in paragraph (a)(3)(iii) of this section; and

(vi) Any change to:

(A) The name of a basic contract party under § 581.4(a)(1)(v); or

(B) The list of affiliates under § 581.4(a)(1)(vi) of any contract party entitled to receive or authorized to offer services under the contract.

(b) *Essential Terms Publication; maintenance.* Each carrier or conference shall maintain a single, current Essential Terms Publication in the form prescribed under § 581.4(b)(2).

(c) *Who must file.*

(1) As further provided in paragraph (c)(2) of this section, the duty under this part to file service contracts, statements of essential terms and notices, and to maintain an Essential Terms Publication, shall be upon:

(i) A service contract signatory carrier which is not a member of a conference for the service covered by the contract; or

(ii) The conference which:

(A) Is signatory to the service contract; or

(B) Has one or more member carriers signatory to a service contract for a service otherwise covered by the conference agreement.

(2) When a conference files a service contract for and on behalf of one or more of its member lines and the contract covers service from, to or between ports and/or points not included within the scope of the conference, the complete text of the statement of essential terms shall be simultaneously filed in the Essential Terms Publications of both the conference(s) and carrier(s) involved, which shall comply with all other Essential Terms Publication filing and maintenance requirements under paragraph (b) of this section and § 581.4(b).

(d) *Exempt commodities.*

(1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, this section does not apply to contracts relating to bulk cargo, forest products, recycled metal scrap, waste paper or paper waste.

(2) An exempt commodity listed in paragraph (d)(l) of this section may be included in a service contract filed with the Commission only if: (i)

there is a tariff of general applicability for the transportation which contains a specific commodity rate for the exempted commodity; or (ii) the contract itself sets forth a rate or charge which will be applied if the contract is rejected or otherwise terminated.

(3) Upon filing under this paragraph, the service contract and essential terms shall be subject to the same requirements as those for contracts involving non-exempt commodities.

§ 581.4 Form and manner.

(a) *Service contract.* Every service contract shall clearly, legibly and accurately set forth in the following order:

(1) On the first page, preceding any other provisions:

(i) A unique service contract number bearing the prefix "SC";

(ii) The FMC number [FMC No. _____] of the carrier's or conference's Essential Terms Publication;

(iii) A reference to the statement of essential terms number ["ET No. _____"] as provided in paragraph (b)(1)(iii) of this section;

(iv) The FMC number(s) [FMC No. _____] of the tariff(s) of general applicability;

(v) The names of the contract parties. Any further references in the contract to such parties shall be consistent with the first reference (*e.g.*, "[exact name]," "carrier," "shipper," or "association," etc.); and

(vi) Every affiliate of each contract party named under paragraph (a)(l)(v) of this section entitled to receive or authorized to offer services under the contract, except that in the case of a contract entered into by a conference or shippers' association, individual members need not be named unless the contract includes or excludes specific members. In the event the list of affiliates is too lengthy to be included on the first page, reference shall be made to the exact location of such information; and

(2) Commencing on or following the first page of the service contract:

(i) The complete terms of the contract, including all essential terms required under § 581.5; and

(ii) (A) A description of the shipment records which will be maintained to support the contract; and

(B) The address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection under § 581.10.

(b) *Essential terms.*

(1) *Statement of essential terms.* Every statement of essential terms shall:

(i) Be printed in black on yellow paper;

(ii) Be subject to the form and manner requirements applicable to governing tariffs as set forth in Part 580 of this chapter;

(iii) Be identified by an essential-terms number bearing the prefix "ET No." which shall be located on the top of each page of the statement of the essential terms; and

(iv) Contain on the first page, in a manner similar to that set forth in §§580.5(a)(8) and 580.5(a)(10) of this chapter, the period of availability of essential terms to similarly situated shippers under §581.6(b), *i.e.*, both the beginning date [which shall be the date the contract is filed at the Commission] and the expiration date [which shall be no less than 30 days after the beginning date].

(2) *Essential Terms Publication.* The Essential Terms Publication shall:

(i) Have all its pages printed in black on yellow paper;

(ii) Be subject to the form and manner requirements applicable to governing tariffs as set forth in Part 580 of this chapter;

(iii) (A) Contain a currently maintained "Index of Statements of Essential Terms" structured as follows:

ET No.	Effective Date	Expiration Date	Page No(s).	Section No(s).	Date of Cancellation of Page(s)

The Index shall include for every statement of essential terms, the ET number, as provided in paragraph (b)(1)(iii) of this section, the effective duration, as provided in §581.5(a)(3)(i), the page and section number(s) [where used], and a column for cancellation dates which shall be used as an alternative to cancelling each individual page of the Essential Terms Publication; and

(B) The statement of essential terms may not be cancelled until after the contract(s), including any renewal or extension, has expired. In the event a contract is terminated, the effective date of the termination shall be used as the date of cancellation;

(iv) Include an alphabetical index of the commodities covered by the service contracts in which each commodity shall make reference to the relevant ET number or numbers;

(v) Contain on its title page, or in a rule, reference to each carrier's or conference's tariff of general applicability; and

(vi) Be referenced in each of the carrier's or conference's tariffs of general applicability, where required to be filed under the Act and this chapter.

§581.5 Content of essential terms; contingency clauses.

(a) *Essential terms*:

(1) May not be uncertain, vague or ambiguous;

(2) May not contain any provision permitting modification by the parties other than in full compliance with this part; and

(3) Shall include the following:

(i) The *duration* of the contract, stated as a specific, fixed time period, with a beginning date and ending date;

(ii) The *origin and destination port ranges* in the case of port-to-port movements, and the origin and destination geographic areas in the case

of through intermodal movements, except that, in service contracts, the origin and destination of cargo moving under the contract need not be stated in the form of "port ranges" or "geographic areas" but shall reflect the actual locations agreed to by the contract parties;

(iii) *The contract rate, rates or rate schedule(s),* including any additional or other charges [*i.e.*, general rate increases, surcharges, terminal handling charges, etc.] that apply, and any and all conditions and terms of service or operation or concessions which in any way affect such rates or charges;

(iv) *The commodity or commodities* involved;

(v) *The minimum quantity of cargo freight revenue* necessary to obtain the rate or rate schedule(s), except that the minimum quantity of cargo committed by the shipper may not be expressed as a fixed percentage of the shipper's cargo.

(vi) The *service commitments* of the carrier, conference or specific members of a conference such as, assured space, transit time, port rotation or similar service features;

(vii) *Liquidated damages for nonperformance*, if any; and

(viii) Where a contract clause provides that there can be a deviation from an original, essential term of a service contract, based upon any stated event occurring subsequent to the execution of the contract, a clear and specific description of the event, the existence or occurrence of which shall be readily verifiable and objectively measurable. This requirement applies to, *inter alia*, the following types of situations:

(A) Retroactive rate adjustments based upon experienced costs;

(B) Reductions in the quantity of cargo or amount of revenues required under the contract;

(C) Failure to meet a volume requirement during the contract duration, in which case the contract shall set forth a rate, charge, or rate basis which will be applied;

(D) Options for renewal or extension of the contract duration with or without any change in the contract rate or rate schedule;

(E) Discontinuance of the contract;

(F) Assignment of the contract; and

(G) Any other deviation from any original essential terms of the contract.

(b) *Notice.* Detailed notice shall be given to the Commission under § 581.3(a)(3) within 30 days of:

(1) Any account adjustment resulting from either liability for liquidated damages under paragraph (a)(3)(vii) of this section, or the occurrence of an event described in paragraph (a)(3)(viii) of this section; and

(2) Final settlement of any account adjusted under paragraph (b)(1) of this section.

(c) *Issuance of proposed final accounting.* Any proposed final account adjustment resulting from liability for liquidated damages or the occurrence of an event under paragraph (b)(1) of this section shall be issued to the

appropriate contract party within 60 days of the termination or discontinuance of the service contract.

§ 581.6 Availability of essential terms.

(a) *Availability of statement.* A statement of the essential terms of each service contract as set forth in tariff format shall be made available to the general public pursuant to the requirements of this section and §§ 581.3, 581.4(b) and 581.5.

(b) *Availability of terms.*

(1) The essential terms of an initial service contract shall be made available to all other shippers or shippers' associations similarly situated under the same terms and conditions for a specified period of no less than thirty (30) days from the date of filing of the service contract as may be adjusted under § 581.8(d).

(2) Whenever a shipper or shippers' association desires to enter into a service contract with the same essential terms, a request shall be submitted to the carrier or conference in writing.

(3) The carrier or conference shall reply to the request by mailing, or other suitable form of delivery, within 14 days of the receipt of the request, either a contract offer with the same essential terms which can be accepted and signed by the recipient upon receipt, or an explanation in writing why the applicant is not entitled to such a contract. The carrier or conference may require the contract offer to be accepted within a specified period of time.

(4) The service contract resulting from a request under this section may not go into effect until an executed copy is filed with the Commission under this section. No additional statement of essential terms need be filed.

(5) In the case of any expressly described event which results in a change to an original essential term by the operation of a contract clause in the service contract under § 581.5(a)(3)(viii), the new essential term(s) shall be immediately made available in writing to other shippers and shippers' associations which have entered into a contract with the same, original essential terms, and which are similarly affected by the event. Copies shall also be submitted to the Commission under § 581.3(a)(3)(i).

§ 581.7 Modification, termination or breach not covered by the contract.

For purposes of this part:

(a) *Modification.* The essential terms originally set forth in a service contract may not be modified during the duration of the contract.

(b) *Mutual termination or shipper failure to meet cargo minimum.* In the event of a contract termination which is not provided for in the contract itself and which results from mutual agreement of the parties or because the shipper or shippers' association has failed to tender the minimum quantity required by the contract:

(1) Further or continued implementation of the service contract is prohibited;

(2) The cargo previously carried under the contract shall be rerated according to the otherwise applicable tariff provisions of the carrier or conference in effect at the time of each shipment; and

(3) Detailed notice shall be given to the Commission under § 581.3(a)(3) within 30 days of:

(i) The occurrence of the contract termination, breach or default under this paragraph;

(ii) Any rerating or other account adjustment resulting from the contract termination, breach or default under this paragraph; and

(iii) Final settlement of the account adjusted under paragraph (b)(3)(ii) of this section.

(4) Any proposed rerating or other final account adjustment resulting from termination, breach or default under this paragraph shall be issued by the carrier or conference to the shipper or shippers' association within 60 days of the termination, breach or default of the service contract.

§ 581.8 Contract rejection and notice; implementation.

(a) *Initial filing and notice of intent to reject.*

(1) Within 20 days after the initial filing of the contract and statement of essential terms, the Commission may notify the filing party of the Commission's intent to reject a service contract and/or statement of essential terms that does not conform to the form, content and filing requirements of the Act or this part. The Commission will provide an explanation of the reasons for such intent to reject.

(2) The parties will have 20 days after the date appearing on the notice of intent to reject to resubmit the contract and/or statement of essential terms, modified to satisfy the Commission's concerns, as set forth in paragraph (a)(1) of this section.

(b) *Rejection.* The Commission may reject the contract and/or statement of essential terms if the objectionable contract or statement:

(1) Is not resubmitted within 20 days of the notice of intent to reject; or

(2) Is resubmitted within 20 days of the notice of intent to reject as provided in paragraph (a)(2) of this section, but still does not conform to the form, content or filing requirements of the Act or this part, as set forth in paragraph (a)(1) of this section.

(c) *Implementation; prohibition and rerating.*

(1) Performance under a service contract may begin without prior Commission authorization on the day both the service contract and statement of essential terms are on file with the Commission, except as provided in paragraph (c)(2) of this section:

(2) When the filing parties receive notice that the service contract or statement of essential terms has been rejected under paragraph (b) of this section:

(i) Further or continued implementation of the service contract is prohibited;

(ii) All services performed under the contract shall be rerated in accordance with the otherwise applicable tariff provisions for such services with notice to the shipper or shippers' association within 30 days of the date of rejection; and

(iii) Detailed notice shall be given to the Commission under § 581.3(a)(3) within 30 days of:

(A) The rerating or other account adjustment resulting from rejection under this paragraph; and

(B) Final settlement of the account adjusted under paragraph (c)(2)(iii)(A) of this section.

(d) *Period of availability.* The minimum 30-day period of availability of essential terms required by § 581.6(b) shall be suspended on the date of the notice of intent to reject a service contract and/or statement of essential terms under paragraph (a)(l) of this section and a new 30-day period shall commence upon the resubmission thereof under paragraph (a)(2) of this section.

§ 581.9 Confidentiality.

(a) *Service contracts.* All service contracts filed with the Commission shall, to the full extent permitted by law, be held in confidence.

(b) *Amendments to non-essential terms.* Amendments to non-essential terms of a service contract shall be accorded similar confidential treatment.

§ 581.10 Recordkeeping and audit.

Every common carrier or conference shall:

(a) Maintain service contract shipment records currently and for a period of five years from the termination of each contract; and

(b) Tender service contract shipment records to the Commission for inspection upon request.

§ 581.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

The information collection requirements contained in these regulations [46 CFR 581] have been approved by the Office of Management and Budget [OMB] in accordance with 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 3072–0044.

By the Commission.*

(S) JOSEPH C. POLKING
Secretary

* Commissioner Thomas F. Moakley's dissent in part is attached.

Commissioner Moakley, dissenting in part

I dissent from the requirement set forth in section 581.7(b) of the final rule that cargo previously carried under the contract must be rerated according to the otherwise applicable tariff upon mutual termination or when the shipper fails to tender the minimum quantity required by the contract. I cannot find a legal basis for the link that the rule would make between these distinct types of pricing and service. If there has been a breach of the service contract, section 8(c) of the Shipping Act of 1984 states specifically that the exclusive remedy is in a court of law. If, instead, we are assuming that any unfulfilled contract constitutes a violation of section 10(a)(1) of the Act, the sanction for such a violation is the civil penalty prescribed in section 13 of the Act.

Moreover, the use of a service contract to circumvent tariff rates would also be likely to constitute a violation of section (10)(b)(4) of the Act by the carrier. The solution contained in the rule would reward the carrier for such a violation by requiring him to collect the tariff rate which, in most instances would be higher.

I would delete section 581.7(b) from the final rule and focus more effort on enforcing the considerable sanctions set forth in section 13 of the Act against both the carrier and the shipper where service contracts are being used merely as a device to circumvent tariffs.

Attachment A

Docket No. 86–6

Commenters

1. American Association of Exporters and Importers (AAOEXIM)
2. American Institute for Shippers' Associations, Inc. (AISA)
3. American President Lines, Ltd. (APL)
4. Asia North America Eastbound Rate Agreement (ANERA)
5. Atlantic and Gulf/West Coast of South America Conference, et al. (South/Central America Conferences)
6. Chemical Manufacturers Association (CMA)
7. Department of Justice (DOJ)
8. Department of Transportation (DOT)
9. E.I. duPont de Nemours & Company (DuPont)
10. Ford Motor Company (Ford)
11. Greece/U.S. Atlantic and Gulf Conference, et al. (Mediterranean Conferences)
12. Hercules Incorporated (Hercules)
13. Houston Port Bureau, Inc. (HPB)
14. IBP, Inc.
15. National Association of Recycling Industries, Inc. (NARI)
16. National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA)
17. National Industrial Transportation League (NITL)
18. New York Chamber of Commerce and Industry (NYCCI)
19. North Europe-U.S. Pacific Freight Conference (NEPFC)
20. Pacific Coast European Conference (PCEC)
21. Phillips Petroleum Company (Phillips)
22. PPG Industries, Inc. (PPG)
23. RCA Corporation (RCA)
24. Sea-Land Service, Inc. (Sea-Land)
25. Stauffer Chemical Company (Stauffer)
26. Trans-Pacific Freight Conference of Japan and Japan-Atlantic and Gulf Freight Conference (Japanese Conferences)
27. Transpacific Westbound Rate Agreement (TWRA)
28. Union Carbide Corporation (Union Carbide)
29. United States Lines, Inc. and United States Lines (S.A.) Inc. (USL)
30. U.S. Atlantic & Gulf/Australia-New Zealand Conference (Australia-New Zealand Conference)

31. U.S. Atlantic-North Europe Conference, et al. (North European Conferences)
32. Warner-Lambert Company (Warner-Lambert)
33. Westwood Shipping Lines (Westwood)

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